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

CASE NUMBER: 2022/32681

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO

6 January 2025

Judge Dippenaar

In the matter between:

S[...] A[...] S[...]

APPLICANT

And

J[...] M[...] S[...]

RESPONDENT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and uploading it onto the electronic platform. The date and time for hand-down is deemed to be 14h00 on the 06th of JANUARY 2025.

DIPPENAAR J:

[1] This is an application for costs under r 41(1)(a) and 41(1)(c), pertaining to an appeal which was withdrawn by the respondent. The applicant sought a judgment in terms of costs.

[2] The genesis of the present dispute was an opposed urgent application in terms of which the applicant sought to appoint Adv M Snyman SC as curator to the parties' two minor children (the main application). That application culminated in a judgment and order granted by Naythi J on 20 September 2022. Adv Snyman SC was appointed as curator ad litem and was afforded certain powers. No order of costs was made.

[3] Dissatisfied with the result, the respondent sought leave to appeal. The applicant opposed the application. Leave to appeal was granted. Costs were to be costs in the appeal. The respondent delivered a notice of appeal. Both parties delivered practice notes and heads of argument. The appeal was set down for hearing on 21 August 2024.

[4] The respondent removed the appeal from the roll on 18 March 2024. On the same date, he withdrew his appeal. The notice of withdrawal, in relevant part, stated: *'...and the costs to be reserved for argument in the main application by agreement between the parties'*.

[5] The applicant enrolled the main application for the determination of costs.

[6] On 01 October 2024, the respondent delivered an affidavit on the costs of the appeal, deposed to by his attorney of record, Ms Muller. In sum, her version was that she had a conversation with the applicant's attorney, Ms Schoeman on 19 February 2024, during which the applicant requested the appeal to be withdrawn and Adv Snyman to be appointed to save costs. She told Ms Schoeman that she would take an instruction but, if the respondent agreed thereto, the respondent would only withdraw the appeal if each party paid their own costs. On 20 February, a letter was addressed to Ms Schoeman. In it, Ms Muller confirmed that the respondent was willing to agree to the appointment of Adv Snyman SC if he would be willing to act *pro bono*. She stated: *"I*

regrettably omitted to mention in this letter that each party shall pay their own costs". Pursuant to Adv Snyman SC agreeing to act *pro bono*, Ms Muller wrote a further letter on 8 March 2024. Therein, it was recorded that the appeal would be withdrawn on condition that the costs be reserved for argument in the main application. On 15 March 2024, Ms Schoeman in writing confirmed the applicant's consent to the proposal that costs be argued in the main application at a later stage.

[7] In her affidavit, Ms Muller further contended that the recordal of the cost issue was wrong and a *bona fide* error which was carried through in further correspondence as the parties agreed that each would pay his and her own costs. She further contended that as the main application had been finalised and the court did not grant a costs order, the cost issue was *res judicata* as costs could not be argued in the main application. It was contended that what the respondent intended was to bring the appeal to an end to save costs of both parties, "although the notices and correspondence did not eloquently set this out". If the costs issue had not been resolved, the appeal would not have been withdrawn. It was proposed that each party pay their own costs of the appeal.

[8] I argue, the respondent's counsel repeated those contentions and further submitted that a compromise had been reached that the appeal be withdrawn on condition that each party pay their own costs. The applicant on the other hand, submitted that she was entitled to costs as the respondent was in the position of an unsuccessful litigant. It was submitted that the correspondence did not evidence any compromise on the costs. She did not file any affidavit responding to Ms Muller's affidavit.

[9] I have various difficulties with the submissions proffered by the respondent. Whatever the respondent and his attorney may subjectively have intended, that was not what was ultimately conveyed to the applicant. In the notice of withdrawal and all the correspondence emanating from the respondent, it was unequivocally conveyed that costs were to be reserved, to be argued as part of the main application. From the correspondence and the version set out in the affidavit, there is no cogent evidence to

suggest that there was a meeting of the minds between the parties to compromise the issue of costs or that they had agreed to each pay their own costs. The parties both considered the main application as the appropriate place to have the costs determined at a later stage. It was common cause that there was no other “main application” pending between the parties.

[10] It does not avail the respondent that in the initial discussion between the attorneys on 19 February 2024 it was stated that the respondent would only withdraw the appeal if each party paid their own costs. That discussion occurred prior to Ms Muller taking instructions from the respondent. The subsequent discussions overtook that conversation after Ms Muller had taken instructions from the respondent. The documentary evidence reflects the discussions between the parties. Ultimately, on the respondent’s own version, costs were to be reserved to be determined in the main application. Both parties were aware of the contents of the judgment of Nyathi J and that the costs of the main application had been determined therein.

[11] The argument that the costs issue was *res judicata* as it was determined in the main application, lacks merit. It conflates the main application itself, with the appeal process which followed. The parties were fully aware that what remained in dispute was the costs of that appeal process, not the costs of the main application. They agreed to determine that issue in the main application. That makes sense, as it obviated the need to have three judges being burdened to hear the parties’ arguments.

[12] The respondent further submitted that r 41 does not provide for a reservation of costs and that the applicant should have applied for costs in an application in terms of r 41(1)(c).

[13] Rule 41(1) in relevant part provides:’

’(a) 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.

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

[14] Read in context, r 41(1)(c) does not by necessity envisage the launching of a substantive application. Our courts have held that an applicant for an order for costs need only deliver a notice of his intention to do so. No affidavit is required since the relevant material is already before the court.¹ The relevant material was placed before the court and the respondent availed himself of the opportunity to place an affidavit before court dealing with his grounds of opposition.²

[15] By agreeing to reserve the costs of the appeal to be determined in the main application, the respondent effectively introduced that as an issue in the main application, which had not yet been determined. In setting the main application down for hearing, the applicant complied that that arrangement.

[16] A party which withdraws its case is as a general principle liable for costs as it is in the same position as an unsuccessful litigant and the opposing party is entitled to its costs.³ Where a party withdraws a claim the other is entitled to cost unless there are good grounds⁴ or exceptional circumstances⁵ for depriving him. A court retains a discretion to do so in appropriate circumstances.

¹ Nel v OVS Staalkonstruksie en Algemene Sweiswerke 1977 (3) SA 993 (O) at 996H; Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape 2005 (6) SA 123 (EDC).

² Nel supra, at 997C; Wildlife and Environmental Society supra at 129A.

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

⁴ Waste Products Utilisation (Pty) Ltd v Wilkes and another (Biccari as interested party) 2003 (2) SA 590 (W).

⁵ Absa Bank Ltd and others v Robb [2014] 3 All SA 322 (GSJ); Reuben Rosenblum Family Investments (Pty) Ltd and Another v Marsubar (Pty) Ltd (Forward Enterprises (Pty) Ltd intervening 2003 (3) SA 547 (C).

[17] On a conspectus of all the facts, the respondent elected not to pursue the appeal and must be treated as an unsuccessful litigant. I am not persuaded that there are any exceptional circumstances present justifying the applicant to be deprived of her costs. There are also no good grounds to do so. It follows that the application succeeds and the applicant is entitled to judgment in her favour for the costs relating to the appeal and the application for leave to appeal. The costs of this application must follow the result.

[18] In the proposed draft order provided by the applicant, the costs of the application were sought on an attorney and client scale. That was however not sought in the application, nor in the heads of argument. I am further not persuaded that such an order is warranted. The granting of costs Scale C is justified given the complexities involved.

[19] In the result, the following order is granted:

[1] The respondent is directed to pay the costs of the appeal, including the application for leave to appeal, such costs to be on Scale C;

[2] The respondent is directed to pay the costs of this application on Scale C.

EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING : 14 NOVEMBER 2024

DATE OF JUDGMENT : 06 JANUARY 2025

APPLICANT'S COUNSEL : Adv. X Van Niekerk

APPLICANT'S ATTORNEYS

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RESPONDENT'S COUNSEL

: Adv. W.N. Wannenburg

RESPONDENT'S ATTORNEYS

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