IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG PROVINCIAL DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~.
(3) REVISED.

DATE **SIGNATURE**

CASE NO.: 7996/2020

Date of hearing: 8 March 2023

Date of Judgment: 8 March 2023

In the matter between:

SEWATUMONG MICRO LENDING CC
t/a SEWATUMONG CASH LOANS 1st Applicant

SETLAKALA GILBERT SETSHEKGAMOLLO 2nd Applicant

and

THE CHAIRPERSON OF THE NATIONAL CREDIT TRIBUNAL,
JOSEPH MANDLA MASEKO 1st Respondent

THE NATIONAL CREDIT REGULATOR 2nd Respondent

THE EXECUTIVE MEMBER FOR THE DEPARTMENT OF
TRADE AND INDUSTRY 3rd Respondent

PRENESEN MOODLY 4th Respondent

LUCKY RABOTAPI 5th Respondent

JUDGMENT

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1. In case 7996/2020 I delivered my judgment *ex tempore*. The outstanding issue is costs.

2. The first applicant in the case is Sewatumong Micro Lending CC, with its member as the second applicant, and then there are five respondents with the third respondent not participating in the application before court.

3. This is essentially a review application which includes also certain relief wherein the applicants seek declaratory orders. Those declaratory orders are also premised on the provisions of PAJA or the Promotion of Administrative Justice Act and constitute therefore inherently review proceedings.

4. The applicants and the first, fourth and sixth respondents, earlier today, reached agreement, which agreement has been set out in a draft order between the said parties, which I made an order of this Court, and the content of the draft order reads as follows. I read it into this judgment because it is pertinently relevant to my decision. The upshot of the draft order is that:

    4.1. the applicants withdraw their application against the first, fourth and fifth respondents.

4.2. each party is to pay its own legal costs; and

4.3. the applicants' appeal of the decision of the National Consumer Tribunal on 12 March 2019 dismissing the application for condonation will be considered by a full panel of the tribunal in due course.

5. When the parties came to court this morning counsel for the applicants told this court that the applicants also intended to withdraw as against the second respondent. The second respondent is the National Credit Regulator. The applicants' counsel did however convey to this court that the applicants were not willing, notwithstanding the fact that it intended to withdraw the application, to tender the second respondent's costs. I am therefore to consider whether the second respondent is entitled to its costs.

6. Counsel for the second respondent indicated to this Court that the second respondent accepts the withdrawal but is obviously not satisfied with the non-tender of costs and insists on costs. Mr. Makhubele, who appeared for the applicants, then attempted to persuade me that in this case the second respondent is not entitled to costs because of the way the second respondent had conducted itself prior to the litigation. Several unpersuasive examples were provided of what was the alleged undue conduct by officials of the second respondent.

7. The applicants then made propositions to this court premised on a case which was handed up to me. It is the case of *Waste Products Utilisation (Pty) Ltd v Wilkes and Another (Biccari interested party) 2003 (2) SA 590 (W)* where the then Witwatersrand Local Division had to decide on an issue of costs where a party had

withdrawn the special costs relief it had sought as against an attorney. In that case a cost order was sought during the course of litigation against an attorney who participated in the falsification of evidence that was placed before the court on behalf of the defendants in that action.

8. On the day of the hearing of that case the party who sought costs against the attorney decided, for whatever reason, not to persist with its application for costs *de bonis propriis* against the attorney and withdrew the request for special costs. What then transpired is that because of that withdrawal, the said attorney's legal team argued that the implicated attorney was naturally entitled to costs because it was effectively successful due to the withdrawal. In that case, the court, however, decided that the attorney is not entitled to costs because he came to court with unclean hands in the sense that he participated in the falsification of evidence or at least *prima facie* did so and therefore no costs order was granted. As such the facts of that case differ substantially from the present matter.

9. In the same *Waste Products Utilisation*- case that was handed up to me, however, the court, and that is to be found on page 597 of that judgment, sets out the general proposition namely, and I quote:

"*Where a party withdraws a claim the other is entitled to costs unless there are good grounds for depriving him: Germishuys v Douglas Besproeiingsraad 1973 (3) SA 299 (NC) and Sentraboer Kooperatief Bpk v Mphaka 1981 (2) SA 814 (O).*"

10. The general principle is therefore that, where a party withdraws a claim, the other party is entitled to costs unless there are good grounds for depriving that party of costs. It accords with the general principle that a successful party should be

awarded costs. I disagree with the applicants in respect of their contention that I am entitled to consider whatever happened prior to the launching of this application.

11. Counsel for the applicants also sought to convince me that it does not follow that, when a party is cited to proceedings and, but no substantive relief is sought against that party, such party is entitled to costs. That proposition is firstly not good, because there is relief sought against the second respondent. It may very well be that, due to the draft order that was concluded between the other parties to this application, the relief has become academic. That does not mean that the second respondent was before this court without a good case or because of a frolic on its own. In this respect, I also refer to the case of *Van Staden and Others NNO v Pro-Wiz (Pty) Ltd 2019 (4) SA 532 (SCA)* where the Supreme Court of Appeal had the following to say on paragraph 13 of the judgment[1]:

> "*[13] Furthermore, as a matter of principle, when a party is cited in legal proceedings it is entitled without more to participate in those proceedings. The fact that they were cited as parties gives them that right. Here the liquidators were cited and decided to resist the application. They were entitled to do so by the mere fact of their joinder as parties.*"

12. The upshot being that where a party has been joined, it has a right to oppose the relief sought, and if the case is withdrawn against such party, the corollary being

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[1] In that case the applicants for business rescue had withdrawn their application but refused to pay the costs of the liquidators and premised on a wrong legal principle the court a quo had refused the liquidators their costs, notwithstanding that they had been joined as parties to the application.

that it is entitled to the costs, unless some exceptional circumstances exist that allows a court to exercise its judicial discretion otherwise.

13. The applicants, concededly so, joined the second respondent as a party to the proceedings. As a natural consequence the second respondent had the right to participate in the proceedings and resist the relief sought by the applicants. It is furthermore so that one of the main disputes between the parties in the litigation which the second respondent raised, as a pertinent issue, is the fact that the applicants failed to have exhausted their internal remedies as they were required to do as envisaged in section 7 of PAJA.

14. This is premised on the notion that the applicants had launched an internal appeal before the National Credit Tribunal, which appeal was pending when the applicants lodged their review application. On that premise alone, it seems at least *prima facie* that there was no exhausting of internal remedies. The question then is whether there were exceptional circumstances why these remedies did not have to be exhausted. The mere fact that the applicants had already launched their internal appeal evinces a concession that such remedies exist and ought to be exhausted. This has now, however, been overtaken by the agreement that the applicants reached with the first, fourth and fifth respondents, referred to hereinbefore, namely that it was agreed between those parties that the appeal will be proceeded with and be considered by a full panel of the National Consumer Tribunal in due course.

15. In my view this constitutes a clear concession that the point taken by the second respondent was good in law and ought to have been successful. In those circumstances, save for the fact that the mere withdrawal of the application against

the second respondent would have entitled the second respondent naturally to costs, it seems that it is conceded by the agreement concluded with the other parties that the point taken by the second respondent was proper. In my view therefore the second respondent is entitled to costs of the application.

16. In the premises, I issue the following order:

16.1. the application, as against the second respondent, by agreement between the parties, is withdrawn.

16.2. the applicants shall pay the second respondent's costs of the application.

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D VAN DEN BOGERT
Acing Judge
High Court of South Africa
Gauteng Division, Pretoria

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