

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 2024-011161

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
_____	_____
DATE	SIGNATURE

In the matter between:

**MARCE FIRE FIGHTING TECHNOLOGY
(PTY) LTD**

First Applicant

RICHARD GOODCHILD

Second Applicant

and

MASILO LAPSON JOHN SEALE

First Respondent

JAN PETRUS STEYN

Second Respondent

MARCE PROJECTS (PTY) LTD

Third Respondent

***Delivered:** This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date and for hand-down is deemed to be 8 March 2024.*

Summary: Liability for punitive costs. Applicants, after a debate with the bench opted to withdraw the urgent application. The respondents sought an order of punitive costs given the warnings issued to the applicants that what they were seeking the Court to order was already done by way of a resolution as authorised by the provisions of the Companies Act 71 of 2008. The applicants were reckless and vexatious in bringing the application. The application clearly amounted to an abuse of Court processes. The respondents should not be left out of pocket because of such a vexatious and frivolous application. Accordingly, a punitive wasted cost order is warranted. Held: (1) The applicant is ordered to pay the respondents' wasted costs on the scale of attorney and client.

JUDGMENT

CORAM: MOSHOANA, J

Introduction

[1] This matter emerged before me as a fully opposed urgent application. In the midst of oral submissions in Court, the applicant decided to withdraw the application. In their opposition of the application, the respondents prayed for the dismissal of the application with an attorney and client costs. The respondents had labelled the application as a classic case for abuse of Court process and implored the Court to show its dissatisfaction by ensuring that the respondents are not out of pocket because of the conduct of the applicants. Owing to the withdrawal of the application, the respondents persisted with their quest for punitive costs. Therefore, this judgment deals only with the question of costs.

Pertinent background facts to the present application

[2] Given the limited issue to be considered in this judgment, it is not necessary to narrate all the facts of this matter. It suffices to state that the second

respondent, Mr Jan Petrus Steyn (Steyn) was a director of Marce Projects (Pty) Ltd. On 21 June 2023, Steyn was removed as a director by way of a resolution. Allegedly, the first respondent, Mr Masilo Lapson John Seale (Seale) re-appointed Steyn as a director. In a board meeting which followed the removal of Steyn as a director, he was allegedly in attendance on account of being re-appointed by Seale. Allegedly, Seale was instructed by the shareholders to regularise the directorship of the Company. An impasse ensued on the issue of directorship. Ultimately, the applicants decided to launch the present application and sought an order to remove Steyn as a director.

Analysis

[3] The only issue remaining in the present application is that of costs in particular the scale thereof. As pointed out at the dawn of this judgment, the respondents are seeking a punitive costs order. Such a cost order is exceptional in nature and requires the Court to consider some exceptional circumstances before it can be made. The respondents in their answering papers pertinently indicated that since Steyn was already removed, seeking to remove him again is nothing but an abuse of Court process. On the hearing day, this Court debated the same point with the applicants' counsel. The Court afforded the parties an opportunity to resolve the matter owing to the debate that took place. When the matter was recalled counsel for the applicants attempted to advance further arguments on the matter. Following a further debate, he relented and withdrew the matter.

[4] Clearly this was an eleventh hour withdrawal. It was when the applicants realised that the shoe is pinching that they decided to withdraw. In my view, the approach taken by the Namibian Supreme Court in the matter of *Myburgh Transport v Botha t/a Truck Bodies (Myburgh)*¹ avails in this instance of late withdrawal of a matter. Dealing with a late postponement application, the learned Mohamed AJA, writing for the majority aptly stated the following:

“[10] Where the applicant for postponement has not made his application timeously, or is otherwise to blame with respect to the procedure which he

¹ 1991 (3) SA 310 (NmSC)

has followed, but justice nevertheless justifies a postponement in the particular circumstances of a case, the Court in its discretion might allow the postponement but direct the applicant in a suitable case to pay the wasted costs of the respondent occasioned to such a respondent on the scale of attorney and client."

[5] In *casu*, there is no success costs involved. Perhaps the respondents may have succeeded had the applicants not withdrawn, in which case, the ordinary rule of costs following the results would have applied. Clearly, the applicants withdrew because red lights were already flashing. Although the application was withdrawn, the view of this Court remains that the application was manifestly unsustainable from the get go. In *African Farms and Townships Ltd v Cape Town Municipality*², it was made clear that an action is vexatious and an abuse of the process of the Court *inter alia* if it is obviously unsustainable. Nevertheless, what the respondents are entitled to are wasted costs as opposed to success costs. In the circumstances, this Court is bound to award the respondents wasted costs on a scale of an attorney and client. The approach in *Myburgh* was approved by the Constitutional Court in the matter of the *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*³.

[6] For all the above reasons, I make the following order:

Order

1. The applicants must pay the wasted costs of the respondents on a scale of an attorney and client.

GN MOSHOANA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

² 1963 2 SA 555 (A)

³ 2000 (2) SA 1 (CC).

APPEARANCES:

For the Applicants:

Mr J A Klopper

Instructed by:

Cavanagh & Richards Inc, Centurion

For the Respondents:

Mr X Mofokeng

Instructed by:

M T Ramabala Attorneys, Pretoria

Date of the hearing:

05 March 2024

Date of judgment:

08 March 2024