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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NO: 40443/20

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

21 October 2021

Date

Signature

In the matter between :

**ANNA MAPULE HARTMAN**  
(ID No. [...])

Applicant

and

**COMPANIES AND INTELLECTUAL PROPERTY  
COMMISSION REPUBLIC OF SOUTH AFRICA**

First Respondent

**PRISTEEN BODYWORX (PTY) LTD**  
(Registration No. 2014/251492/07)

Second Respondent

**GERHARDUS STEENKAMP**  
(ID No. [...])

Third Respondent

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## JUDGMENT

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**STRYDOM J:**

### INTRODUCTION

[1] This matter was set down before this court as an opposed application.

[2] Before this court there were two applications. First, an application for postponement of the main application and second, the main application itself.

[3] The postponement application was withdrawn by the third respondent and the court only heard the main application. The main application only pertained to costs. This was common cause between the parties. At the end of the hearing the court made an order in the following terms:

*“(1) The third respondent to pay the applicant’s wasted costs for the postponement application up to its withdrawal on 2 September 2021.*

*(2) The third respondent to pay the applicant’s costs for the main application on a party and party scale.”*

[4] After the order was made the third respondent asked reasons for the court’s decision pursuant to the terms of Rule 49(1)(c) of the Rules of Court.

[5] In the applicant's main application, she *inter alia*, averred that her shares in the second respondent was unlawfully transferred to third respondent and that she was unlawfully removed as a director of the second respondent by the third respondent.

[6] In her notice of motion dated 19 August 2020, the applicant sought the following relief:

6.1 That it be declared that the removal of the applicant as a director of the second respondent is void;

6.2 That the first respondent be ordered to correct its records to reflect the applicant as being a director of the second respondent and never having been removed as a director;

6.3 That it be declared that any transfer of shares of the applicant in the second respondent to the third respondent is void;

6.4 That the third respondent be ordered to sign any and all documents to immediately effect the transfer of 51 % of the issued share capital in the second respondent to the applicant and should do so within five days after being requested to do so, that the Sheriff, Johannesburg Central, be authorised to do so on his behalf.

[7] As far as costs were concerned, the applicant sought a costs order against the third respondent on an attorney and client scale. Alternatively, a review was sought which is not relevant at this stage. Despite specific

relief being sought against first respondent it failed to file a notice of opposition.

[8] On or about 12 October 2020, the third respondent filed a notice to oppose the application. The third respondent never filed an answering affidavit but, the court was referred to various letters exchanged between the respective attorneys on behalf of the applicant and the third respondent which became common cause.

[9] The third applicant filed heads of argument where various factual allegations were made pertaining to a liquidation application which lead to the liquidation of the second respondent. Reference is made to remarks made in the judgment in the liquidation application. Also of cost orders made. The correspondence between the parties was not referred to in affidavits, but was simply uploaded onto CaseLines and referred to. The status of these documents remains questionable but will be referred to for purposes of considering the issue of costs.

[10] On 27 October 2020, and 9 November 2020, the third respondent's attorney, Mr Negota, wrote letters to the applicant's attorneys, Tintingers Incorporated, in which settlement proposals were made. It should be noted that an even dated letter was written to the provisional liquidator wherein the offer is mentioned. The letter to the applicant dated 27 October 2020 was not uploaded onto CaseLines, but was referred to in the reply letter from Tintingers. In essence, the proposal to the applicant was that the third respondent will sell to her all the shares in second respondent at R1.00 per share and will cause her reinstatement as a co-

director of the second respondent. For that purpose third respondent will sign all necessary documents. This offer was made conditional on the provisional liquidator's approval.

- [11] On or about 19 November 2020, the applicant's attorney accepted the settlement offer, but on the following conditions:

*"3.1 That the settlement be regulated in terms of a Court Order in which the CIPC is directed to amend its records to reflect that Anna Hartman was never removed as a director;*

*3.2 Steenkamp pays the costs of the application to date."*

- [12] In the reply letter dated 25 November 2020, the third respondent's attorneys indicated that the third respondent appointed a consultant to take all necessary steps to remove the applicant as director, that the person did that, but has subsequently died and could not inform the third respondent exactly what steps were taken in the process. In this letter it was indicated that the third respondent was not prepared to pay costs of the application to date of the letter and it was suggested that each party bears its own costs. Should the applicant disagree on this it was suggested that the matter be set down for argument on the costs issue only.

- [13] It was common cause before this court and a court order was uploaded onto CaseLines indicating that the second respondent was finally liquidated on 14 December 2020. It was also no longer in dispute that after the liquidation the relief applicant was seeking became moot.

- [14] After the liquidation of second respondent a further letter, dated 25 February 2021, was delivered from the applicant's attorneys to the third respondent's attorney confirming that the matter was settled except for the costs issue. It was stated that the matter would be enrolled on the opposed motion roll to argue such costs.
- [15] In reply, the third respondent's attorneys wrote on 1 March 2021 stating that the second respondent was liquidated and that *"we are uncertain as to how your client intends to enforce the proposed sale of shares back to your client as the company subject to the Liquidation (sic) no longer exists."* The question was asked how would CIPC enforce the transfer of shares if second respondent was no longer in existence. It was stated that as far as the cost of the application was concerned note was taken of the stance of applicant and heads of argument was awaited.
- [16] After considering the correspondence it becomes clear that the conditional offer of settlement was only conditionally accepted by applicant. The parties remained apart as far as finally settling the matter in relation to all issues. What however became common cause after the liquidation is that the substantive relief sought by the applicant became moot and that the cost issue was the only issue outstanding.
- [17] The matter was then set down before this Court for argument on costs.
- [18] After the set down for hearing of 30 August 2021 and shortly before such hearing, the third respondent filed a substantive application for postponement of this opposed costs argument. The applicant filed an opposing affidavit whereby the application for postponement was

opposed. On the allocated date for hearing of the postponement application on 2 September 2021, the third respondent, through his counsel from the Bar, abandoned the postponement application and indicated that he would appear on behalf of the third respondent to oppose the application for costs in the main application.

[19] The third respondent caused the applicant to incur costs to file an answering affidavit in the postponement application and he was accordingly ordered to pay the costs of the applicant in opposing the postponement application up to its withdrawal on 2 September 2021.

[20] The argument on the applicant's entitlement of costs in the main application then proceeded.

[21] As stated hereinbefore it was common cause between the parties that all issues between them became moot except for the issue pertaining to costs.

[22] It was argued on behalf of the applicant that on the instructions of the third respondent she was removed as director of the second respondent and that her shares in second respondent were transferred to the third respondent. It was argued that this was unlawfully done and that this caused the third respondent to tender reinstatement of her as director and return of the shares after the applicant launched her application.

[23] On behalf of third respondent it was argued that the applicant would never have been entitled to her relief without the active participation of the first respondent in the matter. This in my view is wrong. If a party to an

application fails to oppose an application relief can be granted against such party. It was further argued that at the time of the offer of third respondent the applicant should have accepted the offer, albeit, that the offer was without an offer for costs. Therefore, so the argument went, the applicant is not entitled to costs, even more so as the second respondent was finally liquidated on 14 December 2020. In my view the applicant was under no obligation to accept the offer which was not made with prejudice.

[24] It was argued that there was material misjoinder of one Tweehuysen, the second applicant in the liquidation application. I am of the view that Tweehuysen was not a necessary party in the application for reinstatement of the applicant as a director and for the transfer of her shares. The case of the applicant was that the third respondent was the party responsible for what transpired.

[25] It was argued that the merits were never unconditionally conceded by the third respondent. This may be correct, but it became common cause that the merits became moot after the liquidation of second respondent.

[26] When the application was filed the issues were not moot and the final liquidation of the second respondent only came about on 14 December 2020. On that basis, the applicant if she could have proven her case before liquidation or, at least to the time when the tender was made for her reinstatement as a director and for the return of the shares, would have been entitled to her costs. As part of the settlement proposal a costs tender was never made. The applicant was entitled to set the matter

down for argument on costs and this remained opposed and further costs were incurred in the application.

[27] For purposes of the costs dispute the court had to consider the main application. There was only one version before the court as the third respondent never filed an answering affidavit.

[28] On the papers, the court can conclude that no formal process was followed for the removal of the applicant and that she received no prior notice of an intention to remove her. The third respondent was not even certain what process was followed as this was left for a consultant to do and this consultant was not available to inform the court about the steps taken.

[29] The applicant never sold her shares and she never signed any transfer forms. This would render the transfer of the shares unlawful. It was only after the application was filed that the third respondent made a tender for the re-appointment of the applicant as director and to sell back the shares.

[30] Generally speaking, when the merits of the matter have been disposed of, for example, by an offer which conceded the claim, and only the costs of the whole case remained to be decided, the issue of costs must be decided on a broad general consideration and not a consideration that would necessitate a full hearing on the merits. See ***First National Bank of South Africa Ltd t/a Wesbank v First East Cape Financing (Pty) Ltd*** 1999 (4) SA 1073 (SE) where it was found as follows:

*“Where an applicant incurs costs in preparation of an application against a respondent who refuses to concede the applicant’s*

*entitlement until after the application has been prepared, but not issued, the applicant is entitled to an order for costs reasonably incurred provided he would have been successful in the intended application.”<sup>1</sup>*

In ***Erasmus v Grunow en Ander 1980 (2) SA 793 (O)***, it was found as follows:

*“The same argument/principle applies in reverse –*

*‘A litigant who withdraws his action or application is in the same position as an unsuccessful litigant : it is not necessary to enter into the merits of the case, and they must be very sound reasons for depriving the defendant or respondent of his costs.’<sup>2</sup>*

- [31] When the cost order was made against third respondent the court concluded that it was the third respondent who was responsible for the removal of the applicant as a director and for transfer of the shares.
- [32] Costs of the application was granted as the court had to hear argument on the merits to consider costs. The emphasis was on costs only, but it remained a full-blown opposed application which applicant was fully entitled to have launched before the liquidation of second respondent.
- [33] This court has a wide discretion to make an order as to costs and it considered that the applicant has not made out a case for punitive costs on an attorney and client scale. The court nevertheless was of the view that the third respondent should pay costs of the application on a party and party scale. After the application had to be brought to protect the

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<sup>1</sup> *First National Bank* at 1080 E-G

<sup>2</sup> *Erasmus* at p 798.

rights of the applicant she would have been entitled to obtain the relief up and until the liquidation of the second respondent. After that date she was entitled to pursue her costs order and this caused the continuation of the opposed application. That is why the court made a costs order against third respondent.

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R. STRYDOM

JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA

CASE NUMBER: 40443/2020

HEARD ON: 2 September 2021

FOR THE APPLICANT: ADV. J. MALHERBE

INSTRUCTED BY: Tintingers Inc

FOR THE THIRD RESPONDENT: ADV. J. BRENKMAN

INSTRUCTED BY: Mogajane Attorneys

DATE OF JUDGMENT: 21 October 2021

