IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

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

SIGNATURE DATE: 24 August 2023

Case No. 22/12513

In the matter between:

RVRN CRUSHING (PTY) LTD Applicant

and

GDF INCORPORATED CONSULTANTS (PTY) LTD Respondent

JUDGMENT

WILSON J:

1 The respondent, GDF, sued the applicant, RVRN, for the repayment of a penalty levied under an agreement for the sale of three items of heavy construction and earth-moving equipment. RVRN cancelled the sale because GDF failed to pay the purchase price due on the goods. By the point of cancellation, however, GDF had paid more than R2 million towards

the R5 million purchase price. The sale agreement stipulated that, in the event of cancellation, RVRN would be entitled to keep GDF's payments towards the full purchase price in place of the rent that would have been payable had the goods been leased to GDF.

2 GDF alleges that the forfeiture of the R2 million or so it had already paid constitutes an excessive penalty in terms of section 3 of the Conventional Penalties Act 15 of 1962. This is because RVRN sold the goods on to a third party, in circumstances which rendered R2 million substantially more than any losses RVRN would have been able to claim as a result of GDF's failure to perform on the sale agreement, or any rent to which RVRN would have been entitled had it leased the goods to GDF.

3 GDF instituted its claim on 22 April 2022. On 26 April 2022, RVRN gave notice of its intention to defend the claim. On 26 May 2022, GDF placed RVRN under bar. It did so prematurely. On 27 May 2022, RVRN pointed that out, by way of a notice under Rule 30A. On the same day, accepting his mistake, GDF's attorney withdrew the notice of bar.

4 That should have been the end of the matter, but it was not. On 30 May 2022, RVRN's attorney complained that GDF's notice withdrawing its notice of bar did not include a tender for costs. I spent some time in argument asking Ms. van Niekerk, who appeared for RVRN, to identify the source of GDF's obligation to make such a tender. After some valiant but fundamentally misdirected argument, Ms. van Niekerk was constrained to accept that there is no such obligation.

5 Seeing RVRN's position for the self-serving obstruction it obviously was, GDF placed RVRN under bar again – this time after the period for the delivery of RVRN's plea had actually expired.

6 At this point, RVRN doubled down. It brought this application to set aside GDF's first – premature – notice of bar, GDF's notice of withdrawal of that notice (said to be irregular because it did not contain a tender for RVRN's costs), and GDF's second notice of bar. It also sought an order directing GDF to pay the costs occasioned by what it called the irregular notice of withdrawal of the notice of bar. Finally, RVRN asked that GDF be directed to pay the costs of its application to set aside these irregularities on a punitive scale.

7 None of that relief can be granted. The application must be dismissed, because it is a contrivance, built upon a misapprehension of the applicable rules and their purpose.

8 Where a litigant institutes and then withdraws an application that they come to recognise has no merit, the expectation is that, generally, that litigant will tender the costs the other parties to the application ran up in opposing it. That expectation is embodied in Rule 41, which provides for the unilateral withdrawal of any proceeding prior to set down with an appropriate tender for costs. If no costs are tendered, they may be applied for on notice.

9 The situation is different, though, where a litigant takes a step that it subsequently accepts was irregular. In that event, Rule 30A provides for any party prejudiced by the irregular step to give notice of the irregularity. There follows a ten-day period during which the litigant who took the irregular step

can cure the irregularity. If they fail or refuse to do so, the aggrieved party may then bring an application to set the irregularity aside.

10 If an application is necessary, costs will generally follow the result of that application. But there is no obligation on a litigant who cures the irregularity before an application to set it aside becomes necessary to tender the costs occasioned by the irregular step. Those costs will be costs in the main proceeding.

11 There should really be no need to spell this position out, but RVRN's conduct in this case necessitates that I do so. The position is underpinned by at least two sound considerations of policy. The first is that litigants who commit irregularities ought to be encouraged to cure them quickly and cheaply without running the risk of an adverse costs order. Irregular steps, so long as they are corrected promptly, are a foreseeable hazard of litigation which ought generally to be dealt with as part of the costs order that the court ultimately makes in the main proceeding.

12 The second consideration is that the purpose of Rule 30A is to avoid "excessive formality and point-taking" and "to enable to parties to get on with the litigation by curing between themselves any prejudice caused" by an irregularity (see *Biologicals and Vaccines Institute of Southern Africa (Pty) Ltd v Guardrisk Insurance Company Limited* [2023] ZAGPJHC 729 (27 June 2023), paragraph 4). If every withdrawal of an irregular step gave rise to a subsidiary claim for costs, litigation would soon descend into absurdity.

13 This case is a good illustration of that absurdity. Standing on its phantom claim for costs, RVRN refused to take any further steps to file its plea until

the costs of pointing out GDF's irregular step were tendered. That has delayed the progress of GDF's claim in the main action for over a year, while papers in RVRN's wholly meritless application were exchanged and the matter was enrolled for argument.

14 Given the patently misguided nature of this proceeding, RVRN must bear the costs of the application on the scale as between attorney and client. Despite being given a week in which to advance written argument on this issue, Ms. van Niekerk was unable to convince me that such an order would be inappropriate.

15 The application is dismissed with costs on the scale as between attorney and client.

S D J WILSON
Judge of the High Court

This judgment was prepared by Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 24 August 2023.

HEARD ON:	10 August 2023
FURTHER SUBMISSIONS ON:	18 August 2023
DECIDED ON:	24 August 2023
For the Applicant:	P van Niekerk Instructed by Kyriacou Inc
For the Respondent:	E Sithole Instructed by Edward Sithole & Associates Inc