IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case No: 686/2023

In the matter between:

MANTSOPA LOCAL MUNICIPALITY Applicant

and

WEST RAND CONSULTING (PTY) LTD Respondent

In re:

In the matter between:

WEST RAND CONSULTING (PTY) LTD Applicant

and

MANTSOPA LOCAL MUNICIPALITY First Respondent

EMS SOLUTIONS (PTY) LIMITED Second respondent

JUDGMENT BY: MHLAMBI, J

DELIVERED ON: 01 FEBRUARY 2023.

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[1] This is an application for leave to appeal against the order I made on 26 July 2023 in terms of which each party had to pay its own costs in the urgent application that was withdrawn and the respondent had to pay the applicant's costs in the uniform rule 41(1)(c) proceedings.

[2] The appeal is based in essence, on the following four grounds of appeal:

> "2.1 *the Learned Justice concluded that the letter of 17 October 2022 is the determinative factor for the application as the threat contained therein left the applicant (the municipality) with no choice but to approach the court on an urgent basis for the rescission of the said court order.*
>
> *2.2 The Learned Justice agreed with the applicant (the municipality) that it had no choice but to approach the court on an urgent basis for the rescission of the court order.*
>
> *2.3 The Learned Justice further held that each party should pay its own costs for the urgent application.*
>
> *2.4 The learned Justice also held that the respondent should pay the applicant's (the municipality's) costs of the Rule 41(1)(c) proceedings."*

[3] The application was opposed on the basis that the applicant did not satisfy the requirements for leave to appeal where the only issue against which leave is sought is a cost order. There was nothing new, it was contended, nor did any exceptional circumstances present themselves that would render the leave to appeal against the discretionary costs order, on its own, to be in the interests of justice. No exceptional circumstances presented themselves in this matter.

[4] In its notice of appeal, the applicant contended that the presiding officer failed to consider that the contents of the letter of 17 October 2022 were erroneous and that the factual position was that the applicant (the municipality) would not be in contempt by virtue of the interim interdict no longer being extant.[1] The court a quo misdirected itself in disregarding the principle that the successful party should, as a general rule, have its costs and failed to consider that the respondent (West Rand) was for all intents and purposes the successful party.[2]

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[1]Para 5.4.
[2]Para 5.5.

[5] It was stated in the judgment[3] that the applicant regarded the relief sought in the application as meritless as there was no order to rescind. The *ipssissime verba* used by the applicant in this regard were:

> "*But to what purpose and point?*[4]*…This- I say- conclusively shows that this application serves absolutely no purpose. It seeks to amend an interim order that no longer applies. Indeed, it constitutes an abuse of the Court process. Coupled of course with the fact that there is simply no urgency to the application, it is difficult to conceive of why the Municipality decided to act as it here did. There is no order to be rescinded.*[5]

[6] In its heads of argument, the applicant conceded that its letter of 17 October 2023 was factually and legally wrong as the 25 February 2022 order was no longer extant.[6] This letter was addressed to the respondent by the applicant's Head of Legal, marked urgent. The question that arises is to what purpose and point was this urgent letter forwarded to the defendant at a time when there was no order to be rescinded? Surely the applicant should have traversed this aspect in the answering affidavit. However, the applicant chose not to deal with the founding affidavit *ad seriatim* as he had been advised that it would be wholly unnecessary to do so.[7] The nagging question remains: Had it not been for the impugned letter, would an urgent application have been launched as it was?

The Legal Position

[7] Both parties referred me to the decision of *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell- NO and Others*[8] where the following was stated:

> *"The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the*

[3]Para 6.
[4]Para 4.9 of the AA.
[5]Para 4.10.
[6]Para 64.
[7]Para 2 of the AA.
[8]1996 (2) SA 621 (CC) at para 3.

successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants and the nature of the proceedings."

[8] It would appear that the principle that the successful party should have his or her costs is subject to the first principle that the award of costs is in the discretion of the presiding judicial officer. Furthermore, the successful party can be deprived of his or her costs depending on the circumstances such as the conduct of the parties, the conduct of their legal representatives, whether a party achieves technical success only and the nature of the proceedings.

[9] The order of 1 December 2022 was granted by agreement when the urgent application was withdrawn by the application. It would appear that the applicant regarded itself as the successful party who should have been awarded costs as it contended that the court misdirected itself in depriving the respondent, as the successful party, of the costs.[9] This matter was not adjudicated upon and the fact that the application was withdrawn by agreement does not justify a costs order against the other party.

[10] The applicant contended, furthermore, that the court failed to conduct an exhaustive analysis and did not consider all the facts before it. The applicant referred in this regard to the documents that were related to the settlement of the 25 February 2022 order which, had the respondent provided to his legal team, the November 2022 application would not have been lodged.[10] This reasoning is faulty. It is clear from the above that the cause for the November 2022 application was the letter dated 17 October 2022.

[11] Sections 17(1)(a)(i) and (ii) provide that leave to appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. The reasons advanced by the applicant are neither

[9]Para70 of the heads of argument.
[10]Para 68 of the heads of argument.

compelling nor persuasive. The applicant has failed to show that the court exercised its discretion capriciously, based on a wrong principle or was biased in its judgment. In the circumstances, the application stands to be dismissed.

[12] The following order ensues:

Order:

The application is dismissed with costs.

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MHLAMBI, J

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