IN THE KWAZULU HIGH COURT PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

1171/2010

In the matter between:

HELEN ROPER CONSULTING — DEFENDANT APPLICANT

and

TOYOTA TSHUSHO AFRICA — PLAINTIFF RESPONDENT

JUDGMENT

Heard: 15 June 2012
Delivered: 21 June 2012

D. PILLAY J

[1] In this application for costs of an application to compel discovery, the facts are as follows: On 13 May 2010 the defendant applicant delivered a discovery notice in terms of Rule 35(1) of the Uniform Rules of Court on the plaintiff respondent. On 30 August 2011 Goodrickes Attorneys for the respondent wrote to Deneys Reitz Inc for the applicant alerting the latter to trial dates being allocated for 13 and 14 February 2011 and inviting them to arrange a Rule 37 conference. Not having received a response by 5 December 2011 Goodrickes put Deneys Reitz Inc on terms to hold the Rule 37 conference. Much affronted, Norton Rose Attorneys for the applicant wrote:

> 'We are astonished at your suggestion of dilatoriness on the part of our client, given that the applicant, as *dominis litis*, has not taken a further step in over 18 months since we filed the defendant's plea. We are also surprised that you waited until just before the annual holiday season to reactivate this matter.'

[2] On 11 December 2011 the applicant duplicated costs by delivering a further Rule 35(1) notice. On 19 January 2012 Norton Rose motivated for the postponement of the trial which Goodrickes resisted. Norton Rose instructed its Pietermaritzburg

agent to launch an application to compel discovery. Later that afternoon Goordrickes emailed Norton Rose an unsigned copy of the respondent's discovery affidavit pointing out that all the documents discovered were already in the applicant's possession. Simultaneously, Goodrickes forwarded the draft discovery affidavit to the respondent in Johannesburg for her signature. As for the postponement of the trial Goodrickes explained that one day would be sufficient in contrast to Norton Rose's opinion that more than the assigned two days would be required for trial.

[3] On 20 January 2012 Norton Rose replied disagreeing that the unsigned discovery affidavit disclosed all relevant documents and disputed that it constituted discovery. The respondent returned the signed affidavit on 23 January 2012. On 25 January 2012 at 3.31pm Goodrickes served the signed discovery affidavit. In the meantime, that very morning at 09.13am, the applicant had served its application to compel on the respondent's Pietermartizburg correspondent.

[4] On 30 January 2012 Goodrickes wrote to Norton Rose recording that the postponement of the trial was not as a result of the respondent's late discovery or any reason other than respondent's counsel being unavailable. It also suggested that the discovery application be argued with the documentation already forming part of the proceedings. Goodrickes invited Norton Rose to withdraw the discovery application enrolled for 1 February 2012, reserving its costs for determination at the trial.

[5] On 31 January 2012 Norton Rose replied protesting about the reasons Goodrickes advanced for the postponement. Norton Rose then set out its reasons for the postponement as follows:

> 'The reasons why we suggested a postponement are, as indicated in our letter of 20 January and telephonically to you, that a pre-trial conference has not yet been held, the plaintiff's discoverY was late and, as confirmed in today's telephone discussion, a

notice in terms of Rule 35(3) and (6) will be required and the defendant is of the view that the trial will not be completed in two days. These are all aspects which the plaintiff, as *dominus litis*, has failed to attend to in a timely manner. As we stated on the telephone, this has made a postponement unavoidable particularly as there is no practical way in which the defendant can receive and fully consider all documentation that will be required in terms of the notice in terms of Rule 35(3) and (6) that we will soon deliver. It is these factors upon which the defendant will in all likelihood be forced to apply for a postponement should one not be agreed.'

[6] Regarding the discovery application Norton Rose wrote:

'Your suggestion that the discovery application be withdrawn with costs reserved is unacceptable to the defendant. The discovery affidavit was served after delivery of the defendant's application. You stated on the telephone that the plaintiff's view is that discovery was unnecessary and that on this basis she need not pay the application costs. That is, with respect, fallacious. Accordingly, as stated on the telephone, we will instruct our correspondents to proceed with the application for costs tomorrow.'

[7] The discovery application scheduled for 1 February 2012 was postponed to 6 March 2012 and further postponed to the opposed roll today (14 June 2012), with costs reserved.

[8] As the matter was now opposed the respondent was obliged to incur the costs of preparing and delivering a twenty-eight page answering affidavit which it did on 10 February 2012. The applicant incurred the further costs of delivering an eleven page replying affidavit on 27 February 2012. Both parties incurred further costs delivering heads of argument and complying with the practice directive, adding another nineteen pages to the pleadings.

[9] The applicant's submission that it was entitled to the costs of the application is technically correct. As Mr Pretorius, counsel for the applicant correctly pointed

out, this court routinely grants cost orders in applications for discovery. The respondent's representatives would have been aware of this when they resisted paying costs. It is therefore necessary to consider the basis on which the respondent refused to pay the costs incurred beyond the delivery of the application.

[10] The respondent's suggestion that the issue of the costs of the discovery application be held over for determination at the trial was eminently reasonable, practical, cost effective and efficient. As the respondent pointed out, all the relevant information would have been before the trial court to be able to decide the issue of costs. It would not have been necessary to deliver any further pleadings beyond the founding affidavit. Besides, in the nature of litigation, interlocutory applications have a way of resolving themselves along the way.

[11] Furthermore, the respondent delivered the discovery affidavit as a formality and because it was obliged to do so. The discovery affidavit contains no surprises for the applicant. By delivering the unsigned affidavit the respondent endeavoured to spare the applicant any prejudice that might arise as a result of discovering late. Mr Pretorius correctly points out that an unsigned affidavit is not in compliance with the Rules and the respondent might well have later filed a different affidavit. That concern could easily have been addressed. Norton Rose could have sought an undertaking from Goodrickes to the effect that if the affidavit changed any prejudice the applicant suffered would be for the respondent's account. At the time when the applicant was desperately seeking an adjournment of the trial a changed affidavit might have given it the leverage it required to secure the postponement. Furthermore, if it transpired that in delivering an unsigned affidavit the respondent deliberately sought to mislead the applicant, the applicant would also not have been without remedy. At the very least it could hold the respondent's representatives accountable for its dishonourable conduct which would also have entitled the applicant to a postponement of the trial. Even though technically the respondent

had not complied with the Rules, substantively it had. As the suggestion to hold over determination of the costs was sensible, the respondent's refusal to pay the costs of the application at that time was reasonable.

[12] Beyond asserting that it was entitled to its costs the applicant proffered no explanation as to why the suggestion that the costs of the discovery application be dealt with at the trial was unacceptable. Its attitude is inexplicable considering that it was itself not ready for trial. On the papers before me it appears that after delivering its discovery notice in 2010 the applicant did little else to prepare for trial. It also did not react promptly after being notified of the trial dates on 30 August 2011. Only after it received the unsigned affidavit did it realise that the discovery might not be adequate and that it would need to call for the production and inspection of further documents in term of sub-rules 35 (3) and (6). The applicant was clearly unprepared for trial, unwilling to proceed and desperately sought the postponement which it eventually got.

[13] The most probable explanation for the applicant's insistence on costs being paid is that the applicant wanted to cow the respondent into submission. The respondent, as a private individual, was pitted against the applicant, a multinational corporate. Mr Topping pointed out the 'David and Goliath' parallel in the relationship. Mr Pretorius submitted that I should have no regard to the identity of the parties. I agree with him that the identity of litigants do not dictate whether the rules of court and the law should apply. The quintessence of the rule of law is that it applies to all. Hence since the 15th century Lady Justice is often depicted as wearing a blindfold to represent justice meted out objectively, without fear or favour, regardless of identity, money, power or weakness. However, the thrust of the allegory is objectivity, fearlessness and impartiality. The identity of litigants is material to a decision. For instance the law itself distinguishes between child and adult litigants, and for present purposes, between employers and employees.

[14] In this case the identity of the parties is relevant. The applicant had previously employed the respondent as an assistant general manager before she agreed to resign and be engaged as a part-time facilitator. The respondent's claim in the main action is based on an alleged fixed term contract for her facilitation services which the applicant pleads was void because it signed the contract for services in error after being misled by the respondent. As a former employee and possibly an independent contractor the respondent was in a subordinate position in relation to the applicant and therefore vulnerable. As an individual litigant the respondent does not have the financial muscle that the applicant has to litigate. Her resistance to postponing the matter and to pay costs beyond the delivery of the application to compel must stem from her caution about her ability to bear the costs of the litigation. If the applicant was indigent and its legal representative desperately needed to be paid then that could have been an explanation for not wanting to wait until the trial. As a multinational corporate the applicant could hardly be out of pocket if the respondent did not pay the costs before trial, or at all. Therefore, the identity of the litigants is relevant.

[15] A disturbing feature of this case is the lack of collegiality on the part of the applicant's legal representatives. Collegiality is a relationship between colleagues. Colleagues are people united in a common purpose in a professional or work situation. Broadly, it connotes a commitment to the common purpose and working towards it. Narrowly, colleague and collegiality refer to fellow members of the same profession. Respect for the commitment to the purpose and to fellow members welds the relationship amongst colleagues.[1] In academic circles collegiality may count as one of the pillars of performance.[2] Collegiality on the bench means that

1 http://en.wikipedia.org/wiki/Collegiality

2 Collegiality in Higher Education: toward an understanding of the factors involved in collegiality. http://www.highbeam.com/doc/1P3-93300011

judges have a common interest as members of the judiciary to getting the law right,[3] and to dispensing justice efficiently and effectively. This must also be the common purpose of the legal profession as a whole. The common purpose must be to resolve disputes efficiently and effectively. Interlocutory applications that tend to seek tactical advantages and which do not remedy disputes substantively tend not to be effective. Applications for cost that tend to unsuite litigants are equally ineffective. Not only do such applications fail to resolve disputes finally but they could also deny a litigant the constitutional right to access to the courts. I generalize mindful that in a particular case resolution of a technical point could be decisive of the entire dispute. This is not such a case.

[16] In contrast to the conduct of the applicant's legal representatives, the respondent's representatives had an opportunity to retaliate with equal vitriol but chose not to do so. Despite the applicant's counsel delivering his heads of argument and practice directive one day late without an accompanying application for condonation, respondent's counsel Mr Topping, did not ask the court to strike the matter off the role or even impose an adverse order for costs as he was technically entitled to do in terms of Rule 49 (15). If he had asked for any such order, not only might the costs have escalated but also the acrimony. Collegiality is therefore important not only for the efficient resolution of a particular dispute but also for the cordial functioning of the legal profession to attain the common purpose.

[17] The Uniform Rules of Professional Conduct of the General Council of the Bar of South Africa, Rule 4.12 exhorts as follows:

> 'Clients, not counsel, are the litigants. Whatever may be the ill feeling existing between clients it should not be allowed to influence counsel in their conduct and demeanor towards each other or towards suitors in the case.'

3 The effects of collegiality on judicial decision making in his article 'Nature of the Judicial Process' University of Pennsylvania Law Review, May 1, 2003

In a similar vein Rule 9 of the Rules of the KwaZulu-Natal Law Society Code of Ethics for Legal Practitioners provides:

> 'All legal practitioners shall . . .
>
> (9) extend to all colleagues, judges, academics, professionals, litigants and students including persons from foreign jurisdictions cordiality and respect at all times'

[18] More significantly for the purposes of this case the International Code of Ethics attached to the Law Society's Rules as the 8th Schedule provides at Rule 11:

> 'Lawyers shall, when in the client's interest, endeavour to reach a solution by settlement out of court rather than start legal proceedings. Lawyers should never stir up litigation.'

[19] The age old mantra that clients may come and clients may go but colleagues go on forever seems to have been lost in this case. The costs of a 9 page application for discovery would on the unopposed basis amount to approximately R2 000. The costs of a fifty page opposed application will be considerably more, discounting the cost to collegiality.

[20] The order I grant is the following:

a. The respondent pays the applicant's costs up to and including the preparation and delivery of the application to compel and the costs of removing the matter from the unopposed roll on 01 February 2012.
b. The applicant pays the respondent's costs after 01 February 2012.

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D. PILLAY J

Counsel for the Appellant:	Mr C Pretorius Instructed by Norton Rose South Africa

Counsel for the Respondent:	Mr I L Topping Instructed by Goodrickes