IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE.

(2) OF INTEREST TO OTHER JUDGES

(3) REVISED

CASE NO: 54312/2016

23/6/2017

In the matter between:

DR PENUELL MPAPA MADUNA	First Applicant
(ID NO. [….])	
SITHABILE CHARITY SITHOLE	Second Applicant
(ID NO. [….])	
and	
NOMPUMELELO CHERYL MADUNA	
(ID NO. [….]) in her capacity as director	
Of the Fifth Respondent	First Respondent
NOMPUMELELO CHERYL MADUNA	
(ID NO. [….]) obo THE NONPUMELELO	
MADUNA FAMILY TRUST IT 1180/2000	Second Respondent
MARIE LOUISE NYKAMP (ID [….])	
obo THE NONPUMELELO	
MADUNA FAMILY TRUST IT 1180/2000	Third Respondent
DR PENUEL MPAPA MADUNA	
obo THE NONPUMELELO	

MADUNA FAMILY TRUST IT 1180/2000	Fourth Respondent
NGAZANA LIQUID FUELS (PTY) LTD	Fifth Respondent
TSHWARISANO LFB INVESMENT (PTY) LTD	Sixth Respondent
JITENDRA M JEENA in his capacity as director of the Fifth Respondent	Seventh Respondent
EURO BLITZ 30 (PTY) LTD	Eighth Respondent
NOKULUNGU MADUNA	Ninth Respondent
SASOL LIMITED	Tenth Respondent
SASOL OIL (PTY) LTD	Eleventh Respondent
STANDARD BANK OF SOUTH AFRICA LIMITED	Twelfth Respondent

JUDGMENT

MIA, AJ

[1] The respondents seek an order that the applicants pay their costs in the main application, the costs of the rule 30 notice, the costs of this application as well as the costs of the application to strike out. The respondents seek all of the above costs on an attorney client scale which are to include the fees of senior counsel.

CONDONATION

[2] When the matter came before me, the applicant's heads of argument, practice note and authorities bundle had not been filed. The applicant thus brought an application for condonation. The explanation given by the attorney for the applicant indicated that he and counsel in the matter had been seized with various matters indirectly related to the present matter and some of the parties herein. They were busy with a forensic audit for SASOL and related to the parties' dispute which took up a great deal of time until February 2017. They had focussed on those issues hoping to resolve the underlying disputes between the parties. They were also instructed to assist with the defence in proceedings in the South Gauteng

High Court involving the fifth and sixth respondent. In addition to the aforementioned they were occupied with other matters where they were previously instructed as well. They indicated they attended to the present matter at the earliest opportunity.

[3] When they finalised the heads of arguments they served same by email upon the respondents by agreement. They experienced difficulty in filing the heads of argument on the court file. The heads of argument were stamped by the registrar but could not make its way into the court file as the files were already sent to the senior judge for allocation. They were then hamstrung by unanticipated protest action which prevented them from gaining access to the court file which had already been sent to the Judge to whom the matter was allocated. When they managed to access the Judges Registrar they were informed that the Judge had issued an instruction to hand up the heads of argument, practice note and authorities bundle on the day of the hearing.

[4] The respondents opposed the application for condonation and although they had received the heads of argument per email had refused to remove the matter from the roll when the applicants had experienced problems in filing the heads of argument timeously to be re-enrolled later. Mr Basslian, counsel for the respondents, argued that the explanation given was insufficient for the full period. The explanation was not a full explanation for the four months from November 2016 to March 2017. Further he argued, this Court should not accept as reasonable an explanation that the applicants instructed his legal representatives to deal with a forensic audit which had no time limits as more important than taking a few days to finalise heads of argument in the present matter. He argued that in the event that condonation was granted the applicants should be mulcted with an attorney and client costs order to include the costs of counsel.

[5] Having taken this matter over, I took into account the directive issued to hand up the heads of argument on the day of the hearing and considered the explanation given and granted the application for condonation for the late filing of the heads of argument, practice note, and authority bundles in

respect of the costs application and the striking out application. The applicant had tendered to pay the costs. Despite the ongoing disputes between the parties and the various matters requiring attention this matter appears to have received less attention after the withdrawal of the action. The applicants prioritised matters such as the forensic audit which did not appear to have a time constraint. A lot of time was devoted to assisting other attorneys and SASOL over the period of four months from November 2016 to March 2017. The heads of argument herein received attention after addressing all the other matters despite the applicants having regarded this matter as urgent in July 2016. Consequently, I ordered that the costs be paid on the attorney client scale to include the costs of senior counsel.

COSTS IN THE MAIN APPLICATION

[6] I now to turn to deal with the costs in the main application. The applicants brought an urgent application on 12 July 2016 wherein they sought various urgent prayers for relief as follows:

- an interdict to prevent the first and seventh respondents from adopting a resolution and declaring and distributing a dividend to the second, third, and fourth respondents in their capacities as the trustees of the Nompumelelo Maduna Family Trust, IT 11810/2000(the NCM Trust) on 14 July 2016;

- further that the second and third respondent be interdicted and restrained from ceding or assigning, alienating or encumbering or in any way dealing with 51% of the issued share capital in the fifth respondent.

- that the first and seventh respondent be interdicted and restrained from authorising any subscription for shares of whatsoever nature in regard to the fifth respondent's shareholding which will result in an increase of the fifth respondent's share register as at the 30 June 2016;

- that first respondent and seventh respondent be interdicted and restrained from withdrawing money from the fifth respondent's bank accounts with numbers 000197505 and 00197521 with the twelfth respondent and that the twelfth respondent gives effect to this order;

- the applicant sought an order for costs against the first and seventh respondent *de bonis propriis* on an attorney and client scale jointly and severally the one paying the other to be absolved alternatively that second and third respondent pay the applicant's costs *de bonis propriis* on an attorney client scale jointly and severally the one paying the other to be absolved, alternatively that the fifth respondent be ordered to pay the first applicant's costs.

- The second applicant requested similar interdictory relief and similar costs orders.

[7] The urgent application was struck off the roll on 13 July 2016 by Swartz AJ, with an order that the applicants pay the respondents costs on an attorney client scale including the costs of senior counsel. This did not however put an end to the matter. Correspondence passed between the parties' attorneys regarding the continuance of the main application in the normal course and the filing of further affidavits. The communication was unclear as to what the applicants intended doing. The applicants held the view that respondents should take no further steps but did not disclose whether they intended withdrawing the application or not upon enquiry by the respondents attorneys. The respondents therefore filed an answering affidavit when a clear satisfactory response regarding a withdrawal was not forthcoming. The applicants in turn delivered a notice in terms of Rule 30 claiming that the answering affidavit constituted an irregular step.

[8] The applicants held the view that the matter was not re-enrolled after it was struck off the roll and an answering affidavit was not necessary. The urgent relief requested was disposed of when the urgent matter was struck

off the roll. They did not take further action to re-enroll the matter. The applicants thus held the view that the answering affidavit constituted an abuse of the court process as it failed to deal with the founding affidavit *ad seriatim(* paragraph by paragraph). The respondents' attorney addressed a letter indicating they would not react to the Rule 30 notice and the applicant should regard the time period in terms of Rule 30 for bringing an application in terms of the Rule. The applicants on 25 August 2016 by way of correspondence withdrew the Rule 30 notice and delivered a notice of withdrawal of the main application. The applicant did not tender costs in respect of either the main application or the Rule 30 notice.

[9] The respondents launched the application for costs on 2 September 2016. The issue which the respondents seek this court to determine is whether the respondents are entitled to costs of the main application other than the costs awarded by Swartz AJ on 13 July 2016. The applicants tendered the respondents' costs in relation to the Rule 30 notice, however the respondents seek an order for costs on a punitive scale and that the fees of senior counsel be included. The first applicant's view is that the respondents are not entitled to costs for the answering affidavit as the respondents filed the answering affidavit belatedly and in an effort to run up costs and for publicity purposes. The first applicant requested the respondents application for costs be dismissed with costs on a punitive scale.

[10] Rule 41(1) (a) provides:

" A person instituting any proceedings may at any time before a 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."

[11] The view regarding costs where an application is withdrawn in our courts is expressed in *Wildlife and Environmental Society v MEG for Economic*

Affairs 2005 (6) SA 123 (ECO) at 129 E-G as follows:

"... [the] applicant opposes the application for costs on the ground that in launching the application it had acted reasonably. In this regard Mr *Eksteen* referred to a number of authorities dealing with the issue of costs, to which authorities I shall refer hereunder. Mr *Swanepoel,* however, submitted that the ordinary common-law principles applicable to the determination of costs where an application had been withdrawn were applicable. He referred, first, to *Germishuys v Douglas Besproeiingsraad* 1973 (3) SA 299 (NC) the headnote of which correctly reflects what was stated by Van Rhyn J at 300D - E, namely:

'Where a litigant withdraws an action or in effect withdraws it, very sound reasons (baie gegronde redes) must exist why a defendant or respondent should not be entitled to his costs. The plaintiff or applicant who withdraws his action or application is in the same position as an unsuccessful litigant because, after all, his claim or application is futile and the defendant, or respondent, is entitled to all costs associated with the withdrawing plaintiffs or applicant's institution of proceedings.'"

[12] The urgent application before Swartz AJ was struck off the roll and costs were awarded in favour of the respondent in respect of the urgent application. These costs were on an attorney and client basis and as costs are in the discretion of the court these punitive costs reflected the Courts view on the application at that stage. The applicant laboured under the belief that the application in totality became 'mart' after the urgent application was struck from the roll. This is not so. It remained alive and was destined to follow the normal course until it was withdrawn.

[13] The striking of the matter off the urgent roll on 13 July 2016 only had the effect of denying a portion of the relief sought. The remaining relief claimed by the applicants remained to be dealt with and accordingly the */is* remained alive and the main application was still before the Court with the respondents having given intention to oppose the application. It followed that the answering affidavit was to be filed. The *tis* only ceased to exist

when the applicants withdrew the application as they did on 25 August 2016. The applicants were thus not correct when they contended that it was not necessary for the respondents to file an answering affidavit. It would not have been prudent for the respondents without any written assurances from the applicants to delay in responding to the application filed by the applicants. The applicants had chosen the particular forum through which to proceed. In doing so had set in motion a process to follow.

[14] The respondents filed an answering affidavit on 29 July 2016. The applicants filed a Rule 30 notice on 1 August 2016 and withdrew the main application on 25 August 2016. The applicants were thus in the position of the unsuccessful litigant. The respondents were thus entitled to costs. The applicant did not tender to pay the costs when it withdrew the application. The respondents launched the present application to pursue their costs. The various cases referred to by the respondents support their request for costs. The authorities referred to support the view that the party withdrawing an application or action must pay the costs except in exceptional circumstances. *(Net v* 0. *V.S Staatkonstruksie en Alg. Sweiswerke* 1977(3) SA 933 (O); *Wildlife and Environmental Society v MEG for Economic Affairs* 2005 (6) SA 123 (ECO); *Waste Products Utilisation v Wilkes (Biccari Interested party)* 2003(2) SA 590 (W) ; *ABSA BANK v Robb* 2013(3) SA 619 (GSJ) Therespondents argued that there were no exceptional circumstances prevalent in the matter. The applicants have not persuaded me that there are exceptional circumstances present in the matter. It follows then in view of the applicants' withdrawal and in the absence of exceptional circumstances that the applicants are to pay the costs of the main application as well as the Rule 30 notice which they have tendered already.

[15] The respondents would like the costs to be paid on an attorney client scale to include the cost of counsel. The parties have both briefed counsel and retained counsel herein in view of the complexity of the matter. It is evident from the explanation for condonation that counsel was required to work

through cabinets filled with files of documents to assist the parties to reach consensus on related issues. The parties were aware that the matter required counsel and the complexity was such that they briefed counsel on both sides.

[16] The first respondent states at paragraph 8 of her affidavit:

"Both the first applicant, who is my former husband , and I are well known figures in the political and business spheres in South Africa, first applicant having formerly been a cabinet minister and being a senior partner and Deputy Chairman of one of South Africa's largest firms of attorneys, Bowman Gilfillan. As a result the launching of the main application by the applicants and the striking from the roll received prominent publicity in the South African media"

And at paragraph 12

"It will be submitted at the hearing hereof that the conduct of the applicants and in particular the first applicant in instituting the application especially by way of urgency, in making the scandalous and defamatory allegations against the respondents, Ms. Robinson, Mr. Feldman and me constitutes vexatious litigation and merits sever censure by the Court and that will be justified in expressing its displeasure by an appropriate order of punitive costs. This is particularly so in the case of the first applicant, who by virtue of his status and training must have been fully aware of the impropriety of his conduct."

[17] The applicants at the outset requested costs *de bonis propriis.* They further requested that this application be dismissed with punitive costs. The respondents in turn request punitive costs orders against the applicants. Valuable time has been expended on the matter and the issue of costs remains unresolved still. After the answering affidavit was filed the applicants immediately withdrew the application. Whilst it is evident that the parties have unresolved issues it appears that the manner in which the

application came before the court caused much embarrassment and the parties have ongoing power struggles. The court cannot be the forum in which this plays out and costs orders cannot be the weapon.

[18] Whilst it is evident that the respondents were embarrassed by the application and regarded same as vexatious, this related to the urgent application. The urgent application was dealt with by Swart AJ and an appropriate order was made to indicate the Court's displeasure and censure. To order further punitive costs would be to punish the applicant twice for what has already been dealt with in the urgent application. The applicants are liable to pay the respondents costs in the main application, the Rule 30 notice and the present application. The costs of the present application however are costs in the ordinary course to include the cost of counsel.

STRIKING OUT –

[19] The respondents raised eight points which the applicant raises in the answering affidavit related to the costs application. The respondents contend they are prejudiced by the introduction of these issues in the costs application. They contend that these issues contain irrelevant allegations, annexures as well as hearsay evidence which require a full response and take the question of costs no further. This would extend the hearing of the application in relation to costs unnecessarily incurring additional legal costs.

[20] The respondents made application to strike out paragraphs 40 to 48, 56 to 74, 79 to 81, 85 and 86 and 102 to 105 of the answering affidavit and in heads of argument referred to paragraphs 30 to 48, 47, 56 to 74, 79 to 81, 85 to 86 and 102 to 105 of the applicants' application. They argue they are irrelevant to the present application and take the issues no further. Further the respondents wish to have paragraph 19 of the applicants answering affidavit struck out as being hearsay. This to include the annexures referred to namely Annexure AA3 page 110. The request to strike out applies to Annexure AA27 on page 181 to 183 which was not signed and

respondents request that same be struck out alternatively be disregarded. The respondents also request that the matters raised in paragraphs 19 to 21 of the answering affidavit to the application for costs be struck out as it is not relevant. It takes the issues no further. The respondents rely on the applicants' contentions regarding lack of authority and hearsay and state that the applicants have been vexatious and defamatory once more in their opposition in introducing information in the costs application which is not relevant to the question of costs.

[21] The applicants took issue with the discrepancy between the paragraphs in the application to strike out and the paragraphs noted in the heads of argument and argued that the application to strike out amounted to an abuse of the Courts process. Mr Nigrini argued that the paragraphs are relevant to the issue of costs and where a fact may be relevant it should not be struck as was held in *Levinsohn v Ferreira* 1948 (4) SA 299 (T) and *Foord v Lake and Others NNO* 1968 (4) SA 395 (W) . Further that where there is doubt as to the relevance that the matter ought not to be struck. *Harding and Parker v John Pierce* & Co 1919 OPD 113 at 122; *Richter v Town Council of Bloemfontein* 1920 OPD 172 ; *Golding v Torch Printing and Publishing* Co *(Pty) Ltd* 1948 (3) SA 1067 (C)

[22] Mr. Nigrini further argued on behalf of the applicants that the respondents' launching of a striking out application in the costs application served no purpose other than to harass the applicants and was vexatious. It would yield no tangible result which would advance the position of either of the parties in a meaningful manner and is counterproductive. Further it is a waste of the courts time and resources which could have been utilized to serve the interests of justice in meritorious matters which justifies the Courts intervention, attention and resources and a judgment.

[23] He argued further that the respondent incorrectly relied on Rule 23(2) to strike out the paragraphs as Rule 23(2) was applicable to pleadings whilst Rule 6(12) provided for instances such as the present where the respondent requests certain paragraphs to be struck out. The respondent

is required to show that such paragraphs are vexatious and cause prejudice. The issues raised have nothing to do with the application for costs. If the respondent did wish to take issue they ought to have dealt with it when the Rule 30 notice was issued. It is simply too late to address this issue in the costs application.

[24] Rule 6(15) Provides:

" The court may on application order struck on from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client."

[25] The urgent application was dealt with and this Court will not deal with that matter. The question of costs in the urgent matter was dealt with by Swartz AJ. The main application was withdrawn and so too the withdrawal of the affidavits wherein offending statements containing hearsay and annexures. In view of the withdrawal of the main application the matter is no longer to proceed before a Court. The applicants have clearly appreciated this consequence in withdrawing the application. The applicant is thus in the position of an unsuccessful litigant and is liable for costs. The applicants tendered costs in the Rule 30 notice. I am of the view that they pay costs in the main application as well as the present application. Regarding the striking out in the answering affidavit to the application for costs, the applicant may resist the application for costs and place before the Court facts relevant to persuade the court that the costs order is not justified. The applicants have attempted to do so in a lengthy affidavit but have not succeeded. I am still persuaded that the applicants should pay the costs of the main application. The application to strike out is in the courts discretion. I am not inclined to restrict the applicant in their effort to resist the costs application. In view hereof I am not persuaded to grant the respondents application to strike out. The respondent has however been successful on the costs application and consequently should succeed overall with regard to costs.

ORDER

[26] In view of the above the following order is issued:

1. Applicants are to pay the costs of the respondents in the application for condonation on an attorney and client scale to include the cost of senior counsel.

2. Applicants are to pay the costs of the respondents in the main application, the Rule 30 notice and the present application on the party and party scale to include the cost of senior counsel.

S C MIA
ACTING JUDGE OF THE HIGH COURT

Appearances:

On behalf of the applicants	:	Adv D.K. Nigrini
Instructed by	:	JJ Viljoen Attorneys
On behalf of the respondent	:	Adv M Basslian SC
Instructed by	:	David Feldman Attorneys
Date of hearing	:	19 April 2017
Date of judgment	:	23 June 2017