IN THE HIGH COURT OF SOUTH AFRICA
[TRANSVAAL PROVINCIAL DIVISION]

Case Number: 34171/2008

PFP PROFESSIONAL FORENSIC PROFILING CC — **FIRST APPLICANT**

HEMSLEY, DEBRA LEE — **SECOND APPLICANT**

AND

PIETERS, LAURIE KATHERINE — **RESPONDENT**

JUDGMENT

MABUSE AJ: (1) This is an application for an order of costs. It is opposed by the respondent. The First Applicant is PFP Professional Forensic Profiling cc, a close corporation duly incorporated in terms of the close corporation laws of this country. The first applicant conducts business at its principal place of business located at St. Peter's Square, Waterfront Place, Palshof, Johannesburg. It is represented in this application by the second applicant. The second applicant is a major businesswoman who resides at the same address as the first applicant.

The second applicant is a member of the first applicant.

(2) The respondent is a major businesswoman who resides at [.......]. The respondent also is a member of the first applicant. Both the second applicant and the respondent, as members of the first applicant, each holds 50% interest in the first applicant. The second applicant brought an application on behalf of the first applicant against the respondent in a fiduciary capacity as enjoined by the provisions of Section 42 of the Close Corporation Act 69 of 1984.

(3) During April 2008, the second applicant became a member of the first applicant. The first applicant's business had already commenced during January 2008. The principal business of the first applicant consisted in conducting forensic profiling of individuals through a computer software known as layered voice analyses, a system that works in the same way as polygraph.

The first applicant had purchased this system from a company known as Nemesycho Service Centre Africa (Pty) Ltd for R 119 130.00, same being the sum loaned by the said company to the first applicant. The said amount paid for the said system as well as the one year open licence for using the system.
(4) The system, though licensed to the first applicant was, as at the time this application was launched, licensed for use to the personal computer owned by the respondent. Notwithstanding that the system was licensed to the personal computer of the respondent, the first applicant was and remained at all times, the owner of the system. It would appear from a letter dated 1 July 2008 from the respondent's attorneys to the applicant's attorneys that the respondent claimed that she was a licensed operator and that, the first applicant could not possess the software as it was not a licensed operator. In the same letter, the respondent claimed that the software was licensed to her computer but that ownership vested with the first applicant.

(5) The first applicant was only licensed to use the system for a period of a year after which the licence would expire. In deed on 8 July 2008, the license expired. Although the respondent had claimed in the said letter that she would not use the system, it would appear that she tried to reactivate it, without the knowledge of the applicants. The applicants only became aware of the respondent's clandestine attempts to re-activate the system, when the company from which the system was bought contacted the second applicant and requested her confirmation to reactivate the system.

(6) On the basis of the said request, the second applicant inferred that the respondent had been using the system or wanted to contrary to, her undertaking. The entire system consists of the LVA 6.50 installation compact disc; the Protection Plug, otherwise known as the Dongle; the LVA User Guide and the Telephone PC USB Phone Connector. Of these items, the first applicant was in possession of the Installation Disc and the packaging only while the respondent was in possession of the rest of the components of the system. Without the items in the respondent's possession, the whole system could not operate.

(7) Notwithstanding the respondent's undertaking contained in an e-mail of 9 June 2008 to deliver the items to one Andy Irving, the employee of the AdvanceNet, the respondent failed or refused to return the said items. Accordingly, the respondent's conduct of refusing or failing to return the items as undertaken or at all necessitated the launching of the application to deliver the relevant items. As a consequence of the respondent's failure or refusal to return the aforementioned items, the first applicant was unable to conduct any core business and was therefore prejudiced in the proper conduct of its business.

(8) The respondent admits that on 30 June 2008 her attorney received a letter from the second applicant's attorneys, who had demanded that the items in her possession should be delivered within 24 hours of receiving the said letter

to AdvanceNet. In the same letter, the respondent was warned that if she failed to act as demanded by the said defendant's attorneys' letter dated 30 June 2008, a Court would be approached. In response to the said letter, the respondent adopted the attitude that ownership in the items she had in her possession vested with the first applicant and furthermore that the software could only be possessed by a licensed operator. Because the software had been licensed to her laptop, for that reason only, she was the licence operator.

(9) The respondent refused to deliver the relevant items on the strength of another reason. She claimed that as she had applied for the winding up of the first applicant, it was ridiculous for the second applicant with full knowledge of her application, to request her to deliver assets that belonged to the close corporation for the purposes of allowing the close corporation to use the software. In her opposing affidavit, the respondent states that she decided *"It would be in the best interest of oil the parties concerned if I would retain control over those items which were in my possession until the outcome of the Application, that I would deliver the items to the liquidator of the close corporation, should the first applicant be placed in liquidation by the Honourable Court."*
Subsequently the respondent decided to return the items to the licensor for safekeeping.

(10) It is not in dispute that the respondent was in possession of the relevant items, that the second applicant, acting for the first applicant and the first applicant demanded delivery of those items; that the respondent was in possession of the relevant items; that she had initially undertaken to deliver those items; it is furthermore that on second thoughts she refused on reasons that she furnished only in her affidavit, to deliver those items. It is finally not in dispute that the respondent returned those items only after a copy of the application had been served on her.

(11) In the first place it is not clear why the respondent adopted the attitude that she would not return the items after she had earlier undertaken to deliver the goods - even if this Court was to accept her reason as genuine and honest that she always prepared to deliver the items to the licensor. It is difficult to understand why, in the first place the respondent did not, in her initial undertaking promise to return the items to the licensor or seemingly why she did not immediately deliver the items to the licensor earlier as she did. It is clear that she only delivered the items after she had been served with a copy of the application. The applicant's would not have launched the application had the respondent not been unreasonable in her conduct. This Court finds no merit at all in the reasons advanced by the respondent in refusing to deliver the items. There is no valid reason why the respondent should not be ordered to pay the applicant's costs on the scale requested by the applicants. The basic rule with regard to the award of costs was stated in Kruger Bros & Wasserman v Ruskin 1918 A. D. 63 at 69, where the Court stated that:

"The rule of our low is that oil costs unless expressly otherwise enacted - are in the discretion of the judge. Its discretion must be judicially exercisedbut it cannot be challenged, *take alone and apart from the main order*, *without his permission."*

It is indeed so that the general rule, with regard to the award of costs, is that the costs should be awarded to the winning party.

(12) Finally in keeping with the authority of Ward v Sulzer 1973 (3) SA 701 A.D. 706 G where the Court stated that:

"The same basic principles apply to costs on the attorney and client scale. For example, *vexatious, unscrupulous, dilatory or mendacious conduct (this list is not exhaustive) on the part of unsuccessful litigant may render it unfair for his harassed opponent to be out of pocket in the matter if his own attorney and client costs;"* I find that the respondent's conduct merits to be visited with a punitive order of costs.

Accordingly, the respondent is hereby ordered to pay the Applicants' costs of this application on attorney-and-client scale.

MABUSA, AJ

APPEARANCES

Applicant's Attorneys:	Rorich Wolmarans & Luderitz
Counsel for Applicant:	Inc. Adv D Botha
Respondent's Attorneys:	Du Plessis Lessing Brits Inc.
Counsel for Respondent:	Adv M H Van Twist
Date of Hearing:	15 September 2009
Date of Judgment:	15 September 2009