

SOUTH AFRICA / JUDGMENT

Maninjwa v Velocity Finance (RF) Limited (5589/21) [2021] ZAGPPHC 666 (15 October 2021)

[2021] ZAGPPHC 666

COURT

North Gauteng High Court, Pretoria

BEFORE

Mthimunye

CASE / FILE NUMBER

5589/21

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED: NO

DATE

15/10.2021

CASE NO: 5589/21

In

the matter between:

SIVUYILE

ABEDNIGO MANINJWA

Applicant

AND

VELOCITY

FINANCE (RF) LIMITED

Respondent

JUDGMENT

Mthimunye AJ

- [1] The applicant herein (Sivuyile Abednigo Maninjwa) seeks the following orders against the respondent (Velocity Finance (RF) Limited):
- (i) An order directing the respondent to pay the applicant's taxed costs on an attorney and client scale in respect of the following:
 - (a) The applicant's exception brought under case number 31239/2020;
 - (b) The applicant's heads of argument in respect of the exception referred to above;
 - (c) The respondent's amendment of its particulars of claim filed under the said case number 31239/2020;
 - (d) The applicant's notice in terms of Rule 30 of the Uniform Rules of this court, issued under case number 31239/2020; and
 - (e) The respondent's withdrawal of action brought under case number 22471/2020.
 - (ii) An order staying the respondent's action brought under case number 31239/2020 pending payment of the applicant's taxed legal costs.
 - (iii) An order directing the respondent to pay the costs of this application on an attorney and client scale, alternatively if opposed, cost de bonis propriis against the respondent's legal representatives being Glover Kannieappan Inc on an attorney and client scale.
- [2] The respondent is a public company with registration number 2016/138581/06 and having its registered address as Freestone Office Park, 135 Patricia Road, Sandton, Gauteng. The respondent herein is a plaintiff in respect of two actions brought against the applicant, who then is a defendant in respect of those actions. In order to avoid confusion, I refer to the parties throughout this judgment as applicant and respondent.
- [3] It is necessary to go into some detail in respect of facts giving rise to this application. On 30 March 2017, the applicant entered into a credit agreement with Volkswagen Financial Services SA (Pty) Ltd (Hereinafter referred to as "VW") in terms of which the applicant was advanced an amount of R315 554.40 (Three Hundred and Fifteen Thousand, Five Hundred and Fifty-Four Rand Forty-Two cents) to purchase a vehicle described as a 2017 Volkswagen Polo Vivo GP 1.4 Trendline with engine number CLP262751 and chassis number AAVZZZ6SZHU013353. The applicant was to repay the loan in monthly instalments of R4 622.86 from May 2017.

- [4] The credit agreement was ceded to the respondent in a cession agreement entered into by the respondent and VW on 18 July 2017 in terms of which all VW's rights, title and interests were ceded to the respondent. This cession was acknowledged by the applicant. The applicant is said to have breached the credit agreement by failing to make full and punctual payments, which resulted in him being in arrears.
- [5] On 19th June 2020, the respondent issued summons against the applicant under case number 22471/2020 ("the first action") and withdrew it on 25th June 2020, but in withdrawing, the respondent failed to tender costs for such withdrawal. At the request and persistence of the applicant, the respondent finally tendered the costs for withdrawal on 14 December
2020. The applicant alleges that the respondent took a stance that it will pay the costs on finalisation of the action pending under case number 31239/2020 ("the second action") hence this application to stay the second action pending payment of all the costs sought herein.
- [6] As stated above, the respondent instituted subsequent action proceedings against the applicant under Case Number 31239/2020 on 10 July 2020 seeking cancellation of the agreement, return of the vehicle by the applicant to the respondent, leave to return to the court on the same papers, duly supplemented, to obtain judgment for damages once the vehicle is sold, and costs.
- [7] On 20 September 2020 the applicant delivered an exception in terms of Rule 23 to set aside in totality the respondent's particulars of claim on the basis that they failed to disclose a cause of action.
- [8] On 5th November 2020 the applicant delivered heads of argument in respect of the exception. The respondent had to deliver its heads on 20th November 2020 but failed to do so. The applicant sent a reminder for the respondent to file its heads but instead of doing so, on 30 November 2020 the respondent delivered a notice of intention to amend its particulars of claim and ignored the exception.
- [9] The applicant argues that the filing by the respondent of a notice of intention to amend its particulars of claim was not only irregular but a blatant abuse of the court's processes as no such notices should have been filed whilst an exception was pending. For this reason, the applicant seeks costs on a punitive scale against the respondent. The applicant argues that at best, the respondent should have asked the applicant for consent to amend prior to filing a notice but no such courtesy was afforded to the applicant by the respondent.
- [10] Further, the applicant avers that the purported amendment did not address all the causes of complaint set out in his exception and, despite the provisions of Rule 28 that a party seeking an amendment is liable for costs, the respondent tendered no such costs. The applicant's view hereof was that any prejudice occasioned by the respondent's disregard of court rules would be cured by a tender for costs.

- [11] Following an email alerting the respondent of its failure to tender costs arising from the proposed amendment, which email was ignored by the respondent, the applicant delivered a Rule 30 notice in respect of the respondent's notice of intention to amend.
- [12] On 15 December 2020 the respondent delivered a tender for costs to applicant wherein in it tendered 'wasted costs occasioned by the plaintiff's amendment to its particulars of claim, together with any wasted costs occasioned by the plaintiff's notice of intention to amend'. This was a second tender preceded by a tender for costs in the action that was withdrawn, dated 14th December 2020 as noted in paragraph 5 above.
- [13] On 17 December 2020 the respondent delivered its notice to oppose the applicant's Rule 30 notice. Believing that the tenders he received covered all the costs to which he is entitled to, including the exception and the rule 30 notice, the applicant decided not to proceed with the Rule 30 application.
- [14] The respondent subsequently amended its particulars of claim. The effect thereof, the applicant submits, was to render the exception irrelevant and to confuse any court that was going to deal with the matter because it would have meant the applicant was excepting to particulars of claim that were no longer before court.
- [15] In response, the applicant filed a plea incorporating a special plea. Instead of filing a replication, the respondent brought a Rule 32(1) application for summary judgment against the applicant, which move is tagged by the applicant as vexatious and frivolous.
- [16] The applicant avers that none of the respondent's claims can be brought under Rule 32(1) as the claim is not based on a liquid document; neither is it for a liquidated amount of money, delivery of specified movable property or for ejectment as envisaged by the Rule. The Rule 32(1) application is not before this court and is mentioned herein only for completeness of the context.
- [17] On 12 January 2021 the applicant served a notice of intention to tax a bill relating to the amendment and the exception. The respondent decided to oppose taxation on the basis that the bill is excessive and has been drafted on an attorney and client scale, which the applicant is, according the respondent, not entitled to.
- [18] The respondent then, through its attorneys of record, clarified that the tender for costs did not include costs in respect of the exception and the heads of argument for the exception but only those related to the notice of intention to amend and the amendment of its particulars of claim. It argues that certain items of the bill tagged to be related to the exception would have been incurred by the applicant in any event.
- [19] The applicant however contends that the respondent amended its particulars of claim because the applicant raised an exception, in other words, the exception triggered the amendment. By amending its particulars of claim, the respondent acknowledged that it's particulars of claim were defective and evidenced that the applicant's exception had merit.

- [20] The applicant submits that although the respondent tendered costs in respect of the withdrawn action and 'wasted costs' occasioned by the amendment, such tenders do not cover all the costs incurred by the applicant as a defendant, and the respondent has refused to make tenders that cover all the costs that the applicant is lawfully entitled to. He avers, correctly so, that even with the tenders that have been made, he is required by this Court's practice directive to bring an application for a court cost order prior to the matter being referred to the Taxing Master for taxing.
- [21] The applicant also raised an issue with the respondent's answering affidavit that it was deposed to by Ms Mandy Gillian of Wesbank, who had no authority to depose to an affidavit on behalf of the respondent. Consequently, the applicant argues that the answering affidavit is not properly before court and should be disregarded and the application be dealt with as unopposed.
- [22] The respondent admits that its particulars of claim did not contain all required averments to sustain a cause of action. It admits that it did not oppose the exception as it was advised by its attorneys of record to rather amend its particulars of claim in order to plead the cession instead. This according to the respondent, would also ensure that the matter is ready for summary judgment or trial proceedings. It contends that there was no bar against it to amend its particulars of claim either before or after the exception. It further admits that it instituted and withdrew an action under case number 22471/2020 against the applicant.
- [23] The respondent also does not dispute that the applicant is entitled to some costs, subject to taxation. It contends that the issues raised by the applicant herein should be decided by the Taxing Master on taxation and should not have been brought before court. It denies that a cost order is a prerequisite to taxation and submits that the seeking of a punitive cost order and staying of proceedings by the applicant is an abuse of this honourable court's processes.
- [24] The respondent further argues that in so far as the Rule 30 costs form part of the wasted costs occasioned by its amendment, these should be part of the bill of costs and if not the applicant may attempt to recover his costs after the Rule 30 application has been determined or the litigation between the parties finalised. It contends it is not the duty of this court to tax costs in respect of the Rule 30 notice.
- [25] It argues that the Rule 30 notice had no merit and it was never pursued by the applicant. The applicant explained, which explanation I accept, that it abandoned the Rule 30 Notice because it believed that the costs tendered by the respondent were inclusive thereof.
- [26] This court is ceased with a burden to determine firstly, whether or not a tender for costs is tantamount to a court order and can as such be presented to the Taxing Master for taxation as alleged by the respondent. Secondly, whether or not the applicant is entitled to all the costs claimed in terms of its notice of motion and on which scale and lastly, whether the respondent's answering affidavit, deposed to by Ms Gillian is properly before court.

- [27] There is no dispute of facts in this matter. In fact, as articulated in para 22 above, the respondent has admitted to the facts raised by the applicant in its founding affidavit. The dispute is about the applicant's entitlement to certain costs and the scale thereof.
- [28] In terms of the principle established in *Plascon Evans Paints Ltd v Van Riebeek Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A), a court must grant the order in favour of the applicant when the facts pleaded and admitted by the applicant and those admitted and pleaded by the respondent justify the order. In establishing this principle, Corbett JA stated "It is correct that, where in proceedings on notice of motion disputes of fact have arising on affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with facts alleged by the respondent justify, such an order. In certain instances, the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact". The question that this court must then answer is whether or not the facts, as pleaded by the applicant and those admitted and pleaded by the respondent justify the order in favour of the applicant.

[29]

] Notwithstanding the order in which the issues before this court have

been tabulated in para 26 above, I deem it necessary to first dispose of the issue relating to the respondent's answering affidavit.

- [30] The respondent's answering affidavit was deposed to by Ms Mandy Gillian from Wesbank who avers that Wesbank administers the collections and administration for and on behalf of the respondent, and that falls within her personal duties and responsibilities. For that reason, she avers she is duly authorised to depose to this affidavit and to represent the respondent in this application. The applicant argues that Ms Gillian has no authority to depose to affidavits in this matter and as such her affidavit should be disregarded and the application be regarded as unopposed.
- [31] It is trite that in motion proceedings, a deponent to an affidavit need not be authorised by a party concerned to depose to an affidavit. In this regard the respondent has correctly relied on *Eskom v Soweto City Council* 1992 (2) SA 703 (W), which decision was referred to with approval by the Supreme Court of Appeal in *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) 624I to 625A. In terms of the Eskom case, the remedy of a respondent who wishes to challenge the authority of a person purporting to act for another is encapsulated in Rule 7(1) of the Uniform Rules of Court. The applicant chose not to go this route but raise an issue in his replying affidavit.

- [32] In the Ganes case, it was established that a person signing an affidavit on behalf of a party need not be authorised to do so, all that is required is the requisite knowledge of the facts deposed to in the said affidavit. It is the institution of the proceedings and the prosecution thereof that must be authorised. It follows therefore that the applicant's contention about Ms Gillian's authority cannot stand. Her affidavit as such is admitted as an opposing affidavit and has been duly considered by this court.
- [33] I now turn to deal with whether or not a tender for costs has the effect of a court order and can as such be presented to the Taxing Master for taxation as averred by the Respondent. In this regard, the respondent relied on Rule 41(1)(b) which provides that:
- "a consent to pay costs referred to in paragraph (a) shall have the effect of an order of court for such costs".*
- [34] The applicant in contention, asserts that the Taxing Master cannot decide the scale and which items to which the applicant is entitled to but only the amount. The cause of the dispute herein is the scale to which the applicant is entitled to and the line items thereof. The respondent tendered costs, which tender was not clear to the applicant. The applicant sought clarity and when such did not come forth, he served a bill drawn on his preferred scale with items to which he believes he is entitled. This was rejected and opposed by the respondent. Clearly this tender, even after clarification of what it represents is not accepted by the applicant hence the applicant has launched this application for a clear order.
- [35] The applicant also referred to a Practice Directive issued by the Judge President of the Gauteng Division of the High Court on 17 February 2021. Paragraph 3 thereof reads: "Under no circumstances may a Taxing Master tax costs in matters wherein the claim was settled inter partes without a Court Order OR a valid Discharge Document or an equivalent document confirming settlement of the claim(s).
- [36] It appears that the respondent confuses the determination of cost entitlement granted in terms of an order of court (which would stipulate the scale to which a winning party is entitled to) and taxation. I formed this view from the respondent's contention in its answering affidavit that it is not this court's duty to tax costs. I do not view what is before this court as taxation or a request for the court to tabulate line items as argued by the respondent but rather the determination of the scale of such costs which will in turn determine the line items to which the applicant is entitled. The core of the dispute herein is the scale that the applicant has drawn his bill on and the line items to which he avers is entitled to. That, I agree with the applicant, cannot be determined by the Taxing Master, it is determined by the court that grants the order.
- [37] In *Scott v Nel, NO & Another* 1963(2)SA 384 (E), the Taxing Master refused to tax on the basis, inter alia, that it was premature to tax a bill of costs where there is no judgment or order of court entitling him to do so.

[38] I now turn to deal with principles applicable to an exception. Rule 23 of the Uniform Rules of this court reads as follows:

“(1) Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of paragraph (f) of subrule (5) of rule (6): ...

(2)

(3)

(4) Whenever any exception is taken to any pleading or an application to strike out is made, no plea, or other pleading over shall be necessary...”

[39] Rule (6)(5)(f) referred to in Rule 23 (1) reads: “Where no answering affidavit, or notice in terms of sub-paragraph (iii) of paragraph (d) is delivered within the period referred to in sub-paragraph (ii) of paragraph (d) the applicant may within five days of the expiry thereof apply to the registrar to allocate a date for the hearing of the application....”

[40] The respondent argues that there was no bar against it to amend its particulars of claim either before or after the exception. The question that arises is whether or not a party can ignore a process instituted in terms of the Rules of court simply because there is no bar to moving to the next step. It is trite that the Rules of the court are meant to ensure order in courts. The suggestion by the respondent that it is entitled by Rule 28(1) to amend any pleading and needed no consent of the applicant or court order to do so even when such pleading has been excepted to is concerning. It is very clear that this amendment was provoked by the exception. The respondent had an exception to answer to before court, the court would then most probably order the respondent to amend, which is a competent order in exceptions. For the respondent to ignore the applicant's exception and proceed to file a notice to amend makes the respondent's averment of litigating in good faith questionable.

[41] The respondent argues that there is no rule that an amendment may not be pursued whilst the pleading that stands to be amended is subject to an exception thus suggesting that a process of this court can simply be ignored by a litigant. Not only that but the litigant against which the rule has been invoked, can continue its litigation by simply invoking another rule that is in his/her favour. It almost suggests that a litigant can pick and choose which Rule it will comply with and which one it will ignore even if the latter is invoked before court. I cannot imagine a clearer disregard and disrespect of the court rules by a litigant.

[42] In the High Court Motion Procedure: A Practice Guide – MM Joffe & Others, Issue 5, 1-34, Joffe asserts that an exception is a pleading and is subject to the rules of pleadings. A litigant cannot therefore ignore an exception brought on notice by just proceeding to the next step or correcting the object of the exception. An exception is certainly not an ordinary pleading that comes in the normal course of litigation, it must be provoked or triggered. In this case, it is clear that the exception was brought about by defective particulars of claim,

and by its own admission, the respondent chose to rather not oppose the exception but correct the defect. The applicant is then correct in its assertion that the amendment was triggered by the exception. If we accept that an exception is a pleading, which pleading was in fact necessitated by the respondent's defective particular of claim, a fact accepted by the respondent in its subsequent conduct to amend it, it escapes this court why the respondent holds a view that the applicant is not entitled to all of his costs in respect thereof.

- [43] I turn now to deal with the law of costs. The applicant has asked this court to grant the costs articulated in his notice of motion on an attorney and client scale. In respect of the costs of this application, he has requested costs de bonis propriis against the respondent's legal representatives on an attorney a client scale, in the event that this application is opposed, which it is.
- [44] The approach to costs rests on two principles, firstly that unless expressly otherwise enacted, the granting or not of costs falls within the discretion of the court. I have alluded to this in my discussion of the role of the court vis-à-vis that of the Taxing Master. The second principle is that generally, costs follow the results, i.e. they are awarded in favour of the successful litigant.
- [45] An attorney and client scale is a punitive scale reserved for matters where there has been conduct on the part of a litigant that the court views so serious that it warrants a punitive scale. It is meant to punish a litigant where there has been conduct which is unreasonable and objectionable that it demonstrates a total disregard of the court processes and its authority by a litigant. In *Plastic Converters Association of SA on behalf of Members v National Union of Metalworkers of SA* [2016] ZALAC; (2016) 37 ILJ 2815 (LAC) at para 46, the Labour Appeal Court articulated that:
- “the scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensive manner. Such award is exceptional and is intended to be very punitive and indicated of extreme opprobrium”.* This view was affirmed in the *Public Protector v South African Reserve Bank* [2019] ZACC; (2019) (6) SA 253 at Para 8 where Chief Justice Mogoeng Mogoeng, as he then was, noted in a minority judgment that “costs on an attorney and client scale are to be awarded where there is fraudulent, dishonest, vexatious conduct and conduct that amounts to an abuse of court process”.
- [46] Another objective of a punitive scale is to ensure that the successful litigant is not out of pocket in respect of expenses caused to him or her by the losing party's approach to litigation. In *Nel v Waterberg Landbouwers Kooperatiewe Vereeniging* (1949) AD 597 at 608 this principle was expressed as follows:

‘The true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special

considerations arising wither from the circumstances which give rise to the action from the conduct of the losing party, the court, in a particular case considers it just, by means of such an order, to ensure more effectually that it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expenses caused to him by the litigation.

Theoretically, a party and party bill taxed in accordance with the tariff will be reasonably sufficient for the purpose. But in fact, a party may have incurred expense which is reasonably necessary but is not chargeable in the party and party bill...Therefore, in a particular case the Court will try to ensure, as far as it can, that the successful party is recouped. I say 'as far as it can' because there may be a considerable difference between the amount of the attorney and client bill which a successful party is bound to pay to his own attorney and the amount of an attorney and client bill which has been taxed against the losing party...'

- [47] It is trite that and attorney and client scale entitles the party in favour of which a cost order has been granted, to costs relating to items which otherwise cannot be included in a party and party bill. It is also trite that no party can litigate in a court of law risk free.
- [48] As evident in the preceding paragraphs, courts have used varying strong words to describe the conduct of a litigant against whom a punitive scale is justified. The question this court must answer then is whether or not in its view, the conduct of the respondent, throughout or at any point during this litigation, in respect of either the first or the second action, justifies a punitive scale. To do so, I will now consider the actions of the respondent in relation to each step for which the applicant seeks a punitive cost order.
- [49] I deem it necessary to start with the applicant's exception brought under case number 31239/2020. As explained above, an exception is a plea allowable by the Rules of this court. In this case, it was brought about by the failure of the respondent's particulars of claim to disclose a cause of action. There may be numerous reasons why the drafter of particulars of claim would fall into that trap. Rule 23 provides a recourse for the defendant on the receiving end of such particulars of claim. In this case, the applicant took shelter in that Rule. Undoubtedly, each case must be judged on its own merits but in casu, to suggest that in serving the applicant particulars of claim that do not disclose a cause of action and thus triggering an exception, the respondent was fraudulent, dishonest and vexatious or even disrespectful and abusing the court's process would be unjust. For this reason, much as the court agrees that the applicant is entitled to his costs in respect of the exception and heads of argument therein, I do not find anything justifying a punitive scale.
- [50] I now move to the costs relating to the amendment of the particulars of claim by the respondent and the applicant's Rule 30 notice. Instead of answering the exception and following the court rules, the respondent decided to catapult the process and go straight into an amendment. Completely ignoring, not only the applicant but a process of this court. The respondent justifies this conduct on the basis that it was not barred from doing so. In my view, ignoring a step taken by a litigant in terms of the Court Rules is not only antagonistic

and arrogant but a complete disregard and disrespect for the court and its processes. In this regard, I agree with the applicant that the respondent ought to bear these costs on an attorney and client scale. Similarly, in respect of the applicant's Rule 30 notice as same was triggered by the respondent's attitude towards the steps taken by the applicant to get to this point.

[51] I now consider the costs relating to the withdrawn action. The respondent first instituted action against the applicant under case number 22471/2020 and withdrew it after 5 days. Its explanation is that it wanted to give its clients more time to pay up their arrears as it understood the pressures brought about by the Covid-19 pandemic. This court was not favoured with a copy of the withdrawal notice however, from the averments in the papers before court, it is clear that a tender for costs was not included in the notice of withdrawal and not so soon thereafter. It is only after the applicant filed a Rule 30 notice in respect of the second action dated 11 December 2020 that the respondent filed a tender for costs in the withdrawn action dated 14 December 2020. This brings to question the respondent's assertion that it has not litigated in bad faith against the applicant. Be that as it may, not including a tender for costs in the withdrawal notice and eventually tendering same later cannot justify such costs being awarded on a punitive scale. As such I do not agree with the applicant that these costs must be borne by the respondent on a punitive scale.

[52] I must now deal with cost de bonis propriis as prayed for by the applicant against the respondent's legal representatives. In SA Liquor Traders Association and others v Chairperson, Gauteng Liquor Board and others 2009 (1)SA 565 (CC) at para 54, the Constitutional Court held that"

An order of costs de bonis propriis is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the court's displeasure. An attorney is an officer of the court and owes a court an appropriate level of professionalism and courtesy".

[53] In Indwe Risk Services (Pty) Ltd v Van Zyl (2010) 31 ILJ 956 (LC), at paragraph 39, Judge Basson held that:

"...an order for cost de bonis propriis is only awarded in exceptional cases and usually where the court is of the view that the representative of a litigant has acted in a manner which constitutes a material departure of the responsibilities of his office. Such an order shall not be made where the legal representative has acted bona fide or where the representative merely made an error of judgment. However, where the court is of the view that there is a want of bona fides or where the representative had acted negligently or even unreasonably, the court will consider awarding costs against the representative..."

[54] In this case, the applicant bases his request for cost de bonis propriis on whether or not the respondent opposes this application. Assuming that such advice would have been given by the respondent's legal representation and to punish them for so advising, they must be mulct with cost de bonis propriis. I am guided by S A Traders Association and Others case as well as the Indwe Risk Services cases cited above in finding that such is not warranted.

[55] As I conclude, I must now deal with the stay of proceedings as prayed for by the applicant. The discretion whether or not the grant a stay in proceedings pending payment of costs rest entirely with the court. In *Smit v Venter* (2080/2009) [2014] SANWHC 8 at para 9:

"The court has a discretion in deciding whether or not a stay of proceedings should be granted because of unpaid costs. Three criteria

have been enunciated in this regard:

1. whether that party has been ordered to pay costs incurred then by reason of some abuse of the process of the court;
2. whether that party has either deliberate or through carelessness occasioned unnecessary costs; and
3. whether that party has contumaciously refuse to pay the cost awarded against him / her or is efficaciously withholding payment"

[56] In casu, much as the respondent disputes the scale and certain items, it is clear from the progression of the matter that these costs, have been occasioned by the manner in which the respondent has handled the litigation between the parties. I found nothing to suggest that all three criteria must be simultaneously met and I am guided by the court's inherent discretion. As such I have no hesitation in granting a stay of proceedings pending payment of taxed legal costs as prayed for by the applicant.

Consequently, I make the following order:

1. The respondent is ordered to pay the applicant's taxed costs as follows:
 - 1.1. The costs relating to the applicant's exception which was brought under case number 31239/2020 on a party and party scale;
 - 1.2. The costs relating to the applicant's heads of argument in respect of the exception brought under case number 31239/2020 on a party and party scale;
 - 1.3. The costs occasioned by the respondent's amendment of its particulars of claim under case number 31239/2020 on an attorney and client scale;
 - 1.4. The costs occasioned by the applicant's Rule 30 notice, issued under case number 31239/2020 on an attorney and client scale.

- 1.5. The costs occasioned by the withdrawal of the respondent's action brought under case number 22471/2020 on a party and party scale.
2. The respondent's action brought under case number 31239/2020 is stayed pending payment by the respondent of the applicant's taxed costs in terms of this order.
3. The respondent is ordered to pay costs of this application on a party and party scale.

Mthimunye DP

Acting Judge of the High Court

Gauteng Division

Appearances:

For the Applicant : Mr Pumzo Mbana

Instructed by: S A Maninjwa Attorneys

For the Respondent: Mr B Van der Merwe

Instructed by:

Glover Kannieappan Inc

Date of Hearing : 02 August 2021

Date of Judgment : 15 October 2021

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