

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO.: B3733/23

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO [REDACTED]

Date: 2 May 2025 E van der Schyff

In the matter between:

NDODANA CONSULTING ENGINEERS (PTY) LTD	FIRST APPLICANT
OARONA CONSULTING AND ENGINEERING (PTY) LTD	SECOND APPLICANT
NDODANA-OARONA JOINT VENTURE	THIRD APPLICANT
and	
SOUTH AFRICAN NATIONAL ROADS AGENCY SOC LIMITED	FIRST RESPONDENT
INGEROP SOUTH AFRICA (PTY) LTD	SECOND RESPONDENT
HORIZON CONSULTING ENGINEERS (PTY) LTD	THIRD RESPONDENT
THE INGEROP-HORIZON JOINT VENTURE	FOURTH RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

- [1] The main review application in which all the parties cited herein were involved has been finalised, and a judgment was handed down on 27 February 2025. This judgment deals solely with costs that were reserved in three applications that were issued subsequent to the main review application being launched.

- [2] It is trite that a court has a wide discretion in determining which party bears the legal costs of litigation. In considering the respective costs order, I was guided by principles of fairness, reasonableness, and proportionality. I also had regard to the broad context that underpinned the litigation. I was alive to the general approach that costs orders should indemnify a party against expenses incurred as a result of litigation that it should not have been required to initiate or defend.¹

- [3] The first application was an application by the applicants (Ndodana) to compel the conclusion of a confidentiality agreement and thereafter the production of a complete Rule 53 record. The notice of motion is dated 13 October 2023. No relief was sought against the Ingerop respondents. SANRAL filed a notice of intention to oppose the application, but no subsequent opposing affidavit. For the sake of clarity, this application is referred to as the Ndodana application.

- [4] The second application is an application issued by the second to fourth respondents collectively referred to as Ingerop. Ingerop approached the court on a semi-urgent basis in an effort to compel the delivery of certain documentation from SANRAL. The notice of motion in this application is dated 28 August 2024. No relief was sought against the applicants in the main review, collectively referred to as Ndodana. This application was settled, and the agreement was made an order of court. For purposes of clarity this application will be referred to as the first urgent Ingerop

¹ *President of the Republic of South Africa & Others v Gauteng Lions Rugby Union & Another* 2002 (2) SA 64 (CC) at para [15].

application. It is somewhat ironic that the settlement agreement reflects the relief sought by Ndodana in the Ndodana application.

- [5] The Ndodana application was enrolled on the unopposed motion court roll, but the application effectively became moot due to the settlement reached in the first urgent Ingerop application. Ndodana is entitled to costs despite the application not being heard due to the settlement reached. However, the Ndodana application did not evolve into an opposed application. The parties might have been involved in correspondence preceding the application, but no opposing affidavit was filed. Ndodana seeks an order that SANRAL pays the costs incurred in relation to this application as if it were an opposed application on scale C, which costs should include the costs consequent on the employment of senior counsel.

- [6] Ndodana's senior counsel has been involved in this matter since its inception. The review as a whole was a complicated and intricate matter. Ndodana was not overly cautious to insist that their senior counsel deal with the matter in totality. The costs could have been avoided by the timeous filing of the record that Ndodana was entitled to. The application, however, remained unopposed and was finalised by the order granted in the first urgent Ingerop application discussed below. For this reason, Ndodana is entitled to party and party costs on scale C. It is not entitled to an order specifically declaring that the costs must be taxed as if the matter was opposed. The Taxation Master will exercise its discretion in the taxation of the account.

- [7] As for the first urgent Ingerop application, no costs order was sought against Ndodana. The application was, however, ill-conceived. Ingerop was aware of the fact that Ndodana's application was enrolled in the unopposed motion court to be heard on 24 October 2024. Ingerop was a respondent in the review application and would have received the record in due course with sufficient time to finalise its own affidavits in opposing the review application. Ndodana's opposition was justified, and Ndodana is entitled to its costs. Since it is SANRAL's inexplicable delay that caused Ingerop's impatience and anxiety as matters took its course, I am not inclined to grant a costs order to SANRAL's benefit in this first urgent Ingerop application.

- [8] Ndodana, then instituted a counter application as it wanted to protect certain confidential material. Ndodana's approach herein was justified, and Ndodana was ultimately successful in that the by-agreement order contained the necessary terms to protect confidential information. As a result, it is entitled to costs.
- [9] As for the institution of the second urgent court application by Ingerop, the question of whether the application was justified is neither here nor there. The application resulted in the main review application being case managed and brought to finality. The parties might not have received the outcome they respectively wished for, but the opportunity to finalise the review application was to all parties' benefit. For this reason, I am of the view that it is just for each party to pay their own costs as far as the second urgent court application is concerned.
- [10] As for Ndodana's costs incurred to argue the outstanding costs orders in the abovementioned applications, SANRAL is to be held liable for the costs. A responsible litigant would have realised that its failure to move the review application along would result in unnecessary costs for all parties. Ingerop should also have realised that its first urgent court application was ill-conceived and that it would be liable for Ndodana's costs. The issue of costs should have been settled.

ORDER

In the result, the following order is granted:

In re: Ndodana's application to compel the conclusion of a confidentiality regime and thereafter the production of a complete rule 53 record:

1. **The first respondent ("SANRAL") is to pay the applicants' ("Ndodana's") costs on scale C, including the costs consequent upon the employment of Senior Counsel.**

In re: Ingerop's first urgent application of 17 September 2024 brought in terms of rule 35(14) to compel the production of selected documents as well as Ndodana's

counter application that, if produced, such must be in accordance with an appropriate confidentiality regime:

2. **The second, third and fourth respondents (“Ingerop”) to pay the applicants’ (“Ndodana’s”) costs of the urgent application.**
3. **The second, third, and fourth respondents (“Ingerop”) are to pay the applicants’ (“Ndodana’s”) costs of the counter application.**
4. **Such costs are to be paid on scale C (and include the costs consequent upon to the employment of Senior Counsel).**

In re: Ingerop’s second urgent application of 29 October 2024 brought to interdict SANRAL from extending Ndodana’s contracts:

5. **Each party to pay its own costs.**

In re: The argument on 25 April 2025 in relation to the outstanding costs of the abovementioned interlocutory applications and/or applications ancillary to Ndodana’s main review application in Part B:

6. **The applicants (“Ndodana”) are entitled to the costs of preparing for, and then arguing, the issues concerning the outstanding costs in the abovementioned interlocutory applications and/or applications ancillary to Ndodana’s main review application in Part B.**
7. **The first respondent (“SANRAL”) is liable to pay the applicants’ (“Ndodana’s”) costs incidental to such preparation and argument.**
8. **Such costs are to be paid on scale C (and include the costs consequent upon the employment of Senior Counsel).**



E van der Schyff
Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines.

For the first to third applicants:	Adv. K. Hopkins SC
Instructed by:	Fairbridges Wertheim Becker
For the first respondent:	Adv. D. Mtsweni
Instructed by:	MB Tshabangu Incorporated
For the second to fourth respondents:	Adv. A. Verhoef
Instructed by:	York Attorneys Incorporated
Date of the hearing:	25 April 2025
Date of judgment:	2 May 2025