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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: 2022/22065
2023/101121

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED: YES/ NO
DATE	SIGNATURE

In the matter between:

TRUE MOTIVES 44 (PTY) LTD

Applicant

and

CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY

Respondent

JUDGMENT

AMM, AJ

Introduction

[1] There are two related matters before me. They come together before me pursuant (i) an 8 November 2023 order of Twala J. under case no. 2023/101121 (“the Twala J. Order”) and (ii) a combined notice of set down (dated 19 April 2024) ¹.

[2] The two matters are (i) the defendant’s exception to the plaintiff’s particulars of claim in the pending action under case number 2022/22065 (“the pending action”); and (ii) the applicant’s interim interdict application under case number 2023/101121 (“the urgent application”).

[3] For ease of reference, and unless otherwise apparent, I refer to the parties in this judgment as they are referenced in the urgent application. Mr Van Huyssteen appeared for the applicant and Mr Sithole appeared for the respondent.

[4] Given two common cause “recent developments”, I am only required to determine the (outstanding) question of costs pertaining to (i) the respondent’s exception in the pending action, and (ii) the urgent application.

The respondent’s exception to the plaintiff’s particulars of claim in the action

[5] The applicant is the owner of an immovable property situated at S[...] 8[...], M[...] E[...] 2[...], Johannesburg. The respondent supplied and supplies electricity to the applicant’s property under account no. 5[...]. It does so because the applicant’s property is located within the respondent’s geographical area of jurisdiction and service delivery responsibility.

[6] During March 2022, the applicant reported account billing errors to the respondent. The errors pertained to the respondent overbilling the respondent in respect of the kVARh component of its electricity account.

[7] Various unsuccessful attendances at the respondent’s walk-in customer centre, and engagements by the applicant (including its attorneys) with the respondent, proved unsuccessful.

¹ The combined notice of set down clearly lists both of the aforesaid case numbers, and it also expressly references and sets down both of these matters.

[8] As such an overbilling dispute arose between the applicant and the respondent; resulting in the applicant instituting the pending action during June 2022. While the amount (initially) claimed in the summons was in the order of approximately R 1,457 million, the aggregate amount of the respondent's overcharging, and the applicant's accompanying overpayments, ultimately exceeded R 2 million.

[9] The respondent, in response to a notice of bar delivered by the applicant, sought an indulgence to file its plea and, at the same time, advised that it would not terminate the electricity supply to the applicant.

[10] The respondent however did not subsequently file a plea. Instead, the respondent excepted to the applicant's particulars of claim. Its exception is dated 30 August 2022. The exception raised three grounds. The exception caused the applicant to amend its particulars of claim, but only in response to grounds one and three of the exception.

[11] The applicant did not respond to ground two of the respondent's exception. Ground two raised section 8(4) of the respondent's Credit Control and Debt Collection By-Laws, 2004. Section 8(4) reads:

“(a) Any amount paid by a customer in excess of an existing debt may be held in credit for the customer in anticipation of future rates and fees for municipal services or for the purposes contemplated in section 14(b).

(b) No interest is payable on any amount contemplated in paragraph (a).”

[12] The respondent however did not subsequently pursue ground two of its exception. Consequently, as set out above, the applicant set the respondent's exception (effectively the remaining second ground) down for hearing. It did so during April 2024.

[13] In the interim, the respondent communicated to the applicant during September / October 2022 that “the above query has been resolved” (being indubitably a reference to the overcharging dispute) and that the “Account is

adjusted on the statement dated 05/10/2022". The applicant's account was however not "adjusted" in respect of reimbursement of the applicant's historical overpayments, and the respondent failed to pass the relevant account credit.

[14] Equally importantly, the respondent eschewed subsequent engagement endeavours, requests, and demands that the respondent pass the appropriate account credit. It was only during September 2024, some two years later, that the respondent passed an account credit.

The circumstances that triggered the need for the urgent application

[15] Notwithstanding the pending action, the overbilling dispute, and the then pending delivery of its plea in the pending action, the respondent delivered a pre-termination notice in respect of the respondent's supply of electricity to the applicant. It did so on 11 August 2022. The pre-termination notice caused the applicant's attorneys to seek an undertaking from the respondent that the respondent, inter-alia, would not terminate the electricity supply pending the outcome of the pending action, failing which it would proceed with the bringing of an urgent application. The respondent subsequently provided an undertaking, albeit not in the express terms requested but nevertheless satisfactory, on 16 August 2022; avoiding the need for an urgent application.²

[16] Seemingly blind to the pending action proceedings, its previously provided undertaking(s), and that stated within the context of its already mentioned request for indulgence for the filing of its plea, the respondent, delivered a further pre-termination notice, dated 5 September 2022. On 8 September 2022, in response to this further pre-termination notice, the applicant's attorneys demanded an undertaking that the respondent would not implement the threat contained in the "latest Pre-Termination Notice", failing which the applicant would bring an urgent interdictory application. The respondent subsequently provided an undertaking,

² I pause to mention that the affidavits filed also include a reference to an undertaking given by the respondent's attorneys, on 24 August 2022, that "*there shall be no disconnection of your client's services*"

albeit out of time, on Monday, 12 September 2022. Again, the need for an urgent application was avoided.

[17] On 18 October 2022 - notwithstanding the respondent's aforesaid statement during September / October 2022 that it had resolved the applicant's "query" and adjusted the applicant's account - the applicant's attorneys communicated to the respondent that a contractor for the respondent was attending at the applicant's premises for purposes of terminating the electricity supply. Whilst it is unclear from the affidavits filed in the urgent application what subsequently transpired, the applicant's electricity supply appears not to have been then terminated. I assume that this is because of that communicated by the applicant's attorneys.

[18] On 15 September 2023, the respondent delivered a further (third) pre-termination notice. The applicant's attorneys' response was to again seek an undertaking that (i) the pre-termination notice be withdrawn, and (ii) "there will be no termination of services until [the credit dispute] is resolved". The demand also recorded that "[i]n the absence of this undertaking, an application for an interdict will be launched". On 21 September 2023, the respondent's attorneys advised, inter-alia, that the pre-termination notice had been withdrawn.

[19] Further contaminating the aforesaid ineluctably adverse optics for the respondent is the following: (i) the respondent's statement a year prior that that the applicant's "query had been resolved"; (ii) the respondent's admission that it was responsible for the billing error; (iii) the respondent's failure to make the appropriate historical adjustments to the applicant's account despite stating that it had done so, and (iv) the respondent's subsequent intervening written advices, on at least three occasions, that the adjustments would be made.

[20] Undeterred, and apparently oblivious to or unconcerned with any of that set out above, the respondent sought fit to deliver a "Customer Electricity Disconnection Card Level 2" to the applicant on 3 October 2023, providing the applicant with a "final notice" of the termination of the electricity supply to the applicant's property.

The urgent application, the Twala J. Order and subsequent events

[21] The aforesaid exchanges, sequence of events, and breaches of undertakings understandably resulted in the applicant's bringing, on 4 October 2023, of its urgent application.

[22] In its notice of motion, the applicant seeks, in addition to the usual prayer for urgency (paragraph 1), the following relief:

- "2. Pending the outcome of [the pending action], interdicting and restraining the Respondent from terminating the supply of electricity to the [applicant's property].
3. Directing that the costs of this application be determined in the pending [action]."

[23] The urgent application was enrolled for hearing on 7 November 2023. The respondent inexplicably opposed the urgent application. Despite its answering affidavit being due by no later than 20 October 2023, it only provided its answering affidavit, without explanation, during the evening of 6 November 2023 (literally the eve of the hearing of the urgent application).

[24] Moreover, the respondent's answering affidavit is obtuse and opaque; which, together with annexures, runs needlessly to more than 110 pages. Therein, the respondent endeavours to unblushingly justify the issuing of the pre-termination notices notwithstanding (i) its earlier claim that "the above query has been resolved", and (ii) its continuing failure to pass the required account credit.

[25] On 8 November 2023, Twala J. sitting in the urgent court granted the following orders by agreement between the parties (i.e., the Twala J. Order):

- a. The urgent application was postponed sine die (paragraph 1).
- b. Paragraphs 2, 3 and 4 of the Twala J. Order, properly construed and interpreted³, provide for what can be labelled as a "good faith" settlement engagement process between the parties; centring on an analysis

³ *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 304 and see *Martrade Shipping and Transport GmbH v United Enterprises Corporation and MV 'Unity'* 2020 JDR 2076 (SCA) para 2

reconciliation and, if required, an adjustment process pertaining to the applicant's accounts with the respondent. In essence, the purpose of the good faith process is to resolve the very dispute(s) that form(s) the subject matter of the pending action, and, as such, end the need for the continued pursuit, enrolment and determination of the exception, and so too the pending action.

- c. Paragraphs 5 and 6 of the Twala J. Order regulates that which is to happen procedurally, via an agreed timetable, if the parties are unable to reach a settlement. In turn, paragraph 5.3 includes that relevant to the filing of practice notes, heads of argument and list of authorities in respect of the respondents' exception. Paragraph 5.5 provides for the simultaneous (re-) enrolment of the urgent application, and enrolment of the respondent's exception, so that such are to be heard together.
- d. Paragraph 7 of the Twala J. Order interdicts and restrained the respondent from terminating the electricity supply to the applicant's property "pending the final determination of this application".
- e. Paragraph 8 provides that "the issues of costs is [sic] reserved".

[26] By all accounts, the good faith engagement and settlement contemplated in paragraphs 2, 3 and 4 of the Twala J. Order were not achieved; hence the still pending action, and urgent application (subject to the below mentioned "recent development" pertinent to the urgent application).

[27] Additionally, and in breach of the Twala J. Order, the respondent subsequently terminated, or attempted to terminate, the applicant's electricity supply on three sperate occasions during January and February 2024. The applicant was thus again compelled to seek urgent relief. As I understand matters, Vally J., on 7 March 2024 under case no. 20243-058425: (i) directed the respondent to disclose the names of its officials who had given the instruction for the three electricity supply terminations, and (ii) granted a punitive costs order against the respondent. Contempt proceedings are now pending in respect of the Vally J. order.

The common cause "recent developments"

Introduction

[28] The two “recent developments” that result in my only being required to determine the aforesaid costs questions are set out below. These “recent developments” must be placed within the context of (i) the failure of the good faith settlement process provided for in the Twala J. Order, and (ii) the applicant setting down both the urgent application and the exception, and (iii) the accompanying express request to Registrar in the aforesaid regard.

The first development: The respondent’s withdrawal of the exception

[29] The first development is the respondent’s withdrawal of its exception to the applicant’s particulars of claim in the pending action. The notice of withdrawal is dated 5 September 2024. The respondent did not tender, in its notice of withdrawal, the payment of the plaintiff’s costs (the remaining part) of the exception.

[30] Instead, the respondent’s notice of withdrawal of its exception reads:
 “TAKE NOTICE THAT the Defendant hereby withdraws the Exception served on the Plaintiff on the 30th August 2022 as the main action matters become settled by crediting the Plaintiff, with each party is [sic] to pay their costs.”

[31] The respondent has disavowed any liability for the costs of its exception (especially in as far as the exception pertains to ground two).

The second development: The respondent’s passing of a credit

[32] The second development is the respondent’s recent afore-mentioned crediting of the applicant’s account held with the respondent. The respondent passed the account credit in and via the applicant’s September 2024 account.

[33] Notwithstanding the credit, I am advised that the plaintiff’s action remains alive because there is, so the applicant contends, an unresolved “residual issue” relating to the credit’s non-inclusion of interest.

[34] That said, the applicant's position is that the respondent's passing of the account credit has to all intents and purposes negated the need for the applicant's continued pursuit of the interim interdict. Mr Sithole for the respondent equivocally, albeit inexplicably, disagrees. Nevertheless, I proceed herein on the basis that subject to the question of costs, the applicant's position vis-a-vis its urgent application is tantamount to a withdrawal of its application.

[35] The respondent (initially) refused or failed to tender the plaintiff's costs of its urgent application. A tender (in the form of a concession) was only forthcoming, and then belatedly so, during argument.

The relevant legal principles pertaining to costs

[36] Subject to not presently applicable considerations pertaining to constitutional or public interest litigation⁴, our law of costs is long standing and well established. The basic or general rule pertaining to an award of costs is that subject to court's obvious discretion⁵, costs ordinarily follow the result⁶. As to a court's discretion, Innes CJ stated more than hundred years ago in *Kruger Bros & Wasserman v Ruskin*⁷ (footnote omitted) that:

"... [t]he rule of our law is that all costs – unless expressly otherwise enacted – are in the discretion of the judge. This discretion must be judicially exercised, but it cannot be challenged, taken alone and apart from the main order, without his permission."

[37] The Constitutional Court in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*⁸ has confirmed and re-stated the aforesaid basic or general rule and accompanying principle(s) as follows (footnotes omitted):

"The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the

⁴ *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC)

⁵ *Levben Products (Pvt) Ltd v Alexander Films (SA) (Pty) Ltd* 1957 (4) SA 225 (SR) 227

⁶ *Vassen v Cape Town Council* 1918 CPD 360

⁷ 1918 AD 63 69

⁸ 1996 (2) SA 621 (CC) para 3

presiding judicial officer and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first.”

[38] Apropos the withdrawal of the respondent’s exception, the following restatement of the principles, qualified by the court’s aforesaid discretion⁹, pertaining to the withdrawal of an action or application mutatis mutandis by Cilliers¹⁰ are, I believe, equally appropriate and relevant to the withdrawal of a process such as an exception (footnotes omitted):

“A plaintiff or applicant who withdraws his or her action or application is usually in the same position as an unsuccessful litigant because, after all, his or her claim or application is (as a rule) futile and the defendant or respondent is entitled to all costs caused by the institution of proceedings by the withdrawing party. In such a case it is not necessary to go into the merits of the case: there is a crucial difference between the position of an applicant settling his or her case on the merits and then asking the court’s ruling on costs, and the position of an applicant withdrawing his or her claim and after that attempting to avoid an order of costs against him.”

[39] As to punitive costs, the power of a High Court to award costs as between attorney and client is founded on long-standing practice, impliedly recognised by the legislature.¹¹

[40] The following dicta of Opperman J. in *White Rock Property Trading (Pty) Limited v Khaka and Another*¹² is apt on the question of an attorney and client costs order:

“[47] The applicant has claimed attorney client costs. In special cases the court may come to the conclusion that the successful party should not be out

⁹ *Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape, and Others* 2005 (6) SA 123 (E) traversing the question of costs of a withdrawn application and the related question of whether the urgent application was brought and pursued in a reasonable manner.

¹⁰ AC Cilliers, *Law of Costs*, see the commentary at 8.17: “Withdrawal”

¹¹ AC Cilliers, *Law of Costs*, see the commentary at 4.12: “Powers of different courts to award attorney and client costs”

¹² 19602/16) [2017] ZAGPJHC 175 (7 June 2017) para 47 and 48

of pocket as a result of the litigation and may then award attorney and client costs, see Nel v Waterberg Landbouwers Ko-Operatiewe Vereniging 1946 AD 597.

[48] An attorney client costs order may issue where the other party has been guilty of dishonesty, fraud or that his motives and conduct may have been vexatious, reckless, malicious or frivolous, or that he has been guilty of some form of misconduct in connection with the matter investigated or in the conduct of the case. The intention to delay the matter and to prolong the first respondent's occupation of the property, is readily discernible in this matter [referencing Van Dyk v Conradie 1963 (2) SA 413 (C); De Goede v Venter 1959 (3) SA 959 (O) and Ward v Sulzer 1973 (3) SA 701 (A)]."

[41] While the parties do not contest the aforesaid legal principles, Mr Sithole argued that those relevant to punitive costs orders did not apply in the present instance.

Determining the costs' liability vis-à-vis the respondent's withdrawn exception

[42] I deal first with the fate of the costs of the respondent's withdrawn exception.

[43] Mr Van Huyssteen, appearing for the applicant, correctly accepts that the applicant is not entitled to all the costs of the respondent's exception. This is because of the applicant's amendments to its particulars of claim pursuant to grounds one and three of the respondent's exception.

[44] The applicant however seeks that the respondent is to be held liable for the costs of the exception, as far as it relates to the second ground of exception, and then on a punitive basis.

[45] Mr Sithole, for the respondent, vigorously, if not too overly enthusiastically at times, argued that the respondent is not liable for the said costs of its exception. His argument centred on the submission that the exception, as a whole (including ground two), ceased to exist when the applicant amended its particulars of claim in

response to the first and third grounds of exception. His argument is illogical, confusing and belied by subsequent events.

[46] The argument is illogical because the applicant's amendments plainly did not address the second ground of exception; which remained in existence, and with it the exception as far as it pertained to that (second) ground. The respondent, if it wished to do so, could have pursued the second ground of exception by setting it down for hearing. If it did not intend to pursue the second ground, the respondent should have withdrawn the (still extant second ground of) exception. The respondent did neither.

[47] Moreover, Mr Sithole also argued that the importance or value of the second ground, within the context of the exception, as a whole, was lessor or secondary to that of the first and third grounds of exception, and because of the applicant's amendments to its particulars of claim, the respondent was no longer required to pursue the second ground of exception. I disagree. A ground of exception is either a proper ground of exception, or it is not. If the respondent did not believe it to be proper ground of exception worthy of being pursued, it should not have been raised in the first place.

[48] Additionally, Mr Sithole's aforesaid arguments are undermined by the respondent's subsequent and continuing acknowledgement of the continued existence of the respondent's exception in at least two respects. First, there is express reference thereto in paragraphs 5.1 and 5.5 of the Twala J. Order, and second, (ii) the respondent's recent filing of its notice of withdrawal of its exception.

[49] Mr Sithole's endeavours to qualify, and argue away, these two objective facts were unsatisfactory and discombobulated. For example:

- a. Mr Sithole argued that the reference to the exception in the Twala J. Order is because, while the respondent believed that the exception was no longer extant, it did not object to it being referenced and included in the order. This explanation defies logic and is, in any event, impermissibly premised on evidence from the Bar. If anything, this argument contemplates

the respondent potentially having misled both Twala J. and the applicant on this score; something I certainly hoped the respondent did not intend to do.

b. As to the filing of the notice of withdrawal, Mr Sithole argued that the notice of withdrawal was only filed within the context of the passing of the account credit and because (purportedly) “the main action matters become settled”. This argument is unpersuasive and unsustainable for, at least, three reasons. First, the “main action” (being a reference to the pending action) is not settled. Second, if the pending action was settled, there would only be a need for the filing of notice of withdrawal of the pending action. There would be no need for the filing of the notice of withdrawal of the exception. Third, and most obviously, the notice of exception, in its own terms, does not state that the exception is withdrawn because it has been overtaken by the applicant’s amendments to its particulars of claim.

[50] As such, I find that the respondent is liable for the costs of ground two of the respondent’s exception consequent upon the withdrawal of the respondent’s exception.

Determining the costs’ liability vis-à-vis urgent application

[51] Turning now to the costs of the applicant’s urgent application, the applicant asks that the respondent pay these costs, and then on a punitive basis.

[52] Given inter-alia the circumstances set out above, I cannot help but find that the applicant was compelled to bring the urgent application in the circumstances that it did; circumstances which were entirely of the respondent’s making and due to its misadventure.

[53] Mr Sithole ultimately conceded that the respondent should be liable for the costs of the urgent application. Mr Sithole’s concession aside, the respondent had already expressly, if not inferentially, conceded the need for the urgent application by agreeing to the granting of interdictory relief in favour of the applicant in paragraph 7 of the Twala J. Order.

[54] Mr Sithole, however, argued again in a discombobulated manner that (i) it was not for this court, now, to determine the liability for these costs, and (ii) such costs should not be levied on a punitive basis. I deal with Mr Sithole's latter argument later on below under the following separate heading.

[55] As to his former argument, Mr Sithole contended that because of the express prayer in the applicant's notice of motion in the urgent application that "the costs reserved for determination in the pending action", the only court that could determine the fate of the reserved costs is the trial court determining the pending action. This argument is however belied by the express terms, and a proper construction and interpretation, of the Twala J. Order (granted by agreement between the parties); including the unqualified paragraph 8 reserved costs order subsequently granted by Twala J.

[56] Moreover, Mr Sithole's argument also flounders because the parties intended (or at least hoped), via the implementation of paragraphs 5 and 6 of the Twala J. Order to end the pending action. If the pending action was ended via such good faith settlement process, then what would happen to the reserved costs, and which trial court would be responsible for the un-reserving and determination of such costs?

Are punitive costs orders warranted?

Introduction

[57] The applicant claims attorney client costs orders in respect of both matters before me.

[58] For inter-alia the reasons already alluded to above as well as those that follow, I cannot but conclude that the applicant, as the successful litigant in both matters, should not be out of pocket because of the respondent's, at least insouciant, if not vexatious malicious and reckless, conduct in both proceedings.¹³

¹³ *White Rock Property Trading supra* and see *Nel v Waterberg Landbouwers Ko-Operatiewe Vereniging* 1946 AD 597 quoted therein.

[59] The respondent's conduct has contaminated both the exception proceedings, the urgent application and the hearing before me. The respondent's conduct is lamentable. It has conducted itself with scant regard to inter-alia contractual and litigation rights of the applicant, established litigation processes, orders of Court, the rules of Court and the convenience of the Court.

The withdrawn exception

[60] As to the withdrawn exception, the respondent does not explain why it did not withdraw its (remaining) exception (i) when the plaintiff amended particulars of claim; nor (ii) when the plaintiff set the exception down for hearing. There is equally no explanation as to why the notice of exception was only withdrawn a month ago (September 2024).

[61] The respondent's argument to the effect that, consequent upon the plaintiff's amendment to its particulars of claim, the respondent's exception on ground two somehow disappeared into the ether, and the accompanying and supporting arguments, comprise little more than intellectual gymnastics, within the context of that already stated (i) regarding that agreed in respect of the Twala J. Order and (ii) the notice of withdrawal of the exception. In fact, given such context the arguments are not only misplaced but *mala fide*.

[62] Equally egregious is the respondent's false statement in its notice of withdrawal that the pending action had been "settled" with "with each party is [sic] to pay their costs".

[63] I also cannot ignore that despite the respondent somewhat sanctimoniously relying on section 8(4)(a) as forming the subject matter of the respondent's second ground of exception, the respondent inexplicably dilly-dallied, if not recklessly delayed, in passing an account credit that it knew, for at least two years, it owed the applicant [i.e., the respondent delayed in acting in terms of its own obligations under section 8(4)(a)].

The urgent application

[64] On the question of a punitive costs order in the urgent application, as already mentioned Mr Sithole ultimately conceded that the respondent should be liable for the costs of the application, but not on a punitive scale.

[65] Mr Sithole argued that a punitive costs order is unwarranted because I should have regard to (i) the fact that the respondent has several contractors who act, at times, in an over-eager manner, and (ii) how the respondent subsequently responded to the urgent application and agreeing to the Twala J. Order.

[66] These contentions are unsustainable and self-defeating. Rather than serving to exculpate and exonerate the respondent, its subsequent conduct, and the accompanying arguments, instead deeply inculcates it. This is because (i) both contentions do not serve to excuse nor explain away the respondent's (prior) misconduct which triggered the need for the bringing of the urgent application; and (ii) the second contention is inconsistent with the subject matter of the proceedings that subsequently served before Vally J.

[67] Mr Sithole's unblushing endeavour, in argument, to shift or divert responsibility for the need for bringing of the urgent application onto the shoulders of its contractors is opportunistic, if not deplorable. The respondent is responsible for its contractors' conduct, including their over-eagerness. Mr Sithole did not suggest otherwise. It is further apparent that the respondent is unable to control its own contractors and/or its systems within the context of the respondent's assurances that the applicant's "account had been flagged and that [the applicant's] municipal services shall not be terminated".

[68] If the respondent is unable to control its own contractors and systems (for which ratepayers such as the applicant have paid), then it begs the question why it gave the undertakings, and why the applicant should be out of pocket because of its inability and its failure to abide by its undertaking.

[69] I additionally simply fail to understand on what basis it was suggested, as I understood it, that I should, let alone could, ignore the respondent's conduct that

triggered the need for the urgent application in determining, in the exercise of my discretion, the question of a punitive costs order. The respondent's breach of at least three undertakings is unconscionable and cannot be ignored. The suggestion that I should ignore this conduct is risible.

[70] The very purpose for the applicant seeking the undertakings, and the reasons why the undertakings were given, was to avoid the need for urgent proceedings of the very type that ultimately served before Twala J. There is no reason for the applicant to be out of pocket in seeking and obtaining undertakings that ultimately proved to be worthless, including undertakings communicated on behalf of the respondent by its attorneys.

[71] Inasmuch as Mr Sithole argued that I should have regard to the respondent's post urgent application conduct, such conduct separately and independently confirms the need for a punitive costs order. It reflects dismally on the respondent to have it crow about it agreeing to the terms of the Twala J. Order, only for it to subsequently breach the order. That said, I believe that the respondent's conduct prior to the bringing of the urgent application alone justifies the granting of a punitive costs order.

The respondent's conduct generally

[72] In additionally considering the question of a punitive costs' orders, I have also had regard to the respondent's misconduct leading up to, and during, the proceedings in issue.

[73] Within the context of its (extra-litigation) conduct generally, the applicant's founding affidavit in the urgent application is replete with extensive, but unsuccessful, endeavours by the applicant and its representatives, in essence, to engage with the respondent's representatives to obtain a correction, and reimbursement, of the erroneous billing; even when the respondent conceded that it erred in billing the applicant.

[74] As to its (intra-litigation) conduct leading up to the hearing of this application, such is set out, in part at least, in an uncontested “unilateral joint practice note” filed on behalf of the applicant, and in respect of which the respondent raised no contest.

- a. By way of example, the respondent does not dispute that its legal representatives did nothing to assist in the holding of a pre-hearing conference. In fact, the respondent’s legal representatives failed, without explanation, to attend at a pre-hearing conference arranged for 4 September 2024.
- b. Equally concerning is the respondent’s failure to assist and participate in the preparation of a joint practice note for purposes of the hearing of the two proceedings that served before me (hence the applicant’s filing of a “unilateral joint practice note”).

[75] Additionally, when the respondent eventually filed its concise heads of argument dealing with the costs’ questions, the respondent traversed only the costs of the withdrawn exception. They did not deal with the urgent application. The explanation, such as it was, proffered from the bar by Mr Sithole is that only the exception had been set down. For the reasons set out above, this explanation is false. Moreover, no apology was forthcoming when such was demonstrated to be the case.

[76] I also cannot close my eyes to the fact that this Court has been burdened with what may, or ought, possibly have been an unnecessary hearing, accompanied by lengthy and difficult to follow arguments for the respondent, in circumstances where the respondent should at least have timeously tendered the costs in issue (even if the tender was on a party and party scale). The concession ultimately made in respect of the costs of the urgent application came simply too late and was, in any event, contaminated by Mr Sithole’s initial arguments premised on the framing of the costs’ relief sought in the notice of motion in the urgent application.

[77] In further considering the question of a punitive costs’ orders, I have also had regard to the respondent’s and its legal representatives disregard of inter-alia that set out in paragraphs [2], [17] and [48] of the March 2024 decision of Sutherland DJP

in *Millu v City of Johannesburg Metropolitan Municipality and Another*¹⁴ (which findings and sentiments I find apply equally in the present instance).

[78] Given the aforesaid reasons, individually and collectively, I am satisfied, in the exercise of my discretion, that a punitive attorney-client costs orders is warranted in respect of both the urgent application, and ground two of the withdrawal of the respondent's exception. For the avoidance of doubt, attorney-client costs orders are also warranted in respect of those costs that pertain to the hearing and argument that served before me on 8 October 20-24 [see paragraph [62](c) below] to the extent that such costs are for any reasons not included in, or form part of, the aforesaid cost orders pertaining to the urgent application, and ground two of the withdrawal of the respondent's exception.

[79] In closing this topic, the applicant's requests that an order is granted directing that the urgent application costs order(s) "be increased and allowed at taxation in terms of uniform rule 67A(4)(a)", by increasing the fees in uniform rule 70 section A, B, C and D by 15%.

[80] In *Mashavha v Enaex Africa (Pty) Ltd*¹⁵, Wilson J. explains the distinction between "party and party" and "attorney and client" costs orders¹⁶, and then deals with uniform rule 67A, and its application, as follows (my italics):

"5. Rule 67A addresses itself only to awards of costs as between party and party. Its purpose is to permit a court to exercise control over the maximum rate at which counsel's fees can be recovered under such an award. "Counsel" in this context should be understood to mean any legal practitioner, whether a referral advocate, a trust account advocate or an attorney with higher appearance rights, who actually does the work of counsel. The focus is accordingly on assigning a maximum value that may be recovered in respect of the work done in the presentation of the case before court. The professional affiliation of the person undertaking the work does not matter.

¹⁴ 2024 JDR 1329 (GJ) (18 March 2024) (marked reportable)

¹⁵ 2024 JDR 1686 (GJ)

¹⁶ para 3 *et seq*

6. ...

7. *Rule 67A (3) provides that a court ‘shall’, when making a party and party costs order, ‘indicate the scale in terms of rule 69, under which costs have been granted’. ...*

8. *Rule 67A (3) (c) states that if a court declines to indicate a scale in its order, the lowest scale – scale “A” – applies.*

9. *Rule 67A (4) provides for the right to apply for an order determining which parts of the proceedings, if any, were urgent, and whether the costs of more than one counsel may be recovered. The effect of that subrule is, notionally, that a different scale could be assigned to the services of each counsel whose fees are allowed under the rule. Given that each of the parties in this case was represented only by one counsel, I leave open the question of whether, when and how such an order should be made.”*

[81] Given the above, I am unable to accede to the applicant’s uniform rule 67A request. This is because I intend granting an attorney-client costs order, and not a party and party costs order, in respect of the urgent application. In any event, I understand that only Mr Van Huyssteen appeared for the applicant in the urgent hearing before Twala J.

Conclusion

[82] In the result, I grant the following costs orders:

- a. The respondent’s exception under case no. 2022/22065:
 - i. the respondent is liable for and is ordered to pay the costs of the respondent’s exception under case no. 2022/22065 except for those costs that the Taxing Master may determine relate to the first and third grounds of exception raised therein; and
 - ii. such costs order (i) shall be on the scale as between attorney and client and (ii) shall include, on the same attorney and client scale, the costs of the applicant’s representative appearing as an attorney that has rights of appearance in the Superior Court.
- b. The applicant’s interim interdict application under case no. 2023/101121:

- i. the respondent is liable for and is ordered to pay for the costs of the applicant's interim interdict application under case no. 2023/101121 (including all reserved costs orders); and
- ii. such costs order (i) shall be on the scale as between attorney and client and (ii) shall include, on the same attorney and client scale, the costs of the applicant's representative appearing as an attorney that has rights of appearance in the Superior Court.
- c. The hearing and argument on 8 October 2024 (to the extent that such costs are not included in, or form part of, any of the aforesaid cost orders):
 - i. the respondent is liable for and is ordered to pay the costs of the proceedings, argument and hearing before me on Tuesday, 8 October 2024; and
 - ii. such costs order (i) shall be on the scale as between attorney and client and (ii) shall include, on the same attorney and client scale, the costs of the applicant's representative appearing as an attorney that has rights of appearance in the Superior Court.

AMM G

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

JUDGMENT ELECTRONICALLY DELIVERED: - This judgment was handed down electronically by circulation to the parties' legal representatives by email. It will also be uploaded onto CaseLines.

The date and time for the handing-down of this judgment is deemed to be:

10h00 on 14 OCTOBER 2024.

For the Applicant: KJ Van Huyssteen
Instructed by Fluxmans Attorneys

For the Respondent: Adv. E Sithole
Instructed by Ramatshila Muger Inc.

Date of Hearing: 08 October 2024

Date of Judgment: 14 October 2024