



COMPANIES TRIBUNAL REPUBLIC OF SOUTH AFRICA

Case No: CT01427/ADJ/2023

In the matter between:

BAYSOLAR (PTY) LTD.

APPLICANT

Registration number: 2016/521657/07

and

BAY SOLAR (PTY) LTD.

RESPONDENT

Registration number: 2019 /037316/07

TRIBUNAL PANEL

Ms D Terblanche – Chairperson

DATE OF RULING

1 July 2024

COSTS RULING AND REASONS

THE PARTIES

1. The Applicant is BAYSOLAR (PTY) LTD. (Applicant), a company registered under registration number 2016/521657/07, located in the Eastern Cape of South Africa.
-

2. The Respondent is BAY SOLAR (PTY) LTD. (Respondent), a company registered under registration number 2019/037316/07, located in the Western Cape of South Africa.

MATTER FOR CONSIDERATION BEFORE THE TRIBUNAL

3. The matter for consideration before the Tribunal is the Respondent's request for an order against the Applicant to pay the Respondent's costs at the attorney-and-own client scale under regulation 156 under the Companies Act 71 of 2008 (the CA or the Companies Act), as amended.
4. Regulation 156(1) provides that:

"Upon making an order, the Tribunal may make an order for costs."

5. The Tribunal heard the application on the 26th of June 2024, on notice to both parties.
6. The Respondent appeared virtually at the hearing represented by its legal representatives, having duly filed heads of argument on the application as directed by the Registrar of the Tribunal (the Registrar).
7. The Applicant did not appear at the scheduled hearing, nor did the Applicant put its heads of argument before the Tribunal as directed and notified by the Registrar.

BACKGROUND

8. In February 2022, the Applicant filed a name dispute application (the first and abandoned application) against the Respondent. The Registrar assigned case number CT01948ADJ2022 to the application. The Applicant did not serve this application on the Respondent, nor did it serve the application on the Respondent after the Registrar advised it of the requirement to do so. Accordingly, nothing came of the application.
9. On the 6th of July 2023, the Applicant filed a second application (the second and current application) under case number CT01427/ADJ/2023 against the Respondent, requesting

the Companies Tribunal (the Tribunal) to order the Respondent to change its name. This time, the Applicant served the application on the Respondent. The Respondent opposed the application and filed its answering affidavit within the prescribed time. The Applicant did not file a reply to the Respondent's answer. The pleadings in that application closed, and the Registrar set the second and current matter down for a hearing for the 18th of April 2024.

10. The Respondent, on the 30th of November 2023, under case number CT01607ADJ2023, brought the third and a currently pending application for the Tribunal to order the Applicant to change its name, claiming that the Applicant's name contravenes section 11(2) of the CA. This application is still pending before the Tribunal. In this matter, the deadline for the Applicant to file an answer opposing the application has expired. The Respondent has not yet applied for default judgment.
11. On the 18th of April 2024, the date on which the Registrar enrolled the hearing into the second and current application, the parties discussed the possibility of engaging in mediation. The Applicant agreed to inform the Tribunal and the Respondent about their willingness to engage in mediation by the 30th of April 2024.
12. On the 18th of April 2024, the parties further agreed that –
 - 12.1. The Registrar will distribute information on the mediation procedure in the Tribunal to the parties by the 24th of April 2024.
 - 12.2. If the parties do not engage in mediation, that –
 - 12.2.1. the Respondent will complete the indexed paginated bundle of the records on case numbers CT01427ADJ2023 and CT01607ADJ2023, file it at the Tribunal, and serve on the Applicant by the close of business on Wednesday, the 24th of April 2024.
 - 12.2.2. the Applicant will file its reply on the answering affidavit filed by the Respondent in case number CT01427ADJ2023 and any additional responses it wishes to file to the founding affidavit in support of the application in case number CT01607ADJ2023 by the 22nd of May 2024.
 - 12.2.3. the parties filing their respective heads of argument by the 10th of June 2024.

12.2.4. the Registrar will schedule the hearing of the application under case number CT01427/ADJ/2023 *via* the Microsoft Teams audio and visual conference for June 21, 2024.

13. The Registrar enrolled the hearing according to the parties' agreement for the 21st of June 2024

14. On the 19th of June 2024 the Applicant served a notice of withdrawal of the application with the Tribunal in terms of which the Applicant -

14.1. *"Withdraws the above matter, in its entirety."*; and

14.2. *"Does not consent to pay costs."*

THE RESPONDENT'S CASE

15. The Respondent accepted the Applicant's withdrawal of its application in its entirety, but objected to the Applicant not tendering costs.

16. The paragraphs below capture the main submissions and arguments the Respondent placed before the Tribunal in support of its application.

17. In the main the Respondent argued for the Tribunal to make the costs order on the authority of established case law and because of the way in which the Applicant conducted itself over the period the Applicant's applications were before the Tribunal.

18. With regard to established case law in the main the Respondent submitted that in -

18.1. *Ferreira v Levin NO and Others*¹, the court stated the basic rules pertaining to legal costs, i.e.,

"The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as

¹ 1996 (2) SA 621 (CC) at 3

a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants and the nature of the proceedings... ”

18.2. ***Sublime Technologies v Jonker and Wilkinson***² the court held that the party responsible for a case not proceeding on the day set down for hearing must ordinarily pay the wasted costs as a general rule.

19. The Respondent takes issue with the Applicant’s conduct in dealing with the applications the Applicant launched against the Respondent at the Tribunal. The Respondent submitted that the Applicant’s conduct since it filed the first and abandoned application in 2022 was vexatious and unreasonable, in that -

19.1. The Applicant did not provide reasons for the failure to proceed with the first and initial 2022 application, and then took 17 months to bring the current application to the Tribunal.

19.2. The Applicant unduly and unreasonably delayed the finalization of this application, notwithstanding that it was *dominus litus* and had an obligation to actively advance the finalization of this and other applications it brought against the Respondent.

19.3. The Applicant's failed to comply with the requirements of the Act and the Directives of the Tribunal. The Applicant did not place valid reasons before the

² Sublime Technologies (Pty) Ltd v Jonker and another (484/08) [2009] ZASCA 149; 2010 (2) SA 522 (SCA) ; [2010] 2 All SA 267 (SCA) (27 November 2009), at [paragraph 3](#).

Tribunal why the Applicant blatantly refused to comply with every Directive (timeline) the Tribunal imposed, notwithstanding that the majority of the dates were agreed upon between all parties and on the Applicant's request. The latest refusal or neglect of the Applicant of a directive by the Tribunal, was to serve its Heads of Argument on the costs issue.

- 19.4. In the current application, after the Respondent incurred considerable legal costs, the Applicant withdrew the application without any notice to the Respondent at the eve of the hearing, further emphasizing the Applicant's bad faith.
- 19.5. The Respondent became aware that the Applicant withdrew the application an hour after the hearing was supposed to take place on the 21st of June 2024, when all preparations and consultations were already done, and the diaries of the Respondent and its legal representative were cleared for the day. As a result of not being informed of the withdrawal, considerable additional costs were incurred and time wasted for the Respondent and its legal representative.
- 19.6. The Applicant's claim that the matter was resolved privately, insinuating that the parties settled, is also blatantly untrue and a further indication of the Applicant's bad faith.
20. In a summary, the Applicant's behaviour, which included starting and then abandoning an application, and withdrawing an application on the eve of the hearing, forced the Respondent to incur significant legal costs to adequately oppose the application.
21. The dire consequences that would have resulted if the Tribunal had granted the Applicant's application justify the Tribunal granting a cost order in favour of the Respondent on an attorney-own-client scale as a mark of disapproval of the Applicant's conduct.

DISCUSSION AND ANALYSIS

22. The timeline of events the Respondent outlined aligns to the timelines in the Tribunal records.
23. It does appear that the Applicant filed the first application and never processed it despite the Registrar's guidance.
24. The Applicant then filed the second and current application, served it on the Respondent and did not reply on the Respondent's opposing answering affidavit.
25. The Registrar set the second application down for a hearing for 18 April 2024. The Tribunal postponed the matter on request by the Applicant to obtain legal representation, and on the basis of agreements and commitments by the parties, towards finalizing the second application at a hearing the Registrar scheduled for 21 June 2024.
26. The Applicant withdrew the application in its entirety on 19 June 2024, without serving the withdrawal notice on the Respondent and without tendering costs.
27. The Respondent prepared for and appeared at the hearing on 21 June 2024, only to be informed at the hearing that the Applicant had by then withdrew the application in its entirety and did not offer to cover costs.
28. The Tribunal has no doubt that the Applicant would have been aware that the Respondent would have had to incur substantial legal costs in preparing for and attending the hearing, having engaged lawyers itself, yet disregarded that and then not tendering costs.
29. This conduct is a clear indication to the Tribunal of the Applicant's bad faith, in addition to the matters the Respondent raised in its submission, including the Applicant falsely claiming that the parties settled their dispute.
30. I have considered the basic rules pertaining to legal costs the court expounded in *Ferreira v Levin NO and Others 1996 (2) SA 621 (CC) at 3*, put forward by the Respondent, namely,"... *the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to*

the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs... for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants and the nature of the proceedings...”

(Emphasis added)

31. The discretion the court refers to above is similar to the discretion the Tribunal has to order costs in Regulation 156 of the Regulations promulgated under the Companies Act.
32. I have further considered the case of ***Sublime Technologies v Jonker and Wilkinson®*** the Respondent reference where the court held that the party responsible for a case not proceeding on the day set down for hearing must ordinarily pay the wasted costs as a general rule.
33. The Applicant brought an application against the Respondent forcing the Respondent to incur costs in defending itself, and then withdrew the application on the eve of the hearing without notice to the Respondent and falsely implying that the parties settled their dispute.
34. In the light of the above I am of the view that the Respondent is entitled to a costs order under regulation 156 of the regulations.
35. I will now consider whether I may award Respondent's costs at attorney-own-client scale, which in effect is punitive costs.
36. I requested the Respondent to make submissions substantiating its request for a costs order on an Attorney own Client scale considering Regulation 156 referring only to party-and-party costs.
37. The Respondent referred the Tribunal to the Applicant's lack of good faith in making an application against it and then not proceeding with it. After that the Applicant brought another application, After the Respondent had incurred considerable legal costs

defending the application, the Applicant withdrew the application on the eve of the hearing, falsely claiming the parties reached a settlement, without tendering costs.

38. The above is a clear indication of careless conduct, if not a lack of good faith, on the part of the Applicant to this Tribunal.
39. From the case law it is clear that in certain circumstances courts may, as a mark of disapproval of a party's conduct, award punitive costs. In the matter of *Mkhatshwa and Others v Mkhatshwa and Others*³, the Constitutional Court held that the purposes of punitive costs, being an extraordinarily rare award, are to minimise the extent to which the successful litigant is out of pocket and to indicate the court's extreme opprobrium and disapproval of a party's conduct. Although punitive costs are rarely awarded, the Constitutional Court affirmed that existing jurisprudence indicates that they are appropriate when it is clear that a party has conducted itself in an indubitably vexatious and reprehensible manner.
40. The question is whether the Tribunal, as a creature of statute without inherent jurisdiction, bearing in mind the Applicant's conduct, may award attorney-own-client costs where the empowering provision only provides for party-and-party costs.
41. The Tribunal invited the Respondent to point to provisions in the Companies Act and Regulations empowering the Tribunal to award costs at an attorney-own-client scale. The Respondent could not point the Tribunal to such provisions.
42. From my consideration and interrogation of the relevant provisions of regulation 156, it is clear that the Tribunal may only make costs orders on a party-and-party scale and not attorney-own-client costs, irrespective of how egregious the Applicant's conduct.

ORDER

43. The Tribunal hereby orders -

³ [2021] ZACC 15

43.1. The Applicant to pay the Respondent's costs in terms of Regulation 156 of the Regulations promulgated under the Companies Act; and

43.2. The Registrar of the Tribunal to bring this order to the attention of the parties.

Dated at Johannesburg on this 1st day of July 2024.



Ms D Terblanche

Member of the Companies Tribunal