REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 42876/2020

DELETE WHICHEVER IS NOT APPLICABLE

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

Judge Dippenaar

In the matter between:

ARNOLD, PHILLIP HENRY	First Applicant
ULTIMAX CONSULTING (PTY) LTD	Second Applicant

and

ABSA BANK LIMITED	First Respondent
FIRST NATIONAL BANK LIMITED	Second Respondent
FITZGERALD, MICHAEL N.O.	Third Respondent
COWIN, MONICA N.O.	Fourth Respondent
VAN JAARSVELDT, ANKIA N.O.	Fifth Respondent

EOH MANAGED SERVICES (PTY) LTD Sixth Respondent

SILVER TOUCH IT SOLUTIONS (PTY) LTD Seventh Respondent

THE MASTER OF THE HIGH COURT Eighth Respondent

GAUTENG LOCAL DIVISION, JOHANNESBURG

WERKSMANS ATTORNEYS Ninth Respondent

In re:

EOH MANAGED SERVICES (PTY) LTD Applicant

and

ADAM CRESWICK First Respondent

ARNOLD, PHILLIP HENRY Second Respondent

ULTIMAX CONSULTING (PTY) LTD Third Respondent

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 11h30 on the 14th of September 2022.

DIPPENAAR J

[1] The central issue to be determined is the costs of an urgent application as between the applicants and the sixth respondent. The other parties did not participate in the proceedings. The sixth respondent seeks costs on the scale as between attorney and client against the applicants and their attorney, Mr Creswick on a *de bonis propriis* basis.

[2] The genesis of this application is an urgent application launched by the applicants on 21 April 2021 in terms of which the applicants sought relief against Absa Bank Ltd and First National Bank Limited to prohibit them from providing certain documents pursuant to subpoenas issued to provide such documents to a commission of enquiry under s417 and 418 of the Old Companies Act, 1973 (“the enquiry”).

[3] The application was opposed by the sixth respondent, represented by senior counsel. The application came before Vally J in the urgent court on 21 April 2021, but was at the discretion of the presiding judge not enrolled for hearing. No costs order was made.

[4] The application was brought on truncated time periods and on less than 2 hours’ notice, albeit that the application was heard later than the time stipulated in the notice of motion. There were also issues with service on the fourth and fifth respondents. The costs were later reserved by agreement between the parties.

[5] Pursuant thereto, the applicant delivered a further notice of motion and a voluminous supplementary affidavit. The sixth respondent had delivered substantial answering papers to the original founding affidavit and also delivered substantial supplementary answering papers responding to the supplementary founding papers.

[6] The application was again enrolled for hearing in the urgent court on 29 April 2021. On that date Wright J was concerned with proper service on the fourth and fifth respondents, the liquidators, and removed the matter from the roll. Costs were reserved.

[7] No substantive relief was ever granted in relation to the urgent application.

[8] On 4 May 2021 at the enquiry, Absa Bank Ltd provided the documents forming the subject matter of the urgent application. The relief sought against First National Bank Limited had already become moot earlier, when it provided the documents referred to in the subpoena.

[9] The applicants, on their own version and in an affidavit deposed to by their attorney, Mr Creswick, had elected not to pursue the urgent application but to rather make submissions at the enquiry. The applicants did not further pursue the application and it was common cause that the urgent application had become moot.

[10] On 6 May 2021, the attorneys for the sixth respondent addressed correspondence to the applicant's attorneys seeking a tender of costs in relation to the urgent application. No tender was forthcoming. Pursuant to further correspondence between the parties, the sixth respondent delivered a notice of motion seeking leave to file a supplementary affidavit for costs. It then enrolled the application for hearing, initially on the unopposed roll. On 18 January 2022, Mudau J granted a consent order setting dates for the delivery of opposing papers and postponing the application. The matter was on 27 June 2022 set down on the opposed roll.

[11] The applicants conceded that part B of the urgent application had become moot as of 4 May 2021, but argued that the sixth applicant was not entitled to a dismissal of the application with costs as it had not set the main application down for hearing. In my view, this argument lacks merit. From the notice of set down it is clear that the main application was enrolled for hearing on the opposed roll and not any interlocutory application, albeit that a supplementary notice of motion and supplementary affidavit were delivered during July 2021.

[12] The sixth respondent argued that the procedure followed in placing the supplementary affidavit before court was proper and required in the circumstances given the relevant subsequent events which occurred after the original application papers were delivered. I agree that this is a case where the supplementary affidavit should be allowed[1].

[13] According to the affidavit of Mr Creswick, the applicants erroneously but *bona fide* thought Werksmans attorneys, the attorneys of the sixth respondent, were representing

[1] Hano Trading CC v JR 209 Investments (Pty) Ltd and Another 2013 (1) SA 161 (SCA) para 11; Kings Prop Development (Pty) Ltd v Checkmate Distribution (Pty) Ltd 2019 JDR 1243 (GJ)

the joint liquidators, and thus the urgent application was initially not served on the liquidators. It is thus undisputed that there was an issue with service on the fourth and fifth respondents when the application was heard on 21 April 2021.

[14] In his affidavit, Mr Creswick further contended that Wright J could not be persuaded to allow the matter to stand down on 29 April 2021 to the following day for the liquidators to assess their position. He contended that if the matter had been stood down, the merits would have been determined and that the applicants had good prospects of success if the matter had been heard.

[15] In argument, the applicants contended that the application should be determined on its merits in order to determine an appropriate costs order, despite the merits of the application having become moot.

[16] Relying on *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd*[2] and *Jenkins v SA Boiler Makers, Iron& Steel Works & Ship Builders Society*[3], the applicants argued that a court hearing an application which has become moot must determine the issue of costs by considering the merits of the application and not simply on the basis that the application has become moot.

[17] In my view, the argument lacks merit for various reasons. First, as the application has become moot, there is no existing or live controversy between the parties. [4]

[18] Second, it is not for this court to revisit the decision made by Wright J on 29 April 2021 to remove the matter from the roll and that decision is not open to appeal. In the exercise of his discretion, Wright J decided not to entertain the merits of the application but to remove it and to reserve costs.

[19] Third, *Pretoria Garrison* is distinguishable, given that it pertains to the principles which must be applied in deciding an appeal as to costs and whether interlocutory orders

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[2] 1948 (1) SA 839 (A) at 863
[3] 1946 WLD 15
[4] Radio Pretoria v Chairman, Independent Communications Authority of South Africa and Another 2005 (1) SA 47 (SCA) para 39

are appealable. In any event, *Pretoria Garrison*[5] does not avail the applicants in the present context. It was held:

> *"It may even be that no order on the merits was made in the court a quo because by the time the matter came before that court the necessity for an order was gone and the sole question that one of costs. This shows the merits of the dispute in the court below must be investigated in order to decide whether the order as to costs made in that dispute was properly made or not. In deciding whether or not the court below made the correct order as to costs the reasons which prompted that court to make its order must be examined that those reasons must be the actual reasons and no others."*

[20] Fourth, *Jenkins* does not avail the applicants as it was held that where a disputed application is settled on a basis which disposes of the merits except insofar as the costs are concerned, a court should not have to hear evidence to decide the disputed facts in order to decide who is liable for costs. The court held[6]:

> "*It seems to me to be against all principle for the court time to be taken up for several days in the hearing of a case in respect of which the merits have been disposed of by the acceptance of an order in order to decide questions of cost …*
> *I think the court must to do its best with the material at its disposal to make a fair allocation of costs, employing such legal principles as are applicable to the situation. This is much to be preferred to laying down a principle which requires courts to investigate dead issues to see who would have won on such issues. In most such cases the litigants would be required to incur far greater costs than those at stake. In my view the costs must be decided on broad general lines and, not on lines that would necessitate a full hearing on the merits of a case that has already been settled."*

[21] In my view the same principles would apply to the present circumstances where the applicants have abandoned the application and the relief sought has become moot. Costs must thus be decided on broad general lines.

[22] Having considered the available material and the undisputed facts, I concluded that the applicants did not comply with the requirements set out by Sutherland J in *South*

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[5] At p868
[6] At pp17-18

African Airways SOC v BDFM Publishers (Pty) Ltd[7] in launching the application on 21 April 2021, on less than two hours' notice. The applicants further did not comply with the practice directives pertaining to urgent applications and the relevant principles explained by Wepener J in *In re : Several Matters on the urgent Court Roll*[8].

[23] These deficiencies, combined with the lack of proper service on the liquidators and the abandonment of the application by the applicants, justify a conclusion that the application constituted an abuse of process, as contended by the sixth respondent.

[24] Having abandoned the application, the applicants had a duty to make a reasonable proposal pertaining to costs[9] pursuant to the parties' duty to contribute to the efficient use of judicial resources. The applicants failed to do so. To the contrary, the applicants sought to place on additional burden on this court by insisting that the main application, consisting of a voluminous record, be considered on its merits in the face of them abandoning the relief sought therein and the application having become moot.

[25] Had the applicants timeously made a reasonable proposal, substantial additional time and costs could have been avoided. Instead, substantial time and expense was spent on preparing additional affidavits and heads of argument in addition to the costs of this opposed application. The applicants in abandoning the application did not avail themselves of the procedure envisaged by rule 41 (1)(c). Had this remedy been utilised, further costs would have been avoided.

[26] The first tender of any costs, was made shortly before the hearing on 22 July 2022. That tender, made by the first and second applicants under rule 34, was for payment of the costs of the day in respect of the hearing before Vally J on Wednesday, 21 April 2021 and Wright J on Thursday 29 April 2021 only.

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[7] 2016 (2) SA 561 (GJ) paras 24 to 26
[8] 2013 (1) SA 549 (GSJ)
[9] John Walker Pools v Consolidated Aone Trade & Invest 6 (Pty) Ltd (in liquidation) and Another 2018 (4) SA 433 (SCA) para 10

[27] I am not persuaded that this tender was reasonable or that these are the only costs the applicants are liable for, given the undisputed facts. The applicants' argument that it is logical that the only costs in issue relates to the hearings of 21 and 29 April 2021, lacks merit.

[28] For the reasons advanced herein, I am persuaded that a costs order on the scale as between attorney and client is justified, having regard to the applicants' conduct in relation to the matter. Even if such a costs order is not granted on a punitive basis, the circumstances are such that there are special considerations rendering it just that the sixth respondent not be left out of pocket in relation to the costs of the application.[10]

[29] The sixth respondent argued that a *de bonis propriis* costs order was warranted on the basis that Mr Creswick had instituted the urgent proceedings in a haphazard manner, wilfully ignored court procedures and rules and presented a case that was plainly misconceived and frivolous.

[30] A court is vested with a discretion to award costs on a *de bonis propriis* basis where a practitioner has acted inappropriately in a reasonably egregious manner. [11]

[31] Although there is merit in the sixth respondent's criticism against the way in the application was launched and the litigation conducted, it is not clear from the papers whether Mr Creswick had simply acted on instructions of his clients or whether his conduct in relation to the main application was at his own instance. In those circumstances I am not persuaded that it would be appropriate to direct Mr Creswick to pay the costs on a *de bonis propriis* basis.

[32] I further conclude that the sixth respondent is entitled to an order dismissing the main application so that finality can be achieved in relation thereto. The applicants on their own version abandoned the relief sought and concede that the application is moot. The

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[10] Nel v Waterberg Landbouwers Ko-operativewe Vereeniging 1946 AD 597 at 607
[11] Stainbank v South African Apartheid Museum at Freedom Park and Another [2011] ZACC 20; 2011 (1) BCLR 1058 (CC) para 52

simple fact of the matter is that wasted costs were incurred by the sixth respondent in opposing the application, which was thereafter simply abandoned. There are consequences to the applicants' election.

[33] As the sixth respondent is substantially successful in this application, there is no reason to deviate from the normal principle that costs follow the result.

[34] I grant the following order:

[1] The sixth respondent is granted leave to file the further supplementary affidavit of Jennifer Anne Smit dated 15 February 2022;

[2] The main application brought by the applicants is dismissed;

[3] The costs of the main application, including the costs of the hearings on both 21 April 2021 and 29 April 2021 are to be paid by the applicants, jointly and severally, on the scale as between attorney and client;

[4] The applicants are directed to pay the costs of the sixth respondent in relation to the hearing on 28 July 2022, jointly and severally.

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EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING : 28 July 2022

DATE OF JUDGMENT : 14 September 2022

APPLICANT'S COUNSEL	: Adv Ross Shepstone
APPLICANT'S ATTORNEYS	: Adam Creswick Attorneys
RESPONDENT'S COUNSEL	: Adv Douglas Ainslie
RESPONDENT'S ATTORNEYS	: Werksmans Attorneys