



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION,
CAPE TOWN**

CASE NO.: 17784/2023

In the matter between:

CHAPMAN'S SEAFOOD COMPANY (PTY) LTD

Applicant

and

TONI LOMBARD

First Respondent

ECONO FOODS (PTY) LTD

Second Respondent

JUDGMENT

ANDREWS, AJ

Introduction

[1] This is an opposed application for the determination of costs which has been set down by the Second Respondent pursuant to the matter being removed from the roll by the Applicant, who had sought interdictory and related ancillary relief against the Respondents in the urgent court in October 2023.

Factual Background

[2] The First Respondent was initially employed by the Applicant from 03 May 2021 until 21 July 2023. The First Respondent commenced employment with the Second Respondent, on 02 October 2023. On 04 October 2023, the Applicant directed a letter to the Second Respondent, requesting an undertaking by 05 October 2023 that the First Applicant's employment with the Second Respondent cease forthwith as per the terms of the restraint of trade agreement entered into between the Applicant and the First Respondent. The Second Respondent complied with the request. The Applicant launched an urgent application against the Respondents on 15 October 2023 in terms of Rule 6(12) for interdictory and related ancillary relief.

[3] This matter served before me as a fast lane urgent application on 23 October 2023, where the matter was resolved between the Applicant and First Respondent, which culminated in an order being taken by agreement. A prohibitory interdict was granted against the First Respondent in terms of paragraphs 2(a) and 2(b) of the Notice of Motion. The matter of costs stood over for later determination.

[4] At the hearing, it was submitted that the matter was not ripe for hearing in respect of the Second Respondent. It was expressed in the Answering Affidavit that the papers were prepared under truncated time constraints, extreme pressure and without being able to deal substantially with each and every averment made in the papers by the Applicant. The Applicant had also not filed its Replying Affidavit.

[5] This court after hearing the submissions made by the parties, specifically considered that the matter of urgency was inextricably linked to the merits of the application and was not persuaded that the matter was ripe for hearing in the absence of a full set of pleadings. The matter was accordingly adjourned to 07 December 2023 which recorded a specified timetable for the exchange of further pleadings:

- ‘...
2. *Second Respondent is granted leave to supplement its answering papers to the extent necessary and to file same by close of business on 6 November 2023.*
3. *Applicant shall file its replying papers by close of business on Monday 13 November 2023.*’¹

[6] The issue of costs stood over for later determination.² The Second Applicant complied with the agreed Order of Court dated 23 October 2023 and filed its supplementary papers on 06 November 2023, however the Applicant, did not file any replying papers. On 06 November 2023, the Applicant delivered a Notice of Removal. Later, on 06 November 2023, the Second Respondent’s Attorney served an affidavit deposed to by the First Respondent. The Second Respondent set the matter down for hearing on the issue of costs. On 15 April 2024, and by agreement between the parties, the issue of costs was adjourned for hearing to 19 June 2024.

Issues for Determination

[7] The question for adjudication is whether or not an Applicant who launches an application, but then fails to proceed with it, can avoid the costs consequences of its failure to obtain any relief in terms of its Notice of Motion by simply

¹ Pleadings Bundle, Order “X1” pages 161 – 162.

² Pleadings Bundle, Order “X”, pages 159 – 160.

refusing to set the matter down for hearing and/or by refusing to withdraw the application.

[8] The court reserved its ruling regarding the email correspondence attached to the Applicant's Heads of Argument.

Status of the Application

[9] At the commencement of the proceedings, the court enquired what the status of the application was since the matter was removed from the roll and not re-enrolled for hearing. The Applicant was requested to address the court on whether the decision not to proceed with the main application has the effect that its legal status is implied to be "withdrawn".

[10] Rule 41(1)(a) of the Uniform Rules states:

'A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs; and the taxing master shall tax such costs on the request of the other party.'

[11] Mr Moosa on behalf of the Applicant, correctly pointed out that it would not be competent of an Applicant to withdraw an application without the consent of the other party or without the leave of the court as envisaged in the Rule.³ It was submitted that because the restraint of trade had lapsed, there is no live issue in the main application that required ventilation, save for the question of costs. It was for this reason that the matter was referred for argument on the narrow issue of costs only.

³ *Reuben Rosenblum Family Investments (Pty) Ltd and Another v Marsubar (Pty) Ltd (Forward Enterprises (Pty) Ltd and Others Intervening)* 2003 (3) SA 547 (C) at 549f – H.

[12] The general rule is that once a party withdraws an action, this is tantamount to accepting a defeat and unless there are exceptional circumstances, the other party is entitled to its costs.⁴ In terms of Rule 4(1)(a), the application cannot be regarded as withdrawn. In this regard, the Applicant argued that the remedies available to the Respondent was to apply on Notice of Motion to have the application dismissed for want of prosecution. The matter of **Cassimjee v Minister of Finance**⁵ succinctly dealt with the manner in which the discretion to dismiss an action for want of prosecution is to be exercised. In this regard, the following requirements have been recognised:

'[11] ...First, there should be a delay in the prosecution of the action; second, the delay must be inexcusable and, third, the defendant must be seriously prejudiced thereby. Ultimately the enquiry will involve a close and careful examination of all the relevant circumstances, including, the period of the delay, the reasons therefore and the prejudice, if any, caused to the defendant. There may be instances in which the delay is relatively slight but serious prejudice is caused to the defendant, and in other cases the delay may be inordinate but prejudice to the defendant is slight. The court should also have regard to the reasons, if any, for the defendant's inactivity and failure to avail itself of remedies which it might reasonably have been expected to do in order to bring the action expeditiously to trial.

[12] An approach that commends itself is that postulated by Salmon LJ in the English case of Allen v Sir Alfred McAlpine & Sons Limited; Bostic v Bermondsey & Southwark Group Hospital Management Committee. Sternberg & another v Hammond & another [1968] 1 All ER 543 (CA), where the following was stated at 561e-h:

'[A] defendant may apply to have an action dismissed for want of prosecution either (a) because of the plaintiff's failure to comply with the Rules of the Supreme Court or (b) under the Court's inherent jurisdiction. In my view it matters not whether the

⁴ *Bisschoff NO and Another v Karsten NO and Others* (29641/03, 29642/03) [2005] ZAGPHC 227 (28 April 2005) at para 2.

⁵ 2014 (3) SA 198 (SCA) at para's 10 -12.

*application comes under limb (a) or (b), the same principles apply. They are as follows:
In order for such an application to succeed, the defendant must show:*

- (i) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff - so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case, but it should not be too difficult to recognise inordinate delay when it occurs.*
- (ii) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.*
- (iii) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself; prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.'*

[13] The matter of ***Martin Boikanyo Pitsie NO v Paul Sepopi Ditshego***⁶ to which the court was referred dealt with the general principles applicable in an application for dismissal in circumstances that may constitute an abuse of the process. In the absence of a formal application for dismissal, this court is not seized with making a determination in this regard.

[14] The question that remains is whether the decision not to withdraw the application is correctly predicated on the principle of mootness, more particularly:

- (a) The relief sought by way of the Order made in respect of the First Respondent also binds the Second Respondent and as such the relief is not required; and

⁶ [2023] ZAGPJHC (7 June 2023) at para 23.

(b) There is no longer a live issue for determination because the restraint of trade clause has lapsed.

[15] The doctrine of mootness has been explained by the Constitutional Court in ***Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation (SOC) Limited and Others***⁷ as follows:

*'Mootness is when a matter "no longer presents an existing or live controversy".⁸ The doctrine is based on the notion that judicial resources ought to be utilised efficiently and should not be dedicated to advisory opinions or abstract propositions of law, and that courts should avoid deciding matters that are "abstract, academic or hypothetical"'*⁹

[16] It is trite that a High Court does not have any discretion relating to mootness which has been aptly demystified in ***Minister of Justice and Correctional Services and Others v Estate Late James Stransham-Ford and Others***¹⁰:

'The situation before Fabricius J was not comparable to the position where this court or the Constitutional Court decides to hear a case notwithstanding that it has become moot. When a court of appeal addresses issues that were properly determined by a first instance court, and determines them afresh because they raise issues of public importance, it is always mindful that otherwise under our system of precedent the judgment at first instance will affect the conduct of officials and influence other courts when confronting similar issues. A feature of all the cases referred to in the footnotes to para 22 above is that the appeal court either overruled the judgment in the court below

⁷ (CCT195/19) [2020] ZACC 5; 2020 (6) BCLR 748 (CC); 2020 (4) SA 409 (CC) (24 March 2020), at para 47.

⁸ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 21.

⁹ *J T Publishing (Pty) Ltd v Minister of Safety and Security* [1996] ZACC 23; 1997 (3) SA 514 (CC); 1996 (12) BCLR 1599 (CC) at para 15. See also Loots "Standing, Ripeness and Mootness" in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (2014) at 7-19 and Du Plessis et al *Constitutional Litigation* (Juta & Co Ltd, Cape Town 2013) at 39.

¹⁰ (531/2015) [2016] ZASCA 197; [2017] 1 All SA 354 (SCA); 2017 (3) BCLR 364 (SCA); 2017 (3) SA 152 (SCA) (6 December 2016), at para 25.

or substantially modified it. The appeal court's jurisdiction was exercised because 'a discrete legal issue of public importance arose that would affect matters in the future and on which the adjudication of this court was required'.¹¹ The High Court is not vested with similar powers. Its function is to determine cases that present live issues for determination.¹²(my emphasis)

[17] It is therefore unequivocal that the function of a High Court is to determine cases that present a live issue. The lapse of the restraint period has rendered the relief which was originally sought in the main application moot. It is pellucid that enrolling the matter for hearing after the restraint period would not have a practical effect.¹³ The Applicant has chosen to leave the matter in respect of the Second Respondent in a state of limbo, without withdrawing the application, possibly because to do so, would be tantamount to accepting defeat. It is clear that the Applicant is unwavering that it was entitled to seek relief against the Second Respondent, but for the issue of mootness and because it believes that it has achieved satisfactory relief in the form of the order obtained in respect of the First Respondent. I will deal with this aspect further, later in this judgment.

[18] Whilst it may be so that the Applicant cannot be compelled to withdraw its application; however, the fact that the Applicant launched the application against the Respondents attracts with such a decision an inevitable cost implication.

¹¹ *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others* [2012] ZASCA 166; 2013 (3) SA 315 (SCA) para 5.

¹² See also *VINPRO NPC v President of the Republic of South Africa and Others* [2021] ZAWCHC 261 para 42; *South African Breweries Proprietary Limited and Others v President of the Republic of South Africa and Another* [2022] 3 All SA (WCC) at para 36.

¹³ *Solidariteit Helpende Hand NPC and Others v Minister of Cooperative Governance and Traditional Affairs* (104/2022) [2023] ZASCA 35 (31 March 2023) at para 12.

This is evident from the Further Affidavit attested to by Storm Barry, the Second Respondent's instructing Attorney where the following was illuminated:

*'Saliently, in the letter I indicated that it was clear that Chapmans no longer wished to proceed with its own application...and advised Chapmans that Econo Foods would be amenable to the withdrawal for the application subject to an appropriate tender of costs. The costs incurred by Econo Foods to date were set out and it was indicated that Econo Foods would – at that point in time – have considered an offer of a reduced amount in relation to the aforesaid costs.'*¹⁴

[19] Leaving the ball in the court of the Respondents, proverbially speaking, to apply for a dismissal of the application is, in my view, a stratagem to by the Applicant to not directly deal with the consequential cost implication of the application, which has now principally become the bone of contention in this matter. This further begs the question whether the Respondents should now be forced to launch a dismissal application in circumstances where the Applicant has decided not to prosecute its application against the Second Respondent to its finality or withdraw same.

[20] It is trite that in circumstances such as these, the Respondents have recourse to apply for the dismissal of the application. Consequently, in the absence of such an application, this Court is beholden to deal with the matter as it stands. The status of the matter is what it purports to be, which is seemingly alive with an issue that is no longer live.

¹⁴ Application Bundle, para 15, page 197.

Principal Submissions by the parties

Applicant vis-a-vis First Respondent

[21] The Applicant submitted that the First Respondent had caused it to seek redress on an urgent basis in order to protect its commercial interests, which it was entitled to do. Prior to launching the application, the Applicant caused various notices to be sent to the First Respondent calling on her to desist from the injurious conduct complained of in the founding papers. Despite prior notice being given timeously, and more than once, the First Respondent refused to desist from her injurious conduct. It is further averred that the First Respondent had refused to engage with the Applicant to diffuse the situation and avert litigation.

[22] The First Respondent, it was argued, did not dispute that the Applicant is entitled to the relief it sought against her and consented to a Court Order. It was mooted that her acquiescence is the clearest indication that she admitted that the Applicant is entitled to the relief it sought against her. Furthermore, the Applicant contended that it successfully obtained the prohibitory interdict sought in its petition against the First Respondent. In addition, the Applicant averred that it was successful against the First Respondent and since costs generally follow the result, the Applicant is entitled to its costs on an attorney-client scale, alternatively on a party and party scale C.

[23] I deem it prudent to mention that the First Respondent did not file an Answering Affidavit subsequent to filing a Notice of Opposition. However, the First Respondent attested to an affidavit on 6 November 2023, in support of the Second Respondent's opposition. The First Respondent makes averments therein to essentially explain why she elected to resolve the matter on the basis set out in the

Settlement Agreement. It was submitted that the Settlement Agreement did not in any manner restrict the First Respondent's intended actions and expressly reserved her rights to argue the merits of the matter insofar as they are relevant to the issue of costs. It was argued that it is disingenuous for the Applicant to argue that the costs should naturally follow.

[24] In addition, the First Respondent raised the following objections to the issuing of a cost order in favour of the Applicant namely:

- (a) There was no basis for urgency;
- (b) That the application constitutes an abuse of the process;
- (c) The application was launched prematurely;
- (d) There is no basis on the papers for the relief sought by the Applicant.

[25] The First Respondent seeks a cost order in her favour.

Applicant vis-a-vis Second Respondent

[26] The Applicant sought relief against the Second Respondent which would prohibit it from permitting the First Respondent to be engaged, interested or concerned in its business anywhere in the Republic of South Africa in any capacity; and which would prohibit the Second Respondent from competing with the Applicant by misappropriating confidential information received unlawfully through the First Respondent. The Applicant contended that Paragraphs 1.1 and 1.2 of the Court Order against the First Respondent expressly refers to the Second Respondent and as such is legally bound to comply thereby.

[27] The Applicant contended that it obtained a court order which granted it relief of the kind envisioned in its relief sought against the Second Respondent as the Second Respondent was obliged to obey on pain of an order for contempt of court. It was argued that because the Applicant succeeded in obtaining prohibitory relief against the Second Respondent, the Applicant is entitled to its costs on the basis of the same rule, namely that costs follow on success.

[28] Additionally, it was submitted that the terms of the order were known to both Counsel on behalf of the First and Second Respondents' respectively at the time of the hearing. The Order, it was argued, places a binding and enforceable duty upon the Second Respondent of the kind sought by the Applicant against the Second Respondent. In further augmentation, it was argued that if there had been non-compliance with the court order, hypothetically speaking, the Applicant would be entitled to launch contempt proceedings against both First and Second Respondent arising from the Order granted on 23 October 2023.

[29] Applicant argued that the conduct of the Second Respondent was unreasonable, exacerbated costs and strained the court's resources and as such, it was submitted, the Applicant is entitled to an award of costs against the Second Respondent on an attorney-client scale, alternatively on a party and party scale C.

[30] The Second Respondent submitted that the Applicant's argument that an order granted against the First Respondent somehow bound the Second Respondent is fantastical and without precedent. No authority for this proposition was cited by the Applicant. The Second Respondent contended that the argument by the

Applicant is disingenuous because if the Applicant was of the view that the order which it could have obtained against the First Respondent would have been sufficient to safeguard all its alleged rights and interests, then it would not have been necessary to seek relief against the Second Respondent. In addition, it was argued that the reason why relief was sought against the Second Respondent was because the Applicant recognised that an order against the First Respondent would not be binding on the Second Respondent.

[31] The question to be answered is whether the Applicant through the order granted on 23 October 2023 against the First Respondent in effect obtained substantial relief against the Second Respondent. In this regard, the Applicant contended that logic and common-sense dictates that not only is the First Respondent interdicted and restrained in terms of the order granted on 23 October 2023, but that the Second Respondent is by operation of the court order, prohibited and restrained from permitting the First Respondent to undertake any work or other conduct in Second Respondent's business anywhere in South Africa as envisioned in the Court Order. Furthermore, the Second Respondent is prohibited and restrained from benefitting from the disclosure of confidential information by the First Respondent as contemplated in the court order.

Second Respondent vis-à-vis Applicant

[32] The Second Respondent contended that:

- (a) The application was moot because the Second Respondent immediately complied with the Applicant's request for a specific undertaking;

- (b) The relief sought by the Applicant was and is bad in law, premature and wholly unsubstantiated;
- (c) It was inappropriate to attempt to obtain the relief sought by the Applicant on an urgent basis, given the severely curtailed timetable and import of final interdictory relief;
- (d) The application amounts to an abuse of the court process for the following reasons:
 - (i) it was launched tactically so as to provide the Respondent with as little time as possible to prepare their defence and
 - (ii) The order sought compliance with the terms of the restraint in circumstances in which the First Respondent was not employed at the time of the Application and would not be employed by the Second Respondent for the duration of her restraint period;
- (e) The further final interdictory relief sought by the Applicant against the Second Respondent based on unlawful competition:
 - (i) Lacked any factual foundation; and
 - (ii) Was cast in terms so wide and pervasive as to be impossible of practical application and likely to only lead to further litigation;
- (f) The application was launched in an attempt to:
 - (i) extract further concessions from the Second Respondent to which the Applicant was not entitled; and
 - (ii) extract payment in the amount of R50 000 from the Second Respondent.

[33] The Applicant deemed it sensible to remove the matter from the roll in an attempt to curtail waste of valuable judicial resources and costs. The notice of

removal was delivered more than a month before the intended hearing date and before any supplementary papers were delivered. It was argued that the Second Respondent later objected to the removal of the application from the court roll and to the Applicant's decision not to proceed with the argument in the matter on the merits. This stance, it was submitted, demonstrated the unreasonableness of the way in which the Second Respondent has gone about this litigation.

[34] The Second Respondent submitted that because the Applicant has obtained no relief enforceable against it; the Second Respondent has in effect been successful in defending the application and is entitled to its costs. It was argued that the Court should visit its displeasure on the conduct of the Applicant and award costs on an attorney client basis, with the award of counsel's fees on scale C of the scale of fees as set out and contemplated in Uniform Rule 67A(3) read with sub-rule (7) thereof.

Submissions in Heads of Argument

[35] The Applicant attached email correspondences exchanged between the parties to the Heads of Argument, in an effort to demonstrate the purported unreasonableness of the conduct of the Second Respondent at the time when the costs were relatively insubstantial. The Second Respondent argued that the correspondence to which the Court was referred, is not part of the record in these proceedings and to insert same into Heads of Argument is irregular, inappropriate and improper. The Applicant submitted that the Court has a discretion to consider all material relevant.

[36] It is trite that in motion proceedings, the affidavits constitute both the pleadings and the evidence. It is thus expected of an Applicant to disclose facts that

would make out a case for the relief sought, and sufficiently inform the other party of the case it was required to meet in the Founding Affidavit.¹⁵ This legal principle has been enunciated by the Appellate Division in *Director of Hospital Services v Mistry*¹⁶ and cited with approval by this Court in *Siemens Energy (Pty) Ltd and Others v City of Cape Town and Others*¹⁷ endorsing the entrenched legal position as follows:

'It is therefore settled law that the issues and averments in support of the parties' cases should appear clearly from the Founding Affidavit. The Founding Affidavit is to contain sufficient facts upon which a court may find in the Applicant's favour. It must do so by defining the relevant issues and by setting out the evidence upon which it relies to discharge the onus of proof resting on it in respect thereof. Therefore, it is impermissible to raise issues during argument, which has not been pleaded.'

[37] Therefore, in the absence of a substantive application to further augment papers, this court cannot have regard to further correspondences exchanged between the parties. The email correspondences, so attached to the Applicant's Heads of Argument will therefore not be deemed to form part of the pleadings.

[38] Insofar as the Affidavit of Ms Barry is concerned, the parties placed on record that there was no objection for the additional or further affidavit to be handed up.

¹⁵ See also *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T); *Juta & Co Ltd v De Koker* 1994 (3) SA 499 (T) at 508 B-D.

¹⁶ 1979 (1) SA 626 (AD) at 635H-636B

"When...proceedings were launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by Krause J in Pountas' Trustees v Lahanas 1924 WLD 67 at 68 and has been said in many other cases:

'...an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny'

Since it is clear that the applicant stands or falls by his petition and the facts therein alleged, 'it is not permissible to make out new grounds for the application in the replying affidavit (per Van Winsen J in SA Railways Recreation Club and Another v Gordonia Liquor Licensing Board 1953(3) SA 256 (C) at 260)"

¹⁷ (19749/2022) [2024] ZAWCHC 193 (25 July 2024) at para 95.

Applicable Legal Principles

[39] It is an accepted legal principle that costs ordinarily follow the result and a successful party is therefore entitled to his or her costs.¹⁸ The guiding principle is that *'...costs are awarded to a successful party in order to indemnify him for the expense to which he has been put through having been unjustly compelled either to initiate or to defend litigation, as the case may be. Owing to the unnecessary operation of taxation, such an award is seldom a complete indemnity; but that does not affect the principle on which it is based.'*¹⁹ It is also an accepted legal principle that cost is in the discretion of the court.²⁰

[40] The basic rules were stated as follows by the Constitutional Court in ***Ferreira v Levin NO and Others***²¹:

'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 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. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for

¹⁸ *Meyer v Abramson* 1951 (3) SA 438 (C) at 455.

¹⁹ Cilliers AC 'Law of Costs' Butterworths page 1-4; *Agriculture Research Council v SA Stud Book and Animal Improvement Association and Others*; *In re: Anton Piller and Interdict Proceedings* [2016] JOL 34325 (FB) par 1 and 2; *Thusi v Minister of Home Affairs and 71 Other Cases* (2011) (2) SA 561 (KZP) 605-611.

²⁰ *Ibid* page 2-16(1); *Fusion Hotel and Entertainment Centre CC v eThekweni Municipality and Another* [2015] JOL 32690 (KZD) '[12] It is common cause that in this matter the issues at hand remained undecided and the merits were not considered. When the issues are left undecided, the court has a discretion whether to direct each part to pay its own costs or make a specific order as to costs. A decision on costs can on its own, in my view, be made irrespective of the non-consideration of the merits. I am stating this on the basis that an award for costs is to indemnify the successful litigant for the expense to which he was put through to challenge or defend the case, as the case may be...'

²¹ 1996 (2) SA 621 (CC) at 624B—C (par [3]).

example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of litigants and the nature of proceedings.'

[41] In **Nel, Appellant v Waterberg Landbouwerkers Kooperatiewe Vereniging Respondent**²², the following was stated in relation to costs on an attorney and client scale:

*'The true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action from the conduct of the losing party, the court, in a particular case considers it just, by means of such an order, to ensure more effectually that it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expenses caused to him by the litigation. Theoretically, a party and party bill taxed in accordance with the tariff will be reasonably sufficient for that purpose. But in fact a party may have incurred expense which is reasonably necessary but is not chargeable in the party and party bill. See *Hearle and McEwan v Mitchell's Executor* (1922 TPD 192). Therefore in a particular case the Court will try to ensure, as far as it can, that the successful party is recouped. I say 'as far as it can' because there may be a considerable difference between the amount of the attorney and client bill which a successful party is bound to pay to his own attorney and the amount of an attorney and client bill which has been taxed against the losing party ...'*²³

²² 1946 AD 597 at 608.

²³ *Cadac (Pty) Ltd v Weber Stephen Products Co and Others* [2011] 1 All SA 343 (SCA) at para 24, also reported at 2011 (3) SA 570 (SCA); *Jeebhai and Others v Minister of Home Affairs and Another* (139/08) [2009] ZASCA 35; [2009] 3 All SA 103 (SCA), where, in a dissenting judgment, Cameron and Cachalia JJA, suggested that the non-compliance with the Court's rules could be dealt with by means of a punitive costs order. See also *Gauteng Gambling Board and Another v MEC for Economic Development: Gauteng Provincial Government Corporation Ltd* (01563/2012) [2012] ZAGPJHC (8 May 2012), where on appeal, the respondent was ordered to pay the costs of the application on the attorney and client scale.

Discussion

[42] The matter of ***Salt and Another v Smith***²⁴ distils the requirements of Rule 6(12) as follows:

'This Rule entails two requirements, namely the circumstances relating to urgency which has to be explicitly set out and secondly, the reasons why the applicants in this matter could not be afforded substantial redress at a hearing in due course.'

[43] Notshe AJ, in the case of ***East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others***²⁵ stated that the procedure outlined in Rule 6(12) is not a mere formality. An applicant must explicitly detail the circumstances that make the matter urgent. More importantly, the applicant must articulate why they cannot obtain substantial redress in a standard hearing. The question of urgency is fundamentally tied to the absence of alternative substantial redress.

[44] The Applicant's motivation for urgency, as set out in the Founding Affidavit was premised on what the Applicant referred to under the heading of grounds of urgency as "various reasons set out above and further ones advanced below". The Applicant then goes on to state that the nature of a restraint of trade clause and confidentiality clause which carries with it the potential of irreparable harm which the Applicant may endure, coupled with the fact that the restraint only has a few months left for run until January 2024, the Applicant will not be afforded substantial redress at a hearing in due course.

²⁴ 1991 (2) SA 186 at 187A – B.

²⁵ (11/33767) [2011] ZAGPJHC 196 (23 September 2011).

[45] The restraint of trade was valid for 6 months. The First Respondent had resigned in July 2023, meaning that the restraint of trade would have expired on 20 January 2024. The relevant clause states as follows:

'21.1 *The Employee undertakes that he shall not, while he is employed in any capacity by the Company, and for a period of six (6) months after the termination of his employment with the Company, for any reason whatsoever be directly or indirectly interested, engaged or concerned, whether as assistant, manager, proprietor, principal agent, partner, representative, shareholder, director...of whatsoever nature which competes either solely or in conjunction with any other party directly or indirectly with the Company or carries on a similar business to that of the Company within South Africa...*²⁶

[46] It is common cause that the First Applicant, as at the time when the application was launch was no longer employed by the Second Respondent, which employment was terminated at the instance and request of the Applicant, although the restraint of trade was still extant at the time. It is unrefuted that the First Respondent's employment with the Second Respondent, lasted no longer than 2 days. It is therefore manifest that the First Respondent's employment was terminated substantially prior to the launch of the urgent application. Notwithstanding, the Applicant in its application sought an order preventing the Second Respondent from employing the First Respondent for the restraint period, which was in essence moot and unnecessary.

[47] The Applicant goes further to state in the Founding Affidavit that the First and Second Respondents have acted in flagrant violation of the Applicant's

²⁶ Application Bundle, Contract of Employment, para 21.1, page 67.

proprietary rights and commercial interests. The high watermark of the Applicant's contention is premised on a speculative concern where the following is stated:

'Except for Econo Foods' "say so", there is no credible or reliable facts to support any contention that Applicant's rights and interests are not being, and will not be violated ...'

[48] It is noteworthy, that on the Applicant's own version wherein email correspondence to the following effects was attached:

*'Unless we receive confirmation in writing by 12 noon tomorrow, being 5 October 2023, that Ms. Lombard's employment will cease forthwith during the restrain period, we will launch the urgent High Court application and seek an interdict to operate from the date of the granting of the order.'*²⁷

[49] As previously stated, the Second Respondent telephonically confirmed this fact on 05 October 2023. Despite the undertaking that was furnished and later confirmed in writing, the Applicant nonetheless approached the court on the basis of urgency because it couldn't rely on the "say so" of the Second Respondent.

[50] I interpose to state that the Applicant has been astute to emphasise that because the restraint of trade had lapsed, there is no longer a live issue. However, the matter was enrolled for hearing on 07 December 2023 for argument. At that stage, the restraint of trade was still active as the restraint only lapsed in January 2024. The Notice of Removal is dated 03 November 2023. The Second Respondent, in compliance with the court order of 23 October 2023, proceeded to file its supplementary papers on 06 November 2023. The timing of the removal raises a

²⁷ Annexure MRE 19, page 98.

question as to whether the Applicant foreshadowed that the relief it sought would have been moot due to the effluxion of time and be of no practical effect.

[51] I am not persuaded that the Applicant has obtained any relief against the Second Respondent by virtue of an agreement it reached with the First Respondent as there is no basis in law upon which the Applicant can anchor this argument, more especially if regard is had to the manner in which the adjournment order was framed namely:

*'1. The application against Second Respondent is adjourned to 7 December 2023 to enable the Second Respondent to supplement its papers to the extent necessary and to permit Applicant to reply thereto, if needed...*²⁸[Emphasis added]

[52] The application against the Second Respondent in its entirety was adjourned to 07 December 2023. To aver that the Second Respondent is bound by what was agreed to by the First Respondent flouts the fundamental principles of the Rule of Law and has the effect of the Second Respondent being blindsided without the benefit of supplementing its papers, which is tantamount to not giving effect to the *audi alteram partem* rule. The Applicant's argument has been likened to being tantamount to some sort of legal osmosis. If litigation in this manner were to be condoned, it would render Section 34 of the Constitution²⁹ meaningless as litigants have the right to access the courts so that disputes that can be resolved by application of the law be decided in a fair public hearing. The matter of **Kusasa**

²⁸ Application bundle, page 161.

²⁹ The Constitution of the Republic of South Africa, Act 108 of 1996; Section 34 'Everyone has the right to have any dispute that can be resolved by the application of law, decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'.

Refining (Proprietary) Limited v Commissioner for the South African Revenue Services³⁰ aptly crystallises the legal principles as follows:

'Section 34 of Constitution guarantees the right to a fair trial which includes affording parties to the litigation a fair opportunity to adequately address material issues in the papers, by evidence or during argument.... Peach sums up the audi rule as follows:

"The audi alteram partem rule implies that a person must be given the opportunity to argue his case. This applies not only to formal administrative enquiries or hearings, but also to any prior proceedings that could lead to an infringement of existing rights, privileges and freedoms, and implies that potentially prejudicial facts and considerations must be communicated to the person who may be affected by the administrative decision, to enable him to rebut the allegations. This condition will be satisfied if the material content of the prejudicial facts, information or considerations has been revealed to the interested party."

[53] The Applicant places reliance on the provisions of Section 165(5) of the Constitution³¹ which states that:

'An order or decision issued by a court binds all persons to whom and or organ of state to which it applies.'

[54] This, it was argued, in reference to **MEC for the Department of Public Works and Another v Ikamva Architects CC**³² lies at the heart of the Rule of Law which enjoins courts to ensure that all person to whom a court order applies obeys the terms thereof at pain of sanction.

[55] In my view, these principles envisage a situation where there has been compliance with Section 34 of the Constitution. However, it is evident that the Second Respondent did not have the benefit of a fair public hearing which is a constitutionally entrenched right afforded to all litigants. There was clearly no

³⁰ [2023] 4 All SA 459 (GP) (1 August 2023) at para 22.

³¹ The Constitution of the Republic of South Africa, Act 108 of 1996.

³² 2023 (2) SA 514 (SCA) para 30; See also *Pheko and Others v Ekurhuleni Metropolitan Municipality* (No. 2) 2015 (5) SA 600 (CC) para 2.

application of law to the issues in dispute and therefore, the basis upon which the Applicant claims it was no longer necessary to pursue the Second Respondent because the Second Respondent was bound by the order of the First Respondent is not good in law. The Applicant is essentially placing a limitation on the rights of the Second Respondent which is in my view, neither reasonable or justifiable.³³ The Second Respondent has in effect been deprived from an opportunity to be heard in circumstances where it could potentially be held in contempt of a court order on the strength of an agreement concluded between the First Respondent and the Applicant. This manner of litigation cannot be encouraged and is deserving of censure.

[56] In respect of the First Respondent, it is evident that she has only filed a Notice to Oppose and no Answering Affidavit was filed as contemplated in Rule 6(5)(d)(iii). The Applicant has invoked the provision of Rule 6(5)(f)(i). The Applicant submitted that in these circumstances, the application in respect of the First Respondent is unopposed. The order against the First Respondent was an order taken by agreement.

[57] The First Respondent has deposed to an affidavit on behalf of the Second Respondent. There is no request by the First Respondent for any relief against the Applicant and no prayer for costs by her in the absence of her answering affidavit. As was dealt with earlier in this judgment, it is not competent to make out a litigant's case in Heads of Argument, which has not been pleaded.

[58] The First Respondent's affidavit specifically states:

³³ Section 36 of the Constitution.

'8. I understand that the application against me settled on the above proposed basis and an order in terms according with the agreement was made an order of Court prior to the Court hearing argument in relation to the application against Econo Foods.

...

10. It is against this background that I was asked by Econo Foods (and their legal representatives) to consult with them with a view of establishing the true facts surrounding my employment with the Applicant...³⁴

[59] The purpose of the affidavit was essentially to provide the facts surrounding her employment with the Second Respondent. In circumstances where there is no Answering Affidavit deposed to by the First Respondent and where the matter has become settled between her and the Applicant, the court only has the benefit of the pleadings as it stands, which remains unopposed insofar as it relates to the First Respondent, for want of the filing of an Answering Affidavit by the First Respondent.

[60] This court will have regard to the common cause facts which includes the fact that the First Respondent was only employed with the Second Respondent for a period of two days. The Second Respondent emphatically states, that:

'THE COMMON CAUSE FACTS: MS TONI LOMBARD IS NOT EMPLOYED BY THE SECOND RESPONDENT, WAS NOT EMPLOYED BY THE SECOND RESPONDENT AT THE TIME OF THE LAUNCH OF THIS APPLICATION AND WILL NOT BE EMPLOYED BY THE SECOND RESPONDENT FOR THE PERIOD OF HER RESTRAINT IN ACCORDANCE WITH THE SPECIFIC DEMAND MADE BY THE APPLICANT, OF THE SECOND RESPONDENT.'³⁵

³⁴ Application Bundle, Affidavit: Lombard, paras 8 and 10, page 167.

³⁵ Application Bundle, Second Respondent's Answering Affidavit, para 8, page 136.

[61] The Applicant asserted that the restraint provisions are enforceable as it seeks to protect a protectable interest. The Second Respondent adequately dealt with these assertions on the papers. In this regard, the Second Respondent stated:

- '47.2.1 while the applicant and the second respondent do compete with one another in certain aspects of the food supply chain market they are not direct competitors in all aspects of their respective businesses;
- 47.2.2 in the aspects of their respective businesses in which they do compete, they service common customers and are serviced by common suppliers;
- 47.2.3 the prices charged by the second respondent and applicant to its customers are common knowledge in the market (the information usually being provided to competitors by the customers themselves); and
- 47.2.4 the prices charged by suppliers to all the players in the industry are market related and well-known.³⁶

[62] On the strength of these averments and the common cause facts, the protectable interest which the Applicant sought to protect in relation to the Second Applicant, required ventilation at a hearing for the court to make a determination on the two mutually destructive versions by applying the principles set out in **Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd**³⁷.

[63] Whether the application brought on the basis of urgency in respect of the Second Respondent, was meritorious would have been determined by the court at the hearing of 07 December 2023. The horse, on the matter of urgency, has proverbially speaking already bolted. It is not for this court to make a determination in this regard, however, it is a factor to be considered for the purposes of costs.

³⁶ Application Bundle, Second Respondent's Answering Affidavit, paras 47.2.1 – 47.2.4, page 150.

³⁷ (53/84) [1984] ZASCA 51 '...where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts are stated by the respondent together with the admitted facts in the applicant's affidavits justify such an order...where it is clear that facts, though not formally admitted, cannot be denied they must be regarded as admitted.'

[64] All indications are that urgency had already dissipated by the time that the Application was enrolled in the urgent court, as the First Respondent was no longer in the employ of the Second Respondent. In terms of receiving substantial redress in the ordinary course, in matters of this nature, a motivation for an expedited hearing could have been sought. Instead, the Respondents were given very little time on a truncated timetable to prepare, in circumstances where there appeared to be no imminent harm or prejudice. The fact that the matter was ultimately adjourned for hearing until the 7th of December 2023, underscores the Court's inference pertaining to urgency.

Conclusion

[65] It is evident that the Application was a non-starter against the Second Respondent as the First Respondent's employment was terminated substantially prior to the launch of the proceedings. Furthermore, Applicant consented to mediation, which is a relevant factor to be taken into account. The Second Respondent was amenable to abide by the terms of the restraint.

[66] It is imperative for the Court to consider the context and circumstances under which settlement was reached between the Applicant and the First Respondent. It is apposite to mention that if regard is had to the terms of the Order agreed to between the Applicant and the First Respondent, it is clear that the Applicant sought to affect the restraint of trade agreement to protect a broader interest beyond that of the Second Respondent, especially after the First Respondent had taken up employment with the Second Respondent, despite the restraint being extant.

[67] As a general rule, agreements in restraint of trade are valid and enforceable as was pointed out in ***Micros SA and 2 Others v Kleynhans and 2 Others (074606/2023)*** ³⁸ :

'Public policy under our constitutional dispensation requires that contracting parties honour obligations that have been freely and voluntarily undertaken – the principle of pacta sunt servanda...'

[68] There was no challenge by the First Respondent as to the reasonableness of the restraint of trade or that she does not wish to be bound thereto. The Court is alive to the circumstances of the First Respondent, namely that she is young and does not have means, however, the jurisprudence on costs, although fundamentally discretionary, has developed from case law. In civil litigation, the ordinary approach is that cost orders should indemnify a party against expenses that were occurred as a result of litigation that she should not have been required to initiate or defend.

[69] Even if the settlement agreement was reached in the manner that it had, to curtail costs of litigation, the reality is that the Respondent has acquiesced by accepting the agreed terms of the order made on 23 October 2023. Inasmuch as the matter of costs is discretionary, I can find no reason why costs should not follow the result, but limited on a party and party Scale. I am not, however persuaded that costs on a punitive scale is justified in the circumstances of this matter.

[70] In my view, an Applicant who launches an application, but then fails to proceed with it, cannot avoid the costs consequences of its failure to obtain any

³⁸ [2023] ZAGPPC (01 September 2023), para 9.

relief in terms of its Notice of Motion by simply refusing to set the matter down for hearing and/or by refusing to withdraw the application. Therefore, in the exercise of my unfettered judicial discretion and in weighing up the matter in its entirety, a punitive cost order is justified against the Applicant in respect of the Second Respondent's costs. The Applicant's application for costs as against the Second Respondent therefore falls to be dismissed.

[71] It is trite that Rule 67A of the Uniform Rules requires that party and party costs in the High Court be awarded on one of three scales. The scales set a maximum recoverable rate for work having regard to the importance, value and complexity of the matter. The amendment to the Rule applies prospectively. After carefully considered the complexity of the matter, its value and importance to the parties, in the exercise of my discretion, I am of the view that costs on Scale C are justified as agreed between the parties.

[72] The parties are *ad idem* that the costs of 15 April 2024 will be on a Third Division Fee. Costs in respect of the actual days when the matter was argued, will follow the cause. There is no application for costs by the First Respondent against the Applicant. In the absence of a valid counter application for costs, I make no order in this regard.

Order:

[73] In the result, the Court, after having heard counsel for the Applicant and Counsel for the Respondents, and having read the papers filed of record make the following orders:

1. The First Respondent is to pay the Applicant's costs of the application on a party and party at Scale C from 12 April 2024, as contemplated under uniform rule 69A.
2. The Applicant's application for costs as against the Second Respondent is dismissed.
3. The Applicant is ordered to pay the Second Respondent's costs on an attorney and client scale which costs are to include the costs of counsel on the party and party scale, at Scale C from 12 April 2024, as contemplated under Uniform Rule 69A.
4. The costs for 15 April 2024 will be as agreed, on a Third Division Fee tariff.



P ANDREWS, AJ

**Acting Judge of the High Court
Western Cape Division**

APPEARANCES

For the Applicant:

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For the First Respondent:

Mr M Baynham

Instructed by:

Michael Baynham Attorneys

For the Second Respondent:

Advocate R D E Gordon

Instructed by:

Ulrich Roux & Associates

Dates of Hearing: 19 June 2024, 20 June 2024 and 30 July 2024

Date of Judgment: 12 September 2024

NB: The judgment is delivered by electronic submission to the parties and their legal representatives.