



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

JUDGMENT

Not Reportable

Case no: **14649/2024**

In the matter between:

VENUDHIRA MOODLEY

PLAINTIFF

and

MELOMED CLAREMONT HOSPITAL (PTY) LTD t.a.

MELOMED TOKAI

DEFENDANT

Coram: **JONKER AJ**

Heard: 27 August 2026

Delivered: 31 August 2026

Summary: Civil procedure – withdrawal of action – Uniform rule 41(1)(a) – notice of withdrawal delivered after set-down without the consent of the other party or the leave of the court – leave granted – whether a tender of party-and-party costs embodied in such a notice binds the court as to scale – held that it does not – costs – attorney-and-client scale – plaintiff persisting with the action after it had lost its practical purpose – punitive costs ordered in respect of that period only.

ORDER

1. The plaintiff is granted leave in terms of Uniform rule 41(1)(a) to withdraw the action, such withdrawal to take effect from the date of this order.
2. The plaintiff shall pay the defendant's costs of the action incurred up to and including 21 January 2026 on the party-and-party scale, counsel's fees to be allowed on scale B in terms of rule 67A.
3. The plaintiff shall pay the defendant's costs of the action incurred from 22 January 2026 to date of this order, including the hearing on 27 August 2026, on the scale as between attorney and client, counsel's fees to be allowed on scale B in terms of rule 67A.

JUDGMENT

Jonker AJ:

Introduction

[1] The plaintiff no longer wishes to pursue this action. Shortly before two special pleas were due to be argued, the plaintiff delivered a notice purporting to

withdraw the action and tendered the defendant's costs on the party-and-party scale.

[2] The defendant did not consent to the withdrawal when the notice was delivered, but it does not now oppose the granting of leave to withdraw the action. It does, however, take issue with the scale of the costs tendered. It contends that the plaintiff's conduct of the litigation warrants an order for costs on the attorney-and-client scale.

[3] It is that issue which ultimately brought the parties before me. Both parties delivered comprehensive heads of argument, for which I am grateful. They were of considerable assistance in identifying the relatively narrow issue that remains for determination.

[4] The action had already been set down when the plaintiff delivered the notice of withdrawal. It is common cause that the defendant did not consent to the withdrawal and that the plaintiff did not first obtain the leave of the Court as required by Uniform Rule 41(1)(a).

The relevant background

[5] It is necessary to set out the history of the litigation to the extent relevant to the exercise of the discretion on costs.

[6] The plaintiff instituted the action during June 2024. The cause of action concerned the purported termination of a lease. Whatever may ultimately have been the merits of the parties' respective positions, it is common cause for present purposes that the action was not moot when it was instituted. The plaintiff remained in occupation and the litigation had a practical purpose while the lease continued to endure. The lease expired by effluxion of time on 30 November 2025.

[7] The action was, however, not prosecuted with any particular expedition for a considerable period of some 15 months since service of the summons.

[8] That changed during November 2025. The plaintiff caused subpoenas to be issued and delivered a notice of bar requiring the defendant to plead. The defendant thereupon delivered two special pleas in which it raised the question of mootness. From that point onwards it was clear that the practical foundation for the principal relief sought in the action had fallen away.

[9] The plaintiff nevertheless continued with the litigation. Replications were delivered in response to the special pleas on 22 January 2026 and further procedural steps followed.

[10] During February 2026, the plaintiff filed a Rule 37 questionnaire and Notice of enrolment of the matter. On 6 May 2026, and at the pre-trial conference, the defendant sought a separation of issues so that the special pleas could be determined first. Its position was that determination of those pleas would be dispositive of the action and avoid the unnecessary ventilation of the merits.

[11] The matter was so separated, and the file was declared allocation ready. 27 August 2026 was ultimately allocated as the date for the hearing of the special pleas. The defendant duly delivered its heads of argument in accordance with the applicable practice directives on 5 August 2026.

[12] The following day the plaintiff delivered the notice purporting to withdraw the action and tendered the defendant's party-and-party costs.

[13] The defendant immediately took issue with the tender. It contended that, having regard to the plaintiff's persistence with the action after its practical

purpose had disappeared, it was entitled to its costs on the attorney-and-client scale.

[14] Correspondence followed. The parties were encouraged to attempt to resolve what had by then become a dispute solely about the scale of costs. Regrettably, they were unable to do so.

[15] I say regrettably because the substantive litigation is over. The parties nevertheless remained sufficiently entrenched in their respective positions to require the allocation of judicial time to determine the scale upon which the costs of that litigation are to be paid.

[16] The history between the parties may provide some explanation for the strength with which each side has pursued its position. It cannot, however, determine the proper exercise of the Court's discretion.

The purported withdrawal

[17] Uniform rule 41(1)(a) provides, in relevant part, that a person instituting proceedings may withdraw them at any time before the matter has been set down, but thereafter only with the consent of the parties or with leave of the court. Rule 41(1)(b) provides that a consent to pay costs embodied in such a notice shall have the effect of an order of court for those costs. Rule 41(1)(c) provides that, if no such consent is embodied in the notice of withdrawal, the other party may apply to court on notice for an order for costs. None of this is in dispute.

[18] The rule is clear. Once proceedings have been set down, a unilateral notice of withdrawal without the consent of the other party or the leave of the

court does not, without more, bring the proceedings to an end.¹ It follows that the plaintiff's notice did not, of itself, validly terminate the action.

[19] That does not mean that the plaintiff should now be compelled to continue litigating an action which it no longer wishes to pursue. In *Levy*² the Appellate Division emphasised that it is not ordinarily the function of a court to compel a litigant to proceed with an action against their will. A court may intervene where the withdrawal itself constitutes an abuse of its process, but, as the Appellate Division observed with reference to *Hudson*,³ that is a power to be exercised with great caution and only in a clear case.

[20] The defendant does not seek to compel the plaintiff to proceed with the merits. Its complaint concerns costs. There is accordingly no reason to refuse leave to withdraw the action. I shall grant that leave.

[21] The consequence is that the substantive dispute falls away and the issue which remains is costs.

The effect of the tender

[22] The plaintiff submits that the tender of party-and-party costs should effectively bring the matter to an end. Reliance was placed, amongst others, upon rule 41(1)(b) and (c) and on authority holding that a court will not compel a litigant to proceed with proceedings which it no longer wishes to pursue, and will not enquire into its motive for withdrawing them. That line of authority is directed

¹ See *Protea Assurance Co Ltd v Gamlase and Others* 1971 (1) SA 460 (E) at 465G; *Reuben Rosenblum Family Investments (Pty) Ltd and Another v Marsubar (Pty) Ltd* 2003 (3) SA 547 (C) at 550C.

² *Levy v Levy* 1991 (3) SA 614 (A) at 620B-C.

³ *Hudson v Hudson and Another* 1927 AD 259 at 268.

at whether leave to withdraw should be granted. It does not govern the terms upon which such leave is granted, and it does not determine the scale of costs.

[23] The plaintiff relied upon *Pienaar*⁴. The defendant sought to distinguish it on the ground that it concerned magistrates' courts rule 27 and not Uniform rule 41. The two rules are, however, materially similar in the respect which matters here: a tendered consent to pay costs has the force of an order of court and, failing such a tender, the other party must apply for costs. The principal difference is procedural, in that rule 27(3) prescribes an application within 20 days. *Pienaar* is accordingly of persuasive value on the point of principle.

[24] It illustrates a proposition which is relevant here. A litigant cannot, by unilaterally selecting the scale of costs in a notice of withdrawal, necessarily insulate itself against the court's ordinary discretion in relation to costs where the opposing party properly places the scale in issue.

[25] That conclusion does not depend upon the irregularity of the notice. Had the plaintiff obtained the defendant's consent or the leave of this Court before delivering it, rule 41(1)(b) would have given the tender the force of an order of court for the costs tendered. It would not have determined the scale upon which those costs fall to be taxed where the opposing party places the scale in issue, as the defendant promptly did. To hold otherwise would permit a withdrawing litigant to fix, unilaterally and finally, the basis upon which its opponent is to be indemnified, and would allow a party whose conduct of the litigation warranted censure to escape that consequence by the simple expedient of abandoning the proceedings and tendering the lower scale. In any event, the plaintiff withdrew after set-down without the defendant's consent and without leave. The action consequently remained before this Court and the plaintiff requires the Court's leave to withdraw it.

⁴ *Pienaar NO v Silver Lakes Homeowners Association NPC* [2021] ZAGPPHC 898 (12 July 2021).

[26] In determining the terms upon which that leave should be granted, the court retains its discretion as to costs, including the scale upon which they should be awarded.

The applicable principles on costs

[27] The ordinary position where a litigant withdraws proceedings is well established. The withdrawing litigant is ordinarily required to pay the opposing party's costs. Very sound reasons are required for departing from that position.⁵

[28] The fact that proceedings ultimately became moot does not, by itself, determine the question of costs. The court must consider the circumstances in which the proceedings were instituted, the subsequent events which rendered the relief unnecessary or unobtainable, and the conduct of the parties thereafter.

[29] The more difficult question is whether the circumstances justify a departure from the ordinary party-and-party scale. An attorney-and-client costs order is punitive. It is not made merely because a litigant has been unsuccessful, nor because its view of the law or the merits has proved to be incorrect.

[30] In *Nel*,⁶ the court explained that such an order may be justified by special considerations arising either from the circumstances which gave rise to the litigation or from the conduct of the losing party. The purpose is to ensure, more effectively than an ordinary costs order would, that the successful party is not left out of pocket as a result of the litigation.

⁵ See *Germishuys v Douglas Besproeiingsraad* 1973 (3) SA 299 (NC) at 300D-E and *Wildlife and Environment Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape* 2005 (6) SA 123 (E) at 130G-131C.

⁶ *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1946 AD 597 at 607.

[31] The punitive scale is accordingly reserved for circumstances in which the conduct under consideration is sufficiently reprehensible, vexatious, reckless or otherwise deserving of the court's disapproval. The enquiry is necessarily fact-specific. The formulation in *Public Protector v South African Reserve Bank*,⁷ namely that costs on the attorney-and-client scale are to be awarded where there is fraudulent, dishonest or vexatious conduct, or conduct amounting to an abuse of the process of the court, is to the same effect. That formulation appears in the judgment of Mogoeng CJ. It was endorsed by the Constitutional Court in *Normandien*⁸, together with the statement in *Plastic Converters Association*⁹ that the scale is an extraordinary one, reserved for cases in which a litigant has conducted itself in a clearly and indubitably vexatious and reprehensible manner.

The plaintiff's conduct

[32] It cannot be suggested that the action was improper from its inception. When summons was issued, there remained a live dispute concerning the lease and the plaintiff remained in occupation. The action was capable of serving a practical purpose. The fact that the relief later became unnecessary does not retrospectively render its institution vexatious. That consideration is important because a punitive costs order should not be imposed merely with the benefit of hindsight.

[33] The position changed when the lease expired by effluxion of time on 30 November 2025, and any residual doubt was removed the following day. On 1 December 2025 the defendant delivered its special pleas and squarely raised the mootness of the action. From that date the plaintiff knew, or ought reasonably to have appreciated, that the lease upon which the substantive relief was founded

⁷ *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC) para 8.

⁸ *Normandien Farms (Pty) Ltd v South African Agency for Promotion of Petroleum Exportation and Exploitation (SOC) Ltd and Others* [2020] ZACC 5; 2020 (4) SA 409 (CC) paras 69-72

⁹ *Plastic Converters Association of South Africa v National Union of Metalworkers of SA* [2016] ZALAC 39; (2016) 37 ILJ 2815 (LAC) para 46.

had expired and that whatever practical purpose the action had previously served had substantially disappeared.

[34] At that stage the sensible course was to reconsider whether there remained any purpose in continuing with the action and, if not, to bring it to an end before further costs were incurred.

[35] The plaintiff did not do so. Instead, the litigation continued for several further months. This was not a period of inactivity while the parties considered their positions. The plaintiff continued actively to prosecute the action. It had shortly before pressed the defendant to plead. The defendant was thereby required to deliver the special pleas. Thereafter the plaintiff delivered a replication. The matter remained enrolled and the defendant was required to prepare for the hearing.

[36] The plaintiff's explanation is that the action had been necessary when instituted and had achieved its purpose because the purported termination of the lease was not implemented and the lease was permitted to run its course.

[37] I accept the first part of that proposition. It does not answer the second part of the enquiry. Once the lease had run its course, the very fact upon which the plaintiff relies to justify the original institution of the proceedings also demonstrated why their continued prosecution had become unnecessary.

[38] There is a material distinction between instituting proceedings reasonably and persisting with them after the circumstances which justified their institution have ceased to exist.

[39] That distinction is fatal to the plaintiff's own formulation of the enquiry. Relying on *Wildlife*, the plaintiff submitted that the question is whether a litigant acted reasonably in launching proceedings and was later driven to withdraw

them because subsequent developments rendered the relief unnecessary or unobtainable. I accept that formulation. The difficulty is that the plaintiff was driven to withdraw when the lease expired at the end of November 2025. It did not withdraw for a further eight months, during which it continued actively to prosecute the action. The test upon which the plaintiff relies measures precisely the interval which it has not explained.

[40] Litigants must ordinarily be afforded a reasonable opportunity to consider the consequences of changed circumstances, obtain advice and attempt to resolve questions of costs. The plaintiff had that opportunity in the present matter. The expiry of the lease by effluxion of time cannot have taken it by surprise, and the defendant raised the resulting mootness in its special pleas.

[41] The plaintiff took that opportunity and reached the opposite conclusion. On 22 January 2026, some seven weeks after mootness had been raised, it elected to deliver replications and to press the action on. That election, and the eight further months of pleadings, procedural steps and preparation for a hearing which followed it, could no longer produce any practical relief on the underlying dispute.

[42] Most tellingly, the plaintiff did not withdraw when the lease expired, when the defendant raised mootness, while the special pleas and replications were being exchanged, or when separation was sought. It withdrew only after the defendant had incurred the expense of preparing and delivering its heads of argument for the imminent hearing.

[43] Viewed cumulatively, that conduct went beyond a mere error of judgment. It amounted to unreasonable persistence in litigation which the plaintiff knew, or ought reasonably to have appreciated, could no longer produce any practical

relief, and in that sense to an abuse of the process of this Court. In *Normandien*¹⁰ the Constitutional Court held that it was highly inappropriate for a litigant to leave litigation pending with knowledge that the case had become moot, and that such conduct was reprehensible and an abuse of process warranting a punitive costs order. It caused the defendant to incur costs which could and should have been avoided.

The costs hearing

[44] The plaintiff submits that, once it offered to withdraw and tendered party-and-party costs, the defendant could have brought the litigation to an end. It is contended that the defendant's insistence upon a punitive scale caused the costs incurred after the notice of withdrawal and that those costs should therefore be borne by the defendant.

[45] I cannot agree. Once the defendant disputed the adequacy of the tender, there remained a live and concrete dispute between the parties, namely whether the plaintiff's conduct justified a punitive costs order.

[46] The authorities relied upon by the plaintiff for the proposition that courts should not expend scarce judicial resources deciding abstract questions of law do not assist it.¹¹ The scale upon which one litigant must reimburse another for costs already incurred is not an abstract proposition. It has direct financial consequences for both parties.

[47] Nor was the defendant obliged to accept a party-and-party tender merely because the plaintiff had elected to withdraw at a late stage.

¹⁰ *Normandien Farms (Pty) Ltd v South African Agency for Promotion of Petroleum Exportation and Exploitation (SOC) Ltd and Others* [2020] ZACC 5; 2020 (4) SA 409 (CC) paras 69-72.

¹¹ *Police and Prisons Civil Rights Union v South African Correctional Services Workers' Union and Others* [2018] ZACC 24; 2019 (1) SA 73 (CC) para 43.

[48] The fact that the parties could not settle a dispute concerning costs is unfortunate. But a litigant who contends, with justification, that its opponent's conduct warrants a punitive order is entitled to have that dispute determined.

[49] I therefore do not regard the defendant's insistence upon adjudication of the scale as an abuse of process.

The contractual costs clause

[50] The defendant submitted, as an alternative and freestanding ground for a punitive order across the whole of the action, that clause 22.5 of the lease entitles it to costs on the attorney-and-own-client scale. Clause 22.5 provides that

'should the party ("the aggrieved party") institute action against the other party ("the defaulting party") pursuant to a breach by the defaulting party of this Lease when without prejudice to any other rights which the aggrieved party may have, the aggrieved party shall be entitled to recover all legal costs/charges, tracing fees and such collection commission on an attorney and own client scale.'

[51] The plaintiff answered that clause 22.5 is not a general costs clause covering any litigation arising out of the lease. On its terms it operates where an aggrieved party institutes action against a defaulting party pursuant to a breach. It does not provide that any party which successfully resists proceedings is entitled to costs on that scale. The defendant instituted no action, and there has been no finding that the plaintiff was the defaulting party.

[52] There is force in that submission. The clause is triggered by the institution of proceedings by an aggrieved party against a party in default, and not by success in litigation however that success is achieved. On the ordinary meaning of its language it does not confer an automatic entitlement upon a defendant in the position of this defendant. To apply it as the defendant contends would in

addition require me to determine which party was in breach of the lease, and to do so for the sole purpose of fixing a costs scale in an action which has been withdrawn and in which the merits were never adjudicated. That I decline to do. The alternative ground accordingly fails, and nothing in this judgment rests upon the clause.

[53] The costs order which I consider appropriate rests upon the plaintiff's conduct of the litigation after the action had lost its practical purpose, and not upon an assumed determination of the contractual merits.

The appropriate order

[54] There remains the question whether the punitive scale should apply to the entire action. In my view it should not. As I have found, the action was not moot when instituted and I am not persuaded that its institution was vexatious or otherwise deserving of censure. The defendant is entitled to the ordinary costs incurred during that period, consistently with the tender which the plaintiff itself made.

[55] The position is different from 22 January 2026. The defendant had raised mootness in its special pleas on 1 December 2025, and the plaintiff was allowed a reasonable opportunity to consider its position, take advice and address the question of costs. It is for that reason that the costs of the special pleas themselves, and of the period of reflection which followed, remain on the ordinary scale. What the plaintiff did instead was to deliver a replication on 22 January 2026 and to prosecute the action for a further eight months. From that date the continued prosecution of the action was unnecessary, and the defendant was put to the expense of the subsequent pleadings, the separation and pre-trial proceedings and preparation for the hearing.

[56] I am satisfied that the cumulative conduct described above constitutes the special circumstance required for an attorney-and-client order in respect of the costs incurred from 22 January 2026, being the date upon which the plaintiff, with full knowledge that the action had ceased to serve any practical purpose, elected to prosecute it further.

[57] That conclusion also disposes of the costs of the present proceedings. The defendant was substantially successful in its contention that the plaintiff's party-and-party tender did not adequately address the costs occasioned by the plaintiff's later conduct. There is no basis to require the defendant to bear the costs of obtaining that determination. Those costs are, moreover, the direct product of the conduct which justifies the punitive scale in relation to the action itself. The plaintiff maintained a tender which its own defective notice of withdrawal could not render binding, and thereby obliged the defendant to incur the expense of a hearing which ought not to have been necessary. Those costs should follow the same scale.

[58] A punitive order limited in this manner is, in my view, both fair and proportionate. It recognises that the plaintiff was entitled to institute the action, while ensuring that the defendant is not required to bear the additional expense caused by the plaintiff's unreasonable persistence after the basis for continuing the litigation had fallen away.

Order

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

1. The plaintiff is granted leave in terms of Uniform rule 41(1)(a) to withdraw the action, such withdrawal to take effect from the date of this order.

2. The plaintiff shall pay the defendant's costs of the action incurred up to and including 21 January 2026 on the party-and-party scale, counsel's fees to be allowed on scale B in terms of rule 67A.
3. The plaintiff shall pay the defendant's costs of the action incurred from 22 January 2026 to date of this order, including the hearing on 27 August 2026, on the scale as between attorney and client, counsel's fees to be allowed on scale B in terms of rule 67A.

EM JONKER
ACTING JUDGE OF THE HIGH COURT

Appearances

For the plaintiff: T du Preez
Instructed by: CK Attorneys, Bloubergrant.

For the defendant: EA deVilliers-Jansen SC with S Mahomed
Instructed by: MZ Solomon Attorneys, Grassy Park.