IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE No: 3581/2019P

In the matter between:

FLAME LILY INVESTMENTS (PTY) LTD
PLAINTIFF

and

EDWARD PHILIP WALTER SOLOMON **1ST**
DEFENDANT

J LESLIE SMITH & COMPANY INC. **2ND**
DEFENDANT

ORDER

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1. The trial set down for ten (10) consecutive days from 31 January 2022 is adjourned sine die.

2. The first defendant is ordered to pay the plaintiff's and second defendant's wasted costs occasioned by the adjournment including costs of two counsel where so employed on party and party scale.

3. The first defendant is ordered to pay the plaintiff' and the second defendant's costs of the application including costs of two counsel where so employed.

JUDGMENT

Delivered on:

Mngadi J:

[1] This judgment relates to wasted costs occasioned by the adjournment of the matter enrolled for hearing.

[2] The plaintiff is Flame Lily Investments (Pty) Ltd a company with limited liability incorporated in terms of the company laws of the Republic of South Africa. The first Defendant is Edward Philip Walter Solomon a farmer and businessperson. The second Defendant is J Leslie Smith & Company an incorporated professional firm of attorneys.

[3] The plaintiff instituted action against both Defendants. The action is based in that the plaintiff in a sale agreement dated 6 February 2018 prepared by the second defendant bought an immovable property from the first defendant. In anticipation of the property transferred to it, the plaintiff incurred substantial expenses in the form of improvements and maintenance of the property. The second defendant in its capacity as conveyancers was appointed to attend to the transfer of the registration of the property to the plaintiff. The second defendant withdrew his mandate to the second defendant to transfer the registration of the property. Both the defendants failed to

advise the plaintiff of the withdrawal of the mandate as it continued with the improvement and maintenance of the property, and it later turned out that the sale was unenforceable. As a result, the plaintiff suffered damages for which it held the defendants liable.

[4] On 11 August 2021 after the pleadings closed, the matter was enrolled for hearing from 31 January 2022 to 11 February 2022. On 25 January 2022 the plaintiff launched this application seeking the adjournment of the matter and the order for the first defendant to pay wasted costs occasioned by the adjournment on attorney and own client scale as well as the costs of the application on an attorney and own client scale. The first defendant opposed the application. The application when it was heard no party opposed the adjournment of the matter. The first defendant before the plaintiff launched the substantive application for an adjournment had advised the plaintiff that although he did not agree with the reasons for seeking an adjournment he would not oppose the adjournment if certain conditions it stipulated were agreed to. The first defendant argued that wasted costs occasioned by the adjournment be reserved for determination by the trial court.

[5] The plaintiff in the supporting affidavit stated that the pleadings in the matter closed early in March 2021. The plaintiff filed its discovery affidavit on 26 March 2021. The first defendant filed his discovery affidavit on 31 March 2021 and the second defendant filed its discovery affidavit on 12 May 2021.

[6] The plaintiff stated that on 17 January 2022 the second defendant filed a supplementary discovery affidavit discovering a lease on the property in favour of Voigts (Pty) Ltd (second lease). This lease was first referred to in the second defendant's expert's valuation report dated 5 January 2022. The plaintiff stated the first defendant had not advised it of the existence of the said lease and he had not discovered it. The other experts in their valuation reports had not considered the said lease because they were not aware of it. The second lease was a material factor in the determination of the

value of the property at the date of the sale and on the date the property was evaluated with the improvements.

[7] The plaintiff stated that in addition, nine (9) days before the date of trial a lease extension of a lease on the property for a period of ten (10) years was furnished to the plaintiff. The plaintiff was not aware of the existence of the extension of the lease. The first defendant was a party to the lease extension but he did not advise the plaintiff of it and he did not disclose it in the discovery. The experts on the valuation of the property had not considered the lease extension because they were not advised on it. The plaintiff stated that both the second lease and the lease extension were material factors in the action. The first defendant's failure to disclose both the second lease and the lease extension constituted misrepresentation amounting to fraud, contending the plaintiff.

[8] The plaintiff on 19 January 2022 wrote to the first defendant and to the second defendant. It pointed out the impact to it and the consequences for the failure by the first defendant to disclose the second lease and the lease extension. It indicated that it is necessary that the trial be adjourned for it to reconsider its position. It stated that this was caused by the first defendant's failure to discover material documents. It requested the first defendant to tender the wasted costs occasioned by the adjournment incurred by the plaintiff and the second defendant including costs of two counsel where so employed in respect of the plaintiff and the costs on a scale of attorney and own client.

[9] The first defendant replied to the letter dated 19 January 2022 on 20 January 2022. He stated that the second lease and the lease extension were not material to the plaintiff's case. They were not relevant in determining the value of the property. The reports by the valuation experts, stated first defendant, did not have to take into consideration the second lease and the lease extension. The letter advised that no tender of any wasted costs occasioned by the adjournment shall be tendered; there were no grounds for adjourning the matter. The plaintiff, he claimed, was on spurious grounds seeking the adjournment to reformulate claims, which had poor prospects of

success. He suggested that the parties hold a pre-trial meeting to deal with the issues raised by the plaintiff

[10] The second defendant did not file any papers in the application for adjournment. It adopted the view that it was entitled to its wasted costs occasioned by the adjournment. The costs to be paid by the party the court finds was at fault in causing the matter to be adjourned. In the hearing counsel for the second defendant argued that there was no evidence that the second defendant had been furnished with the second lease before it made it available. The second defendant should be commended, argued counsel, for disclosing the second lease immediately it became aware of it. Counsel contended that the first defendant failed to discover documents it was bound in terms of the rules of court to discover and that the first defendant was the primary cause of the matter not proceeding.

[11] The plaintiff's counsel pointed out that the first defendant has furnished no explanation for failing to discover material documents. He failed, argued counsel, to deal which the averments paragraph by paragraph set out in the founding affidavit. He failed to do so, argued counsel, because he had no answer to the averments.

[12] The first defendant's counsel argued that the plaintiff's case was not directed at the failure to discover material documents, which is a procedural matter, and therefore the first defendant is not required to deal with a case not made in the papers. She argued that the plaintiff's case relates to the impact of the documents not discovered on its case. Counsel argued that this is the case first defendant dealt with in its papers and in the letter dated 20 January 2022. The plaintiff's case raised issues to be dealt with in the trial. It follows, argued counsel, that the liability for wasted costs occasioned by the adjournment must be reserved for determination by the trial court.

[13] The first defendant's counsel argued that there are no basis to claim wasted costs occasioned by the adjournment on a scale of attorney and own client. She argued that such costs are awarded on specific grounds or on special circumstances.

She further argued that the plaintiff was not entitled to the costs of the application because the plaintiff rushed to court. She said the first defendant proposed that a meeting be held to sort out the issues raised by the plaintiff but the plaintiff did not respond to the proposal.

[14] The first defendant in the answering affidavit stated that the plaintiff brought the substantive application for adjournment with the sole purpose to obtain punitive costs order against them and to obtain the adjournment without being held liable for the wasted costs of the defendants. He continued and he stated that his opposition is confined to the punitive costs order sought against him. He said the significance of the documents not disclosed can only be determined when all the other issues are dealt with in the trial. Therefore, he said, it would be premature to make an order of costs at this stage against him. In *Santam v Segal* 2010 (2) SAV 160 (N) at para 10 it was held that the assessment of relevance is objective and not subjective; it is not for a party's legal representative to decide what he thinks the issues are and what documents are relevant to them; and that any document it is reasonable to suppose that it contains information which may enable a party applying for discovery either to advance his own case or to damage that of his adversary or which may fairly lead him to a train of inquiry to such documents must be discovered..

[15] The plaintiff in the founding affidavit stated that the plaintiff's case in the action turns on the value of the immovable property as at the date of the sale agreement as well as the current value of the property after the improvements made by the plaintiff. The parties engaged expert professional valuers in order to present expert evidence in court on the issue. Overall, three experts were engaged and submitted expert reports. In a valuation of an immovable property, a long-term lease on the property is a material factor. The period of the lease, the rent payable and obligations and responsibilities have a bearing on the market value of an immovable property. The lease not disclosed provides that it is for a period of nine (9) years and 11 months commencing on the date of termination of the existing lease. It is between the first defendant and IR Voigts (Pty) Ltd and it was concluded in March 2017.

[16] The first defendant emailed the lease extension to the plaintiff on 17 January 2022 after a request from the plaintiff. It is between the first defendant and Msinsi Holdings (Propriety) Limited. It was concluded on May 2021. It extends an existing lease that is due to expire on 30 June 2022 by a further period of nine (9) years eleven (11) months. The object of discovery is to ensure that before trial both parties are made aware of all the documentary evidence that is available. This results in the narrowing of issues and the debate on points, which are incontrovertible, is eliminated. The party in possession or custody of documents is supposed to know the nature thereof and carries the duty to put those documents in proper order for both the benefit of his adversary and the court in anticipation of the trial action. It like cross-examination is a mighty engine to expose the truth. There is an obligation to make discovery of documents, which may directly or indirectly enable the party requiring discovery either to advance his own case or to damage the case of his adversary. A party may only obtain inspection of documents relevant to the issues on the pleadings and relevance does not depends on the subjective view of the party making discovery.

[17] In my view, the basis of the action of the plaintiff against the defendants makes it clear that matters relevant for the determination of the market value of the property were subject to discovery. The first defendant was obliged to discover both the second lease and the lease extension. It matters not that on receipt thereof the plaintiff could amend the particulars of claim. The first defendant's contention that the question of wasted costs occasioned by the adjournment be reserved for the trial court would have had merit if the plaintiff intended only to use the documents not disclosed to consider reformulating its claim against the defendants. However, the plaintiff has shown that the documents not disclosed are relevant in the issues in the action as it stands. Therefore, the wasted costs occasioned by the adjournment are the costs that have been incurred and this court is in a position to decide the liability of those costs.

[18] The belated disclosure of the second lease and the lease extension caused the plaintiff to be ill prepared for trial. This was entirely due to the fault of the first

defendant. He failed to properly and timeously carry out his obligation to discover. It follows that the first defendant is liable for wasted costs occasioned by the adjournment. The first defendant refused to tender wasted costs occasioned by the adjournment. The plaintiff was left with no option but to launch an application for adjournment and to seek an order that the first defendant pay the wasted costs occasioned by the adjournment. The belatedly disclosed documents had an impact on plaintiff's preparation for trial, which could not be resolved in a pre-trial meeting. The first defendant in refusing to agree to an adjournment and to tender wasted costs occasioned by the adjournment was forcing the plaintiff to launch a court application.

[19] The plaintiff seeks costs on a punitive scale. The purpose of an award of costs is to indemnify the party entitled to costs for the expense to which he has been put through. It is a refund of expenses actually incurred. Party and party costs are those costs that have been incurred by a party and the other party is ordered to pay. Those costs, charges and expenses that appear to the taxing master to have been necessary or properly incurred by the party in the litigation.

[20] Attorney and client costs are costs that an attorney is entitled to recover from a client for the disbursements made on behalf of a client and for professional services rendered. It includes all costs that the attorney is entitled to recover against the client . Whereas attorney and own client scale of costs is a scale higher than the attorney and client scale although this is not settled. The courts are reluctant to make an award of costs on the very punitive attorney and own client scale.

[21] The award of costs is a matter wholly within the discretion of the court but this a judicial discretion to be exercised on reasonable grounds. The court takes into consideration the circumstances of the case, carefully weighing the various issues in the case, the conduct of the parties and any other circumstance which may have a bearing upon the question of costs and then make such order as to costs as would be fair and just between the parties. In *Nel v Waterberg Landbouwers Ko-operatieve Vereeniging* 1946 AD 597 the court stated 'that by reason of special considerations arising either from the

circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case may consider it just, by means of such an order, to ensure more effectually than it can do by means of a judgment and party and party costs that a successful party will not be out of pocket in respect of the expense caused by the litigation by granting costs on a punitive scale. An award of attorney and client costs cannot, however, be justified merely as a form of compensation for damage suffered'. It is trite that an award of attorney and client costs will not be granted lightly, as the court looks upon such orders with disfavour and is loath to penalise a person who has exercised a right to obtain a judicial decision on any complaint a party may have. The grounds upon which the court may order a party to pay an opponent's attorney and client costs include the following; that the party has been guilty of dishonesty or fraud; or had vexatious, reckless and malicious or frivolous motives; or committed grave misconduct either in the transaction under inquiry or in the conduct of the case. The court's discretion to order the payment of attorney and client costs is not, however, restricted to cases of dishonesty, improper or fraudulent conduct. It includes all cases in which special circumstances or considerations justify the granting of such an order, for example, where a notice of discovery in terms of the rules of court was ignored(not promptly complied with) without convincing reasons for the delay or as a mark of the court's disapproval of some conduct that should be frowned upon. It is clear in my view that of importance is the degree of blameworthiness gleaned from a conduct of a litigant.

[22] The adjournment of the matter means that the determination of the merits is still to be done in the trial. The wasted costs is not totally wasted in the event the plaintiff succeeds in its action against the defendants. The first defendant's failure to make full discovery is not explained. There are no basis to conclude that it was based on ulterior motives or dishonesty. It shows a serious neglect of his obligations. A party through his attorneys attends to discovery. It is not known whether it was the fault of the attorneys or of the first defendant. It establishes a disturbing degree of negligence on the part of the first defendant. The attitude of the first defendant to cast aspersions to the plaintiff instead of tendering payment of wasted costs occasioned by the adjournment shows a litigant not conscious of his obligations. The second defendant has not sought costs on a punitive scale. One counsel each represents the first

defendant and the second defendant. In my view, it is a relevant consideration to consider the costs the party entitled to costs would have been exposed to if it were the party paying the costs.

[23] The reasons mentioned above are all reasons, which justify that the first defendant should be held liable for wasted costs occasioned by the adjournment as well as the costs of the application. In my view, they fall short of justifying the first defendant mulcted with costs on the punitive scale. Mr Combrink referred me to the case of *Ferreira v Endly* 1966 (3) SA 618 (ECD) and the case of T*aary & Co Ltd v Matatiele Municipaity* 1956 (3) SA 131 (ECD) both matters in many respects are similar to this matter. However, in both matters the parties were represented by one counsel, the matter was set down for one day, and applications for adjournment were lodged on the date of trial, which was found to cause some embarrassment to the court, the courts, in exercising their discretion, awarded costs on attorney and client scale. I am not persuaded to follow those decisions.

[24] I ordered as follows.

1. The trial set down for ten (10) consecutive days from 31 January 2022 is adjourned *sine die.*

2. The first defendant is ordered to pay the plaintiff's and second defendant's wasted costs occasioned by the adjournment including costs of two counsel where so employed on party and party scale.

3. The first defendant is ordered to pay the plaintiff's and the second defendant's costs of the application including costs of two counsel where so employed.

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Mngadi, J

APPEARANCES

Case Number	:	3581/2019P
For the Plaintiff	:	Mr. Combrink SC
Instructed by	:	Redfern & Findlay Attorneys PIETERMARITZBURG
For the first Defendant	:	Ms Vermeulen
Instructed by	:	Lester Hall, Fletcher Inc. c/o PGPS Attorneys PIETERMARITZBURG

For the second Defendant : Mr Pillemer

Instructed by : Bowman Gilfillan Inc.
c/o J Leslie Smith & Company Inc.
PIETERMARITZBURG

Heard on : 31 January 2022

Judgement delivered : 03 February 2022