IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Reportable/Not Reportable
Case no: D1403-2025

In the matter between:

McCARTHY (PTY) LTD t/a	
BIDVEST AUDI CENTRE WONDERBOOM	**APPLICANT**
and	
MAHESHWARI NAIDOO	**RESPONDENT**

In re:

MAHESHWARI NAIDOO	**APPLICANT**
and	
McCARTHY (PTY) LTD t/a	
BIDVEST AUDI CENTRE WONDERBOOM	**FIRST RESPONDENT**
AUDI SA (PTY) LTD	**SECOND RESPONDENT**

[And in the first respondent's application for costs in terms of rule 41(1)*(c)*]

Coram: M E Nkosi J

Heard: 24 July 2026

Delivered: 04 August 2026

ORDER

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1. The application and the counter-application are dismissed.
2. Each party shall pay its own costs of the main application, this application, as well as the counter-application.

JUDGMENT

M E Nkosi J

Introduction

[1] This is an interlocutory application brought by McCarthy (Pty) Ltd t/a Bidvest Audi Centre Wonderboom (the first respondent in the main application) in terms of Uniform rule 41(1)*(c)*. It seeks an order directing Maheshwari Naidoo (the applicant in the main application) to pay its costs occasioned by her withdrawal of the main application, together with the costs

of this application. The second respondent did not play any role in the main application.

[2] For the purposes of this application and for ease of reference I will refer to McCarthy (Pty) Ltd as the applicant and to Maheshwari Naidoo as the respondent. The application is opposed by the respondent who, in turn, lodged a counter-application seeking an order directing the applicant to pay the costs of the main application, together with the costs of her counter-application.

Factual background

[3] The factual background to the matter, briefly stated, is that the respondent purchased a brand-new vehicle (an Audi A3) from the applicant. She took delivery of the vehicle on 1 May 2004. The vehicle operated flawlessly from that date until 1 November 2024 when, following an attempt to install a tracking device by a third-party technician, it displayed an electrical fault. On 2 November 2024, the vehicle was towed to the Audi Centre, Durban, for inspection. On 8 November 2024, the applicant transmitted an email to the respondent advising that the diagnostic finding was that the vehicle had visible traces of water and water damage.

[4] The respondent was also provided with colour photographs depicting the rust on the bolts on the side of the gearbox of the vehicle. According to the applicant, the rust on the bolts were an indication that the water level had, at some point, been above the two bolts. This means that the lower part of the gearbox was somewhat submerged in water, or salt water, even if it was for a brief moment. The respondent was not satisfied with such finding, and did not accept it.

[5] On 11 November 2024 the respondent transmitted an email to the applicant demanding a full refund of the purchase price of the vehicle in terms of s 56 of the Consumer Protection Act 68 of 2008 ('the CPA') on the basis that the vehicle was defective. On 20 December 2024 Audi Centre, Durban, issued a conditional repair estimate of R60 341.10 which, supposedly due to water ingress, was subject to stripping and further diagnosis. On 3 February 2025 Mr Deon Furber, a qualified mechanic and diagnostic technician who was employed by the applicant at the time, conducted an inspection of the vehicle at the premises of the Audi Centre, Durban.

[6] Mr Furber's findings were, *inter alia*, that the electrical faults in the vehicle were caused by an ingress of water which resulted in the protective device, being an 18-amp fuse designed to break the circuit when excess water enters the system, operating as intended to prevent damage to the vehicle. According to his findings, simply replacing that fuse restored the vehicle to working order. According to the applicant's answering affidavit in the main application, the water ingress could have occurred when the vehicle was partially submerged in water by the respondent.

[7] On 10 February 2025 the respondent instituted legal proceedings in the main application claiming a refund of the full purchase price and tendering the return of the vehicle. On 14 February 2025, the vehicle was inspected and diagnostically tested by Audi Centre Umhlanga, which issued a repair estimate stating that the vehicle had water damage. It required repairs to the fuse box and the replacement of fuses. It added that the diagnosis was subject to further assessment, stripping, diagnosis and possible price increase. The

estimated cost of the initial repairs quoted by Audi Centre Umhlanga was R11 774.23.

[8] The respondent, through her attorneys, requested a copy of the Audi Centre Umhlanga assessment report. In response, the applicant declined the respondent's request on the basis that the Regional Area Manager representing the manufacturer at the time refused to grant the applicant permission to provide the respondent with a copy of the relevant report. The respondent, on the other hand, was not prepared to accept the applicant's word regarding the nature and extent of the alleged damage to the vehicle without seeing the report compiled by Audi Centre Umhlanga in support thereof.

[9] According to the respondent, she was then advised by her counsel at the time to appoint a certain Mr Yves Accolla, who is an expert in the field of motor mechanics, to inspect the vehicle. She accepted the advice and proceeded to appoint Mr Accolla. On 7 October 2025, the unsigned report that was supposedly prepared by Mr Accolla was forwarded to the applicant's attorneys by the respondent's attorneys. On 8 October 2025, which was the date of the hearing of the matter on the opposed motion roll, the respondent withdrew the main application without tendering the costs thereof.

The issues

[10] According to the agreement between the parties, the issues for determination by this court are the following:

(a) whether Mr Accolla's report is admissible;

(b) whether the respondent has established circumstances justifying a departure from the general principle that a withdrawing party must pay the costs occasioned by the withdrawal;

(c) in the event that the general principle regarding costs is departed from, whether the respondent's counter-application ought to be granted; and

(d) whether certain portions of the respondent's opposing affidavit are scandalous, vexatious and/or irrelevant and ought to be struck out in terms of rule 6(15).

[11] Regarding the counter-application, it was indicated by Ms *Maharaj*, who appeared for the respondent, in response to a question posed to her by this court that such application was not brought in terms of rule 41(1). In her submission, which was not challenged by Mr *Prinsloo*, who appeared for the applicant, the presiding judge in the main application was not inclined to hear arguments on costs without affidavits being filed by both parties setting out the factual basis thereof. It was further submitted by Ms Maharaj that it was always the respondent's intention to claim the costs of the main application against the applicant. Subject to such clarification, I am now proceeding to consider the issues referred by the parties to this court for determination.

Whether Mr Accolla's report is admissible?

[12] It is contended by the applicant that Mr Accolla's report has no probative value. Instead, it constitutes hearsay evidence because it is unsigned and is not supported by any confirmatory evidence deposed to by Mr Accolla. For this reason, the applicant implores this court to regard Mr Accolla's report as inadmissible. In response, it was submitted by Ms Maharaj that the applicant cannot approbate and reprobate regarding the admissibility of Mr

Accolla's report. She argued that when the applicant elected to annex a copy of Mr Accolla's affidavit, in its unsigned form, to its founding affidavit, and explicitly relied upon it by cherry picking from it information to support its version of events regarding the costs argument, it formally introduced the document into evidence.

[13] By introducing the document under oath, so argued Ms Maharaj, the applicant adopted the document and explicitly accepted its relevance to these proceedings. The authority she relied on in support of her argument is *Mooketsi v MEC for Health and Social Development*,[1] where the following comment was made by that court:

'The documents originate from the respondent and were relied on by both parties, at least for some time. As such, the respondent could not be heard to be objecting to the same documents he has placed in evidence.'[2]

[14] Taking into account the facts of this matter, I am inclined to agree with Ms Maharaj. By annexing a copy of Mr Accolla's report to its founding affidavit the applicant has effectively put it up as part of the evidence for consideration by this court. The applicant cannot expect this court to be selective in its consideration of the document by referring only to those parts thereof that support its case. For the sake of fairness, this court is bound to consider the document in its entirety. For this reason, my view is that the answer to the question posed in the heading to this section must be in the affirmative, which means that Mr Accolla's report is admissible as evidence.

[1] *Mooketsi v MEC for Health and Social Development* [2023] ZANWHC 105.
[2] Ibid para 18.

[15] In the light of the decision to accept Mr Accolla's report as admissible, it follows that the contents thereof are obviously of relevance. In essence, the view expressed by Mr Accolla in his report is that the electrical fault in the vehicle was caused by condensation exposure to sea water under the chassis of the vehicle components. He opined that this could have occurred while the vehicle was shipped from Germany to South Africa, or while it was parked close to the harbour waiting to be loaded onto the ship. He added that the fact that the respondent also lives close to the beach could be another possible cause of the vehicle's undercarriage being exposed to the sea salt condensation contamination.

Whether the respondent has established circumstances justifying a departure from the general principle that a withdrawing party must pay the costs occasioned by the withdrawal?

[16] In addressing this issue, I think it will be appropriate to adopt as a starting point the provisions of rule 41(1), which read as follows:

'**Withdrawal, settlement, discontinuance, postponement and abandonment**

(1)*(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.

(b) A consent to pay costs referred to in paragraph *(a)*, shall have the effect of an order of court for such costs.

(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.'

[17] Insofar as the costs occasioned by the withdrawal are concerned, the general principle is that the party withdrawing the proceedings is regarded as an unsuccessful litigant and, as such, is liable to pay the other party's costs of the proceedings. However, this does not take away the court's discretion to deprive the successful party of its entitlement to costs if, based on its consideration of all the facts of the matter, it believes that it would be unfair or unjust to order the unsuccessful party to pay the costs of the proceedings.[3]

[18] The circumstances justifying a departure from the general principle may vary, and need not necessarily be 'exceptional' or 'special'. The court must consider all the facts and exercise its discretion judicially in such a manner that it is fair to both sides.[4] For instance, a litigant who acted reasonably in launching the proceedings may be driven to withdraw such proceedings in order to save costs because of developments occurring after the proceedings have already been launched but before the hearing of the matter.[5]

[19] Coming to the facts of the present case, the crucial question is whether the respondent acted reasonably in launching the main application and, if so, whether the respondent's claim was time-barred under s 56(2) of the CPA. While the second segment of this question is not included in the list of issues agreed between the parties for determination by this court, I am mindful of

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[3] DE van Loggerenberg *Erasmus Superior Court Practice* (RS 29, 2026) at D1 Rule 41-4; *Germishuys v Douglas Besproeiingsraad* 1973 (3) SA 299 (NC); *Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape, and Others* 2005 (6) SA 123 (E) (*Wildlife*) at 129E-130B and 131B.
[4] See *Wildlife* at 130C, where the court quotes *Holmes JA* in *Ward v Sulzer* 1973 (3) SA 701 (A) at 706G.
[5] Wildlife (supra) at 132J-133A

the fact that it is one of the issues raised by the applicant in its founding affidavit. I will accordingly address it on that basis.

[20] At the outset, it must be borne in mind that the vehicle was relatively new at the time when the electrical fault was discovered in its operation system. The vehicle was exactly six months old at the time. According to the respondent's evidence, which is not disputed by the applicant, its mileage at the time was 3 302 kilometres. It was towed to the applicant's premises for attention. On 20 December 2024 Audi Centre, Durban, issued a conditional repair estimate of R60 341.10 to repair the alleged damage to the vehicle.

[21] The respondent's contention is that the applicant declined to provide her with a copy of the assessment report compiled by Audi Centre Umhlanga, detailing the extent of the damage, together with an explanation as to how such damage was caused. Consequently, she perceived the applicant to be evasive in its conduct towards her and proceeded to institute legal proceedings against the applicant claiming a refund of the full purchase price of the vehicle.

[22] The applicant, on the other hand, is blaming the respondent for declining its repeated proposals to obtain an independent assessment of the vehicle. Be that as it may, the fact of the matter is that it is not clear from the evidence as to when the water ingress had occurred to the undercarriage of the vehicle. Not even the experts engaged by both parties were in a position to shed some light in that regard, save for mere speculation that the water ingress could have occurred during the time when the vehicle was imported from Germany to South Africa or, as suggested by the applicant in its answering

affidavit to the main application, when it was partially submerged in water by the respondent contrary to the user's manual.

[23] According to the applicant, it was finally agreed between the parties that Audi Centre Umhlanga be approached to provide an independent assessment of the vehicle. On 14 February 2025, the vehicle was inspected and diagnostically tested by Audi Centre Umhlanga, which provided a significantly lesser quote of R11 774.23 to repair the water damage to the vehicle. However, when the relevant assessment report was received from Audi Centre Umhlanga the applicant had, once again, declined the respondent's request to be provided with a copy thereof. The reason, according to the applicant, was because the Regional Area Manager representing the manufacturer had refused the applicant permission to do so.

[24] Therefore, taking into account the inexplicable refusal of the applicant to provide the respondent with copies of the two assessment reports, together with the huge discrepancy between the two quotations obtained from Audi Centre, Durban, and Audi Centre Umhlanga, respectively, my view is that the respondent acted reasonably in launching the main application. If anything, it was the lack of transparency on the part of the applicant which put her in a position where she was uncertain as to whether the vehicle had latent defects at the time when she took delivery thereof.

[25] This brings me to the question as to whether the respondent's claim was time-barred under s 56(2) of the CPA. In my view, it was not. This is for the simple reason that it is not clear from the evidence as to when the water ingress to the undercarriage of the vehicle had actually occurred. The experts

themselves are not certain of that fact, which leaves alive the possibility that it could have occurred when the vehicle was shipped from Germany to South Africa as opined by Mr Accolla.

[26] The uncertainty surrounding the occurrence of water ingress to the undercarriage of the vehicle is compounded by the conclusion made by Mr Furber in the applicant's answering affidavit in the main application, which reads as follows:

'With the evaporation of the water/dampness, and the replacement of the 18amp fuse which restored the operation of the power steering, the alleged defectiveness no longer prevails. It thus follows that the vehicle is not defective either as alleged or at all, but was damaged during the use thereof, necessitating repairs.'[6]

[27] With due respect to Mr Furber, his conclusion is rather confusing. On the one hand he suggests that the vehicle was damaged during the use thereof by the respondent, necessitating repairs. On the other hand he states that all it took to restore the vehicle to its normal operation was to wait long enough for the water/dampness to evaporate and, thereafter, to simply replace the 18amp fuse. If the latter statement is correct, then the only logical conclusion is that it was not necessary to affect any repairs to the vehicle. This raises the question why the vehicle was diagnosed as 'damaged' in the first place, when the simple solution that restored it to normal operation did not require any repairs.

[28] Therefore, if all it took to restore the vehicle to its normal operation was to allow enough time for the water/dampness to evaporate and, thereafter,

[6] Applicant's answering affidavit in the main application deposed to by Marietjie van Tonder, para 41.

replace the 18amp fuse, the question is why the respondent was not advised about such option, particularly, as it is obviously much cheaper than the cost of repairs quoted by Audi Centre, Durban, and Audi Centre Umhlanga, respectively. To be fair to the respondent, it was incumbent upon the applicant to advise her about the former option. Failure to do so, in my view, justifies a departure by this court from the general principle that a withdrawing party must pay the costs occasioned by the withdrawal. As a customer of the applicant, it is not unreasonable for the respondent to expect the applicant to advise her about all her options to restore the vehicle to its normal operation.

Whether the respondent's counter-application ought to be granted

[29] To put this issue in a proper perspective, the respondent alleges that it is the conduct of the applicant which caused her to approach this court for relief in the main application. In particular, she alleges that the applicant had initially misrepresented the status of the vehicle alleging that it had water damage, and that such damage was caused by her. It was only in the applicant's supplementary affidavit filed on 12 August 2025, two and a half months after delivery of the respondent's heads of argument, that the applicant changed its stance and alleged that the vehicle was not damaged. It was in the light of the applicant's shifting stance that the respondent decided to appoint an independent expert to assess the vehicle.

[30] The above explanation is somewhat different from what the respondent stated in her answering affidavit to this application, where she stated that: '*My counsel at the time had offered me an opportunity to appoint Mr Yves Accolla to inspect the vehicle, which I accepted*'. In any event, she contended that it was on the strength of the independent expert's report, presumably Mr

Accolla, that she elected to withdraw the main application. Regarding the issue of costs, she contends that her counsel, just like the applicant's counsel, wanted to argue the costs of the application, but the presiding judge was not inclined to hear the arguments on costs.

[31] As indicated elsewhere in this judgment, the general principle is that the party withdrawing the legal proceedings is liable, as an unsuccessful litigant, to pay the costs occasioned by the withdrawal. It may do so by embodying in its withdrawal notice a consent to pay costs. If no consent to pay costs is embodied in the notice of withdrawal, then the other party, meaning the non-withdrawing party, may apply to court on notice for an order of costs. According to my interpretation of rule 41, it does not make any provision for the withdrawing party to, not only withhold its consent to pay costs, but also claim such costs from the non-withdrawing party.

[32] If the court decides to exercise its discretion to depart from the general principle that the withdrawing party must pay the costs of the proceedings, it can deprive the non-withdrawing party of its entitlement to such costs. There is nothing in rule 41which suggests that the court may, in addition to depriving the non-withdrawing party of its entitlement to costs, also order the non-withdrawing party to pay the costs of the proceedings. This is irrespective of the circumstances which may have caused the withdrawing party to withdraw the proceedings.

[33] Even if I am wrong in the view I express in the preceding paragraph, I do not believe that there is any basis for this court to exercise its discretion to award the costs of the main application to the respondent. This is because

according to the evidence of the applicant, which was not challenged by the respondent, the proposal to appoint an independent expert to assess the vehicle was made by the applicant to the respondent on, at least, three separate occasions. However, except for the appointment of Audi Centre Umhlanga, whose independence was disputed by the respondent, the aforesaid proposals by the applicant were rejected by the respondent outright.

[34] According to the applicant, the first proposal to appoint an independent expert to assess the vehicle was made by the applicant to the respondent on 3 February 2025. The respondent is said to have agreed to such proposal, which resulted in the appointment of Audi Centre Umhlanga. To be fair to the respondent, her disgruntlement with the independence of Audi Centre Umhlanga is understandable and, in my view, justified, because of the applicant's refusal to furnish her with a copy of the assessment report compiled by Audi Centre Umhlanga.

[35] However, there is no reasonable explanation provided by the respondent for her refusal to agree to the subsequent proposals by the applicant on 26 February 2025 and 29 May 2025, respectively, to appoint an independent assessor to assess the vehicle. Instead, the respondent waited until 2 October 2025 to appoint Mr Accolla, supposedly, after she was advised by her counsel to do so. Bearing in mind that she was represented by both an attorney and counsel throughout the proceedings, the question is what prevented her counsel and/or attorney from advising her to that effect all along.

[36] It is common cause that the respondent was in possession of the assessment report compiled by Mr Accolla on 4 October 2025, with the matter being set down for hearing on the opposed motion roll on 8 October 2025. It is also common cause that the attorneys for both parties were contacted by the registrar of the presiding judge on 6 October 2025 enquiring whether the hearing of the matter was proceeding on 8 October 2025. According to the applicant's attorneys, the respondent's attorneys responded in the affirmative.

[37] The confirmation by the respondent's attorneys that the hearing of the matter was proceeding on 8 October 2025 was notwithstanding the fact that their client was already in receipt of Mr Acccolla's assessment report which, according to her, primarily informed her decision to withdraw the main application. Therefore, taking into account the conduct of the respondent set out in the preceding paragraphs, I am not inclined to grant her counter-application, nor the costs of the main application.

Whether certain portions of the respondent's opposing affidavit are scandalous, vexatious and/or irrelevant and ought to be struck out in terms of rule 6(15)?

[38] For what it is worth, I do not believe that it is necessary or desirable for the opposing parties in any litigation to resort to the use of colourful and/or offensive language in their pleadings. Such conduct does not enhance the strength of a party's case. Instead, it may be a source of irritation to the presiding judge. In the present case, the respondent used a variety of colourful terms and phrases to describe the alleged conduct of the applicant towards her. Some of the said terms and phrases are bordering on being outright offensive and/or disrespectful.

[39] While I understand the respondent's apparent frustration with the manner in which her complaint was dealt with by the applicant, I must emphasize that her use of the terms and phrases which form the subject of the applicant's complaint was unwarranted and, more importantly, did not serve to advance the strength of her case in any way. The complaint raised by the applicant against her strong language is understandable and, in my view, fully justified.

[40] The terms and phrases complained of include, *inter alia,* the following: 'continuously twisted, manipulated and back-paddled its narrative throughout the proceedings'; 'chooses to manipulate the true facts'; displayed clandestine behaviour regarding the matter'; 'lies'; 'This deliberate lie further illustrates the first respondent's lack of credibility in its ongoing pattern of dishonesty throughout these proceedings'; 'The first respondent elected to lie, mislead and not comply with the applicant and this Honourable Court, and; 'the report had also and more importantly brought all the lies and misrepresentations by the first respondent to my attention.'

[41] I accordingly find that all the terms and phrases that are listed in the preceding paragraph, together with all the other similar terms and phrases used in the respondent's opposing affidavit but not listed herein, ought to be struck out in terms of rule 6(15) for being scandalous, vexatious and/or irrelevant for the purposes of this application.

Order

[42] In the result, I make the following order:

1. The interlocutory application and the counter-application are dismissed.

2. Each party shall pay its own costs of the main application, this application, as well as the counter-application.

[redacted]

ME NKOSI

JUDGE

Appearances

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Date of hearing: 24 July 2026

Date of judgment: 04 August 2026