IN THE NORTH WEST HIGH COURT
MAHIKENG

CASE NO.: M19/16

In the matter between:

ENHANCED INNOVATIONS PROJECTS (PTY) LTD **Applicant**

and

QUANTIBUILD (PTY) LTD **Respondent**

DATE OF HEARING	**:**	**17 NOVEMBER 2016**
DATE OF JUDGMENT	**:**	**17 NOVEMBER 2016**
DATE REASONS REQUESTED	**:**	**7 DECEMBER 2016**
DATE REASONS WERE HANDED	**:**	**24 FEBRUARY 2017**
FOR THE APPLICANT	**:**	**Adv. Naidoo SC With Him Advocate Mmusi**
FOR THE RESPONDENT	**:**	**Adv. Swanepoel**

REASONS FOR JUDGMENT

KGOELE J:

[1] There is in this Court an application (**Main application**) pending wherein the applicant seeks payment in the sum of R3 603 874.88. The cause of action as relied upon in the founding affidavit, is a written contract in terms whereof the applicant was appointed as sub-contractor for the execution of work and supply of material in respect of the Thabazimbi Waste Treatment Works – Outfall Sewer.

[2] Respondent's opposition to the main application is based on three *Points in limine* and several defences to the merits of the application.

[3] To date, the applicant has launched several proceedings against the respondent in respect of the same or similar cause of action, which prompted the respondent to launch this interlocutory application in order to stay the proceedings in the main application, which application was argued before me on the 17th of November 2016 wherein the following order was granted:-

> *"THAT:1. The main proceedings (the main application brought by the Applicant against the Respondent under the aforementioned case number, wherein the Applicant seeks the relief set out in its notice of motion dated the 19th day of JANUARY 2016)("the main application") be stayed;*
>
> *1.1 That the order in paragraph 1 be and is hereby operative immediately pending finalisation of the payments to be made by the Applicant to the Respondent, of the Respondent's taxed bills of*

*costs(copies of which are attached to this notice of motion marked annexure "**NOM1,NOM2,NOM3 and NOM4"***

*1.2 The Applicant be and is hereby prohibited from enrolling the main application for hearing until such time that it has made payment in full to the Respondent of the Respondent's taxed bills of costs (annexure **"NOM1, NOM2,NOM3 and NOM4"** hereto).*

2. There be no order as to costs."

[4] On the 7th of December 2016 the Registrar received a letter requesting reasons for the said order and the reasons thereof follows hereunder. For the sake of convenience I will refer to the parties as they are cited in the main application. The background to this application is the same as the one in the matter that was heard by Chwaro AJ, and to avoid repetition I will not repeat it here.

[5] As stated above, the purpose of this interlocutory application is to obtain an order whereby a stay of proceedings of the main application be granted pending finalisation of payments to be made by the applicant to the respondent of the latter's taxed bills of costs.

[6] The relevant facts that supports the application of the respondent are that:-

6.1 During September 2015 the applicant (as plaintiff) instituted an action against the respondent (as defendant) out of this

Court under **Case No. 1414/2015**. In this action according to the respondent, the applicant claimed payment of the exact amount of R3 603 874.00 on the same cause of action which forms the subject matter of this application.

6.2 Thereafter the applicant launched an application for summary judgment under **Case No. 1414/2015** on or about 12th of October 2015.

6.3 The respondent (as defendant) delivered its answering affidavit under Case No. 1414/2015 together with an application for striking out certain vexatious, irrelevant and inadmissible portions of the applicant's affidavit in support of its application for summary judgment.

6.4 Pursuant thereto the applicant's instituted action under Case No. 1414/2015 was withdrawn in circumstances where the applicant failed to tender the respondent's costs of the action.

6.5 On or about 28th January 2016 the respondent (as defendant under Case No. 1414/2015) successfully obtained a costs order in that action against the applicant from this Court.

6.6 The applicant's aforementioned action was preceded by an urgent application launched by it during April 2015 against the respondent, wherein the applicant sought certain declaratory relief together with an order whereby it be declared that *"the applicant is entitled to damages that were quantified in the sum of R28 556 247.00 inclusive of 14% VAT".*

6.7 The urgent application was launched out of this Court under **Case M141/2015**.

6.8 On the 4th June 2015 this Court struck the applicant's urgent application from the roll with costs on the basis that same lacked urgency.

6.9 Thereafter the urgent application was again enrolled on the normal opposed Motion Court roll for hearing on 13 August 2015.

6.10 The application was argued and subsequently dismissed with costs by an order of this Court as per Chwaro AJ on 20 August 2015.

[7] The respondent in this interlocutory application contends that both the urgent application proceedings as well as the action instituted by the applicant previously against the respondent related to exactly the same subject matter which forms the cause of action in the current application.

[8] To date, so claimed the respondent, the applicant has refused and/or failed to make payment of any portion of the taxed bills of costs to the respondent. Notwithstanding warrants of execution in respect of the taxed cost having been issued, the Sheriff of the High Court at Thabazimbi was unable to execute the Warrant of Execution. This is evident from the Sheriff's return attached hereto marked annexure "VDW4". On the same breath the Sheriff of the High Court at Pretoria was similarly unable to execute the Warrant of Execution at the applicant's registered address. This

as well is evident from the Sheriff's return attached hereto marked annexure "VDW5".

[9] The respondent's Counsel submitted that as a general rule, this Court will not permit a party who has been unsuccessful in an action (or application) to harass the other party with further proceedings concerning the same cause of action until the first mentioned party has paid the costs of the unsuccessful litigations. The basis of the aforementioned rule is that, since the former judgment(s) is/are presumed to be correct, it is *prima facie* vexatious to re-open the matter without paying the costs awarded under the former judgment(s). The applicant's enrolment of the present application for hearing on 17 November 2016 is vexatious, particularly in circumstances where the applicant is aware of the existence of the aforementioned taxed bills of costs and also acutely aware that those bills of costs remain unpaid.

[10] In the circumstances the respondent's Counsel contended that this Court has a judicial discretion to order a stay of the main application proceedings pending finalisation of payments to be made by the applicant to the respondent in respect of the latter's taxed bills of costs. The respondent's attorneys of record has requested payment from the applicant of the costs as per annexures "VDW3.1" and "VDW3.2". It is prejudicial for the respondent to be expected to continue to litigate against the applicant in circumstances where the applicant has failed to make payment of the afore-mentioned taxed bills of costs. It is contended that, in the circumstances, the applicant should not be

allowed by this Court to continue with the present litigation (the main application proceedings) in circumstances where the taxed bills of costs remain unpaid.

[11] Based on the reasons advanced in the respondent's answering affidavit, in the main application, it is was contended that the respondent has excellent prospects of successfully opposing all of the reliefs sought by the applicant in the main application. It was submitted that this serves as a further reason why this Court should, in the circumstances, exercise its judicial discretion in favour of the granting of the relief sought by the respondent in this interlocutory application.

[12] The law that governs the stay of proceedings is settled and has been succinctly summarised in the case of **Smit v Venter (2080/2009) ZANWHC 8 (20 February 2014),** a case of this Division**, Case No. 2080/2009** by **Hendricks J** delivered on the **20 February 2014** in paragraphs **8,9,10.11** and **12** wherein it was stated:-

"**The Law**:-

[8] The principles which underlies the intervention of the courts where the cost of the previous proceedings have remained unpaid is the court's inherent right to prevent vexatious litigation. The basis of the stay of proceedings in such circumstances has also been stated to be prevention of abuse of the process of the court.

[9] The court has a discretion in deciding whether or not a stay of proceedings should be granted because of unpaid cost. Three criteria have been enunciated in this regard:-

[9.1] whether that party has been ordered to pay costs incurred then by reason of some abuse of the process of the court;

[9.2] whether that party has either deliberate or through carelessness occasioned unnecessary costs;

and

[9.3] whether that party has contumaciously refuse to pay the cost awarded against him/her or is efficaciously withholding payment.

See:-

- **Argus Printing & Publishing Co Ltd v Rutland 1953 (3) SA 446 (C); (PVT.) Ltd v Tromp's Engineering (PVT) Ltd**
- **Howff (PDT) Ltd v Prompts Engineering (Bpk) Ltd 1977 (2) SA 267 (RHODESIA);**
- **Rheeder v Sperns 1978 (1) SA 1041 (RHODESIA)**.

[10] There is no hard and fast rule as to when costs incurred in earlier proceedings in a case must be paid before the litigant will be allowed to proceed further. The matter is entirely in the discretion of the court. However, it is only in exceptional cases that the court will depart from the general rule requiring payment of costs before the continuation of litigation.

REQUISITES:-

[11] The requisites for a stay of proceedings on the basis of non-payment of cost previously incurred are as follows:-

- the further proceedings must cover substantially the same grounds as the former proceedings and must be brought veraciously;
- a further requisite for a stay of proceedings is a previous judgment in the applicant's favour. Moreover the costs must have been taxed and demand made for the payment coupled with proof of a wilful refusal by the debtor to make such payment.

[12] Although a court is always slow to place a clog upon a litigant's free access to the court, it may, depending on the circumstances, attached to an order for a postponement the condition that cost wasted by a party should be paid before such party be permitted to continue with the litigation".

[13] The Constitutional Court in the case of **Trevor B Giddey No, v J C Barnard and Partners 2007 (5) SA 525 (CC)** in **paragraph 17** and **18** thereof held that the argument that any material bar or impediment to a litigant's access to Court constitutes a limitation of the right protected under Section 34 is misconceived.

[14] The applicant does not deny that it was ordered to pay the costs relating to the urgent application and its application on merits, and further that they have been billed of such costs. As their first defence to the respondent's interlocutory application they contend that the urgent application and action mentioned above were for damages. The main application is according to the applicant completely different from the previous urgent application and the action and is based on completely different documents. It is the contention of the applicant that the difference was brought about by the Junior Counsel who was acting for the applicant in those

matters who misconceived the reliefs sought to be claimed and the basis thereof owing to no fault imputable to applicant.

[15] To substantiate their opposition the applicant submitted further that the present main application confronts the respondent with an unanswerable case that is why they do not want to proceed with it. According to the applicant the summary of the unanswerable case this time is to the effect that in accordance with the established practice between applicant and respondent, applicant rendered invoice numbers 31 and 32 to the respondent, which the contents thereof were incorporated into respondent's certificate numbers 5 and 6, which were in turn submitted to the municipality. Payment in full was received by respondent in respect of applicant's invoice numbers 31 and 32, and when this payment in full was received from the municipality by the respondent payment certificate numbers 5 and 6 were also included therein. Despite this and in breach of it's previous practice and obligation to pay respondent withholds payment for no valid reason.

[16] The applicant heavily relied on the comments by **Erasmus** which is found in his book **"Superior Court Practice** in page **D5-38 (b)** wherein it was stated as one of the requirements for staying of proceedings that:-

> "The issue between the parties must have been the same as, or closely connected to, the issue in the latter case. The Court will not order a stay of action if the causes of action are different, even if they arise from the same facts".

[17] This argument cannot suffice in the set of facts in the matter before this Court. Firstly, the applicant lost sight of the fact that although the urgent application mainly dealt with the damages suffered as a result of a breach of contract, an amount of R3 603 874-88 was also included there as delayed payment of tax invoices 5 and 6 which invoices are the same subject matter in the current application. Paragraph [4] in the judgment of Chwaro AJ which was not taken on appeal bears testimony of this as it says:-

> 4. "The dispute between the parties arose with the delay in payment of tax invoices number 5 and 6 which the applicant calculated to be a combined amount of R3 603 874.88. The applicant further claims contractual damages in the amount of R19 918 586,80 plus interest for what it terms the unilateral termination of the agreement by the respondent".

AND

> 13. In respect of the claim for an amount of R3 603 874.00 for work allegedly done, it is my considered view that such a claim is a matter of serious factual dispute borne out by the fact that the applicant has failed to attach certified payment certificates in respect of such claims, which would then have been assisted the applicant in its contention that the payment is owing, due and payable. The success of the said claim is further hampered, at least on the papers before me, by the possible counter-claim which the respondent intends launching in the amount in excess of the claimed amount and for material on-site allegedly bought by the respondent."

[18] In my view, both these paragraphs support the respondent's view that the claimed payment of the exact amount of R3 603 874.88

was made in the urgent application, and also on the same cause of action which forms the subject matter of this application. The applicants are now trying to bring this claim in a reformulated cause of action as they now claim that this amount is claimed **"in breach of it's previous practice and obligation to pay respondent withholds payment for no valid reason".** Unfortunately the reformulated cause of action does not take away the fact that the issues between the parties are the same, and most importantly, or closely connected to, the issue in the current application.

[19] In paragraph 7.4 the applicant alleges:-

> *"The main application is completely different from the previous urgent application and action and based on completely different documents".*

Unfortunately paragraph 7.5 already quoted above paragraph 17 of this judgment reveals the contrary, that, the same documents are the centre of the issues between the parties in the current application.

[20] The position of the applicant is exacerbated by the fact that they claim that the Junior Counsel acting for the applicant in those matters misconceived the relief to be claimed and the basis thereof. How he misconceived the reliefs sought and to what extent it is not explained. If this is the true state of affairs of what happened previously, then it will mean that the Court as per Chwaro AJ equally misconceived the papers that were before it. I am saying this because as already indicated above, it also referred

to and dealt with the delay in payment of tax invoices number 5 and 6 as a claim of R3 603 874.00 which amount is equal to the one in the current application and a further claim of contractual damages in the amount of R19 918 586.00 for what it termed a unilateral termination of the agreement by the respondent. Unfortunately all these tends to strengthen an element of vexatiousness on the part of the applicant. In my view, the causes of action in the previous proceedings are closely connected to the one in the current proceedings.

[21] A second defence relied by the applicant is that an important and indeed a decisive factor which militates against the respondent's application for a stay is that whilst being well aware of the Sheriff's return of non-service in respect of the bill of costs, the respondent caused the main application to be set down for hearing on the 17 November 2016 by agreement with the applicant. What is more disturbing is that the respondent agreed that one day will be sufficient for the hearing of the main application. The applicant further submitted that the respondent has continuously to date acquiesced in the prosecution of the main application to finality on 17 November 2016, and the incurring of the costs in this regard there came with its knowing consent. There can be no harassing of the respondent in these circumstances nor is it put to wasteful costs, save by means of respondent's own application to stay brought at the eleventh hour.

[22] The applicant's further contention is that it is clear that the first two bills of costs where available in February 2015, as was the Sheriff's return being Annexure VDW3.3 and 3.4 and VDW4.

Likewise the sheriff's return was available to the respondent in February and September 2016, as set out in VDW5. Despite the availability of all the ingredients for the respondent's current application to stay as early as February 2016, the respondent has elected to set down the application to stay today on the 17 November 2016 after service thereof yesterday afternoon as described above.

[23] According to the applicant, the respondent's application is a last minute grasp attempt to continue withholding applicant's monies and to run away from having applicant's unanswerable case dealt with by the Court. The circumstances of this case speak loudly against this Court exercising its discretion to order a stay of the main application especially because the applicant is not deliberately withholding payment.

[24] This defence by the applicant also does not have merit. The order that the respondent seek is not final in nature. It is temporary with the proviso that if costs are paid, the applicant may proceed with the main proceedings. There must be a balance of rights. The respondent already armed with costs in his favour, have the right not to be dragged to Court by a litigant who does not show any willingness to pay. On the other hand the applicant wants to proceed with its main application.

[25] According to the respondent their attorney of record has requested payment from the applicant of the costs as per annexure "VDW5". The applicant in their answering affidavit indicated that this letter did not reach them as their facsimile is not working. The applicant

had since the bills were taxed been acutely aware of them and had never indicated to the respondents their willingness to pay let alone their inability to pay as they contend after being served with this application. It is also quite clear that the respondent did not sit back without attempting to recover the said costs. The two attempted execution of writ of execution says a lot about the applicants. It seems as if the office of their attorney of record also has some problems because they were aware of the taxed bills but did nothing. Their office facsimile has been left for such a long period not in operation, that is, from the 4th September 2016 when the letter from the respondents was faxed till the 17th November 2016, the day when the attorney of record signed the confirmatory affidavit. This is quite a long time for an office operating with legal documents to operate without such resources. We are not even told whether there is another fax and/or whether the one the respondent used has been discarded totally or not. But above all of these, the fact that the respondents had to come to Court to wrinkle the costs out of the applicant when they had remain mum about them says a lot. The applicant does not even suggest that they had not been aware of this taxed bills. They say they did not pay because they were not paid the amount they claimed by the respondent. Unfortunately this stance lent credence to the submission by the respondent that the respondents are not *bona fide* in their defence that they are unable to pay.

[26] As a general rule, the Court will not permit a party who has been unsuccessful in an action (or application) to harass the other party with further proceedings concerning same cause of action until the first mentioned party has paid the cost of the unsuccessful

litigation. The basis for this rule is that, since the former judgment(s) is/are presumed to be correct, it is *prima-facie* vexatious to re-open the matter without paying the costs awarded under the former judgement(s).

[27] As a last attempt the applicant based its opposition on the defence that the applicant is unable to pay the costs in question for the reason that the applicant duly executed work and duly supplied material for such work for the respondent's benefit at great cost to applicant and now respondent continues to withhold payment in respect of such work and material even though the respondent has been paid by the municipality. It is the applicant's contention that applicant needed this money to generate new income and is now unable to generate new income nor pay respondent's costs because of applicant's non-payment. The applicant's Counsel submitted that there is indeed no *mala fides* or intention to act vexatiously on the part of applicant. The debt in the first place springs from the respondent's unlawful and unreasonable withholding of monies due to applicant hence the present inability to pay. These factors should weigh heavily in moving the Court's discretion to allow the applicant's application to be proceeded with.

[28] Unfortunately this inability to pay is a mere allegation from their answering affidavit as no supporting documents and/or bank statement have been provided, this bare allegation therefore cannot assist this Court to determine their *bona fides* in this regard especially because they have kept quiet for so long. They claim that the non-payment of these two invoices caused the inability to pay, whereas they lose sight of the fact that they alleged in the pending application that the other invoices were paid by the

respondents except these two. Sight should not be lost of the fact that the causes of action in the previous proceedings are closely connected to the one in the main proceedings, and this militates against their *bona-fides* and the fact that they are not deliberately withholding the payment of these costs.

[29] I am of the view that the order that the respondent is seeking is not aimed at continuing withholding applicant's monies and running away from having applicant's case dealt with by the Court as the applicant puts it. This is so because the order sought is not final in nature or effect. There is no reason to suggest that the respondent do not want to proceed with the matter because the matter as we speak is trial ready. As already indicated above in deciding on this matter, there must be a balance of the rights of litigants. It is in my view prejudicial for the respondent to be expected to continue to litigate against applicant in circumstances of this matter where the applicant has failed to make payment of the aforementioned taxed bills of costs, kept quiet of their reasons for doing that, and the warrants of execution cannot be effected.

[30] In as far as the issue which the applicant raised to the effect that their case in the main application is unanswerable with strong undisputed evidence, I will not dwell much in it in order to avoid pre-empting and judging the issues in the main application because it is not before me, suffice to say that the prospects of the respondent successfully opposing the relief sought therein cannot be ruled out simply because the respondent has managed to do that in all the action(s) and application(s) that preceded the main application. This serves as a further reason why I am inclined to

exercise my judicial discretion in favour of granting the relief sought by the respondent in this interlocutory application. It will not be unfair to stay the proceedings in the main application pending payment of the previous costs orders. On this note, I may pause here and say in passing that the respondent's Counsel also indicated that there are other costs that are also still outstanding in the main application ordered by Hendricks J which costs are not yet before this Court today in this application because they had not been taxed.

[31] In the circumstances, I came to a conclusion that the applicant should not be allowed by this Court to continue with the present litigation (the main application proceedings) in circumstances where the taxed bills of costs remain unpaid.

[32] The above serves as the reasons why the order on the 17th November 2016 was granted.

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A M KGOELE
JUDGE OF THE HIGH COURT

ATTORNEYS:

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