



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 24010/2022

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 18 NOVEMBER 2022
SIGNATURE

In the matter between:

THUNGELA OPERATIONS (PTY) LTD

Applicant

and

XAKWA COAL (PTY) LTD

First

Respondent

WEALTHAGE HOUSE OF CAPITAL PTY LTD

Second Respondent

BENTECH MINING (PTY) LTD

Third Respondent

THABO MACHETE

Fourth Respondent

MINISTER OF WATER AND SANITATION

Fifth Respondent

MINISTER OF MINERAL RESOURCES AND ENERGY

Sixth

Respondent

Summary: Withdrawal of application – despite this each party to pay its own costs – applicant justified in having pursued relief until a directive in terms of the National Water Act has been issued.

ORDER

The applicant and the fourth respondent shall each pay its own costs.

J U D G M E N T

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

Introduction

[1] On 17 May 2022 Fourie J delivered a judgment in respect of the initial hearing of this matter. At the conclusion of the judgment, the applicant's application against two erstwhile holders of mining permits on the property adjacent to that of the applicant was dismissed. At the same time, interim interdicts were granted against two other respondents, being another mining company and the neighbouring landowner, the fourth respondent, on an unopposed basis. The fourth respondent subsequently entered the fray and opposed the granting of the final interdict. Before the matter could be heard on

an extended return day, the Department of Water and Sanitation (DWS) had issued a directive against the fourth respondent in terms of sections 19(3) and 53(1) of the National Water Act 36 of 1998 (NWA). The applicant, being of the view that this intervention obviated the need for a final court order, subsequently withdrew its application. In the final instance, the matter then proceeded in respect of the issue of costs only.

The principles pertaining to costs when a matter is withdrawn

[2] The general principle is that a party withdrawing an application launched by it becomes liable, as an unsuccessful litigant to pay the costs of the proceedings initiated by it¹.

[3] Following *Germishuys*, it has been held that “... *it is only in exceptional circumstances that a party that has been put to the expense of opposing withdrawn proceedings will not be entitled to all the costs caused thereby*”².

[4] The court, however, retains a discretion to “deprive” the successful party, that is the party against whom the application was initially launched, of its costs³.

[5] The above principles do not detract from or limit a court’s ordinary discretion⁴.

[6] In exercising its discretion, which is to be exercised judicially, a court “... *should have due regard to the question whether, objectively viewed, the applicant [had] acted reasonably in launching the main proceedings but was subsequently driven to withdraw it in order to save costs because facts*

¹ *Germishuys v Douglas Besproeiingsraad* 1973 (3) SA 299 (NC) (*Germishuys*).

² *Reuben Rosenblum Family Investments (Pty) Ltd and Another V Marsuban (Pty) Ltd (Forward Enterprises (Pty) Ltd and Others intervening)* 2003 (3) SA 547 (C) at 550C-D

³ *Waste Products Utilisation (Pty) Ltd v Wilkes (Biccari interested party)* 2003 (2) SA 590 (W) at 597A.

⁴ *Erasmus v Grunow and Another* 1980 (2) SA 793 (O) at 797H – 798C.

emerging for the first time from, for instance, the respondent's answering affidavit in the main proceedings or because the relief was no longer necessary or obtainable because of developments taking place after the launching of the main proceedings⁵".

[7] The last-mentioned comment quoted above, was made by the learned authors of *Erasmus* with reference to *Wildlife & Environmental Society of SA v MEC for Economic Affairs, Environment & Tourism, Eastern Cape and Others* 2005 (6) SA 123 (ECD) (*Wildlife*). In that matter, the additional considerations were whether applicants who seek to enforce Constitutional rights, particularly for the sake of protection of the environment and who sought to obtain relief in the public interest, should be spared costs orders, should they withdraw their applications. These considerations also apply to the present matter.

Summary of background facts

[8] The adjacent properties in question are portions of the Farm Kromdraai 297 JS Emalahleni situated in Mpumalanga. The applicant's properties have loosely been referred to as portions 10 and 11 and the fourth respondent's property as portion 23.

[9] The history of the matter regarding these two sets of properties have been set out by Fourie J in his judgment and it is not necessary to repeat that here. What has, however, become clearer by way of papers delivered since his judgment, is that mine-impacted water is continually being discharged from a dam on the fourth respondent's property into the environs thereof.

[10] Due principally to historical mining operations on the sets of adjacent properties, the underground mining pillars between the properties have either

⁵ Van Loggerenberg, *Erasmus superior Court Practice*, Second Edition at D1 - 55 (*Erasmus*)

become compromised or may have been breached, resulting in inter-mine flow of mine impacted drainage.

[11] There is a dispute as to whether there is drainage or surface seepage of such water from the applicant's properties to the fourth respondent's property or not. The fact of the matter is however, that the applicant has taken steps to contain the discharge of mine-impacted water from its property and/or its mining operations while the fourth respondent's attempts to do the same, has fallen short, particularly in respect of the water flowing from dam 2 on the edge of the old Xakwa mine on its property. While measures taken by the fourth respondent appear to have been successful in respect of the remainder of its property, the discharge or overflow from the Xakwa dam continued virtually unabated.

A brief history of the litigation

[12] The applicant launched its application on an urgent basis, intending for it to be heard on 10 May 2022. In the end, it was heard on 12 and 13 May 2022. The relief sought was to interdict the respondents (which expressly included the fourth respondent) from "... *discharging or permitting the discharge ...*" of mine-impacted water from the fourth respondent's property onto adjacent properties, erosion trenches, the applicant's water holding and treatment facility or "*causing ... significant pollution and degradation and erosion of the environment ...*". The applicant also sought an order directing the respondents to fulfil their duties of care contemplated in section 28 of the National Environmental Management Act 107 of 1998 (NEMA) and the NWA.

[13] The rule nisi issued by Fourie J on 17 May 2022, returnable on 14 July 2022, contained the relief as claimed by the applicant, as an interim order with immediate effect.

[14] Ten days later, on 24 May 2022 the DWS, whose Minister had been cited as the fifth respondent, issued a notice of intention to issue a directive in terms of sections 19(3) and 53(1) of the NWA, to the third and fourth respondents.

[15] On 28 June 2022 the fourth respondents made representations to the DWS in response to the aforesaid notice and thereafter delivered its answering affidavit in the present matter on 8 July 2022.

[16] On the initial return day of the rule nisi, the interim order was confirmed against the third respondent and the rule nisi was extended to 15 September 2022. The very next day the DWS conducted follow-up inspections on the fourth respondent's property. Hereafter, on 8 August 2022 the fourth respondent delivered a supplementary answering affidavit.

[17] On 14 September 2022, being the day before the extended return day of the rule nisi, the DWS, under signature of the Provincial Head, Mpumalanga Provincial Operations, issued a directive in terms of the relevant sections of the NWA to the third and fourth respondents, requiring them to provide authorisations for their water use and to immediately stop any unlawful use upon failure to provide such authorization and to:

- “3. *Provide a written corrective Plan of Action (PoA) in which you specify measures that will be employed by the mine to manage the pollution of Acid Mine Drainage emanating from the pits within fourteen (14) working days of the receipt of this directive.*
4. *Appoint a suitably registered professional to compile a rehabilitation plan for all the affected areas (pits, nearby water resources and the environment) within thirty (30) working days upon receipt of the directive which must be submitted to the*

Department for recommendation. The rehabilitation plan must entail amongst- others; the nature and extent of the impact that the water use activities have had or may have on the water resources and measures that will be implemented to remediate or mitigate the impacts with clear timeframes and descriptions of how and when each remedial/mitigation action will be implemented.

5. *The rehabilitation plan must further indicate the cost estimated of the entire rehabilitation process; and*
6. *Implement all the recommendations contained in the rehabilitation plan and rehabilitate the areas affected by the water use activities within thirty (30) working days of the Departmental recommendation of the Rehabilitation Plan”.*

[18] Subsequent to the above, the rule nisi was further extended to 7 November 2022, on which date the applicant did not persist with seeking confirmation of the rule nisi. This intention had been conveyed to the fourth respondent’s attorneys shortly before, resulting in a dispute about costs. The applicant’s position had been set out in heads of argument delivered on its behalf as follows: *“The effect of the DWS Directive is that it is no longer necessary to obtain a final interdict against the fourth respondent. In the notice of motion [the applicant] had sought the interim interdict against the respondents pending compliance in full with the DWS directives. It has taken the DWS four months to issue the Directive. But, in any event, [the applicant] had always recognized that the DWS is the proper authority that is empowered to compel the fourth respondent (and any persons responsible for the pollution) to take steps to ensure that the discharge of the mine-impacted water is stopped. It is now for the DWS to ensure that the fourth respondent complies with the*

Directives. For that reason the applicant no longer intends on pursuing the relief which it sought in this application against the fourth respondent”.

Evaluation

[19] The fourth respondent contended forcefully, both in its papers and by way of argument in court, that the influx of water into the Xakwa dam emanates from the applicant’s properties. It relied on the opinion of a hydrologist in this regard and the fact that it (and/or the third respondent) had stopped pumping water into dam 2 of the old Xakwa mine, yet the water levels continued to rise. It alleged that the applicant had conceded that the water in question emanated from its properties.

[20] Dealing with the last-mentioned contention first: on my reading of the papers, the applicant only conceded that there was inter-mine flow of water due to the boundary pillars of mining activities not having been observed or maintained. It however continued to deny the fourth respondent’s contentions. In fact, the applicant’s experts asserted that the lowest point in the underground mining activities (described as the seam floor) was on the applicant’s properties and that there “... is a depression from portion 23 [the fourth respondent’s property] into portion 11 [the applicant’s property]”. The seepage of groundwater and direction of the flow of sub-surface water is also disputed. The purported concession relied on by the fourth respondent is therefore either disputed or by no means unequivocal.

[21] In argument in court, much was also made by the applicant of the fact that the duties imposed on a landowner in terms of NEMA, obliged it to manage water on its property to prevent pollution or degradation, irrespective of the source of the water⁶.

⁶ This duty of care emanates from section 28 of NEMA

[22] I need not finally determine these issues as the applicant is no longer seeking relief against the fourth respondent and neither did the fourth respondent persist with a counter-application alluded to in its opposing papers. I therefore need not determine the factual issues regarding the source or origin of the water flow (which the fourth respondent in any event contends cannot be determined without oral evidence), I need only determine whether the launch of the application had been reasonable in the circumstances. The overflow of water from the “old Xakwa mine pit” (dam 2) had been common cause prior to the launch of the application and where it is apparent that this had not been contained, I find that the applicant had reasonable cause to launch the application. In the absence of action by the DWS to stop the discharge of such mine-impacted water, it was not unreasonable for the applicant to have kept the application “alive” even after delivery of the fourth respondent’s answering affidavit, from which contents the admission of the discharge appeared, albeit that it was coupled with a disputed accusation as to the cause thereof.

[23] In addition to the above, in *Wildlife* the court accepted the argument that a party relying on the enforcement of the duties imposed by NEMA, should not necessarily carry the burden of costs in the event of it being unsuccessful. Section 32(2) of NEMA provides as follows:

“A court may decide not to award cost against a person who, or group of persons which, fails to secure the relief sought in respect of any breach of threatened breach of any provision concerned with the protection of the environment or the use of natural resources if the court is of the opinion that the person or group of persons acted reasonably out of a concern for the public interest or in the interest of protecting the environment and had made due

efforts to use other means reasonably available for obtaining the relief sought”.

[24] In seeking the enforcement of the duties imposed by section 28 of NEMA (in paragraphs 2.6 of its notice of motion) the applicant in this matter was entitled to rely on section 32(2) of NEMA. This section has further been held to “*free the court from the fetter of ordinary principles, on the basis of compliance with certain conditions*”⁷.

[25] In these circumstances, not only do I find that the applicant has satisfied the abovementioned “conditions” but I find that the applicant should not be saddled with costs despite the fact that it became the “unsuccessful” party, once the events set in motion by the DWS overtook the need for a final interdict.

[26] Having made the above finding however, I am not of the view that it goes so far as to convert the applicant into a “successful” party, making it entitled to costs. To reach that point, a determination would have had to be made on the disputed facts or at least on the question of whether the applicant would have been entitled to a final interdict, an exercise which the applicant elected not to pursue. By the same token, the fourth respondent also did not pursue the claim for an “opposite” interdict referred to askance in its papers.

[27] Taking all this into consideration, in the exercise of the court’s discretion, I find that it would be equitable to order each party to pay its own costs. This would, it seems to me, be fair in the circumstances⁸. In reaching this conclusion, I have also taken into account that no final determination had or could be made in respect of the correctness of the opinions of opposing experts relied on by the parties and therefore neither party should be liable for the costs of the other party’s experts.

⁷ *Silvermine Valley Coalition v Sybrand van der Spuy Boerderye and Others* 20002 (1) SA 478 (CC) at 491 I.

⁸ See the Oft-relied on case of *Fripp v Gibbon & Co* 1913 AD 354 at 363.

Order

[28] The following order is made:

The applicant and the fourth respondent shall each pay its own costs.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 7 November 2022

Judgment delivered: 18 November 2022

APPEARANCES:

For the Applicant:	Adv B L Manentsa
Attorney for the Applicant:	Webber Wentzel Attorneys, Johannesburg
	c/o Hills Incorporated, Pretoria
For the Fourth Respondent:	Adv R Andrews
Attorney for the Fourth Respondent:	Dhooge Law Inc, Benoni c/o Legal Serve Serve Centre, Pretoria