



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

Case No: 3303/2019

Reportable

In the matter between:

JOHANNES HENDRIK CONRADIE

Applicant

and

WIETZ JACOBUS CAREL CHRISTIAAN BOTES N.O.

First Respondent

JOHANNES FRANCOIS JACOBS

Second Respondent

WESSEL CHRISTIAAN BESTER N.O.

Third Respondent

(In their capacities as trustees of the

Wietz Botes Family Trust, IT 1666/2010)

WIETZ JACOBUS CAREL CHRISTIAAN BOTES

Fourth Respondent

THE BREEDE RIVER GOURITZ CATCHMENT

Fifth Respondent

MANAGEMENT AGENCY

THE MINISTER OF WATER & SANITATION

Sixth Respondent

THE MINISTER OF ENVIRONMENTAL AFFAIRS

Seventh Respondent

Date of Hearing: 17 February 2025

Date of Judgment: 25 April 2025

JUDGMENT

PARKER AJ

Introduction

[1] This is an application by the first to fourth respondents (hereinafter referred to as “the respondents”), for costs in terms of the provisions of rule 41(1)(c) of the Uniform Rules of Court. The parties shall be referred to as per the appellation in the Urgent application.

[2] On 28 February 2019 the applicant brought a wide ranging urgent application against seven respondents set down for hearing on 9 April 2019, and then failed to proceed with its application after the respondents filed their answering affidavit. More than four years later, the applicant served his notice of withdrawal of the urgent application against all respondents, however failed to tender costs in its notice of withdrawal.

[3] The respondents pursuant to the provisions of Rule 41(1) (c) pursued its cost order against the applicants which application is opposed by the applicant.

Issue for determination

[4] The issues for determination are:

- 4.1 whether the applicant should be ordered to pay the respondents costs of the withdrawn application.
- 4.2. whether the issue of costs should be reserved for the determination by the trial court.

Chronology of events

[5] 28 February 2019 - urgent application.

29 March 2019 - first to fourth respondents delivered opposing affidavits.

9 April 2019 - hearing did not proceed.

15 April 2019 - fifth and sixth respondents filed an explanatory affidavit

2 May 2019 - a court order obtained by agreement before Honourable Judge Sher.

8 August 2023 - applicant instituted action and served a summons against the respondents.

1 September 2023 - applicant filed a notice of withdrawal in respect of the 2019 urgent application.

[6] The 2 May 2019 court order included, *inter alia*, as summarized are:

- 6.1 the urgent application was postponed for hearing on the semi urgent roll on 3 September 2019
- 6.2 the applicant was ordered to file his replying affidavit by 22 May 2019
- 6.3 the parties agreed to approach the Judge President for further directions (as may be agreed to between the parties or failing agreement as may be determined) on anticipation of the hearing of the matter for final relief and including directions on the referral of the matter to oral evidence and on discovery
- 6.4 the costs incurred as a result of the postponement was to stand over for later determination.

[7] The applicant however failed to file a replying affidavit in terms of the agreed timeline for 22 May 2019 or at any time thereafter. Furthermore, the applicant also failed to take any further steps in respect of the urgent application including obtaining directions for the potential hearing of oral evidence neither was the application set down for hearing on the arranged date being 3 September 2019.

[8] More than four years later, on 7 August 2023 the applicant instituted the action against the respondents that he had indicated in the urgent application that he would

institute on or before 30 April 2019 and in respect of the finalization of which the praise in the urgent application would have stood as interim orders.

[9] The applicant is not asking this Honourable Court to dismiss the application for costs but to rather reserve the issue of costs for later stage. Although the general principle is that a party withdrawing an application or action should be held liable to pay the cost of the proceedings the principle is not absolute in that the court contains a discretion on the issue of costs.

[10] Thus the court should exercise its discretion in applicant's favour on the basis that the applicant acted reasonably in launching the application proceedings in the first place, primarily because the applicant sought interim relief pending the action which relief he could not have sought other than by way of application. Accordingly, the trial court would be in a better position to decide the issue of costs of the application because the trial court will be able to decide whether the factual disputes raised by the respondents are genuine or bona fide or whether those disputes were fictitious or without merit. In the result the question on the costs of the main application will at this stage be premature as the trial court will be best placed to decide the issue.

[11] After summons was served respondents' attorney of record in a correspondence dated 22nd August 2023 informed the applicant that he had failed to prosecute the urgent application which has been waiting since March 2019, having failed to take steps to set the application down for hearing and which in their opinion was inexcusable causing respondents to be seriously prejudiced. The applicant was informed that he should withdraw the application and tender respondents' costs failing which respondents will reserve their rights to apply for a dismissal of the application and ask for a punitive cost order against plaintiff alternatively to set the application down for hearing and seek the legal remedy and punitive cost order.

Legal rules and principles

[12] Both parties set out the legal principles guiding a withdrawal, settlement discontinuance, postponement and abandonments. Namely a party withdrawing an application or action is generally liable for the costs of the proceedings. In the instance that a litigant withdraws an action “very sound reasons must exist why a defendant or respondent should not be entitled to the costs”¹. The said case also made mention that an applicant who withdraws his application is in the same position as an unsuccessful litigant” because, after all, his claim or application is futile and the defendant, all respondent, is entitled to all costs associated with the withdrawing plaintiffs or applicants institution of proceedings”², save in exceptional circumstances when “a party that has been put to the expense of opposing withdrawn proceedings will not be entitled to all the costs caused thereby”.³

[13] The general principle notwithstanding, a court retains a discretion on the issue of costs.⁴ It therefore follows, that the court in exercising its discretion should have due regard to the question whether objectively viewed the applicant acted reasonably in launching the main proceedings in the first place, but was later driven to withdraw it in order to save costs because of facts emerging for the first time from, for instance the respondents’ answering affidavit in the main proceedings or because the relief was no longer necessary or obtainable because of developments taking place after the launch of the main proceedings.

Analysis of the urgent application

¹ *Germishuys v Douglas Besproeiingsraad* 1973 (3) SA 299(NC) at 300D-E

² *ibid*

³ *Reuben Rosenblum Family Investments (Pty) Ltd and Another v Marsubar (Pty) Ltd (Forward Enterprises (Pty) Ltd and Others Intervening* 2003 (3) SA 547 at 550 C; *supra* *Germishuys*.

⁴ *Waste Products Utilization* at 597-A; *Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape*, 2005 (6) SA 123 (ECD) at 130 C-131C

[14] The central issue of the application as well as in the action revolves around water in particular the flow of water and what percentages of the stream flow over a weir in the Jasonskloof River, the applicant and the respondents were entitled to. The relief which was sought in the urgent application was supposed to serve as interim interdicts pending the final determination of the further proceedings, which if granted the interim interdicts and declaratory orders would have remained in place pending the final determination of the applicants envisaged action.

[15] The first to fourth respondents' argument would effectively have remained in place for years to come given the ambit of the applicants envisaged action and as such it would in essence have had final effect and if granted would have had such a substantial effect on the respondents' farming activities as such depriving them of a large part of the farming property's water. This was the reason that the respondents opposed the urgent application as they had done which caused them to incur substantial legal costs, only to learn that the applicants effectively abandoned the urgent application.

[16] In the result the respondents submits that the normal rule as to costs should apply and that they should be entitled to the legal costs. More so because the applicant more than four years later after bringing the urgent application was through the application and therefore is in the same position as an unsuccessful litigant.

[17] The applicant on the other hand deferred to the answering affidavit filed by the respondents in the main application and specifically stated that they created various factual disputes which due to the nature of the factual disputes would have meant that it would not have been possible for court to decide on application whether the respondents allegations are false and which ones are partially true and which ones are indeed true. The applicant, relying on advice received chose to withdraw the main application and to rather issue a summons because of these factual disputes to be

tested on the basis of oral evidence and cross examination. Furthermore, the applicant advance that the respondents do not dispute the applicant's version which was countered by the respondents who stated that this is not correct as this was denied.

[18] Furthermore the applicant's attempt to persuade the court to exercise its discretion to postpone the issue of costs for later determination by the trial court who would not only be in a better position but will have to decide which of the applicant's version or the respondents' versions on each of the factual disputes is the correct and bona fide version or whether they were merely created in order to avoid the application being decided on paper.

[19] If the applicant's version of the factual disputes is indeed correct the respondents will not be deprived of its costs as the trial court will in all probability, then have to find that the respondents are entitled to the costs in respect of the application. The applicant reiterated that the applicant's opposition to the current costs is therefore not to deprive the respondents of the costs but rather to postpone the issue of costs in order for the court to decide on the issue after the evidence on the factual disputes have been tested.

[20] The respondents submit that the foregoing reasons raised by the applicant do not constitute exceptional circumstances or very sound reasons to depart from the normal rule as to costs when a party withdraws an application.

[21] The relief claimed in the urgent application and the action are basically identical. However, the two proceedings ought not to be conflated it was separate proceedings both requiring at the proper time a substantive response from the respondents. For example, in the urgent application the applicant had to also prove urgency and that the matter was able to be heard on application. The applicant's contention that the application and the action are essentially the same and the trial court should decide

on the issue of costs of the urgent application does not have merit. The nature of the urgent application was such that it put the respondents through a considerable defence in defending an application with wide reaching interim relief on short notice within a restricted time frame as is usually provided in urgent applications.

[22] Importantly that it was only after the respondents filed its answering affidavit that applicant acting on advice instituted action proceedings. This causes a problem because the applicant throughout knew or should reasonably have known that there would be factual disputes.⁵ This was raised in the respondents answering affidavit that *"there are a host of factual disputes in this matter of which the applicant was well aware before the bringing of the application, and argument will be raised during the hearing that this Honourable Court cannot decide the matter on the papers alone."*⁶

[23] Lastly the applicant did not utilize the avenue made available to him despite the court order by Honourable Sher J, that the parties could approach the court for directions regarding oral evidence and discovery and therefore failed to make use thereof had the applicant utilized this provision the veracity of the respondents allegedly created factual disputes could have been ventilated in the urgent application. Instead, applicant failed to set the application down for hearing and allowed it to languish for more than four years before withdrawing the application subsequent to instituting the action.

[24] Accordingly there are no exceptional circumstances nor sound reasons to depart from the normal rule applicable in respect of costs, namely, that the party withdrawing proceedings must pay the other party's costs in opposing the application. To have the costs of the urgent application stand over for later determination by a trial

⁵ the respondents answering affidavit paragraphs 38 to 46 applicant knew that multiple factual disputes would be present.

⁶ paragraph 8 respondents answering affidavit

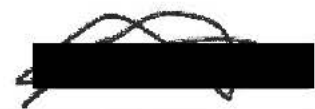
court would not be reasonable or proper in these circumstances. Accordingly, there is no reason to deprive the respondents of the relief as set out in its notice of motion.

Costs

[25] It therefore follows that first to fourth respondents' application in terms of rule 41(1)(c) is upheld and that applicant is ordered to pay the costs of this application to be awarded costs in the urgent application.

[26] Accordingly it is ordered:

- (a) The applicant is ordered pay the first to fourth respondents' legal costs of opposing the urgent application such costs be taxed on the High Court scale and to include the cost of counsel
- (b) The applicant is ordered to pay the costs borne by first to fourth respondents in the respect of the application for costs in terms of Rule 41 (1) (c)



PARKER AJ
Acting Judge of the High Court

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This judgment was handed down electronically by circulation to the parties' representatives by email.