

SOUTH AFRICA / JUDGMENT

ILEX South Africa (Pty) Ltd v National Health Laboratory Service and Others (16167/2019) [2019] ZAGPJHC 352 (19 September 2019) [2019] ZAGPJHC 352

COURT

South Gauteng High Court, Johannesburg

BEFORE

FD Dippenaar

CASE / FILE NUMBER

16167/2019

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REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NUMBER:16167/2019

In

the matter between:

ILEX

SOUTH AFRICA (PTY)

LTD

Applicant

and

NATIONAL

HEALTH LABORATORY SERVICE

First Respondent

DR

KARMANI CHETTY

NO

Second Respondent

ABBOT

LABORATORIES SOUTH AFRICA (PTY) LIMITED

Third Respondent

ROCHE

DIAGNOSTICS (PTY)

LTD

Fourth Respondent

SIEMENS
HEALTHCARE (PTY) LIMITED
Fifth Respondent

JUDGMENT

DIPPENAAR J:

Introduction

and facts

- [1] This application pertains to the costs of an interlocutory application launched by the applicant in review proceedings under rule 53 for an order compelling the production of certain specified documents which it contended formed part of the full record of the proceedings. The application involves only the applicant and the first respondent. The remaining respondents did not participate in these proceedings.
- [2] The background facts are uncontentious. The judicial review proceedings were launched on 7 May 2019 in terms of which the applicant sought to review the first respondent's tender award and all contracts concluded between the applicant and the third and fourth respondents resulting from the impugned decision. It is common cause that the value of the tender award is substantial and exceeds a billion rand.
- [3] In terms of rule 53(1)(b) the first respondent was required to produce the record of the impugned decision on 29 May 2019. It failed to do so. Instead, the first respondent on 28 May 2019 informed the applicant and the other parties to the litigation that it had formed the view that certain of the documents forming part of the record may contain certain confidential information which should not be disclosed without first following a process to address the confidentiality and possible protection thereof against disclosure. It proposed a mechanism for dealing with any disputes which arose and sought an extension of the time period for the filing of the record.
- [4] On 29 May 2019, the applicant objected to the approach and adopted the stance that the record of the decision could never be confidential and that no legal privilege attached to any of the documents. It persisted in this stance in the current application.
- [5] A rule 30A notice was delivered on 31 May 2019 affording the first respondent 10 days to file the record, failing which an interlocutory application would be launched.
- [6] On 5 June 2019, the third respondent advised the first respondent that it did not assert any rights to confidentiality in respect of its bid submission. On 10 June 2019, the fourth respondent provided a similar response.

- [7] The first respondent filed a partial record on 7 June 2019, excluding certain documents of the third and fourth respondents pending their advices on the issue of confidentiality. On 10 June 2019, a supplementary record was filed.
- [8] During the period 13 to 18 June 2019, the applicant wrote four letters to the first respondent identifying a variety of additional documents to be produced.
- [9] The applicant launched the interlocutory application under rule 30A on 18 June 2019, compelling the first respondent to deliver 23 categories of documents which were to be produced as part of the record of the proceedings under rule 53(1)(b).
- [10] At a case management meeting held on 19 June 2019, this court issued certain directives[1] pertaining to dates for the delivery of objections to the disclosure of any documents which were to form part of the record.
- [11] In accordance with such directives, on 10 July 2019, the first respondent filed a further supplementary record, by which by date it contends the complete record had been filed. It is undisputed that the record presently runs to some 20 000 pages.
- [12] Objections were lodged by the third, fourth and fifth respondents on 3 July 2019, 26 June 2019 and 2 July 2019 respectively to the production of certain documents referred to in the correspondence. It is not necessary to deal with these documents in detail.
- [13] On 29 July 2019, a second case management meeting was held at the request of the applicant at which the parties agreed on certain timelines for the delivery of documents in this application. Thereafter, the applicant advised of its intention to amend its notice of motion. The applicant further advised that it intended to amend its notice of motion and file a supplementary founding affidavit in the main application by 5 August 2019, a date prior to the set hearing date for the present application.
- [14] On 30 July 2019, the applicant duly amended its notice of motion. Its amendment did not address the documents objected to by the third, fourth and fifth respondents. It abandoned all the substantive relief sought and limited its relief to seeking a costs order.
- [15] The letter accompanying the amendment advised:
- “Our client does not intend to pursue the substantial relief sought in its Notice of Motion in the Interlocutory application. Our client only intends to proceed to argue costs against the first respondent, in that it has been substantially successful in its relief, unless the first respondent tenders the applicant’s costs”.*
- [16] On 1 August 2019, the first respondent responded, proposing that the compelling application be abandoned. It further invited the applicant to engage it on what costs were being sought and the basis on which such costs were being claimed.

[17] The applicant persisted in its view that pursuant to the application to compel, the second respondent produced a second supplementary record, including the final minute containing the actual decision sought to be reviewed which demonstrates that it has been substantially

successful, thus justifying a costs order in its favour, based on the general principle that a successful party is generally entitled to its costs[2]. It maintains this stance in the present application.

[18] It has sought a punitive costs order against the first respondent on the basis that the first respondent's persistence in its refusal to tender the costs of the application was unreasonable.

[19] The first respondent on the other hand, contends that the application constitutes an abuse of process which justifies the granting of a punitive costs order against the applicant.

Defective nature of application

[20] The first respondent further challenged the short notice format in which the present application was launched as no time periods were set for the delivery of opposing papers. It did not however contend for any prejudice. This challenge lacks merit inasmuch as the present application is interlocutory and relates to matters incidental to the order granted during the litigation between the parties [3].

[21] The applicant properly brought the application on notice under rule 6(11)[4] and 30A(2). The provisions of rule 6(5)(e) relating to time periods within which further affidavits must be filed do not apply to interlocutory applications[5].

Discussion on costs

[22] Considering that the substantive relief originally sought in the application has become moot pursuant to the applicant's amendment of 30 July 2019, this court must make a proper allocation as to costs with the material at my disposal[6] and on broad general lines. In order to do so, it is necessary to consider the conduct of the parties in relation to the litigation.

[23] Whilst I agree with the applicant's proposition that the applicant is entitled to utilise all the remedies at its disposal[7], it must be considered whether its conduct was reasonable and resulted in unnecessary costs being incurred. It is trite that a party must pay such costs as have been unnecessarily incurred through his failure to take proper steps or through his taking wholly unnecessary steps [8].

[24] In issue is first; whether the applicant was reasonable in launching the present application and, second; whether it was reasonable in persisting with the application subsequent to amending its notice of motion which jettisoned the substantive relief sought.

- [25] When the first respondent first sought an extension of the period for the delivery of the record and raised the issue of confidentiality, the applicant adopted the stance that the record of the decision could never be confidential and that no legal privilege attached to any of the documents. It persisted in this stance in the current application.
- [26] It was undisputed that there are only a few companies in the market that can provide the services to which the tender award sought to be impugned in the main application relates. A party's right to claim confidentiality in respect of information which could be used by its competitors in appropriate circumstances is well recognised in our law.[9] So too, it is recognised that in appropriate circumstances confidentiality may be invoked in the context of rule 53 proceedings[10] .
- [27] In the circumstances it cannot be said, as the applicant alleges, that the first respondent was employing dilatory tactics or acted unreasonably in raising the confidentiality issue when it was advised by its legal representatives to do so. The inferences which the applicant seeks to draw supporting its contention that the confidentiality issue was raised to buy time are in my view, based on supposition rather than fact[11].
- [28] From the application papers and the correspondence between the parties it does not appear that the objections raised by the third, fourth and fifth respondents have been addressed.
- [29] In argument, the applicant did not persist in its original contention that the record of the proceedings was defective, which formed one of the pillars of its application. Instead, it contended that the completeness of the record was not an issue in the present application, but still remains an issue in the main application. The reason for such distinction was not explained.
- [30] From the stance adopted by the applicant in intending to raise the incomplete nature of the record in the main application, it is unclear to what extent these objections will feature and whether it will now be necessary for the court seized with the main application to determine issues of confidentiality. Insofar as the interlocutory application was aimed at alleviating the burden on the court seized with determining the review application, such aim can no longer be achieved.
- [31] The first respondent argued that the applicant's approach in contending that it was substantially successful as the record was filed pursuant to the compelling application, is misconceived. It is argued that the parties rather acted in line with the directives issued at the first case management meeting.
- [32] There is merit in this argument. It cannot simply be concluded that because the first respondent filed the record by 10 July 2019, the applicant was substantially successful in the compelling application. At the case management, the parties agreed to file the undisputed portion of the record and appropriate directives were issued.

[33] The applicant elected not to persist with any substantive relief in this application. Whilst on the one hand maintaining that the record is still incomplete and relying on this contention in its papers in this application, the applicant subsequently disavowed any reliance on this state of affairs in argument. It has not sought to resolve any of the objections raised by the third to fifth respondents and expressed the intention to deal with these issues in the main application.

[34] The applicant was obliged to consider the first respondent's proposal of 1 August 2019 pursuant to its amendment. As stated by the Supreme Court of Appeal in *John Walker Pools v Consolidated Aone Trade & Invest 6 (Pty) Ltd (in liquidation) and Another* [12]:

"As a general rule, litigants and their legal representatives are under a duty, where an appeal of proposed appeal becomes moot during the pendency of appeal proceedings, to contribute to the efficient use of judicial resources by making sensible proposals to that an appellate court's intervention is not needed. If a reasonable proposal by one of the litigants is rejected by the other, this would play an important part in the appropriate costs order".

[35] The same principle applies in the present instance. It is not only the efficient use of judicial resources which is at issue, but also the unnecessary incurral of costs.

[36] The first respondent's proposal of 1 August 2019 was stated as follows:

"Our client believes that it will be a greater expense to file an answering affidavit and solely argue costs on 17 September 2019 and is of the view that your client abandons the relief sought in its amended notice of motion and that no costs be pursued between the parties as a result of the interlocutory application. Should your client not be amenable to this suggestion then our client will proceed with seeking a punitive costs order against your client as a result of the interlocutory application, as your client's

conduct constitutes an abuse of the process of court".

[37] Whilst there is merit in the applicant's contention that it could not reasonably be expected of the applicant to simply abandon the costs of the interlocutory application, it was incumbent on the applicant to rationally and reasonably weigh up the implications of proceeding with the interlocutory application and the costs which would be incurred as a result, against the costs which had up to then been incurred in what was at the time, an unopposed application. The applicant further did not take up the first respondent's invitation to further engage it on the cost issue extended in its letter of 1 August 2019 and made no attempt to resolve the issue amicably. It was this conduct which in my view was unreasonable and which resulted in substantial additional costs being incurred.

- [38] Considering all the facts and for the reasons stated, I conclude in favour of the applicant that the applicant was entitled to utilise the remedies available to it and that it was not unreasonable in launching the compelling application, specifically considering that the issues surrounding confidentiality had not at the time been dealt with in any detail and the ambit and merit of such claims had not yet crystallised.
- [39] The subsequent events which transpired at the case management meetings required the applicant to reconsider its position in relation to the interlocutory application. I conclude that the applicant's persistence in the application was however unreasonable and resulted in unnecessary costs being incurred. It follows that the applicant must be held liable for these costs.
- [40] Both parties have sought punitive costs orders against the other. This court must try to achieve fairness between them. In my view the interests of justice would be best served if the first respondent be reimbursed for its litigation expenses so that it would be less out of pocket than it would if party and party costs were awarded[13].
- [41] In my view, it cannot be said that the first respondent acted unreasonably in relation to this application or in the course of the litigation relevant thereto. The first respondent attempted to avoid the substantial and unnecessary expense of formally opposing this application once the substantive relief was abandoned and made a reasonable proposal prior to doing so. Had this proposal been accepted, the costs could have been substantially curtailed. The award of a costs order on the scale as between attorney and client is thus justified in the circumstances.
- [42] I grant the following order:
- [1] The first respondent is directed to pay the applicant's costs in relation to the interlocutory application up to 30 July 2019.
- [2] The applicant is directed to pay the costs of the application incurred subsequent to 30 July 2019, including the costs of opposition and the hearing on 17 September 2019 on the scale as between attorney and client.

F DIPPENAAR

JUDGE OF THE HIGH COURT JOHANNESBURG

APPEARANCES

DATE OF HEARING

: 17 September 2019

DATE OF JUDGMENT

: 19 September 2019

APPLICANT'S COUNSEL

: Adv HC Bothma

Written submissions drafted by Adv A Mundell SC and Adv K Williams

APPLICANT'S ATTORNEYS

: Webber Wentzel

Mr I Gouws

FIRST RESPONDENT'S COUNSEL

: Adv S Tshikila

RESPONDENT'S ATTORNEYS

: Cliffe Dekker Hofmeyr Inc

Ms R Moodley

- [1] Objections to the production of documents were to be raised by 3 July 2019, documents to which no objections were raised were to be disclosed by 10 July 2019 and any remaining issues were to be dealt with in a case management meeting during the period 15-18 July 2019.
- [2] Ferreira v Levin NO and Others [1996] ZACC 27; 1996 (2) SA 621 (CC) para [3]
- [3] South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A) 549F; Muller v Paulsen 1977 (3) SA 206 (E) 208E
- [4] Yorkshire Insurance Co Ltd v Reuben 1967 (2) SA 263 (E)
- [5] Gisman Mining and Engineering Co (Pty) Ltd v LTA Earthworks (Pty) Ltd 1977 (4) SA 25 (W)
- [6] Gamlan Investments (Pty) Ltd v Trillion Cape (Pty) Ltd 1996 (3) SA 692 (C) 700 G-H, 701B-C
- [7] Relying on Gentiruco AF v Firestone Sa (Pty) Ltd 1972 (1) SA 667 (A) at 669A-B
- [8] Gamlan 701C-F
- [9] Bridon International GmbH v International Trade Administration Commission and Others 2013 (30 SA 197 (SCA); Democratic Alliance and Others v Acting National Director of Public prosecutions and Others 2012 (3) SA 486 (SCA) and the mechanisms structured to protect such confidentiality in Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another 1979 (2) SA 457 (W); crown Cork 7 Seal Co Inc and Another v Rheem South Africa (Pty) Ltd and Others 1980 (3) SA 1093 (W)
- [10] Helen Suzman Foundation v Judicial Service Commission 2018 (4) SA 1 (CC)

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- [11] Caswell v Powell Duffryn Associated Collieries Ltd [1939] 3 All ER 722 at 733 E, approved in Motor Vehicle Assurance Fund v Dubuzane 1984 (1) 700 AD at 706B-C. Also approved in AA Onderlinge Assuransie-Assosiasie Bpk v De Beer 1982 (2) SA 603 AD at 620-E-G
- [12] 2018 (4) SA 433 (SCA) para [10]
- [13] Swarthbooi and Others v Brink and Others 2006 (1) SA 203 (CC) 201A-D
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