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**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Case No. 4655/2021

In the matter between:

VEHICLE DELIVERY SERVICES a division of **ONELOGIX (PTY) LTD)**

REGISTRATION NUMBER: [...] **PLAINTIFF**

and

KEY GROUP **1ST DEFENDANT**

REGISTRATION NUMBER: [...]

SIFISO MTSHALI **2ND DEFENDANT**

IDENTITY NUMBER: [...]

CORAM: GUSHA, AJ

HEARD ON: 25 APRIL 2023

DELIVERED ON: This judgment was delivered electronically by circulation to the parties' representatives by way of email and by release to SAFLII. The date and time for delivery is deemed to be at 13h00 on 11 MAY 2023.

JUDGMENT

[1] The plaintiff is a duly incorporated private company and the registered owner of a heavy motor vehicle with registration number [...]

- [2] The 1st defendant is a duly incorporated private company and the owner of a heavy motor vehicle with registration number[.]. The 2nd defendant is an adult male employee of the 1st defendant.
- [3] The dispute between the parties has its genesis from a motor vehicle collision that occurred between the aforesaid heavy motor vehicles on the 19th October 2020. The main dispute between the parties has since become settled. The defendants conceded the merits and the plaintiff's quantum is settled at R739 460.23. Having conceded the merits and the quantum, it follows that the costs should follow that result.
- [4] The nub of the current dispute between the parties is the scale on which such costs order should be made.
- [5] The primary underlying purpose of any costs award is to minimise the extent to which a successful litigant will be out of pocket as a result of litigation that he or she should not have had to endure. Costs orders often do not even achieve that objective, and fall short of assisting the successful litigant in fully recovering his or her expenses. It will at times be just and equitable to award costs on a punitive scale, not just to punish vexatious litigation, but also to assist the successful litigant in recouping their often substantial expenses. Generally, punitive costs orders are not frequently made. Exceptional circumstances must exist before they are warranted¹.
- [6] It is a well-established principle of our law that the general rule regarding costs is that the unsuccessful party pays the costs of the successful party on the party and party scale. Equally established is the principle that the court exercises a discretion when considering an appropriate costs order and should, of necessity, exercise same judiciously². In the exercise of its discretion, the court must carefully weigh the issues in the case, the conduct of the parties and any other circumstance which may have a bearing on the issue of costs and then make

¹ LAWSA, Volume 10, Third Edition, 284 note 15.

² *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22 at para 85.

such order as to costs as would be fair and just between the parties. In **Van der Walt v Murray and Another**³ Naidoo J held that the aforesaid position is particularly so if the court intends to depart from the general rule.

- [7] In its particulars of claim the plaintiff initially prayed for costs of suit. It appears that the parties had engaged in some negotiations⁴ in an endeavour to settle this matter. During those negotiations the plaintiff proposed that costs be awarded on a party and party scale and that such costs should include costs of counsel, experts and the correspondent⁵. This proposal was however spurned by the defendants who insisted on an order providing for costs, which costs would include costs of counsel and no more.
- [8] It would seem that the plaintiff has now made an about turn and now prays for a punitive costs order on the attorney and client scale. In arguments it was submitted that in awarding costs on a punitive scale, this court would be expressing its displeasure at the defendants conduct as well as ensuring that as a result of such conduct, the plaintiff was not left unnecessarily out of pocket.
- [9] For brevity's sake, I do not propose to repeat their submissions in full herein, as same has been comprehensively canvassed in their heads of argument.⁶. Truncated, their reasons are as follows; firstly, the plaintiff employed the services of an expert witness and were thus entitled to fees in this regard. Secondly, the plaintiff resides in Gauteng and his attorneys of record are also in Gauteng, thus it was justified in appointing a correspondent attorney within the court's area of jurisdiction, Bloemfontein. Lastly, in order to fortify their submissions *re* the punitive costs, they relied on the defendants' pre-settlement conduct, which conduct they deemed vexatious.
- [10] The defendants in turn submitted that costs should be awarded on a party and party scale as originally prayed for by the plaintiff. Further, that the plaintiff

³ (2554/2019) [2019] ZAFSHC 169 at para 9

⁴ On the 21st April 2023.

⁵ Plaintiff's heads of arguments page 2 para 3.

⁶ Ibid fn 1 at para 6 – 73.

submitted its expert notice 12 days before set down⁷. It is on the strength of this expert notice that, 7 days after receipt, a settlement offer was made. The defendants contend that, had the plaintiff filed its expert notice timeously, the settlement offer would similarly have been made sooner. It was further submitted that due to the notice being filed out of time, the plaintiff was not entitled to these fees. However, if the court was inclined to award costs in this regard, it was submitted that the plaintiff was only entitled to fees in respect of the 1 expert report they filed. The defendants further contended that the conduct complained of was prior to the settlement offer being made, and was thus irrelevant for purposes of deciding present the issue before the court.

[11] *In casu* this court must now determine what constitutes a just and equitable costs order. In arriving at that determination I have taken into account that the main dispute between the parties became settled as a result of the settlement offer made by the defendants. Furthermore, that same was occasioned by the plaintiff's expert report which was submitted a few days before set down. It is illuminating that even after the defendants' alleged vexatious conduct, and more specifically on the 21st April 2023, the plaintiff was still keen on costs being awarded on the party and party scale. What brought about the plaintiff's sudden change of attitude in this regard escapes me. It certainly could not have been as a result of the plaintiff feeling aggrieved by the defendants' alleged vexatious conduct, this on their own version, predates the settlement negotiations. On this aspect only, I do not deem it necessary to make a finding whether the defendants' conduct prior to settlement was vexatious or not

[12] Accordingly, I am not persuaded that this is a case where a punitive costs order is warranted. I am mindful of the fact that the plaintiff may as a result of this order be left out of pocket. I am further mindful of the fact that costs orders generally may not assist a successful party to fully recover expenses occasioned by litigation, I am satisfied however that the costs order hereunder will assist the plaintiff to recoup some, if not all, of its litigation expenses.

⁷ The plaintiff conceded in arguments that only 1 expert notice was filed and not plural as per their heads of arguments.

[13] In the result I make the following order;

- 13.1. The First and Second defendants are ordered, to jointly and severally, pay 100% of the plaintiff's damages.
- 13.2. The First and Second defendant's counterclaim is withdrawn.
- 13.3. The First and Second defendants must pay, within 30 calendar days from the date of this order, jointly and severally, the other paying the other to be absolved, the amount of R739 460.23 (SEVEN HUNDRED AND THIRTY NINE THOUSAND, FOUR HUNDRED AND SIXTY RAND AND TWENTY THREE CENTS)
- 13.4. No interest shall accrue on the outstanding amount, should the amount be paid as directed under paragraph 3, whereafter interest shall accrue at the prescribed mora interest rate from the date of this order to date of final payment.
- 13.5. The defendants to pay, the one paying the other to be absolved, the plaintiff's taxed or agreed party and party costs on the High Court scale, until the date of this order, which costs shall include the costs of 2 counsel and the reasonable qualifying fees of the following expert: Mr Shaun Basil Le Roux.
- 13.6. Payment to be made into the trust account of the plaintiff's attorneys which details are as follows:

ACCOUNT HOLDER	:	ROETS & VAN RENSBURG
BANK	:	[...]
BRANCH CODE	:	[...]
ACCOUNT NUMBER	:	[...]
REFENCE NUMBER	:	[...]

NG GUSHA, AJ

On behalf of the plaintiff

Instructed by:

Adv. BP GEACH (SC) and FHH KEHRHAHN

HILL MCHARDY & HERBST INC

BLOEMFONTEIN

On behalf of the respondent:

Instructed by:

Adv. LA VISSER

PWC INC ATTORNEYS

BLOEMFONTEIN