IN THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 51027/19

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED. ~~YES~~/NO

[redacted]

14 January 2021

..... SIGNATURE

..... DATE

In the matter between:

ADVOCATE LINDON CLIFFORD LEYSATH **APPLICANT**

and

THE LEGAL PRACTITIONERS FIDELITY

FUND BOARD OF CONTROL on behalf of

THE LEGAL PRACTITIONERS

FIDELITY FUND previously known as

THE ATTORNEYS FIDELITY FUND

BOARD OF CONTROL AND THE ATTORNEYS

FIDELITY FUND **RESPONDENT**

JUDGMENT

VAN NIEUWENHUIZEN AJ:

[1] In this application, the Applicant, a practising advocate of the High Court, seeks a monetary order against the Respondent in the amount of R472 666,00, together with ancillary relief relating to interest and costs. There is no dispute insofar as the Respondent's *locus standi* to be sued is concerned and it does not appear to me that much turns on the difference in the citation as asserted by the Applicant in the founding affidavit and what the Respondent itself contends is its correct citation. The Applicant would in any event be entitled to make out a case for the relief he claimed on the Respondent's papers (see **Administrator, Transvaal and Another v Theletsane and Others** 1991 (2) SA 192 (A) 195H/I). The Respondent records that its correct citation is *"the Legal Practitioners Fidelity Fund Board"*. The Respondent is the successor in law of the Attorneys Fidelity

Fund Board of Control which ceased to exist on 1 November 2018 with the commencement of the Legal Practice Act 28 of 2014 ("the Legal Practice Act"), which replaced the Attorneys Act 53 of 1979 ("the Attorneys Act"). The Respondent is a creature of statute created in terms of Section 61(1) of the Legal Practice Act. The Respondent is responsible for acting on behalf of the Fidelity Fund (see Section 53(2) of the Legal Practice Act), the latter being the already existing juristic person created under Section 25 of the Attorneys Act, and whose existence continues under the Legal Practice Act in terms of Section 53(1) thereof. The Legal Practice Act is not of retrospective effect and it is common cause that the Applicant's claim arose prior to the repeal of the Attorneys Act and thus falls to be considered under Section 26(a) thereof (see Section 12(2)(b) of the Interpretation Act 33 of 1957).

[2] The Applicant's case is summarised in his founding affidavit as follows:

[2.1] at paragraph 4:

> *"At the outset, this is an application to compel the Respondent to affect payment to me of advocate's fees due, owing and payable to me by an Attorney firm M F Martins Costa Attorney ("Costa"), a sole proprietorship of an attorney Manuel Fernando Martins Costa, who conducted business as an attorney at 33 Lakefield Avenue, Lakefield, Benoni, Gauteng, pursuant to my claim that amounts for advocate's fees are held by an attorney in trust in accordance with the precepts of Section 26 of the Attorneys Act."*

[2.2] and at paragraph 6:

> *"... I wish to advise that the dispute that arises between the Respondent and I is of a very limited nature and concerns the question of whether Advocate's fees are entrustment funds within the ambit of Section 26(a) of the Attorneys Act. ..."*

[3] Similarly, the Respondent came out swinging in its answering affidavit in paragraph 2.1 recording that:

> *"The main reason that Applicant's claim was rejected by the Attorneys Fidelity Fund was that Applicant was unable to discharge the onus of proving that funds had been entrusted to MF Martins Costa Attorneys, "Attorney Costa", to be held on Applicant's behalf and, in bringing this application, Applicant has again failed to discharge that onus as is detailed below."* (*sic*)

It was further stated on behalf of the Respondent that the dispute between the parties does not concern the question of whether advocate's fees are entrustment funds within the ambit of Section 26(a) of the Attorneys Act, but rather whether any monies were held in trust by Costa Attorney on behalf of the Applicant.

[4] In order to succeed with his application, the Applicant was required to show that:

[4.1] he suffered pecuniary loss;

[4.2] by reason of theft committed by a practising attorney;

[4.3] of money entrusted by or on behalf of the Applicant to the attorney;

[4.4] in the course of his practice as such,

(see **Industrial and Commercial Factors (Pty) Ltd v Attorneys Fidelity Fund Board of Control** 1997 (1) SA 136 (A) ("**ICF**") 140C – F).

[5] According to the evidence of the Applicant:

[5.1] He had launched a claim against the Respondent principally on the basis that his *"unpaid advocate's fees accounts rendered to Costa for the provision of professional services by me to Costa at his instance and request as an Advocate of the High Court during the period of February 2018 to June 2018 wherein I performed my functions and duties to Costa in accordance with instructions received and in terms of which I duly submitted accounts to Costa in respect of the work and which accounts remained unpaid."*

[5.2] Costa apparently had a policy that advocates would only be engaged and briefed for services to be rendered once funds were placed in trust with the firm.

[5.3] The Applicant had a long history with Costa in respect of the provision of professional services, which spanned well over a period of 10 years and throughout such period, right until January 2018, his accounts had been paid on a 97 day basis.

[5.4] The aforementioned policy was implemented by the firm [of Costa] and in his (i.e. the Applicant's) presence clients were often advised that funds would be required in advance to be used to pay advocate's fees.

[5.5] He had raised, in his affidavit in support of this claim lodged directly with the Respondent, the *"fact"* that funds were *"in fact"* provided for by clients in respect of the provision of his services directly to Costa.

[6] It is common cause that the Applicant's accounts to Costa had remained unpaid. It does not appear to me to be seriously in dispute that Costa had fled the country and according to the Applicant a trust deficit of R30 million was left behind. Costa had also been sequestrated in the meantime.

[7] What is contentious between the parties is that the Respondent disputes the Applicant's contention that Costa had dissipated advocate's fees and misappropriated same which he held on behalf of counsel. In view of the approach I propose to adopt herein, I shall assume for the moment, in favour

of the Applicant (without making any such finding) that clients of Costa had indeed paid amounts at least to the equivalent of the Applicant's claim against the Respondent in the form of deposits to cover counsel's fees in pending or imminent litigation. I shall further assume that Costa had committed theft in the course of his practice.

[8] In my view, the matter thus stands to be determined as to whether or not by reason of the assumed theft committed by Costa the Applicant had suffered a pecuniary loss of money entrusted by him or on his behalf to Costa. Put differently, having assumed that money was paid or deposited by clients to Costa for purposes of covering advocate's fees, and that Costa stole same in the course of his practice:

[8.1] was such money *"entrusted"* to Costa;

[8.2] if such deposits or payments made to and received by Costa from his clients constitute money *"entrusted"*, then was such money entrusted by the Applicant, or on his behalf;

[8.3] if the money was *"entrusted"* to Costa by the Applicant, or on his behalf, did the theft thereof result in a pecuniary loss to the Applicant?

[9] I interpose that these questions have been covered by the disputes

raised by the Respondent in its answering affidavit (see, for example, paragraphs 23.2 and 31 thereof). I shall turn to address these questions in turn.

Was money "entrusted?"

[10] In **ICF**, F H Grosskopf JA, at 143I to 144I, set out what is meant by the word *"entrust"* as follows:

> *"Where money is paid into the trust account of an attorney it does not follow that such money is in fact trust money (Paramount Suppliers (Merchandise) (Pty) Ltd v Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund Board of Control 1957 (4) SA 618 (W) at 625F-G). If money is simply handed over to an attorney by a debtor who thereby wishes to discharge a debt, and the attorney has a mandate to receive it on behalf of the creditor, it may be difficult to establish an entrustment.*
>
> *After considering certain definitions of the word 'entrust' - in addition to those referred to in the judgment in British Kaffrarian Savings Bank Society v Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund Board of Control 1978 (3) SA 242 (E) at 248B-D - Nicholas J concluded as follows at 543E-F in the Provident Fund case, supra:*
>
> > *'From these definitions it is plain that "to entrust" comprises two elements: (a) to place in the possession of something, (b) subject to a trust. As to the latter element, this connotes that the person entrusted is bound to deal with the property or money concerned for the benefit of others (cf Estate Kemp and Others v McDonald's Trustee 1915 AD 491 at 499).*

> *"(The trustee) is bound to hold and apply the property for the benefit of some person or persons or for the accomplishment of some special purpose"*

(ibid at 508).'

I do not understand these passages, and similar remarks in the case of SVV Construction (Pty) Ltd v Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund 1993 (2) SA 577 (C) at 589G, to convey that the liability of the Fidelity Fund is limited to those cases where the money or property concerned was impressed with a trust in the technical legal sense of the word. The Afrikaans text of the Act, which is also the signed one, provides as follows in s 26(a):

> *'Behoudens die bepalings van hierdie Wet, word die fonds aangewend ten einde persone te vergoed wat geldelike verlies ly weens -*
>
> *(a) diefstal gepleeg deur 'n praktiserende praktisyn . . . van geld of ander goedere deur of namens sodanige persone toevertrou aan hom . . . in die loop van sy praktyk. . . .'*

(Emphasis added.)

Die Verklarende Handwoordeboek van die Afrikaanse Taal (HAT) 2nd ed (1992) defines 'toevertrou' as 'met vertroue opdra aan, oorgee aan die sorg van . . .'.

Die Verklarende Afrikaanse Woordeboek 8th ed (1992) gives the following definition of 'toevertrou':

> *'1. In vertroue gee. 2. In iemand se sorg laat; ter veilige bewaring gee. . . .'*

The word 'toevertrou' does therefore not imply that the handing over of the

money or property concerned has to be subject to a trust in the technical legal sense of the word. Moreover, the Legislature appreciated that the word 'trust' has a technical meaning, and where it intended to convey that meaning it used the word 'trust' in the Afrikaans text. This appears from s 27(2) of the Act which reads as follows:

> *'(2) Die fonds word deur die beheerraad in trust gehou vir die doeleindes in hierdie hoofstuk vermeld.' (Emphasis added.)*

Had it been the intention of the Legislature to give 'entrust' the technical legal meaning of placing money or other property with an attorney subject to a trust, it would have used an expression such as 'in trust aan hom gegee' in the Afrikaans text of s 26(a).”

[11] At the risk of repeating myself, assuming, for the moment, in the Applicant's favour that all the funds which form the subject of his claim were deposited or paid to Costa in advance by Costa's clients for the purpose to cover advocate's fees of pending litigation or litigation to be instituted, in my view, such money would clearly be *“entrusted”* as explained by F H Grosskopf JA. Deposits are paid to Costa, to be held, one would expect (although from the afore-quoted authority of **ICF**, not necessarily) in Costa's trust account, to be held for the payment of services to be rendered by counsel to Costa's clients in due course. In this regard, services rendered by counsel are rendered to or on behalf of the attorney's client, and not to or on behalf of the attorney (see **General Council of the Bar of South Africa v Geach and Others** 2013 (2) SA 52 (SCA) [144]).

[12] That being said, although counsel renders services on behalf of the attorney's client, he does so at the instruction of, and by agreement with, the attorney – and not the client.

[12.1] In **Serrurier and Another v Korzia and Another** 2010 (3) SA 166 (W) ("**Korzia**") at 180F – 181A, Jordaan AJ found as follows:

> *"My personal view is that the defendant is liable for the fees of the plaintiffs in view of the following:*
>
> *1. The obligation to pay fees must flow from an agreement between parties.*
>
> *2. This agreement can either be an express agreement or by necessary implication.*
>
> *3. Counsel is not allowed in terms of his ethical rules to receive instructions or payment from a client. General Council of the Bar of South Africa v Van der Spuy (supra); and De Freitas and Another v Society of Advocates of Natal and Another 2001 (3) SA 750 (SCA) (2001 (6) BCLR 531). These two cases illustrate that an advocate will be suspended from practice even if he is not subject to the rules of the General Bar Council and even if the constitution of his own professional body allows receiving instructions and payment from members of the public.*
>
> *4. If there is not an express agreement between counsel and attorney the necessary implication is therefore that it can never be an implied term of the agreement that counsel look to the client to pay*

his fees.

5. *Counsel will not be permitted to conclude an express agreement that his fees be paid by anyone else than his attorney.*

6. *It therefore in my view follows logically that an attorney will always in our law be liable for counsel's fees, even in the event of the client not paying him. ...”*

[12.2] In **Fluxmans Incorporated v Lithos Corporation of South Africa Ltd and Another (No 1)** 2015 (2) SA 295 (GJ) at paragraph 35, Sutherland J said that:

“What counsel is to charge is the subject-matter of an agreement between counsel and attorney, not between counsel and the client. The client does not approve what Counsel charges; that is the function of the attorney who is liable to pay the fees (See: Serrurier and Another v Korzia and Another 2010 (3) SA 166 (W) at esp 181A). What Ndebele [a director of Fluxmans] *sought from Gyenfie* [a director of the client of Fluxmans] *was an agreement that Gyenfie would cover Fluxmans for those sums. Sensibly, Ndebele did not wish to bind Fluxmans to pay the fees unless he had secured cover.”*

[12.3] In **Fluxmans Incorporated v Lithos Corporation of South Africa (Pty) Ltd and Another (No 2)** 2015 (2) SA 322 (GJ), Victor J at paragraph 26 stated that:

“It is clear that counsel cannot contract with the members of the public

directly. It is a referral profession and it is a professional practice or trade usage that the legal nexus between counsel and their fees is the attorney and not the member of the public. See General Council of the Bar of South Africa v Geach and Others 2013 (2) SA 52 (SCA) ([2012] ZASCA 175); Minister of Finance and Another v Law Society, Transvaal 1991 (4) SA 544 (A); and Serrurier and Another v Korzia and Another 2010 (3) SA 166 (W).”

[13] It follows that there are two distinct separate legal arrangements in the trinity of counsel, attorney, and client.

[13.1] Firstly, there is a contractual relationship between the attorney and the attorney’s client, which is wholly separate from counsel. Secondly, there is a contractual relationship between an attorney and counsel, which but for the fact that the services requested by the attorney are to be rendered on the client’s behalf, has otherwise no bearing on the client.

[13.2] As the authorities demonstrate, the agreement between an attorney and counsel renders the obligation for payment of counsel’s fees on the attorney. That position cannot in law not be altered by passing the obligation to the attorney’s client. Pursuant to that contractual arrangement, counsel had a right to claim his fees from the attorney, and the attorney was obliged to make payment towards counsel of counsel’s fees. Whether or not the client had paid the attorney was irrelevant insofar as that contractual relationship was concerned, unless their agreement

was qualified in some manner whereby counsel would not render any work unless satisfied that counsel's fees were secured by the attorney in the form of a deposit.

[13.3] Irrespective of the agreement between counsel and the attorney, in contrast, in the contractual relationship between the attorney and the attorney's client places an obligation on the client to pay the attorney, and thus the attorney is vested with the right to claim from the client payment, in respect of services rendered by the attorney, as well as disbursements for which the attorney would be liable, such as counsel's fees.

[13.4] Put differently, in the contractual relationship between counsel and attorney, counsel is the creditor, and the attorney the debtor. In the contractual relationship between the attorney and client, the attorney is the creditor, and the client the debtor.

[14] It follows then that when clients paid deposits to Costa to ensure that there were funds available to pay Costa's disbursement in the form of the Applicant's fees (or other counsels' fees), such money was *"entrusted"* to Costa.

Who entrusted money to Costa, or on whose behalf was money entrusted to Costa?

[15] If then, money was entrusted to Costa, who so entrusted it? The money was certainly not deposited by the Applicant and it follows that it was entrusted by the client or clients of Costa.

[16] That is certainly the starting point of the enquiry. If the money was entrusted to Costa by his clients, was it done on the Applicant's behalf, or on the clients' behalves? In my view, it can never be said that the money entrusted as deposits by Costa's clients was so entrusted on the Applicant's behalf. It may well be that its purpose was to ensure that counsel's fees were covered, but it would be farfetched to suggest that deposits were paid with the sole purpose only of covering counsel's fees as a disbursement and not other disbursements, such as sheriff's costs, correspondent's fees, messenger's fees and the like (including at least part of the attorney's own initial fees).

[17] In my view, the Applicant conflates the purpose of the money so entrusted by Costa's clients with the interest (in the legal sense) for which the money was entrusted.

[17.1] The client had no obligation towards counsel. The client's sole obligation was to the attorney. The purpose of a deposit, on the assumed

facts in favour of the Applicant, was to ensure that the disbursements for which Costa would be liable *vis-à-vis* counsel, would be covered and that Costa thus would not be out of pocket. Such an arrangement is sensible if an attorney does not wish to run the risk of being out of pocket due to his obligation to counsel, and his client defaulting on the obligation to pay the attorney.

[17.2] If clients had entrusted money on counsel's behalf, then counsel would be free to direct what should be done with such money. It has not been suggested by the Applicant that he had ever been so entitled to direct what might be done with money that was so entrusted. If money was indeed so entrusted, then the Applicant would be liable for income tax and VAT (from the invoices attached to the founding affidavit, the Applicant was a registered VAT vendor) once the money was deposited with Costa, as it would then accrue to the Applicant if held on his behalf. Such a proposition is merely to be stated to be rejected as untenable. If that were not the case, it would lead to the absurd scenario where a client, who paid a significant deposit, but subsequently terminated the mandate of the attorney, would be precluded from claiming whatever money is left in trust which had not yet been spent on disbursements or in respect of the attorney's fees. The client would then have to, on the Applicant's contention, claim such money from counsel based on some *condictio*.

[18] It follows, that at this hurdle, the Applicant's case already falls short.

Has the Applicant suffered pecuniary loss due to the theft of money entrusted?

[19] From the conclusion in respect of the second question above, it follows logically that the Applicant had not suffered a pecuniary loss. This further follows from the ratio quoted of F H Grosskopf JA in **ICF** *supra* with reference to 143J – 144A.

[20] The money held in trust, in the sense of being *"entrusted"* and not merely where the attorney's trust account or the attorney is acting as a conduit for a payment to discharge a debt on behalf of a client or third party, is generally entrusted on behalf of the client as a consequence of the contractual relationship between the attorney and a client (*cf* **Roestoff v Cliffe Dekker Hofmeyr Inc** 2013 (1) SA 12 (GNP) [71]). But of course one can imagine a scenario where money is entrusted into trust by client on behalf of someone else. Take the following examples:

[20.1] in the first scenario, where a client entrusts money into trust for that client's own behalf: S sells to P, who purchases an immovable property from S, in the amount of R1 million. In terms of the agreement, P was to pay a deposit to the conveyancing attorney of R100 000.00 to be held in trust until registration of transfer, whereafter same was to be paid to

S. The sale agreement is further subject to a suspensive condition that P obtains a mortgage bond loan for the balance of the purchase price. If the suspensive condition is not met and the property never transferred, the deposit remains entrusted on behalf of P, and P may direct how the attorney is to deal with such a deposit.

[20.2] in the second scenario, where a client entrusts money into trust on behalf of another: If, however, in the preceding example, the sale agreement provides that the deposit is to be paid to the conveyancing attorney and held in trust (i.e. entrusted) pending registration of transfer, in favour of S, then upon non-compliance with the suspensive condition, the money would remain entrusted on behalf of S, and S would be entitled to direct what is to be done with the deposit. P would have a claim against S for the return of the deposit and not against the attorney. The point in this second scenario remains that there was an obligation created through contract between S and P. In the present matter, there is no contract between the Applicant and Costa's clients.

[21] Thus, as is alleged to have happened in the present circumstances, where a client pays a deposit to an attorney, and the attorney steals the deposit, irrespective of the fact that the purpose thereof was to cover counsel's fees, it was entrusted by the client and to be held on behalf of the client. If the attorney stole the deposit and no services were rendered by

counsel, it is the client that suffers that loss and the client would have a claim against the Fidelity Fund.

[22] If counsel had rendered any services on behalf of the client, but in discharge of his contractual obligation to the attorney, his claim lies against the attorney (or possibly subsequent insolvent estate as happened *in casu*). It is for the trustee(s) to, if so directed by the creditors of the insolvent estate of Costa, including the Applicant, if he proves a claim, to direct the trustee(s) to collect such money as is due for the services counsel rendered. The client would not suffer a loss, because he received the service (from counsel) which he paid for to the attorney.

[23] If a deposit was paid in respect of fees of counsel not yet incurred, and stolen, then the loss is plainly that of the client. If, however, services had been rendered by counsel and duly invoiced and paid by client to the attorney and that money then stolen, the aforesaid dictum of **ICF** applies and the money was not entrusted by the client to the attorney, but paid in terms of the client's obligation to discharge a debt due and owing to the attorney. The loss that counsel suffers in such a circumstance is not the theft of the money paid by the client, but the default by the attorney of the attorney's obligation to make payment of a debt due to counsel. Counsel would have suffered damages due to the attorney failing to comply with the payment obligation arising from the contract between counsel and the attorney. It is the breach of

the contract that is the causal nexus of Counsel's loss, not the theft of the money entrusted by the clients for the purpose of covering counsel's fees.

[24] From the authorities already referred to herein, counsel's claim for outstanding fees lies against the attorney. If the attorney is sequestrated, the claim is against his insolvent estate. It follows that the Applicant had not suffered a pecuniary loss due to the alleged theft of Costa of any money paid by clients to Costa. The Applicant's loss, as I have indicated, arises due to Costa's breach of his agreement with the Applicant.

Concluding remarks

[25] For the reasons dealt with under the previous two sub-headings, I need not consider the remaining contentions of the parties. It is, however, perhaps prudent, to conclude this judgment in dealing with certain aspects raised by the parties. On behalf of the Applicant, reliance was placed on the *obiter dictum* of Jordaan AJ in **Korzia** at 176B where the learned acting judge remarked that:

> *"What falls to be decided is if counsel is briefed by an attorney, who is responsible for the payment of his fees? There can be no doubt that, in the event of the client paying the attorney, but the attorney failing to pay counsel, an action against the attorney would be justified. (In such an event the fidelity fund would in all probability pay the counsel. See s 26 of the Attorneys Act 53 of 1979.) Such an event would also attract the*

attention of a criminal court." [My emphasis added.]

[26] With respect to the learned acting judge, no reasoning was given for the postulation in parenthesis as quoted. As I have demonstrated herein, such a proposition cannot be supported as a matter of logic in the context of the separate debtor-creditor relationships at play.

[27] The Respondent has highlighted several facts apparent from the Applicant's papers which, in any event, would go a long way to negate the assumptions that I have made in the Applicant's favour in this judgment. For example, of the invoices upon which the Applicant's claim is based, same appears to have been for work rendered for Costa himself. Deposits did not square up with invoices rendered *per se*. And other counsel was also briefed by Costa and deposits seemingly would have been for the purpose of discharging disbursements, and clearly not, to be entrusted on behalf of the counsel whose fees would constitute such envisaged disbursements.

[28] In addition thereto, insofar as the Applicant relies on the purported practice of Costa, this practice was clearly not uniformly employed by Costa himself, nor does that seem to have perturbed the Applicant in that the Applicant had rendered services, as counsel, to Costa, despite, on the Applicant's own version, Costa having reneged on due fulfilment of his payment obligations towards the Applicant from January or February 2018.

The Applicant does not shed any light on why he continued to do work for Costa seemingly five months after Costa had no longer paid him on a 97 day basis as he had done, on the Applicant's version, for the preceding 10 years.

[29] I would therefore have been inclined, to have agreed with the argument on behalf of the Respondent that, in the context where the Applicant seeks final relief, the denial by the Respondent that the monies so deposited by the clients of Costa (as contended by the Applicant) and earmarked for the Applicant's fees, were in fact part of the money stolen by Costa. This is of course in accordance with the well-known **Plascon-Evans** rule (**Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) 634E – 635C).

[30] The Applicant conflated the Legal Practice Council, with the Fidelity Fund. They are separate entities (compare Sections 4 and 53(1) of the Legal Practice Act). It follows that the denial in this regard on behalf of the Respondent is not subject to the criticism levelled against it by the Applicant in the context of **Wightman t/a J W Construction v Headfour (Pty) Ltd and Another** 2008 (3) SA 371 (SCA) at paragraph 13. In my view, the disputes as raised on behalf of the Respondent's (which includes an attack premised upon inadmissible hearsay evidence) would fall neatly under the category as set out by Murray AJP in **Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd** 1949 (3) SA 1155 (T) at 1163 under point (c):

"or (c) he may concede that he has no knowledge of the main facts stated by the applicant, but may deny them, putting applicant to the proof and himself giving or proposing to give evidence to show that the applicant and his deponents are biased and untruthful or otherwise unreliable, and that certain facts upon which the applicant and his deponents rely to prove the main facts are untrue. The absence of any positive evidence possessed by respondent directly contradicting the applicant's main allegations does not render such a case such as this free of a real dispute of fact."

[31] There is no reason why costs shouldn't follow the result. In the premises, the application is dismissed with costs.

H P VAN NIEUWENHUIZEN
Acting Judge of the High Court
Gauteng Division of the High Court, Pretoria

Electronically submitted, therefore unsigned

Delivered: This judgment was prepared and authored by the Judge whose name is reflected on 28 December 2020 and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 14 January 2021.

Date of hearing : Counsel for the Respondent, and the Applicant, agreed that the matter was capable of being resolved on the papers as read with the heads of argument filed and that absent the court requiring a hearing, by way of video

conferencing or otherwise, the matter may be determined accordingly. Accordingly, the matter was set down for the motion court week of 9 November 2020 without a hearing and has been determined accordingly.

Date of judgment: 14 January 2021

Appearances:

Gishen-Gilchrist Inc.
Attorneys for the Applicant
Counsel for the Applicant: in person

Brendan Müller Inc
Attorney for the Respondent
Counsel for the Respondent: G Oliver