HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 74701/2018

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 2 DECEMBER 2021
SIGNATURE

In the matter between:

MARCEL SCHARRIGHUISEN N.O	First Plaintiff
SYLVIA SCHARRIGHUISEN N.O	Second Plaintiff
CLASINA SCHARRIGHUISEN N.O	Third plaintiff

and

BLACK ROCK PROPERTY MANAGEMENT (PTY) LTD	First Defendant
HEINZ RYNNERS	Second Defendant

J U D G M E N T

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

DAVIS, J

[1] Introduction

This is the judgment in an opposed application for costs launched by the defendants in an action pursuant to the plaintiffs' withdrawal of that action without a tender for costs. The parties shall be referred to as in the main action.

[2] Applicable principles

2.1 Rule 41(1) provides that a person withdrawing proceedings (particularly after it has been set down and who does so without consent of the other party or leave of the court), should consent to paying the costs of the proceedings. Should such consent not be "embodied" in the notice of withdrawal, "*the other party may apply to court on notice for an order for costs*".

2.2 The general principle is that a plaintiff who withdraws its action, finds itself in the position of an unsuccessful litigant. See: *Germishuis v Douglas Besproeiingsraad* 1973 (3) SA 299 (NC) at 300D – E.

2.3 The further principle of general application that, unless there are good grounds to find otherwise, costs should follow the event. See the discussion of this rule in Van Loggenberg, *Erasmus – Superior Court Practice*, Vol 2 at D5 – 7.

2.4 Counsel for the defendants, quite correctly, in her heads of argument, relied on the following dictum in *Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape and Others* 2005 (6) SA 123 (E) at 131 B: "*It is clear from the above, in my view, that, even in cases where litigation has been withdrawn, the general rule is of application, namely, that a successful litigant is entitled to its costs unless the Court is persuaded, in the exercise of its judicial discretion upon a consideration of all the facts, that it would be unfair to mulct the unsuccessful party in costs*".

2.5 In the *Wildlife*-case above, reference was also made to *Erasmus v Grunow and Another* 1980 (2) SA 793 (OPD) wherein reference was not only made to the general principles regarding an award for costs, but to numerous cases where litigation had not been brought to finality, including cases where this was as a result of a withdrawal of proceedings, such as in *Germishuis v Douglas Besproeiingsraad* (above) and *Republikeinse Republikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A). The relevant portions of the judgment in *Erasmus v Grunow* by Flemming J (as he then was) with the concurrence of Erasmus J which I find applicable to the case at hand are at 798D and 798H. My translation thereof is as follows: "*When a decision regarding costs is made in the absence of a decision on the merits because an order on the merits is no longer sought or is no longer permissible, it does not mean that the decision on costs must be reached in total isolation of considerations regarding the merits ... various decisions (such as Roupell v Metal Art (Pty) Ltd and Another 1972 (4) SA 300 (W) and Hugo v Hugo 1947 (1) SA 325 (O)) contemplate circumstances which remain in accordance with the general fairness of the situation, namely to, in appropriate circumstances, take into account whether the party who withdraws the litigation, had been*

justified in launching such litigation". The corollary is equally that a court may, in the interests of fairness, consider whether the defence to the litigation had been justified.

2.6 The "general principles" should also never be applied in a dogmatic fashion, thereby unduly limiting the basis judicial discretion of a court. See *Erasmus v Grunow* above at 797 H and *Cronje v Pelser* 1967 (2) SA 589 (A) at 593.

2.7 A last relevant consideration for the exercise of judicial discretion regarding the award of costs (or the deprivation thereof) is the conduct of a litigant during the course of the litigation. See inter alia: *Headleigh Private Hospital (Pty) Ltd t/a Rand Clinic v Soller & Manning* [1998] 4 All SA 334 (W) and *Investec Employee Benefits Ltd v Electrical Industry KZN Pension Fund* 2010 (1) SA 446 (W).

[3] The background facts

3.1 The plaintiffs are the trustees of a property-holding trust. From their affidavit delivered in opposition to the defendants' Rule 41(1)(c) application, it appears they take their fiduciary duties regarding trust property and expenses very serious, as indeed they are obliged to do.

3.2 It is not disputed that the first defendant, a company of which the second defendant appears to be the sole director and controlling mind, had rented a property from the trust.

3.3 Having regard to the admissions contained in the defendants' plea, the first defendant would have rented the property for a period of 3 years, but has vacated the property after nine months. The terms of the lease are not in dispute.

3.4 Based on the aforesaid, the trust instituted action for payment of arrears rental and damages for loss of rental for the unexpired portion of the agreement. Foreseeing that the circumstances might change, i.e for instance if a new tenant can be found, the plaintiff reserved the right to amend the quantum of damages sought.

3.5 The trust had done its best to mitigate its damages, which included attempts to obtain new tenants for the property which has been converted into six office spaces but, dispute its best efforts, had been unable to do so, resulting in an amendment to its particulars of claim, increasing the initial damages from some R400 000.00 to over R 1, 2 million.

3.6 The second defendant had been cited in his capacity as surety but denied this on the basis of a lack of consencus or a mistake in that some, but not all of the clauses pertaining to his suretyship had been deleted. He did not however, otherwise distance himself from the conduct of the first defendant who he controlled.

3.7 After some postponements and, at one stage, having been "crowded out" from the trial roll, the trust withdrew the action and later proposed that each party pays its own costs. In the aforementioned affidavit by one of the trustees, the position has been set out as follows: "*The trust instituted proceedings against the applicants following the first applicant having failed to pay rental due to the Trust and simply moving out of the Trust's property only nine months into a three year lease, without reason ... the lease was cancelled ... the Trust made considerable effort to re-let the premises vacated by the first applicant but had extremely limited success in this regard ... throughout the matter, the defendants did the bare minimum to advance matters towards trial, failing to file their plea until a notice of bar was served on them, failing to discover, failing to attend a*

pre-trial conference to which they were invited and appearing to do very little by way of preparation ... . Shortly before the trial, it was established that the first applicant had stopped trading and was, in fact, an "empty shell of a company with the result that the only (potential) prospect of the Trust recovering the claim, interest and substantial legal costs that it had incurred, should it be successful at trial, would be from the second defendant, whose ability to pay such a substantial amount of money was subject to a considerable amount of doubt ... as a consequence thereof, the trustees made a business, rather than a legal, decision not to proceed any further with the matter and instructed the Trustees' attorneys of record to withdrawn the proceedings against both applicants".

3.8 The defendants chose not to respond to the above allegations.

3.9 Instead, the defendant's attorney deposed to an affidavit in reply thereto. In it, he contends that the trust's affidavit makes for "interesting reading" but nothing more. None of the facts regarding the lease, the rental or the damages are controverted in any meaningful way, save for a referral to the plea. Apart from the second defendant's plea regarding the suretyship form which he had signed and the first defendants' admission of the vacation of the premises, the plea is, save further for the admission of the terms of the agreement, nothing more than a bald denial. Therefore, the attorney's incorporation thereof by reference, does not detract from the allegations made by the trust as quoted above.

3.10 The impecunity of the defendants are also, significantly, not disputed.

3.11 The only aspect about which the attorney would actually have personal knowledge, was the constant dilatory nature of the defendants' conduct during the course of the litigation and the preparation for trial. Rather than

answer to, or even deny these allegations, the attorney labelled them simply as irrelevant.

3.12 It is against these background facts that the court has to consider the issue of costs.

[4] Evaluation

4.1 Apart from the fact that the extent of the trust's damages still had to have been proven (in respect of which extensive discovery had been made by the trust) it is clear that the first defendant had no real defence on the merits.

4.2 It is a weighty factor that an expensive trial is run by a "shell company" at the behest of its sole director simply in an attempt to avoid paying damages which it had itself caused, in the unanswered words on behalf of the trust, "without reason". It would in these circumstances be facile to draw a distinction between the two defendants only because the second defendant had a separate defence on the pleadings regarding his suretyship.

4.3 The unanswered dilatory conduct of a shell company and its controlling mind in the course of litigation is another weighty factor.

4.4 The reasonable conduct of litigants in the position of the defendants would have been to give a collective sigh of relief upon learning that the litigation against them will not be continuing. To, however claim their costs and even on an attorney and client scale is, in these circumstances unreasonable. I will, however, accept that, all other things being equal, they had procedurally been entitled to rely on Rule 41(1)(c). Costs should therefore not be awarded against them for not having been successful in that application.

4.5 However, I find that circumstances constitute sufficient grounds to deprive the notionally successful defendants of their costs of the action.

[5] Order

1. The application is refused.

2. The parties shall each bear their own costs of both the application and the withdrawn action.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 26 November 2021

Judgment delivered: 2 December 2021

APPEARANCES:

For the Plaintiffs:	Adv C E Ellis
Attorneys for the Plaintiffs:	NSG Attorneys, Musgrave c/o Jacobson & LevyPretoria
For the Defendants:	Adv S Venter
Attorney for the Defendants:	Strydom & Bredenkamp Inc, Pretoria