

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2019/24387

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

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SIGNATURE **...15/11/2023.....**
DATE

In the matter between:

CROWD TECH LIMITED

Applicant

and

GEORGE PROKAS

First Respondent

CYBER-FX (PTY) LIMITED

Second Respondent

ABSA BANK LIMITED

Third Respondent

JUDGMENT

Manoim J

Introduction

- [1] The sole issue in this case is whether the applicant, which had abandoned an interim order obtained *ex parte* against the first respondent, should pay the latter's costs on an attorney client scale. The applicant has already tendered party and party costs, but this has not satisfied the first respondent against whom the original interim order was awarded. The second and third respondents are not involved in the present litigation.
- [2] The matter has been brought to the court by the first respondent in terms of Rule 41(1)(c) of the Uniform Rules of court. This rule states that if a party withdraws a matter without tendering costs the other party can apply to court on notice for an order of costs. This rule also applies when the party in whose favour a judgment has been granted abandons the judgment. This is in terms of Rule 41(2) which deals with the consequences of abandonment.

Background

- [3] In one week of urgent court hearings in July 2019, three of the *dramatis personae* in the present matter were involved in three separate applications, albeit in different guises.¹ The issue in this case relates to one of those applications; an *ex parte* application in which the applicant, Crowd Tech Limited ("Crowd Tech") sought to partially freeze a bank account belonging to the first

¹ The *dramatis personae* are the applicant and the first and second respondent. The third respondent, ABSA has not involved itself in this litigation.

respondent, George Prokas (“Prokas”) which he holds with ABSA Bank Limited, (“ABSA”) the third respondent.² I will refer to this as the freezing application.

[4] Crowd Tech succeeded in getting an interim order to partially freeze the Absa account but has, in subsequent litigation, abandoned that relief. Although it eventually tendered costs on a party and party scale, Prokas is not satisfied and believes he is entitled to attorney client cost hence the present application. I turn first to the background that led to the freezing application.

[5] The second respondent in this case is Cyber FX (Pty) Ltd (“Cyber”). Cyber has two shareholders, Prokas and Kevin Reinstein. Prokas was also a director but resigned on 6 June 2019.

[6] Crowd Tech is an investment firm based in Cyprus. It has clients who seek opportunities internationally to trade in derivatives. In 2018 it took a decision to invest in South Africa and was referred to Cyber. The attraction of Cyber was that it had a licence to trade derivatives on an online platform in what is known as the over the counter derivative market. In November 2018 the two companies entered into an agreement known as a White Label agreement.³ In terms of the agreement Crowd Tech deposited funds from its clients into an account controlled by Cyber which was necessary for the clients to enable them to trade.

² I will refer to the parties by name and not their designations. Although they have reversed their respective designations in the present costs application, they have continued to use their designations as they were in the main mater. These designations are reflected in the heading of this judgment.

³ A white label agreement is a contract that allows a party to rebrand and sell a product or service developed by another as their own. See <https://www.contractsounsel.com>.

These accounts are known as margin accounts. The significance of these accounts is that they held the clients funds.

[7] On 7 May 2019 Crowd Tech transferred € 271 985.36 to Cyber's account. This amount represented money from its clients for the purpose of Cyber using it to conduct trades on its platform on behalf of these clients. But, Crowd Tech claimed, it later learnt that Cyber did not transfer these funds into end users margin accounts as it was required to in terms of the White Label agreement. It got to find this out because in June, one of Crowd Tech clients complained to it that its funds had not been transferred to its margin account. Then On 3 July 2019, Crowd Tech says it got information that Prokas had transferred € 69 837 from Cyber's account with a Portuguese bank to his personal account in South Africa, held with ABSA. This transfer was alleged to have taken place on 17 May 2019.i.e., ten days after the date that Crowd Tech had transferred the € 271 985.36, to the Cyber account. As proof of this transfer, Crowd Tech attached a document from a foreign exchange agent called Fidelis. The document is headed "Trade Confirmation" and evidences an instruction from Prokas to pay the amount to an ABSA account. The reference is for: "*consulting fees and disbursements*".

[8] Crowd Tech claims that after it learnt of this transfer on 3 July, it attempted to contact Prokas but was unable to get hold of him. On 18 June it got its attorneys to send a letter of demand to Prokas calling upon him to remedy what it

considered was a breach of the White Label agreement. It set a deadline for this to be done by 2 July 2019. Prokas never responded by the deadline given to him.

- [9] Based on these facts Crowd Tech sought an interim interdict to prohibit Prokas from withdrawing or transferring an amount of € 271 985.36 from his Absa bank account, pending an action to be instituted against him to recover this amount from him.⁴ The justification for doing so is set out in the following paragraph of the founding affidavit:

“A letter of demand was sent to Prokas on 18 June 2019 setting out the breach and requesting a remedy of the breach. There has been no response. The silence of Prokas is in itself telling and reasonably gives rise to the inference that Prokas has misappropriated the funds.”

- [10] On 12 July Matojane J, who was in the urgent court that week, granted the interim order *ex parte*. This was on a Friday. But in that same week Crowd Tech, on the Tuesday, had applied for an *ex parte* order to freeze the Cyber account, which was granted unopposed. This account was also with ABSA and the freeze was limited to € 271 985.36; the same amount in the freeze sought later that week to be imposed on Prokas. On the Tuesday as well, Prokas brought an application to place Cyber in provisional liquidation. In the application Prokas alleged that his co-shareholder, Reinstein, had misappropriated money from the company. The application was unsuccessful. It is not clear why. According to

⁴ This action is still pending at the time of this decision I was informed by counsel.

Prokas it was dismissed on the grounds of urgency. But as Ms Cooke for Crowd Tech points out, the order does not state this – it says the application was dismissed, but not in the customary terms that this was because of lack of urgency. What is common cause is that Matojane J who had heard the liquidation application on the Tuesday also heard the present *ex parte* application on the Friday of that same week.

[11] Once the order was granted it was not served on Prokas until five days later. He then proceeded to anticipate the order. Crowd Tech then abandoned the order on 20 November 2019. It did not however tender costs at the time it served its notice of abandonment. Hence Prokas brought the present application in terms of Rule 41(1)(c) but only in January 2022. It was only after Prokas brought the present Rule 41(1)(c) application that Crowd Tech tendered costs, but then only on a party and party scale.

[12] Prokas contends that he is entitled to attorney client costs because Crowd Tech had brought the *ex parte* application in bad faith. Three reasons were advanced for this contention. First, that Crowd Tech had failed to disclose material facts. Second, that the application relied on hearsay evidence and third, on illegally obtained evidence.

[13] However, the three points are interrelated. The first relates to the Trade Confirmation. Recall that this was attached to the founding affidavit in the *ex parte* application. Crowd Tech never disclosed to the court how it had obtained the document or verified it. According to Prokas the document was password

protected and only he knew the password. Therefore, he assumes it must have been obtained illegally. Crowd Tech has despite filing further affidavits remained silent on this point. I can assume it is reluctant to disclose these facts. However, there is no dispute about its authenticity. Crowd Tech argues even it was illegally obtained, something it does not concede, there are circumstances where courts can still rely on this evidence.

[14] Moreover, it argues even if the document is considered hearsay, a court can still accept it as evidence. I do not need to go into this. This is because it is common cause the document was historical. Prokas had on 20 May 2019 (i.e., three days later) cancelled the instruction, and so he never withdrew the money from the Fidelis account to his ABSA account. He says he did so because Cyber was then in “*parlous financial circumstances*” and his action was taken to ensure it had the funds to meet some of its immediate debts.

[15] The cancellation instruction had been issued prior to the date that the *ex parte* application had been sought. To put it plainly had the application not been brought *ex parte* this fact would have been revealed to the court and an important factual plank underpinning the *ex parte* application would have been dismantled. This is the real objection to Crowd Tech’s reliance on the Trade Confirmation. Less because it was illegally obtained or constituted hearsay, but because it was unreliable and hence tempting as it was for an applicant in a freezing application to rely on it – it was reckless to do so, when either it did not have the full context, or if it did not, by denying Prokas an opportunity to offer an

explanation. If he had been able to file an answer undoubtedly this fact would have been brought to the court's attention and so the most important piece of evidence suggesting Prokas was guilty of misappropriation, would have been negated, and hence it is unlikely that the freezing order would have been granted.

[16] But this was not the only problem with the application. The most egregious non-disclosure concerned the allegation that Prokas had not paid the moneys over to the investors and when called upon to explain why he had not done so; he had remained silent. But Prokas had not been silent. In fact, he had been in contact with an internal auditor for Crowd Tech and had explained to him that he needed to know who the owners of the funds were in order to pay the moneys out as part of compliance with FICA regulations. He had made it clear that because of regulatory requirements he could not pay out the monies until he had this information. Prokas had corresponded with the internal auditor using another email, not his Cyber email address, which is the one Crowd Tech's attorneys had used to send their letter of demand.

[17] Crowd Tech says it was entitled to use his Cyber email because this was the email given by Prokas for all communications with the company in terms of the White Label agreement. This is correct, but if a representative of Crowd Tech was in active communication with Prokas on his personal email why did they not make use of that as well.

[18] The only possible explanation for these failures is that Mr. Agathocleous, Crowd Tech's deponent to the founding affidavit, was not aware of the communications with the internal auditor and has only found out that now in the present application. But Crowd Tech does not say so. I thus cannot rely on speculation when the opportunity to explain has been given and not taken. Thus if the full facts had been made known, negative inferences which might otherwise have been drawn by the urgent court about Prokas' apparent unexplained failure to pay monies out to the client's margin account, or by his alleged failure to respond to Crowd Tech's attorneys letter of demand, would have been seen in a different light.

[19] Much was made by counsel for Prokas of Crowd Tech's failure to disclose in the *ex parte* application that Prokas had brought an application for the liquidation of Cyber on the Tuesday of the same week. Unlike with the other points of complaint raised, I do not consider this criticism has substance. The allegation was that when the liquidation application was heard during the course of that week, Crowd Tech had an attorney on a watching brief during the hearing. However, it is not clear that Agathocleous was aware of the liquidation application. His affidavit was deposed to in Cyprus on 9 July, presumably prior to the liquidation hearing. Whilst no mention was made of the liquidation application in his affidavit it does not follow that this may not have been mentioned by counsel during the *ex parte* application on the Friday. There is no record of this proceeding. But it is common cause that Matojane J who heard the *ex parte* application had also heard the liquidation application so he may well have been

aware of it. Matojane J had also granted the freezing order in respect of the Cyber FX account.

[20] Moreover, even if it had been mentioned, it is not clear that this disclosure would have led to the court to come to a different conclusion. Counsel for Prokas suggests that it was a material fact in the liquidation application that Prokas had accused his erstwhile partner in the business of misappropriation, but the partner had despite opposing the application not made similar accusations against Prokas. This would suggest that Prokas was attempting to preserve the company's assets not dissipate them by lining his own pocket, as the *ex parte* application implied. Whilst this is one reading of the implications of the liquidation application it is not the only one. The court might well have considered that conflict between the two joint shareholders was a sufficiently alarming development that might lead credence to a third party's concerns about its money being dissipated.

Scale of costs

[21] I now consider what the implications of these background facts should be for the scale of costs. The question is whether Crowd Tech's conduct in the *ex parte* litigation merits the sanction of

[22] It is as well to commence by considering what is not objectionable. The general caution about courts granting orders pursuant to an *ex parte* application is that the respondent is denied its fundamental right to be heard. Nevertheless, our

courts have recognised, based on pragmatism, that sometimes orders obtained pursuant to *ex parte* applications are necessary, to avoid negating the relief being sought. Over time a number of instances where courts will do so has emerged. One of those instances, as recently recognised in this division in the *Mazetti* case was that of: “... a creditor who seeks to freeze the bank account of a debtor when grounds exist to fear illegitimate dissipation especially in insolvency proceedings.”⁵

[23] Crowd Tech’s choice to institute proceedings *ex parte*, was not on its own, objectionable, as if the facts before the court were correct, it fell into one of the classic cases justifying its use.

[24] The next question is whether Crowd Tech’s use of the withdrawal instruction was use of illegally obtained evidence which should not have been placed before the court. Prokas alleges that the document could only have been accessed using a code known to him. Crowd Tech denies it was illegally obtained but offers no explanation of how it obtained the document. I will assume for the present purposes that it was illegally obtained. Whilst our law on the use of illegally obtained evidence in civil proceedings is evolving, since the adoption of our Constitution, from a common law rule to always admit this evidence, to now a more nuanced approach to give courts a discretion, I do not consider this a case where the point has to be decided more definitively ⁶. I will accept for present

⁵ *Mazzetti Management Services (Pty) Ltd and another v Amabhungane Centre for Journalism NPC and others* Case number 050131- 2023.

⁶ See for instance the useful discussion in *Protea Technology and Another v Wainer and Others* 1997 (3) All SA 594 (W)

purposes that where an illegally obtained document in a freezing application serves as evidence of an act of alleged dissipation, based on an authentic instruction to a bank, such evidence could be accepted in the interests of justice.

[25] I now turn to the question of whether Crowd Tech acted in good faith given this was an *ex parte* application.

[26] It is a trite principle of law that good faith is a “*sine qua non in an ex parte application.*”⁷ But the duty to disclose goes further than merely acting in good faith. Even where it is not shown that a party has acted *mala fide* the court can take into account whether the applicant acted recklessly in the sense that it failed to disclose facts. In *Schlesinger v Schlesinger* the court acknowledged the distinction but nevertheless granted an award of attorney client costs against the party who had brought the *ex parte* application holding that:

“The respondent and her legal advisers, in my opinion, brought the original application with a reckless disregard for the full and true facts in an effort to obtain some tactical advantage over the applicant or to use the pending action in South Africa against him in the matrimonial proceedings in Switzerland. I am not, however, imputing fraudulent conduct to either the respondent or her attorney, but a reckless disregard of a litigant’s duty to a Court in

⁷ See Erasmus Superior Court Practice volume 2, D1-61

*making a full and frank disclosure of all known facts which might influence the Court in reaching a just conclusion.*⁸

[27] In this case I do not consider there is sufficient evidence to suggest that Crowd Tech and its attorneys acted in bad faith. Rather the question in this case is whether there was a reckless disregard of their duty to the court in disclosing certain facts given that this was an *ex parte* application.

[28] I consider that there was. The failure to disclose the discussions between the internal auditor and Prokas regarding the reasons he was not making the payments to the clients was material. It may well be that Agathocleous was unaware of this interaction. But he has had an opportunity to explain this and has failed to do so. The failure to get all the necessary facts from his subordinates or agents before taking these drastic steps was reckless. One would have expected him to consult with these people before taking action. Secondly, whilst he could bring the court's attention to the Trade Confirmation instruction, doing so without context as to how and when it had been obtained was reckless, because it risked reliance on an incomplete picture, as has become now evident in this case. Unknown to the court was that at time of the hearing, this very document on which presumably much reliance was placed had been countermanded and there had been no withdrawal of funds.

[29] This is not the end of the saga. Several further affidavits were filed including two by Crowd Tech. In the first, Crowd Tech whilst accepting that Prokas had not

⁸ *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 354.

withdrawn monies pursuant to the withdrawal letter, maintained adamantly that having scrutinised the accounts of Crowd Tech its suspicions were justified. But a litigant who has brought an *ex parte* application on incomplete and erroneous allegations cannot look to subsequent facts to justify why it took the action it did.⁹ Nor in any event is the post hoc reconstruction dispositive of the need to have frozen the account. The disputes of facts on the papers are inconclusive and will only be clarified during the subsequent action proceedings.¹⁰

[30] Crowd Tech has never acknowledged that it was incorrect to have attempted to have applied to freeze Prokas' ABSA account. It did however abandon the order once it was opposed. Crowd Tech contends that this was done because it had now become evident that there was a negligible amount left in Prokas' ABSA account, and hence pursuing the application was pointless. But Crowd Tech has also elected not to leave the costs decision to the trial court as suggested initially by its counsel in the written heads of argument. This means I must decide the case on what facts I have before me now that are uncontested.

[31] A proper case has been made that the *ex parte* application was made without disclosing all the information to the court and this omission was reckless. I am satisfied that an attorney client costs award is justified. Although Crowd Tech complains that the present application was brought months after the abandonment of the *ex parte* application, I do not consider this a relevant consideration. Proper compliance with the duty to disclose in an *ex parte*

⁹ See *Mazetti* supra.

¹⁰ By way of example, the disputes of facts concerning what Reinstein is alleged to have stated in the opposed liquidation application about Prokas.

application is a concern to the courts generally.¹¹ Imposing a punitive costs order for non-compliance is appropriate not only as a solatium to the disaffected party but also as an independent consideration as a corrective discipline on litigants.

ORDER:-

[32] In the result the following order is made:

1. The applicant (“Crowd Tech”) is ordered to pay the first respondent the costs of this application including the application in terms of Rule 41(1)(c) on the scale as between attorney and client.

**N. MANOIM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG**

Date of hearing: 31 October 2023

Date of judgment: 15 November 2023

¹¹ See more recently, *Public Protector v South African Reserve Bank 2019 (6) SA 253 (CC)* where the court refers to abuse of process as one of the grounds where an attorney client costs award may be appropriate.

Appearances:

First Respondent's Counsel: JM Heher

Instructed by: Raymond Druker Attorneys/ Raymond Druker

Applicant's Counsel: A Cooke (Heads of Arguments drafted by
C. Van der Linde)

Instructed by: Norton Rose Fulbright South Africa Inc/G.
Bouwer