

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 38649/2019

DATE: 2022-07-20

**DELETE WHICHEVER IS NOT APPLICABLE**

**(1) REPORTABLE: NO.**

**(2) OF INTEREST TO OTHER JUDGES: NO.**

**(3) REVISED.**

**DATE**

**SIGNATURE**

10 In the matter between

CE SWART

Applicant

and

JJ OOSTHUIZEN SWART

Plaintiff

---

**J U D G M E N T**

---

**CRUTCHFIELD J:** This application came before me initially in respect of an application for leave to appeal brought by  
20 the respondent in the main application, (I refer to the parties as they were referred to in the main application), in respect of the judgment handed down by me on 9 May 2022. On the day prior to the date of hearing of the application for leave to appeal ('the leave application'), the respondent delivered a notice of withdrawal and tendered the wasted

costs on a party and party scale.

The applicant declined to accept the tender of costs and I heard argument from both parties on the applicant's claim for costs on a punitive scale.

The applicant's claim rested on three bases; 1) The lack of merit in the leave application, the lateness of the withdrawal and the fact that the leave application served to delay the applicant's enjoyment of the relief ordered in her favour in the main application.

10           The respondent argued that the lateness of the withdrawal arose from the respondent initiating settlement proposals between the parties in respect of the judgment on 9 July 2022.

The attempts at settlement failed and thus the respondent filed the notice of withdrawal on the day prior to the hearing of the leave application.

20           The applicant warned the respondent in advance of the respondent launching the leave application, that the applicant would claim costs on a punitive scale in the event that the respondent brought such an application. Notwithstanding, the absence of merit in the leave application, in and of itself, in my view, does not justify a punitive costs order. The respondent has the right to seek leave to appeal by reason of the respondent's right of access to the court and access to justice overall.

The absence of merit in the leave application is covered by the respondent's tender of party and party costs.

It is the lateness of the withdrawal that is the primary cause of my concern. The applicant's legal representatives, in compliance with the directions issued by me, duly filed heads of argument as required of them. It was only subsequent to those directions being given and the matter being set down for hearing, that the respondent attempted to settle the matter. The lateness of that  
10 settlement proposal ultimately caused the delay in the withdrawal of the leave application.

The respondent cannot be criticised for attempting to settle the matter. It is the fact that the attempt at settlement was made at such a late stage and the leave application withdrawn on the day before the leave application was due to be heard, that is the reason for the order that I intend to make.

The tender for wasted costs on a party and party scale in circumstances where the matter was set down for  
20 hearing, the applicant had prepared and submitted heads of argument as required, whilst the respondent failed to comply with the direction regarding heads of argument, justifies my view that an order for punitive costs in terms of which the applicant is adequately compensated for those additional costs incurred by it, should be granted.

In the circumstances I grant the following order;

- 1) The withdrawal of the application for leave to appeal by the respondent in the main application is noted.
- 2) The respondent in the main application, being the applicant in the application for leave to appeal, is ordered to pay the wasted costs of the application for leave to appeal, including of the hearing in respect of costs, on an attorney and client scale.

10

I hand down the judgment.

.....

**CRUTCHFIELD J**

**JUDGE OF THE HIGH COURT**

**DATE:** .....