



**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 8526/21

In the matter between:

**HAMMOND AND HAMMOND TRANSACTIONAL  
LAW CLINIC**

Applicant

and

**BITOU MUNICIPALITY**

First Respondent

**CHAUKE QUANTITY SURVEYORS AND  
PROJECT MANAGERS**

Second Respondent

**PROVINCIAL DEPARTMENT OF HUMAN  
SETTLEMENTS**

Third Respondent

Date of hearing: 5 August 2021

Date of judgment: 11 August 2021

**Judgment delivered electronically via email to the parties on 11 August 2021.**

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**JUDGMENT**

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SAVAGE J:

[1] In this matter the applicant, the Hammond and Hammond Transactional Law Clinic, sought urgent relief against the respondents, Bitou Municipality ('Bitou'), Chauke Quantity Surveyors and Project Managers ('Chauke') and the Provincial Department of Human Settlements ('the Department'). Chauke did not oppose the application.

[2] The application was launched on 20 May 2021 but was removed from the roll by the applicant on 27 May 2021. On 4 June 2021 an amended notice of motion was filed by the applicant together with a supplementary affidavit. The relief sought by the applicant in its amended notice of motion was an order of specific performance to compel Bitou to perform its obligations in accordance with a contract for the construction of 169 top structures in Qolweni, Phase 3A, Plettenberg Bay ('the contract') and "*reimburse all costs incurred by the Contractor as a direct result of unlawful termination*". The applicant also sought an order that Bitou and the Department be interdicted from appointing a new contractor to execute the contract "*pending the resolution of the current dispute*", with Bitou and Chauke to pay the costs of the application on an attorney and client scale.

[3] On 9 June 2021 Bitou filed a notice to oppose the application and the applicant enrolled the application for hearing on 15 June 2021. The matter was rolled over for hearing on 18 June 2021, the same date on which Bitou filed its answering affidavit. The application was by agreement postponed for hearing to 15 July 2021, with the applicant directed to file any replying affidavit by 30 June 2021 and costs to stand over for later determination. The parties attempted to settle the matter without success. On 30 June 2021 the applicant filed its replying affidavit to Bitou's answering affidavit. On 12 July 2021 the Department filed an "explanatory" answering affidavit opposing the relief sought against it. On the same date, Bitou filed an application for condonation together with a supplementary affidavit concerning *inter alia* the liquidation of Ukhana Projects CC ("Ukhana"), the entity to which Bitou had awarded the contract following a tender process. On 14 July 2021 the parties agreed that the application be postponed to 22 July 2021 with the applicant granted until 16 July 2021 to file a replying affidavit. It was ordered that costs stand over for later determination.

[4] On 19 July 2021 the applicant filed its affidavit replying to the Department's opposing ("explanatory") affidavit. When the matter came before the urgent court on 22 July 2021 it was crowded out of the roll given the number of matters to be heard and it was agreed that the application be postponed for hearing on an urgent basis to 5 August 2021, with costs to stand over. At the hearing of the matter on 5 August 2021 the applicant withdrew the application but made no tender of costs and sought that the court exercise its discretion to order that each party bear its own costs. Bitou and the Department opposed such an order.

[5] From the papers it is apparent that Both Bitou and the Department took issue with the locus standi of the applicant to launch the application. Dr Anele Hammond, the applicant's founder and director, deposed to its founding affidavit in which it was stated that the applicant is a public benefit organisation "*duly authorised by the Legal Practice Council and the South African Revenue Services*" and a transactional law clinic which offers legal aid and financial management services to small, medium and micro enterprises at no cost. In reply it was stated that the applicant is registered with the National Home Builders Registration Council ("NHBRC"), although no certificate of such registration was advanced. Bitou awarded the contract to Ukhana following a tender process. Ukhana was not joined as a party to the proceedings and the respondents in their opposing papers put up evidence that it had been liquidated in April 2021. The applicant took the view that the joinder of Ukhana was unnecessary given that it the contract had been ceded to it by Ukhana.

[6] On 9 October 2020 Ukhana received written notice from Bitou that that it was the preferred bidder in respect of the contract and, according to Dr Hammond, Ukhana ceded the contract on the same day to the applicant, with it recorded that Bitou would only acknowledge the cession once the contract had been awarded. The letter of award of the contract by Bitou to Ukhana was dated 1 December 2020. On 7 December 2020 in a letter addressed to the Bitou Municipal Manager, Mr Lonwabo Ngoqo, Ukhana indicated that it "*hereby cedes*" the contract to the applicant, with all payments in respect of the contract to be paid to an entity described as Hammond and Hammond Inc. Mr Ngoqo signed in acknowledgement of the purported cession on the same date.

[7] In her affidavit Dr Hammond indicated that subsequent to the purported cession of the tender she received a demand from a Mr Sompani to pay Bitou's top six officials an upfront bribe in the amount of R700 000,00, with the remainder of the money to be paid as a monthly percentage on each certificate due until the end of the contract. After Dr Hammond refused payment, Bitou's Mayor visited her at her home apparently "*sent by the comrades to collect what had been promised to them*" by Ukhana. Mr Enquin Le Roux of Ukhana told Dr Hammond that "*this happens on every transaction*" and that he was coerced and under duress had agreed to pay the R700 000,00, which had been arranged with the Deputy Mayor, Mr Sandiso Gcabayi. Dr Hammond was contacted again by Mr Sompani and told that the payment was non-negotiable. Thereafter Dr Hammond's house was broken into three times during the course of which she and her daughter were threatened and hurt. Mr Ngoqo visited her and reiterated the demand for payment on 16 December 2020 and indicated that given that a variation order extending the contract sum had been agreed, an extra R 500 000,00 had to be paid before Christmas day which would be shared amongst Bitou's top six officials. Following Dr Hammond's refusal to make the payments, she stated that the contract was taken away from the applicant and given to new contractors. And, after legal action was threatened the contract was reinstated, subject to conditions including the identity of individuals who were to be offered positions and suppliers who were to be employed.

[8] On 2 February 2021 when Dr Hammond's house was broken into for the ninth time she became "*incapacitated for a few months*" following which on 17 February 2021 the contract was apparently awarded to other companies and the applicant's site office and storeroom were occupied. At a community meeting the applicant's employees were purportedly fired and the works were taken over. After legal intervention the contract was reinstated by Bitou but this was, according to Dr Hammond, under duress and the working relationship became intolerable. As a result a notice of default was sent to Bitou and Chauke by the applicant on 24 February 2021 and, after no response was received, works were suspended by the applicant on 19 March 2021. On 7 April 2021 the applicant gave notice of termination of the contract, following which it was denied access to the site and its assets seized by a group of people, apparently in the presence of Mr Ngoqo and Mr Sompani. On 12 April 2021 Mr Sompani sent the applicant a letter purporting to terminate the

contract. The applicant responded that the unlawful termination of the contract amounted to a repudiation which was not accepted, with it demanded that Bitou perform in terms of the contract. After it did not, on 28 April 2021 the applicant sent a letter of demand to Bitou and Chauke demanding payment. Full payment was not received and the applicant's vehicles and machinery worth R2 200 000,00 remain on the site. Efforts at mediation failed on 13 May 2021.

[9] Mr Ngoqo deposed to Bitou's answering affidavit, taking issue with the applicant's locus standi and stating that the application was "*misplaced, misdirected and vexatious*". He denied that Bitou was a party to the cession agreement and stated that the municipality is governed by the principles of accountability and transparency, as well as the statutory conditions governing the implementation of building contracts and supply chain management. If the contract was ceded in its entirety, he stated that this would have required various checks and balances to have been followed, which were not, and for the applicant to be recognised by the building industry in the manner required by statute, which it was not. Furthermore, it was disputed that the application was urgent and denied that a contractual relationship existed between the applicant and Bitou. It was stated further that the applicant's affidavits "*vexatiously contain unsubstantiated, irrelevant allegations of corruption and incompetence on the part of members of [Bitou]*".

[10] In her replying affidavit Dr Hammond persisted that a cession had been agreed and approved in October 2020, that the applicant therefore held the requisite locus standi in the matter and that there was no requirement that Ukhana be a party to the application. It was stated that it was Mr Ngoqo who had proposed the cession, that he was aware of it and had acknowledged and approved of the cession. Dr Hammond stated that a further addendum to the previous cession agreement was concluded between the applicant and Ukhana on 22 January 2021, a copy of which was attached to the replying affidavit. In addition, the "Cession and Subcontract Agreement" concluded on 25 January 2021 between Ukhana and the applicant, in terms of which *inter alia* Ukhana was to be appointed as "*the Contractor responsible for the Technical execution of the project for a monthly remuneration*", was put up for the first time in reply. It was also in reply that Dr Hammond stated that the applicant was registered by the National Home Builders Registration Council ("the NHBRC") at the request of Bitou.

[11] The Department sought that the late filing of its “explanatory” opposing affidavit on 13 July 2021 be condoned on the basis that although the application was initially served on it the matter was removed from the roll and that the Department became aware of the re-enrolment of the matter on 30 June 2021 after attempts at settlement failed. On this date a letter of demand was received by the Department from the applicant in terms of which the applicant sought that the Department halt the appointment of a new contractor, Ruwaccon, to execute the contract pending the judicial review of that appointment. On 1 July 2021 the Department undertook “*pending the resolution of the current dispute in the High Court*” not to permit Ruwaccon to go on site or incur costs in respect of the project. This, it was stated, was understood by the Department to mean that the undertaking applied pending the resolution of the interdict application brought by the applicant against the Department. Following a dispute between the parties as to what it was that the undertaking contemplated, the Department filed a notice of opposition in the matter.

#### Submissions on costs

[12] The applicant sought, following its withdrawal of the matter, that it be ordered that each party bear its own costs given that this would be just and equitable given the facts and circumstances relevant to the launch of the application and its withdrawal. The applicant stated that it acted in an attempt to benefit the community and that it was the Department which had sought the postponement of the matter on 15 June 2021 to explore settlement, with other delays not caused by the applicant.

[13] It was contended for Bitou that the application had been instituted in bad faith, in a reckless and vexatious manner and that the applicant’s locus standi had not been established, with the application premature and that Ukhana had not been joined as a party to it. It was also indicated that the allegations of criminal misconduct raised by the applicant had been referred to the prosecuting authorities for further investigation. However, despite this, Bitou sought that it be granted its costs on an attorney and client scale.

[14] The Department argued that costs be awarded in its favour against the applicant on a party and party scale, including the costs of two counsel. In this regard it was stated that at the heart of the matter was the status of the contract to which the Department was not a party. It was the termination of this contract which

impacted on service delivery in the area and which triggered the Department's obligation in terms of section 156 of the Constitution to intervene. Importantly, it was stated that the relief sought by the applicant was conceptually flawed and not competent, with the applicant lacking locus standi to institute the proceedings. It was contended that no case had been made out for such relief sought as the applicant had not tendered performance under the contract or stated that it was capable of performance and therefore could not claim an order of specific performance.<sup>1</sup> In addition, the requirements for interdictory relief had not been met and the applicant had failed to join Ukhana or its liquidators, when they had a direct and substantial interest in the outcome of the application.

### Evaluation

[15] Liability for costs in a civil matter is a separate issue which is governed by its own criteria.<sup>2</sup> The general rule is that costs follow the result, with this rule departed from only for good reason having regard to the facts and circumstances of the matter and fairness to both sides. Rule 41(1)(a) provides that a person instituting any proceedings may at any time after the matter has been set down with, the consent of the parties or the leave of the court, withdraw such proceedings and "must" file a notice of withdrawal which may set out a consent to pay costs. Where there is no consent to pay costs, the other party may apply to court for an order of costs.<sup>3</sup> The rule does not constrain the court's discretion in relation to the determination of costs and where an applicant indicates at the hearing of a matter that it has elected to withdraw the matter before the court, the court may at its discretion proceed to determine the issue of costs.

[16] Ordinarily, the withdrawal of a matter is viewed as a concession on the merits, a recognition that the merits have become academic or that the relief sought is for whatever reason futile. Whatever the reason for the withdrawal of a matter, the court retains a discretion to award costs,<sup>4</sup> with the general rule being that the respondent is entitled to all costs caused by the institution of the proceedings, a rule

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<sup>1</sup> *Farmers' Cooperative Society v Berry* 1912 AAD 343 at 315.

<sup>2</sup> *Graphic Laminates CC v Albar Distributors CC* 2005 (5) SA 409 (C) at 412.

<sup>3</sup> Rule 41(1)(c).

<sup>4</sup> See *Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape and Others* 2005 (6) SA 123 (E) st 129-30.

which is not to be departed from without good grounds.<sup>5</sup> The court exercises a wide but not unlimited discretion in determining costs, with it required to consider the facts and circumstances of the matter. Importantly, the exercise of this discretion must lead to a result which is one to which a reasonable person could have come.

[17] In considering whether this court should exercise its discretion to award costs against the applicant in favour of Bitou, the conduct of Bitou and its officials in the dispute which resulted in this application being launched is relevant. The purported cession of the contract was discussed with senior officials of Bitou, with Mr Ngoqo signing in acknowledgement of the purported cession on 7 December 2020. The relevant officials of Bitou conducted themselves in a manner which indicated that they recognised the purported cession and allowed the applicant to commence work and receive payment under the contract. It follows that the claim in these proceedings that the purported cession was invalid, regardless of whether this may indeed be so, contradicts the conduct and representations of Bitou's officials which caused the dispute to arise. This coupled with the serious allegations of corruption and other criminal misconduct made against senior Bitou officials by Dr Hammond, indicate that the application was not one launched in bad faith, recklessly or vexatiously as is suggested by Bitou's counsel. To the contrary, it is unlikely that the need for the application would have arisen at all had Bitou's officials performed their duties with due regard to the law and in the manner required of them. The serious allegations raised by the applicant against the top six officials of Bitou and the circumstances surrounding the award of the tender to Ukhana by Bitou clearly require urgent investigation by the relevant authorities in the public interest and particularly the interests of the community of Plettenberg Bay. For all of these reasons, there appears to me to be no basis on which to award costs against the applicant in favour of Bitou, let alone costs on an attorney and client scale.

[18] Turning to whether the applicant should be ordered to pay the Department's costs on a party and party scale, it is relevant that the applicant did not have careful regard, more so as a law clinic, to the issue of its locus standi in this matter. On the applicant's own version it was the purported cession of the contract entered into between it and Ukhana which founded its locus standi in the matter, yet the agreement was only put up for the first time in reply. It is equally relevant that the

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<sup>5</sup> AC Cilliers Law of Costs at 2-8 and 2-10.



applicant did not join either Ukhana or, after its liquidation had become apparent, the liquidators of Ukhana to the proceedings despite the fact that it was Ukhana that had been awarded the public tender by Bitou and when, on the applicant's own version, was, by virtue of the purported cession, "*responsible for the Technical execution of the project*". In such circumstances Ukhana or its liquidators clearly had a direct and substantial interest in the matter.<sup>6</sup>

[19] It is also noteworthy that the applicant accepted that the purported cession of the contract to it did not follow any public procurement process despite the public funds involved and the fact that the contract had been awarded following a public procurement process. In this regard, the applicant took the view that there was no transparent, fair or equitable process required in relation to the cession, which was purely a matter of contract. In taking this view the applicant failed to have regard to the public nature of the contract, the public funds allocated to the contract, the system of public finance management applicable to the award of public contracts or the provisions of s 217 of the Constitution, the Local Government: Municipal Finance Management Act 56 of 2003, the Supply Chain Management Regulations and Bitou's own supply chain management policy.

[20] Following the launch of the application, the Department provided the applicant with a limited undertaking in relation to Ruwacou and supported efforts to settle the matter. When these efforts proved unsuccessful the matter was set down for hearing. Having regard to the relevant facts and circumstances in the matter, the relief sought against the Department, the public funds involved, the public interest and interests of the community, the difficulties inherent in the applicant's case more so in relation to the applicant's locus standi and the failure to join Ukhana or its liquidators, the Department was obliged to oppose the matter. This is all the more so given the applicant's expressed view as to the extended scope to be given to the Ruwacou undertaking, the Province's constitutional obligations and the serious issues raised with regards to the procurement process undertaken by Bitou in relation to the contract.

[21] In considering an award of costs against the applicant it is relevant that while the applicant indicates that it is a public benefit organisation and a registered

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<sup>6</sup> *Kethel v Kethel's Estate* 1949 (3) SA 598 (A).

law clinic, it states that it is also registered with the NHBRC. As such it is clearly operating within the commercial sphere. The consequences of having launched and withdrawn this application would therefore have been known to it. Having regard to considerations of fairness the applicant cannot be exempted in toto from the payment of the Department's costs. However, given the relevant facts and circumstances the view I take is that the applicant should not be saddled with the costs incurred before the Department opposed the matter, when the matter was crowded out of the urgent roll or the costs associated with the Department's application to have the late filing of its opposing affidavit condoned.

[22] Costs on a party and party scale are therefore to be paid by the applicant to the Department from the date on which it opposed the application, save for costs in respect of the Department's application for condonation and those occasioned by the postponement of the matter on 22 July 2021, when the matter could not be heard given the number of urgent matters on the roll. I am, in addition, not persuaded that the matter warranted the employment of two counsel by the Department and, as a result, the costs awarded against the applicant in favour of the Department are to be limited to costs in respect of only one counsel.

### Order

[23] In the result, the following order is made:

1. Subsequent to its withdrawal of this application on 5 August 2021, the applicant, the Hammond and Hammond Transactional Law Clinic, is ordered to pay the costs of the third respondent, the Provincial Department of Human Settlements ("the Department") on a party and party scale from the date on which the Department opposed the application. Such costs are to include the costs of only one counsel but exclude –
  - 1.1 costs in respect of the Department's application to condone the late filing of its "explanatory" opposing affidavit; and
  - 1.2 costs occasioned by the postponement of the matter on 22 July 2021.
2. The first respondent, the Bitou Municipality, is to bear its own costs.

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SAVAGE J

Appearances:

Applicant: M Ipser  
Instructed by Hammond and Hammond Transactional Law Clinic

First respondent: J Jantjies  
Instructed by Sokutu Attorneys

Third respondent: I Jamie SC and L Stansfield  
Instructed by the State Attorney