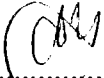


IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

27/3/2017
CASE NO: 1436/12

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED.
27/03/2017	
DATE	SIGNATURE

In the matter between:

BRENTON GRAHAM GRAY

APPLICANT

and

FIRSTRAND BANK

RESPONDENT

J U D G M E N T

COLLIS AJ:

INTRODUCTION

- [1] In the present application, the Applicant seeks costs in terms of Uniform Rule 41(1) (c). The application is opposed by the Respondent.

BACKGROUND

- [2] On or about 13 April 2005, and at Johannesburg, the Applicant and the Respondent concluded a written loan agreement. Pursuant to the loan agreement and on or about 14 June 2005, the Applicant caused to be registered in the office of the Registrar of Deeds Johannesburg, a first mortgage bond in favour of the Respondent as continuing covering security for all and any sum or sums of money which may then or in future be owing to or claimable by the Respondent or claimable by the Respondent from the Applicant, from any cause of whatsoever nature.¹
- [3] On 12 January 2012, the Respondent launched the main application against the Applicant in respect of a breach on the part of the Applicant in terms of the mortgage loan agreement.²
- [4] As on 25 September 2011, the Applicant was in arrears for more than 6 (six) months in respect of his monthly repayments under the mortgage loan agreements in the amount of R188 528.21 (One Hundred and Eighty Eight Thousand Five Hundred and Twenty Eight Rand and Twenty One Cents.)

¹ Main application, Founding affidavit para 3 pg 6

² Main application Founding affidavit para 9 pg 10

[5] The main application was opposed by the Applicant and the Respondent upon receipt of the answering affidavit proceeded to file a replying affidavit.

[6] On 18 June 2015, the set down of the main application was served on the Applicant and thereafter enrolled for hearing, on 7 September 2015.

[7] However, on 24 August 2015, before the hearing of the main application, the Applicant paid an amount of R60 000.00 (Sixty Thousand Rand) in respect of the arrears and as a result the main application was removed from the roll on the day of hearing.

[8] What follows next was a withdrawal of the main application by way of notice on 29 September 2015, without a tender for cost, and it's this very withdrawal which gave rise to the present application in terms of the Uniform Rules 41(1)(c).

[9] The Rule provides as follows:

“If no such consent to pay costs is embodied in the notice of withdrawal, the other party may apply to court on notice for an order for costs”.

[10] The general principle is that the party withdrawing is liable as an “unsuccessful” litigant to pay the costs of the proceedings.³ The court however

³ Germishuys v Douglas Besproeiingsraad 1973 (3) SA 299 (NC)

retains a discretion to deprive the successful party of his costs.⁴ In the exercise of its discretion the court should have regard to the question whether objectively viewed, the Applicant acted reasonably in launching the main proceedings but was subsequently driven to withdraw it in order to save costs, because of the facts emerging for the first time from for instance the Respondents answering affidavit in the main proceedings or because the relief was no longer necessary or obtainable because of developments taking place after the launching of the main proceedings.

[11] Furthermore a court when granting any cost order exercises a discretion which discretion must be exercised judicially⁵ upon the consideration of the relevant facts of each case. In essence it is a matter of fairness to both parties.

[12] In the present application the Respondent in his answering affidavit contends that as at 25 September 2011, the total amount due by the Applicant amounted to R839 226,87 (Eight Hundred Thirty Nine Two Hundred and Twenty Six Rand and Eighty Seven Cent). In support of this contention the Respondent annexed extracts of bank statements from the Applicant's account for the period 30 October 2011 to 22 September 2012, ⁶ evidencing, that the Applicant was failing to make payments of his monthly debit orders prior to the issue of the application.

[13] As a result of this breach the Respondent launched the main application.

⁴ Waste Products Utilisation (Pty) Ltd v Wilkes (Biccari Interested Party) 2003 (2) SA 590 (W) at 597A.

⁵ Gelb v Hawkins 1960 (3) SA 687(A) at 694

⁶ Founding affidavit para 20-22 pg 23

- [14] In his answering affidavit to the main application the Applicant conceded that he was in arrears with his monthly instalments under the loan agreements.⁷

The Applicant stated in paragraph 13 of his answering affidavit that:

"I fell on hard times due to no fault of my own but rather to the downturn in the economy as I was in construction and building industry, which has been struggling since the global economic crisis started in 2008. I am slowly but surely getting my business up and running and back on track, and believe that within the next couple of months I will be able to regularise my payments and get back on track with the payments due to the applicant. I will pay the minimum amounts as proposed by my debt counsellor, alternatively, higher amounts if I am able to do so".

- [15] Subsequently to the replying affidavit being filed, the matter was thereafter enrolled on the opposed roll and it was only after the matter was enrolled that the applicant paid an amount of R60 000.00 (Sixty Thousand Rand) in respect of his arrears.

- [16] The payment made on 24 August 2015 substantially reduced his arrears to an amount of R1 107,67 (One Thousand One Hundred and Seven Rand and Seventy Six Cent) and it is for this reason that a notice of withdrawal was delivered by the Respondent on 29 September 2015.

⁷ Main application Answering affidavit para 7 pg 63

[17] During argument counsel for the Applicant had submitted the following:

17.1 The onus is on the Respondent to satisfy the court that there are good grounds to deprive the Applicant of the costs, to which as a general rule, he is entitled.

17.2 In the answering affidavit to the main application the Respondent was warned that the Applicant was applying to be placed under debt review and in terms of Sec 86(5) of the National Credit Act, 34 of 2005 the credit provider (*i.e. Respondent*) is to participate in the review process in good faith.

17.3 On 13 December 2011, the debt review application was removed at the instance of the Respondent in order to obtain instructions.

17.4 What transpired thereafter, was a termination by the Respondent of the debt review proceedings which termination was not valid and concluded in terms of Sec 86(10) of the National Credit Act.

17.5 The Respondent thereafter subsequently launched its main application.

[18] Counsel on behalf of the Respondent had made the following submissions:

- 18.1 The Applicant is not entitled to costs in terms of Rule 41(1)(c) as the Applicant conceded in the main application that he had fallen into arrears in respect of his loan agreement.
- 18.2 The Applicant having fallen into arrears had committed a breach, which constituted the underlying causa for the instituting of the main application.
- 18.3 The payment made by the Applicant on 24 August 2015 resolved his arrears to the satisfaction of the Respondent, which resulted in the substratum and underlying causa in respect of the main application no longer existing.⁸
- 18.4 The withdrawal of the application resulted in the merits of the application not being argued before and adjudicated upon by the court and as such the Applicant could not be considered as the successful litigant.
- 18.5 Furthermore, the withdrawal of the main application was not as a result of lack of prospect of success but rather as result of the payment of the arrears by the Applicant to the satisfaction of the Respondent.
- 18.6 Counsel also submitted that the withdrawal of the application had nothing to do with the merits of the main application.

⁸ Firstrand Bank Ltd v Nkata 2015 ZASCA 44; Eloff v Road Accident Fund 2009 (3) SA 27 (CPD).

- [19] As mentioned previously, a court in considering the issue of costs, should have regard to the question whether objectively viewed, the Applicant acted reasonably in launching the main application, and whether the subsequent withdrawal of the application was a result of the relief no longer necessary or obtainable because of developments taking place since the launching of the main application.
- [20] At the outset it should be mentioned the merits or demerits of the main application, this Court was not required to adjudicate upon. This I say, as counsel appearing for the Applicant spent a great deal around the termination of the debt review proceeding and whether in fact such termination was as is required in terms of Sec 86(10).
- [21] Furthermore, strong arguments were also presented in respect of whether the Respondent in good faith participated in the debt review proceedings, and as counsel contends, the Respondent did not, which would have resulted in a finding against the Respondent in the main application. These arguments presented by counsel would have been best ventilated at the hearing of the main application.
- [22] Two questions to my mind are crucial in determining the outcome of this present application. They can be listed as follows:

22.1 Firstly, objectively viewed, what brought about the launching of the main application and whether such launching was reasonable; and

22.2 Secondly, what development(s) took place after the launching of the main application which resulted in the withdrawal of the main application?

[23] In answering these questions the following became apparent. The arrears which the Applicant had fallen into brought about the launching of the main application which launching was reasonable, and secondly, the subsequent payment made by the Applicant on 24 August 2015 resulted in the withdrawal of the main application. It is noteworthy to mention that the payment so made, merely substantially reduced the arrears; it did not extinguish it in its entirety.

[24] Furthermore, the Respondent's subsequent withdrawal of the application was an election which was made at its instance and not a step which ordinarily will follow as a result of payments having been made to settle a portion of the arrears.

[25] Consequently, I cannot conclude that the withdrawal of the main application resulted in the Applicant having been the successful party, which successful party ought to be awarded the costs of the main application.

ORDER

[26] In the result the following order is made:

26.1 The application is dismissed with costs.



C. J. COLLIS

ACTING JUDGE GAUTENG DIVISION PRETORIA

APPEARANCES:

FOR APPLICANT: ADV. B EDWARDS

INSTRUCTED BY: RYAN D LEWIS INC

FOR RESPONDENT: ADV. C DENICHAUD

INSTRUCTED BY: GLOVER KANNIEAPPAN INC

DATE OF HEARING: 13 MARCH 2017

DATE OF JUDGMENT: 27 MARCH 2017