REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***23rd July 2021*** Signature: _____

CASE NO: 42546/2020

DATE: 23RD JULY 2021

In the matter between:

FUELEX (PTY) LIMITED Applicant

and

S P ATTORNEYS INCORPORATED First Respondent

LOPDALE SERVICES & INVESTMENTS (PTY) LIMITED Second Respondent

THE LEGAL PRACTICE COUNCIL Third Respondent

Coram: Adams J

Heard: 20 July 2021 – The 'virtual hearing' of the application was conducted as a videoconference on the *Microsoft Teams* digital platform.

Delivered: 23 July 2021 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 14:00 on 23 July 2020.

Summary: Costs order – always within the discretion of the court – discretion to be judicially exercised and punitive costs order should be warranted – the general rule is that the successful party should be awarded costs – punitive costs order – insufficient reasons furnished for the granting of such order.

ORDER

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(1) The applicant's application for the liquidation of the first respondent is dismissed.

(2) The applicant shall pay the first respondent's costs of the said application, including the costs consequent upon the employment of two Counsel, one being a Senior Counsel.

JUDGMENT

Adams J:

[1]. In this opposed application by the applicant for the liquidation of the first respondent, I am required to adjudicate only the issue of costs. The applicant, after having proceeded with the application and after having received the first respondent's answering affidavit, now has a clear understanding of the true facts in the matter, which do not support the applicant's cause to have the first respondent liquidated. This, so the applicant contends, was as a result of the first respondent playing 'cat-and-mouse' prior to the applicant issuing the liquidation application, leaving the applicant no choice but to base its legal action on inferential reasoning.

[2]. In its replying affidavit dated the 17th of December 2020, the applicant gave a clear and unequivocal indication that it has no intention of prosecuting the application further. The liquidation application has accordingly for all intents and purposes been abandoned by the applicant, who is however not prepared to formally withdraw the application, as that would entail it having to tender the costs

of the application. The applicant contends that the conduct of the first respondent was *mala fide* and unbecoming of a firm of attorneys and which conduct left the applicant with no alternative but to take the legal action it did. Therefore, because of these special circumstances, so the applicant submits, it should not be held liable for costs. In fact, so the argument on behalf of the applicant goes, the first respondent should pay the applicant's costs.

[3]. The first respondent, on the other hand, contends that the applicant had no business diving headfirst into an urgent application for the liquidation of the first respondent, before first establishing the facts. The first respondent has been successful in opposing the application for its liquidation and therefore, so the argument on behalf of the first respondent goes, applying the general rule, the applicant should be liable for the first respondent's costs.

[4]. The trigger for the liquidation application was an assumption by the applicant that the first respondent had misappropriated about R960 000 of the applicant's money, which it (the first respondent) had received from the second respondent in settlement of the latter's indebtedness to the applicant. This amount, so the applicant assumed, had been stolen by the first respondent, relying in that regard on a communication from the second respondent. With the benefit of hindsight, which, we know, is an exact science, it can safely be said that that that assumption was wrong. The applicant's attorneys therefore demanded payment of the settlement amount of the R960 000 odd by 14:00 on the 23rd of November 2020, failing which, so the demand went, the applicant would proceed with an urgent winding up application.

[5]. In its written response on the 25th November 2020 to the aforesaid demand, the first respondent gave a perfectly plausible explanation to the effect that at some point it (the first respondent) acted for both the applicant and the second respondent. The latter during April 2020 instructed them to make to the applicant a settlement offer, but before the offer could be made, the applicant terminated the first respondent's mandate. The first respondent therefore, on instruction from the second respondent, held on to the R960 000 and awaited further instructions from the second respondent. Importantly, the claim by the first

respondent that the matter had not been settled was corroborated by the objective documentary evidence, notably the fact that the supposed settlement agreement had not been signed by the applicant. As already indicated, the indications were that the first respondent's explanation was viable especially in view of the fact that no settlement agreement had been concluded in relation to the dispute between the applicant and the second respondent.

[6]. Strangely, the applicant, probably motivated by a deep-rooted suspicion of the first respondent and some serious conspiracy theories harboured by the applicant, fuelled by an erroneous claim by second respondent that the dispute had been settled between them, opted not to accept the first respondent's explanation. In fact, what the applicant then did was to 'jump the gun', as it was put by the first respondent in their papers, and to launch the urgent application for the liquidation of the first respondent. In my view, this cause was ill-advised and misguided. This is so simply because of the quantum leap that need to be taken by the applicant from the point of the suspicion that the first respondent had stolen the money – with no real objective facts to support the suspicion – to positive allegation that the first respondent owes the applicant the said sum as a basis for a liquidation of the first respondent.

[7]. The point is that the applicant, faced with a plausible version of events by the first respondent and the risk that that version may very well be true, truly jumped the gun by the institution of the urgent application. What is instructive is that the same version contained in the first respondent's answering affidavit was rejected by the applicant before the application was issued. The difference being that the applicant now accepts that version.

[8]. In sum, I find myself in agreement with the submissions on behalf of the first respondent that the applicant, in launching into an urgent application in the reckless manner it did, ran the risk of falling at the first hurdle. The applicant had no business issuing an application against the first respondent. On what basis did the applicant reject the version of the first respondent and opt to align itself with conspiracies and inferences assuming that the first respondent, a firm of attorneys, bound by high ethical and professional standards, had made itself

guilty of theft? I ask this question rhetorically. The point is that, viewed objectively, there was no reason for the applicant not to accept the perfectly plausible explanation proffered by the first respondent.

[9]. I am therefore satisfied that the applicant should, in terms of the general rule that a successful party should be awarded costs, pay the first respondent's costs of this application.

[10]. The next question is whether a punitive costs order should be granted against the applicant. It is trite that the rationale for a punitive attorney and client costs order is more than mere punishment of the losing party. Tindall JA explained it as follows in *Nel v Waterberg Landbouwers v Ko-operatiewe Vereeniging*[1]:

'[t]he true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special consideration arising either from the circumstances which give 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 than 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 the expense caused to him by the litigation.'

[11]. And see further: *Swartbooi v Brink*[2]. The issue of costs is a matter for the discretion of a trial court. Smalberger JA elaborated on the nature of this discretion as follows (in the context of an agreement between parties that attorney client costs be paid) in *Intercontinental Exports (Pty) Ltd v Fowles*[3] at para 25:

'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 consideration. These would include the nature of the 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's conduct in relation to the litigation.'

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[1] *Nel v Waterberg Landbouwers v Ko-operatiewe Vereeniging* 1946 (1) AD 597 at 607;

[2] *Swartbooi v Brink* 2006 (1) SA 203 (CC) par 27;

[3] *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA).

[12]. SCA judgements have indicated that a court should be disinclined to grant costs orders on the scale as between attorney and client until salient argument and sufficient forensic debate have helped to establish the appropriate judicial basis on which to make them: *AA Alloy Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd*[4] and *Thoroughbred Breeders Association v Price Waterhouse*[5].

[13]. Applying these principles *in casu*, I am not persuaded that a punitive costs order would be appropriate. However, I am in agreement with the submissions made by Mr Pillay SC, who appeared on behalf of the first respondent with Mr Kisten, that the matter was of such a serious nature – especially for the first respondent, an attorney of this this court, accused of serious wrongdoings – that the employment of two Counsel, one being a Senior, was justified.

[14]. In the premises, I am of the view that costs should be awarded in favour of the first respondent against the applicant only on the party and party scale.

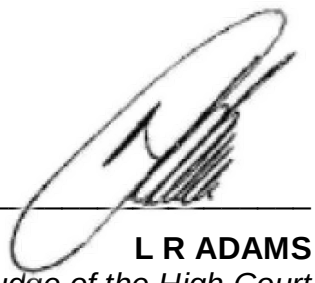
[15]. The parties were also *ad idem* that the application should be dismissed and I will therefore grant an order to that effect in addition to the costs order.

Order

Accordingly, I make the following order: -

(1) The applicant's application for the liquidation of the first respondent is dismissed.

(2) The applicant shall pay the first respondent's costs of the said application, including the costs consequent upon the employment of two Counsel, one being a Senior Counsel.



L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

[4] *AA Alloy Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd* 2000 (1) SA 639 (SCA) at 648 E-I;

[5] *Thoroughbred Breeders Association v Price Waterhouse* 2001 (4) SA 551 (SCA) at 596 D-I.

HEARD ON:	20th July 2021 – in a 'virtual hearing' during a videoconference on the *Microsoft Teams* digital platform
JUDGMENT DATE:	23rd July 2021 – judgment handed down electronically
FOR THE APPLICANT:	Advocate W J Botha
INSTRUCTED BY:	Faber Goertz Ellis Austin Inc, Bryanston
FOR THE RESPONDENT:	Advocate Indhrasen Pillay SC, with Adv Reece Renae Kisten
INSTRUCTED BY:	SP Attorneys Incorporated, Sandton