IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION – GQEBERHA)

CASE NO.: 3618/2022

Matter heard on: 28 March 2024

Judgment delivered on: 11 April 2024

In the matter between: -

TUKELA ZUMANI	First Applicant
FLORENCE HERMAANS	Second Applicant

and

CITY MANAGER OF THE NELSON MANDELA BAY MUNICIPALITY	First Respondent
INDEPENDENT ELECTORAL COMMISSION	Second Respondent
NELSON MANDELA BAY MUNICIPALITY	Third Respondent
DEFENDERS OF THE PEOPLE	Fourth Respondent

AND

CASE NO.: 2160/2022

In the matter between:-

DEFENDERS OF THE PEOPLE	Applicant

and

TUKELA ZUMANI First Respondent

FLORENCE HERMAANS Second Respondent

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.
………………………… …………………………
Signature Date

JUDGMENT

ROSSI AJ:

[1.] Two applications served before me at the hearing date. One day before the set-down date on the opposed motion roll, the respective applications were withdrawn without a tender for costs. The court was called upon to make a determination in regard to the wasted costs occasioned by the withdrawn applications. For that reason, it is necessary only on a perfunctory basis to detail the history of these applications.

<u>Introduction and background</u>

[2.] The first application, under case number 3168/2022, which was initiated on an urgent basis was ultimately for relief in terms of Part B for a declaratory order that the decision of the First Respondent to declare vacant seats on the Third Respondent Municipality's council (the First and Third Respondents shall

collectively be referred to as the *"Municipal Respondents"*) be reviewed and set aside. Part A was to interdict the Second Respondent (the *"IEC"*) from taking any steps to remove the Applicants (the *"Members"*) as councillors pending the outcome of the review in Part B.[1]

[3.] The two seats held by the Fourth Respondent (the *"Political Party"*), which was the subject matter of the present litigation, were two proportional representative seats in the Municipality's council.[2]

[4.] The second application, under case number 2160/2022, was for confirmation of the removal of the Members from the Political Party. The Members opposed the application and brought a counter-application to review the decision of the Political Party to terminate their membership.

[5.] A partial order in respect of Part A of the application under case number 3168/2022 was granted, by agreement between the parties, on 13th December 2022.[3]

[6.] Thereafter, on 2nd February 2023, the remaining relief in terms of Part A was granted pending the finalisation of Part B, which was postponed to 16th March 2023. Again, this order was taken by agreement, which aspect becomes relevant and will be returned to at a later stage in this judgment.

[7.] What then followed were several postponements at the request of the Members.[4] On each occasion costs were reserved, save for the order of 8th February 2024 where the Members were ordered to pay such costs on a punitive scale.

[1] As well as finalisation of application under case no. 2160/2022.
[2] The political party's nominated representatives.
[3] Save for the IEC, which did not oppose the application.
[4] On 16 March 2023, the application was postponed to 4 May 2023. On 4 May 2023, the application was postponed to 26 October 2023. On 26 October 2023, the application was postponed to 1 February 2024. On 1 February 2024 the application was postponed to 8 February 2024. Finally, on 8 February 2024, the application was postponed to 28 March 2024.

[8.] On 2nd March 2023, the Political Party withdrew its application under case number 2160/2022.[5] As from that date, it was only the Members' counter-application which remained extant, and which then became effectively consolidated for hearing with the application under case number 3168/2022.[6]

[9.] The hearing date of the 28th March 2024 marked the applications' eighth appearance on the opposed motion court roll. I have already mentioned that on 27th March 2024, one day prior to its set down date, the Members withdrew their applications by way of notice under Rule 41(1). There was no tender for costs.

[10.] The Municipal Respondents and the Political Party do not object to the withdrawal but seek to be indemnified for their wasted costs occasioned by the abandoned applications.

The general principles of a withdrawal and its impact of costs

[11.] An apposite starting point is Rule 41(1)[7] which reads:

> *"(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 events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs; and the taxing master shall tax such costs at 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 for costs."*

[5] Although the notice was silent on the aspect of costs, these costs were tendered in the Political Party's affidavit which was deposed to on 20 June 2023.
[6] Evident from the order of court of 4 May 2023.
[7] This rule applies to action and application proceedings.

[12.] The right of a party to withdraw its application after set-down is not an absolute one.[8] Absent an agreement between the parties, the court retains a discretion whether or not to allow the withdrawal of a case.[9] This is apparent from the wording of Rule 41(1), which requires of a litigant to seek the leave of the court absent the consent of the parties.

[13.] Where a notice of withdrawal does not embody a consent to pay costs, the other party may apply to court for a costs order.[10]

[14.] The general principle[11] is that the party withdrawing is liable, as an unsuccessful litigant to pay the costs of the proceedings.[12] In ***Germishuys v Douglas Besproeiingsraad***[13] the headnote of which correctly reflects what was stated by Van Rhyn J namely:

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

[15.] It is only in exceptional circumstances that a party that has been put to the expense of opposing withdrawn proceedings will not be entitled to all the costs caused thereby.[14] Put differently, unless the court is persuaded, in the exercise of its judicial discretion upon a consideration of all the facts, that it would be unfair to mulct the unsuccessful party in costs.[15]

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[8] ***Protea Assurance Co Ltd v Gamlase*** [1971] 1 All SA 394 (E) at 400.
[9] This discretion is aptly explained in ***Karroo Meat Exchange Ltd v Mtwazi*** [1967] 3 All SA 374 (C) at 377.
[10] Rule 41(1)(c).
[11] ***ABSA Bank Ltd and others v Robb*** [2013] 3 All SA 322 (GSJ) at par 8.
[12] ***Germishuys v Douglas Bespoeiingsraad*** 1973 (3) SA 299 (NC).
[13] *Supra* at 300D-E. This *ratio* retains judicial favour and has been quoted by the seat of this division in ***Wildlife and Environment Society of SA v MEC for Economic Affairs, Environment and Tourism, EC Provincial Government and Others*** [2005] 3 All SA 389 (E) at 394.
[14] ***Germishuys v Douglas Besproeiingsraad*** *supra at* 300D. ***ABSA Bank Ltd and others v Robb*** *supra* at par 8.
[15] ***Wildlife and Environment Society of SA v MEC for Economic Affairs, Environment and Tourism, EC Provincial Government and Others*** *supra* at 395.

[16.] With the aforesaid principles in mind, I turn to the submissions made by counsel.

Discussion

[17.] I have already mentioned that these applications served before the court on eight occasions. On each occasion, the presiding Judge seized of the matter would have had to expend substantial time and judicial resources in preparing for the hearing and considering the voluminous paperwork.[16] Preparation time would also have been expended on each occasion by the relevant legal representatives.

[18.] By parity of reasoning, it also means that several other applications lost their opportunity to be heard by virtue of this consolidated matter occupying a place on the motion court roll.

[19.] This is clearly an undesirable practice which is contrary to the public interest and the efficient administration of justice.[17]

[20.] Counsel for the Municipal Respondents and the Political Party urged the court to mulct the Members with all the wasted costs occasioned by the previous postponement dates inclusive of an attorney and client cost order for the attendances on 8th February 2024[18] and present attendance.[19]

[21.] Counsel for the Members attempted to by-pass the responsibility of paying the costs on the basis that the Members were unrepresented for a period of time,

[16] The total of both applications comprises in excess of 550 pages.
[17] ***ABSA Bank Ltd and others v Robb*** *supra* at par 24.
[18] An affidavit was filed by the Municipal Respondent’s legal representative detailing the reason for the postponement, which affidavit went unanswered by the Members. In this affidavit it was explained that the court file was uplifted by the Members’ legal representatives and returned shortly before the hearing in circumstances where the Presiding Judge did not have an adequate opportunity to prepare, which resulted in a postponement of the matter.
[19] On 28 March 2024, which was premised on the withdrawal of the applications one day before the hearing date.

which occasioned the delays and postponements. Leaving aside that I do not consider this to constitute exceptional circumstances, the contention is also factually incorrect. The Members were only unrepresented at one hearing.[20] The remaining appearances they were legally represented.

[22.] Accordingly, I do not find that a lack of representation played any relevant role.

[23.] It was further argued on behalf of the Members that as the Political Party was the *fons et origine* of the whole dispute, it should be liable for the costs of the applications. In this regard reference was made to conflicting representations arising from the Political Party regarding the Members' status. Although there may have been conflicting representations, in the face of the withdrawal by the Political Party in early March 2023,[21] what remained was only the Members' counter-application, which they saw fit to pursue for over one year. It is those costs which form part of the subject matter of this argument.

[24.] Criticism was also levied against the Municipal Respondents in becoming embroiled in the litigation[22] and running up its own costs in circumstances where it should have adopted the same approach as the IEC, which elected not to enter the fray. This contention stands to be rejected. The Municipal Respondents opposed the application because substantive relief was sought against it in Part B inclusive of a cost order.[23] The Municipal Respondents cannot be criticised for taking steps to protect its interests. No relief was sought against the IEC and its decision not to oppose the application is thus distinguishable.

[25.] The alternative argument to the Political Party being liable for the costs, was that each party should be responsible for their own costs in accordance with the well-known ***Biowatch*** principle,[24] which principle was articulated thus:

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[20] 26 October 2023.
[21] The Political Party has already tendered costs for the application in case number 2160/2022.
[22] Being case number 3168/2022.
[23] In the application under case number 3168/2022.
[24] ***Biowatch Trust v Registrar, Genetic Resources and Others*** 2009 (6) SA 232 (CC) at par 23.

"If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of State conduct, it is appropriate that the State should bear the costs if the challenge is good, but if it is not, then the losing non-State litigant should be shielded from the costs consequences of failure. In this way the responsibility for ensuring that the law and State conduct are constitutional is placed at the correct door."

[26.] Leaving aside that the ***Biowatch*** principle does entitle one to risk-free constitutional litigation,[25] reference in argument to section 158 of the Constitution[26] and the invocation of Constitutional principles, is not mentioned in any of the Members' affidavits.[27] This entirely new argument, which is not supported by primary facts,[28] especially in the circumstances of a review, stands to be rejected.[29] Plainly, what the members sought to enforce was their position as council members and not any Constitutional right.

[27.] It was further argued on behalf of the Members that as they enjoyed partial success,[30] they should not be mulct with costs as their applications were not futile. Similarly, this contention stands to be rejected. It loses sight of the fact that as Part A was granted by agreement between the parties, no court was ever called upon to make a determination on the merits. The decision to abide Part A may well have been made so as to progress to the main dispute which was the review in Part B. This factor is neutral and does not change their status as the unsuccessful litigant, which follows by virtue of their withdrawal.

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[25] ***Lawyers for Human Rights v Minister in the Presidency and Others*** 2017 (1) SA 645 (CC) at par 17.

[26] Which sections concerns the membership of municipal councils.

[27] In ***Director of Hospital Services v Mistry*** 1979 (1) SA 626 (AD) at 635H to 636B the Appellate Division (as it then was) had the following to say of applications, *"When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by Krause J in Pountas' Trustee v Lahanas 1924 WLD 67 at 68 and as has been said in many other cases: "...an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny."*

[28] Regarding primary facts, see ***Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others*** 1999 (2) SA 279 (W) at 323G.

[29] ***Nwafor v Minister of Home Affairs and Others*** [2021] ZASCA 58 at par 39.

[30] Part A having been granted.

[28.] Accordingly, and for the aforesaid reasons, I find that no exceptional and/or special reasons are present to justify a departure from the general rule that the party withdrawing the application should be liable for the costs.

[29.] Lastly, I turn to whether, in addition to the ordinary cost order, the Members should be liable for the costs on an attorney and client scale for the attendances of 8th February 2024 and 28th March 2024.

[30.] The award of costs is a matter in respect of which courts exercise a true discretion.[31] A true discretion exists where the court has a number of equally permissible options available to it.[32] The imposition of costs on an attorney and client scale is a punitive measure.[33] In ***Public Protector v South African Reserve Bank*****,** the Constitutional Court cited with approval the explanation adopted by the Labour Appeal Court in ***Limpopo Legal Solutions v Vhembe District Municipality:***[34]

"[t]he 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 reprehensible conduct. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium."

[31.] Put differently, where the conduct concerned is *"extraordinary"* and worthy of a court's rebuke.[35]

[32.] Applying these principles to the matter at hand, I am not persuaded that the conduct of the Members, albeit far from exemplar, warrants a punitive cost order for the attendances of 8th February 2024 and 28th March 2024.

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[31] ***Public Protector v South African Reserve Bank*** 2019 (6) SA 253 (CC) at par 144.
[32] *Ibid*.
[33] *Ibid* at par 220.
[34] 2017 (9) BCLR 1216 (CC) at par 17.
[35] ***SS v VV-S*** 2018 (6) BCLR 671 (CC) at par 41.

In the result the following order will issue:

1. **The First and Second Applicants in case number 3168/2022 and the First and Second Respondents in case number 2160/2022 are ordered to pay the costs occasioned by the said applications inclusive of the opposed hearing on 28th March 2024 and the following reserved costs:**

   1.1. 13th December 2022;

   1.2. 2nd February 2022;

   1.3. 16th March 2023;

   1.4. 4th May 2023;

   1.5. 26th October 2023; and

   1.6. 8th February 2024.

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T ROSSI

ACTING JUDGE OF THE HIGH COURT

Appearances:

In case no. 3688/2022

For the First and Third Applicants	Mr Nobatana SC
and	Instructed by:

First and Second Respondents in case no. 2160/2022	Ntlabezo Attorneys 59B Fourth Avenue Newton Park Gqeberha
In case no. 3688/2022 For the First and Third Applicants	 Mr Moorhouse Instructed by: Kuban Chetty Inc. 163 Cape Road Mill Park Gqeberha
In case no. 3688/2022 For the Fourth Respondent: and Applicant in case no. 2160/2022	 Mr Barnett Advocate PP Plaatjies Inc. First Floor Harmony Building Market Square, North End Gqeberha