

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

APPEAL CASE NUMBER: A5034/21

COURT A QUO CASE NUMBER: 49337/2017

(1)	REPORTABLE: <i>No</i>
(2)	OF INTEREST TO OTHER JUDGES: <i>No</i>
(3)	REVISED:
<i>24, 7</i> 2024	
DATE	SIGNATURE

In the matter between:

EAGLE TWO PROPERTY INVESTMENTS (PTY) LTD
EAGLE THREE PROPERTY INVESTMENTS (PTY) LTD

First Applicant
Second Applicant

and

CITY OF JOHANNESBURG

Respondent

In re:

CITY OF JOHANNESBURG

Appellant

and

EAGLE TWO PROPERTY INVESTMENTS (PTY) LTD

First Respondent

EAGLE THREE PROPERTY INVESTMENTS (PTY) LTD

Second Respondent

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines/Court online and by release to SAFLII. The date and time for hand- down is deemed to be 10h00 on 24 July 2024.

Order: Paragraph [20] of this judgment.

JUDGMENT

TODD, AJ:

- [1] This matter came before me on the unopposed motion roll on Thursday 6 June 2024.
- [2] Although it had not been opposed and was properly enrolled on the unopposed roll, when the matter was called Mr Sithole appeared for the Respondent, the City of Johannesburg. Mr Sithole accepted that no notice had been given to oppose the matter and that no papers had been filed in opposition, but nevertheless sought a postponement and an opportunity for the Respondent to file papers. He tendered the costs occasioned by the postponement.
- [3] Mr le Roux, who appeared for the Applicants, submitted that no notice to oppose had been filed and that the Respondent did not meet the basic threshold of grounds for a postponement.
- [4] The underlying application is a somewhat unusual one. The Applicants seek to have an order made on terms which it contends were agreed between the parties' legal representatives in the course of settlement discussions entered into previously, during the course of a Full Court appeal.

- [5] The settlement agreement which the Applicants rely upon followed discussions that had taken place between the parties' respective legal teams, including attorneys and counsel, after the appeal had been adjourned and the parties had been encouraged by the Full Court to settle the matter.
- [6] The terms of the agreement were set out in an exchange of emails which recorded the key terms agreed, and in a draft order incorporating those terms, with some minor differences, also exchanged and approved by both sides' attorneys and counsel.
- [7] The parties' legal representatives then agreed that the draft order would be sought on an unopposed basis, and the matter was enrolled on 2 February 2023 for that purpose.
- [8] When the matter was called on that date, Mr Sithole appeared and submitted that the Respondent's legal representatives had not had authority to settle the matter on the terms reflected in the draft order. The matter was then removed from the unopposed roll.
- [9] This led to the present application. The Applicants contend that the matter was indeed settled on terms that are clear, that were negotiated between legal representatives who had authority to resolve the matter, and that an order should consequently be granted in the terms agreed.
- [10] The matter has a regrettably long litigation history having regard to the amount of money that is at stake. It is a matter of significant concern that a matter involving a public authority should produce so much litigation, including a significant number of interlocutory applications, resulting in an escalation of legal costs which, since legal representatives appear able to agree on the terms of an appropriate commercial settlement, can and should be avoided and are already, or are likely to become, disproportionate to the amount in issue in the underlying dispute. This was no doubt a consideration in the minds of the Full Court, confronted with an appeal by the Respondent against a refusal of a rescission application, when it encouraged the parties to attempt to settle the matter and postponed the appeal for this purpose.

- [11] The parties' respective legal representatives successfully negotiated a settlement, on the terms which the Applicants now seek to embody in an order of this Court. All of this seems eminently sensible.
- [12] Having said that, Mr Sithole referred to the recent decision of the Constitutional Court, handed down a few days before the matter came before me, in the matter of *City of Ekurhuleni Metropolitan Municipality In re: Unlawful Occupiers 1 Argyle Street and Others v Rohlandt Holdings CC and Others*¹. In that matter the Constitutional Court was satisfied that grounds existed to rescind an order to which a legal representative had consented without the requisite authority.
- [13] Although there are presently no facts before me to indicate that the legal representatives who concluded the agreement reached between the parties to this matter lacked authority to do so, it is conceivable, in light of Mr Sithole's submissions, that this may be established in answering papers if the Respondent is permitted to deliver them. The point that Mr Sithole made, as I understand it, is that the Respondent contends that it has legitimate grounds on which to dispute the authority of those who purported to settle the matter and should be given an opportunity to deliver answering papers explaining why this is so.
- [14] In circumstances in which the Respondent disputes that authority, even if I were to make an order on an unopposed basis there is a significant risk that this will lead to a further rescission application in which the same issues will be ventilated.
- [15] In those circumstances it seems to me that the proper course of action is to postpone the matter and give the Respondent an opportunity to deliver answering papers explaining the grounds on which it contends that the order sought should not be made.

¹ [2024] ZACC 10

- [16] The Respondent should, at the same time, carefully consider what I state in paragraph [10] above, and should take care to ensure that it does not continue to incur substantial legal expenses which can and should be avoided. The costs order that I make below will result in further such expenses, which could have been avoided if the matter had been attended to timeously. There is a real risk, if litigation continues, that further such costs will be incurred. If they are, the question will arise whether the Respondent is being properly advised by its legal representatives, whether further costs should be awarded on a punitive scale, and whether it is the Respondent, its responsible officials, or its legal representatives personally who should bear those costs. These will, however, be questions for this court to consider further down the line.
- [17] Mr Sithole indicated that the Respondent tendered the costs wasted by the appearance on 6 June 2024. Mr le Roux submitted that in light of the late arrival of the Respondent in the matter and the grounds on which it objected to an order being made, costs should be granted on a punitive scale.
- [18] In my view having regard to the litigation history of the matter there are grounds on which to grant costs on a punitive scale. A Respondent is of course entitled to advance its defence to an application, but it has timeframes within which to do so and must do so properly and not in a manner that results in Applicants being strung along with the result, as here, that ongoing costs are incurred in litigation that could and should be dealt with expeditiously and, where possible, resolved.
- [19] The order I make will now give the Respondent an opportunity to lay out in plain terms the factual basis on which it objects to the settlement terms that were negotiated between the parties' respective legal representatives. Absent good grounds, in my view, the Respondent may face further punitive costs orders in due course.

[20] For present purposes, as regards the unopposed application that came before me on 6 June 2024, I make the following order:

1. The matter is removed from the roll.
2. The City is afforded ten (10) days from the date of this order to deliver answering papers together with a condonation application explaining the late delivery of those papers.
3. The Respondent is ordered to pay the Applicants' costs, including the costs of preparing for and appearing on 6 June 2024, on an attorney and client scale.

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C TODD
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of Hearing: 6 June 2020

Date of Judgment: 24 July 2024

APPEARANCES

Counsel for the Applicants: Adv. JHF le Roux

Instructed by: DBM Attorneys

Counsel for the Respondent: Adv. E Sithole

Instructed by: Nozuko Nxusani Attorneys