IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2022/23017

DATE: 05-07-2024

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.
DATE 07.08.2024
SIGNATURE

In the matter between

ORGANISATION UNDOING TAX ABUSE NPC Plaintiff

and

NATIONAL ENERGY REGULATOR OF SA & 7 Defendant

J U D G M E N T

WINDELL, J: During 2022, the applicant a non-profit company known as the 'Organisation Undoing Tax Abuse' instituted a review application in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) against the decision of the first respondent, "NERSA", to grant generation licences to the second to fifth respondents, hereafter referred to as Karpowership.

The licences authorised Karpowership to generate electricity by way of three floating storage and regassification units referred to as "powerships". In the Review Application

the applicant raised serious questions about the cost-effectiveness of the anticipated 20-year project and its adverse climate impacts. It is estimated that the project is to be in excess of R200 billion.

Rule 53 of the Uniform Rules of Court provides the procedure for delivering the record of the decision maker in review proceedings. NERSA failed to provide the Rule 53 record within the stipulated time provided in the Uniform Rules of Court. Instead, it filed a redacted record pursuant to the claim by Karpowership that the documents are confidential and should not be disclosed to the applicant.

But even before the redacted record was provided to the applicant, the applicant had already proposed to NERSA in correspondence that a confidentiality regime be agreed upon before the record is distributed.

NERSA refused the proposal and filed a heavily redacted record on 17 June 2022 in accordance with Karpowership wishes. It did so by taking the law into its own hands and without seeking condonation for non-compliance with the provisions of Rule 53 or considering the impact of its refusal on the applicant's right to access to Courts and equality of arms.

In September 2022, the parties engaged in a case management meeting during which the applicant proposed a similar resolution: the matter should be resolved in

accordance with the confidentiality regime established in the Supreme Court of Appeal's decision in Cape Town City v South Africa Roads Authority and Others 2015(3) SA386 (SCA). The proposal was again rejected out of hand by both NERSA and Karpowership.

The applicant accordingly delivered a Notice in terms of Rule 30A on 12 December 2022, and, failing compliance with it, instituted the current application to compel the delivery of the Rule 53 record on 23 January 2023. NERSA and Karpowership opposed the application and filed answering affidavits. The matter was set down for argument for 4 to 6 June 2024.

NERSA opposed the application on mainly three grounds. One, the application was premature. Two, they are precluded by their own guidelines and policies and by PAIA (the Promotion to Access to Information Act), to provide the information, and three, that it was common cause that the information was confidential and that there should be a confidentiality agreement.

Seemingly none of these reasons for refusing to provide the record had merit, as on 17 May 2024 (10 days before the hearing of the matter) Karpowership filed a notice of withdrawal of their opposition to the application to provide the Rule 53 record. They however did not tender any costs.

Despite their withdrawal NERSA persisted in its

opposition to the main relief sought by the applicant (to provide an unredacted record) as well as the alternative relief, namely to provide the record but subject to a confidentiality agreement. On the day of the hearing, the applicant as well as the Court were informed that NERSA had received a letter from Karpowership giving them "permission" to enter into a confidentiality agreement to provide the Rule 53 record. Based on the so-called "permission", NERSA entered into a settlement agreement broadly based on the applicant's proposal more than two years ago.

No permission was needed from Karpowership. NERSA is an independent entity that should have accessed its position separately from that of Karpowership. This is not an application terms of PAIA in which a public body has a duty under specific circumstances to project sensitive commercial information as well as personal information. Section 7 of PAIA specifically states that that Act is not applicable to civil proceedings. A review application is not subject to PAIA. And Rule 53 specifically provides that the record must be provided by the decision maker.

It is for these reasons amongst others that the applicant is seeking a punitive cost order against all the respondents. NERSA tendered party and party cost, whilst Karpowership is not opposing the request for cost on an attorney and client scale.

It is trite that the granting of costs is discretionary. In *Intercontinental Exports (Pty) Limited v Fowles* 1999 (2) SA 1045 (SCA) the Supreme Court of Appeal held that:

> "The Court's discretion is a wide, unfettered and equitable one. It is a facet of the Court's control over the proceedings before it. It is to be exercised judicially with due regard to all relevant considerations. These would include the nature of a litigation being conducted before it and the conduct before it and the conduct of the parties (or their representatives). A Court may wish, in certain circumstances, to deprive a party of costs or a portion thereof or order lesser costs than it might otherwise have done as a mark of its displeasure at such party' conduct in relation to the litigation."

In *Texas Company Limited v Cape Town Municipality 1926 AD 467,* Innes C J said the following about the purpose of a cost order:

> "Costs are awarded to a successful party in order to indemnify him for the expense to which he has been put through having

> been unjustly compelled either to initiate or to defend litigation, as the case may be. Owing to the necessary operation of taxation, such an award is seldom a complete indemnity; but that does not affect the principle on which it is based."

The statement of Innes CJ refers only to an award of party and party cost which is not a full indemnification. In the *Law of Costs in South Africa,* the learned author, with reference to case law states that an award of attorney and client costs is not only meant to punish the losing party. Such an award is justified where in the view of the Court, there are circumstances which gave rise to the litigation, or arising out of the conduct of the losing party, which would render it just and equitable, and necessary to ensure that the successful party is not out of pocket.

Conduct which is vexatious and an abuse of the process of the Court may form the basis for an order that costs should be paid on an attorney and client scale, even though there is no intention to be vexatious. It is not necessary to find dishonesty or a vexatious intention. Even with the most upright and most firm belief in the justice of its cause, a litigant can be vexatious by putting the other side to unnecessary trouble and expense, which it ought not to bear.

In *Multi-Links Telecommunications Ltd v Africa Prepaid*

Services Nigeria Ltd; Telkom SA SOC Limited and Another v Blue Label Telecoms Limited and Others the court stated the following:

'In my view an overall balanced view of the whole of the proceedings and the relevant facts ought to be taken. If a court is then left with that indefinable feeling, which feeling must, however, be based on rational analysis of the facts and legal principles, that something is "amiss", if I can put it that way, it may justify that feeling by deciding that the opposing party ought not to be out of pocket as a result of the application having been launched.

A party who withdraws his or her defence or who settles is in the same position as an unsuccessful litigant and the opposing party is entitled to all cost caused by the institution of proceedings. In *Nel v Waterberg Landbouers Kooperatiewe Vereniging 1946 AD 597,* Tindell JA remarked as follows:

> "The true explanation of awards of attorney and client cost not expressly authorised by statute seems to be that by reason of special consideration arising either from the circumstances which gave rise to the action or from the conduct of the losing party the Court in a particular case considers it just, by means of such an order, to ensure more

effectually that it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of expenses caused to him by the litigation."

The applicant had been put to unnecessary trouble and litigation costs. There are no reasons why the applicant should not receive a full indemnification for its cost. Having regard to the matter as a whole and in the exercise of my discretion, justice and fairness requires that the respondents be ordered to pay the applicants cost on an attorney and client scale. As such, such an order is made an order of Court.

You have provided me with a settlement agreement yesterday which I will now mark A and it is made an order of court. I will include in the settlement order the costs order as attorney and client costs.

UNKNOWN FEMALE: ...[inaudible]

COURT: Yes, scale C. It will be scale C. I will include that as well. There is no reason why it should not be scale C. I f one looks at the requirements that is now incorporated into our rules it justified and for that reason scale C is ordered.

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WINDELL, J

JUDGE OF THE HIGH COURT

DATE: 07.08.2024.