



**THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

- (1) REPORTABLE: Yes ☐ / No ☒
(2) OF INTEREST TO OTHER JUDGES: Yes ☐ / No ☒
(3) REVISED: Yes ☐ / No ☒

Case 2023-122457

Date: 14 October 2024

WJ du Plessis

In the matter between:

NMPOFU TRADING AND PROJECTS CC

Applicant

and

**NTP LOGISTICS (PTY) LTD
VZLR INC ATTORNEYS**

First Respondent
Second Respondent

Coram: Du Plessis AJ

Heard on: 14 August 2024
Decided on: 14 October 2024

This judgment has been delivered by uploading it to the CaseLines digital database of the Gauteng Division of the High Court of South Africa, Johannesburg, and by e-mail to the attorneys of record of the parties. The deemed date and time of the delivery is 10H00 on 14 October 2024

JUDGMENT

DU PLESSIS AJ

Introduction

[1] This is an application in terms of Rule 41(1)(c), where the issue is one of costs incurred in connection with an action that did not proceed.

[2] In 2018, the first respondent, “NTP”, a state-owned entity, employed Ms Shasha as its financial manager. Before she started her employment with NTP, she was employed by the applicant, “Nmpofu Trading”. During Ms Shasha’s employment with NTP, she was responsible for paying beneficiaries that were created on the banking profile by her. It came to NTP’s attention that illicit transactions had been processed against the account. After investigation, it was found that Ms Shasha created four beneficiaries, including Nmpofu Trading, with the same bank account information. That bank account information was Nmpofu Trading’s information. She made at least five payments in excess of R3,1 million. These payments were purportedly for a loan she had with Nmpofu Trading, but she never informed them about the source of the money. When NTP became aware of the misappropriation of funds, it took steps to secure them.

[3] The first was to launch an urgent application for interdictory relief. By agreement between NTP and Nmpofu Trading, NTP prayers were granted. As part of the agreement, an amount of R257 685,02 was transferred to the second respondent, VZLR Inc. attorneys’ (“VZLR”) account, to be kept in trust and invested in an interest-bearing account pending finalisation of the action. VZLR are the attorneys of NTP.

[4] After that, NTP issued summons against Ms Shasha and Nmpofu Trading under case no 25074/2019. The cause of action against Sasha was damages for misrepresentation and against Nmpofu Trading for enrichment. Both entered an appearance to defend the action. Nmpofu Trading delivered its plea and an exception against NTP’s particulars of claim, which was dismissed with costs. NTP raised an

exception against Nmpofu Trading, which was also dismissed with costs. After various other exceptions, the court eventually struck out Shasha's plea.

[5] After this, NTP and Shasha entered into a settlement agreement, settling the action between NTP and Shasha. In terms of the agreement, she had to pay back a certain amount, which she did. The action was then withdrawn without a tender for costs.

[6] Nmpofu Trading states that they were unaware that the action was settled in its totality with Shasha. When they became aware of this, they asked for the return of its funds kept with VZLR, plus interest, which was refused. Instead, they withdrew the action without tendering costs. Nmpofu Trading says there is no explanation for the two-year delay in withdrawing the action. Moreover, they indicate that the settlement included Sasha agreeing that she would pay the NTP's "cost of suit," which includes the whole action. NTP disagrees. They state that until Sasha made the last payment, the issue was still alive between NTP and Nmpofu Trading. They also did not enter into a settlement with Nmpofu Trading. They furthermore could not withdraw the action until Sasha made the last payment. They withdrew the main action once the monies were recuperated, and the matter became moot. They had to institute the action to get the money, and since they had a good prospect of success in the main action, it is only fair that each party pays their own cost. They state that they acted reasonably when they issued the summons.

[7] The reasonableness, NTP states, is based on the following: Nmpofu Trading's account was overdrawn when the payments were made to Nmpofu Trading. The loan was also not accounted for in their management statements. Nmpofu Trading furthermore used the funds paid into its account after being informed by NTP that Sasha had illicitly paid the money into its account. The illicit payment is reflected in its management statement as revenue generated after the delivery of an invoice. This would not be if the payments received were indeed by Sasha as repayment of the loan. Lastly, the payments on the bank account statements reflect as from NTPL or NTP logistics, which means it could not be that Nmpofu Trading could have mistaken these payments

as loan repayment. NTP states they *had* to issue summons against Nmpofu Trading in these circumstances.

[8] There is also a disagreement as to who must pay the cost of this application. This is because when this application was issued, VZLR paid R323 330,06. Nmpofu Trading seeks costs for this application on a punitive scale, as NTP had to return the funds once the action was withdrawn, and they refused to do so. Thus, this application was launched. Since the funds were paid, Nmpofu Trading states it was substantially successful in the application, and costs should follow.

[9] NTP disagrees about the cost of this application. They only kept the funds until then because the action was not finalised. Still, they paid over the funds in January 2024, so the first prayer is moot. That leaves only the costs of the action as disputed in this application, and they had to defend that. NTP states that the only issue in this application is the cost of that action and the cost of this application and that each party is equally successful and should pay their own costs for this application.

[10] Rule 41(1)(c) of the Uniform Rules of Court provides that a party against whom an action is withdrawn and whose costs have not been tendered may apply to the court on notice for an order for its costs. The general rule is that a party against whom an action is withdrawn is entitled to costs unless there are good grounds for depriving such a party of costs. I thus have a discretion whether or not to grant costs.

[11] Nmpofu Trading confirms that when a litigant withdraws an action, sound reasons must exist as to why the defendant should not be entitled to the costs.¹ This is because a plaintiff who withdraws his action is in the same position as an unsuccessful litigant unless there are exceptional circumstances why they will not be entitled to all costs.²

¹ *Waste Products Utilisation (Pty) Ltd v Wilkes (Bicarri Interested Party)* 2003 (2) SA 590 (W) at 597.

² *Rosenblum Family Investments (Pty) Ltd v Marsubar (Pty) Ltd (Forward Enterprises (Pty) Ltd Intervening)* 2003 (3) SA 547 (C) on 550c.

[12] In *Wildlife and Environment Society of SA v MEC for Economic Affairs, Environment and Tourism, EC Provincial Government*³ there were settlement negotiations with the respondents. There was an agreement with two of the respondents that the application would be withdrawn, and each party would pay its own costs. However, two of the four respondents did not agree. They also gave notice to apply in terms of Rule 41(1)(c) for the applicant to pay the costs. The applicant, however, opposed relying on specific provisions in legislation to indicate that they acted reasonably out of concern for the public interest. The court had regard to the papers filed in the main application to guide its discretion. It thus had regard to the merits without deciding on the merits.

[13] Thus, in exercising my discretion on costs, I must consider the material before me when the claim was made.⁴ I thus consider the following: NTP states that summons was issued against Sasha and Nmpofu Trading after the five illicit payments, which it admits to receiving and utilising. It continued to use the payment even after it knew it was illicit. In fact, when asked to repay the money, they refused, citing that it was payments made by Sasha as repayment of her loan. This version, NTP states, is improbable. NTP had no alternative but to issue summons, and in that summons, Nmpofu Trading was a necessary party. Only with the launching of the urgent ex parte application to freeze the bank accounts did Nmpofu Trading tender to pay the funds over to VZLR for safekeeping. This, NTP states, indicates that the launching of the action was reasonable. Moreover, the plea that Nmpofu Trading filed in the action is inconsistent with the affidavit it filed in anticipation of the return date for the ex parte application. This all warrants a denial of Nmpofu Trading's costs against NTP, NTP argues.

[14] In *Ward v Sulzer*⁵ Holmes JA stated

³ [2005] 3 All SA 389 (E).

⁴ *Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape* 2005 (6) SA 123 (E) 129-130.

⁵ 1973 (3) SA 701 (A)

“In awarding costs the Court has a discretion, to be exercised judicially upon a consideration of all the facts; and, as between the parties, in essence it is a matter of fairness to both sides.”

[15] That fairness includes whether the party that withdrew the litigation was justified in bringing the litigation. Based on the facts presented, the answer is yes. When NTP learned about the illicit transfers, it informed Nmpofu Trading thereof. Despite informing them of the illicit transfers, Nmpofu Trading only agreed to pay back the monies after the summons was issued. Moreover, they used some money even after knowing it was wrongly paid. Their argument that they were under the impression that it was the loan repayment from Ms Sasha does not hold because the reference on their bank account indicated “NTP”, and there was no accounting for the loan in the management statements. While there was an agreement with Ms Sasha to settle the *lis* between NTP and her, there were no such settlement negotiations or agreements with Nmpofu Trading. Until Sasha paid the monies, there was still a *lis* between NTP and Nmpofu Trading. The issue between NTP and Nmpofu Trading was moot only after Sasha repaid the money. There was nothing to litigate once the money was paid, and the withdrawal followed. Issuing the summons was necessary and reasonable for NTP to recover the illicitly paid monies. Under these circumstances, fairness on both sides will be achieved by each party paying their own costs for the action.

[16] As for this application, NTP had to defend the application once it was launched. As far as defending the costs of the action is concerned, they were successful. However, as far as the repayment of the monies held by VZLR is concerned, Nmpofu Trading was successful. They are thus both equally successful and unsuccessful. In that case, fairness on both sides will be that each party pay their own costs for this application.

Order

[17] The following order is made:

1. The application is dismissed, and each party is to pay their own costs
2. Each party is to pay their own costs in the action instituted under case number 25074/2019.



WJ du Plessis
Acting Judge of the High Court

For the Applicants:

RF de Villiers instructed by Deneys
Zeederberg Attorneys

For the Respondents:

H Scholtz instructed by VZLR Inc
Attorneys