

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

S.E. WEINER

07 DECEMBER 2022

CASE NUMBER: 2020/26987

(JOHANNESBURG)

In the matter between:

FIRSTRAND

Applicant

BANK

LIMITED

and

**XOLISA GENERAL CC (XOLISA)
(FORMERLY SERVIGRAPH 42 CC)**

Respondent

First

CLARK, WAYNE ROBERT N.O.

Respondent

Second

MKHONDO, RAYNOLD SELLO N.O.

Respondent

Third

THE COMPANIES AND INTELLECTUAL
Respondent
PROPERTY COMMISSION

Fourth

CASE NUMBER: 2021/19335
(PRETORIA)

In the matter between:

KOBIE

Applicant

JOHAN

NAUDE

and

XOLISA GENERAL CC (XOLISA)
(FORMERLY SERVIGRAPH 42 CC)

Respondent

First

FIRSTRAND BANK LIMITED

Respondent

Second

RAYNOLD SELLO MKHONDO N.O.

Respondent

Third

WAYNE ROBERT CLARK N.O.

Respondent

Fourth

THE COMPANIES AND INTELLECTUAL

Respondent

PROPERTY COMMISSION

Fifth

CASE NUMBER: 2021/21599
(PRETORIA)

In the matter between:

CEDAR POINT TRADING 342 (PTY) LTD
Applicant

and

**XOLISA GENERAL CC (XOLISA)
(FORMERLY SERVIGRAPH 42 CC)** First
Respondent

THE COMPANIES AND INTELLECTUAL Second
Respondent

**PROPERTY COMMISSION
FIRSTRAND BANK LIMITED** Third Respondent

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded to Case Lines. The date and time for hand-down is deemed to be 10h00 on 07 December 2022.

JUDGMENT ON COSTS

WEINER J:

Introduction

[1] This judgment concerns three applications:

- a) An application by FirstRand Bank Ltd (FRB) to place Xolisa General CC (Xolisa) (formerly Servigraph 42 CC) (Servigraph) under final winding-up launched on 21 September 2020.

(‘The Winding-Up Application’)¹

- b) An application by Kobie Johan Naude (K Naude) launched on 16 April 2021 for an order:
 - i) declaring the offer made by Highveld Agrochem (Pty) Ltd to purchase FRB’s voting interests in the business rescue of Servigraph, to be valid and binding; and
 - ii) setting aside FRB’s vote taken on 11 November 2020 as inappropriate,

(The Binding Offer Application).²

- c) An application instituted by Cedar Point Trading 342 (Pty) Ltd (Cedar Point) launched on 30 April 2021, to place Servigraph under business rescue.

(The Business Rescue Application).³

[2] On 27 August 2021, I handed down a consolidated judgment in all three cases (the main judgment). In such judgment I made the following orders:

- a) Xolisa (Servigraph) was placed under final winding-up;
- b) the Binding Offer Application was dismissed; and
- c) it was recorded that the Business Rescue Application was withdrawn on 15 July 2021, without a tender of costs.

¹ Case No.: 26987/2020 (GLD). Servigraph CC changed its name to Xolisa General CC on 7 July 2021. This judgment will refer to the CC as Servigraph, unless Xolisa is specifically referred to

² Case No19335/2021 (GD).

³ Case No 21599/2021 (GD).

[3] In addition, I made the following further orders, which orders are the subject matter of the present proceedings:

a) In the Winding-Up Application:

Mr Dekker Naude (Naude) and Mr Johannes Jacobus Nel (Nel) are to file affidavits setting out why they should not, jointly and severally, pay the costs of the winding-up application personally.

b) In the Binding Offer Application:

The applicant shall file an affidavit addressing the issue as to why he should not be ordered to pay the costs of FirstRand Bank Limited, including the costs of two counsel.

c) In the Business Rescue Application:

The matter having been withdrawn, the applicant shall file an affidavit addressing the issue as to why it should not be ordered to pay the costs of FirstRand Bank Limited, including the costs of two counsel, where so employed.

[4] The relevant parties all filed the required affidavits. It is trite that, in deciding the issue of costs, the Court has a discretion to be exercised judicially upon a consideration of the facts; the decision is a matter of fairness to both sides. An unreasonable attitude, having the result of unnecessarily increasing costs, will justify the court in making a special order of costs against the unreasonable party.

[5] I do not intend to deal with the merits of each application. They have been dealt with in the main judgment. This judgment is a follow-on from the main judgment.

The winding up application

[6] A party suing or defending in a representative capacity may be ordered to pay costs *de bonis propriis* if there is a lack of bona fides on their part, or if they acted negligently or unreasonably.⁴

[7] In an appropriate case, the Court may order the costs of a winding-up application to be paid *de bonis propriis* by a director of a company (or a member of a close corporation). In *BS Finance Corp (Pty) Ltd v Trusting Engineering (Pty) Ltd*,⁵ the Court held that:⁶

“...where the sole director and shareholder of a company litigates on behalf of that company in a manner which cannot be to the advantage of the company, and in a vexatious and thoroughly dishonest manner – and, in so doing tells deliberate lies — the Court is entitled and in fact should in a proper case penalise such deponent with an appropriate order of costs *de bonis propriis*”.

[8] The winding-up application of FRB against Servigraph was launched on 21 September 2020. Naude and Nel signed the resolution to place Servigraph under voluntary liquidation on 5 July 2021 and adopted it on 8 July 2021. In the main judgment, I found that, having regard to the dilatory tactics that had been employed by them for many years, in opposing the winding-up

⁴ Van Loggerenberg *et al Erasmus Superior Court Practice* [Service 45, 2014] at E12-27: “It is unusual to order an unsuccessful litigant in a fiduciary capacity to pay out of his own pocket. The general rule is that a person suing or defending in a representing capacity may be ordered to pay the costs *de bonis propriis* if there is a want of *bona fide* on his part or if he acted negligently or unreasonably. No order will be made where the representative has acted *bona fide*: a mere error of judgment does not warrant an order of costs *de bonis propriis*.”

Whether a person who acts in a representative capacity has acted *bona fide*, with due care and reasonably, must be decided in the light of the particular circumstances prevailing in the case with which the court is concerned.

The fact that the party has substantial personal interest in the outcome of the matter constitutes an important factor in shaping such a decision. In judging whether a representative party’s conduct is reasonable or not, one must approach the matter not from the point of view of a trained lawyer but from the point of view of a man of ordinary ability bringing an average intelligence to bear on the question in issue. A person acting in a representative capacity who institutes an action in circumstances in which he can have no certainty that the action will be successful, and makes no provision for the defendant’s costs, may be ordered to pay a successful defendant’s costs *de bonis propriis*.”

⁵ 1987 (4) SA 518 (W).

⁶ At 524.

application, this conduct appeared to be ‘... a further ploy in a long list of events that have taken place since the winding-up application was first launched.’⁷ I also stated that the inescapable inference to be drawn from the conduct of Naude and Nel was that they sought to avoid an enquiry, which could be held if the company was placed under compulsory liquidation.⁸

- [9] Naude and Nel took every possible step to avert the winding-up of Servigraph, only to capitulate at the last minute. FRB points out that only one business day before the resolution for voluntary liquidation was signed, Nel signed and delivered a lengthy supplementary opposing affidavit in the winding-up application contending, inter alia, that Servigraph should not be wound up. Naude also signed a confirmatory affidavit in support of the business rescue application on 6 July 2021, after signing the resolution placing Servigraph into voluntary liquidation [emphasis added]
- [10] FRB’s argument was that both Naude and Nel had substantial personal interest in the outcome of the winding-up application. As such, they litigated on a basis whereby their judgment was so clouded by personal interest that they acted *mala fide*, negligently or unreasonably. FRB refers, inter alia, to the actions that took place on 5 July 2021 (the signing of the resolution to place Xolisa into voluntary liquidation) and on 8 July 2021, the name change from Servigraph to Xolisa).
- [11] FRB contended that the decision to place Servigraph into voluntary liquidation was to “steal a march on the other creditors and appoint their own liquidators and [they] wished to avoid the provisions of sections 417 and 418 of the Companies Act, 1973, which are only applicable in windings-up by court order.” One of the main distinctions between a voluntary and a compulsory winding-up (and an important difference in the present proceedings) is that the powers of inquiry in terms of s 417 of the Companies Act are only available in compulsory winding-up proceedings (save in the event of converting voluntary

⁷ Judgment, [9] at CL 000-11.

⁸ Id at [28] - [29].

proceedings in terms of s 346(1)(e) or applying for leave to convene an inquiry in terms of s 388).

[12] RB referred to the *mala fide* actions of Naude and Nel, (including that Servigraph, through Naude and Nel, ceded the same assets to various entities, as security, thus, in essence committing a fraud). However, Naude and Nel submitted, that despite this, no allegations relating to a *de bonis propriis* order were previously advanced by FRB in seeking the final winding-up of Xolisa / Servigraph.

[13] FRB contended that Naude and Nel must have agreed that Servigraph should be liquidated (by resolving to place Servigraph/ Xolisa into voluntary liquidation) and therefore the winding-up application should not have been opposed. But Naude and Nel argued that FRB relied only on their conduct of changing Servigraph's name and placing Xolisa in voluntary liquidation to warrant a punitive costs order.

[14] Naude and Nel submitted that, in addition, the business rescue process was supported by various creditors of Servigraph. It was FRB as majority creditor in value who stifled the process. They argued that, at the time that the voluntary liquidation was resolved, the costs in respect of the winding-up application had already been incurred. They submitted further that during those proceedings, no complaints relating to the *bona fides*, reasonableness or negligence has been raised, and no order for personal costs had been sought.

[15] However, Naude and Nel contended that, even if the decision to change Xolisa's name and place Xolisa in voluntary liquidation was made *mala fide* for the purposes advanced by FRB, it does not render the decision to oppose the winding-up application *mala fide*, unreasonable or negligent, from its inception.

[16] FRB submitted that Naude and Nel should pay the entire costs of the winding-up application jointly and severally, the one paying the other to be absolved, on an attorney and client scale, such costs to include the costs of two counsel where employed, and including the reserved costs of 6 October 2020 and 4 May 2021.⁹

[17] In my view there is some merit in Naude and Nel's arguments. They, as well as other creditors of Servigraph believed it could be rescued and thus supported the business rescue application of Cedar Point. However, their actions thereafter are clear evidence of mala fides. From the time they resolved to change Servigraph's name and place it into voluntary liquidation, their conduct is worthy of censure and they should pay the costs of proceedings from that date personally.

The Business Rescue Application

[13] It is trite that a litigant who withdraws an action or application, without tendering costs must provide sound reasons why they should not bear the costs of the litigation. Werner Lategan, the director of Cedar Point attempted to evade liability for costs on the basis that, once Cedar Point learned of the voluntary winding-up of Servigraph, it was left with no choice but to withdraw the business rescue application. But this is not an adequate reason as a business rescue application may be brought even after a final winding-up order has been granted.¹⁰

[14] Mr Louw, who appeared for Cedar Point submitted that it should not bear the costs occasioned by this application, but that Naude and Nel should. Cedar Point were completely unaware of the sequence of events which occurred. It

⁹ FRB contended that these reserved costs should follow the result, as they did in the original costs order at page 13 of the Judgment. By way of example, they stated that Nel and Naude supported the Business Rescue Application, which on occasion resulted in the postponement of the Winding-Up Application.

¹⁰ *Richter v Absa Bank Ltd* 2015 (5) SA 57 (SCA).

had filed the business rescue application on 30 April 2021. Servigraph supported that application and the members signed a supporting affidavit on 6 July 2021. Cedar point was unaware of the fact that, despite supporting the business rescue application, Servigraph, through Naude and Nel, had changed its name to Xolisa 7 July 2021; it had resolved to put Servigraph/Xolisa into voluntary liquidation on 5 July 2021 and had adopted such resolution on 8 July 2021.

[15] It is trite that costs follow the result of an application, unless there are exceptional reasons, and that a party withdrawing an application should tender those costs. Cedar point may very well have some remedy against Naude and Nel, but this court is not seized with that issue.

[16] Cedar Point is obliged to pay the costs occasioned by FRB (an affected person in that application, who was joined by Cedar Point).

The Binding Offer Application

[17] The Binding Offer Application was dismissed and FRB was the successful party. There are plainly no exceptional circumstances justifying a deviation from the ordinary rule that a successful party is entitled to its costs. But FRB contended that there are reasons why the costs should be borne by the applicant, K Naude:

- a) The application could never have succeeded on its merits, inter alia because of the judgment in *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others*¹¹ (*Kariba*) and the principle of *stare decisis*. I stated in the main judgment that, even without applying *stare decisis*, I was of the view that the *Kariba* judgment was correctly decided by the SCA.

¹¹ *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others* 2015 (5) SA 192 (SCA).

b) K Naude, on his own version, accepted that the Binding Offer Application would, accordingly, have to be dismissed, unless this court “overruled” Kariba and/or if it did not, that leave to appeal would be granted. FRB submitted that to persist with the application in such circumstances, with little or no regard to the interests of FRB in opposing such an ill-fated application, amounts to an abuse of court process. Despite this ill-fated argument, no application for leave to appeal was filed against the main judgment.

[18] In the circumstances, FRB submits that K Naude should be ordered to pay FRB’s costs on an attorney and client scale, such costs to include the costs of two counsel where employed. In my view, this submission is well-founded.

[19] As the orders in the main judgment did not refer to costs on the attorney and client scale, I am of the view that it would inequitable to grant costs on the punitive scale.

[20] Accordingly, the following order is made:

A. In the Winding-Up Application under Case Number: 2020/26987

In respect of Servigraph/ Xolisa, the costs shall be in the winding-up. Jointly and severally with such costs, Messrs Dekker Dirk Naude, Johannes Jacobus Nel shall, the one paying the other to be absolved, pay the costs of the Winding-Up Application, including the costs of two counsel where employed, from 5 July 2021 to 27 August 2021 which costs shall include the reserved costs of 6 October 2020 and 4 May 2021. Such costs shall also include the costs of the hearing on 28 October 2022 inclusive of the affidavits filed therein.

B. In the Business Rescue Application under Case Number: 2021/21599

The applicant, Cedar Point Trading 342 (Pty) Ltd, shall pay the costs of the Affected Person, FirstRand Bank Limited, including the costs of two

counsel where employed. Such costs shall also include the costs of the hearing on 28 October 2022 inclusive of the affidavits filed therein.

C. In the Binding Offer Application under Case Number: 2021/19335

The applicant, Kobie Johan Naude, shall pay the costs of the second respondent, FirstRand Bank Limited, including the costs of two counsel where employed. Such costs shall include the costs of the hearing on 28 October 2022 inclusive of the affidavits filed therein.

S.E. WEINER

Judge of the High Court

Gauteng Local Division, Johannesburg

Heard: 28 October 2022
Judgment: 07 December 2022

Appearances:

For FirstRand Bank: J.E. Smit (with M De Oliveira)
Instructed by: Edward Nathan Sonnenbergs Inc.

For Xolisa (Servigraph): C.E. Thompson
Instructed by: Martin Van Vuuren Attorneys

For Jacobus Nel: C.E. Thompson
Instructed by: Martin Van Vuuren Attorneys

For Dekker Naude: C.E. Thompson
Instructed by: Martin Van Vuuren Attorneys

For Cedar Point Trading: A. Louw

Instructed by:

Mashabane Liebenberg Sebola Inc.