D5 Costs in General [1]

Commentary

Introduction. The purpose of an award of costs is to indemnify a successful party who has incurred expenses in instituting or defending an action. [2] In the wide sense of the word 'costs' (*expensae litis*) are the expenses incurred by a litigant in actions or other legal proceedings, and they consist of money due to the attorney for his fees and disbursements, the latter embracing counsel's fees, stamps upon documents, sheriff's fees and witness expenses. [3] When granting an order in favour of a lay litigant who appears in person, the court should not simply use the word 'costs' but should rather make an order in terms of which the lay litigant is awarded 'costs limited to actual disbursements reasonably incurred'. [4]

Classification. Costs fall into one or other of two classes: [5]

(1) party and party costs; and

(2) attorney and client costs.

(1) Party and party costs. These are the costs which the winner of legal proceedings can properly ask of his opponent. The object of an award of party and party costs has been stated as follows: [6]

> 'As uitgangspunt is dit nodig om in gedagte te hou dat ons te doen het met 'n kosterekening tussen party en party en dat in die algemeen gesproke die breë opset van so 'n kosterekening is om die party aan wie koste toegestaan is ten volle te vergoed vir kostes en uitgawes redelikerwys deur hom aangegaan en volgens die oordeel van die Takseermeester nodig en gepas was om reg te laat geskied of om die regte van die party te beskerm.'

Thus, the costs of proceedings directly necessitated by the main action, such as an application by a guardian for leave to bring or defend an action on behalf of a minor, are necessary costs and will be allowed as between party and party, [7] but as a general rule the costs of obtaining counsel's opinion on the prospects of success in the proposed action and, in

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general, costs incurred before the proceedings commence, [8] are not properly allowable as between party and party.

(2) Attorney and client costs. These costs are those which the attorney is entitled to recover from his client in respect of disbursements made on behalf of the client, and for professional services rendered by him to his client. They are payable by the client whatever the outcome of the case and do not depend upon any award of costs by the court. Herbstein & Van Winsen *Civil Practice* states: [9]

> 'In the wide sense it includes all the costs the attorney is entitled to recover against his client on taxation of his bill of costs, but in the narrow and more technical sense the term is applied to those costs, charges and expenses as between attorney and client which ordinarily the client cannot recover from the other party.'

In *Hawkins v Gelb* [10] the court described attorney and client costs in the wider sense as including 'all those costs in respect of which the client is indebted to his attorney'. [11] In a proper case he may recover some of these at least from the other party, and any costs over and above those which may be so recovered remain part of his indebtedness to his attorney: 'This latter portion of his costs, the attorney and client costs in the narrow sense, consists of items for which charges were made by the attorney but which the client cannot recover from the other party, and the difference between certain amounts debited by the attorney and the amount allowed for those items by the taxing master as being an expenditure recoverable from the other party.' [12] The differences between a bill for attorney and client costs and one for party and party costs are, first, that the former, while containing all the items which appear in the latter, may also contain some additional items. Secondly, while the former contains the same amounts as the latter, it may in certain cases indicate bigger amounts for the same items. [13] It is not possible that the bill for party and party costs may contain items which do not appear on the bill for attorney and client costs or that the former may stipulate a higher amount than the latter for the same item. [14]

If costs are to be paid as between attorney and client, only one bill should be presented for taxation and not two bills — one a party and party bill and the other an attorney and client bill. [15]

Terminology

'Costs' or 'taxed costs.' The word 'costs' means party and party costs unless the contrary is expressed; where attorney and client costs are intended, the costs should be so described. [16] The words 'taxed costs', without further implication, normally mean party and party costs only. [17] The phrase covers only such costs as the taxing officer, acting within his ordinary powers, can allow, and does not cover costs which need a special order of court to make them payable. [18] An agreement to pay costs normally relates only to party and party costs [19] and, in the absence of anything to indicate an intention to the contrary, covers only taxed costs. [20] A refusal to pay costs until they have been taxed [21] or agreed upon [22] is therefore not a breach of the agreement. When construing the word 'costs' in an agreement to pay costs, however, it should be remembered that resort to authority is not always helpful, and what the court must do is to arrive at the intention of the parties in the light of the surrounding circumstances. [23]

'Costs of appeal.' These mean the extra expenses first incurred in the litigation which is started by the notice of appeal — extra expense incurred by reason of the appeal being taken. [24]

'Costs in the cause.' This is an order, made in interlocutory proceedings, the general effect of which is that the costs of those proceedings are to stand over and are to be paid by the party who is ultimately ordered to pay the costs of the main action.

'Costs *de bonis propriis*.' These are costs which a litigant, acting in a representative capacity, is ordered to pay out of his own pocket by way of a penalty for some improper conduct. [25]

'Costs here and below.' This is an order made by the court of appeal when awarding the costs to the party who has won both in the court of first instance and in the court of appeal.

'All costs.' These have been held to be party and party costs, and do not include attorney and client costs unless either the agreement thereanent or the order for such costs states specifically or expressly and in unequivocal language that attorney and client costs must be paid. [26]

'No order as to costs.' This is an order, granted if fair and just to do so, the effect of which is that each party pays its own costs. [27]

'Qualifying expenses.' These are the expenses necessarily incurred by a witness who has to qualify himself to give evidence upon some matter, usually technical; they mean the expenses incurred by him in making experiments, investigations or research. [28]

> ' "Qualifying expenses", it seems, covers all acts performed by the expert which relate to the opinion he would express in court. This may include the observation of persons and places, or the investigation of or experiments on the *corpus delicti*. It does however not include pre-trial examinations or investigations which go to direct proof of the *factum probandum*. The pre-trial activity of the expert may relate to both qualifying and non-qualifying preparatory acts; indeed it may be difficult to unravel the one from the other. But the basis of the distinction however is clear: qualifying acts bear upon the expert's opinion, all other acts fall outside the scope of the concept.' [29]

The court must be requested to make a special order allowing such expenses to be taxed as between party and party, failing which the party calling such witness will have to bear these costs himself. [30] If the expert witness is not called the question whether the qualifying expenses (and the witnesses' allowances) should be claimable on taxation depends on whether they were reasonably necessary when they were incurred, in other words, whether it was reasonable for the legal representatives of the successful party to incur the expenses when they did so. [31] If the answer to this question is in the affirmative, the expenses should be allowed. [32] If the case is settled and the agreement states that one party is to pay the other party's taxed costs, these do not include the qualifying expenses of a witness whom the court

has not heard. [33] It is, of course, always open to a party who negotiates a settlement to stipulate for the payment of the qualifying expenses of expert witnesses. [34]

In *Ndlovu v Road Accident Fund* [35] the court, after having expressed its disappointment in the quality of some of the experts' reports that were presented to it, remarked [36] that 'a time

may come when a court will consider that an expert's lack of care, skill and diligence will have adverse costs consequences upon the successful litigant, or will direct that the expert is limited in what may be recovered from the instructing party (particularly where there is a contingency-fee arrangement and this may constitute an additional disbursement reducing the ultimate award received)'.

'Question of costs to stand over.' This is an order the effect of which is to postpone a decision on the costs of an interlocutory proceeding until the trial of the main action. [37] If the court wishes to avoid giving a decision on costs at the interlocutory stage, the only way in which it can do so is to make this order or to order that the costs be reserved, an order which is synonymous with an order that the costs stand over. Where the issues affecting interlocutory costs are clear the court dealing with the matter should not choose an easy way out to shift the task to another court. [38]

If judgment is given in a case where costs of earlier proceedings have been ordered to stand over/be reserved, the court giving judgment should deal with any such costs. If it overlooks its task to do so, its attention should be drawn to the oversight. If this is not done as the judgment is delivered, the parties can approach the court to deal with the said costs. [39]

'Costs of the day.' These are those extra costs caused by a postponement of the proceedings and which are ordered to be paid by the party responsible for the postponement and consequent waste of a day. [40]

'Wasted costs.' Costs are 'wasted' when the services which occasioned them are of no more use to the parties in the proceedings. [41] Costs may be 'wasted' as a result of, for example, the postponement of a trial, [42] amendments, [43] failure to make discovery, [44] double citation of respondents, [45] or withdrawal of claims. [46] In appropriate circumstances the court may order that the party responsible for wasting the previous costs pay these costs before being allowed to proceed further. [47]

Award of costs in court's discretion. It has frequently been emphasized that in awarding costs, the court has a discretion to be exercised judicially upon a consideration of the facts in each case, and that in essence the decision is a matter of fairness to both sides. [48] In leaving

the court a discretion, the law contemplates that it should take into consideration the circumstances of each case, carefully weighing the issues in the case, the conduct of the parties and any other circumstance which may have a bearing on the issue of costs and then make such order as to costs as would be fair and just between the parties. [49] The Appellate Division has further stated that, since costs are in the discretion of the court, it is undesirable to lay down hard and fast rules for the guidance of courts to which they will be expected to conform in the absence of special circumstances. [50] Previous comparable decisions on costs do not create binding principles; they are, at most, instructive ('insiggewend'). [51] In *Cronje v Pelser* [52] Van Blerk JA stated:

> 'Dit kan nie sterk genoeg beklemtoon word nie dat dogmatiese toepassing van ander gewysdes, as sou dit geykte beginsels vir kostebevele voorskryf, die ongewenste uitwerking het dat die diskresie waarmee die hof *a quo* beklee is, aan bande gelê word.'

In fact, it has been said that simply to regard oneself as bound by general rules is not to exercise a discretion at all. [53] The court's discretion should, however, be exercised within the limits of certain general rules which the courts have, in the course of many years, laid down for guidance. [54] In addition to these general rules, rule 67A of the Uniform Rules of Court, which was inserted with effect from 12 April 2024, [55] provides for certain relevant factors that a court may take into account when awarding costs. See further rule 67A in Part D1 above.

If the question of costs has been fully ventilated and a court does not say anything about liability for costs or specifically states that there will be no order as to costs, each party is liable for the payment of its own costs. [56]

In *Estate Garlick v CIR* [57] the principle was laid down that when a court has made an order as to costs, without having heard any argument as to costs, the mulcted party is entitled thereafter to contend that the order should be altered and that the court is not *functus officio*, but may alter the order if it now takes a different view. The principle applies to all courts and is not peculiar to the Supreme Court of Appeal. [58]

Rules for court's guidance

The rules referred to above, which the court should follow in exercising its discretion in the award of costs, are as follows:

(1) The general rule is that the successful party is entitled to his costs. [59]

(2) Where a successful application is made for the grant of an indulgence the general rule is that costs do not follow the

event.

(3) In determining who is the successful party the court looks to the substance of the judgment and not merely to its form.

(4) The court has the power to deprive a successful party of portion or all of his costs and, in a proper case, to order him to pay portion or all of the costs of the unsuccessful party.

(5) The court may order the losing party to pay the costs of the successful party on an attorney and client basis.

(6) The court may order an unsuccessful party, suing or being sued in a representative capacity, to pay costs *de bonis propriis*.

The principle that courts should not grant adverse costs orders, without providing the affected parties an opportunity to be heard, is well established and sacrosanct. [60]

In disputes about the validity of wills, it is often ordered that both sides' costs be paid from the estate. It has, however, been held that if in an application to declare a will invalid the repondents' opposition was unreasonable, the costs were to be borne by them personally. [61]

Rule 1. Costs to successful party. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there be good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. [62]

A successful lay litigant who appears in person is entitled to 'costs limited to actual disbursements reasonably incurred'. [63] Such lay litigant may prepare a bill of costs and present it to the taxing master for taxation. [64] The taxing master may request proof that the expenses and disbursements were indeed incurred. [65] If the actual disbursement is not reasonable, the amount thereof should be decreased on taxation. [66] If the successful lay litigant has employed the services of an attorney to assist him in the preparation of an affidavit, the costs thereof can be recovered as an expense. [67] If such lay litigant has incurred travelling expenses he can obtain an award of costs and recover the expenses as if he were a witness. [68]

If an attorney is himself a successful litigant, he is entitled to tax a bill for professional work done by him, but is not allowed to charge fees for consulting with or instructing himself. [69] This is also the case if the attorney has employed his own partner. [70]

If a party has been joined, it has a right to oppose the relief sought, and if the case is withdrawn against such party, it is entitled to costs, unless some exceptional circumstances exist that allow the court to exercise its judicial discretion otherwise. [71]

Rule 2. The grant of an indulgence. Where a successful application is made for the grant of an indulgence the general rule is that costs do not follow the event. [72] The general rule in such cases is that 'the applicant for the indulgence should pay all such costs as can reasonably be said to be wasted because of the application, these costs to include the costs of such opposition as is in the circumstances reasonable, and not vexatious or frivolous'. [73] The justification for an order that an applicant is to pay the respondent's costs of opposition is that the respondent ought not to be put in a position where he opposes the granting of an indulgence at his peril, in the sense that, if the amendment is granted, he cannot recover his costs of opposition, or may even have to pay such costs as are occasioned by his opposition, despite the fact that such opposition is reasonable in the circumstances. [74] A respondent who opposes an application only to resist the costs order sought against it is entitled to the costs of opposing the application if it is successful in warding off the costs order. [75] If a respondent unreasonably opposes an application for an indulgence he may therefore be deprived of his costs of opposition and, in appropriate circumstances, be ordered to pay the costs of opposition. [76]

Rule 3. Who is the successful party? In determining who the successful party is the court looks to the substance and not the form of the judgment. It is quite possible for the party against whom the judgment is given to be, in substance, the winner on the point in connection with which the question of liability for costs arises.

(a) Where a plaintiff succeeds in recovering substantially less than he claimed, [77] or an appellant succeeds to an insignificant extent, [78] the opponent in each case is really the substantially successful party. The smallness of the amount recovered is not always the test of success, however, for in the case where a plaintiff recovers only a nominal amount but succeeds in establishing a substantial right, he is the substantially successful party. [79]

Furthermore, before the court will deprive a plaintiff of his costs, where he has recovered only a small amount the claim must have been excessive or grossly disproportionate to the amount recovered. [80] However, this principle may be departed from where there are distinct issues and where virtually the whole trial turned on issues in regard to which the ultimately successful party has been unsuccessful. [81] In damages actions even a gross disproportion between claim and award will not necessarily justify the court in penalizing the plaintiff; the court should consider the circumstances before depriving a plaintiff of his costs. [82] Where, however, a plaintiff is awarded only nominal damages, the 'usual order' is that there should be no order as to costs. [83] Where, in the absence of a claim in reconvention, the amount recovered by a plaintiff is reduced by virtue of the provisions of the Apportionment of Damages Act 34 of 1956, the defendant's liability for costs is in no way altered and the plaintiff will recover all his costs. [84]

(b) There are cases where several claims or issues are involved. Where there is a main claim and an alternative claim, and the applicant or plaintiff succeeds on the main claim, the general rule is that he should receive the whole of the costs. [85] If there are several claims or issues of equal importance, however, and the applicant or plaintiff succeeds on one of these, the others not being decided, the court has a discretion either to order each party to pay his own costs on the undecided issues or to award costs of these issues to the successful party. [86] The question seems usually to be approached from the point of view of whether the issues can be separated or not.

(i) Where the issues are separate and distinct, the costs of each issue should be awarded to the party successful thereon. [87] If there are technically separate issues but all the issues had to be raised in order to lead evidence so as to enable the judicial officer to give a correct judgment upon the issue whereon the litigant succeeds, then there must be some exceptional reason for not adopting the general principle that the successful litigant is entitled to all his costs. [88]

If it is claimed that separate issues are involved, so that a special order as to costs should be made, the party so claiming should draw the court's attention to the matter, at the latest immediately after judgment is given. [89]

(ii) Where the issues are not separate and distinct but are too closely connected to allow the court to apportion costs between the different issues or claims, or where an

account is in dispute, the party to whom the balance is found due usually gets the costs. [90] Other orders which the court has made in these circumstances are 'no order as to costs', [91] which means that each party has to pay his own costs, or the court may order an approximate apportionment of costs between the parties; [92] or may order the costs to be costs in the cause. [93]

(c) Where there is a claim and a claim in reconvention the same principles apply as are set out above: that is, where the two can be kept separate, the costs of each are usually awarded to the party successful thereon, [94] but where the claim and claim in reconvention are inextricably mixed, the balance usually carries costs. [95] In the case where the claim and the claim in reconvention are distinct, the court may in its discretion award the costs to the party who wins on balance, particularly where the costs incurred by the loser are small; such exercise of discretion is perhaps not logical, but is not impermissible. [96] The court should not give only one judgment and make one order as to costs, intended to cover costs of both claim and claim in reconvention: there are really two actions being tried, and the general rule is that each plaintiff, if successful, is entitled to judgment and costs thereon. [97] A suitable order in such a case, where the costs approximately balance, is that each party shall pay his own costs. [98]

(d) Where a defendant, who has been predominantly successful, has failed on certain of his defences he will not, as a rule, be deprived of his costs of the unsuccessful defences unless he acted unreasonably in raising these defences. [99] The rule would, *mutatis mutandis*, apply to a partially successful plaintiff.

(e) Where the court leaves issues undecided, it possesses a discretion either to direct each party to bear his own costs of such issues or to award the costs of such issues to the party successful on the decided issues. [100]

(f) Where one of two defendants succeeds and the other fails, the successful one is entitled to the whole of his separate costs and to an *aliquot* portion of the joint costs. If they are entitled to be separately represented, the fact that they have employed the same counsel is no ground for reducing the successful defendant's costs on taxation. As to the circumstances

under which two sets of costs will be allowed to defendants severing their defence and employing separate legal advisers, see the cases of *Britz v Engelbrecht* [101] and *Maseto v Pleskus*. [102] A party which is successful on an issue should not be ordered to help the unsuccessful party pay another successful party's costs, unless exceptional circumstances dictate otherwise. [103]

Rule 4. Deprivation of costs. [104] A court should not be astute to deprive a successful litigant of any of his costs. [105] In the absence of special circumstances the successful litigant is entitled to his costs. [106] The successful party should not be ordered to pay the costs of the unsuccessful party except where the conduct of the successful party has been the cause of all the costs of the proceedings. [107] An unsuccessful party cannot escape liability for costs by labelling the litigation as a 'test case' when it is clear that a resort to litigation was the only way in which the successful party could obtain delivery of that which the unsuccessful party unlawfully refused to deliver. [108]

The grounds upon which a successful party may be ordered to forfeit costs or pay those of his opponent are various, but may for convenience be roughly classified under the following heads:

(a) making excessive demand;

(b) causing unnecessary or frivolous litigation;

(c) succeeding on a technicality only;

(d) increasing costs through wrong procedure;

(e) allowing defects in pleading;

(f) being guilty of misconduct generally.

This list makes no pretence of being an exhaustive or logical classification. In many instances the decisions given below under one head might with equal reason be placed under another; and, in others, grounds falling under two or more heads contributed to the final result. In a confused subject any order is better than none.

It must be stressed that a successful litigant can, as a rule, be deprived of his costs only on the ground of some fault on his own part; special claims on the part of his opponent, such as reasonable ground for opposing, [109] distressed circumstances, [110] or an offer to pay by instalments, [111] are insufficient grounds for such deprivation. Nor is it a good ground that the successful defendant failed to reveal his defence to his opponent. [112] Where defendants obtain absolution at the end of plaintiff's case, it is not competent to the court to deprive them of costs on the ground of negligence which they have denied on the pleadings, for they have obviously had no opportunity of disproving it; [113] and the same rule applies where one of two defendants has raised a defence which, owing to the other defendant's having consented to judgment, has not been heard and adjudicated upon. [114]

(a) **Making excessive demand.** The mere fact that a successful plaintiff claimed more than he succeeded in obtaining judgment for is no ground for depriving him of his costs. [115]

Where there is a gross disproportion between the amount claimed and that recovered, [116] or the plaintiff's claim was excessive or exorbitant, [117] or he actually knew or should have known that he was not entitled to the full amount claimed, the court may well deprive him of his costs. [118]

In actions for damages even a gross disproportion between the claim and the final award will not justify the court in depriving the plaintiff of his costs, for the factors in such a case more important than the size of the claim are the conduct of the plaintiff and the facts of the case generally. [119]

Where nominal damages are claimed or awarded but the real object was to secure a declaration of right, [120] or where the plaintiff, though awarded only a nominal amount,

succeeds in establishing a substantial right, [121] he will not be deprived of his costs. Where he is awarded merely contemptuous damages he will not, as a rule, be given costs [122] though in some cases such awards have carried costs. [123]

(b) **Causing unnecessary or frivolous litigation.** Under this head fall those cases where one party has misled or otherwise needlessly induced the other into initiating proceedings which could have been avoided, and where a party has himself instituted unnecessary [124] or frivolous proceedings. A successful party may be deprived of costs where the proceedings were needlessly occasioned by some fault on his part. [125] Thus, a successful defendant may be deprived of his costs where he has misled [126] or provoked [127] the plaintiff into initiating the proceedings, or into taking steps which would not

have been taken had the defendant conducted himself in a proper manner in the litigation. [128] A successful plaintiff may similarly be deprived of his costs for misleading the defendant into committing the act in respect of which the plaintiff brings the action. [129]

Where a plaintiff is premature in instituting proceedings and the defendant admits liability after the proceedings have begun — in other words, where there need never have been an action at all — the plaintiff may be ordered to pay all the costs. [130]

Where the dispute arises out of a mutual misunderstanding, [131] or where both parties have been at fault and are equally responsible for the resultant litigation, the court may make no order as to costs. [132]

If a plaintiff brings a frivolous claim, e g for a trespass of a kind usually submitted to among neighbours, [133] or succeeds in circumstances where he should have known that he would gain nothing by his success, [134] the court may make no order as to costs.

(c) **Succeeding on a technicality only.** Costs have been refused to a party who succeeded, but only on a technical point, the merits being against him. [135] In some instances the successful party has even been ordered to pay all the costs, [136] and, in another, costs were made costs in the cause; [137] but in all these cases the circumstances were exceptional. As a general rule the fact that a party sets up a claim or defence which the law allows is not per se a reason for penalizing him in costs; and this is especially true where the other party might have saved costs by offering to amend. [138]

(d) **Increasing costs through wrong procedure.** The general rule is that costs which have been unnecessarily or ineffectively incurred should be borne by the party responsible therefor: [139]

> 'I think it is the duty of a litigant to avoid any course which unduly protracts a lawsuit, or unduly increases its expense. If there is a legal defence which can be effectively raised, by way of exception or otherwise, at an early stage, he ought at that stage to raise it. If he only takes it later on it may still be effective, but the fact that it came late, or that considerable expense was unnecessarily incurred in consequence, seems to me an element which may well affect the mind of the court in apportioning the costs.' [140]

Our law reports abound in cases in which this general rule has found application. It would be impossible to refer to all of them and only a few of the more prevalent and illustrative examples are, therefore, mentioned.

(i) **Wrong forum.** Where the case could have been heard in a less expensive forum, such as a magistrate's court, but instead is brought in the High Court, [141] costs may be allowed only on the scale of the appropriate court. The onus is upon the plaintiff to justify his recourse to the more expensive tribunal. [142] The question as to whether High Court or magistrate's court costs are to be awarded [143] is a matter within the discretion of the trial judge, to be exercised judicially upon a consideration of all the facts. [144] Though each case must therefore be dealt with in the light of its peculiar facts, certain guiding principles have been laid down. Factors which may be relevant include the following: [145]

(1) that the case presents considerable difficulties in fact or in law; [146]

(2) that the case is one of public interest, in the sense that the decision will affect not only the plaintiff, but the community at large; [147]

(3) that the decision in the case is of great importance to the plaintiff in order that he may vindicate his reputation, either where he has been defamed or where his professional or other skill or ability has been brought into question; [148]

(4) that serious allegations, bordering on fraud, have been made; [149]

(5) that allowance should be made for the unpredictability of awards in claims for damages, especially in defamation cases, the test being whether the plaintiff might reasonably have expected, at the time when he issued summons, to recover more than a magistrate was entitled to award him; [150]

(6) that the plaintiff's recourse to the High Court amounts to an abuse of the process of the court, in which case the High Court may not only refuse costs, but in appropriate circumstances refuse to entertain the proceedings; [151]

(7) that, although the award falls within the jurisdiction of the magistrate's court, the plaintiff is an officer of the court and therefore entitled to approach the High Court; [152]

(8) that the plaintiff was justified in coming to the High Court to vindicate his professional reputation; [153]

(9) that both parties in a trial in the magistrate's court (and in subsequent appeals) employed two counsel and had correctly agreed that the costs of two counsel were justified. [154]

(ii) **Application instead of action.** If the successful party proceeds by way of application when it is quite clear that the issues cannot be decided upon affidavit but must go to trial, he will have to pay the wasted costs. [155] If, when the proceedings were commenced, it was not clear that the application proceedings would be abortive, the costs thereof will usually be made costs in the cause, [156] or the court may give leave to reclaim the costs. [157]

(iii) **Proceeding *ex parte* instead of on notice**.If a party proceeds *ex parte* instead of by application on notice to his opponent in a matter where notice is required, he will have to pay the costs unnecessarily incurred. [158]

(iv) **Failure to except.** If the successful party could have taken an exception which would have removed the necessity for a trial but followed some more expensive course, he

will be given only such costs as he would have received had he excepted. [159] Thus, where a defendant opposes on the merits instead of excepting, he will, though successful, be awarded only such costs as would have been allowed had he excepted to the summons. [160] The rule is, however, not an inflexible one. The question in each case, the Appellate Division has held, is whether the party who did not take the exception was unreasonable in failing to do so. [161] The court may depart from the rule where the exception, if successful, would not have ended the proceedings but would merely have led to an amendment. [162] There may be circumstances which make it impossible for the court to say that the omission to except was due to unreasonableness. [163] If the defendant wishes a decision on the merits — for example, where an allegation of criminal conduct is made in the summons and the defendant wishes to go to trial to vindicate his honour — the court may depart from the rule. [164]

(v) **Failure to take point *in limine*.** The successful party may also be penalized in costs for omitting to take *in limine* an objection (or special plea) that would have disposed of the matter then and there. [165]

(vi) Failure to apply for absolution. If the successful defendant ought to have applied for absolution at the close of the plaintiff's case, and if it is clear that the application would have been granted, the defendant may be deprived of the costs of the trial. [166]

(vii) Failure to apply for discovery. Where a plaintiff should have applied for discovery but failed to do so, he was, as a mark of disapproval, deprived of his costs for the final day of the trial. [167]

(viii) Increasing costs through unreasonableness. An unreasonable attitude in a party, having the result of increasing the costs quite unnecessarily, will justify the court in making a special order of costs against such party. Thus, where a respondent unreasonably opposes an application for an indulgence, he may be ordered to pay the costs of opposition. [168] Where a number of defendants bring the same judgment in review

on substantially the same grounds, [169] or a number of plaintiffs bring separate actions on the same facts; [170] or several applicants separately initiate proceedings which might have been combined into one motion, [171] they may be allowed only such costs as they would have got had they joined in doing so. Similarly, where two causes of action between the same parties which might have been combined in one summons are separated into two summonses, returnable on the same day, the court may allow only the costs of one summons. [172]

(ix) Employment of too many counsel. In *Compensation Commissioner v Compensation Solutions (Pty) Ltd*; *Compensation Solutions (Pty) Ltd v Compensation Commissioner* [173] the Supreme Court of Appeal observed:

> '[34] The judgment cannot be concluded without dealing with the Commissioner's decision to appoint five counsel in appeal 1175/2021. When the matter was called on 5 September 2022, the State parties were represented by seven counsel in total, a senior and junior in appeal 997/2021 and a senior and four juniors in appeal 1175/2021. This Court called for an explanation as to why it was deemed necessary to appoint so many counsel. When the appeal was eventually heard, the State parties were only represented by two counsel in appeal 1175/2021 and as previously, the two other counsel in appeal 997/2021. Money that could be made available for the payment of compensation to worthy claimants was wasted on unnecessary legal costs. There was simply no explanation as to why that many counsel were briefed. It would accordingly not be appropriate for the State Attorney to recover from its clients in appeal 1175/2021 the fees and expenses of more than one senior and one junior counsel.'

If a party, after receiving notice that his opponent is withdrawing an appeal [174] or has admitted the claim and is prepared to concede the relief asked, [175] persists in continuing with the proceedings, he may be deprived of the costs incurred after the withdrawal or admission.

Where a defendant has tendered to satisfy the plaintiff's claim but the latter continues with the proceedings, the defendant, as a general rule, will be entitled to the costs incurred subsequent to the tender; [176] but the court is not bound to award these costs to him. [177] If a defendant wishes to avail himself of a tender in order to disavow liability for costs, the tender should be pleaded. [178] Where the defendant makes a tender subject to conditions to which the plaintiff is entitled to object, [179] or does not admit liability for the amount tendered, [180] costs may be awarded to the plaintiff, even though the tender be found to be adequate.

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. [181]

If a party wishes to object against being made to pay costs wastefully incurred, he must do so at the hearing of the proceedings, for if they are allowed against him in the judgment, and he objects to them for the first time when the taxation is being reviewed, he will be too late and his objection will be of no avail. [182]

***(e)* Defective pleadings.** It may happen that the successful party's pleadings are faulty in some respect and that this leads to unnecessary expense being incurred. In this event he may be ordered to bear the extra costs himself, i e the unsuccessful party will not be obliged to pay costs unnecessarily incurred, not by him, but by his opponent. Thus, a successful party may be deprived of the costs of elaborate sets of pleadings, [183] or of affidavits containing unnecessary evidence. [184]

The usual rule is that a party who successfully resists an exception is awarded the costs thereof; [185] but where the pleading excepted to is at first sight lacking in certainty and precision, then, though the respondent defends his pleading successfully, he will not necessarily be given the costs thereof, and they may be made costs in the cause. [186] Similarly in the case of a successful excipient: as a rule he gets the costs of the exception, but where his exception is vague and the vagueness has added to the costs of the proceedings, [187] or the exception does not set out in what way the respondent's pleading is excipiable, [188] costs may be made costs in the cause.

Where the defence set up at the trial is different from that pleaded, there may be no order as to costs, even though the defendant is successful. [189] Where a plaintiff puts

forward one case and it appears on trial that his case is really something else, as, for example, where he sues in contract for payment in respect of work ordered and done but gets judgment for some lesser sum as a *quantum meruit*, there may be no order as to costs. [190] The fact that a successful party omitted to raise timeously the contention upon which he succeeds is ground for depriving him of his costs; [191] and for similar reasons, where a party succeeds on appeal on a point not pleaded by him but dealt with in the court below and which the appeal court allows him to insert in his plea, there may be no order as to costs. [192]

***(f)* Misconduct generally.** Under this head are grouped those cases where the successful party has been guilty of improper conduct of a serious nature in or connected with the litigation, [193] calculated to delay or defeat justice; or of some criminal or quasi-criminal misconduct, such as a fraud or crime or preparation therefor, or possibly some act of serious oppression, in the course of the transaction out of which the cause of action arises. [194] If the misconduct complained of is merely incidental or extraneous to the litigation and to the transaction from which the cause of action arises, it will not justify a deprivation of costs. [195] Nor can the court act on a mere suspicion of misconduct; there must be proper evidence of it. [196]

(i) Misconduct in or in connection with the litigation. A successful party has been deprived of his costs for showing a spirit of vexatious litigation; [197] for 'unreasoning and obstinate' conduct; [198] for making a false statement in a pleading; [199] for producing or giving false evidence; [200] for misleading the court; [201] for attempting to bribe the opponent's legal advisers; [202] for making reckless charges of fraud; [203] for not disclosing

fully and fairly all material facts in an application; [204] for employing the sequestration process for an ulterior purpose; [205] for not filing heads of argument timeously despite repeated undertakings to the court that it would be

done. [206]

(ii) Misconduct in the course of the transaction founding the cause of action. A successful party has been deprived of his costs where he tried to pass off an inferior article not in accordance with the contract and refused an offer which would probably have avoided litigation; [207] where he, being an attorney, had successfully resisted a claim for damages for negligence but had placed himself in a position where the conflicting interests of other clients prevented him from giving unprejudiced advice; [208] where the action was based on an immoral contract, [209] or one against public policy; [210] where the plaintiff sued for infringement of copyright of a scheme originated by him and the defendant successfully pleaded that the scheme was a lottery, it was shown that defendant had copied the scheme none the less; [211] where the successful plaintiff had been guilty of collusion in his attempts, prior to action, to obtain what he was suing for; [212] where the successful party had been guilty of high-handed and arbitrary conduct; [213] where the successful party had disobeyed with impunity an order of court granted at an earlier stage in the dispute between the parties; [214] where the successful defendant's conduct was illegal; [215] where the conduct of one of the parties had been scurrilous; [216] and where the successful respondent (on appeal and in the court below) behaved with less than courtesy, and less than candour, in dealing with the applicant's claims. [217]

Misconduct of an agent has the same effect as misconduct of the party himself. [218]

(iii) Moral considerations. In the exercise of its discretion as to costs the court may also attach weight to the moral as opposed to the legal obligations of the parties. [219] The court is, however, reluctant to regard the existence of ethical grounds unconnected with the litigation in question as relevant to an award of costs. [220] As a general rule, the court will not deprive a successful litigant of his costs on ethical grounds. [221] A litigant

who takes up an attitude which the law entitles him to should not lose his costs simply because from a moral point of view it might be said that he ought not to have taken up that attitude. [222]

Rule 5. Attorney and client costs. In some of the cases it has been said that the court makes an order of attorney and client costs in order to mark its disapproval of the conduct of the losing party. In *Public Protector v South African Reserve Bank* [223] the majority of the Constitutional Court, with reference to *Orr v Schoeman*, [224] stated: [225]

> 'More than 100 years ago, Innes CJ stated the principle that costs on an attorney and client scale are awarded when a court wishes to mark its disapproval of the conduct of a litigant. Since then this principle has been endorsed and applied in a long line of cases and remains applicable. Over the years, courts have awarded costs on an attorney and client scale to mark their disapproval of fraudulent, dishonest or mala fides (bad faith) conduct; vexatious conduct; and conduct that amounts to an abuse of the process of court.'

This terminology suggests that an award of attorney and client costs is a form of punishment. [226]

The treatment of such an award simply as punishment does not, however, supply a complete explanation of the grounds on which the practice rests; something more underlies it than the mere punishment of the losing party. On the other hand, the order cannot be justified merely as a form of compensation for damages suffered. The true explanation of awards of attorney and client costs not expressly authorized by statute is that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expenses caused to him by the litigation. Theoretically, a party and party bill taxed in accordance with the tariff will be reasonably sufficient for that purpose. However, in fact a party may have incurred expense which is reasonably necessary but is not chargeable in the party and party bill. Therefore in a particular case the court will try to ensure, as far as it can, that the successful party is recouped. [227]

An award of attorney and client costs will not be lightly granted, as the courts look upon such orders with disfavour and are loath to penalize a person who has exercised his right to obtain a judicial decision on any complaint he may have. [228] Where a court is considering making a punitive costs order against a party, that party should be informed and afforded an opportunity to be heard on the issue. [229]

In general it can be stated that the court does not order a litigant to pay the costs of another litigant on the basis of attorney and client unless some special grounds are present, such as, for example, that he has been guilty of dishonesty or fraud or that his motives have been vexatious, reckless and malicious, or frivolous, [230] or that he has acted unreasonably in his conduct of the litigation [231] or that his conduct is in some way reprehensible. [232] The courts

have awarded costs against the losing party on an attorney and client basis in the following circumstances: where the losing party has been guilty of dishonesty or fraud; [233] where a defence was dishonest and only for the purpose of gaining time, [234] or was a completely false and fraudulent defence; [235] where the loser showed malice; [236] or made reckless charges of incompetence and impugned the plaintiff's honour; [237] or without grounds imputed fraud or dishonest conduct to a professional man in regard to his profession; [238] or made an unwarranted and unpleasant personal attack on his opponent; [239] or made a scurrilous attack upon the plaintiff and his attorney in an affidavit; [240] or attempted to arrest the winning party on a cause of action which he (the loser) had renounced; [241] or put up and persisted in a defence which he knew was spurious; [242] or had proceeded from vexatious, reckless and malicious motives; [243] where the conduct of the losing party was found to be a deliberate flouting of the law in the face of lawful attempts by the applicant (a municipality) to perform its statutory duty; [244] where an application was needlessly caused by some fault on the part of the party who is ordered to pay the costs; [245] where scurrilous allegations were made against advocates unsuccessfully sought to be joined in an action; [246] where an application to place a close corporation under business rescue was brought with ulterior motives and where the applicant could never have thought that a viable business rescue could be instituted in relation to the close corporation; [247] where the court was scandalized by allegations which were without any factual foundation; [248] where a business rescue practitioner, in flagrant disregard of his obligations, opposed an application for the final winding-up of an insolvent company; [249] where a

losing party made unwarranted, scandalous, attacks on the court; [250] having been informed that rule 35(12) of the Uniform Rules of Court was not available to it, the unsuccessful applicant nevertheless persisted in pursuing that relief and, in addition, despite having been provided with resolutions and powers of attorney verifying that the respondents' attorneys were authorized to act, insisted on further evidence in that regard; [251] where the losing applicants made unwarranted *ad hominem*

attacks on the integrity of the officials of the first respondent municipality. [252]

Conduct which is vexatious [253] and an abuse of the process of the court [254] may form the basis of an award of costs on the attorney and client scale, although the intent may not have been such. [255]

Attorney and client costs have also been awarded for bringing a hopeless action for the sake of advertisement; [256] for recklessly relying upon hearsay evidence and failing to check sources of information; [257] for showing a contemptuous disregard for the opponent's rights; [258] for acting in a high-handed manner and knowingly making demands which were unjustified; [259] for filing a disingenuous affidavit which was an attempt to trifle with the court; [260] for filing a lengthy answering affidavit that was unnecessary and inappropriate; [261] for deliberately

attempting to mislead the court; [262] for failing to disclose to the court a highly material fact [263] and making inconsistent statements in motion proceedings which, when brought to his notice by the replying affidavits of the other party, induced the loser to withdraw his application. [264] Attorney and client costs may also be awarded on the ground of unscrupulous, dilatory or mendacious conduct on the part of an unsuccessful litigant; [265] absence of bona fides in conducting litigation; [266] unworthy, reprehensible or blameworthy conduct; [267] an attitude towards the court which is deplorable and highly contemptuous of the court; [268] the existence of a grave defect relating to the proceedings; [269] disregarding a defendant's right to defend the action by putting the defendant to unnecessary trouble and expense to oppose an application for summary judgment and thereafter conceding that leave to defend had to be given under circumstances where the plaintiff had, before delivering the application, been sufficiently apprised of the defence; [270] the gross unlawfulness of an applicant's actions together with his failure in *ex parte* proceedings to disclose all relevant facts to the court and the absence of a bona fide claim in law to a final order; [271] the flagrant disregard by a Minister of her 'constitutional duty

in respect of ensuring that all relevant evidence was timeously . . . placed before the court'; [272] an obstructive approach to the litigation. [273]

The court has refused to make an order of attorney and client costs in the following instances: where the plaintiff recovered heavy damages for adultery with her husband in circumstances where the defendant showed a flagrant disregard for the plaintiff's rights and feelings; [274] where it was possible that the losing party had acted bona fide, notwithstanding that there was some evidence from which fraud or recklessness might be inferred; [275] where the loser had failed to disclose a material piece of information, but there was no proof that the non-disclosure was deliberate; [276] where an election petition alleging illegal and corrupt practices was withdrawn the day before the hearing but there was no proof of improper conduct on the part of the petitioner; [277] where a defendant had indulged in inordinately lengthy cross-examination of the plaintiff; [278] where a litigant's attorneys had failed in a number of respects to comply with the rules of court but exceptional circumstances were not present to justify an order for costs on the attorney and client basis; [279] where a party's conduct was due to ignorance rather than *mala fides*. [280]

Where the misconduct of agents is such as to justify an award of attorney and client costs, it may equally do so in litigation against the principal arising out of such misconduct. Where the misconduct of agents of a company in and about the company's business is imputable to the company as such, the court is entitled to have regard to the conduct of the agents in making an award of costs against the company. [281] The principal must, however, know of the agent's misconduct and adopt it as his own before the principal can be held responsible. [282]

If the Road Accident Fund opposes an appeal against a clearly incorrect judgment of the court *a quo*, a punitive order against it as to costs on the scale as between attorney and client is justified. [283] In *Law Society of South Africa v Road Accident Fund* [284] a punitive order as to costs on the scale as between attorney and client was made against the RAF in circumstances where it attempted to thwart the legal system by secretly introducing a direct payment system calculated to bypass attorneys and frustrate access of beneficiaries to courts. In *Bovungana v Road Accident Fund* [285] two punitive costs orders on the scale as between attorney and client were made against the RAF: in the first, the RAF was ordered to pay the plaintiff's costs of suit because it should not have allowed the matter to proceed to trial; in the second, the RAF was ordered to pay the costs of a futile application for postponement brought on the first

day of trial, jointly and severally with two of its officials who deposed to affidavits in the application which did not remotely fulfil the requirements for the grant of a postponement. In *Modise obo A Minor v Road Accident Fund* [286] a punitive costs order was made against the RAF for incurring unnecessary costs, wasting time and causing prejudice to the plaintiff. In *K obo M v Road Accident Fund* [287] a costs order on the scale as between attorney and client was made against the RAF as a mark of the full court's displeasure with the Fund's 'litigation delinquency' and in order not to leave the plaintiffs 'out of pocket for litigation costs which the Fund could, and should, have prevented'. [288]

A provincial government was ordered to pay costs on the scale as between attorney and client where, in an application for payment of a social grant, both its decision to oppose the application and the way in which the case was conducted represented unconscionable conduct on the part of the provincial government. [289]

Awards of costs on the scale as between attorney and client as a result of the conduct (or lack thereof) of the State Attorney are on the increase. [290]

A municipality was ordered to pay costs on the scale as between attorney and client as a result of the high-handed (not just neglectful) behaviour of its Metro Police. [291]

A municipality was ordered to pay costs on the scale as between attorney and client where, in an application for access to information by a ratepayer following a discontinuation-of-service notice issued by the municipality, the latter acted obstructively, irrationally, arrogantly and without due and proper regard to the applicant's rights. [292]

Normally an order for costs on the attorney and client scale will be made only where there is a special prayer therefor or when notice has been given that such an order will be asked for, [293] but the absence of such notice is not necessarily fatal. [294]

Attorney and own client costs. In *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* [295] a distinction was recognized between an attorney and client bill to be paid by an unsuccessful party to litigation and one where the costs are to be paid by the client to his attorney. The former, it was held, 'demands what may be termed an intermediate basis of taxation'. [296] The

difference between costs as between attorney and own client, and costs as between attorney and client, has been frequently recognized in our law. [297]

In *Aircraft Completions Centre (Pty) Ltd v Rossouw* [298] the law relating to attorney and client costs is extensively discussed. It is pointed out that Roos *Taxation of Bills of Costs* [299] contains no reference to *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* [300] and that the difference in Roos's levels of taxation is inconsistent with the *Nel* decision. [301] The court held that the South African law of costs knows only three principles or bases of taxation of attorney and client costs. In ascending order of strictness (or descending order of generosity to the costs creditor), they are taxation of a bill for payment of an attorney by his own client; taxation of a bill for payment of attorney and client costs out of a common fund; and taxation of a bill for payment of attorney and client costs by one party to another. [302] The proposition that the latter basis gives little more than taxation as between party and party has never reflected the law anywhere in South Africa. [303] An order that a party pay the costs of another party as between attorney and own client has no meaning in law beyond the requirements of an order to tax as between attorney and client. [304] However, in an inter-party taxation as between attorney and client, the taxing master is not necessarily confined to the tariff and a more complete recoupment is envisaged. [305]

As is pointed out in *Thoroughbred Breeders' Association v Price Waterhouse*, [306] there are considered decisions in the High Court, both that orders for costs as between attorney and own client are inappropriate as they are not generically different from orders for costs as between attorney and client and to the contrary. In view of the conflicting decisions, this debate will only be settled by the Supreme Court of Appeal or, ultimately, the Constitutional Court.

It is submitted that costs on the basis as between attorney and own client is, in fact, merely a species of the genus 'attorney and client costs'. [307] In a number of cases [308] reference has been

made, with approval, to the so-called 'Roos' categories [309] of attorney and client costs. Thus, for example, in *Brooks v Taxing Master* [310] Burne AJ said the following:

> 'The final question is one of selecting the correct attorney and client basis. According to the work of Mr. Roos on the subject of *Taxation of Bills of Costs* (see 1st ed. p. 8), there are three bases of taxation of attorney and client costs. The learned author describes them as follows:
>
> "(1) Where the costs are payable by the client to his attorney; or where the costs are payable out of a fund belonging entirely to the client.
>
> (2) Where the costs are payable out of a general or common fund.
>
> (3) Where the costs are payable out of a fund which belongs to other parties and in which the party has no interest, or where the costs are payable by one party to another."
>
> The learned author adds:
>
> > "The taxation in the cases of (1) is more generous than in the case of (2) and (3), while in the case of (2) the taxation is not so generous as in the case of (1). The taxation in the case of (3) is the strictest, and, in effect, gives little more than a taxation as between party and party, except that any necessary letters to and attendance on the client are allowed, Porter and Wortham *Guide to Costs*, 13th ed. p. 915. This is the English practice and is followed in the Union."
>
> I accept the views of the learned author.'

It has been held [311] that there is support for the difference in Roos' levels of taxation (1) and (3) in the following dictum from the judgment of Tindall JA in *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging*: [312]

> '[T]here may be a considerable difference between the amount of the attorney and client bill which a successful party is bound to pay to his own attorney and the amount of an attorney and client bill which has been taxed against the losing party. For instance, in the taxation of the attorney's bill against his client, the latter could not object to a special fee, however high, to counsel which he had specially authorised . . . but before the amount of an attorney and client bill can be recovered against the opposite party it must be taxed against the latter. Law 12 of 1899 (Transvaal), which deals with the taxation of bills of costs in lawsuits, makes no mention of the taxation of an attorney and client bill against the opposite party. But there can be no doubt that such taxation is necessary . . . And on this, taxation charges in the nature of luxuries incurred with the approval of the client, who may happen to be a rich man, and may have authorised his attorney to pay exceptionally high fees to counsel, would not be allowed against the losing party. Where the attorney and client costs are to be paid by the opposite party, the taxation should be stricter than in a taxation as between attorney and client where the costs are to be paid

> by the client to his attorney . . . We have no rule of court on the subject but it seems to me that here also, when the bill is taxed against the losing party, it is essential to apply a stricter taxation to prevent injustice to the latter as the result of the award of attorney and client costs against him. Thus the award of attorney and client costs against the losing party really demands what may be termed an intermediate basis of taxation.'

The effect of an attorney and client costs order is to place taxation in the third category set out by Roos, while an attorney and own client costs order clearly refers to taxation on the basis of the first category. [313]

An award of costs as between attorney and own client has been described as exceptional ('uitsonderlik'), [314] very punitive [315] and as indicative of extreme opprobrium. [316] It must be seen as an attempt by the court to go a step further than the usual order of costs as between attorney and client, to ensure that the successful party is indemnified in respect of all the reasonable costs of the litigation. [317] Taxation of a bill of costs as between attorney and own client will be on a more liberal and lenient basis, but exorbitant or unreasonable costs will not be sanctioned. [318] In *Public Protector v South African Reserve Bank* [319] the majority of the Constitutional Court stated: [320]

> 'The question whether a party should bear the full brunt of a costs order on an attorney and own client scale must be answered with reference to what would be just and equitable in the circumstances of a particular case. A court is bound to secure a just and fair outcome.'

The courts have awarded costs against the losing party on an attorney and own client basis in the following circumstances: where the losing party, a large company, had attempted to intimidate the plaintiff into not proceeding with legal proceedings by threatening to institute a counterclaim for a large amount of money and to ruin the plaintiff, and had conducted itself during the trial in a vexatious manner; [321] where the losing party had obtained evidence, which was subsequently held to be inadmissible on the grounds of public policy, in an improper and reprehensible manner; [322] where the losing party had resorted to procedural stratagems, trifling defences and delaying tactics, conduct which was held by the court to be vexatious and reprehensible; [323] where the losing party had been guilty of an abuse of

procedure; [324] where the losing party's conduct of the case had been found to be unconscionable, appalling and disgraceful; [325] where the losing parties had requested a postponement which had been necessitated by their attorneys'

procrastination and negligent failure to oppose an application; [326] where the losing party *(a)* delivered an answering affidavit, the substantial portion of which contained facts which were irrelevant; *(b)* resorted to defences which were extravagant; *(c)* adopted a deliberate hostile position in an attempt to frustrate the winning party in enforcing her rights; and *(d)* acted unreasonably; [327] where the respondents acted tactically to avoid and frustrate scrutiny under disciplinary proceedings before a Law Society; [328] where the losing parties have been extremely remiss in the manner in which they conducted all litigation pertaining to a matter, including a flagrant disregard for the relevant practice directive of the High Court concerning the filing of heads of argument and practice notes; [329] where judicial time was wasted when an entire week was set aside for the further hearing of a defendant's case, including an application to recall a witness, only for the defendant to suddenly change course at the commencement of the proceedings and close his case, thereby putting the plaintiff to great expense (yet again). [330]

Costs against successful respondents on an attorney and own client basis have been awarded where the respondents fought the application even though they should have known *ab initio* that their administrative conduct was wrong and where their attitude lacked acknowledgment of the applicant's rights and ignored the interests of other persons who were involved in the administrative process by the respondents. [331]

Orders of attorney and own client costs have been refused in the following instances: where the losing party's application was characterized as vexatious and justifying an order of costs as between attorney and client, it nevertheless fell short of the description of extreme opprobrium; [332] where the losing party had refused to give effect to a judgment when he was in a position to do so and thereby compelling the plaintiff to return to court in order to enforce

its rights; [333] where the losing party's conduct of the trial and its witnesses' testimony had been dishonest; [334] and where the losing party in an application to strike out had put together certain parts of the papers without any regard for the rules of practice and procedure and the law of evidence and had endeavoured to overwhelm its opponent and the court, inundating the opponent and the court with irrelevant material and relying on speculative material and then raising arguments on the speculative material. [335]

Rule 6. Costs *de bonis propriis*. [336] The basic notion underlying such an award is material departure from the responsibility of office; [337] the aim of the order is to indemnify a party against an account for costs from his own representative, i e to compel the representative to pay the costs himself. [338]

Costs *de bonis propriis* are unusual [339] and not easily awarded. They are awarded when there is 'negligence in a serious degree'. [340] The authorities caution that costs orders *de bonis propriis* should be awarded only in exceptional circumstances. [341] It is not unprecedented that costs orders *de bonis propriis* are made on an attorney and client basis. [342]

In *Lushaba v MEC for Health, Gauteng* [343] the trial court issued a rule *nisi* calling upon the MEC to show cause why he should not be held liable for the costs *de bonis propriis* in his personal capacity, alternatively to indicate those officials in the offices of the Department of Health and the State Attorney who should be held liable. Subsequently, the court confirmed the rule and ordered four officials whom it deemed responsible to pay 50% of the costs *de bonis propriis* jointly and severally with the defendant on an attorney and client scale. The MEC was discharged from personal liability. On appeal *sub nomine MEC for Health, Gauteng v Lushaba* [344] the Constitutional Court held:

(a) that it was not competent for the trial court to allow, as it did in the rule *nisi*, the MEC to be the judge of whether he should be held personally liable for costs and, if he should not be held personally liable, to identify who should be. Such an approach did not accord, first, with s 165 of the Constitution of the Republic of South Africa, 1996, which declared judicial authority to vest in the courts and, secondly, with the entrenched principle that no one should be a judge in their own case; [345]

(b) that the final order to the effect that certain officials should be held liable for costs in their personal capacity was irregular. First, the officials had not been joined to the matter. Secondly, the rule *nisi* did not call any of them to show cause why they should not be held liable, the effect being that the trial court had no legal basis to exercise its judicial authority over them; [346]

(c) that in punishing these officials without notice and without having given them any opportunity to make representations, the trial court violated the officials' right to a fair hearing guaranteed by s 34 of the Constitution. While the officials did depose to affidavits, they did so in support of the MEC's case, and in particular so that he could not be held personally liable; the affidavits were not meant to show cause why they should not be found personally liable for costs; [347]

(d) accordingly, that the costs order be set aside. [348]

In *President of the Republic of South Africa v Public Protector* [349] the full court ordered the President to pay the costs of the application, including the costs of the second respondent's conditional counter-application, in his personal capacity on an attorney and client basis because 'the President was ill-advised and reckless in launching the challenge against the remedial action of the Public Protector'.

In *ABSA Bank Ltd and related matters v Public Protector* [350] the full court ordered the Public Protector in her official capacity to pay *(a)* the costs of Absa Bank Ltd, on an attorney and client scale, including the costs of three counsel; *(b)* 85% of the costs of the African Reserve Bank on an attorney and client scale, including the costs of three counsel; *(c)* 15% of the costs of the South African Reserve Bank on an attorney and client scale, including the costs of three counsel, *de bonis propriis*.

In *Gordhan v The Public Protector* [351] the conduct of the Public Protector, was, in summary, described as 'egregious' [352] and the following costs order was made against her:

> 'The Public Protector and Advocate Mkhwebane are ordered, jointly and severally, to pay Minister Pravin Jamnadas Gordhan, Mr Visvanathan Pillay and Mr George Ngakane Virgil Magashula's costs on the scale between attorney and client such costs to include the costs of two Counsel where so employed. It is further ordered that Advocate Mkhwebane shall pay such costs personally with her liability limited to 15% of those costs.'

In *Democratic Alliance v Public Protector* [353] the Public Protector brought an unnecessary application for leave to cross-appeal. There was no indication that the application was authorized by her office. She was ordered to pay the costs in her personal capacity. [354]

In *Ex parte Minister of Home Affairs* [355] the Minister of Home Affairs and the Director-General: Home Affairs dismally failed to oversee the passing of corrective legislation following an order of the Constitutional Court, made on 29 June 2017, declaring s 34(1)*(b)* of the Immigration Act 13 of 2002 unconstitutional and invalid, and suspending the declaration of invalidity

for 24 months so that Parliament could remedy the constitutional defects. The period of suspension expired on 29 June 2019. During 2022 the Minister launched an urgent *ex parte* application in the High Court in an attempt to revive the 2017 order. On 21 June 2022, the High Court granted an order directing that the 2017 order would remain operative pending the finalization of the application by the Minister in the Constitutional Court for a revival of the 2017 order, alternatively, pending the enactment of the necessary legislative amendments to the Immigration Act 13 of 2002, in the event that such amendments had been effected before the hearing of the application in Constitutional Court. In 2023, the Minister and the Director-General approached the Constitutional Court on an *ex parte* basis by way of an urgent direct access application for what was termed in the notice of motion a 'revival' of the 2017 order. Lawyers for Human Rights were admitted as an intervening party. The costs issues confronting the Constitutional Court were as follows:

> '[55] Lastly there is the issue of costs. Quite apart from the fact that LHR is entitled to the costs incurred to help resolve the appalling state of affairs brought about by the egregious remissness of the Minister and Parliament, there are the issues whether:
>
> *(a)* the applicants' legal representatives should be denied raising any fees to convey this court's displeasure at the dreadful manner in which this litigation has been conducted; and
>
> *(b)* for the same and additional reasons, the applicants should be ordered to pay LHR's costs from their own pockets.'

After an exposition of the facts relevant to the conduct (or lack thereof) of the Minister and the Director-General, as well as that of their legal representatives, and the relevant principles relating to costs orders, [356] the Court came to the conclusion that the litigation had been conducted in a dreadful manner, [357] and stated (footnotes omitted):

> '[111] I accept that, as far as the Minister and the Director-General are concerned, they were largely dependent on the advice of their lawyers. But that does not absolve them from culpability for the shambles in this case. There is little difference between their

> apologies and that proffered by Mr *Bofilatos SC*. It is a classic case of "too little, too late". The Minister is ultimately accountable for the fulfilment of the objectives of his Department and for the actions or failures of his officials. And it is the Minister who bears responsibility for the powers and functions of the executive assigned to him. As a Member of Cabinet, he is accountable to Parliament for the exercise of his powers and the performance of his functions. Apart from the Minister's constitutional responsibilities and accountability, an important further consideration is that a higher standard of conduct is expected from public officials.
>
> [112] I am prepared to accept that, as troubling a fact as that may be, the Minister was in the dark about this litigation and about the shoddy manner in which it was conducted. I have no reason to doubt the Minister's averments in that regard. On that basis, I take the view that the Minister should be held liable in his personal capacity for 10% of LHR's costs. In light of what I have said, there is, however, no basis to order that the costs to be paid personally must be on a punitive scale. There is no evidence of reprehensible conduct in the litigation by the Minister himself.
>
> [113] The Director-General is in a different position in respect of degree of culpability. On his own version under oath, the Director-General admits to gross negligence inasmuch as he failed to —
>
> *(a)* fully apply his mind to the contents of the affidavits, despite confirming during deposition their correctness under oath; and
>
> *(b)* inform and consult with the Minister prior to attesting to an affidavit on his behalf.
>
> [114] Furthermore, the Director-General advanced wholly unsustainable reasons for the failure to pass remedial legislation, namely the national lockdown pursuant to the Covid-19 pandemic and the fire at Parliament, events that happened long after the deadline for the enactment of remedial legislation had passed. These are serious aberrations. The Director-General is the most senior official in a government department and is its accounting officer. They are expected to lead by example. The conduct displayed in this case is unacceptable and deserving of censure. The personal costs order that will follow is a mark of this court's displeasure at the Director General's conduct. On these facts, his culpability for this shambolic litigation plainly exceeds the Minister's. In my view the Director-General must be held personally liable for 25% of LHR's costs. Again, though, there is no basis to mulct the Director-General in punitive costs, as his conduct cannot be described as reprehensible.'

The Court accordingly ordered the Minister and the Director-General to pay respectively 10% and 25% of the intervening party's costs *de bonis propriis*. [358]

As far as the conduct of the Minister's and Director-General's (former) legal representatives was concerned, the Court observed that costs orders *de bonis propriis* against legal representatives appear to be far more frequent than those depriving them of their fees. [359] Nonetheless, the Court deprived them of their fees [360] for the following reasons:

> '[97] The applicants' legal representatives have abysmally failed in their duty to represent their clients in the manner required by their professional rules. To recap, they:
>
> *(a)* inexplicably approached the High Court on an urgent ex parte basis for an order that, pending the application to this court, or the enactment of remedial legislation envisaged in the 2017 order, the provisions in s 34(1)*(b)* and *(d)* remain operative;

> *(b)* then approached this court, again on an ex parte basis, for an order "reviving" the 2017 order;
>
> *(c)* in both instances, failed to join the original applicant, LHR, and then failed to serve the papers on it;
>
> *(d)* troublingly failed or, worse, deliberately omitted, to mention the four decisions of this court that unequivocally held that, while this court can extend a suspension period before that period expires, it has no power to do so after the expiry of that period; and
>
> *(e)* stridently opposed LHR's intervention application in this court and then bizarrely used the inexcusable failure to join LHR by contending that LHR was not party to the proceedings and had no standing to make "damning statements".'

It is unusual to order an unsuccessful litigant in a fiduciary capacity to pay costs out of his own pocket. [361] The general rule is that a person suing or defending in a representative capacity may be ordered to pay costs *de bonis propriis* if there is a want of bona fides on his part, or if he acted negligently or unreasonably. [362] No order will be made where the representative has acted bona fide; a mere error of judgment does not warrant an order of costs *de bonis propriis*. [363]

Whether a person who acts in a representative capacity has acted bona fide, with due care and reasonably, must be decided in the light of the particular circumstances prevailing in the case with which the court is concerned. [364] The fact that the party has a substantial personal interest in the outcome of the matter constitutes an important factor in shaping such a decision. [365] In judging whether a representative party's conduct is reasonable or not the matter must be approached not from the point of view of a trained lawyer, but from the point of view of a man of ordinary ability bringing an average intelligence to bear on the question at issue. [366]

A person acting in a representative capacity who institutes an action in circumstances in which he can have no certainty that the action will be successful, and makes no provision for the defendant's costs, may be ordered to pay a successful defendant's costs *de bonis propriis*. [367]

In *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* [368] Fabricius J stated the following in relation to costs *de bonis propriis* against legal representatives:

> 'It is true that legal representatives sometimes make errors of law, omit to comply fully with the rules of court or err in other ways related to the conduct of the proceedings.
>
> This is an everyday occurrence. This does not, however, per se ordinarily result in the court showing its displeasure by ordering the particular legal practitioner to pay the costs from his own pocket. Such an order is reserved for conduct which substantially and materially deviates from the standard expected of the legal practitioners, such that their clients, the actual parties to the litigation, cannot be expected to bear the costs, or because the court feels compelled to mark its profound displeasure at the conduct of an attorney in any particular context. Examples are dishonesty, obstruction of the interests of justice, irresponsible and grossly negligent conduct, litigating in a reckless manner, misleading the court, gross incompetence and a lack of care. See, for instance, Cilliers et al *Herbstein & Van Winsen: The Civil Practice of the High Courts of South Africa* 5 ed vol 2 at 984. See also *Ward v Sulzer* 1973 (3) SA 701 (A) at 706G–707H.'

See also the discussion of *Ex parte Minister of Home Affairs* [369] in the notes above.

The court will in appropriate circumstances award costs *de bonis propriis* against:

- attorneys, [370]

- an office of State Attorney, [371]
- counsel, [372]
- trustees, [373]
- guardians, [374]
- company directors, [375]
- liquidators, [376]
- executors and administrators, [377]
- receivers, [378]

- debt counsellors, [379]
- a MEC in a provincial government, [380]
- a municipal manager [381] and even
- insolvents. [382]

A *curator ad litem* is prima facie protected against an order for costs *de bonis propriis*, [383] but if the conduct of the *curator* was wilful and reprehensible and the ward cannot pay the costs, the *curator* may be ordered to pay them himself. [384] A *curator* appointed in terms of the Prevention of Organised Crime Act 121 of 1998 occupies a fiduciary position but is protected against an order for costs *de bonis propriis* save where he acts without good faith. [385]

In general the courts do not grant orders for costs against a judicial officer in relation to the performance by him of such functions solely on the ground that he acted incorrectly. [386] This rule does not apply to judicial officers who are taken on review in respect of purely administrative actions performed by them. In *Priem v Hilton Stuart Trust* [387] a magistrate had refused to furnish reasons for judgment on the ground that the request did not comply with the local practice that the application had to be in a specific form with notice to other party. In ordering the magistrate to furnish the reasons the High Court held that he had

been acting as an administrative functionary in refusing to supply the reasons and not in a judicial capacity. The magistrate was ordered to pay the applicant's costs. [388] It is the existence of *mala fides* that introduces the risk of an order of costs being made against him *de bonis propriis*. [389] Costs may be awarded against a judicial officer, acting in a judicial capacity, where his conduct can be described as *male fide*, he has taken sides, where he has conducted himself maliciously or where there has been a gross illegality in the case. [390] Such an order can also be made against a judicial officer if he chooses to make himself a party to the merits of proceedings instituted in order to correct his action and should his opposition to such proceedings fail. [391]

Persons acting in a public capacity may also have this order made against them in a proper case. Orders have been made against a mayor, [392] a civil commissioner in connection with an election, [393] members of a committee, [394] the members of an irrigation board, [395] and the members of a village board. [396] See further the notes s v 'Costs against public officers and quasi-judicial bodies' below.

The Constitutional Court has granted orders of costs *de bonis propriis* where the conduct of the persons concerned showed a disregard for their professional responsibilities [397] and where they acted inappropriately and in an egregious manner. [398] In this regard the assessment of the gravity of the conduct was held to be objective and lying within the discretion of the court. [399]

In *Public Protector v South African Reserve Bank* [400] the majority of the Constitutional Court, in dismissing the Public Protector's appeal against a costs order *de bonis propriis* on an attorney and client basis, held, amongst others: [401]

> '[152] As mentioned, the source of a court's power to impose personal costs orders against public officials is the Constitution itself. The Constitution requires public officials to be accountable and observe heightened standards in litigation. They must not mislead or obfuscate. They must do right and they must do it properly. They are required to be candid and place a full and fair account of the facts before a court.
>
> [153] The purpose of a personal costs order against a public official is to vindicate the Constitution. These orders are not inconsistent with the Constitution; they are required for its protection because public officials who flout their constitutional obligations must be held to account. And when their defiance of their constitutional obligations is egregious, it is they who should pay the costs of the litigation brought against them, and not the taxpayer. This court has repeatedly affirmed the principle that a public official who acts in a representative capacity may be ordered to pay costs out of their own pockets in certain circumstances.
>
> [154] In *Black Sash II*, this court held that the common law rules regarding the granting of personal costs orders are well grounded and buttressed by the Constitution. The traditional common law tests of bad faith and gross negligence must be infused by the Constitution. Froneman J said that the question whether the conduct of a public official justifies the imposition of liability for personal costs can be answered by having regard to institutional competence and constitutional obligations. He went on to explain:

"From an institutional perspective, public officials occupying certain positions would be expected to act in a certain manner because of their expertise and dedication to that position. Where specific constitutional and statutory obligations exist the proper foundation for personal costs orders may lie in the vindication of the Constitution, but in most cases there will be an overlap."

[155] The Public Protector falls into the category of a public litigant. A higher duty is imposed on public litigants, as the Constitution's principal agents, to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. The need to hold government to the pain and duty of proper court process is sourced in the Constitution itself. This is because the Constitution regulates all public power and public officials are required to act in accordance with the law and the Constitution.

[156] In a concurring judgment in *Matatiele Municipality*, Sachs J held that the constitutional injunction for our democratic government to be accountable, responsive and open implies that candour is required from government officials when they are before the courts. This is also consistent with s 165(4) of the Constitution which requires organs of state to assist and protect the courts in order to ensure that they are effective. The Public Protector is therefore enjoined by the Constitution to observe the highest standards of conduct in litigation.

[157] Despite this clear authority that personal costs orders are constitutional and necessary in order to hold public officials to account when they fail, for example, to fulfil their constitutional obligations, the Public Protector argues for an exception in her case. There is no merit in the Public Protector's contention that the independence of her office and proper performance of her functions demand that she should be exempted from the threat of being mulcted with adverse personal costs orders. On the contrary, personal costs orders constitute an essential, constitutionally infused mechanism to ensure that the Public Protector acts in good faith and in accordance with the law and the Constitution.

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[158] The imposition of a personal costs order on a public official, like the Public Protector, whose bad faith or grossly negligent conduct falls short of what is required, vindicates the Constitution. The Supreme Court of Appeal in *Gauteng Gambling Board* opined that public officials who act improperly in "flagrant disregard of constitutional norms" should be personally liable for legal costs incurred by the state. The Supreme Court of Appeal reasoned that the imposition of personal liability might have a "sobering effect on truant public office bearers" and would avoid the taxpayer ultimately having to bear those costs.

[159] The fears that the Public Protector has about the impact of a personal costs order on the institution of the Public Protector are unwarranted. Personal costs orders are not granted against public officials who conduct themselves appropriately. They are granted when public officials fall egregiously short of what is required of them. There can be no fear or danger of a personal costs award where a public official acts in accordance with the standard of conduct required of them by the law and the Constitution.

[160] Furthermore, granting a personal costs order in a case where it is warranted will not open the floodgates for further personal costs orders because, as this court has emphasised, whether a personal costs order should be granted must be determined "in the light of the particular circumstances of each and every case". The only relevant question is whether the High Court misdirected itself in concluding that the Public Protector did not act in good faith, and behaved in an unacceptable and secretive manner.

. . .

[220] It does not follow that a punitive costs order will always be justified in circumstances where a personal costs order is warranted. An order for personal costs against a person acting in a representative capacity is in itself inherently punitive. The imposition of costs on an attorney and client scale is an additional punitive measure. This could, as pointed out in the first judgment, be viewed as "double punishment". While the test for awarding a personal costs order or costs on a punitive scale may overlap, an independent, separate enquiry should be carried out by a court in respect of each order. Both personal and punitive costs orders are extraordinary in nature and should not be awarded "willy-nilly", but rather only in exceptional circumstances.

[221] This court has endorsed the principle that a personal costs order may also be granted on a punitive scale. The punitive costs mechanism exists to counteract reprehensible behaviour on the part of a litigant. As explained by this court in *Eskom*, the usual costs order on a scale as between party and party is theoretically meant to ensure that the successful party is not left "out of pocket" in respect of expenses incurred by them in the litigation. Almost invariably, however, a costs order on a party and party scale will be insufficient to cover all the expenses incurred by the successful party in the litigation. An award of punitive costs on an attorney and client scale may be warranted in circumstances where it would be unfair to expect a party to bear any of the costs occasioned by litigation.'

In *Economic Freedom Fighters v Gordhan* [402] two cases served before the Constitutional Court. In case no CCT 232/19 the Court held [403] that as the Public Protector is a state institution, the *Biowatch* principle [404] was not applicable to her office. [405] The Court therefore reversed the costs order that the High Court had made against her office. In case no CCT 233/19 the Court held [406] that the costs order by the High Court against the Public Protector in her personal capacity had been unfounded. The Court pointed out that personal costs orders against public officials were primarily aimed at vindicating the Constitution and ensuring that public officials who flout the Constitution were held accountable. In this instance the High Court furnished no reasons for the personal costs order made by it and, evidently, there was no factual basis for the order. Consequently, the order was set aside.

In *Mlatseni v Road Accident Fund* [407] the court warned that 'the time may well have arrived for orders of costs *de bonis propriis* to be awarded against employees of the defendant who give instructions that have the effect of frivously frustrating legitimate claims'. In *Bovungana v Road Accident Fund* [408] the court, in holding that the 'time for such orders has now arrived', ordered the RAF and two of its officials to pay the costs of a futile application for postponement brought on the first day of trial, jointly and severally, on the scale as between attorney and client. In *Hlatshwayo v Road Accident Fund* [409] the full court held [410] that due to late settlements on the date of trial in the cases before it, when enormous costs of litigation had already been incurred or could not be prevented, occasioned by non-compliance with the Uniform Rules of Court pertaining to pre-trial conferences and judicial case management procedures, the chief executive officer and the board of the RAF were liable for costs *de bonis propriis*. The following order was made:

'[227] Consequently an order is hereby made as follows:

227.1 The CEO (Mr Letsoalo) and the Board are hereby directed to pay out of their own pockets, jointly and severally the one paying the other to be absolved, the costs connected to and occasioned by the late settlement in each matter.

227.2 The costs referred to in paragraph 227.1 shall include the costs to date connected to or associated with the enquiry proceedings herein.

227.3 The costs occasioned by or connected to the late settlements herein shall include costs of two counsel where applicable.' (Emphasis added by the court.)

In *Solidarity v South African Broadcasting Corporation* [411] Lagrange J ordered [412] the officials of the SABC who appeared to have authorized the dismissals of the applicants with 'reckless disregard for the pending applications and with little regard for the relative costs and benefits to the SABC of doing so', to file affidavits within five days of the date of the order 'showing cause why they should not personally be held liable for all or part of the costs of this application, such costs to be paid on the

attorney–own-client scale and including the costs of two counsel'.

A costs order *de bonis propriis* must be supported by facts and cannot be granted in the abstract. A court would be derelict in its duties if it imposed such an order where the facts did not justify it. Similarly, a court would be derelict in its duties if it failed to furnish the reasoning for imposing the order. [413]

It has been laid down that there must be a prayer for an order of costs *de bonis propriis* before the court can make it, [414] though such order has been made even where there was no prayer. [415]

The application for the order should be made at the time judgment is given in the suit, [416] though the court may make the order on a subsequent application or in a subsequent suit, [417] if application is made timeously. [418]

In *Mogale City Municipality v Fidelity Security Services* [419] the full court was not placed in a position to determine whether a punitive costs order should be made and to hold officials of the municipality liable for costs. Instead it adopted the following approach: [420]

> 'What does seem appropriate, in the public interest, is that the circumstances be drawn to the attention of the Minister of Local Government and the MEC, Local Government, Gauteng. Accordingly, we shall direct the registrar to forward to those officials copies of the six judgments given in the course of the litigation between the parties, with a request to investigate the matter and determine whether any grounds exist to suppose public funds are being wastefully expended such as contemplated by the Local Government: Municipal Finance Management Act 56 of 2003. Furthermore, the minister and the MEC shall be requested to report to the Judge President of this division their findings, within 12 months of the referral to them of the judgments.'

In *Mahapane v Mohokare Local Municipality* [421] the court labelled the conduct of the speaker and mayor of the Mohokare Local Municipality (i e the second and third respondents) as 'deliberate and grossly negligent' and held that their conduct had to be be 'investigated and managed by the Municipality' (i e the first respondent) as they could not be allowed to escape with impunity. [422] The following order was made:

'[8] **ORDER**

1. The First Respondent is ordered to pay the costs of this case including the wasted costs incurred on 3 November 2022.
2. The Council of the First Respondent is directed to investigate and determine whether, in terms of section 176(2) of the Local Government: Municipal Finance Management Act 56 of 2003, the costs ordered above should be recovered from any political office bearers and officials.'

Costs against public officers and quasi-judicial bodies. The rule that a successful party will be deprived of his costs only because of some default on his part admits of an exception. This is in the case of a public authority (officer or body) which comes to court in good faith to bring proceedings — though it more frequently happens that the public authority comes to oppose proceedings brought against it. Even though such authority may be unsuccessful, the court may decline to award costs against it, on the principle that a public authority should not be deterred from engaging in litigation, in the fulfilment of its public duty, by the prospect of being mulcted in costs if unsuccessful.

In *Coetzeestroom Estate and Gold Mining Co v Registrar of Deeds* [423] the general rule was laid down that an order for costs will not be awarded against a public official where his action or attitude, though mistaken, was bona fide. [424] The Appellate Division has, however, stressed several times that the rule should not be elevated into a rigid one of universal application which fetters the judicial discretion. [425] In the application of the general rule, and in the exercise of a judicial discretion, the courts have often made no order as to costs in matters of this kind. [426]

Where, however, a public officer acts in a judicial or quasi-judicial capacity and no costs are sought against him unless he opposes, the position is different: if he opposes unsuccessfully, he should pay the costs occasioned by his opposition, except in certain circumstances. [427] In

Chairman of the Board of the Sanlam Pensioenfonds (Kantoorpersoneel) v Registrar of Pension Funds [428] the court, in applying this principle, awarded costs against the Registrar of Pension Funds.

If the State appears as an ordinary litigant the ordinary rule applies and costs follow the event. [429]

For costs *de bonis propriis* against public officials in their personal capacity, see the notes s v 'Rule 6. Costs *de bonis propriis*' above.

Costs in divorce actions. In a divorce action the court is not bound to make an order for costs in favour of the successful party. [430] The court is, however, entitled, having regard to the means of the parties and their conduct in so far as it may be relevant, to make such order as it considers just, including an order that the costs of the proceedings be apportioned between the parties. [431]

Costs in Road Accident Fund actions. It often happens that in a damages claim against the Road Accident Fund ('the RAF'), the court is presented with an agreement containing a draft order settling the merits of the action and postponing the issue of *quantum sine die*. The agreement normally provides that the RAF is liable for costs to date, including the costs of counsel and (unidentified) medico-legal experts 'who assessed and filed medico-legal reports on behalf of the plaintiff'. In *Mbatha v Road Accident Fund* [432] Satchwell J, pointing out that there was no expert evidence yet before the court, and also no tangible result in the form of proven damages for the plaintiff, refused to endorse the agreement as to the payment of costs, ordering instead that the costs be costs in the cause. [433]

Costs in constitutional matters. See the notes to s 38 of the Constitution s v 'Appropriate relief-awarding costs' in Volume 1 third edition, Part A.

Costs in matters of public importance. Private litigants who bona fide seek to ventilate issues of public importance are usually immunized from adverse costs orders. [434]

***Amicus curiae*.** An *amicus curiae* appears not as a party, but as a friend of the court, and it is well established that it is thus not entitled to costs. [435] On the other hand, costs orders may be made against an *amicus curiae*. [436]

No prayer for costs. The failure to include a prayer for costs in the claims does not debar the court from awarding the successful party his costs where the unsuccessful party has had

notice of the prayer, even though an amendment is not formally asked for. [437] The position maybe different when the unsuccessful party has not appeared and has had no notice that costs will be claimed, for clearly equity requires that he

should be given such notice. [438]

Costs have been granted upon application at the hearing of a contested matter when the application was made at the time judgment was given and the opposite party was present or represented; [439] when in similar circumstances an amendment was formally applied for to include a prayer for costs; [440] and when notice had been given beforehand that costs would be applied for. [441] In uncontested matters or matters where the opposite party does not appear at the hearing the court will award costs, although not prayed for in the pleadings, provided that there is prior notice to the opposite party that they will be applied for; [442] or the court may award costs but reserve leave to the party affected to move to set aside the order as to costs within a stated time. [443] Occasionally, costs have been ordered without notice when applied for at the time of giving judgment, in cases where the defendant did not oppose the main claim, [444] but it is submitted that the better practice is to insist upon notice in all uncontested matters or matters where there is no appearance at the hearing. [445]

If a subsequent application is made to recover costs not asked for and not granted at the time of judgment, notice of such application must be served upon the respondent. [446] If no notice is given, the court may issue a rule *nisi*, but the applicant will have to bear the costs of the rule. [447] In any event the costs of any subsequent application for costs must be borne by the applicant, [448] though if the respondent needlessly opposes, he may have to pay whatever extra costs are occasioned by his opposition, or at any rate his own costs. [449]

RS 22, 2023, D5-36D

Costs the only issue. When the merits of a matter have been disposed of, for example, by an offer which concedes the claim, and only the costs of the whole case remain to be decided, the issue of costs must be decided on broad general lines and not on lines that would necessitate a full hearing on the merits. [450]

The position is different where a litigant withdraws his case and thereafter seeks to avoid an order of costs against him. 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 there must be very sound reasons for depriving the defendant or respondent of his costs. [451]

Appeal on costs. See the notes to s 19 of the Superior Courts Act 10 of 2013 s v 'Appeals on costs only' in Volume 1 third edition, Part D.

RS 21, 2023, D5-37

Costs on appeal. See the notes to s 19 of the Superior Courts Act 10 of 2013 s v 'Power to award costs on appeal' in Volume 1 third edition, Part D.

Previous costs unpaid. The court will as a general rule not permit a party who has been unsuccessful in an action to harass the other party with further proceedings concerning the same cause of action until he has paid the costs of the unsuccessful action. [452] If further proceedings are instituted, the defendant [453] can apply to court on notice of motion to stay the proceedings, and the court has a discretion to order a stay until the costs of the previous proceedings have been paid. [454]

The basis of the rule is that since the former judgment is presumed to be correct, it is prima facie vexatious to reopen the matter without paying the costs awarded under the former judgment. [455] If there is a mere inability to pay and where there is no *mala fides* or intention to act vexatiously, the court is entitled to look at all the surrounding circumstances and then in its discretion determine whether or not the earlier costs should be paid. [456] Generally, if the court orders absolution from the instance, the plaintiff may not commence a fresh action until he has paid the previous costs. [457]

RS 21, 2023, D5-38

The following requirements must be satisfied before a stay will be granted:

(a) The parties to the previous action must have been substantially the same. [458]

(b) The issue between the parties must have been the same as, or closely connected to, [459] the issue in the later action. The court will not order a stay of action if the causes of action are different, even if they arise out of the same facts: in such a case there is no vexatiousness or abuse of the court's process. [460]

(c) There must have been a definite order on the plaintiff to pay the costs of the previous proceedings. [461] A consent to judgment has the same effect as a judgment for costs. [462]

(d) The plaintiff must in fact not have paid them. [463] It is sufficient if the plaintiff has tendered the costs before the plea is lodged, [464] but a tender after plea is not a sufficient answer. [465] Nor is it a sufficient answer to reduce the amount claimed in the second summons by deducting the amount of costs awarded on the first case. [466]

(e) The costs must have been ascertained, [467] and must have been demanded. [468] Notice of the application for a stay is in itself a sufficient demand for the purpose of this rule. [469]

(f) It is immaterial that the first proceedings were brought in another court. [470]

RS 4, 2017, D5-39

If the first proceedings were interlocutory, the position seems to be that unless a special order for the taxation of the costs of an interlocutory matter is made by the court, no bill of costs shall be presented until the conclusion of the action. Where such order is made, it probably means that the court is of the opinion that the action ought not to proceed until these costs have been paid. [471]

In the exercise of its discretion the court will judge each case on its merits. [472] The following principles are applied:

(a) The court will not order a stay where to do so would lead to injustice. [473] Thus, it will not stay an application for a spoliation order on the ground that previous costs are unpaid. [474]

(b) If a plaintiff asks the court to dispense with the rule, he must show exceptional circumstances. [475]

(c) If the party who owes the costs is able to pay them, this would incline the court towards exercising its discretion in favour of a stay. If the party who owes the costs is unable to pay, and is therefore not acting in bad faith, or with the intention of harassing the other party, the court will look at all the surrounding circumstances and then in its discretion determine whether or not a stay should be ordered. [476] The law seeks within limits to protect a party against litigation which operates harshly or oppressively, even if the other party is honestly seeking to assert what he believes to be his right. [477]

(d) If the parties have come to an arrangement as to previous costs, and the applicant is amply secured thereunder against non-payment, a stay will be refused. [478]

(e) If a plaintiff had previously made an unsuccessful application to proceed as a pauper, and had failed to pay the costs awarded against him on such an application, a stay was granted, for in the circumstances his attitude was held to be vexatious. [479]

(f) A plaintiff could not, simply by pleading set-off of prior costs and eliciting a plea, deprive a defendant sued for a second or further time of his right to apply for a stay until the previous costs have been paid. To allow a plaintiff to do so would afford litigious plaintiffs an undesirable device with which to meet otherwise meritorious stay applications. [480]

(g) The court will sometimes order absolution from the instance instead of ordering a stay of action. [481] In the exercise of its inherent discretion to prevent an abuse of the process of the courts the High Court will even summarily dismiss a plaintiff's action, without hearing evidence, but will do so only in very exceptional cases. It must be plain and obvious that the action is frivolous or vexatious, and that its failure is a foregone conclusion. The test is whether the action is 'so groundless that no reasonable person can possibly expect to obtain any relief in it'. [482]

1 See further Cilliers *Costs*.

2 *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 at 488; *Maloney's Eye Properties BK v Bloemfontein Board Nominees Bpk* 1995 (3) SA 249 (O) at 257. See also *Cobb v Levy* 1978 (4) SA 459 (T) at 464–5; *Jonker v Schultz* 2002 (2) SA 360 (O) at 363H–I; *Rabinowitz v Van Graan* 2013 (5) SA 315 (GSJ) at 324E; *Agility Holdings (Pty) Ltd v Company Tribunal* (unreported, GP case no 92630/2019 dated 11 February 2022) at paragraph [3.6]; *Ideal Trading 199 CC v Polokwane Local Municipality* (unreported, LP case no 3087/2021 dated 15 August 2023) at paragraph [6].

3 See *Nationwide Detectives & Professional Practitioners CC v Standard Bank of Namibia Ltd* 2008 (6) SA 75 (NmHC) at 76I–J.

4 *Nationwide Detectives & Professional Practitioners CC v Standard Bank of Namibia Ltd* 2008 (6) SA 75 (NmHC) at 82D. See further the notes s v 'Rule 1. Costs to a successful party' below.

5 See De Villiers (1959) 22 *THRHR* 197.

6 *Die Voorsitter van die Dorpsraad van Schweizer-Reneke v Van Zyl* 1968 (1) SA 344 (T) at 345, cited with approval in *Cobb v Levy* 1978 (4) SA 459 (T) at 464–5; *Ngubane v Marine & Trade Insurance Co Ltd* 1983 (3) SA 417 (SE) at 419; *Murray v AA Mutual Insurance Association Ltd* 1984 (3) SA 496 (E) at 498; *Cambridge Plan AG v Cambridge Diet (Pty) Ltd* 1990 (2) SA 574 (T) at 595. See also the remarks of Van Heerden J in *Mediterranean Shipping Co Ltd v Speedwell Shipping Co Ltd* 1989 (1) SA 164 (D) at 170; and see *Ben McDonald Inc and Another v Rudolph and Another* 1997 (4) SA 252 (T) at 257G–J; *Protea Life Co Ltd v Mich Quenet Financial Brokers* 2001 (2) SA 636 (O) at 643B–C; *Jonker v Schultz* 2002 (2) SA 360 (O) at 363I–J.

7 *Hickson v Colonial Government* (1907) 24 SC 293; *Leach v Daubermann* 1907 EDC 185.

8 In *Randall v Baisley* 1992 (3) SA 448 (E) it was held (at 454) that a distinction must be drawn between being put in a position to litigate, on the one hand, and preparing for a contemplated action, on the other. Costs falling within the former category are generally not recoverable by the successful litigant as between party and party, while costs falling within the latter category are recoverable.

9 Vol 2 953; and see *Osho Agri Investments (Pty) Ltd v Honey Attorneys* (unreported, FB case no 3088/2021 dated 6 June 2022) at paragraph [8].

10 1959 (1) SA 703 (W).

11 *Hawkins v Gelb* 1959 (1) SA 703 (W) at 705C–E; *Masango v Road Accident Fund* 2016 (6) SA 509 (GJ) at 516B–E.

12 *Hawkins v Gelb* 1959 (1) SA 703 (W) at 705E–F; *Osho Agri Investments (Pty) Ltd v Honey Attorneys* (unreported, FB case no 3088/2021 dated 6 June 2022) at paragraph [9]. See *Cambridge Plan AG v Cambridge Diet (Pty) Ltd* 1990 (2) SA 574 (T) for a discussion of the different 'scales' of attorney and client costs. See also *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at 21F–22E.

13 In *Ben McDonald Inc and Another v Rudolph and Another* 1997 (4) SA 252 (T) Van Dijkhorst J formulated the difference as follows (at 257G–J):
'1. Party and party costs: These are costs awarded against the losing party in litigation . . . with a view to a full indemnity to the successful party but limited to costs necessary or proper for the conduct of the litigation . . . 2. Attorney and client costs: . . . In cases where the losing party in litigation is to pay them to the successful party this means all reasonable costs incurred on behalf of the client although not strictly necessary or "proper". In practice this means that these costs are taxed according to the tariff, but generous where there is some leeway. Items not in the tariff may be included and so may amounts which would be reduced on taxation on a party and party basis.'
See also *Protea Life Co Ltd v Mich Quenet Financial Brokers* 2001 (2) SA 636 (O) at 643B–644H; *Society of Advocates of KwaZulu-Natal v Levin* 2015 (6) SA 50 (KZP) at 55B–E; *Osho Agri Investments (Pty) Ltd v Honey Attorneys* (unreported, FB case no 3088/2021 dated 6 June 2022) at paragraph [11].

14 *Hawkins v Gelb* 1959 (1) SA 703 (W) at 705.

15 *Heney v Van Zyl* 1956 (4) SA 6 (C).

16 *Francis v Dutch Reformed Church, George* 1913 CPD 179.

17 *De Villiers v Murraysburg School Board* 1910 CPD 535; *Ex parte Estate Badenhorst* 1964 (3) SA 774 (SR) at 777.

18 *Breetzke v Union Government* 1911 EDL 394; *Roos v Morkel and Somerset West Municipality* 1915 CPD 201; *De Villiers v Stadsraad van Pretoria* 1967 (4) SA 533 (T); *Van Wyk v Protea Assurance Co Ltd* 1974 (3) SA 499 (SWA).

19 *Haeusler v Haeusler* 1956 (1) SA 60 (N) at 62; *Tshabalala v Hood* 1986 (2) SA 615 (O) at 619.

20 *Cohen v D Isaacs & Co* 1918 CPD 581.

21 *Cohen v D Isaacs & Co* 1918 CPD 581.

22 *Moxham v Gibson* 1946 NPD 168.

23 *North & Son v Malcomess & Co* (1909) 30 NLR 18; *Estate Brunt v Nel* 1937 OPD 125. In *Barnard v SA Mutual Fire & General Insurance Co Ltd* 1979 (2) SA 1012 (SE) an action instituted in the Supreme Court was settled before trial for an amount within the jurisdiction of the magistrate's court, on the basis that the defendant pay the plaintiff's taxed bill of costs as between party and party. The agreement did not stipulate that such costs were to be taxed on the magistrate's court scale. It was held that in the circumstances it could not be said that the parties intended anything else but that the costs should be taxed on the Supreme Court scale.

24 *Kevans v Joyce* [1897] 1 Ir Rep 1.

25 For the difference between costs on the attorney and client scale and costs *de bonis propriis*, see *Ex parte Minister of Home Affairs* 2024 (2) SA 58 (CC) at paragraphs [91]–[100]; *Pieter Bezuidenhout-Larochelle Boerdery (Edms) Bpk v Wetorius Boerdery (Edms) Bpk* 1983 (2) SA 233 (O).

26 *Keyter v Terblanche* 1935 EDL 186; *Estate Brunt v Nel* 1937 OPD 125; *Markman v Richardson* 1969 (3) SA 465 (E) at 467; *Tshabalala v Hood* 1986 (2) SA 615 (O) at 619.

27 Cf *DE v RH* 2015 (5) SA 83 (CC) at 105D–E. In *Competition Commission of South Africa v Pioneer Hi-Bred International Inc* 2014 (2) SA 480 (CC) it was held that when a state actor is litigating in the course of fulfilling its statutory duties, it should not be inhibited in the bona fide fulfilment of its mandate by the threat of an adverse costs award (at paragraphs [23]–[24]); and see *Electoral Commission of South Africa v Democratic Alliance* 2021 (5) SA 476 (SCA) at paragraph [58].

28 The scope of qualifying expenses is considered, with full reference to earlier authority, in *Köhne v Union & National Insurance Co Ltd* 1968 (2) SA 499 (N). See also *Champion v Morkel* 1971 (2) SA 121 (R) at 128; *City Deep Ltd v Johannesburg City Council* 1973 (2) SA 109 (W); *Julies v Cape Town Municipality* 1976 (3) SA 138 (C); *Owen v Owen* 1979 (2) SA 568 (C); *Administrator, Cape v Buffalo Park Township (Pty) Ltd* 1980 (2) SA 430 (SE); *Randall v Baisley* 1992 (3) SA 448 (E) at 453D–454C. As to allowances to expert witnesses for subsistence and income forfeited, see the notes to Part D4 above.

29 *Randall v Baisley* 1992 (3) SA 448 (E) at 454A–C. See also *Van Deventer v Commercial Union Insurance Co Ltd* 1997 (4) SA 890 (T), where it was held (at 891I–892H) that where experts consult with counsel in order to be informed of the issues and matters on which they would be required to testify and to limit those issues to a minimum, their fees for the consultation fall within the ambit of the qualifying process and are allowable as qualifying fees.

30 *City Deep Ltd v Johannesburg City Council* 1973 (2) SA 109 (W); *Community Development Board v Katija Suliman Lockhat Trust* 1973 (4) SA 225 (N) at 228–9; *Van Wyk v Protea Assurance Co Ltd* 1974 (3) SA 499 (SWA); *Ferreira v Ferreira* 1977 (4) SA 618 (O) at 620; *Luvuno v Southern Insurance Co Ltd* 1980 (2) SA 931 (D) at 934; *South African Forestry Co Ltd v New York Timbers Ltd* 2001 (4) SA 884 (T) at 888D–G; *Transnet Ltd t/a Metrorail v Witter* 2008 (6) SA 549 (SCA) at 558G; *AD v MEC for Health and Social Development, Western Cape* 2017 (5) SA 134 (WCC) at 159B–H.
The request that qualifying fees be allowed need not necessarily be made before judgment: it may be made immediately upon judgment being given or 'very soon' thereafter (*Lynmar Investments (Pty) Ltd v South African Railways and Harbours* 1975 (4) SA 445 (D)). Proper notice should, however, be given to enable the other party to be heard on the aspect of qualifying fees (*Letsoale v Road Accident Fund* 2023

(6) SA 533 (GP) at paragraph [60]).

31 *Stauffer Chemical Co and Another v Safsan Marketing and Distribution Co (Pty) Ltd* 1987 (2) SA 331 (A) at 354I–355H; *Transnet Ltd t/a Metrorail v Witter* 2008 (6) SA 549 (SCA) at 560A–D.

32 *Transnet Ltd t/a Metrorail v Witter* 2008 (6) SA 549 (SCA) at 560A–D.

33 *Breetzke v Union Government* 1911 EDL 394; *Roos v Morkel and Somerset West Municipality* 1915 CPD 201; *De Villiers v Stadsraad van Pretoria* 1967 (4) SA 533 (T); *Van Wyk v Protea Assurance Co Ltd* 1974 (3) SA 499 (SWA); *Theron, Van der Poel, Brink, Roos v Simonsig Landgoed* 1994 (4) SA 204 (A) at 208D–G.

34 As was done in, for example, *Köhne v Union & National Insurance Co Ltd* 1968 (2) SA 499 (N) at 500. See also *Letsoale v Road Accident Fund* 2023 (6) SA 533 (GP) at paragraph [60]. An agreement relating to a claim for bodily injuries to pay an amount as damages plus taxed costs plus such medico-legal fees as are allowed by the taxing officer, includes the qualifying fees of medical experts (*Muller v AA Mutual Insurance Ass Ltd* 1973 (2) SA 787 (T)).
In *TM obo MM v MEC for Health, Mpumalanga* 2023 (3) SA 173 (MM), the High Court was approached to make a settlement agreement an order of court. The agreement provided, amongst other things, for the payment of preparation, qualifying, reservation and consultation fees 'if any' of all 24 experts listed in the draft order. Legodi JP was not impressed with the use of the words 'if any' and issued a directive raising numerous questions pertaining to the fees of the experts (at paragraph [85]). The plaintiff's attorneys were directed to file an affidavit dealing with the questions and were also given an opportunity to file written heads of argument in that regard. Legodi JP was not satisfied with the response contained in the affidavit and heads of argument filed (at paragraphs [86]–[91]) and issued a further directive in terms of which the experts involved were directed to confirm on affidavit that they had been reserved, consulted for the purpose of trial, prepared for trial and were entitled to qualifying expenses (at paragraph [93]). The plaintiff's attorney filed an affidavit in response to the latter directive stating that due to time constraints he was not able to obtain an affidavit from each expert. Consequently, at the commencement of the hearing Legodi JP requested the plaintiff's counsel to deal with the non-compliance with the directive by the experts (at paragraph [96]). Eventually, still being unsatisfied, Legodi JP made the following order, amongst others (at paragraph [107]):
'11. The experts identified in para 3.2 of the draft order and to whom the email of 9 September 2021 is said to have been sent, notifying them of the date of trial as 22 November 2021, are hereby ordered to file affidavits with the registrar of this court by not later than *16h00 on 4 April 2022* wherein they deal with the followings:
11.1 Whether they were ever consulted by the plaintiff's legal practitioners for trial, prepared for trial, reserved for trial and whether they are entitled to qualifying fees as claimed in the draft order discussed in this judgment and insisted on by Mr Joubert in his affi davit deposed to on 24 January 2022.
11.2 Whether the questions as quoted in [85] of this judgment were ever brought to their attention by Mr Joubert.
11.3 Whether the directive as quoted in [93] of this judgment was ever brought to their atten tion by Mr Joubert and, if so, why they did not comply therewith by fi ling affi davits as so directed by the court, and regard should also be had to the assertions made by Mr Joubert as quoted in [94] and [95] of this judgment.
12. The registrar of this court is hereby directed to send a copy of this judgment directly to the plaintiff's experts at the email addresses used by the plaintiff's attorneys as per the email of 9 September 2021.
13. The Legal Practice Council is hereby directed to consider whether the conduct of all legal practitioners for the plaintiff in this matter has made them guilty of misconduct . . . considering . . . concerns raised in this judgment.
14. Insofar as the MEC for Health, Mpumalanga, may have an interest in this matter, including the Road Accident Fund, regarding experts' costs and the conduct of their attorneys in easily agreeing to experts' costs that may not have been incurred in medical-negligence and RAF matters generally, as discussed in this judgment, the registrar of this court is hereby directed to bring a copy of this judgment to the attention of both the MEC and the chief executive officer of the Road Accident Fund.
15. Each party is to pay its own costs regarding the proceedings of 9 February 2022.' (Emphasis added by the court.)
On appeal (against the High Court's finding that there was an illegal contingency agreement underlying the settlement agreement), the Supreme Court of Appeal, *sub nomine Mucavele v MEC for Health, Mpumalanga Province* (unreported, SCA case no 889/2022 dated 11 October 2023), set aside the whole of the order made by Legodi JP (at paragraph [20]).

35 2014 (1) SA 415 (GSJ).

36 At 440I–441A.

37 *Olympia Motors & Engineering Works (Pty) Ltd v Moller* 1949 (3) SA 78 (T); and see *Dunn v Port Alfred Municipality* (1936) 53 *SALJ* 76; *Martin NO v Road Accident Fund* 2000 (2) SA 1023 (W) at 1026H–I.

38 *Martin NO v Road Accident Fund* 2000 (2) SA 1023 (W) at 1026I–1027A.

39 *Martin NO v Road Accident Fund* 2000 (2) SA 1023 (W) at 1029C; *Qunta v Road Accident Fund* 2008 (6) SA 83 (E) at 85H–86B. See also Beverly Shiells 'The impasse of reserved costs — the winning party does not take it all' 2018 (March) *De Rebus* 30–1.

40 *Carlis v Hay* 1903 TS 317: *Craig v Kopermijn Ltd* 1926 TPD 63; *Delfos en Atlas Copco (Edms) Bpk v VV Bande (Edms) Bpk* 1972 (3) SA 907 (O); *Kroonstad Verbruikers Koöp Bpk v National Egg Producers Co-op Ltd* 1981 (3) SA 674 (O); *Mbekeni v Jika* 1995 (1) SA 423 (Tk) at 424F–G.

41 *O'Reilly v Lakofski* 1933 WLD 145 at 148; *Van Heerden v Tarr* 1959 (2) SA 328 (E); *Ferreira v Ferreira* 1977 (4) SA 618 (O) at 619; *Greenberg v Mortimer* 1979 (4) SA 642 (T); *Mbekeni v Jika* 1995 (1) SA 423 (Tk) at 424F–G; *Protea Life Co Ltd v Mich Quenet Financial Brokers* 2001 (2) SA 636 (O) at 647B–D.

42 See the *excursus* to rule 41 s v 'Postponement' in Part D1 above.

43 See the notes to rule 28(9) s v 'Unless the court otherwise directs, be liable for the costs thereby occasioned' in Part D1 above.

44 *Burger v Kotze* 1970 (4) SA 302 (W).

45 *SAR & H v Chairman, Bophuthatswana Central Road Transportation Board; SATS v Chairman, Bophuthatswana Central Road Transportation Board* 1982 (3) SA 629 (B) at 632.

46 *Ramakulukusha v Commander, Venda National Force* 1989 (2) SA 813 (V) at 852–3.

47 *Botes v Potchefstroom Municipality* 1940 TPD 113; *Ferreira v Endley* 1966 (3) SA 618 (E) at 623E–H.

48 *Fripp v Gibbon & Co* 1913 AD 354; *Kruger Bros & Wasserman v Ruskin* 1918 AD 63 at 69; *Merber v Merber* 1948 (1) SA 446 (A) at 453; *Gelb v Hawkins* 1960 (3) SA 687 (A) at 694; *Norwich Union Fire Insurance Society Ltd v Tutt* 1960 (4) SA 851 (A) at 854; *Cronje v Pelser* 1967 (2) SA 589 (A) at 593; *Graham v Odendaal* 1972 (2) SA 611 (A) at 616; *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (2) SA 621 (CC) at 624B–C; *Erf One Six Seven Orchards CC v Greater Johannesburg Metropolitan Council (Johannesburg Administration)* 1999 (1) SA 104 (SCA) at 109A–B; *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) at 1055F–G; *Naylor v Jansen* 2007 (1) SA 16 (SCA) at 23F–28F; *St Clair Moor v Tongaat-Hulett Pension Fund* 2019 (3) SA 465 (SCA) at 481A; *Griessel NO v De Kock* 2019 (5) SA 396 (SCA) at 406C–D; *Motala v Master, North Gauteng High Court* 2019 (6) SA 68 (SCA) at 102G; *First Rand Bank Limited v Xolisa General CC; Naude v Xolisa General CC; Cedar Point Trading 342 (Pty) Ltd v Xolisa General CC* (unreported, GJ case nos 2020/26987; 2021/19335; 2021/21599 dated 7 December 2022) at paragraph [4]; *Moodley v Adzam Trading 48 (Pty) Limited* (unreported, GJ case no 32779/2020 dated 15 December 2022) at paragraph [23]. On the extent to which ethical considerations may enter into the exercise of the court's discretion as to costs, see *Van der Merwe v Strydom* 1967 (3) SA 460 (A). See also *Gamlan Investments (Pty) Ltd v Trilion Cape (Pty) Ltd* 1996 (3) SA 692 (C) at 700C–E; *Jonker v Schultz* 2002 (2) SA 360 (O) at 364A–B; *Treatment Action Campaign v Minister of Health* 2005 (6) SA 363 (C) at 371B–C; *McDonald t/a Sport Helicopter v Huey Extreme Club* 2008 (4) SA 20 (C) at 22A–B; *LP v PR* 2018 (3) SA 507 (WCC) at 513D–514A; *South African Broadcasting Corporation SOC Ltd v South African Broadcasting Corporation Pension Fund* 2019 (4) SA 608 (GJ) at 647D–650B; *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at 298E; the two majority judgments in *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs, KwaZulu-Natal Provincial Government* 2020 (4) SA 453 (SCA) at paragraph [45]; *Central Energy Fund SOC Ltd v Venus Rays Trade (Pty) Ltd* 2022 (5) SA 56 (SCA) at paragraph [78]; *K obo M v Road Accident Fund* 2023 (3) SA 125 (GP) (a decision of the full court) at paragraph [66].
The principle referred to in the text to this footnote accords with the basic rule, namely that, statutory limitations apart, all costs are in the discretion of the court (*Kruger Bros & Wasserman v Ruskin* 1918 AD 63 at 69; *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) at 1055F (a case in which it was held that as a matter of policy and principle, a court should not, and must not, permit the ouster of its discretion because of agreement between the parties with regard to costs); *Jonker v Schultz* 2002 (2) SA 360 (O) at 364A–B; *St Clair Moor v Tongaat-Hulett Pension Fund* 2019 (3) SA 465 (SCA) at 481A; *Motala v Master, North Gauteng High Court* 2019 (6) SA 68 (SCA) at 102G; *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at 298E; *Mashele v BMW Financial Services (Pty) Ltd* 2021 (2) SA 519 (GP) at paragraph [39] (where it was re-stated that courts are not bound by extracurial agreements to pay costs on a particular scale and that costs remain in the discretion of the court hearing the matter)). For statutory limitations, see, for example, s 15 of the Domestic Violence Act 116 of 1998 and s 16 of the Protection from Harassment Act 17 of 2011, both of which provide that the court may make an order as to costs against a party only if it is satisfied that such party has acted frivolously, vexatiously or unreasonably.

49 *Fripp v Gibbon & Co* 1913 AD 354 at 363; and see *Educated Risk Investments 54 (Pty) Ltd v The Master of the High Court, Johannesburg* (unreported, GJ case no 18358/2020 dated 27 September 2021) at paragraph [21]; *Agility Holdings (Pty) Ltd v Company Tribunal* (unreported, GP case no 92630/2019 dated 11 February 2022) at paragraph [3.6]; *Ideal Trading 199 CC v Polokwane Local Municipality* (unreported, LP case no 3087/2021 dated 15 August 2023) at paragraph [10]. An inordinate delay in filing an answering affidavit, the regurgitation of statutory provisions without much attempt to explain how these impact on the case and the annexing of documents to the

affidavit without properly identifying those portions on which reliance would be placed are considerations justifying a costs order against an organ of state (*National Adoption Coalition of South Africa v Head of Department of Social Development for KwaZulu-Natal* 2020 (4) SA 284 (KZD) at paragraph [77]).

50 *Fripp v Gibbon & Co* 1913 AD 354 at 364.

51 *Cronje v Pelser* 1967 (2) SA 589 (A) at 593.

52 1967 (2) SA 589 (A) at 593; and see *Erasmus v Grunow en 'n Ander* 1980 (2) SA 793 (O) at 797.

53 Addleson J in *Van Staden v Union and South-West Africa Insurance Co Ltd* 1972 (1) SA 758 (E) at 759. See also *De Kock v Davidson* 1971 (1) SA 428 (T) at 432.

54 See *Grobbelaar v Snyman* 1975 (1) SA 568 (O) at 570:
'Beginsels uiteengesit in besliste sake kan as rigsnoere dien by die bepaling van wat 'n gepaste kostebevel in 'n besondere geval behoort te wees.'
See also *Westbrook v Genref Ltd* 1997 (4) SA 218 (D) at 220H–221H.

55 By GN R4477 of 8 March 2024 (*GG* 50272 of 8 March 2024).

56 *Graphic Laminates CC v Albar Distributors CC* 2005 (5) SA 409 (C) at 412F–G. See also *eTV (Pty) Ltd v Judicial Service Commission* 2010 (1) SA 537 (GSJ) at 548C–E. See also *DE v RH* 2015 (5) SA 83 (CC) at 105D–E.

57 1934 AD 499; and see *Jojwana v Regional Court Magistrate* 2019 (6) SA 524 (ECM) at 532A–533B.

58 *Hart v Broadacres Investments Ltd* 1978 (2) SA 47 (N) at 49H–50G. See also *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 306H; *Thomson v South African Broadcasting Corporation* 2001 (3) SA 746 (SCA) at 749D–G; *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 6E; *De Villiers and Another NNO v BOE Bank Ltd* 2004 (3) SA 459 (SCA) at 462H–464H; *Jojwana v Regional Court Magistrate* 2019 (6) SA 524 (ECM) at 532A–533B.

59 There is no principle that a costs order cannot be made against a respondent in an unopposed matter. While there might be sound policy considerations why, for example, the respondent in a review application (such as a public body, a magistrate, a master of the High Court or an arbitrator) would not be required to pay the costs of an application, save in the event of opposition, the same considerations do not apply to applications for relief against ordinary commercial entities (*Glencore Africa Oil Investments (Pty) Ltd v Ramano* 2020 (3) SA 419 (GJ)). In *EP Property Projects (Pty) Ltd v Registrar of Deeds, Cape Town, and Four Related Applications* 2014 (1)SA 141 (WCC) it was accepted in principle that potentially a non-party funder could be liable, in the exercise of the court's discretion, for an adverse costs order made against the funded party. In that case, the court ordered the funder to pay the costs in circumstances where she was in full control of the litigation, the claim being ceded to her and she stood to benefit substantially financially if the funded party was successful. See also *Gold Fields Ltd v Motley Rice LLC* 2015 (4) SA 299 (GP) at paragraphs [44]–[49] and *Price Waterhouse Coopers Inc v IMF (Australia) Ltd* 2013 (6) SA 216 (GNP). The aforesaid cases are not authority for making a costs order against a father on the tenuous basis that he may be financially assisting his major son in resisting a delictual damages claim (*Merryweather v Scholtz* (unreported, WCC case no 7965/2009 dated 22 June 2021) at paragraph [159]).

60 *Chithi In re: Luhlwini Mchunu Community v Hancock* (unreported, SCA case no 423/2020 dated 23 September 2021) at paragraph [14], referring to *De Beer NO v North-Central Local Council and South-Central Local Council (Umhlatuzana Civic Association Intervening)* 2002 (1) SA 429 (CC) at paragraph [11]; and see *eThekwini Municipality v Westwood Insurance Brokers Proprietary Limited* (unreported, KZP case no AR230/2018 dated 31 January 2020 — a decision of the full court) (for a discussion of this case, see M du Plessis and MZ Suleman '*eThekwini Municipality and Others v Westwood Insurance Brokers Brokers (Pty) Ltd*: Personal Costs Against Public Officials Through the Lens of *Westwood*' (2021) 1384 *SALJ* 731); *CB v HB* 2021 (6) SA 332 (SCA) at paragraph [20]; *Kosmos Ridge Homeowners' Association v Madibeng Local Municipality* 2022 (2) SA 207 (GP) at paragraph [32]; *Kgoro Consortium (Pty) Ltd v Cedar Park Properties 39 (Pty) Ltd* (unreported, SCA case no 935/2020 dated 9 May 2022) at paragraph [19].

61 *Kriel v Master of the High Court* (unreported, WCC case no 22759/12 dated 30 June 2020).

62 *Pelser v Levy* 1905 TS 466; *Fripp v Gibbon & Co* 1913 AD 354; *Kruger Bros & Wasserman v Ruskin* 1918 AD 63 at 69; *Vassen v Cape Town Council* 1918 CPD 360 at 363; *Sackville West v Nourse* 1925 AD 516; *Pyott Ltd v Commissioner for Inland Revenue* 1925 AD 298; *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 (A); *Union Government v Gass* 1959 (4) SA 401 (A); *Letsitele Stores (Pty) Ltd v Roets* 1959 (4) SA 579 (T); *Valkin v Daggafontein Mines Ltd* 1960 (2) SA 507 (W); *Dickinson v Minister of Water Development* 1971 (3) SA 71 (RA); *Kathrada v Arbitration Tribunal* 1975 (2) SA 673 (A) at 679; *Kunene v SA Mutual Fire and General Insurance Co Ltd* 1977 (4) SA 508 (D); *Nxasana v Minister of Justice* 1976 (3) SA 745 (D) at 761; *Pienaar v Rabie* 1983 (3) SA 126 (A) at 140; *Nxumalo v Mavundla* 2000 (4) SA 349 (D) at 354A; *Mancisco & Sons CC (in liquidation) v Stone* 2001 (1) SA 168 (W) at 181E–F; *Nzimande v Nzimande* 2005 (1) SA 83 (W) at 107B–F; *Treatment Action Campaign v Minister of Health* 2005 (6) SA 363 (C) at 371C–E; *Central Authority v MR (LS Intervening)* 2011 (2) SA 428 (GNP) at 440G–441D; *LP v PR* 2018 (3) SA 507 (WCC) at 512G–H; *National Home Builders Registration Council v Xantha Properties 18 (Pty) Ltd* 2019 (5) SA 424 (SCA) at 431E–432A; *Motala v Master, North Gauteng High Court* 2019 (6) SA 68 (SCA) at 102G–104C; *Cooper NO v Market Fisheries (Oudtshoorn) CC* 2023 (5) SA 212 (WCC) at paragraph [23]. A general rule has developed that where two or more respondents (or defendants) use the same attorney, each successful respondent is entitled to the separate costs incurred by him as well as to a portion of the costs he incurred jointly with the other respondents (*Jooste v Transvaalse Provinsiale Administrasie* 1960 (3) SA 316 (T); *Payen Components South Africa Ltd v Bovic Gaskets CC* 1999 (2) SA 409 (W) at 413D–F).

63 *Nationwide Detectives & Professional Practitioners CC v Standard Bank of Namibia Ltd* 2008 (6) SA 75 (NmHC) at 79B–81B and 82D.

64 *Nationwide Detectives & Professional Practitioners CC v Standard Bank of Namibia Ltd* 2008 (6) SA 75 (NmHC) at 77B–79A and 82E–F.

65 *Nationwide Detectives & Professional Practitioners CC v Standard Bank of Namibia Ltd* 2008 (6) SA 75 (NmHC) at 82H–I.

66 *Nationwide Detectives & Professional Practitioners CC v Standard Bank of Namibia Ltd* 2008 (6) SA 75 (NmHC) at 83A.

67 *Pioneer Investments v Thatcher* 1931 WLD 61.

68 *Parker v Herold* 1935 TPD 376.

69 *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 at 488–9; *Knoll v Van Druten* 1953 (4) SA 145 (T); *Bester & Grové v Benson* 1980 (1) SA 276 (C).

70 *Knoll v Van Druten* 1953 (4) SA 145 (T); *Bester & Grové v Benson* 1980 (1) SA 276 (C).

71 *Sewatumong Micro Lending CC t/a Sewatumong Cash Loans v Chairperson of the National Credit Tribunal* (unreported, GP case no 7996/2020 dated 9 March 2023) at paragraph 12.

72 See Cilliers *Costs* paragraph 2.31, in whose view this rule is in itself a fundamental rule, and not merely an exception to the general rule that a successful party should be awarded his costs.

73 *Myers v Abramson* 1951 (3) SA 438 (C) at 455. See also *Middeldorf v Zipper NO* 1947 (1) SA 545 (SR); *Frenkel, Wise & Co Ltd v Cuthbert* 1947 (4) SA 715 (C); *Greyling v Nieuwoudt* 1951 (1) SA 88 (O); *Meyer v Netherlands Bank of SA Ltd* 1961 (1) SA 578 (GW) at 580; *Zarug v Parvathie NO* 1962 (3) SA 872 (D) at 885; *MacDonald, Forman & Co v Van Aswegen* 1963 (2) SA 150 (O) at 155; *Mutsi v Santam Versekeringsmaatskappy Bpk* 1963 (3) SA 11 (O) at 20; *Kruger v Pizzicanella* 1966 (1) SA 450 (C) at 457; *HDS Construction (Pty) Ltd v Wait* 1979 (2) SA 298 (E); *Meintjies v Administrasieraad van Sentraal-Transvaal* 1980 (1) SA 283 (T) at 294–5; *Genn v Rudick Holdings (Pty) Ltd* 1983 (2) SA 69 (W) at 72; *Niemand v SA Eiendomsbestuur SWD (Edms) Bpk* 1985 (2) SA 710 (C); *Grindrod (Pty) Ltd v Delport* 1997 (1) SA 342 (W) at 347C–D; *Mann v Leach* [1998] 2 All SA 217 (E) at 221.

74 *Grindrod (Pty) Ltd v Delport* 1997 (1) SA 342 (W) at 347E.0

75 *Ramah Farming v Great Fish River Water Users Association* 2021 (2) SA 547 (ECG) at paragraph [48].

76 See the authorities referred to in the preceding footnote, and also *Algoa Milling Co Ltd v Arkell & Douglas* 1917 AD 754; *Van Marseveen v Union Government* 1918 AD 60 at 61; *Walters v Lamb* 1925 SR 54; *Standard Bank v Estate Van Rhyn* 1925 AD 266 at 281; *Makings v Makings* 1958 (1) SA 338 (A) at 342; *United Building Society v Barkhuizen* 1959 (4) SA 295 (O) at 299; *Breytenbach v De Villiers NO* 1961 (2) SA 542 (T) at 551; *Evander Caterers (Pty) Ltd v Potgieter* 1970 (3) SA 312 (T) at 319; *Foley v Taylor* 1971 (4) SA 515 (D) at 521: *Uitenhage Municipality v Uys* 1974 (3) SA 800 (E) at 806; *Christie's Fish Supplies (Pty) Ltd v Ornelas Fishing Co (Pty) Ltd* 1978 (3) SA 431 (C) at 435; *Rautenbach v Symington* 1995 (4) SA 583 (O).

77 *Meera Sahib v North* (1880) 1 NLR 190; *Bainbridge v The Wynberg Municipality* (1889) 11 SC 7; *Marcussen v Skibbe* (1897) 7 CTR 174; *SA Printing Co v Redfern Morrison & Co* (1899) 9 CTR 582; *Biggs v Colonial Government* (1907) 17 CTR 88; *Luntz v Jordaan* (1909) 19 CTR 475; *Van Dyk v Braude* (1909) 26 SC 284; *Reddersburg Town Council v Blignaut* 1920 OPD 258; *Prince v Graetz* 1921 EDL 64; *Rabie v Stewart* 1927 OPD 74.

78 *Maharaj v Balesar* 1931 NPD 370; *Hanna v Mynhardt* 1935 TPD 63.

79 *Gous v De Kock* (1887) 5 SC 405; *Labuschagne v Mulligan* (1903) 13 CTR 940; *Brickman's Trustee v Transvaal Warehouse Co Ltd* 1904 TS 548; *Heydenreich v Van Rensburg* 1926 OPD 47; *Bhika v Minister of Justice* 1965 (4) SA 399 (W); *Bob v Royal Insurance Co of SA Ltd* 1969 (3) SA 102 (E) at 107; *Jonker v Schultz* 2002 (2) SA 360 (O) at 367G–368A.

80 *Van Vuuren v Jonker* 1910 TPD 686; *Rabie v Stewart* 1927 OPD 74; *Janisch v Hall* 1946 CPD 553.

81 *Galion (Pty) Ltd v Burger* 1972 (4) SA 652 (C) at 654B.

82 *Cohen v Engelbrecht* (1898) 15 SC 40; *Kennedy v Dalasile* 1919 EDL 1; and see *Jonker v Schultz* 2002 (2) SA 360 (O).

83 *Mahomed v Kassim* 1973 (2) SA 1 (RA) at 13C; but see *Jonker v Schultz* 2002 (2) SA 360 (O) at 367G–368A.

84 *Ruiters v African Guarantee and Indemnity Co Ltd* 1958 (1) SA 97 (E) at 99; *Taylor v SA Railways and Harbours* 1958 (1) SA 139 (D) at 143; *Goss v Crookes* 1998 (2) SA 946 (N). In *AA Mutual Insurance Association Ltd v Nomeka* 1976 (3) SA 45 (A) the plaintiff succeeded only to the extent of 40% of his claim. He was, nevertheless, awarded his costs (in respect of the proceedings in the trial court).

85 *Jenkins v SA Boilermakers, Iron & Steel Workers & Ship Builders Society* 1946 WLD 15; and see *Simoes v Hasewinkel* 1966 (1) SA 579 (W).

86 *Read v SA Medical and Dental Council* 1949 (3) SA 997 (T); *BEF (Pty) Ltd v Cape Town Municipality* 1990 (2) SA 337 (C) at 347C–D.

87 *Clarke v Bethal Co-operative Society* 1911 TPD 1152 at 1160; *Union Share Agency & Investment Ltd v Green* 1926 CPD 129; *Lynch v Agnew* 1929 TPD 974; *Estate Wege v Strauss* 1932 AD 76 at 86; *Kunze v Steytler* 1932 EDL 4; *Godloza v Smith* 1932 EDL 154; *Meyer v De Jager* 1934 EDL 81; *International Tobacco Co (SA) Ltd v United Tobacco (South) Ltd (2)* 1955 (2) SA 29 (W) 29 at 36–7.

88 *Per* Wessels CJ in *Penny v Walker* 1936 AD 241 at 260, followed in *Geere v Gladwin* 1945 WLD 65. See also *May v Union Government* 1954 (3) SA 120 (N); *Ramakulukusha v Commander, Venda National Force* 1989 (2) SA 813 (V) at 853E–F. See also *AD v MEC for Health and Social Development, Western Cape* 2017 (5) SA 134 (WCC) at 143D.

89 *Kessler v Haagen* 1922 SWA 121.

90 *Siyazi v Foji* 1914 EDL 502; *Kensington Steam Bakery v Dogan* 1916 TPD 17; *Jeevraj Sayed Hoosen & Co* (1916) 37 NLR 337; *Setoli v Du Preez* 1930 TPD 641.

91 *Ohlsson's Cape Breweries v Artesian Well Boring Co* 1919 CPD 125; *Partridge Ltd v Buttar* 1953 (2) SA 415 (N); *Rodgers & Hart (Pty) Ltd v Parkgebou-Beleggings en Wynkelders Bpk* 1956 (3) SA 329 (A); *Greyling v Greyling* 1959 (3) SA 967 (W); *Hodes v Deputy Commissioner of Police* 1959 (4) SA 650 (C); *Wittmann v Deutscher Schulverein, Pretoria* 1998 (4) SA 423 (T) at 456C.

92 *Kunze v Steytler* 1932 EDL 4; *Meyer v De Jager* 1934 EDL 81; *Tarn v London Assurance Co* 1937 WLD 148; *Golding v Torch Printing & Publishing Co (Pty) Ltd* 1949 (4) SA 150 (C); *Invernizzi v Port Elizabeth Municipality* 1954 (2) SA 288 (E).

93 *Yorkshire Insurance Co Ltd v Barclays Bank* 1928 WLD 199.

94 *Fripp v Gibbon & Co* 1913 AD 354; *Ihlenfeldt v Rieseberg* 1960 (2) SA 455 (T); *Slomowitz v Uncini* 1963 (1) SA 475 (T); *BW Brightwater Way Props (Pty) Ltd v Eastern Cape Development Corporation* 2021 (6) SA 321 (SCA) at paragraphs [31]–[33].

95 *Pelser v Levy* 1905 TS 466; *Fripp v Gibbon & Co* 1913 AD 354; *Rabie v Friedgut* 1920 OPD 28; *Graf v De Villiers* 1923 OPD 204; *Pritchard v Monzali* (1928) 49 NLR 197; *Poort Sugar Planters (Pty) Ltd v Umfolozi Co-operative Sugar Planters Ltd* 1960 (3) SA 585 (A); *Letraset v Helios Ltd (2)* 1972 (3) SA 605 (A).

96 See *Zietsman v Vorster* 1912 TPD 1144 at 1149 and 1152.

97 *Simpson v Sharp* 1948 (4) SA 73 (N).

98 *Fyne v African Realty Trust* 1906 EDC 248; *Sack v Sack* 1918 CPD 336.

99 *Treasury v Gundelfinger* 1919 TPD 329; *Gault v Behrman* 1936 TPD 37; *Nel v Nel* 1943 AD 280; *Permanent Coatings of Africa (Pty) Ltd v Magal Investments (Pty) Ltd* 1975 (3) SA 971 (W). Where a defendant was successful in the result but had abandoned certain defences, he was nevertheless awarded all his costs, as the defences raised and abandoned were not unfair ones (*Daniel (Pty) Ltd v Camps Bay Service Station* 1954 (3) SA 309 (C) at 316).

100 *Read v SA Medical and Dental Council* 1949 (3) SA 997 (T) at 1026; *BEF (Pty) Ltd v Cape Town Municipality* 1990 (2) SA 337 (C) at 346–7.

101 1907 TS 876.

102 1917 TPD 366.

103 *Body Corporate of Dumbarton Oaks v Faiga* [1999] 1 All SA 229 (A) at 234.

104 See also the notes to s 19*(d)* of the Superior Courts Act 10 of 2013 s v 'Deprivation of costs' in Volume 1 third edition, Part D.

105 *Feinstein v Taylor* 1962 (2) SA 54 (W) at 56.

106 *Fripp v Gibbon & Co* 1913 AD 354 at 360–1; *Sackville West v Nourse* 1925 AD 516 at 536; *Union Government v Gass* 1959 (4) SA 401 (A) at 413; *Merber v Merber* 1948 (1) SA 446 (A) at 452–3; *Kathrada v Arbitration Tribunal* 1975 (2) SA 673 (A) at 679; *Baptista v Stadsraad van Welkom* 1996 (3) SA 517 (O) at 520E and 521A–C; *Treatment Action Campaign v Minister of Health* 2005 (6) SA 363 (C) at 371C–H.

107 *Krook v Zaltzman* 1930 OPD 108 at 111; *Berkowitz v Berkowitz* 1956 (3) SA 522 (SR) at 527; *De Villiers v Soetsane* 1975 (1) SA 360 (E) at 362F–363H; *Nieuwoudt v Joubert* 1988 (3) SA 84 (SE). See also *Palley v Knight NO* 1961 (4) SA 633 (SR) at 638–9 (where it is stressed that it is unusual for a court to order that a successful party should pay the costs of an unsuccessful party, and that such orders are usually made in cases in which the court disapproves of the actions of the successful party); *Nxumalo v Mavundla* 2000 (4) SA 349 (D) at 354B–E; *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 (4) SA 160 (T) at 178I–179C; *Treatment Action Campaign v Minister of Health* 2005 (6) SA 363 (C) at 370C–372C; *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA) at 323I–324A; *Cele v South African Social Security Agency* 2009 (5) SA 105 (D) at 132C–E; *Kalil NO v Mangaung Metropolitan Municipality* 2014 (5) SA 123 (SCA) at 135E–137G.

108 *Skotnes v South African Library* 1997 (2) SA 770 (SCA) at 778C–E.

109 *Russell v Savory* 1906 EDC 100; *Sing v Sing* 1911 TPD 1034.

110 *Incorporated Law Society v Raaff* 1907 TS 1.

111 *Brink v Triggs* (1909) 4 Buch AC 1.

112 *Rosenthal v Leibenguth* 1930 WLD 272; but if the defendant misleads the plaintiff in such a way that the plaintiff does start proceedings, he may be ordered either to pay his own costs when he succeeds, or even to pay the costs of the unsuccessful plaintiff (*Chetty v Louis Joss Motors* 1948 (3) SA 329 (T) at 332–3; *Nieuwoudt v Joubert* 1988 (3) SA 84 (SE) at 90F–H).

113 *Thomson v Heslop and Heslop* (1916) 37 NLR 142.

114 *Du Plessis v Estate of Teich Bros* 1914 CPD 48.

115 *Loubser v Cashell* (1900) 17 SC 555; *Rabie v Stewart* 1927 OPD 74; *Franks v Muller and Schonken* 1929 TPD 464; *Janisch v Hall* 1946 CPD 553; *Rowles v Isipingo Beach Revision Court* 1966 (3) SA 751 (D).

116 *Cohen v Engelbrecht* (1898) 15 SC 40; and see *Holden & Co v Morton & Co* 1917 EDL 210; *Reddersburg Town Council v Blignaut* 1920 OPD 258; *Franks v Muller and Schonken* 1929 TPD 464.

117 See *Cohen v Engelbrecht* (1898) 15 SC 40; *Merrington v Davidson* (1905) 22 SC 148; *Rabie v Stewart* 1927 OPD 74; *Franks v Muller and Schonken* 1929 TPD 464; *Janisch v Hall* 1946 CPD 553; *Naidoo v Auto Protection Insurance Co Ltd* 1963 (4) SA 798 (D); *Palmer v SA Mutual Life & General Insurance Co Ltd* 1964 (3) SA 434 (D); *J N de Kock & Seun (Edms) Bpk v Elektrisiteitsvoorsienings-kommissie* 1983 (4) SA 929 (A) at 934. In *Gijzen v Verrinder* 1965 (1) SA 806 (D) the court refused to deprive a successful plaintiff of part of his costs on the ground that he had not in any way been actuated by an improper motive, nor had he acted irresponsibly.

118 *Cohen v Engelbrecht* (1898) 15 SC 40; *De Wet v Brink* 1910 TPD 336; *Goold v Bladwell* 1919 TPD 53; *Proctor and Burton v Gray Browne* 1926 EDL 350; *Rossouw v West* 1927 CPD 344; *Nedfin Bank Ltd v Muller* 1981 (4) SA 229 (D) at 238.

119 *Kennedy v Dalasile* 1919 EDL 1; *Goss v Crookes* 1998 (2) SA 946 (N) at 951I–952A.

120 *Edwards v Hyde* 1902 TS 381. Despite its frequent application in South Africa during the late nineteenth and early twentieth centuries, it is submitted that the doctrine of nominal damages is an importation from English law which conflicts with the principles of Roman-Dutch law: see Erasmus (1975) 38 *THRHR* 268 and 362. See also *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at 823A–B.

121 In claims for damages for an infringement of rights, the award of costs depends less upon the amount recovered than upon the question whether the plaintiff's claim is to assert a substantial right or whether the harm done was not worth suing for. See, for example, *Pallinger v Harsant* (1883) 2 HCG 111; *London and SA Exploration Co v Howe & Co* (1886) 4 HCG 214; *Gous v De Kock* (1887) 5 SC 405; *Nathan Bros v Pietermaritzburg Municipality* (1902) 23 NLR 107; *Labuschagne v Mulligan* (1903) 13 CTR 940; *Brickman's Trustee v Transvaal Warehouse Co Ltd* 1904 TS 548; *Behr v Murray* (1906) 2 Buch AC 302; *Heydenreich v Van Rensburg* 1926 OPD 47; *Bhika v Minister of Justice* 1965 (4) SA 399 (W) at 401–2; *Bolo v Royal Insurance Co of SA Ltd* 1969 (3) SA 102 (E) at 107.

In *C v Minister of Correctional Services* 1996 (4) SA 292 (T) the plaintiff, a prisoner, claimed R30 000 damages from the defendant on the grounds of alleged wrongful invasion of his right to privacy, in that the latter had caused an AIDS test to be performed on the plaintiff without his informed consent. The court held that the plaintiff's right to privacy had been infringed, but that he was not, in the circumstances, entitled to more than 'nominal' damages, in the amount of R1 000. He was also found to be an untruthful witness. Nevertheless, it was held that he had been entitled to establish his right to privacy. Therefore, despite his untruthfulness and the fact that the award in his favour was small, he was awarded his costs on the Supreme Court scale, as the principle at stake was an important one.

122 *Upington v Solomon & Co* 1879 Buch 240; *Williams v Shaw* (1884) 4 EDC 105; *Boose v Woodhead* (1891) 1 CTR 61; *Ries v Willets* (1903) 13 CTR 1078; *Cook v Alletz* (1906) 16 CTR 115; *Solomon v The Alfred Lodge* 1917 CPD 177; *Mahomed v Kassim* 1973 (2) SA 1 (RA); *Fraser v De Villiers* 1981 (1) SA 378 (D).

123 *Kriel v Conradie* 1916 CPD 687; *Van Schalkwyk v Esterhuizen* 1948 (1) SA 665 (C).

124 See, for example, *Vilikazi v Malevu* 1979 (1) SA 737 (N) at 746; *Van Niekerk v Coetzee* (unreported, GP case no 41880/16 dated 10 August 2022) at paragraphs [38]–[39].

125 *Fletcher & Co v Le Sueur* (1891) 1 CTR 203; *Spencer v Spencer* (1901) 22 NLR 259; *McDonald v Armstrong & Co* 3 EDC 91; *Kent v Bevern & Co* 1907 TS 395; *Eaton Trust v Schroevers* (1909) 19 CTR 532; *Van der Lingen v Middelburg Municipality* 1911 TPD 84; *Botha v Bendheim* 1912 CPD 365; *Ambrose and Dunning v Dalton* 1921 SR 116; *Meta v Patel* 1943 SR 134; *Palmer v Kimberley Town Council* (1883) 1 Buch AC 227; *Pretoria City Council v Lombard NO* 1949 (1) SA 166 (T); *Treatment Action Campaign v Minister of Health* 2005 (6) SA 363 (C) at 370C–372D. See also *Ncube v Department of Home Affairs* 2010 (6) SA 166 (ECG) at 172F–G.

126 *Annear NO v Kennerley* (1880) 1 EDC 7; *Palmer v Kimberley Town Council* (1883) 1 Buch AC 227; *Friedland Bros v Stephan* (1908) 18 CTR 150; *Kramer v Bennett and Webster* (1908) 18 CTR 226; *Eaton Trust v Schroevers* (1909) 19 CTR 532; *Trimmer v Saacks* 1912 CPD 317; *Impey v Impey* 1926 WLD 249; *Sandler v Middelburg Coal Agency (Pty) Ltd* 1940 WLD 282; *Chetty v Louis Joss Motors* 1948 (3) SA 329 (T); *Rainbow Chicken Farm (Pty) Ltd v Mediterranean Woollen Mills (Pty) Ltd* 1963 (1) SA 201 (N); *D J Visser (Pty) Ltd v CIR* 1963 (3) SA 281 (C); *De Villiers v Soetsane* 1975 (1) SA 360 (E) at 363; *Nieuwoudt v Joubert* 1988 (3) SA 84 (SE) at 90.

127 *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 243.

128 See, for example, *Bosch v Titley* 1908 ORC 27; *Snyman v Crouse* 1980 (4) SA 42 (O) at 52–3; *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 (4) SA 160 (T) at 178I–179C.

129 See, for example, *Pullinger v Harsant* (1883) 2 HCG 111; *Thomas v Taylor* (1892) 13 NLR 166; *Brickman's Trustee v Transvaal Warehouse Co Ltd* 1904 TS 548 at 551; *Assigned Estate of Boliman Bros v Burger* 1909 ORC 8; *Kleinhans v Usmar* 1929 AD 121; *Sowden & Stoddart Ltd v Milborrow* 1931 GWL 33 at 41; *Newman v Biggs* 1945 EDL 51.

130 *Havenga v Lotter* 1912 TPD 395; *Butler v Nigel Cartage Co* 1933 TPD 218 at 220; *Mahomed v Nagdee* 1952 (1) SA 410 (A) at 418; *Bester v Van Niekerk* 1960 (2) SA 363 (E); *De Kock v Davidson* 1971 (1) SA 428 (T) at 432.

131 *Atkinson v Vause's Executors* (1892) 13 NLR 85.

132 *Marillac Bros v Equitable Fire Insurance & Trust Co Ltd* (1862) 1 Ros 22; *Rose-Innes DM Co Ltd v Central DM Co Ltd* (1884) 2 HCG 272; *Standard DM Co v Compagnie Francaise* (1886) 4 HCG 29; *Fryer v Louw's Estate* (1908) 18 CTR 263; *Cowling v Cowling* (1908) 18 CTR 972; *Henderson v Valenti* 1930 NPD 59. In other cases where there was carelessness on both sides, the successful party did get his costs: see, for example, *Kirsten v Van Noorden* 1879 Buch 232 and *Greenhalgh v Rowley* 1925 SR 30.

133 *Cloete v Hollander* (1908) 18 CTR 947.

134 *Jaffer v Parow Village Management Board* 1920 CPD 97; *Oos-Randse Bantoesake Administrasieraad v Santam Versekeringsmaatskappy Bpk (2)* 1978 (1) SA 164 (W) at 164; *Gardiner v Survey Engineering (Pty) Ltd* 1993 (3) SA 549 (SE) at 552C.

135 *London and SA Exploration Co Ltd v Cathapadayachy* (1891) 6 HCG 82; *De Jager v Bethlehem Trading Co* 1916 OPD 3; and see *Oos-Randse Bantoesake Administrasieraad v Santam Versekeringsmaatskappy Bpk (1)* 1978 (1) SA 160 (W) at 164.

136 *Rouxville Municipality v Haupt* 1909 ORC 354; *Fritz v The Administration of SWA* 1922 SWA 98; *Cape and Transvaal Land & Finance Co Ltd v De Villiers* 1926 CPD 59.

137 *Sirkhot v Parker* 1929 (1) PH F26 (C).

138 *Oelrich v General Accident Fire and Life Assurance Corp Ltd* 1928 OPD 105.

139 See *Fripp v Gibbon & Co* 1913 AD 354 at 363–4; *De Villiers v Union Government* 1931 AD 206 at 214; *Gamlan Investments (Pty) Ltd v Trilion Cape (Pty) Ltd* 1996 (3) SA 692 (C) at 704I–705A.

140 *Per* Innes CJ in *Scheepers and Nolte v Pate* 1909 TS 353 at 356.

141 The concurrent jurisdiction of magistrates' courts and the High Court is considered in the notes to s 21 of the Act s v 'Protect and regulate its own process' in Volume 1 third edition, Part D.

142 *De Winter v Ajmeri Properties and Investments* 1957 (2) SA 297 (D) at 299; *Rajah v Manning* 1959 (1) SA 834 (N) at 836; *Palmer v Goldberg* 1961 (4) SA 781 (N) at 785; *Ramsuran v Yorkshire Insurance Co Ltd* 1965 (2) SA 263 (D) at 264. In *Jeftha v Williams* 1981 (3) SA 678 (C) at 685 Grosskopff J adverts to the absence of 'special features which call for an order of costs on the Supreme Court scale'.

143 In *Bennett v Minister of Police* 1980 (3) SA 24 (C) at 38 Baker J went further and ordered that the plaintiff, who recovered in an action in the Supreme Court an amount within the jurisdiction of the magistrate's court and was awarded costs on the magistrate's court scale, should not be required by his legal advisers to pay the difference between Supreme Court and magistrate's court costs on an attorney and client basis.

144 *Champion v Said et Uxor* 1958 (1) SA 360 (N) at 362; *Gelb v Hawkins* 1960 (3) SA 687 (A) at 694; *Norwich Union Fire Insurance Society Ltd v Tutt* 1960 (4) SA 851 (A) at 954; *Palmer v Goldberg* 1961 (4) SA 781 (N) at 785–6; *Jones v Union and South West Insurance Co Ltd* 1970 (2) SA 768 (E) at 769; *Barnard v SA Mutual Fire & General Insurance Co Ltd* 1979 (2) SA 1012 (SE) at 1014; *Mofokeng v General Accident Versekering Bpk* 1990 (2) SA 712 (W), in which the decision in *Sealandair Shipping and Forwarding v Slash Clothing Co (Pty) Ltd* 1987 (2) SA 635 (W) was criticized and not followed. In *Drummond Cable Concepts v Advancenet (Pty) Ltd* 2020 (1) SA 546 (GJ) the plaintiff instituted action against the defendant in the High Court under circumstances where the sum claimed fell within the jurisdiction of the magistrate's court. The defendant raised an exception against the summons which was upheld. An order allowing the defendant to recover its costs on the High Court scale was granted. In *Levin v Corrigan* (unreported, GJ case no 45456/17 dated 16 April 2020) the High Court, in ordering the case to be transferred to the magistrate's court in terms of Uniform Rule of Court 39(22), and after a consideration of the relevant principles relating to costs, held (at paragraph [27]) that 'the sensible and appropriate order is to reserve all costs incurred to date for determination by the trial court at the appropriate time'.

145 *Kock v Realty Corporation of SA* 1918 TPD 356 at 360; *Palmer v Goldberg* 1961 (4) SA 781 (N) at 786; *Keyter v De Wet NO* 1967 (1) SA 25 (O) at 27–8; *Jones v Union and South West Insurance Co Ltd* 1970 (2) SA 768 (E) at 769; *Barnard v SA Mutual Fire & General Insurance Co Ltd* 1979 (2) SA 1012 (SE) at 1014; *Holgate v Minister of Justice* 1995 (3) SA 921 (E) at 937I–938B.

146 *Grobbelaar v Kapotes* 1927 TPD 195 at 198; *White v Saker & Co* 1938 WLD 173; *Hunt v Campbell* 1945 WLD 1 at 5; *Milk Traders' Trustee Co (Pty) Ltd v Levin* 1953 (3) SA 678 (W) at 688; *Champion v Said et Uxor* 1958 (1) SA 360 (N) at 362; *Ramsuran v Yorkshire Insurance Co Ltd* 1965 (2) SA 263 (D) at 265; *Keyter v De Wet NO* 1967 (1) SA 25 (O) at 27–8; *Jones v Union and South West Insurance Co Ltd* 1970 (2) SA 768 (E) at 769–70; *Holgate v Minister of Justice* 1995 (3) SA 921 (E) at 937I–938B; *Paterson NO v Kelvin Park Properties CC* 1998 (2) SA 89 (E) at 33.

147 *De Winter v Ajmeri Properties and Investments* 1957 (2) SA 297 (D) at 299; *Rajah v Manning* 1959 (1) SA 834 (N) at 836; *Palmer v Goldberg* 1961 (4) SA 781 (N) at 785; *Ramsuran v Yorkshire Insurance Co Ltd* 1965 (2) SA 263 (D) at 264; *Jeftha v Williams* 1981 (3) SA 678 (C) at 685; *Manamela v Minister of Justice* 1960 (2) SA 395 (A) at 404; *Dladla v Minister of Police* 1973 (2) SA 714 (W) at 720.

148 *Robertson & Stewart v Edwards* 1908 EDC 186; *Franks v Muller and Schonken* 1929 TPD 464 at 476; *Morkel v Dingley* 1944 NPD 18; *Gelb v Hawkins* 1960 (3) SA 687 (A) at 694; *Keyter v De Wet NO* 1967 (1) SA 25 (O) at 27.

149 *Kock v Realty Corporation of SA* 1918 TPD 356 at 360; *Palmer v Goldberg* 1961 (4) SA 781 (N) at 786; *Keyter v De Wet NO* 1967 (1) SA 25 (O) at 27–8; *Jones v Union and South West Insurance Co Ltd* 1970 (2) SA 768 (E) at 769; *Barnard v SA Mutual Fire & General Insurance Co Ltd* 1979 (2) SA 1012 (SE) at 1014.

150 *Kriek v Gunter* 1940 OPD 136 at 140; *Hunt v Campbell* 1945 WLD 1 at 6; *Ramsuran v Yorkshire Insurance Co Ltd* 1965 (2) SA 263 (D) at 265; *Hassen v Post Newspapers (Pty) Ltd* 1965 (3) SA 562 (W) at 577; *Tsekahale v Minister van Polisie* 1971 (2) SA 442 (O) at 443; *Greeff v Raubenheimer* 1976 (3) SA 37 (A) at 44; *Moyer v Shield Insurance Co Ltd* 1980 (3) SA 468 (C) at 470; *Kritzinger v Perskorporasie van Suid-Afrika (Edms) Bpk* 1981 (2) SA 373 (O) at 390; *Jasat v Paruk* 1983 (4) SA 728 (N) at 735; *Iyman v Natal Witness Printing & Publishing Co (Pty) Ltd* 1991 (4) SA 677 (N) at 687G–H.

151 *Standard Credit Corporation Ltd v Bester* 1987 (1) SA 812 (W) at 821. In this case a full court of the Transvaal Provincial Division rejected the view of Coetzee DJP that the Supreme Court has the right to refuse summarily to entertain proceedings which fall within the jurisdiction of the magistrate's court (*Standard Bank of South Africa v Shiba; Standard Bank of South Africa v Van den Berg* 1984 (1) SA 153 (W); *Sealandair Shipping and Forwarding v Slash Clothing Co (Pty) Ltd* 1987 (2) SA 635 (W)). See also *Mofokeng v General Accident Versekering Bpk* 1990 (2) SA 712 (W).

152 *Raliphaswa v Mugivhi* 2008 (4) SA 154 (SCA) at 160C.

153 *Hunt v Campbell* 1945 WLD 1, at 4; *Gelb v Hawkins* 1960 (3) SA 687 (A) at 694.

154 *Le Roux v Dey* 2010 (4) SA 210 (SCA) at 227A–B.

155 *Brown v Cloete* 1914 CPD 757; *Gray v Goodwood Municipality* 1943 CPD 78; *Porter v Cape Town City Council* 1961 (4) SA 278 (C); *First Consolidated Leasing and Finance Corporation Ltd v Marthinus t/a Noord-Kaap Ingenieurs* 1979 (4) SA 363 (NC).

156 *United Bioscope Cafés Ltd v Moseley Buildings Ltd* 1924 AD 60; *Johannesburg Municipality v Davies* 1925 AD 395; *Porter v Cape Town City Council* 1961 (4) SA 278 (C).

157 *Gray v Goodwood Municipality* 1943 CPD 78.

158 *Ex parte Lewitton* 1919 CPD 16.

159 *Fripp v Gibbon & Co* 1913 AD 354 at 363; *Algoa Milling Co v Arkell & Douglas* 1918 AD 145; *De Villiers v Union Government* 1931 AD 206 at 213; *Desai v Estate Desai* 1935 CPD 503; *Burroughs Machines Ltd v Chenille Corp of SA (Pty) Ltd* 1964 (1) SA 669 (W) at 676; *Allen and Others NNO v Gibbs* 1977 (3) SA 212 (SE); *Edward L Bateman Ltd v C A Brand Projects (Pty) Ltd* 1995 (4) SA 128 (T) at 141G–142B; *Perumal v Govender* 1997 (3) SA 644 (N) at 654C.

160 *Algoa Milling Co Ltd v Arkell and Douglas* 1918 AD 145; *Myers v Shraga* 1947 (2) SA 258 (T); *Scheepers v Vermeulen* 1948 (4) SA 884

(O); *De Lange v Van Niekerk NO* 1951 (4) SA 294 (T); *McKelvey v Cowan NO* 1980 (4) SA 525 (Z) at 527; *Briscoe v Deans* 1989 (1) SA 100 (W) at 105. For a case in which there was a belated exception to a plea, see *Van Wyk v Minister van Finansies* 1971 (4) SA 477 (T). See also *Edward L Bateman Ltd v C A Brand Projects (Pty) Ltd* 1995 (4) SA 128 (T) at 141G–142B.

161 *Van Pletsen v Henning* 1913 AD 82 at 96; *Cohen v Haywood* 1948 (3) SA 365 (A) at 374–5; *Laingsburg Afdelingsraad v Luyt* 1959 (3) SA 679 (C) at 686; *Allen and Others NNO v Gibbs* 1977 (3) SA 212 (SE).

162 *Berezniak v Van Nieuwenhuizen* 1948 (1) SA 1057 (T); *Alderson v Phillips and Evenary Ltd* 1949 (1) SA 663 (SR).

163 *Goldberg v Kroomer* 1947 (4) SA 867 (T); *Cohen v Haywood* 1948 (3) SA 365 (A) at 374–5; *Tooth v Maingard and Mayer (Pty) Ltd* 1960 (3) SA 127 (N) at 135. If, for example, the interpretation of documents is involved, the taking of an exception is not always a safe procedure (*Van Jaarsveld v Ackermann* 1974 (3) SA 664 (T)).

164 *Berger v Israelsohn* 1951 (1) PH F11 (W); and see *Nolan v Povall* 1953 (2) SA 202 (SR) at 220–1.

165 *Majan & Co v Sahib* 1918 WLD 51; and see *Van der Ploeg v Vivier* 1966 (3) SA 218 (SWA).

166 *United Building Society v Lennon Ltd* 1934 AD 149 at 165.

167 *Pelidis v Ndhlamuti* 1969 (3) SA 563 (R); *Ottawa (Rhodesia) (Pvt) Ltd v Highams Rhodesia* 1975 (3) SA 77 (R) at 80C–G.

168 See the notes to rule 27(1) s v 'Upon such terms as to it seems meet' and to rule 41 s v 'Postponement' in Part D1 above. See also *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA) at 323I–324A, where the respondent was ordered to pay the costs of the applicant's application for condonation under s 3(4) of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 in the court *a quo* following the unwarranted and unreasonable refusal by the National Commissioner of the South African Police Service and the State Attorney to forego reliance on s 3(2)*(a)* of that Act.

169 *Thomson v Heslop and Heslop* (1916) 37 NLR 142. See also *Joffe & Co Ltd v Hoskins* 1941 AD 431 at 458–60.

170 *Vinden v The Ladysmith Local Board* (1896) 17 NLR 78; and see *Els v Bruce* 1922 EDL 295 at 300.

171 *Dunbar v Rossmaur Mansions (Pty) Ltd* 1946 WLD 235; and see *Brauns v Chairman, Local Road Transportation Board* 1981 (3) SA 933 (E).

172 *Ball v Croxford* (1882) 1 HCG 93; *Simpson v Naude* (1882) 2 EDC 156.

173 Unreported, SCA case nos 997/2021 and 1175/2021 dated 29 November 2022.

174 *Freedland v Kohn* 1906 TS 239.

175 *Appollinaris v Vasco Mineral Waters Ltd* 1911 CPD 234; *Kensington Steam Bakery v Dogan* 1916 TPD 17; *Le Roux v ARM Pietersburg* 1919 TPD 119; *Lebenya v District Commandant of Police* 1950 (1) SA 867 (O). Where the plaintiff gave notice of withdrawal and undertook to pay the defendant's costs to date, but the defendant went on to apply for judgment for costs, the defendant was ordered to pay the costs of the application, since it was unnecessary to have brought it (*Mervis & Co v Rom Ltd* 1926 OPD 244; *Ngoduka v SAR & H* 1935 EDL 284). However, in *Kajee v Minister of Justice* 1952 (3) SA 467 (N) it was held (at 469F–470H) that the defendant was entitled to apply for judgment for costs, as a judgment for costs was worth more to him than an offer to pay the costs. See also *A v B and C* 1976 (4) SA 31 (SR) at 33D–F. The view expressed in the latter two decisions is to be preferred above that taken in the *Mervis* and *Ngoduka* decisions. See further the notes to rule 41(1)*(c)* s v 'Apply to court on notice for an order for costs' in Part D1 above.

176 *Rood and Van Wyk v Van Ryn* 1913 CPD 311; *Cunningham v Wintour* 1938 CPD 533; *Benab Properties CC v Sportshoe (Pty) Ltd* 1998 (2) SA 1045 (C) at 1051A–D.

177 *Jacobs v Carels* 1913 CPD 334. See also *Nicholaides v Marcus Stores (Pty) Ltd* 1960 (4) SA 694 (SR); *Benab Properties CC v Sportshoe (Pty) Ltd* 1998 (2) SA 1045 (C) at 1050E–J.

178 *Unit Inspection Co of SA (Pty) Ltd v Hall Longmore & Co (Pty) Ltd* 1995 (2) SA 795 (A) at 802I.

179 *Odendaal v Du Plessis* 1918 AD 470; *Harris v Pieters* 1920 AD 644; *Unit Inspection Co of SA (Pty) Ltd v Hall Longmore & Co (Pty) Ltd* 1995 (2) SA 795 (A) at 801J–803B.

180 *Odendaal v Du Plessis* 1918 AD 470; *Unit Inspection Co of SA (Pty) Ltd v Hall Longmore & Co (Pty) Ltd* 1995 (2) SA 795 (A) at 801J–803B.

181 *First National Bank of Southern Africa Ltd t/a Wesbank v First East Cape Financing (Pty) Ltd* 1999 (4) SA 1073 (SE) at 1080E–G.

182 *Bell & Hutton v The Taxing Master* (1906) EDC 298.

183 *Black v Hajie* 1919 CPD 83; *Lotzoff v Connel* 1968 (2) SA 127 (W) at 131–2.

184 *Tomboy v Parker* 1928 CPD 85; *Invernizzi v Port Elizabeth Municipality* 1954 (2) SA 288 (E) at 298–9; *Simoes v Hasewinkel* 1966 (1) SA 579 (W). See also *Katz v Reading* 1944 CPD 197 at 203; *De Bruyn v De Bruyn* 1945 OPD 242; *Henning v Henning* 1975 (2) SA 787 (O); *Patmore v Patmore* 1997 (4) SA 785 (W) at 787H–788H.

185 *Union Government v Heiberg* 1919 AD 477 at 483–4.

186 *Lawford v Minister of Justice* (1914) 35 NLR 284.

187 *Molteno Bros v SA Railways* 1936 AD 408, in which there was no order as to costs.

188 *Parson v Parson's Executors* (1913) 34 NLR 515.

189 *Naidu v Blacher Bros* 1946 CPD 922 at 929.

190 *Combrink v Potgieter* 1914 JWR 666; on the circumstances under which a court will award a *quantum meruit*, see *Middleton v Carr* 1949 (2) SA 374 (A) at 385–7.

191 *Schmidt v Barnardo* (1906) 23 SC 447; *Elebelle (Pty) Ltd v Szynkarski* 1966 (1) SA 592 (W); *Van der Ploeg v Vivier* 1966 (3) SA 218 (SWA).

192 *McKay v Naidoo* 1931 NPD 264; *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 (4) SA 160 (T) at 178I–179C.

193 In *Mokoena v Minister of Law and Order* 1986 (4) SA 42 (W), where there was misconduct on the part of both parties, the court did not make a special order as to costs because the misconduct of the one went in some measure to compensate for that of the other. See also *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 (4) SA 160 (T) at 178I–179C; and see *Abbott v Von Theleman* 1997 (2) SA 848 (C), where a successful applicant for an interdict, who had taken the law into his own hands, was deprived of his costs.

194 See the words of Atkin LJ *Ritter v Godfrey* [1920] 2 KB 47 at 60 cited by Greenberg JA in *Merber v Merber* 1948 (1) SA 446 (A) at 453. See also *Protea Assurance Co Ltd v Matinise* 1978 (1) SA 963 (A) at 977B–H.

195 *Van der Merwe v Strydom* 1967 (3) SA 460 (A) at 470; *Bruwer v Smit* 1971 (4) SA 164 (C).

196 *Siffman v Grydy* 1909 TS 568. It is for this reason that costs were ordered to abide by the result of the trial in *Toerien v Estate Van der Merwe* 1930 CPD 27: the allegation of fraud against the executor was not tested in the interlocutory proceedings in which an exception was upheld.

197 *Van Rooijen v Klerck* (1882) 2 SC 149; *Lyons v Weir* 1916 CPD 226; *Giovagnoli v Di Meo* 1960 (3) SA 393 (N); *Marais v Minister of the Interior* 1971 (1) SA 294 (T); *Soundcraft (Pty) Ltd t/a Advanced Audio v Daan Jacobs t/a Radio Spares and TV* 1982 (4) SA 685 (W) at 688–9; *Ex parte Jordaan: In re Grunow Estates (Edms) Bpk v Jordaan* 1993 (3) SA 448 (O) at 453E–J; *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 (4) SA 160 (T) at 178I–179C.

198 *Headleigh Private Hospital (Pty) Ltd t/a Rand Clinic v Soller & Manning* [1998] 4 All SA 334 (W) at 346.

199 *Marks v Luntz* 1915 CPD 712; *SA Tungsten Mines Ltd v Van Zijl* 1928 CPD 122; *Protea Assurance Co Ltd v Matinise* 1978 (1) SA 963 (A).

200 *Kernick v Fitzpatrick* 1907 TS 389; *Hulscher v Voorschotkas voor Zuid-Afrika* 1918 TS 542; *Heilig v African Export* 1928 WLD 44; *Naylor v Wheeler* 1947 (2) SA 681 (D); *Essop v Mustapha and Essop NNO* 1988 (4) SA 213 (D) at 224; *Michael v Linksfield Park Clinic (Pty) Ltd* 2001 (3) SA 1188 (SCA) at 1201J–1202B, 1204A–1207E.

201 *Evatt v Philip* 1931 WLD 163; *Van der Merwe v Strydom* 1967 (3) SA 460 (A).

202 *Rau v Venter's Executors* 1918 AD 482 at 488.

203 *Jacobson and Woolf v Municipal Council of Johannesburg* 1906 TH 99.

204 *Investec Employee Benefits Ltd v Electrical Industry KwaZulu-Natal Pension Fund* 2010 (1) SA 446 (W) at 480H–I.

205 *Lundy v Beck* 2019 (5) SA 503 (GJ) at 510H–511F.

206 *Geza v Standard Trust Limited* (unreported, ECGq case no 3534/2021 dated 14 March 2023) at paragraph [32].

207 *Van Rensburg v Smit* 1930 EDL 349.

208 *Van der Merwe v Rathbone* 1934 SWA 62.

209 *Makonto v M'Dabankulu* (1892) 6 HCG 244.

210 *Trustees SA Bank v Prince* (1852) 1 Searle 198.

211 *Royal Baking Powder Co v Chrystallisers Ltd* 1928 CPD 448; and see *Zyp Products Co Ltd v Ziman Bros Ltd* 1926 TPD 224.

212 *Jerry John v John Jiba* (1897) 11 EDL 70.

213 *Schmidt v Barnardo* (1906) 23 SC 447; *Smith v Smith* 1925 WLD 183.

214 *Les Marquis (Pty) Ltd v Marchand* 1989 (2) SA 651 (T).

215 *Grootboom v Magennis* 1907 EDC 87. See also *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 (4) SA 160 (T) at 178I–179C.

216 *Levin v Levin* 1962 (3) SA 330 (W). See also *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 (4) SA 160 (T) at 178I–179C.

217 *Sandton Civic Precinct (Pty) Ltd v City of Johannesburg* 2009 (1) SA 317 (SCA) at 323C–I.

218 *Liquidators of the Union Bank v Beit* (1892) 9 SC 109 at 144.

219 *Berkowitz v Berkowitz* 1956 (3) SA 522 (SR); *Howe NO v Essey* 1963 (3) SA 402 (T); and see *Mahomed v Nagdee* 1952 (1) SA 410 (A) at 420; *Erasmus v Grunow en 'n Ander* 1980 (2) SA 793 (O) at 797; *South African Bus and Taxi Association v Cape of Good Hope Bank Ltd* 1987 (4) SA 315 (C) at 323I–326A.

220 *Van der Merwe v Strydom* 1967 (3) SA 460 (A) at 469–71; *Nxasana v Minister of Justice* 1976 (3) SA 745 (D) at 761; *Trust Sentrum (Kaapstad) (Edms) Bpk v Zevenberg* 1989 (1) SA 145 (C) at 151.

221 *Electricity Printing Works (Pty) Ltd v Kathlyns Cosmetics (Pty) Ltd* 1964 (4) SA 378 (N); *Van der Merwe v Strydom* 1967 (3) SA 460 (A) at 469–71; *Trust Sentrum (Kaapstad) (Edms) Bpk v Zevenberg* 1989 (1) SA 145 (C) at 151; *J v Commissioner of Child Welfare* [1996] 2 All SA 259 (W) at 272.

222 *Brink v Stadler* 1963 (2) SA 427 (C) at 431.

223 2019 (6) SA 253 (CC). See also *Tjiroze v Appeal Board of the Financial Services Board* 2021 (1) BCLR 59 (CC) at paragraphs [23] and [24]; *Gordhan v The Public Protector* [2021] 1 All SA 428 (GP) (a decision of the full court) at paragraphs [297]–[304]; *Mkhatshwa v Mkhatshwa* 2021 (5) SA 447 (CC) at paragraphs [21]–[27].

224 1907 TS 281.

225 At 318C–319A (footnotes omitted); and see *Zuma v Democratic Alliance* 2021 (5) SA 189 (SCA) at paragraphs [47]–[52]; *MultiChoice Support Services (Pty) Ltd v Calvin Electronics t/a Batavia Trading* (unreported, SCA case nos 296/2020 and 226/2021 dated 8 October 2021) at paragraph [33]; *Mkhatshwa v Mkhatshwa* 2021 (5) SA 447 (CC) at paragraph [21]; *Hawarden v Edward Nathan Sonnenbergs Inc* [2023] 1 All SA 675 (GJ) at paragraph [132].

226 In *Normandien Farms (Pty) Ltd v South African Agency for Promotion of Petroleum Exploration and Exploitation SOC Ltd* 2020 (4) SA 409 (CC) the Constitutional Court, with reference to costs on an attorney and client scale, unanimously stated (at paragraph [60]):
'A punitive costs order is an extraordinary order which will be imposed only in exceptional circumstances, having regard to the conduct of the parties throughout the litigation.'
In *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) the majority of the Constitutional Court, with reference to *Ka Mtuze v Bytes Technology Group SA (Pty) Ltd* 2013 (12) BCLR 1358 (CC) and *Paulsen v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) stated, amongst others (at 317F–G):
'This court has endorsed the principle that a personal costs order may also be granted on a punitive scale. The punitive costs mechanism exists to counteract reprehensible behaviour on the part of a litigant.'
In *Ex parte Minister of Home Affairs* 2024 (2) SA 58 (CC) the Constitutional Court unanimously described a personal costs order on an attorney and client scale as 'double punishment' (at paragraph [91]). In the same judgment the Court held that a 'punitive costs order is justified where the conduct concerned is extraordinary and deserving of a court's rebuke'; it serves 'to convey a court's displeasure at a party's reprehensible conduct' (at paragraph [92]).
In *Zuma v Democratic Alliance* 2021 (5) SA 189 (SCA) the Supreme Court of Appeal stated (at paragraph [51]):
'There is nothing on the record to sustain the inference that the presiding judges in this matter (or at a more generalised level in other matters involving Mr Zuma) were biased or that they were not open-minded, impartial or fair. The allegations were made with a reckless disregard for the truth and persisted in during argument. They ought not to have been made at all. But, having been made, they ought, in response to the invitation from the EFF, to have been retracted. To have persisted in the unjustified criticism of not just the high court, but more generally the judiciary, is plainly deserving of censure. Little wonder then that the EFF submits that Mr Zuma should be penalised with a punitive costs order as a mark of this Court's displeasure and to vindicate the integrity of the high court and the judiciary. A submission, for the reasons given, with which I am in agreement.'
In *Municipal Manager O.R. Tambo District Municipality v Ndabeni* [2022] 5 BLLR 393 (CC) the O.R. Tambo District Municipality was ordered by the Constitutional Court to pay the respondent's costs on an attorney and client scale because '[a] punitive costs order will assuage some of the harm perpetrated against Ms Ndabeni' as a result of the municipality's dilatoriness, inertia and unaccountability.

227 The whole of the paragraph is taken from *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1946 AD 597 at 607. In this case the jurisdiction of a superior court to award attorney and client costs was exhaustively examined for the first time. See also *Ward v Sulzer* 1973 (3) SA 701 (A); *Jooste NO v Minister of Police* 1975 (1) SA 349 (E) at 356–7; *Buthelezi v Poorter* 1975 (4) SA 608 (W); *Engineering Management Services (Pty) Ltd v South Cape Corporation (Pty) Ltd* 1979 (3) SA 1341 (W) at 1344–5; *Mudzimu v Chinhoyi Municipality* 1986 (3) SA 140 (Z); *Grobler NO v Boikhutsong Business Undertaking (Pty) Ltd* 1987 (2) SA 547 (B) at 581; *Cambridge Plan AG v Cambridge Diet (Pty) Ltd* 1990 (2) SA 574 (T) at 588–9; *Waste Products Utilisation (Pty) Ltd v Wilkes (Biccari Interested Party)* 2003 (2) SA 590 (W) at 598D–F; *Thusi v Minister of Home Affairs and Another and 71 Other Cases* 2011 (2) SA 561 (KZP) at 612A–C; *Society of Advocates of KwaZulu-Natal v Levin* 2015 (6) SA 50 (KZP) at 55B–C; *LP v PR* 2018 (3) SA 507 (WCC) at 512H–513C; *Wingate-Pearse v Commissioner, South African Revenue Service* 2019 (6) SA 196 (GJ) at 229E–F; *Borcherds v Duxbury* 2021 (1) SA 410 (ECP) at paragraph [43.4]; *Cawe v Public Protector of the Republic of South Africa* (unported, GP case no 66063/2018 dated 28 May 2021) at paragraph [63]; *Educated Risk Investments 54 (Pty) Ltd v The Master of the High Court, Johannesburg* (unreported, GJ case no 18358/2020 dated 27 September 2021) at paragraph [20]; *Mkhatshwa v Mkhatshwa* 2021 (5) SA 447 (CC) at paragraph [20]; *Moodley v Adzam Trading 48 (Pty) Limited* (unreported, GJ case no 32779/2020 dated 15 December 2022) at paragraph [22]; *Body Corporate of the Six Sectional Title Scheme No SS 433/09 v City of Cape Town* [2023] 3 All SA 136 (WCC) at paragraph [68]. In *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) the majority of the Constitutional Court, with reference to *Limpopo Legal Solutions v Eskom Holdings Soc Ltd* 2017 (12) BCLR 1497 (CC), stated, amongst others (at 317G–318 — footnotes omitted):
'As explained by this court in *Eskom*, the usual costs order on a scale as between party and party is theoretically meant to ensure that the successful party is not left "out of pocket" in respect of expenses incurred by them in the litigation. Almost invariably, however, a costs order on a party and party scale will be insufficient to cover all the expenses incurred by the successful party in the litigation.'

228 This has frequently been reiterated: *De Villiers v Murraysburg School Board* 1910 CPD 535; *Mallinson v Tanner* 1947 (4) SA 681 (T); *Van Wyk v Millington* 1948 (1) SA 1205 (C); *Moosa v Lalloo* 1957 (4) SA 207 (O); *De Goede v Venter* 1959 (3) SA 959 (O); *Goode, Durrant and Murray (SA) Ltd v Stephenson NO (2)* 1961 (1) SA 657 (SR); *Van Dyk v Conradie* 1963 (2) SA 413 (C); *Simmons NO v Gilbert Hamer & Co Ltd* 1963 (1) SA 897 (N); *Keyter v De Wet NO* 1967 (1) SA 25 (O); *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C); *Ward v Sulzer* 1973 (3) SA 701 (A); *Waar v Louw* 1977 (3) SA 297 (O); *Engineering Management Services (Pty) Ltd v South Cape Corporation (Pty) Ltd* 1979 (3) SA 1341 (W) at 1344C–1345H; *Pieter Bezuidenhout-Larochelle Boerdery (Edms) Bpk v Wetorius Boerdery (Edms) Bpk* 1983 (2) SA 233 (O) at 237; *W v S (1)* 1988 (1) SA 475 (N) at 498; *Snyman v Sentraboer* 1988 (3) SA 919 (O); *Ridon v Van der Spuy and Partners (Wes-Kaap) Inc* 2002 (2) SA 121 (C) at 140C; *Bovungana v Road Accident Fund* 2009 (4) SA 123 (E) at 133G–H; *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at 317D–F and 319A–320B; *Gordhan v The Public Protector* [2021] 1 All SA 428 (GP) (a decision of the full court) at paragraph [304]; *Benatar v Black Academic Caucus* (unreported, WCC case no 18821/2020 dated 15 December 2021) at paragraphs 67–75.

229 *Peter Cooper & Company (Previously Cooper and Ferreira) v De Vos* [1998] 2 All SA 237 (E) at 253–4. See also *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC) at 261F–262A.

230 *Real Estate and Trust Corporation Ltd v Central India Estates Ltd* 1923 WLD 121; *In re Alluvial Creek Ltd* 1929 CPD 532; *Ebrahim v Excelsior Shopfitters and Furnishers (Pty) Ltd (2)* 1946 TPD 226; *Van Dyk v Conradie* 1963 (2) SA 413 (C); *Ward v Sulzer* 1973 (3) SA 701 (A); *Waar v Louw* 1977 (3) SA 297 (O) at 304; *Zodin Investments (Pty) Ltd v Kemp* 1983 (4) SA 483 (C) at 486; *Friederich Kling GmbH v Continental Jewellery Manufacturers; Speidel GmbH v Continental Jewellery Manufacturers* 1995 (4) SA 966 (C) at 974G–975H; *Page v ABSA Bank Ltd t/a Volkskas Bank* 2000 (2) SA 661 (E) at 667C–D; *Wraypex (Pty) Ltd v Barnes* 2011 (3) SA 205 (GNP) at 205I–207G; *Wingate-Pearse v Commissioner, South African Revenue Service* 2019 (6) SA 196 (GJ) at 229A–230J; *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at 318D; *Gordhan v The Public Protector* [2021] 1 All SA 428 (GP) (a decision of the full court) at paragraph [304].

231 *De Sousa v Technology Corporate Management (Pty) Ltd* 2017 (5) SA 577 (GJ) at 655C–655J; *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at 318D.

232 *Van Dyk v Conradie* 1963 (2) SA 413 (C) at 418; *Engineering Management Services (Pty) Ltd v South Cape Corporation (Pty) Ltd* 1979 (3) SA 1341 (W) at 1344–5; *Rautenbach v Symington* 1995 (4) SA 583 (O) at 587J–589D; *Madzunye v Road Accident Fund* 2007 (1) SA 165 (SCA) at 170I–G; *MEC for Public Works, Roads and Transport, Free State v Esterhuizen* 2007 (1) SA 201 (SCA) at 204H–205F; *Minister of Land Affairs and Agriculture v D&F Wevell Trust* 2008 (2) SA 184 (SCA) at 203A–B (a matter where attorney and client costs were granted against a party who, *inter alia*, delivered a founding affidavit which was prolix and argumentative and included lengthy documents already before court); *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC) at 264A–268D (a matter where attorney and client

costs were granted against a provincial government); *Eloff v Road Accident Fund* 2009 (3) SA 27 (C) at 35F–I. See also *Nyathi v MEC for Department of Health, Gauteng* 2008 (5) SA 94 (CC) at 114E–116A where the Constitutional Court refers (at 115F–116A) to, *inter alia*, *South African Liquor Traders' Association v Chairperson, Gauteng Liquor Board* 2006 (8) BCLR 901 (CC) paragraph 54 (2009 (1) SA 565 (CC) at 581F–582G), in which a costs order was made against the office of the State Attorney *de bonis propriis* on the scale as between attorney and client; and see *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 (4) SA 160 (T) at 178I–179D (where a costs order on an attorney and own client basis was made); *President of the Republic of South Africa v Public Protector* 2018 (2) SA 100 (GP) at 147A–148I (where the full court ordered the President to pay the costs of the application, including the costs of the second respondent's conditional counter-application, in his personal capacity on an attorney and client basis); *ABSA Bank Ltd and related matters v Public Protector* [2018] 2 All SA 1 (GP) (where the full court ordered the Public Protector in her official capacity to pay *(a)* the costs of Absa Bank Ltd, on an attorney and client scale, including the costs of three counsel; *(b)* 85% of the costs of the South African Reserve Bank on an attorney and client scale, including the costs of three counsel; *(c)* 15% of the costs of the South African Reserve Bank on an attorney and client scale, including the costs of three counsel, *de bonis propriis*); *Huysamen v Absa Bank Ltd* (unreported, SCA case no 660/2019 dated 12 October 2020) (where a costs order against litigants, and their attorney *de bonis propriis*, was made on an attorney and client scale); *Kunene v Minister of Police* (unreported, SCA case no 260/2020 dated 10 June 2021) at paragraph [49] (a case of dishonourable conduct by legal representatives comprising lies and abuse of State funds, where the High Court made a costs order against each of them on an attorney and client scale, and their appeal against the order was dismissed by the Supreme Court of Appeal); *N.J.M v NBC Holdings (Pty) Limited* (unreported, GJ case no 2021/5545 dated 16 March 2023) at paragraph [25] (where the applicant's attorneys chose to pursue the irresponsible and reckless course of prolonging the matter and were ordered to pay the costs of the first respondent *de bonis propriis* on an attorney and client scale); *Matsena v National Research Foundation* (unreported, GP case no 51776/2020 dated 18 May 2023) at paragraph [46] (where the applicant's counsel was ordered to pay the costs of the respondents *de bonis propriis* on the scale as between attorney and client); *Montle and Neo Transport Service v Engen Petroleum Limited* (unreported, WCC case no 20420/2022 dated 18 August 2023) at paragraph [92] (where the applicant's attorney was ordered to pay the costs of the respondents *de bonis propriis* on on the scale as between attorney and client); and see *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at 318C–319A. In *Gordhan v The Public Protector* [2021] 1 All SA 428 (GP) (a decision of the full court) the conduct of the Public Protector, was, in summary, described as 'egregious' (at paragraph [304]) and the following costs order was made against her:
'The Public Protector and Advocate Mkhwebane are ordered, jointly and severally, to pay Minister Pravin Jamnadas Gordhan, Mr Visvanathan Pillay and Mr George Ngakane Virgil Magashula's costs on the scale between attorney and client such costs to include the costs of two Counsel where so employed. It is further ordered that Advocate Mkhwebane shall pay such costs personally with her liability limited to 15% of those costs.'

233 *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1946 AD 597; *Law Society, Northern Provinces v Mogami* 2010 (1) SA 186 (SCA) at 196I.

234 *Sass v Berman* 1946 WLD 138; *Wooltextiles Manufacturers v Goldberg* 1952 (4) SA 116 (W); and see *Moshal Gevisser (Trademarket) Ltd v Midlands Paraffin Co* 1977 (1) SA 64 (N) at 70.

235 *Munsamy v Dosa* 1949 (2) PH F85 (N); *Performing Right Society Ltd v Berman* 1966 (2) SA 355 (R); *Edwards v McNicol* 1973 (1) SA 540 (RA). See also *Buthelezi v Poorter* 1975 (4) SA 608 (W).

236 *Keyter v Le Roux* (1841) 3 Menz 23; *Lewison v Philips* (1842) 3 Menz 37.

237 *Estate Donaldson v Knight* 1933 NPD 407 at 413; *Moosa v Mahomed* 1939 TPD 271; *Wittrock v Sickel* 1943 SWA 53.

238 *Morris v Jacobs and Wolpert* 1950 (2) SA 189 (N); *Herold v Sinclair* 1954 (2) SA 531 (A) at 537; and see *Gelb v Hawkins* 1960 (3) SA 687 (A); *Spes Bona Bank v Portals Water Treatment* 1981 (1) SA 618 (W) at 637; *Crundall Brothers (Pvt) Ltd v Lazarus NO* 1991 (3) SA 812 (ZH) at 829E–I; *Abrahams v RK Komputer SDN BHD* 2009 (4) SA 201 (C) at 212A–G; *Fluxmans Incorporated v Lithos Corporation of South Africa (Pty) Ltd and Another (No 1)* 2015 (2) SA 295 (GJ) at 321H–J.

239 *W v S (1)* 1988 (1) SA 475 (N) at 497.

240 *Protea Assurance Co Ltd v Januszkiewicz* 1989 (4) SA 292 (W).

241 *MacIntyre v Le Roy* 1904 TH 190.

242 *Friederich Kling GmbH v Continental Jewellery Manufacturers; Speidel GmbH v Continental Jewellery Manufacturers* 1995 (4) SA 966 (C) at 974G–975H; *Fluxmans Incorporated v Lithos Corporation of South Africa (Pty) Ltd and Another (No 1)* 2015 (2) SA 295 (GJ) at 321H–J.

243 *Real Estate and Trust Corporation Ltd v Central India Estates Ltd* 1923 WLD 121; *In re Alluvial Creek Ltd* 1929 CPD 532 at 535; and see *Moshal Gevisser (Trademarket) Ltd v Midlands Paraffin Co* 1977 (1) SA 64 (N) at 70; *Wingate-Pearse v Commissioner, South African Revenue Service* 2019 (6) SA 196 (GJ) at 229A–230J; *Benatar v Black Academic Caucus* (unreported, WCC case no 18821/2020 dated 15 December 2021) at paragraphs 67–75.

244 *City of Tshwane Metropolitan Municipality v Grobler* 2005 (6) SA 61 (T) at 66C–67B.

245 *Treatment Action Campaign v Minister of Health* 2005 (6) SA 363 (C) at 372C–E.

246 *Fluxmans Incorporated v Lithos Corporation of South Africa (Pty) Ltd and Another (No 2)* 2015 (2) SA 322 (GJ) at 328H–329E.

247 *Van Staden NO v Pro-Wiz Group (Pty) Ltd* 2019 (4) SA 532 (SCA) at 538I–540H.

248 *Zuma v Democratic Alliance* 2021 (5) SA 189 (SCA) at paragraphs [47]–[52].

249 *Commissioner, South African Revenue Service v Louis Pasteur Investments (Pty) Ltd (in Provisional Liquidation)* 2022 (5) SA 179 (GP) at paragraphs [85]–[96].

250 *MEC, Department of Public Works v Ikamva Architects* 2022 (6) SA 275 (ECB) (a decision of the full court) at paragraphs [94]–[101].

251 *Directrix Risk Services CC v Badenhorst* (unreported, GJ case no 55831/2021 dated 30 March 2023) at paragraph [41].

252 *South African Farm Assured Meat Group CC v Langeberg Municipality* (unreported, WCC case no 15865/2021 dated 13 July 2023) at paragraphs 187–191.

253 *Giovagnoli v Di Meo* 1960 (3) SA 393 (N); *Simmons NO v Gilbert Hamer & Co Ltd* 1963 (1) SA 897 (N); *Sabena Belgian World Airlines v Ver Elst* 1980 (2) SA 238 (W) at 243; *Hayes v Baldachin* 1980 (2) SA 589 (R) at 595; *Levinsohn's Meat Products (Edms) Bpk v Addisionele Landdros, Keimoes* 1981 (2) SA 562 (NC) at 569; *BS Finance Corp (Pty) Ltd v Trusting Engineering (Pty) Ltd* 1987 (4) SA 518 (W) at 523; *Van der Merwe v Tokkies du Plooy Afslaers (Edms) Bpk* 1990 (3) SA 318 (O) at 322–3; *Rautenbach v Symington* 1995 (4) SA 583 (O) at 587J–589D; *Naidoo v Matlala NO* 2012 (1) SA 143 (GNP) at 157C–I; *Zuma v Office of the Public Protector* (unreported, SCA case no 1447/2018 dated 30 October 2020) at paragraphs [39]–[41].

254 *Mahomed & Son v Mahomed* 1959 (2) SA 688 (T); *Zuma v Office of the Public Protector* (unreported, SCA case no 1447/2018 dated 30 October 2020) at paragraphs [39]–[41]; *MultiChoice Support Services (Pty) Ltd v Calvin Electronics t/a Batavia Trading* (unreported, SCA case nos 296/2020 and 226/2021 dated 8 October 2021) at paragraphs [33]–[34]. See also *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 339E–J; *Furniture Bargaining Council v AXZS Industries (Pty) Ltd* 2020 (2) SA 215 (GJ) at paragraph [60].

255 *In re Alluvial Creek Ltd* 1929 CPD 532; *Lemore v African Mutual Credit Association* 1961 (1) SA 195 (C); *Marsh v Odendaalsrus Cold Storages Ltd* 1963 (2) SA 263 (W) at 270; *Phase Electric Co (Pty) Ltd v Zinmans Electrical Sales (Pty) Ltd* 1973 (3) SA 914 (W); *South African Druggists Ltd v Beecham Group plc* 1987 (4) SA 876 (T) at 882; *Van der Merwe v Tokkies du Plooy Afslaers (Edms) Bpk* 1990 (3) SA 318 (O) at 323; *ABSA Bank Ltd (Volkskas Bank Division) v S J du Toit & Sons Earthmovers (Pty) Ltd* 1995 (3) SA 265 (C) at 268B–I; *Sayed v Editor, Cape Times* 2004 (1) SA 58 (C) at 67E–68A; *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic* 2014 (1) SA 381 (WCC) at 413A–H; *Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd* 2016 (1) SA 78 (GJ) at 94D–G; *Wingate-Pearse v Commissioner, South African Revenue Service* 2019 (6) SA 196 (GJ) at 229A–230J; *Benatar v Black Academic Caucus* (unreported, WCC case no 18821/2020 dated 15 December 2021) at paragraphs 67–75; *Hawarden v Edward Nathan Sonnenbergs Inc* [2023] 1 All SA 675 (GJ) at paragraph [132].

256 *Thom v Union Government* 1929 (1) PH F62.

257 *Epstein v Fraay* 1948 (1) SA 1272 (W).

258 *Magnolia Investments (Pty) Ltd v Kemp* 1934 TPD 297; *City of Tshwane v Ghani* 2009 (5) SA 563 (T) at 570D–H.

259 *Bultfontein Municipality v Strauss* 1943 (1) PH F5. In *Uitenhage Municipality v Uys* 1974 (3) SA 800 (E) at 806 attorney and client costs were awarded against a respondent who, by adopting a harsh and uncompromising attitude towards the applicant's reasonable request for an extension of time, had unnecessarily provoked an opposed application which was bound to succeed.

260 *City of Cape Town v Satz* 1939 CPD 195.

261 *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 309B–G.

262 *Sabena Belgian World Airlines v Ver Elst* 1980 (2) SA 238 (W) at 244; and see *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 354.

263 See, *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 354; *Trakman NO v Livshitz* 1995 (1) SA 282 (A) at 288E–G; *Socratous v Grindstone Investments* 2011 (6) SA 325 (SCA) at 330H–I and 331D.

264 *James v Jockey Club of SA* 1954 (2) SA 44 (W).

265 *Ward v Sulzer* 1973 (3) SA 701 (A) at 706; *Grobler NO v Boikhutsong Business Undertaking (Pty) Ltd* 1987 (2) SA 547 (B) at 581. Not only mendacity in the conduct of the proceedings but also in the conduct leading up to the proceedings will justify an award of attorney and client costs (*Nordbak (Pty) Ltd v Wearcon (Pty) Ltd* 2009 (6) SA 106 (W) at 117H).

266 *Suzman Ltd v Pather and Sons* 1957 (4) SA 690 (N); *De Goede v Venter* 1959 (3) SA 959 (O); *J K Fulton (Pty) Ltd v Logic Engineering Enterprises (Pty) Ltd* 1983 (1) SA 735 (W) at 741.

267 *Hamza v Bailen* 1949 (1) SA 993 (C) at 1003; *Herold v Sinclair* 1954 (2) SA 531 (A) at 538; *Jooste NO v Minister of Police* 1975 (1) SA 349 (E) at 357; *Levinsohn's Meat Products (Edms) Bpk v Addisionele Landdros, Keimoes* 1981 (2) SA 562 (NC) at 569–70; *Mudzimu v Chinhoyi Municipality* 1986 (3) SA 140 (Z) at 144F–I; *Caxton Ltd v Reeva Forman (Pty) Ltd* 1990 (3) SA 547 (A) at 578–9; *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC) at 264A–264D (a case where attorney and client costs were granted against a provincial government); *Eloff v Road Accident Fund* 2009 (3) SA 27 (C) at 35F–I; *City of Tshwane v Ghani* 2009 (5) SA 563 (T) at 570D–H; *Dlusha v King Sabata Dalindyebo Municipality* 2012 (4) SA 407 (ECM) at 414B–C (a case in which attorney and client costs were granted against a municipality). See also *Nyathi v MEC for Department of Health, Gauteng* 2008 (5) SA 94 (CC) at 114E–116A where the Constitutional Court refers (at 115F–116A) to, *inter alia*, *South African Liquor Traders Association v Chairperson, Gauteng Liquor Board* 2006 (8) BCLR 901 (CC) paragraph 54 (2009 (1) SA 565 (CC) at 581F–582G), in which a costs order was made against the office of the State Attorney *de bonis propriis* on the scale as between attorney and client. In *Bond Equipment (Pretoria) (Pty) Ltd v ABSA Bank Ltd* 1999 (2) SA 63 (W), attorney and client costs were ordered against a party which had forced a postponement as a result of a last minute attempt to amend a pleading; a practice which, the court held, was strongly to be deprecated as it interferes with the smooth flow of litigation, which it is the duty of the courts, counsel and attorneys to uphold.

268 *Caluza v Minister of Justice* 1969 (1) SA 251 (N). In *Mudzimu v Chinhoyi Municipality* 1986 (3) SA 140 (Z) at 143 it is stressed that such deplorable and contemptuous conduct must bring about additional and unwarranted expense to the other party in order to warrant an order of attorney and client costs — offensive behaviour towards the court or its officials is irrelevant, as far as costs are concerned, if it does not have this effect. See also *Thunder Cats Investments 49 (Pty) Ltd v Fenton* 2009 (4) SA 138 (C) at 150I–152E; *City of Tshwane v Ghani* 2009 (5) SA 563 (T) at 570D–H.

269 *Reid NO v Royal Insurance Co Ltd* 1951 (1) SA 713 (T); *James v Jockey Club of SA* 1954 (2) SA 44 (W) at 46; *Tarry & Co Ltd v Matatiele Municipality* 1965 (3) SA 131 (E); *Ferreira v Endley* 1966 (3) SA 618 (E); *Levinsohn's Meat Products (Edms) Bpk v Addisionele Landdros, Keimoes* 1981 (2) SA 562 (NC) at 569–70; *Associated Musical Distributors (Pty) Ltd v Big Time Cycle House* 1982 (1) SA 616 (O).

270 *South African Bureau of Standards v GGS/AU (Pty) Ltd* 2003 (6) SA 588 (T) at 592B–593C.

271 *Moila v Fitzgerald* [2007] 4 All SA 909 (T) at 921*f–h*.

272 *AB v Minister of Social Development* 2017 (3) SA 570 (CC) at 632A–633F and 665A–E. See also *President of the Republic of South Africa v Public Protector* 2018 (2) SA 100 (GP) at 147A–148I (where the full court ordered the President to pay the costs of the application, including the costs of the second respondent's conditional counter-application, in his personal capacity on an attorney and client basis); *ABSA Bank Ltd and related matters v Public Protector* [2018] 2 All SA 1 (GP) (where the full court ordered the Public Protector in her official capacity to pay *(a)* the costs of Absa Bank Ltd, on an attorney and client scale, including the costs of three counsel; *(b)* 85% of the costs of the South African Reserve Bank on an attorney and client scale, including the costs of three counsel; *(c)* 15% of the costs of the South African Reserve Bank on an attorney and client scale, including the costs of three counsel, *de bonis propriis*). In *Gordhan v The Public Protector* [2021] 1 All SA 428 (GP) (a decision of the full court) the conduct of the Public Protector, was, in summary, described as 'egregious' (at paragraph [304]) and the following costs order was made against her:
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273 *De Sousa v Technology Corporate Management (Pty) Ltd* 2017 (5) SA 577 (GJ) at 655C–655J.

274 *Valken v Berger* 1948 (3) SA 532 (W).

275 *Van Wyk v Millington* 1948 (1) SA 1205 (C); and see *Bosch v Hofman & Co* 1953 (1) SA 502 (T).

276 *Shaw v Tatham* 1912 WLD 75.

277 *Orr v Solomon* 1907 TS 281.

278 *Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 (2) SA 545 (A) at 560; but see *Africa Solar (Pty) Ltd v Divwatt (Pty) Ltd* 2002 (4) SA 681 (SCA) at 699A–E.

279 *Immelman v Loubser* 1974 (3) SA 816 (A).

280 *Snyman v Sentraboer* 1988 (3) SA 919 (O).

281 *Stetco (Pty) Ltd v Moorcroft* 1950 (2) PH F73 (T).

282 If an employer (a manufacturer) does not deliberately set out to slander his rival's goods, but allows the slander to come about through inattention to the acts of his servants done in order to advertise his goods, there is not, on the part of the employer, a knowledge of the acts of his servants or a conscious desire to injure the rival wrongfully, and attorney and client costs will not be ordered (*International Tobacco Co (SA) Ltd v United Tobacco (South) Ltd (2)* 1955 (2) SA 29 (W) at 36).

283 *Madzunye v Road Accident Fund* 2007 (1) SA 165 (SCA) at 170I–171G.

284 2009 (1) SA 565 (CC) at 581F–582G.

285 2009 (4) SA 123 (E) at 137B–D.

286 2020 (1) SA 221 (GP).

287 2023 (3) SA 125 (GP).

288 At paragraphs [68] and [70].

289 *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC) at 264A–264D. See also *Nyathi v MEC for Department of Health, Gauteng* 2008 (5) SA 94 (CC) at 114E–116A where the Constitutional Court refers (at 115F–116A) to, *inter alia*, *South African Liquor Traders' Association v Chairperson, Gauteng Liquor Board* 2006 (8) BCLR 901 (CC) paragraph 54 (2009 (1) SA 565 (CC) at 581F–582G), in which a costs order was made against the office of the State Attorney *de bonis propriis* on the scale as between attorney and client.

290 See, for example, *MEC for Economic Affairs, Environment and Tourism v Kruisenga* 2008 (6) SA 264 (CkHC) at 302E–303D; *South African Liquor Traders' Association v Chairperson, Gauteng Liquor Board* 2009 (1) SA 565 (CC) at 581F–582G; *Mokhethi v MEC for Health, Gauteng* 2014 (1) SA 93 (GSJ) at 98D–I, 100G–I and 102F.

291 *Van Rensburg v City of Johannesburg* 2009 (2) SA 101 (W) at 111A–B.

292 *Dlusha v King Sabata Dalindyebo Municipality* 2012 (4) SA 407 (ECM) at 413E–414D.

293 *Sopher v Sopher* 1957 (1) SA 598 (W) at 601; *Four Wheel Drive Accessory Distribution CC v Rattan NO* 2018 (3) SA 204 (KZD) at paragraph [69]; *Meyer v Trustees, Aurum Mykel Trust* 2020 (2) SA 557 (WCC) at paragraph [25]. A prayer for attorney and client costs may be inserted in a summons without alleging any ground therefor (*Wilson v Cape Town Stevedoring Co* 1916 CPD 540).

294 *Sopher v Sopher* 1957 (1) SA 598 (W) at 601; *Marsh v Odendaalsrus Cold Storages Ltd* 1963 (2) SA 263 (W) at 270. In certain circumstances it may be necessary to give notice of intention to claim attorney and client costs, so that the issue may be ventilated by evidence if necessary (*Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 (2) SA 545 (A) at 560).

295 1946 AD 597 at 608.

296 *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1946 AD 597 at 608. See also *Fidelity Bank Ltd v Three Women (Pty) Ltd* [1996] 4 All SA 368 (W) at 410.

297 See, *inter alia*, *Enslin v Gallo* 1984 (1) PH F27 (D) 55; *Cambridge Plan AG v Cambridge Diet (Pty) Ltd* 1990 (2) SA 574 (T); *Hyperchemicals International (Pty) Ltd v Maybaker Agrichem (Pty) Ltd* 1992 (1) SA 89 (W) at 101J–102A; *Shell SA (Edms) Bpk v Voorsitter, Dorperaad van die OVS* 1992 (1) SA 906 (O) at 918I–919F; *Delfante v Delta Electrical Industries Ltd* 1992 (2) SA 221 (C) at 233B–G; *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A) at 807C–D; *Fidelity Bank Ltd v Three Women (Pty) Ltd* [1996] 4 All SA 368 (W); *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at 21E–22D; *Ben McDonald Inc and Another v Rudolph and Another* 1997 (4) SA 252 (T); *Lourenco v Ferela (Pty) Ltd (No 1)* 1998 (3) SA 281 (T) at 300F–H; *Harris v Williams* 1998 (2) SA 263 (W) at 275E–277A (the costs order was upheld on appeal — 1998 (3) SA 970 (SCA)); *Badenhorst v Balju, Pretoria Sentraal* 1998 (4) SA 132 (T) at 142B–E; *Waste Products Utilisation (Pty) Ltd v Wilkes (Biccari Interested Party)* 2003 (2) SA 590 (W) at 598D–I; *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 (4) SA 160 (T) at 178I–179D; *Investec Bank Ltd v O'Shea NO* (unreported, WCC case no 10038/2014 dated 31 July 2020) at paragraphs [42] and [44]; *MEC for Co-Operative Governance and Traditional Affairs, KZN v Nquthu Municipality* 2021 (1) SA 432 (KZP) at paragraphs [34]–[36]. However, in *Law Society of the Cape of Good Hope v Windvogel* 1996 (1) SA 1171 (C) the full court expressed the view that an order for attorney and own client costs is not appropriate since it is not generically different from an order for attorney and client costs. In *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) it was remarked (at 596G–H) that the issue remains one for future consideration by the Supreme Court of Appeal. In *AA Alloy Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd* 2000 (1) SA 639 (SCA) at 648G–H doubt was expressed as to whether orders for costs on an attorney and own client basis were justified where someone other than the own client or his privy was involved. In *Moropa v Chemical Industries National Provident Fund* 2021 (1) SA 499 (GJ) the court, after an analysis of certain cases (at paragraphs [87]–[89]), concluded that 'an attorney and own client scale of costs is not part of our law'.

298 2004 (1) SA 123 (W) *per* Stegmann J. For a useful synopsis of the judgment, see 2003 (September) *De Rebus* 23–5.

299 First edition, 1947.
300 1946 AD 597.
301 *Contra Fidelity Bank Ltd v Three Women (Pty) Ltd* [1996] 4 All SA 368 (W) at 409.
302 *Aircraft Completions Centre (Pty) Ltd v Rossouw* 2004 (1) SA 123 (W) at 183I–184B.
303 *Aircraft Completions Centre (Pty) Ltd v Rossouw* 2004 (1) SA 123 (W) at 184B.
304 *Aircraft Completions Centre (Pty) Ltd v Rossouw* 2004 (1) SA 123 (W) at 188F–G.
305 *Aircraft Completions Centre (Pty) Ltd v Rossouw* 2004 (1) SA 123 (W) at 182C–E.
306 2001 (4) SA 551 (SCA) at 596F–H.
307 *Hawkins v Gelb* 1959 (1) SA 703 (W) at 705C–F. See also *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1946 AD 597 at 607–8, where Tindall JA referred to an 'attorney and client bill which a successful party is bound to pay to his own attorney and . . . an attorney and client bill which has been taxed against the losing party' and held that 'the award of attorney and client costs against the losing party really demands what may be termed an intermediate basis of taxation'.
308 For example, *Brooks v Taxing Master* 1960 (3) SA 225 (N) at 230B–D; *City Real Estate Co v Ground Investment Group (Natal) (Pty) Ltd* 1973 (1) SA 93 (N) at 96C–F; *Loots v Loots* 1974 (1) SA 431 (E) at 433C–E; *Law Society of the Cape of Good Hope v Windvogel* 1996 (1) SA 1171 (C) at 1176C–H; *Fidelity Bank Ltd v Three Women (Pty) Ltd* [1996] 4 All SA 368 (W) at 409.
309 In *Law Society of the Cape of Good Hope v Windvogel* 1996 (1) SA 1171 (C) it was held (at 1176H) that one is not dealing here with three different kinds of costs orders, but with three different bases for taxation as between attorney and client. However, the word 'category' has also been used in this context (*Fidelity Bank Ltd v Three Women (Pty) Ltd* [1996] 4 All SA 368 (W) at 409–10). It is submitted that not much turns on this difference in terminology. It has become customary, for example, to speak of costs as being awarded on the 'scale' as between attorney and client or attorney and own client, as opposed to the scale as between party and party. The only scale provided for in the rules is as between party and party and, it is submitted, the terminology is readily understood by both practitioners and taxing masters as referring to different bases or principles of taxation.
310 1960 (3) SA 225 (N) at 230B–D.
311 *Fidelity Bank Ltd v Three Women (Pty) Ltd* [1996] 4 All SA 368 (W) at 409. See, however, *Aircraft Completions Centre (Pty) Ltd v Rossouw* 2004 (1) SA 123 (W).
312 1946 AD 597 at 607–8.
313 *Fidelity Bank Ltd v Three Women (Pty) Ltd* [1996] 4 All SA 368 (W) at 410. In *Muller v The Master and Another* 1992 (4) SA 277 (T) the full court held (at 285D) that where an agreement between an attorney and his client in respect of the particular work done authorizes a specific charge, the taxing master cannot resort to his tariff if the amount does not constitute an overreaching. See also *Ben McDonald Inc and Another v Rudolph and Another* 1997 (4) SA 252 (T) in which it was held (at 258B–C) that:
'Attorney and own client costs, whether . . . (the client himself is to pay them) or where they are to be paid by the losing party to the successful party, means all costs incurred except where unreasonable. Agreed items or amounts are presumed to be reasonable . . . This presumption of reasonableness cannot be irrebuttable as this would open the door to clients agreeing to exorbitant fees with attorneys or counsel in the knowledge that the opponent will foot the bill. This will be *contra bonos mores*.'
See further *Cambridge Plan AG v Cambridge Diet (Pty) Ltd* 1990 (2) SA 574 (T) at 589D–F; *Waste Products Utilisation (Pty) Ltd v Wilkes (Biccari Interested Party)* 2003 (2) SA 590 (W) at 598G–I; *Findlater t/a Findlater Attorneys v M B Morton Estates (Pty) Ltd* (unreported, KZP case no 6994/2022P dated 29 November 2022) at paragraph [5].
314 *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at 22B.
315 *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A) at 807D.
316 *Cambridge Plan AG v Cambridge Diet (Pty) Ltd* 1990 (2) SA 574 (T) at 589D.
317 *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at 22B.
318 *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at 22C–D.
319 2019 (6) SA 253 (CC). See also *Gordhan v The Public Protector* [2021] 1 All SA 428 (GP) (a decision of the full court) at paragraph [304].
320 At 318B (footnotes omitted).
321 *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A).
322 *Shell SA (Edms) Bpk v Voorsitter, Dorperaad van die OVS* 1992 (1) SA 906 (O).
323 *Delfante v Delta Electrical Industries Ltd* 1992 (2) SA 221 (C) at 233B–G.
324 *Lourenco v Ferela (Pty) Ltd (No 1)* 1998 (3) SA 281 (T) at 300F–H; *Lourenco v Ferela (Pty) Ltd (No 2)* 1998 (3) SA 302 (T) at 310H–311B; *Rhino Hotel & Resort (Pty) Ltd v Forbes* 2000 (1) SA 1180 (W) at 1184J–1185A and 1185E–F; and see *Brown v Papadakis and Another NNO* 2009 (3) SA 542 (C) at 545G–546D. See also *Ernst & Young v Beinash* 1999 (1) SA 1114 (W) in which the applicants had applied for an order in terms of the Vexatious Proceedings Act 3 of 1956 prohibiting the respondents from instituting any further legal proceedings against the applicants without leave of the court. In granting the order, the court ordered the respondents to pay the costs of the application as between attorney and own client, as the respondents had evinced an intention and determination to litigate persistently and vexatiously and had demonstrated a lack of bona fides, having launched an avalanche of unmeritorious applications, actions and private prosecutions and in the process making unsubstantiated and groundless allegations of fraud, dishonesty and criminal acts against the applicants. In *Christensen NO v Richter* (unreported, GP case no 73868/2016 dated 6 October 2017) a similar costs order was made against the first respondent in proceedings instituted against him under the Vexatious Proceedings Act 3 of 1956. In *Gouws v Taxing Mistress (Port Elizabeth)* (unreported, ECPE case nos 3300/2018 and 525/2018 dated 5 November 2020) the court declined to make a punitive costs order against the party who was declared a vexatious litigant under the Vexatious Proceedings Act 3 of 1956.
325 *Harris v Williams* 1998 (2) SA 263 (W) at 276E–F; 1998 (3) SA 970 (SCA); *Michael v Linksfield Park Clinic (Pty) Ltd* 2001 (3) SA 1188 (SCA) at 1204A–1207E.
326 *Badenhorst v Balju, Pretoria Sentraal* 1998 (4) SA 132 (T) at 142B–E. It should be noted that only the wasted costs occasioned by the postponement were awarded on the basis as between attorney and own client.
327 *DS v RM* 2015 (3) SA 424 (WCC) at 436F–437A.
328 *Graham v Law Society, Northern Provinces* 2016 (1) SA 279 (GP) at 292G–J and 293A.
329 *MEC for Co-Operative Governance and Traditional Affairs, KZN v Nquthu Municipality* 2021 (1) SA 432 (KZP) at paragraphs [34]–[36].
330 *Heinrich v De Cerff* (unreported, WCC case no 19893/2012 dated 13 September 2022) at paragraph 125.
331 *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 (4) SA 160 (T) at 178I–179D.
332 *Hyperchemicals International (Pty) Ltd v Maybaker Agrichem (Pty) Ltd* 1992 (1) SA 89 (W) at 101J–102A.
333 *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A) at 807C–D. The court held that an award of costs on the very punitive attorney and own client scale was not justified. However, it was deemed 'appropriate and just to award the appellant its trial costs on an attorney and client scale'.
334 *Fidelity Bank Ltd v Three Women (Pty) Ltd* [1996] 4 All SA 368 (W). In this matter, too, attorney and client costs were awarded; the court did not consider that the losing party's conduct had justified imposition of 'the ultimate sanction of an award of costs as between attorney and own client'.
335 *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 339E–J. While the court deemed it appropriate to make a special order as to costs, it did not consider that the circumstances were such that attorney and own client costs should be ordered.
336 On the distinction between costs *de bonis propriis* and attorney and client costs, see *Pieter Bezuidenhout-Larochelle Boerdery (Edms) Bpk v Wetorius Boerdery (Edms) Bpk* 1983 (2) SA 233 (O) at 236. The principle of costs *de bonis propriis* applies only where a person acts or litigates in a representative capacity (*Moller v Erasmus* 1959 (2) SA 465 (T) at 467; *Zalk v Inglestone* 1961 (2) SA 788 (W) at 795; *Pheko v Ekurhuleni City* 2015 (5) SA 600 (CC) at 624G).
337 *Blou v Lampert and Chipkin NNO* 1973 (1) SA 1 (A) at 14; *De Wet NO v Barkhuizen* 2022 (4) SA 197 (ECG) (a decision of the full court) at paragraph [16].
338 *Pieter Bezuidenhout-Larochelle Boerdery (Edms) Bpk v Wetorius Boerdery (Edms) Bpk* 1983 (2) SA 233 (O) at 236; *Kenton-on-Sea Ratepayers Association v Ndlambe Local Municipality* 2017 (2) SA 86 (ECG) at 118F.
339 *Kenton-on-Sea Ratepayers Association v Ndlambe Local Municipality* 2017 (2) SA 86 (ECG) at 118F. See also W Vos 'Personal cost orders: Protecting the public purse' (2020) 31.1 *SLR* 138.
340 *South African Liquor Traders Association v Chairperson and Others, Gauteng Liquor Board* 2009 (1) SA 565 (CC) at 582E–G; *Lushaba v MEC for Health, Gauteng* 2015 (3) SA 616 (GJ) at 634D–E, reversed on appeal, but not on this point, in *MEC for Health, Gauteng v Lushaba* 2017 (1) SA 106 (CC).
341 *Stainbank v SA Apartheid Museum at Freedom Park* 2011 (10) BCLR 1058 (CC) at paragraph [52]; *Lushaba v MEC for Health, Gauteng* 2015 (3) SA 616 (GJ) at 634F (and the authorities there referred to), reversed on appeal, but not on this point, in *MEC for Health,*

Gauteng v Lushaba 2017 (1) SA 106 (CC); *Kenton-on-Sea Ratepayers Association v Ndlambe Local Municipality* 2017 (2) SA 86 (ECG) at 118F–G; *Kunene v Minister of Police* (unreported, SCA case no 260/2020 dated 10 June 2021) at paragraph [49]; *Kgoro Consortium (Pty) Ltd v Cedar Park Properties 39 (Pty) Ltd* (unreported, SCA case no 935/2020 dated 9 May 2022) at paragraph [18] and the cases there referred to; *Arnold v ABSA Bank Limited In re: EOH Managed Services (Pty) Ltd v Creswick* (unreported, GJ case no 42876/2020 dated 14 September 2022) at paragraphs [30]–[31]; *Ribbon Dancer Investments CC v Moos*a (unreported, WCC case no 21019/2022 dated 17 April 2023) at paragraph [22].

342 *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at 320B; *Gordhan v The Public Protector* [2021] 1 All SA 428 (GP) (a decision of the full court) at paragraphs [304] and [305]; *Kunene v Minister of Police* (unreported, SCA case no 260/2020 dated 10 June 2021) at paragraphs [48]–[49]; *Malao v K Malao Inc* (unreported, GP case no 60617/2020 dated 12 August 2021) at paragraphs [6]–[8]; *Badenhorst N.O. v Manyatta Properties Close Corporation* (unreported, MM case no 1019/2021 dated 12 November 2021) at paragraph [77]; *N.J.M v NBC Holdings (Pty) Limited* (unreported, GJ case no 2021/5545 dated 16 March 2023) at paragraph [25].

343 2015 (3) SA 616 (GJ).

344 2017 (1) SA 106 (CC). See also *eThekwini Municipality v Westwood Insurance Brokers Proprietary Limited* (unreported, KZP case no AR230/2018 dated 31 January 2020 — a decision of the full court); M du Plessis and MZ Suleman '*eThekwini Municipality and Others v Westwood Insurance Brokers (Pty) Ltd*: Personal Costs Against Public Officials Through the Lens of *Westwood*' (2021) 1384 *SALJ* 731.

345 At 110H–111B.

346 At 111I–112A.

347 At 112B–D.

348 At 113D and 113G–H.

349 2018 (2) SA 100 (GP) at 147A–148I.

350 [2018] 2 All SA 1 (GP) [2018] 2 All SA 1 (GP).

351 [2021] 1 All SA 428 (GP) (a decision of the full court).

352 At paragraph [304].

353 2024 (3) SA 1 (CC).

354 At paragraphs [161]–[162].

355 2024 (2) SA 58 (CC).

356 At paragraphs [56]–[89].

357 At paragraph [91].

358 At paragraph [118].

359 At paragraph [98].

360 At paragraph [118].

361 *Re Estate Potgieter* 1908 TS 982 at 1000; *Grobbelaar v Grobbelaar* 1959 (4) SA 719 (A) at 725; *De Wet NO v Barkhuizen* 2022 (4) SA 197 (ECG) (a decision of the full court) at paragraph [16]; *Commissioner, South African Revenue Service v Louis Pasteur Investments (Pty) Ltd (in Provisional Liquidation)* 2022 (5) SA 179 (GP) at paragraph [49]; *Harker v MGM Family Trust* (unreported, GJ case no 2994/2022 dated 5 September 2023) at paragraph [6].

362 *Re Estate Potgieter* 1908 TS 982 at 1000–2. See also *Vermaak's Executors v Vermaak's Heirs* 1909 TS 679 at 691; *Caldwell's Trustee v Western Assurance Co* 1918 WLD 146 at 160; *Appel v Estate Ginsberg* 1927 TPD 636 at 641; *Tshandu v Swan* 1946 AD 10 at 28; *Grobbelaar v Grobbelaar* 1959 (4) SA 719 (A) at 725; *Port Elizabeth Assurance Agency & Trust Co Ltd v Estate Richardson* 1965 (2) SA 936 (C) at 942; *Stapelberg v Schlebusch NO* 1968 (3) SA 596 (O) at 605–6; *Ex parte Klopper: In re Sogervim SA (Pty) Ltd* 1971 (3) SA 791 (T) at 797; *Blou v Lampert and Chipkin NNO* 1972 (2) SA 501 (T) at 507; 1973 (1) SA 1 (A) at 14; *Washaya v Washaya* 1990 (4) SA 41 (ZH) at 45G–46A; *Cooper NO v First National Bank of South Africa Ltd* 2001 (3) SA 705 (SCA) at 717D; *Oshry and Another NNO v Feldman* 2010 (6) SA 19 (SCA) at 36D–37A; *Harker v MGM Family Trust* (unreported, GJ case no 2994/2022 dated 5 September 2023) at paragraph [6]; and see *Manton v Croucamp NO* 2001 (4) SA 374 (W) at 383J–385E; *Visser v Cryopreservation Technologies CC* 2003 (6) SA 607 (T) at 609C–D; *Bovungana v Road Accident Fund* 2009 (4) SA 123 (E) at 133H–J; *Pheko v Ekurhuleni City* 2015 (5) SA 600 (CC) at 624G; *De Wet NO v Barkhuizen* 2022 (4) SA 197 (ECG) (a decision of the full court) at paragraph [16].

363 *Natal Bank v Kuranda's Trustee* 1904 TS 586 at 592; *Re Estate Potgieter* 1908 TS 982 at 1007; *Wilkinson v Estate Steyn* 1947 (2) SA 740 (C) at 749; *Elliott v Spheris NO* 1977 (1) SA 190 (W) at 195.

364 *Port Elizabeth Assurance Agency & Trust Co Ltd v Estate Richardson* 1965 (2) SA 936 (C) at 942; *Die Meester v Meyer* 1975 (2) SA 1 (T) at 19E–G; *Pheko v Ekurhuleni City* 2015 (5) SA 600 (CC) at 624G.

365 *Bekker's Trustee v The Master* 1909 TS 646 at 655; *Adkins and Hunter v Crosbie's Executors* 1916 EDL 357 at 364; *McLeod and Shearsmith v Shearsmith* 1938 TPD 87 at 94; *Port Elizabeth Assurance Agency & Trust Co Ltd v Estate Richardson* 1965 (2) SA 936 (C) at 942; *Die Meester v Meyer* 1975 (2) SA 1 (T) at 19F.

366 *Re Estate Potgieter* 1908 TS 982 at 1012.

367 *Caldwell's Trustee v Western Assurance Co* 1918 WLD 146 at 160–3; *Venter NO v Scott* 1980 (3) SA 988 (O).

368 2014 (3) SA 265 (GP) at 289A–D.

369 2024 (2) SA 58 (CC).

370 *David v Naggyah* 1961 (3) SA 4 (N); *Nkosi v Caledonian Insurance Co* 1961 (4) SA 649 (N); *Jenkins v FJJ de Souza & Co (Pvt) Ltd* 1968 (4) SA 559 (R); *Immelman v Loubser* 1974 (3) SA 816 (A); *Machumela v Santam Insurance Co Ltd* 1977 (1) SA 660 (A); *Waar v Louw* 1977 (3) SA 297 (O); *Khunou v M Fihrer & Son (Pty) Ltd* 1982 (3) SA 353 (W) at 363; *Washaya v Washaya* 1990 (4) SA 41 (ZH); and see *Protea Assurance Co Ltd v Januszkiewicz* 1989 (4) SA 292 (W).

In *Webb v Botha* 1980 (3) SA 666 (N) an attorney was ordered to pay, *de bonis propriis*, both the appellant's and the respondent's costs of appeal on the scale as between attorney and client. He had, *inter alia*, occasioned unnecessary costs to be incurred by all the parties to the appeal 'for no reason other than the gratification of his apparent obsession with frivolous technical points' (at 673).

In *Pheko v Ekurhuleni City* 2015 (5) SA 600 (CC) the attorney of record for the Ekurhuleni Metropolitan Municipality failed to notify the registrar of the Constitutional Court, and his clients, of his change of address. It was found (at 625D–E) that such failure constituted gross negligence on the part of the attorney. He was ordered to pay costs *de bonis propriis*.

In *Harding v Maclear* (unreported, WCC case no A 272/2016 dated 24 November 2016) legal practitioners were cautioned not to resort to 'dilatory tactics' and 'smart points'; they were warned that the court would not in future hesitate to order a practitioner who resorts to such practices to bear the costs resulting therefrom personally (at paragraph [34]).

In *CB v HB* 2021 (6) SA 332 (SCA) it was stated (at paragraphs [19]–[21]) that it is settled law that generally a court would only grant a costs order *de bonis propriis* against an attorney in cases that involve gross incompetence or gross disregard of professional responsibilities, dishonesty, wilfulness, or negligence of a serious degree.

In *N.J.M v NBC Holdings (Pty) Limited* (unreported, GJ case no 2021/5545 dated 16 March 2023) it was found that the only reason costs were incurred was because the applicant's attorneys chose to pursue the irresponsible and reckless course of prolonging the matter after 17 March 2023 (at paragraph [25]). They were ordered to pay the costs of the first respondent incurred after 17 March 2023 *de bonis propriis* on the scale as between attorney and client (in addition it was ordered that the applicant's attorneys were not entitled to recover fees or disbursements from the applicant in respect of any of the work done after 17 March 2022 in regard to the application, including the extensions of the *rule nisi*).

In *Ribbon Dancer Investments CC v Moosa* (unreported, WCC case no 21019/2022 dated 17 April 2023) an attorney was directed to pay the costs of the applicant and the first and second respondents *de bonis propriis* in respect of the wasted costs occasioned by an adjournment under circumstances where it was found that the manner in which he applied for the adjournment displayed his lack of respect for his colleagues and for the court, and hampered the administration of justice (at paragraphs [25] and [27.4]).

In *N.C.S v Nompozolo and Gabelana Incorporated* (unreported, ECEL case no 785/09 dated 25 April 2023) costs *de bonis propriis* were awarded against an attorney for not timeously withdrawing an action under circumstances where his client had, to his knowledge, no standing in the action (at paragraphs [63]–[76]).

See also *Khan v Mzovuyo Investments (Pty) Ltd* 1991 (3) SA 47 (Tk); *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz* 1996 (4) SA 411 (C) at 421J–422A; *Philotex (Pty) Ltd v Snyman; Braitex (Pty) Ltd v Snyman & others* 1998 (2) SA 138 (SCA) at 186J–187C; *Darries v Sheriff, Magistrate's Court, Wynberg, and Another* 1998 (3) SA 34 (SCA); *Southern Cape Car Rentals CC t/a Budget Rent a Car v Braun* 1998 (4) SA 1192 (SCA) at 1195F–1196C; *Manana v Johannes* 1999 (1) SA 181 (LCC) at 635G–636D; *Michael v Caroline's Frozen Yoghurt Parlour (Pty) Ltd* 1999 (1) SA 624 (W) at 636C–D; *Leibowitz t/a Lee Finance v Mhlana* 2006 (6) SA 180 (SCA) at 184F–185C; *Makuwa v Poslson* 2007 (3) SA 84 (T) at 88D–I; *Brown v Papadakis and Another NNO* 2009 (3) SA 542 (C) at 545G–546D; *Cele v South African Social Security Agency* 2009 (5) SA 105 (D) at 134H–I; 135I; 137D; 138F–I; 139A; 141A–B; 141H–I; 142A–B and 142E; *Schneider NO v AA* 2010 (5) SA 203 (WCC) at 223E–F; *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* 2014 (3) SA 265 (GP) at 288G–289D; *Malao v K Malao Inc* (unreported, GP case no 60617/2020 dated 12 August 2021) at paragraphs [6]–[8]; *Badenhorst N.O. v Manyatta Properties Close Corporation* (unreported, MM case no 1019/2021 dated 12 November 2021) at paragraphs [72]–[79]; *Kgoro Consortium (Pty) Ltd v Cedar Park Properties 39 (Pty) Ltd* (unreported, SCA case no 935/2020 dated 9 May 2022) at paragraph [18] and the cases there referred to.

371 *South African Liquor Traders' Association v Chairperson, Gauteng Liquor Board* 2009 (1) SA 565 (CC) at 581F–582G; *Tasima (Pty) Ltd v Department of Transport* 2013 (4) SA 134 (GP) at 140C–145G and 152I; *Lushaba v MEC for Health, Gauteng* 2015 (3) SA 616 (GJ) at 635D–H, 640E–F and 649F–I; *Commissioner, South African Revenue Service v Louis Pasteur Investments (Pty) Ltd (in Provisional Liquidation)* 2022 (5) SA 179 (GP) at paragraphs [49]–[56].

372 *Hopf v The Spar Group (Build It Division)* [2007] 4 All SA 1249 (D) at 1258f–1259f; *Thunder Cats Investments 49 (Pty) Ltd v Fenton* 2009 (4) SA 138 (C) at 147A–150A and 150I–152E; *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* 2014 (3) SA 265 (GP) at 288G–289D; *Kunene v Minister of Police* (unreported, SCA case no 260/2020 dated 10 June 2021) at paragraphs [48]–[49]; *Matsena v National Research Foundation* (unreported, GP case no 51776/2020 dated 18 May 2023) at paragraph [46].

373 See, for example, *Natal Bank v Kuranda's Trustee* 1904 TS 586; *Re Estate Potgieter* 1908 TS 982; *De Beer v Vlok NO* 1914 CPD 1001; *Appel v Estate Ginsberg* 1927 TPD 636 at 641; *Williams Hunt (Vereeniging) Ltd v Slomowitz* 1960 (1) SA 499 (T); *The Master v Waterson NO* 1962 (1) SA 1 (T); *De Hart NO v Klopper and Botha NNO* 1969 (2) SA 91 (T); *Blou v Lampert and Chipkin NNO* 1973 (1) SA 1 (A); *First National Bank of SA Ltd v Cooper NO* 1998 (3) SA 894 (W); *Cooper v Master of the Supreme Court* [1998] 1 All SA 158 (N) at 168; *Naidoo v Matlala NO* 2012 (1) SA 143 (GNP).

374 *Bekker's Trustee v The Master* 1909 TS 646 at 655–6.

375 *Trek Tyres Ltd v Beukes* 1957 (3) SA 306 (W); *Registrateur van Banke v Clanwilliam Eksekuteurskamer Bpk* 1972 (4) SA 387 (C); *Francarmen Delicatessen (Pty) Ltd v Gulmini* 1982 (2) SA 485 (W); *BS Finance Corp (Pty) Ltd v Trusting Engineering (Pty) Ltd* 1987 (4) SA 518 (W) at 524.

376 *Toubkin NO v Dönges NO* 1951 (3) SA 72 (T); *Ex parte Klopper: In re Sogervim SA (Pty) Ltd* 1971 (3) SA 791 (T); *Concorde Leasing Corporation (Rhodesia) Ltd v Pringle-Wood NO* 1975 (4) SA 231 (R).

377 See, for example, *Estate Orr v The Master* 1938 AD 336; *McLeod and Shearsmith v Shearsmith* 1938 TPD 87; *Gangat v Bejorseth NO* 1954 (4) SA 145 (O); *Port Elizabeth Assurance Agency & Trust Co Ltd v Estate Richardson* 1965 (2) SA 936 (C); *Conradie v Smit* 1966 (3) SA 368 (A); *Stapelberg v Schlebusch NO* 1968 (3) SA 596 (O); *Die Meester v Meyer* 1975 (2) SA 1 (T); *Manton v Croucamp NO* 2001 (4) SA 374 (W) at 383J–385E; *Gory v Kolver NO* 2006 (5) SA 145 (T) at 158H–159C; *Oshry and Another NNO v Feldman* 2010 (6) SA 19 (SCA) at 36D–37A; *Harker v MGM Family Trust* (unreported, GJ case no 2994/2022 dated 5 September 2023) at paragraphs [6] and [16]–[19].

378 *Venter NO v Scott* 1980 (3) SA 988 (O).

379 *Absa Bank v Robb* 2013 (3) SA 619 (GSJ) at 622F–G and 624H–625G.

380 *Gauteng Gambling Board v MEC for Economic Development, Gauteng* 2013 (5) SA 24 (SCA) at 40G–J.

381 *Kenton-on-Sea Ratepayers Association v Ndlambe Local Municipality* 2017 (2) SA 86 (ECG) at 103D–E, 108D–E, 118F–I and 119H–I.

382 *The Master v Omar NO* 1958 (2) SA 547 (T).

383 *Ex parte Donaldson* 1947 (3) SA 170 (T).

384 *Jacobs v Kegopotsimang* 1937 GWL 43.

385 *Phillips v Van den Heever NO* 2007 (4) SA 511 (W) at 523A–F.

386 *Regional Magistrate Du Preez v Walker* 1976 (4) SA 849 (A) at 852–3, where it is pointed out that to do so would unduly hamper a judicial officer in the proper exercise of his judicial functions.

387 1994 (4) SA 255 (E).

388 *Priem v Hilton Stuart Trust* 1994 (4) SA 255 (E) at 260E–F. It should be noted that the costs were payable of the party and party scale and not *de bonis propriis*. See also *Attorney-General, Eastern Cape v Blom* 1988 (4) SA 645 (A), where the Appellate Division refrained from interfering with an order by a full court ordering the Attorney-General to pay the costs of a review application where his discretionary decision in terms of s 30(1) of the (now repealed) Internal Security Act 74 of 1982 was set aside despite the fact that he was found not to have acted *mala fide*, but merely incorrectly.

389 *Coetzer v Magistrate of Hoopstad* 1929 OPD 86 at 91–2; *SA Motor Acceptance Corp (Pty) Ltd v Venter* 1963 (1) SA 214 (O) at 222; *Nonyake v Die Assistent Landdros, Bloemfontein* 1964 (3) SA 672 (O) at 679; *Regional Magistrate Du Preez v Walker* 1976 (4) SA 849 (A); *Moeca v Addisionele Kommissaris Bloemfontein* 1981 (2) SA 357 (O) at 367; *Civil and General Contractors CC v Civil Magistrate for the District of Albany* [2000] 3 All SA 9 (E) at 15c–e; *O'Brien NO v The Minister of Defence and Military Veterans* [2023] 1 All SA 341 (SCA) at paragraph [61]; and see *Credex Finance (Pty) Ltd v Kuhn* 1977 (3) SA 482 (N) at 485 and *Protea Assurance Co Ltd v Januszkiewicz* 1989 (4) SA 292 (W) at 297–8.

390 *Ntuli v Zulu* 2005 (3) SA 49 (N) at 53B; *Magistrate Pangarker v Botha* 2015 (1) SA 503 (SCA) at 513G–514C; *O'Brien NO v The Minister of Defence and Military Veterans* [2023] 1 All SA 341 (SCA) at paragraph [61].

391 *MacLean v Haasbroek NO* 1957 (1) SA 464 (A) at 469; *Regional Magistrate Du Preez v Walker* 1976 (4) SA 849 (A) at 853B; *Magistrate Pangarker v Botha* 2015 (1) SA 503 (SCA) at 513G–514A.

392 *Wichura v Powrie* (1888) 6 SC 132 (but see the dissenting judgment of Buchanan J); *Pedley v Mayor of Standerton* 1916 TPD 684; *McCullogh v Mayor of Springs* 1932 WLD 170.

393 *Britstown DC v Civil Commissioner of Britstown* (1893) 10 SC 105.

394 *Louvis v Oiconomos* 1917 TPD 465; *Nugent v Morgan* 1932 CPD 181.

395 *Minister of Justice v Pienaar* 1926 (1) PH M26.

396 *Joynt v Joubert* 1959 (1) SA 512 (T); *Moller v Erasmus* 1959 (2) SA 465 (T).

397 *Pheko v Ekurhuleni City* 2015 (5) SA 600 (CC) at 624G; and see *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at 299C–300A.

398 *South African Social Security Agency v Minister of Social Development* 2018 (10) BCLR 1291 (CC) at paragraph [37]; and see *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at 299D.

399 2011 (10) BCLR 1058 (CC) at paragraphs [35]–[36]; and see *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at 299C–D.

400 2019 (6) SA 253 (CC). See also *Economic Freedom Fighters v Gordhan* 2020 (6) SA 325 (CC) at paragraphs [86]–[94]; *Gordhan v The Public Protector* [2021] 1 All SA 428 (GP) (a decision of the full court) at paragraphs [297]–[304].

401 301D–302F (footnotes omitted). See also *Public Protector v Commissioner for the South African Revenue Service* 2022 (1) SA 340 (CC) at paragraphs [33]–[41].

402 2020 (6) SA 325 (CC).

403 At paragraph [85].

404 As to which see *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC). When considering whether the *Biowatch* principle applies, the crucial consideration is not the character of the parties, but the nature of the litigation at issue (*Economic Freedom Fighters v Gordhan* 2020 (6) SA 325 (CC) at paragraph [77]; and see *Afriforum NPC v Nelson Mandela Foundation Trust* 2023 (4) SA 1 (SCA) at paragraph [74]). Of importance is whether a costs award would hinder or promote the advancement of constitutional justice. If a litigant's motivation for pursuing litigation was not advancement of constitutional justice, but rather his dislike of Islam, there could be no reason for costs not to follow the result (*Madrasah Taleemuddeen Islamic Institute v Ellaurie* 2023 (2) SA 143 (SCA) at paragraph [19]).

405 In *Public Protector v President of the Republic of South Africa* 2021 (6) SA 37 (CC) the Constitutional Court made a similar finding (at paragraphs [146]–[147]).

406 At paragraphs [86]–[95].

407 2009 (2) SA 401 (E) at 407B.

408 2009 (4) SA 123 (E) at 128B and 137D. See also *Jwili v Road Accident Fund* 2010 (5) SA 32 (GNP) at 36G–39F.

409 Unreported, MM case no 3242/2019 dated 24 January 2023.

410 At paragraphs [47]–[182].

411 2016 (6) SA 73 (LC).

412 At 100I–101A and 101D–F.

413 *Economic Freedom Fighters v Gordhan* 2020 (6) SA 325 (CC) at paragraph [92]. In *Public Protector v Commissioner for the South African Revenue Service* 2022 (1) SA 340 (CC) the Constitutional Court set aside a personal costs order that was made against the Public Protector and issued a stern warning to the High Court to grant personal costs orders against the Public Protector only when that is warranted and supported by evidence (at paragraphs [42]–[43]).

414 *Per* Juta JP in *Jaffer v Parow Village Management Board* 1920 CPD 97 at 100; and see *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 (4) SA 97 (CC) at 123C–E; *Phillips v Van den Heever NO* 2007 (4) SA 511 (W) at 523G–524E; *Aymac CC v Widgerow* 2009 (6) SA 433 (W) at 452I–J.

415 *Ayliff v Estate Wood* 1928 CPD 210. See also *Naidoo v Matlala NO* 2012 (1) SA 143 (GNP) at 157A–I.

416 *The Master v Hill NO* 1914 JWR 54.

417 *Standard Bank v Jacobsohn's Trustee* (1899) 16 SC 352; *Lamb v Pieters* (1900) 17 SC 427.

418 *Claassens v Naude* 1911 CPD 725.

419 2017 (4) SA 516 (GJ).

420 At 527J–528B.

421 Unreported, FB case no 4913/2022 dated 6 December 2022.

422 At paragraph [7].

423 1902 TS 216 at 223–4.

424 The rule has been applied in many cases dealing with officers and bodies exercising judicial and quasi-judicial functions. See, for example, *Stanford v Graaff-Reinet Municipality* (1900) 17 SC 309; *Kleinenberg v Clerk of the Court, Pietersburg* 1904 TS 90; *Houghton v Registrar of Deeds* 1905 TS 448; *Kliprivier Licensing Board v Ebrahim* 1911 AD 458; *Van Aardt v Atmore* 1912 EDL 247; *Putzier v Registrar of Deeds* 1916 EDL 417; *Pillay v Humansdorp Municipality* 1917 CPD 905; *Chief Pass Officer v Mashamba* 1917 TPD 397; *African Farms v Registrar of Deeds* 1919 OPD 128; *Coetzer v Magistrate of Hoopstad* 1929 OPD 86; *Bruwil Konstruksie (Edms) Bpk v Whitson NO* 1980 (4) SA 703 (T) at 712.

425 *Potter v Rand Townships Registrar* 1945 AD 277 at 293; *CIR v Ropes and Matting (SA) Ltd* 1945 AD 724 at 732; *Die Meester v Joubert* 1981 (4) SA 211 (A) at 218, 224; *Attorney-General, Eastern Cape v Blom* 1988 (4) SA 645 (A) at 670; *Fleming v Fleming* 1989 (2) SA 253 (A) at 262. See also *Bosman NO v Registrar of Deeds and The Master* 1942 CPD 303 at 310: *Deneysville Estates Ltd v Surveyor-General* 1951 (2) SA 68 (C); *L & B Holdings (Pvt) Ltd v Mashonaland Rent Appeal Board* 1959 (3) SA 466 (SR); *Fisher v Presiding Officers, Rosettenville Constituency* 1961 (3) SA 651 (W) at 658; *Ormerod v Deputy Sheriff Durban* 1965 (4) SA 670 (D) at 675; *Ex parte Registrateur van Aktes: In re Van den Berg, NO v Registrateur van Aktes* 1975 (3) SA 321 (T); *Die Meester v Joubert* 1981 (4) SA 211 (A) at 224D–F; *Master of the Supreme Court v Stern* 1987 (1) SA 756 (T) at 771; *Bon Esperance CC v Municipality of Stellenbosch* [1998] 4 All SA 59 (CC) at 69; *Prinsloo v Nasionale Vervolgingsgesag* 2011 (2) SA 214 (GNP) at 226D–G; *Coetzee v National Commissioner of Police* 2011 (2) SA 227 (GNP) at 259E–260B; *Absa Bank v Robb* 2013 (3) SA 619 (GSJ) at 622A–625G.

426 See, for example, *Deneysville Estates Ltd v Surveyor-General* 1951 (2) SA 68 (C) (but see *MacLean v Haasbroek NO* 1957 (1) SA 464 (A) at 469–70); *Pretoria Stadsraad v Geregsbode, Landdrosdistrik van Pretoria* 1959 (1) SA 609 (T); *Reeskens v Registrar of Deeds* 1964 (4) SA 369 (N); *Ormerod v Deputy Sheriff, Durban* 1965 (4) SA 670 (D); *Chibi v Minister of Internal Affairs* 1970 (2) SA 606 (R); *Land and Agricultural Bank of Southern Rhodesia v Jameson* 1970 (3) SA 281 (R); *Van den Berg v Registrateur van Aktes* 1974 (4) SA 619 (T); *Herstigte Nasionale Party van SA v Sekretaris van Binnelandse Sake en Immigrasie* 1979 (4) SA 274 (T) at 292–3: *Bruwil Konstruksie (Edms) Bpk v Whitson NO* 1980 (4) SA 703 (T) at 712; *Master of the Supreme Court v Stern* 1987 (1) SA 756 (T) at 772.

427 *MacLean v Haasbroek NO* 1957 (1) SA 464 (A) at 468–9; and see *Botha v Stadsklerk van Middelburg NO* 1975 (4) SA 241 (T); *Esterhuyse v Jan Jooste Family Trust* 1998 (4) SA 241 (C) at 257G–H.

428 2007 (3) SA 41 (T) 60G–61D.

429 Section 1 of the State Liability Act 20 of 1957. See also Cilliers *Costs* paragraphs 10.02 and 10.04; *Central Judicial Commission v Fass & Co* 1903 TS 825 at 830; *Habib Motan v Transvaal Government* 1904 TS 404; *Cape Coast Exploration Co Ltd v Scholtz* 1933 AD 56; *Potter v Rand Townships Registrar* 1945 AD 277 at 292–3. See, however, *Geldenhuys v Pretorius* 1971 (2) SA 277 (O). In *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC) at 264A–268D a provincial government was, however, ordered to pay costs on the scale as between attorney and client where, in an application for payment of a social grant, both its decision to oppose the application and the way in which the case was conducted represented unconscionable conduct on the part of the provincial government. In *Nyathi v MEC for Department of Health, Gauteng* 2008 (5) SA 94 (CC) at 114E–116A and 123C–E the Constitutional Court, in awarding costs against the respondent, alluded to the 'ineffective negligent acts of State officials [which] resulted in a comedy of errors which could easily have been avoided'. See also *South African Liquor Traders' Association v Chairperson, Gauteng Liquor Board* 2009 (1) SA 565 (CC) at 581F–582G, where a costs order was made against the office of the State Attorney *de bonis propriis* on the scale as between attorney and client.

430 Section 10 of the Divorce Act 70 of 1979.

431 Section 10 of the Divorce Act 70 of 1979. See also *Buttner v Buttner* 2006 (3) SA 23 (SCA) at 41H–J.

432 2017 (1) SA 442 (GJ).

433 The draft order appears at 443C–I. The court's reasoning as to why costs should not be awarded in terms of the draft order appears at 444G–448D.

434 Under the *Biowatch* principle, as to which see *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC). See also, for example, *Steenkamp v Central Energy Fund Soc Ltd* 2018 (1) SA 311 (WCC) at 332B–333A; *Ferguson v Rhodes University* 2018 (1) BCLR 1 (CC); *Harrilall v University of Kwazulu-Natal* 2018 (1) BCLR 12 (CC); *Mabaso v National Commissioner of Police* 2020 (2) SA 375 (SCA) at paragraph [51]; *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs, KwaZulu-Natal Provincial Government* 2020 (4) SA 453 (SCA) at paragraphs [56]–[66] and [68]–[74]; *Mbuthuma v Walter Sisulu University* 2020 (4) SA 602 (ECM) at paragraphs [57]–[59]; *Institute for Accountability in Southern Africa v Public Protector* 2020 (5) SA 179 (GP) at paragraphs [58] and [59]; *Competition Commission of South Africa v Pickfords Removals SA (Pty) Ltd* 2021 (3) SA 1 (CC) at paragraphs [57]–[63]; *AK v Minister of Police* 2023 (2) SA 321 (CC) at paragraph [127]; *e.tv (Pty) Ltd v Minister of Communications and Digital Technologies; Media Monitoring Africa v e.tv (Pty) Ltd* 2022 (9) BCLR 1055 (CC) at paragraph [105]; *Leysath v Legal Practitioners' Fidelity Fund Board of Control* (unreported, SCA case no 770/2021 dated 28 July 2022) at paragraph [42]; *O'Brien NO v The Minister of Defence and Military Veterans* [2023] 1 All SA 341 (SCA) at paragraph [61]; *Ndlovu v Mangosuthu University of Technology* (unreported, KZD case no D8841/2022 dated 28 April 2023) at paragraphs [58]–[62]. On the alleged trend of courts to employ the *Biowatch* principle, see Sello Ivan Phale 'Biowatch betrayal denies justice' 10 January 2024 *Mail & Guardian*.
In *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma* 2021 (5) SA 1 (CC) the Constitutional Court, in granting costs against former President Zuma, stated:
'[112] Although the respondent has not opposed the relief sought, the Commission asked for costs against him. The Commission contended that it was the unlawful conduct on the part of the respondent which forced it to approach and seek relief from this court. If the respondent had obeyed the process lawfully issued by the Commission, continued the argument, the Commission would not have been compelled to institute and fund litigation whose purpose was to stop the respondent's unlawful conduct.
[113] The rule that a private party that loses in constitutional litigation against organs of state should be spared from liability to pay costs, does not apply here. This rule was designed to protect private parties which raised genuine constitutional issues. This is not such a case. Indeed, *Biowatch* cautioned:
"At the same time, however, the general approach of this Court to costs in litigation between private parties and the state, is not unqualified. If an application is frivolous or vexatious, or in any other way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunise it against an adverse costs award."
[114] This holds true also in respect of respondents who raise frivolous defences or whose unlawful conduct has forced the state to litigate. Like the applicants described above, they do not enjoy any immunity against adverse costs orders. But here the costs order is justified by the reprehensible conduct of the respondent towards the Commission. By ignoring process from the Commission, he did not only contravene the Commissions Act but he also breached regulations made by him for the effective operation of the Commission. His conduct seriously undermined the Commission's investigation, that included matters on which the respondent may be the only witness with personal knowledge. For example, as the President at the relevant time, the respondent was the only person who could appoint and dismiss Ministers from Cabinet. And the Commission was mandated to investigate issues relating to the appointment and dismissal of Ministers from Cabinet during the respondent's presidency. These facts outweigh the respondent's decision not to oppose the relief sought.'
See also *Helen Suzman Foundation v The Speaker of the National Assembly* (unreported, SCA case no 484/2021 dated 3 February 2023) at paragraph [8].

435 *Ex parte De Vos* 1953 (2) SA 642 (SR) at 643D–H; *Komape v Minister of Basic Education* 2020 (2) SA 347 (SCA) at paragraph [71]. See, however, *K obo M v Road Accident Fund* 2023 (3) SA 125 (GP) where the full court ordered the Road Accident Fund to pay the costs of the *amici* on the scale as between party and party, and holding the balance of the costs remaining to be 'a consequence of the amici's own choice of becoming involved in the litigation' (at paragraphs [69] and [70]).

436 In *Western Cape Gambling and Racing Board v Sunwest International t/a Grandwest Casino & Entertainment World* (unreported, SCA case no 1330/2021 dated 4 September 2023) the *amicus curiae* unsuccessfully applied for leave to introduce further evidence on appeal. It was ordered to pay the respondents' costs in that regard (at paragraphs [25] and [27]).

437 *Sing v Sing* 1911 TPD 1034 at 1038–9; *Michell v Additional Magistrate Salisbury* 1954 (2) SA 93 (SR) at 95; *Clifford Harris (Pty) Ltd v SGB Building Equipment (Pty) Ltd* 1980 (2) SA 141 (T) at 152. An amendment to include a prayer for costs will usually be granted, unless there is some good reason to refuse it (*Jacobs v Joyce & McGregor* 1937 CPD 468 at 470).

438 *Sing v Sing* 1911 TPD 1034 at 1038–9; see the remarks of Greenberg J in *Johannesburg Commercial Finance Co v Hurwitz* 1935 WLD 131, followed in *Wecke & Voigts v Smit* 1943 SWA 32. In *Northern Burglar Proof Gate & Fence Co Ltd v Venite Construction (Pty) Ltd* 1977 (1) SA 708 (W) the plaintiff had applied for judgment by default for the payment of an amount of money, interest and costs. The summons contained no prayer for interest *a tempore morae* and for costs. The plaintiff applied to amend the summons to include a claim for interest and costs. The court granted judgment for the amount and for costs and ordered that copy of the order to be served upon the defendant by the deputy-sheriff. The defendant was given leave to move to set aside the order as to costs within 14 days of such service on proof of prejudice.

439 *Sing v Sing* 1911 TPD 1034 at 1038–9; *In re Hartley's Trustee v Hartley* (1884) 5 NLR 138.

440 *Marais v Union Government* 1911 TPD 407.

441 *Van Zuylen v Tilanus* 1909 TS 20.

442 See *Kholvad Investments (Pty) Ltd v Dabel Investments (Pty) Ltd* 1929 WLD 226; *National Bank of South Africa Ltd v Bissett* (1920) 37 *SALJ* 127–8.

443 *Van Wyk v Somerset Strand Land Syndicate* 1927 CPD 247; *Stofberg v Consolidated Press* 1947 (1) SA 228 (O); *Segal's Timber Co (Pty) Ltd v Alliance Furniture Manufacturers (Pty) Ltd* 1947 (2) SA 970 (W); *Wool Engineering Co Ltd v Fourie* 1948 (2) SA 180 (O); *Beaufort Retreaders (Pty) Ltd v Brenesson and Brenesson* 1956 (3) SA 576 (C); *Sportswear Specials (Pvt) Ltd v Edmays 'Ballet Centre'* 1970 (1) SA 143 (R); *Northern Burglar Proof Gate & Fence Co Ltd v Venite Construction (Pty) Ltd* 1977 (1) SA 708 (W).

444 *Bolon v Kotze* 1930 CPD 152.

445 See *McLeod v Myers* (1895) 5 CTR 167; *Johannesburg Commercial Finance Co v Hurwitz* 1935 WLD 131; *Wooltextiles Manufacturers v Goldberg* 1952 (4) SA 116 (W).

446 *Parfumerie du Mond Elegant v Bombay Trading Co* 1922 CPD 510; *Van Vuuren v Van Vuuren* 1942 WLD 7; and see *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 at 178; *P Lorillard Co v Rembrandt Tobacco Co (Overseas) Ltd* 1967 (4) SA 353 (T) at 361.

447 *Parfumerie du Mond Elegant v Bombay Trading Co* 1922 CPD 510.

448 *Transvaal Society of Accountants v Cranston* 1906 TS 894; *Ochse v Visser* (1910) 20 CTR 136; *Wood v Wood* (1938) 55 *SALJ* 73.

449 *Transvaal Society of Accountants v Cranston* 1906 TS 894; *Ochse v Visser* (1910) 20 CTR 136; *Wood v Wood* (1938) 55 *SALJ* 73.

450 *Jenkins v SA Boilermakers, Iron & Steel Workers & Ship Builders Society* 1946 WLD 15 at 17–18, followed in *Roupell v Metal Art (Pty) Ltd* 1972 (4) SA 300 (W). See also *Erasmus v Grunow en 'n Ander* 1980 (2) SA 793 (O) at 798; *Wholesale Provision Supplies CC v Exim International CC* 1995 (1) SA 150 (T) at 159; *Gamlan Investments (Pty) Ltd v Trilion Cape (Pty) Ltd* 1996 (3) SA 692 (C) at 700E–701D; *Eloff v Road Accident Fund* 2009 (3) SA 27 (C) at 35D–I; *Minister of Correctional Services v Ozukalu* (unreported, NCK case no 299/21 dated 15 October 2021) at paragraph 23; *Hartman v Companies and Intellectual Property Commission Republic of South Africa* (unreported, GP case no 40443/20 dated 14 October 2021) at paragraph [30].

451 *Germishuys v Douglas Besproeiingsraad* 1973 (3) SA 299 (NC); *Erasmus v Grunow en 'n Ander* 1980 (2) SA 793 (O) at 798.

452 *Van der Liet v Executors of Karnspeck* (1832) 3 Menz 395; *Simson & Co v Fleck* (1833) 2 Menz 255; *Whittaker v Whittaker* (1879) 1 NLR 10; *Goldman v Glass* (1887) 5 SC 76; *Michaelson v Kent* 1913 TPD 48 at 50; *Win and Son v Levin* 1916 WLD 36 at 38; *Van Wyk v Hughes & Co* 1917 EDL 32; *Bloemfontein Town Council v Larsen* 1921 OPD 172; *Argus Printing & Publishing Co Ltd v Anastassiades* 1954 (1) SA 72 (W); *Western Cape Housing Development Board v Parker* 2003 (3) SA 168 (C); *Western Cape Housing Development Board v Parker* 2005 (1) SA 462 (C).

453 There have been attempts to apply this principle so as to allow a plaintiff to ask that a defendant be not allowed to proceed with his defence if he has failed to pay the costs ordered in respect of an interlocutory application. It seems a startling proposition that a defendant unable to pay such costs should therefore be compelled to submit to any judgment claimed against him by the plaintiff. The only case where a decision to that effect has been given is *Adams v Macdonald* (1904) 25 NLR 203. That was a very exceptional case, as the defendant had been found guilty of contempt and ordered to pay the costs of the proceedings for contempt. Upon his failing to do so he was restrained from further proceedings. Even this decision was much doubted in *Michaelson v Kent* 1913 TPD 48; and the view there expressed was that, unless the refusal to pay the costs was vexatious, the principle which restrains a plaintiff from harassing a defendant with a series of unsuccessful actions cannot bar a defendant from being heard in his defence. There is, however, a casual remark of Juta JP in *Goncalves v Fernandez* 1918 CPD 10 which suggests that the principle might be applied to a defendant. In *M'biza v Puza* 1918 TPD 1 the defendant asked for a postponement, which was granted on condition that he paid the costs of the day before the hearing was resumed. He did not pay, and at the resumed hearing evidence was given that his omission to do so was vexatious. He was barred, and judgment given for the plaintiff. On appeal it was doubted whether the court had power to decide in advance that there would be a bar if costs were not paid by a particular day. The appeal was upheld and the case remitted to take the defendant's evidence. Bristowe J considered that the defendant might be barred from proceeding if the refusal to pay costs was contumacious.

454 *Lloyd v Horn* 1915 CPD 13; *Western Cape Housing Development Board v Parker* 2003 (3) SA 168 (C) at 174E–175G; *Western Cape Housing Development Board v Parker* 2005 (1) SA 462 (C) at 465I and 467F–G.

455 *Meyer v Meyer* 1945 TPD 118; *Stone v SA Railways & Harbours* 1933 TPD 265 at 271; *RSA Faktors Bpk v Bloemfontein Township Developers (Edms) Bpk* 1981 (2) SA 141 (O). This being the basis of the rule, it is immaterial that the applicant had been barred from pleading in the second action (*Cooper v Van Ryn Gold Mines Estates Ltd* 1909 TS 547). Although vexatiousness is also the basis of a successful defence of *lis pendens*, the two defences are entirely different from each other in essence and from the point of view of procedure and are based on separate and different factual situations (*RSA Faktors Bpk v Bloemfontein Township Developers (Edms) Bpk* 1981 (2) SA 141 (O) at 145A).

456 *Strydom v Griffin Engineering Co* 1927 AD 552; *Hurter v Hough* 1989 (3) SA 545 (C) at 553B–C. See also *Western Cape Housing Development Board v Parker* 2003 (3) SA 168 (C) at 175E–G.

457 *Simson & Co v Fleck* (1833) 2 Menz 25; *Cape Central Railways v Walker* (1891) 1 CTR 735; *Marincowitz v Matthys* (1895) 12 SC 176 at 178; *Rissik and Mear's Trustee v Mears* 1906 TS 642.

458 *Western Cape Housing Development Board v Parker* 2005 (1) SA 462 (C) at 466C. The rule applies despite a trivial change in the designation of one of the parties. Thus, where the plaintiff in the first case is a father in his capacity as natural guardian of his minor son, and the plaintiff in the second case is the minor son duly assisted by his father, the rule will be applied (*Thorsen v Coopsamy* 1936 NPD 636). Where one member had failed in an action undertaken substantially on behalf of the congregation, and the costs remained unpaid, the court refused to allow another member to sue *pro Deo* on the same point (*David v Abdol Rajieb* 1877 Buch 81). See also *Executors Estate Smith v Smith* 1940 CPD 387.

459 *Spencer v Jagga* 1933 OPD 262; *Executors Estate Smith v Smith* 1940 CPD 387; *Meyer v Meyer* 1945 TPD 118; *Western Cape Housing Development Board v Parker* 2005 (1) SA 462 (C) at 466C. The cause of action need not be identical: it is sufficient if it is substantially the same (*Thacker v Fourie* (1897) 14 SC 123; *Van Ryn Gold Mines Estates Ltd v Cooper* 1911 TPD 37; *Oberholzer v Oberholzer* 1927 SWA 110; *Western Cape Housing Development Board v Parker* 2003 (3) SA 168 (C) at 171H–J; *Nationwide Detectives & Professional Practitioners CC v Standard Bank of Namibia Ltd* 2008 (6) SA 75 (NmHC) at 83C). If in substance the controversy bears upon the same transaction, the court is not astute to find technical points of difference (*Bloemfontein Town Council v Larsen* 1921 OPD 172; *Argus Printing & Publishing Co Ltd v Anastassiades* 1954 (1) SA 72 (W); *Keshavjee v Ismail* 1958 (4) SA 385 (T); and see *Hurter v Hough* 1989 (3) SA 545 (C) at 553D; *Western Cape Housing Development Board v Parker* 2003 (3) SA 168 (C) at 172A–B).

460 *Lewis v Pollaky* 1919 TPD 229; *Shrigley v Collins* 1924 WLD 1; *Potchefstroom Town Council v Botes* 1939 TPD 4; *Western Cape Housing Development Board v Parker* 2003 (3) SA 168 (C) at 172A–B; and see *Western Cape Housing Development Board v Parker* 2005 (1) SA 462 (C) at 465I–466B. A difference in form is irrelevant; for example, if the first action is an unsuccessful appeal, the fact that the costs thereof remain unpaid can be pleaded to support a stay of a subsequent review (*Mahomed v Middlewick NO* 1917 CPD 539).

461 *Pemberton v Cawood & Co* (1883) 3 EDC 152; *Marincowitz v Matthys* (1895) 12 SC 176; *Pohlman v Schultz* 1925 EDL 371; *Nationwide Detectives & Professional Practitioners CC v Standard Bank of Namibia Ltd* 2008 (6) SA 75 (NmHC) at 83D.

462 *Pohlman v Schultz* 1925 EDL 371.

463 *Western Cape Housing Development Board v Parker* 2005 (1) SA 462 (C) at 466D.

464 *Partridge v Blake* (1894) 4 CTR 280; *Smuts v Poole* (1905) 22 SC 286.

465 *Simson & Co v Fleck* (1833) 2 Menz 255; cf *Van Wyk v Hughes & Co* 1917 EDL 32.

466 *Potgieter v Koekemoer* 1928 TPD 159. In *Nationwide Detectives & Professional Practitioners CC v Standard Bank of Namibia Ltd* 2008 (6) SA 75 (NmHC) it was held (at 83D) that the costs must have been taxed. It is submitted that this puts the requirement too high and that costs agreed upon by the parties in a specific amount will suffice.

467 *Western Cape Housing Development Board v Parker* 2003 (3) SA 168 (C) at 173J–174A.

468 *Deneys v Stoffberg* (1828) 1 Menz 301; *Makubalo v Mkuya* 14 EDC 124; *Jessen v Jessen* 1904 TH 98; *Simons v Lawrence & Co* 1911 CPD 854; *Hoggan v Todd* 1930 (1) PH F55; *Nationwide Detectives & Professional Practitioners CC v Standard Bank of Namibia Ltd* 2008 (6) SA 75 (NmHC) at 83D. In the latter case a further requirement is added, viz that non-payment of the costs was vexatious (at 83D). The decision in *Simson & Co v Fleck* (1833) 2 Menz 255 that it is a plaintiff's duty to offer costs appears to have been overruled by the later cases. It is not necessary that a warrant for the previous costs shall have been taken out (*Nederlandsche ZA Hypotheek Bank v Mears* 1913 TPD 704).

469 *Oberholzer v Oberholzer* 1927 SWA 110.

470 *Lazarus v SA Hebrew Benefit Society* 1913 WR 182; *Mahomed v Middlewick NO* 1917 CPD 539.

471 The difference between the approaches adopted by the former Transvaal superior courts, on the one hand, and the former Cape superior courts, on the other, in respect of the non-payment of costs of previous interlocutory proceedings is considered by Cilliers *Costs* paragraph 6.08. See also n 2 on p D5–37 above.

472 *In re Wickham* 35 ChD 272, followed in *Jessen v Jessen* 1904 TH 98; *De Jong v Sliom* 1930 TPD 570 at 572; *Spencer v Jagga* 1933 OPD

262 at 264.

473 *Hurter v Hough* 1989 (3) SA 545 (C) at 553C; *Western Cape Housing Development Board v Parker* 2005 (1) SA 462 (C) at 470I–J and 471A–C.

474 *Win and Son v Levin* 1916 WLD 36.

475 *Van Ryn Gold Mining Co Ltd v Cooper* 1906 TH 1; *Van Ryn Gold Mines Estates Ltd v Cooper* 1911 TPD 37; *Collector of Customs v Morris* 1913 CPD 140 at 144; *Bloemfontein Town Council v Larsen* 1921 OPD 172 at 179; *Pohlman v Schultz* 1925 EDL 371; *Strydom v Griffin Engineering Co* 1927 AD 552. The court will not exercise its discretion in favour of a party who is abusing the process of the court (*Thorsen v Coopsamy* 1936 NPD 636).

476 *Strydom v Griffin Engineering Co* 1927 AD 552; *Hough v Hough* 1989 (3) SA 545 (C) at 553C. In *Western Cape Housing Development Board v Parker* 2005 (1) SA 462 (C) the full court held (at 466D–E) that a respondent in an application for a stay will, upon proof of the requirements for a stay by the applicant, be required to convince the court that considerations of equity militate against the granting of the order.

477 *Meyer v Meyer* 1945 TPD 118.

478 *De Jong v Sliom* 1930 TPD 570; *Spencer v Jagga* 1933 OPD 262.

479 *Strydom v Griffin Engineering Co* 1927 AD 552; *Grissillo v Smith* 1940 CPD 449; *Volker v Weenen Town Board* 1941 NPD 338; but see *Potchefstroom Town Council v Botes* 1939 TPD 4. In *Coetzee & Coetzee v De Bruyn* 1916 OPD 71 the court refused, with costs, an application for leave to sue *in forma pauperis*, but ordered that non-payment of these costs should not prejudice proceedings thereafter taken in a magistrate's court on the same cause of action.

480 *Western Cape Housing Development Board v Parker* 2003 (3) SA 168 (C) at 175C–D, confirmed on appeal by the full court in *Western Cape Housing Development Board v Parker* 2005 (1) SA 462 (C).

481 *Pillay v Pillay* 1946 CPD 372.

482 *Per* Bowen LJ in *Lawrence v Norreys* (1888) 39 Ch D 213 at 234, quoted with approval in *Ravden v Beeten* 1935 CPD 269 at 276; *Texas Co (SA) Ltd v Wilson Bros Garage* 1936 NPD 510 at 515; *Argus Printing & Publishing Co Ltd v Anastassiades* 1954 (1) SA 72 (W) at 73. See also *Western Assurance Co v Caldwell's Trustee* 1918 AD 262; *Corderoy v Union Government (Minister of Finance)* 1918 AD 512; *Soundcraft (Pty) Ltd t/a Advanced Audio v Daan Jacobs t/a Radio Spares and TV* 1982 (4) SA 685 (W) at 687–8; *Kuiper v Benson* 1984 (1) SA 474 (W) at 477.