

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 2498/2009

In the matter between:

BOTHAVILLE SUPERMARK (EDMS) BPK

Applicant

and

NALA LOCAL MUNICIPALITY

Defendant

JUDGMENT:

H.M. MUSI, JP

HEARD ON:

25 MAART 2010

DELIVERED ON:

22 APRIL 2010

[1] This is an application brought in terms of rule 41(1) for an order for costs upon withdrawal of proceedings. I shall refer to the parties as cited in the main application where Bothaville Supermarket is the applicant and Nala Local Municipality the respondent.

[2] The applicant had brought an application seeking from the respondent payment of certain amounts of money. The application was opposed and was set down for hearing on

23 July 2009. On 10 July 2009 the applicant issued and served a notice of withdrawal of the application. The relevant notice reads as follows:

“By ooreenkoms tussen die partye word bogemelde aansoek hiermee teruggetrek deur die applikant op die grondslag dat elke party sy eie kostes sal betaal.

Hiermee word gevolglik ook kennis gegee dat hierdie aansoek verwyder word van die Hofrol van 23 Julie 2009.”

The respondent disputed that there had been an agreement that the matter be withdrawn on the basis that each party would pay their own costs and demanded that the applicant should tender payment of the costs. A deadlock was reached, whereupon the respondent launched the instant application.

- [3] As is customary in applications of this nature, no affidavits were filed and the matter was argued on the papers as they stand. In opposing the application, Mr Van Rooyen for the applicant, insisted that there had indeed been an agreement to withdraw the proceedings on the terms set out in the notice of withdrawal and said that such

withdrawal was not in terms of rule 41(1) but rather based purely on the alleged agreement. Mr Reinders, for the respondent, contested the existence of any such agreement and based his case on the provisions of rule 41(1).

[4] I was concerned about the situation where the applicant argued the matter on the basis of an agreement when nothing was before court to lay a basis for such contention. I then directed that the applicant should file an affidavit indicating the basis on which it alleged there was an agreement. I indicated that the respondent would be free to respond thereto. The matter was accordingly postponed. In due course the applicant filed its affidavit and the respondent responded with an affidavit of its own.

[5] A reading of the affidavits reveals a clear dispute of fact which cannot be resolved on the papers. The dispute centres on what was actually agreed upon in a telephonic conversation between the applicant's attorney, Mr Herbst, and Miss Steyn, of the respondent's attorneys firm. They even differ on the date of the conversation. On the

respondent's version what was agreed upon was that the matter will be removed from the roll of the 23rd July 2009 and that each party would pay their own costs. If anything, the affidavits disclose disagreement rather than agreement. And there was no suggestion made that the matter could be referred to oral evidence in order to resolve the factual dispute. At any rate, that would have been undesirable. Nonetheless, the affidavits are helpful in some respects. They contain correspondences exchanged between the attorneys subsequent to the delivery of the contested withdrawal notice and which I think are important.

- [6] Now rule 41(1) makes it clear that a withdrawal of proceedings after the matter had been set down for hearing can only take place on two bases, either with the consent of the other party or with leave of court. If neither of the two had been obtained a purported notice of withdrawal would be invalid. See **PROTEA INSURANCE CO LTD v GAMLACE AND OTHERS** 1971 (1) SA 460 (ECD) at 465G. In *casu*, neither the consent of the respondent nor leave for the court has been obtained and the notice of withdrawal is therefore invalid.

[7] Mr Van Rooyen argued that since the notice of withdrawal was invalid there was no basis for the instant application because such application could only be made if there was a valid notice of withdrawal. He submitted that the application should be dismissed with costs. In response, Mr Reinders pointed out that a few minutes after the notice of withdrawal was served, the applicant's attorney was informed by letter that the terms of such notice were not acceptable and he was urged to withdraw it. Mr Reinders submitted that that was the most reasonable and proper thing to do, but the applicant unreasonably failed to do this, thus compelling the respondent to launch the instant application.

[8] Now Mr van Rooyen correctly submitted that in the absence of agreement or leave of court the notice of withdrawal would be invalid. Yet in the same breath, he persisted that the applicant was entitled to refuse to withdraw it on the basis of the alleged agreement and also argued that the provisions of rule 41(1) did not apply to this matter as the withdrawal was based purely on the alleged agreement.

This is a contradiction in terms. It is tantamount to saying that the notice is invalid and valid at the same time. Court proceedings transpire in terms of the rules of court and if the rules declare a step to be invalid, it remains invalid irrespective of the whims of the parties. At any rate, the applicant has failed to prove the existence of the agreement it relies upon.

- [9] But this argument is typical of the unreasonable attitude that the applicant had adopted in this whole matter. The applicant was informed as soon as its notice of withdrawal was served that the respondent disputes the existence of the agreement that each party would pay its own costs and was requested to either tender costs or withdraw the notice, which would have been the most reasonable thing to do. Instead of withdrawing the notice, the applicant attempted to force the alleged agreement upon the respondent, which in turn led to the launching of the instant application.

[10] To conclude, I hold that in the absence of agreement, the notice of withdrawal was invalid. That being so, the application in terms of rule 41(1) was not competent and stands to fail. However, I hold that it was due to the applicant's unreasonable conduct that such application was launched. In the premises, I am not prepared to award the applicant the costs of the application.

[10] The application is dismissed and there shall be no order as to costs.

H. M. MUSI, JP

On behalf of the applicants: Adv. P. C. F. van Rooyen SC
Instructed by:
Hill McHardy & Herbst Ing
BLOEMFONTEIN

On behalf of the respondent: Adv. S. J. Reinders
Instructed by:
Honey & Vennote
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