

SOUTH AFRICA / JUDGMENT

Mofokeng and Another v Ridge Body Corporate and Others (4685/2023) [2024] ZAFSHC 323 (17 October 2024) [2024] ZAFSHC 323

COURT

Free State High Court, Bloemfontein

BEFORE

Chesiwe

CASE / FILE NUMBER

4685/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Reportable

/ Not reportable

Case

no: 4685/2023

In

the matter between

THABO

MOSES MOFOKENG

1ST

PLAINTIFF

MABATHO

MOFOKENG

2ND

PLAINTIFF

and

THE

RIDGE BODY CORPORATE

1ST

DEFENDANT

THE

TRUSTEES OF THE RIDGE BODY

CORPORATE

2ND

DEFENDANT

THE

NATIONAL REAL ESTATE (PTY) LTD

3RD

DEFENDANT

Neutral

citation: Thabo Moses Mofokeng and Another v The Ridge Body Corporate and Others

Coram: Chesiwe J

Heard: 22 August 2024

Delivered: This judgment was handed down in open court and electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be 13h00 on 17 October 2024.

Summary: Application in terms of Rule 41(1)(c) of the Uniform Rules of Court – Costs order – Question of Applicants' entitlement to costs in terms of Rule 41(1)(c) for not having consented to the notice of removal by the Respondents.

ORDER

1.

The Respondents are to pay the costs occasioned by the subsequent notice of removal of the exception dated 24 May 2024.

2.

The Respondents are to pay such costs jointly and severally, the one paying the other to be absolved.

3.

Costs are to be paid on a party and party scale A.

JUDGMENT

Chesiwe J

[1] The Applicants (the Plaintiffs in the main action) instituted an application against the Respondents (the Defendants in the main action) in terms of which the Applicants seek the Respondents to pay the costs of an action that the Respondents removed from the roll without Applicants' consent and neither tendering costs. This is in terms of Rule 41(1)(c) of the Uniform Rules of Court. The application is opposed.

- [2] There are several applications between the parties. For hearing on 22 August 2024 was Rule 41(1)(c) application. This judgment will therefore only deal with an application in terms of the abovementioned Rule.

Background

- [3] The Applicants instituted a claim for payment of R630 000,00 against the Respondents on 6 September 2024. The Respondent took exception to the Applicants' particulars of claim. The Court granted an order on 1 March 2024 and upheld the exception; granted the Applicants leave to amend their particulars of claim within 21 days. The order was granted with costs in favor of the Applicants.
- [4] The Respondents lodged a common law application to dismiss the Applicants' claim and this was set down for 24 May 2024. On 18 April 2024, the Applicants served and filed a Rule 30(2) (b) on the Respondents. On 24 April 2024, the Respondents removed the common law application by filing a notice of removal – dismissal of claim[1]. The notice did not tender costs on 16 May 2024, the Applicants filed a notice of opposition to the dismissal with a notice of counter-claim.
- [5] For determination by this Court, is whether the Applicants are entitled to costs in terms of Rule 41(1)(c) for not having consented to the notice of removal by the Respondents.
- [6] Counsel on behalf of the Applicants, submitted in oral argument that the Respondents removed the matter from the roll and tendered no costs and that the removal was defective in terms of Rule 41(1)(c) and Rule 6 of the Free State Division. Counsel further submitted that the Respondents also removed from the roll Rule 30 application and tendered no costs. That the citation of the Applicants' and the Respondents was charged with no explanation or reason from the Respondents[2] and that the Applicants are entitled to costs in terms of the applicable Rule 41(1)(c) of the Uniform Rules of Court.
- [7] Counsel on behalf of the Respondents, in oral argument, submitted that the Applicants did not amend their particulars of claim in terms of the Court Order granted on 1 March 2024. Subsequent to the failure of the Applicants not amending their particulars of claim, the Respondents proceeded with the application for the removal of the matter from the roll. That the matter was removed in terms of Rule 30. Counsel submitted that the matter was removed from the roll and not withdrawn, resulting in the matter still alive to proceed. That to remove the matter from the roll is different to withdrawing it from the roll. Counsel submitted that the application in terms of Rule 41(1)(c) is flawed and ought to be dismissed with costs on a party and party scale.
- [8] Both Counsel made reference to RVRN Crushing (Pty) Ltd v GDF Incorporated Consultants (Pty) Ltd. [3]

[9] Counsel on behalf of the Respondents raised an issue that Rule 41(1)(c) refers to withdrawal of the matter and not a removal. Thus, Rule 41(1)(c) is not applicable in this application. Counsel for the Applicants submitted that, be it a withdrawal or removal, it is just a matter of interpretation and has the same meaning when it comes to the issue of costs.

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

“(a) a person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the Court, withdraw such proceedings, in any of which event he shall deliver a notice of withdrawal any may embody in such notice a consent to pay costs and taxing master shall tax such costs on the request of the other party;

(b)...

(c) if no such consent to pay costs is embodied in the notice of withdrawal, the other party may apply to Court on notice for an order of costs.”

[11] Further that, settlement of trial or withdrawal from the roll as per the Free State High Court directives state as follows: [4]

“6.1 A case may be withdrawn from the roll of cases for trial on such conditions as may be agreed upon between the parties, by addressing a notice in writing, signed by all the parties or their attorneys, to the registrar.

6.2 Subject to the provisions of subrule (1), a case may be withdrawn from the roll only with the consent of the court and on such terms as to the court may seem just.

6.3 Whenever a case is settled out of court, or the parties agree to postpone it, the attorney for the party who placed the case on the roll shall forthwith notify the registrar of such fact and shall file, as soon as possible thereafter, a notice of withdrawal or postponement.

6.4 Where an order by agreement is sought in a matter on the roll of cases for trial for which no judge has yet been assigned, such matter shall be placed before the duty judge who shall dispose of it.”

[12] In *Germishuys v Douglas Besproeiingsraad* [5], the Court said the following:

“Where a litigant withdraws an action or in effect withdraws it, very sound reasons 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 of plaintiff's or applicant's institution of proceedings.”

[13] Firstly, the issue of withdrawal or removal has to be addressed. Oxford dictionary [6] defines removal as the action of taking a thing off or away. And defines withdrawal as to draw back or removal of a thing.

[14] I am of the view that either word stated above will have same effect as a matter would not be proceeding thereby give the words their ordinary meaning and applying the ordinary rules of grammar. As Counsel on behalf of the Respondents stated in the written heads of argument, in terms of Rule 41(1), the operative word is ‘withdrawal’ and the Respondents merely removed the exception from the roll and did not in fact, withdraw it and this is the basic difficulty with which this application bears.

[15] In *Chetty v Hart* [7], the Court reiterated the approach to statutory interpretation as follows:

“It is helpful to reiterate that the method of attributing meaning to the words used in legislation involves, as a point of departure,

examining the language of the provision at issue, the language and design of the statute as a whole and its statutory purpose. So when the lawmaker uses particular words to achieve its purpose they must be given effect. In so doing a court will apply ordinary rules of grammar and syntax. It is not permissible to ignore or distort the meaning of the words to achieve its purpose. For in so doing a court will be substituting its own words for those of Parliament. But if the words used are reasonably capable of bearing more than one meaning, the consequences of the divergent interpretations must be examined so that a meaning that is likely to further rather than hinder its purpose is adopted. In this regard a meaning that is more sensible and businesslike is to be preferred over one that has a contrary effect.”

[16] The word withdrawn as stated in Rule 41(1) is not specifically defined. It follows that the interpretation for a removal, would have the same effect.

[17] It is noted that the Applicants had called upon the Respondents in terms of Rule 30(2)(b), to remove the cause of complaint by withdrawing the exception to which the Respondent obliged. [8] However, to the extent that the enrolment of the exception dated 24 May 2024 constitutes and irregular step or not and the removal of the matter

with a perceived consent, quite plainly the Respondents ought to have filed a notice of withdrawal. [9]

[18] Moreover, I am of the considered view that the Applicants had every right to oppose the exception and with the basic principle of Rule 41(1) being applicable in this case.

[19] As Counsel on behalf of the Respondents stated in the written heads of argument, in terms of Rule 41(1), the operative word is withdrawn and the Respondents merely removed the exception from the roll and did not in fact withdraw it.

Costs

[20] In any application that involves costs, the general rule applies that the successful party be awarded costs, bearing in mind that costs are at the discretion of the Court.

[21] However, in terms of Rule 41(1)(c), when a litigant institutes action and then withdraws it for whatever reason, generally that litigant has to tender costs and this expectation is embodied in Rule 41.

[22] In RVRN Crushing (Pty) Ltd Supra, the Court at paragraph 8 stated as follows:

“[8] Where a litigant institutes and then withdraws an application that they come to recognise has no merit, the expectation is that, generally, that litigant will tender the costs the other parties to the application ran up in opposing it. That expectation is embodied in Rule 41, which provides for the unilateral withdrawal of any proceeding prior to set down with an appropriate tender for costs. If no costs are tendered, they may be applied for on notice.”

[23] The Respondents filed the notice of removal – dismissal of claim on 25 April 2024 with no tender for costs nor any consent from the Applicants.[10] The Respondents followed up the notice of removal with correspondence dated 20 May 2024 [11], where the following was stated:

“2. In order to avoid any confusion, we attach a copy of the notice of removal – dismissal of claim hereto marked “A”.

3. We point out that this document was delivered on 25 April 2024, and the matter was, as a fact, removed from the roll.”

[24] The Applicants brought it to the attention of the Respondents in a correspondence dated 21 May 2024, Annexure “E” on page 59 that:

“3. Furthermore, our main contention is that, your purported notice of removal does not embody a consent to pay costs.”

[25] Rule 41(1)(c) is clear in that, if no consent was obtained from the other party, the litigant filing the withdrawal did not tender costs, the aggrieved litigant may apply to court on notice for an order for costs, which was done by the Applicants.

[26] In terms of Rule 41(1)(a), the general principle is that the party withdrawing, is liable to pay (my emphasis) if the proceeding. In terms of Rule 41(1)(a), a withdrawal cannot occur unilaterally once a matter has been set down.

[12]

[27] In my view, the Respondents unilaterally served a notice of removal of the matter on the Applicants, without tendering costs as provided for by Rule 41(1)(c). The Respondents are therefore, in terms of this Rule liable for the Applicants’ costs. Had the Respondents tendered the costs, I doubt that the Applicants would have approached Court in terms of the Rule 41(1)(c).

[28] According to the Applicants, the Respondents on a previous occasion, with a Rule 30 application, had embodied consent to pay costs however, in this instance no costs were tendered having argued that the matter was removed and not withdrawn. In my view however, the Applicants are entitled to the costs of the notice of removal.

[29] The Applicants prayed for costs on an attorney client scale. However, the Applicants did not make out a case for a punitive costs order. Costs being the discretion of the Court, in my view a fair scale to both parties would be reasonable.

Order

[30] I accordingly make the following order:

3. Costs are to be paid on a party and party Scale A.

CHESIWE J

Appearances For the Applicant: Adv. T Mofokeng Instructed by: Modisenyane Attorneys Inc.
Bloemfontein For the First and Second Respondents: Adv. W A Van Aswegen Instructed by:
Symington De Kok Attorneys Bloemfontein

[1] Index: Application for an Order for Costs: Rule 41(1)(c) In re: Application for Dismissal of Claim (12/08/2024), page 12

[2] Ibid., 12

[3] (22/12513)

[2023] ZAGPJHC 939; 2024 (1) SA 269 (GJ) (24 August 2023)

[4] Erasmus Superior Court Practice/Volume 3: Practice Directions/Part G Free State/G1 Free State Rules/Rules regulating the conduct of the proceedings of the Orange Free State Provincial Division of the High Court of South Africa, published in GN820 of 7 September 2007 and amended by GN 414 of 14 June 2013. Free State provincial division of the High Court of South Africa — GN 820 of 2007/6. Settlement of trial or withdrawal from the Roll

[5] 1973(3) SA 299 (NK)

[6] Clarendon Press; Oxford University Press, Oxford, New York, 1993.

[7] 2015

(6) SA 424 SCA

[8] Defendants' Heads of Argument & Practice Note, page 2

[9] Veleleni v Minister of Safety and Security (483/2006) [2011] ZAECGHC 7 (4 March 2011)

[10] Index: Application for an Order for Costs: Rule 41(1)(C) In re: Application for Dismissal of Claim (12/08/2024), Annexure "A", page 51

[11] Ibid, 56

[12] (See Bondew Midrand (Pty) Ltd v Madzhie and Others (63297/2015) [2016] ZAGPPHC 1097 2017(4) SA 166 (GP) (19 December 2016), para 8)

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