

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 2022/021132

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) NOT REVISED.

DATE 30/7/2024

In the matter between:

SEGWIT SOUTHERN AFRICA (PTY) LTD

APPLICANT

and

KWALITY GROUP AFRICA (PTY) LTD

RESPONDENT

HEARD 15 APRIL 2024

DELIVERED 30 JULY 2024

JUDGMENT

VAN DER MERWE, AJ

INTRODUCTION

1. The application came before me on 15 April 2024. The application pertains to the perfection of a general notarial bond. The application emanated from an urgent application and was set down before me as the final return date, pursuant to a provisional order of 8 September 2022, granting the perfection of a notarial bond.

2. I was advised that the only issue that remained in dispute between the parties, was the issue of costs.

COMMON CAUSE FACTS

3. After hearing counsel for the parties and having considered the supplementary heads of argument along with the bundle of correspondence handed to me at the hearing of the matter, most of the facts relating to the rule 34 tender and purported settlement of the matter, were common cause between the parties or could reasonably not be disputed.
4. The pertinent common cause facts are summarised as the following:
 - 4.1 The Applicant launched an *ex parte* urgent application under this case number for an interim order perfecting the notarial bond number B[...]. The notarial bond was registered in favour of the Applicant over the Respondent's immovable property which served as security for the repayment of money lent and advanced to the Respondent by the Applicant. The Respondent had failed to make payment in terms of the agreement.
 - 4.2 An interim order was granted on 8 September 2022.
 - 4.3 On 19 October 2022 the Applicant launched an application for monetary judgment in this regard under case number 034412/2022. These papers were not before me and are not material to the dispute before me.
 - 4.4 On 1 March 2024 the Respondent procured the services of new attorneys, who on the same date of coming on record, made a without prejudice and without admission of liability offer, in the amount of R1,900,000.00 in full and final settlement of the Applicant's claim inclusive of costs.
 - 4.5 Various correspondence ensued between the legal representatives regarding the settlement of the matter. The parties furthermore drew a proposed settlement agreement, which was never signed, and

therefore the matter was not settled on that basis.

- 4.6 At the hearing of the matter, Respondent's counsel contended the matter had become settled in terms of the settlement agreement. The Respondent's service of a rule 34 tender a month and a half later, and Respondent's counsel being unable to point to the court or hand up documentary proof that the parties had indeed entered into the settlement agreement, lent itself to the Respondent's counsel conceding that the matter had in fact not been settled in terms of the settlement agreement.
- 4.7 On 10 April 2024, the Applicant's attorney sent a letter to the Respondent's attorney outlining a settlement proposal including payment of the capital payment of R1,900,000.00, payable by 15 April 2024 as well as the Respondent to pay the attorney and client costs, to be confirmed by close of business that day. Explicit to this proposal was that if either of these terms were not met, the matter would proceed on the day of the hearing being 15 April 2024.
- 4.8 After close of business (16h45) on the same day, being 10 April 2024, the Respondent's attorneys served on the Applicant a Rule 34(1) tender for payment of R1,900,000.00, without any tender for costs. The Rule 34(1) notice reads as follows:

*“**BE PLEASED TO TAKE NOTICE** that Respondent hereby formally makes the following unconditional offer to settle the entire matter in full and final settlement between the parties (**the offer**).*

***HAVING** considered the Applicant's claim, the Respondent shall pay the Applicant an amount of **R1 900 000.00** in full and final settlement, which will be marked as such on the transfer of funds to Applicant's attorney trust bank account.*

***BE PLEASED TO TAKE NOTE** that the unconditional offer in full and final settlement contained herein will be presented to the court at the hearing of the matter and the Respondent will not be liable for any costs of the trial and/or hearing of any application as from the date of*

the tender so duly being served electronically as agreed.

BE PLEASED TO TAKE NOTICE *that the Respondent disclaims liability for payment of any costs on any scale on the basis that the trial and/or hearing of any application and the Applicant will be liable for the costs resulting from any further litigation herein."*

- 4.9 It appears that at some stage on 11 April 2024, the Respondent's attorney made payment of the sum of R1,900,000.00 into the Applicant's attorneys' trust account. This was only drawn to the Applicant's attorney's attention on 12 April 2024. The Applicant's attorney immediately responded in writing that the monies had been received, but that the aspect of costs remained in dispute. The Applicant's attorney proposed a cost contribution of R150,000.00, failing which, the issue of costs would be argued at the hearing of the matter . It bears to mention that these events transpired on Friday 12 April 2024, one day preceding the hearing date of 15 April 2024.
- 4.10 No further correspondence was received from the Respondent's attorney in dealing with the issue of costs or acknowledging the content of the Applicant's letter.
- 4.11 The matter was heard on the issue of costs on Monday 15 April 2024.

THE APPLICANT'S CASE

5. Applicant's counsel, contended that the rule 34(1) notice is not relevant to the proceedings before this court as this application relates to the final order for the perfection of a notarial bond which it is not a claim sounding in money.
6. Applicant's counsel contended that the Respondent's liability in terms of the principal debt was common cause and referred the court to paragraph 43 of the Respondent's answering affidavit, and further contended that no compromise was made in this matter, and that the Applicant is entitled to retain the amount that was paid. The Applicant's counsel referred the court to the matter of ***Absa Bank Ltd v Van der Vyfer NO 2002 (4) SA 397 (SCA)***, specifically paragraph [16] of the judgment which states as follows:

“[16] What the judgment of Innes CJ Harris at 649-50 does serve to show clearly, in my view, is that the expression “in full and final settlement” is not in itself ambiguous but that its effect differs depending on the context in which it is used: Karson v Minister of Public Works 1996 (1) SA 887 (E) at 895F-G. it is not inherently ambiguous because it always serves to do more, legally speaking, than import the condition that on acceptance the creditor has no further claim to any balance of the debt but, as a matter of language, and with regard to the two different situations in which it is employed, it is a question of fact whether the payment made is intended to effect a compromise or to pay admitted liability. In the former situation the condition is binding if the offer is accepted. If the offer is rejected the money should be returned. In the case of a payment of an admitted liability the condition is not binding. The creditor may keep the money and sue for the balance. It was submitted by counsel that the conduct of the respondent was unbecoming and deserving of the court’s censure and conduct thereof by awarding punitive costs against the respondent.”

7. Applicant’s counsel further submitted that the matter had not been settled, specifically in respect of the issue of costs. This fact was immediately relayed to the Respondent’s attorneys upon receipt of the payment. The correspondence made it clear that it was not the Applicant’s intention to accept any tender, absent a cost tender.
8. Applicant’s counsel further referred me to a draft order uploaded by the Respondent’s counsel the day prior to the hearing. This draft order included a paragraph in which the Respondent was ordered to pay the costs up until 10 April 2024. Applicant’s counsel argued that this document suggested that the Respondent ought to have been liable for the costs up to the date of the tender, or at least the costs remained in dispute. Applicant’s counsel furthermore contended that if the Applicant had known that costs were tendered up to 10 April 2024, the Applicant could have considered such tender, but that the Applicant was not aware of such, prior to noticing the draft order uploaded onto Caselines.
9. Applicant’s counsel contended that a late payment (two days before the hearing) of a rule 34(1) tender that was not accepted, does not absolve the

Respondent from paying the costs of the application, and that in fact, their conduct is worthy of a punitive cost order.

THE RESPONDENT'S CASE

10. The Respondent's counsel argued firstly that the matter had become settled in terms of the settlement agreement and during argument it was conceded that it was not the case. The Respondent's counsel then argued that the rule 34(1) tender of 10 April 2024 had unequivocally been accepted by the Applicant in full and final settlement of the main application and this application, inclusive of costs, constituted a compromise.
11. Despite repeated requests by the court, the Respondent's counsel could not advance correspondence confirming such a compromise, this request was evaded, and no such correspondence was presented. The Respondent's counsel argued that if it was not agreed then the Applicant's ought to have repaid the money and the Applicant's failure to repay the money, indicated that the Applicant had accepted that the payment constituted a compromise, inclusive of costs. Applicant's counsel argued that if the Applicant was not satisfied with the Respondent's failure to tender costs, that rule 34(9) makes provision for the Applicant to set the matter down within 5 days for hearing on the aspect of costs. The Respondent's counsel argued in the alternative, that in the event that it is found that the Respondent is liable for costs, that liability should only extend to the date of the tender, being 10 April 2024.
12. In support of the Respondent's argument, I was referred to the matter of ***Be Bop a Lula Manufacturing and Printing CC v King Tex Marketing (Pty) Ltd 2008 (3) SA 327 SA***. In this matter a dispute had arisen to the quality of T-shirts which were sold by the Respondent to the Appellant, and the discount, if any, to which the Appellant was entitled, arising from the alleged defects. The Appellant sent the Respondent a letter headed "*credit request*", proposing a discount of something over half of the balance of the purchase price in dispute, together with a cheque for the balance. The cheque was marked on its face with the words "*full and final settlement of the account*". With the cheque, the Appellant also sent the Respondent a letter headed "*final reconciliation*". The court considered in paragraph 11 whether the cheque was intended to effect a compromise or pay an admitted liability, and came to

the conclusion, on the facts that the words “*full and final settlement on the cheque – can only amount to an offer to the Respondent to settle their dispute by payment of that amount which the latter could have accepted or declined, but on acceptance of which the dispute between the parties would be compromised. The fact that the Appellant admitted liability in a certain amount is no bar to the proposal being construed as an offer of compromise.*”

13. In paragraph 14 it was further held:

‘[14] In the present case the cheque was deposited by one of the respondent’s employees following the respondent’s policy to deposit cheques above a certain amount for special clearance and paid by the bank on the same day. The process of the cheque however, were retained in the respondent’s attorneys’ trust account. The money, albeit in the trust account was not held for the benefit of both parties neither was it held “pending the outcome of the dispute”. In fact, fees and expenses were deducted and the balance transferred in the respondent’s new attorneys and appropriated to fees. The respondent had to accept or reject the offer of compromise. It could not add any conditions to it and retain the money. It had no right to do so and should have paid the proceeds back to the appellant. Any conditions attached to the acceptance are irrelevant and by retaining the proceeds of the cheque and appropriating it the respondent became bound by the terms of the offer. In these circumstances, although actual consensus between the parties may have been lacking, the opponent acted reasonably in relying on the impression that the respondent was accepting the offer of compromise and compromising the claim’.

14. In closing, the Respondent’s counsel submitted that having failed to repay the monies, that the Applicant did not reject the tender, and as a result thereof, the Applicant should be liable for the costs on a scale as between attorney and client.

APPLICABLE LEGAL PRINCIPLES:

15. The Respondent filed a rule 34(1) notice, which rule provides as follows:

“(1) In any action in which a sum of money is claimed either a loan or with

any other relief the defendant may at any time unconditionally or without prejudice make a written offer to settle the plaintiff's claim. Such offer shall be signed either by the defendant himself or by his attorney if the latter has been authorized thereto in writing."

16. In ***Naylor and Another v Jansen 2007 (1) SA 16 (SCA)***, the court dealt with the purpose of the rule as well as the important matter of the question of the judicial exercise of discretion in the matter of costs generally. In expounding the purpose of the rule the court remarked as follows at 22I – 23B, the following:

"The purpose of the rule is clear. It is designed to enable a defendant to avoid further litigation, and failing that to avoid liability for the cost of litigation. The rule is there not only to benefit the particular defendant, but for the public good generally as Denning LJ made it clear in Findley v Railway Executive 1950 (2) All ER 969 (CA) at 922E-F:

'The hardship on the plaintiff in the instant case has to be weighed against the disadvantages which would ensue if plaintiffs generally would have been offered reasonable compensation were allowed to go to trial and run up costs for impunity. The public is better secured by allowing plaintiffs to go on trial at their own risk generally as to costs.'

17. The court went further and cautioned that courts should take account of the purpose behind the rule and not give orders which undermine it. Accordingly, in the context of litigation, the rule provides an incentive to the reasonable and prudent litigant who makes an informed and concerted effort to bring litigation to an end as well as an incentive to the intransigent and unreasonable litigant. The incentive lies in the risk attendant upon a court exercising its discretion with regards to costs.
18. In *Naylor (supra)* the Supreme Court of Appeal also reaffirmed the principle that a discretion vested in a court with regards to costs was a discretion in the strict and narrow sense and that the power of a Court of Appeal to interfere with its exercise was limited to instances where it could be said that the discretion was not exercised judicially.

19. In ***Unit Inspection Company of SA (Pty) Ltd v Hall Longmore & Co. (Pty) Ltd 1995 (2) SA 795 AD*** the court reaffirmed the position that:

“An offer to settle need not be made in terms of the rule, and if otherwise sufficient, it will protect the defendant from further costs.”

20. In the matter of ***Alluvial Creek Ltd 1929 CPD 532 at 535*** and confirmed in the matter of ***Boots Sports Africa (Pty) Ltd v Southern African Breweries (Pty) Ltd 2015 (5) SA 38 (SCA) at 27*** it was held:

“An order is asked for that he pay the costs as between attorney and client. Now sometimes such an order is given because of something in the conduct of a party which the court consider should be punished, malice, misleading the court and things like that but I think the order may also be granted without any reflected upon the party where the proceedings are vexatious and by vexatious I mean, whether that had been the effect of being vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with the most upright purpose and the most firm belief in the justice of their case, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense with the other side ought not to bear. That I think is the position in the present case.”

DISCUSSION

21. The rule 34(1) tender, absent a cost tender, was made after close of business on 10 April 2024. Without any response from the Applicant’s attorneys and without notifying them, the Respondent’s attorneys paid the sum of R1,900,000.00 into the Applicant’s attorneys’ trust account the following day (11 April 2024), and it only came to the Applicant’s attorney’s notice the day thereafter (12 April 2024). Immediately thereafter the Applicant’s attorneys sent correspondence setting out the cost dispute between the parties. No response was received from the Respondent. The hearing of the matter was the following court day, being 15 April 2024.

22. Whilst it is trite that the rule 34(1) tender or any settlement proposal may constitute a compromise between the parties, rule 34 is clearly an instrument

to prevent either party from incurring unnecessary costs occasioned by what would otherwise have been unnecessary litigation.

23. I do not agree with the Applicant's counsel's submission that the rule 34(1) does not find application in this matter, as it was not a claim sounding in money. It is clear that the underlying *causa* was a loan agreement sounding in money, and that the payment was also a payment sounding in money.
24. I agree with the submission made by the Respondent's counsel that the case law states that to indicate a rejection of a tender made by payment, the monies need to be repaid.
25. I also however agree with the Applicant's counsel's submission that the amount may be retained, seeing as though the Respondent's indebtedness is not disputed. In my view the Applicant's attorney's actions were reasonable. An immediate letter requesting that the parties deal with the issue of costs is acceptable behaviour in the circumstances. I am confident that the learned Judge in the matter of ***Absa Bank Ltd v Van der Vyfer supra*** did not intend his decision to apply in a matter such as this.
26. The facts and legal argument before me lent itself to one conclusion, and that is, on receipt of the Applicant's settlement proposal on 10 April 2024 indicating that this would at that stage include a punitive cost tender, the Respondent adopted to thwart costs by responding with a tender in terms of 34(1) and then making payment of the tendered amount, without an acceptance of the tender by the Applicant. These actions, in my view, is not *bona fide* and an abuse of process.
27. Whilst I take a dim view of the Respondent's counsel's failure to timeously provide the court with heads of argument or a practice note. Cognisance is taken of the paragraph akin to a cost tender contained in the draft order uploaded on 14 April 2024.
28. I find it convenient that the Respondent did nothing from the granting of the interim order of 8 September 2022, and on all, but the eve of the hearing, tenders what it knows to be an unacceptable settlement in terms of rule 34(1), and then without warning simply makes payment thereof, and then argues that

this absolves the Respondent from paying costs.

29. The correspondence and the actions of the Applicant, particularly on the day prior to the hearing (when payment of the money came to his attention), make it clear that the issue of costs remains vehemently in dispute, but that the Applicant was attempting to resolve the issue, even at that late stage.
30. The failure of the Respondent to, as much as acknowledge this correspondence, lends itself to the Respondent's intention which was to ambush the Applicant at the hearing of the matter with the argument made before me, and to ameliorate its clear liability for the costs occasioned by this application. I take exception to this behaviour. By attempting to utilize the Uniform Rules of Court, specifically rule 34(1) in an unsatisfactory way as the Respondent had done, should be penalised. It is trite that the court has a wide discretion in ordering costs, and that the court may show its displeasure for the conduct of the party by way of a punitive cost order.

IN THE CIRCUMSTANCES, I MAKE THE FOLLOWING ORDER:

1. The Respondent is ordered to pay the costs of the application including the costs reserved on 6 September 2022 on a scale as between attorney and client, including the cost of counsel on Scale B.

VAN DER MERWE AJ
ACTING JUDGE IN THE NORTH GAUTENG
HIGH COURT, PRETORIA

For the Applicant: Adv M Jacobs

Instructed by: Jacobs Roos Fouche Incorporated

For the Respondent: Adv M Köhn

Instructed by:

Jaffer Incorporated