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: **6038/2023**

In the matter between:

DEON CORNELIUS MAREE N.O. 1st Applicant
JOHANNA GERTRUIDA MAREE N.O. 2nd Applicant
PETRUS JOHANNES UYS N.O. 3rd Applicant
[In their capacities as trustees of the DC MAREE TRUST,
Master reference number: IT1195/95]

GOLDENSANDS 31 TRADING CC 4th Applicant
(Registration number: 2005/063214/2023)

and

STANDARD BANK OF SA LTD Respondent
(Registration number:1962/000738/06)

In *re*:

STANDARD BANK OF SA LTD Applicant
(Registration number:1962/000738/06)

and

DEON CORNELIUS MAREE N.O. 1st Respondent
JOHANNA GERTRUIDA MAREE N.O. 2nd Respondent
PETRUS JOHANNES UYS N.O. 3rd Respondent
[In their capacities as trustees of the DC MAREE TRUST,
Master reference number: IT1195/95]

GOLDENSANDS 31 TRADING CC 4th Respondent
(Registration number: 2005/063214/2023)

CORAM: JP DAFFUE

HEARD ON: 01 FEBRUARY 2024

DELIVERED ON: The order was granted on 01 February 2024 and the reasons delivered on 2 FEBRUARY 2024

REASONS

[1] I refer to the order granted on 1 February 2024. As mentioned therein, the reasons for the costs order would be emailed to the parties on/or before 5 February 2024. These are the reasons.

[2] It will be recalled that the following order was made pertaining to costs:

'1. The main application of Standard Bank as the applicant, it being the respondent in the interlocutory application, is postponed to the opposed roll of 14 March 2024.

2. The answering affidavits of the respondents in the main application, they being the applicants in the interlocutory application, shall be filed not later than 14 February 2024.

3. The replying affidavit of the applicant in the main application, it being the respondent in the interlocutory application, shall be filed on 1 March 2024.

4. Heads of argument shall be filed by the parties in terms of the Practice Directives of this court, ie Standard Bank shall file its heads of argument on 6 March 2024 and the

respondents in the main application shall file their heads of argument on/or before 8 March 2024; in both instances filing shall take place before 12h00 on the specific dates.

5. The respondents in the main application, they being the applicants in the interlocutory application, shall jointly and severally, the one to pay the others to be absolved, pay the wasted costs occasioned by the postponement, including the costs of opposition of the interlocutory application and the costs attendant to the hearing on 1 February 2024 on an attorney and client scale.

6. Reasons for the costs order shall be delivered to the parties electronically on/or before 5 February 2024.'

[3] I prefer to refer to the parties as in the main application issued by Standard Bank of South Africa Ltd (the Bank) on 8 November 2023 under the above case number. The trustees of the DC Maree Trust, ie Deon Cornelius Maree, Johanna Gertruida Maree and Petrus Johannes Uys, have been cited as first, second and third respondents in their representative capacities in the main application and Goldensands 31 Trading CC, was cited as the fourth respondent. I shall hereinafter refer to them as the respondents. The Bank seeks judgment against the respondents in terms of a settlement agreement entered into between them as well as Mr and Mrs Maree in their personal capacities on the one hand and the Bank on the other hand. The settlement agreement was signed by the respondents and the Maree's in Harrismith on 17 July 2023. They were represented by their attorney. On 8 August 2023 the settlement agreement was signed on behalf of the Bank in Durban. The amount payable to the Bank in terms thereof is in excess of R30 000 000,00.

[4] The main application was duly served on all the respondents who gave notice of their intention to oppose the application on 4 December 2023. Bearing in mind *dies non* between 21 December and 7 January, both days inclusive, the respondents had to serve and file their answering affidavit on/or before 11 January 2024. The respondents' attorneys incorrectly believed that the answering affidavits had to be filed by 28 December 2023.

[5] Uniform Rule of Court 6(5)(f)(i) states that where no answering affidavit or notice raising a question of law is delivered within 15 days of notifying the applicant of the intention to oppose the application, the applicant may within 5 days of the expiry of this period apply to the registrar to allocate a date for the hearing of the application. The Bank's attorneys filed a notice of set down for hearing of the main application on 1 February 2024 as is apparent from annexure POST4 to the respondents' founding affidavit to which I shall return.

[6] An issue was made by Mr Muller, appearing for the respondents, during oral argument that the matter did not appear on the unopposed roll of 1 February 2024. This can only be ascribed to a clerical error in the general office. Fact of the matter is that I had been informed that the Judge President of this division had allocated the file to me during the course of Monday, 29 January 2024, insofar as he did not want the judge in the unopposed motion court to consider what appeared to be an opposed matter. By then, the respondents' application to have the matter struck from roll had been filed. The amended opposed motion court roll issued on 29 January 2024 reflects that the matter was allocated to me.

[7] On 22 December 2023 Arnoud van den Bout Attorneys of Pretoria sent an email to the Bank's Bloemfontein Attorneys. This email was not disclosed in the respondents' application to have the main application struck from the roll, but attached to the Bank's answering affidavit filed on 30 January 2024. I quote from the letter:

'2. We request your leave that we be granted till end of January 2024 to submit our opposition to your Notice of Motion herein. Our request is not *mala fide* and is based on:

a. We were seized with the compiling of the Opposing Affidavit on the sequestration application (case number: 4800/2023) against DC and JG Maree, the interlocutory application in the aforementioned sequestration proceedings, the application for leave to appeal and supplement thereto (case number: 3372/2023), all which required a substantial amount of time;

b. Since the abovementioned matters are interrelated, we require same counsels' advice thereon to assist us in finalising our reply to the Notice of Motion; and is counsel not available to assist us herein due to the holiday period.

3. Should you not be willing to accede to our request, our clients' rights for a fair hearing will be encroached and are we instructed to request the court's leave and apply for condonation to file our opposing papers out of time, when we will also apply for an accompanying cost order.

4. We also request that your application not be placed on an unopposed roll, as happened in the abovementioned sequestration application. It would be inappropriate to place this matter on the unopposed roll since your application in this matter is opposed. Should you proceed to place this matter on the unopposed roll, we will ensure that this letter be handed up to the bench for an appropriate wasted costs order.'

The important point to be made in respect of this letter is that it was 'inappropriate to place this matter on the unopposed roll since [the Bank's] application in this matter is opposed'. This allegation does not hold water. No litigant can merely file a notice of intention to oppose and then elect to do nothing, expecting the applicant to refrain from setting down the matter on an unopposed basis.

[8] Although the respondents sought leave to file answering affidavits by the end of January 2024, the Bank's attorneys informed them on 16 January 2024 that extension was granted until 25 January 2024 only and that if the answering affidavit is not received by then, the application will be enrolled for hearing on the unopposed roll of 1 February 2024. On the same day the respondents' attorney acknowledged receipt of the email without any further comments. Again, as in the case of the respondents' email of 22 December 2023, they failed to mention this correspondence in their founding affidavit, causing the Bank to provide the information with appropriate proof.

[9] I return to the email dated 22 December 2023. The point was made in this email that the request for extension was not *mala fide*, but based on two aspects:

a. The legal representatives were seized with the compiling of an opposing affidavit in the sequestration application against Mr and Mrs Maree, an interlocutory application in the sequestration proceedings and an application for leave to appeal.
b. Since the issues are interrelated with the matter at hand, the clients require the same counsel to advise them and to finalise the reply to the Bank's founding affidavit; also, counsel would not be available to assist due to the holiday period.

[10] Not a word was said in the email of 22 December 2023 of an action for damages to be issued against the Bank and/or it legal representatives and/or agents. There was also no reasonable explanation as to why the legal practitioners would not be able to draft answering affidavits within the time limit provided for in rule 6, ie on/or before 11 January 2024, bearing in mind the information in possession of the respondents' legal team as will be shown *infra.*

[11] Another aspect that has not escaped my attention is the fact that Mr and Mrs Maree did not serve and file an answering affidavit in the sequestration application, but filed a notice in terms of rule 30 only. The evidence is clear: even that application has been delayed unnecessarily so by Mr and Mrs Maree. They were afforded nearly two months to file their answering affidavit and when this was not forthcoming, the Bank set down the sequestration application on the unopposed roll. The Maree's reacted with a rule 30 notice causing that application to be stalled.

[12] The Bank also pointed out that Mr Maree already fully canvassed the respondents' defences in relation to the settlement agreement in an answering affidavit consisting of more than 260 pages when he and his wife opposed a perfection application. It needs to be put on record that a rule *nisi* was issued in that matter on 30 June 2023 and after the rule *nisi* was extended more than once, Loubser J eventually confirmed the rule *nisi* on 7 December 2023, after hearing argument by both parties on 19 October 2023. Mr and Mrs Maree have applied for leave to appeal that judgment, but as stated by the Bank, this perfection application brought against them has got nothing to do with the main application against the present respondents.

[13] Six days after having taken notice of the Bank's attitude pertaining to the filing of the answering affidavit without any comments thereto, the respondents' attorneys emailed a letter to the Bank's attorneys dated 22 January 2024, indicating that they would not be able to meet the deadline of 25 January 2024, but that they will seek condonation when filing their answering affidavit. All of a sudden the Bank's attorneys were informed as follows in paragraph 5 of this letter:

'5. You should, during this week, receive a Summons from our various clients for their claims, the details of which are interconnected with the application against the DC Maree Trust and Goldensands 31 Trading CC, which you are intending to place before court.

6. Please note further that we will be considering, after the issuing of the Summons, whether an application for consolidation of the matters between our clients (except for the pending application for leave to appeal) will be required. Our clients' claims within the Particulars of Claim are interlinked with the applications that have been instituted by your client, and their claims have to be considered in context with the relief that your client is claiming.' (my emphasis)

[14] The respondents waited until Monday, 29 January 2024 to issue their application, seeking that the main application be postponed *sine die* and/or struck from the roll. Neither in the notice of motion, nor in the founding affidavit is there any suggestion of any timeframes to ensure that the matter is finalised as soon as possible. This court does not postpone matters *sine die*.

[15] In the respondents' application the Bank was given an opportunity to notify the respondents' attorney on the very same day, 29 January 2024, of its intention to oppose. The Bank was directed to file its answering affidavit by close of business on 30 January 2024. The Bank did exactly that, but notwithstanding compliance, the respondents failed to file a replying affidavit.

[16] It is apparent from the answering affidavit that the Bank elected not to oppose the postponement of the application, but insisted that the postponement should be structured pertaining to specified timeframes and that the application be postponed

to a specific date. The Bank also made the point that the respondents were seeking an indulgence and that they should pay the costs occasioned by the postponement on the scale of attorney and client.

[17] Contrary to the version put up by the respondents in their founding affidavit, seeking the matter to be struck from the roll, the Bank placed on record that the only agreement that the respondents had to respond to was the settlement agreement entered into between the parties referred to above. I am satisfied that the same legal team that acted for the respondents in the past, particularly pertaining to the sequestration and perfection applications, is still appearing on behalf of the respondents. The settlement agreement that the respondents apparently wish to attack now has been entered into more than five months ago. Bearing in mind the judgment of Loubser J dated 7 December 2023 in the perfection application, several defences relied upon by the Maree's pertaining to the settlement agreement have been adjudicated. I refer to paragraphs 18 to 23 of the judgment attached as annexure POST13 to the founding affidavit. As mentioned, there is a pending application for leave to appeal that judgment and I am neither called upon to consider the validity of the settlement agreement, nor to consider whether Loubser J was correct. This is not the issue, but Mr Muller who appeared before me, also acted as counsel for the respondents in that application.

[18] The Bank pertinently raised the point in paragraph 10 of the answering affidavit that the respondents never requested a postponement in order to file an application or action against the Bank, and/or its attorneys and/or agents, to claim damages. It is unthinkable that the respondents could not file their answering affidavit in the main application with all the information available to them, but they had to wait for the finalisation of their claim for damages allegedly suffered.

[19] The Bank insisted that the respondents' application was *mala fide* and although it agreed to a postponement, it sought proper relief pertaining to a specific timeframe. Having considered the history of the litigation and the respondents' failure

to play open cards, I am in full agreement with the Bank that the respondents are guilty of delaying tactics and that they are *mala fide.*

[20] I reiterate that it was never the respondents' intention to agree on structured timeframes in order to allow them an opportunity to file their answering affidavit. Only during oral argument did I hear for the first time from their counsel, Mr Muller, that timeframes could be imposed. During oral argument, he eventually conceded that there was no reason why the court could not insist that the matter be postponed to a specific date with further orders pertaining to the filing of answering and replying affidavits. He suggested postponement of the application to 28 March 2024, being the last day of the term and the day before the Easter weekend. In such case, he requested that another month be provided to the respondents to file their answering affidavit. Mr Muller insisted that the Bank should pay the wasted costs occasioned by the postponement and the application for postponement. He insisted that the matter was maliciously set down on the unopposed roll. I do not agree. The Bank was fully within its rights to set the matter down as it did and I reject the submission that it acted maliciously.

[21] Mr Zietsman submitted that the main application should be heard two weeks earlier than suggested by Mr Muller, to wit on 14 March 2024. In such a case the respondents shall file their answering affidavits on 14 February 2024 to which the Bank shall reply on 1 March 2024. I was satisfied that the earlier dates suggested by Mr Zietsman were fair to both parties as well as the judge to whom the matter will be allocated, bearing in mind the Easter weekend and the recess.

[22] Although the parties eventually agreed during oral argument that a postponement should be granted, I need to state some pertinent issues. I repeat that the application for postponement/striking off was not *bona fide* and simply a tactical manoeuvre to seek an indulgence to which the respondents were not entitled. It is a typical case of 'kicking for touch' in order to delay the adjudication of the main application. There are sufficient judgments from all our courts, indicating that the postponement of a matter set down for hearing on a particular date cannot be

claimed as of right. Clearly, the application was not timeously made and no proper reasons have been advanced for the failure to timeously file an answering affidavit. I refer to the factors to be considered as set out by the Constitutional Court in the 2007 judgments, to wit *Lekolwane v Minister of Justice and Constitutional Development*[1] and *Shilubana v Nwamitwa* (National Movement for Rural Women and Commission for Gender Equality as *Amici Couriae*[2]). There is no need to discuss these well-established principles.

[23] Although Mr Muller eventually agreed during oral argument on timeframes, the respondents' application was intended to strike the main application from the roll, alternatively to postpone it *sine die.* Contrary to the threat in the email of 22 January 2024, no summons was issued during that week. Instead it was stated in their founding affidavit that more time was needed for filing the answering affidavit 'because we first need to issue and serve our action against [the Bank] and then we need to issue an application for consolidation… [and] our action will probably be finalised in the week of 5 to 9 February 2024'.

[24] The respondents remained vague throughout. In paragraph 8.4 of the founding affidavit they stated that their timeline was 'merely an estimation and will probably be subject to the availability of all the necessary consultants'. The vagueness of these allegations did not escape my attention.

[25] Attorney and client costs are usually granted in order to mark the court's disapproval of the conduct of a litigant. In *casu* the respondents sought an indulgence which they effectively received. Ordinarily, they would in any event be liable for the costs of the postponement insofar as it cannot be said that the Bank's opposition was unreasonable. In *Public Protector v South African Reserve Bank*[3]*,* the majority of the Constitutional Court stated that:

'More than 100 years ago, Innes CJ stated the principle that costs on an attorney and client scale are awarded when a court wishes to mark its disapproval of the conduct of a litigant.

[1] [2007] BCLR 280 (CC) para 17.
[2] 2007 (5) SA 620 (CC) paras 11 - 19.
[3]2019 (6) SA 253 (CC) (22 July 2019) at 318 C – 129 A.

Since then this principle has been endorsed and applied in a long line of cases and remains applicable. Over the years, courts have awarded costs on an attorney and client scale to mark their disapproval of fraudulent, dishonest or mala fides (bad faith) conduct; vexatious conduct; and conduct that amounts to an abuse of the process of court.'

[26] I was satisfied, in the exercise of my discretion, that a punitive costs order was warranted. Therefore, I granted costs in favour of the Bank on the scale as between attorney and client.

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JP DAFFUE J

On behalf of the Applicants (the respondents in the main application):	Adv NMA Muller
Instructed by:	Blignaut Attorneys Inc BLOEMFONTEIN
On behalf of the Respondent (applicant in the main application):	Adv P Zietsman SC
Instructed by:	Phatshoane Henney Inc BLOEMFONTEIN