IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 1083/2017

In the matter between:

SENEKAL MOTOR INGENIEURS BK

(REGISTRATION NUMBER: 2003\060631\23) Plaintiff

and

SETSOTO LOCAL MUNICIPALITY Defendant

HEARD ON: 02 AUGUST 2017

JUDGMENT BY: MBHELE, J

DELIVERED ON: 12 OCTOBER 2017

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[1] In this opposed summary judgment application, the parties agreed that summary judgment be removed from the roll and the defendant be granted leave to defend the action. The only remaining issue for determination is the question of costs of the application.

[2] Mr. Els on behalf of the plaintiff contended that the costs be reserved for determination at trial. On the other hand, Mr. Lechwano contended that the plaintiff should be ordered to pay the costs of this application on attorney and client scale because the plaintiff knew of the Defendant's defence prior to filing this application.

[3] Mr. Lechwano based his contention on the provisions of Rule 32(9). He submitted that the defendant was put to unnecessary trouble and expense at the hands of the plaintiff when it had to oppose this application.

[4] Mr. Els submitted that there is no indication that the plaintiff knew that the defendant relied on a contention which would entitle it to leave to defend. He further contended that there was no correspondence from the defendant apprising plaintiff of the defence the defendant intended to raise. He argued that the current matter does not find support from the provisions of Rule 32(9).

[5] It is important to deal with the underlying dispute in this matter in determining the costs issue. The plaintiff claims payment of an amount of R302 232-70 from the defendant for services rendered and material supplied by it to the defendants at the latter's special

instance and request. The plaintiff provides motor repair services to the defendant on an ad hoc basis.

[6] Plaintiff issues monthly invoices to the Defendant. On 03 March 2017 plaintiff issued summons against the defendant. Plaintiff dispatched two invoices on 28 February 2017 and 30 April 2017 respectively.

[7] The invoice of 28 February shows total amount owing for the said period as R31 733.15. It further shows R11 684-33 as the amount owing for period of 30 days and more. The invoice of 30 April 2017 confirms the amount reflected on the invoice of 28 February 2017 as the total amount owing is reflected as R25 737.89 after a payment of R5 995.26 was made on 22 March 2017.

[8] The defendant, in its opposing affidavit for the summary judgment application, pointed out that based on the plaintiff's invoices the defendant does not owe the Plaintiff the amount as claimed in the summons. It is the defendant's opposing affidavit that prompted the plaintiff to abandon its application for summary judgment.

[9] Rule 32 (9) *(a)* provides as follows:

"The court may at the hearing of such application make such order as to costs as to it may seem just: provided that if-

(a) the plaintiff makes an application under this rule, where the case is not within the terms of subrule (1) or where the plaintiff, in the opinion of the court, knew that the defendant relied on a contention which would entitle him to leave to defend, the court may order that the action be stayed until

> the plaintiff has paid the defendant's costs; and may further order that such costs be taxed as between attorney and client."

[10] Rule 32(9)*(a)* creates a basis upon which a Court may make an award of attorney and client costs, quite independent of the considerations which usually warrant such an order, ie objectionable conduct on the part of a litigant. The provision is, founded on the premise that summary judgment is an unusual procedure which may only be invoked where the conditions set forth in subrules (1) and (2) of Rule 32 are met, including an averment under oath that the defendant does not have a *bona fide* defence. (See **ABSA BANK LTD (VOLKSKAS BANK DIVISION) v S J DU TOIT & SONS EARTHMOVERS (PTY) LTD 1995 (3) SA 265 (C)) at 267**

[11] In ***Floridar Construction Co (SWA) (Pty) Ltd v Kriess*** **1975 (1) SA 875 (SWA) at 878A** stated, quoting from **Nathan, Barnett and Brink *Uniform Rules of Court* at 156:**

> 'The purpose of the subrule is, on the one hand, to discourage unnecessary or unjustified applications for summary judgment, and, on the other hand, to discourage defendants from setting up unreasonable defences. In regard to the first of these it is to be borne in mind that in many instances the object of bringing an application for summary judgment is to force the defendant to put his defence on affidavit. A plaintiff is not entitled to do this unless it is clear that there are good grounds for making the application".

[12] It is clear that summary judgment proceedings can only be brought when the plaintiff is convinced that the defendant has no *bona fide* defence. It is a tool used to curtail lengthy litigation proceedings

and cannot be used as a means to frustrate the opponent. In **MAHOMED ADAM (PTY) LTD v BARRETT 1958 (4) SA 507 (T) at 509** the court said the following:

> "A plaintiff should therefore not resort to summary judgment proceedings where the case is not within the Rule, or where he knows that the defendant relies on a contention which would entitle him to unconditional leave to defend. Such a proceeding would be abortive and the costs wasted. As a safeguard against such a step, the Court is given a discretion to order that an action be stayed until the plaintiff has paid the defendant's costs; sub-rule (9) *(a)*. This sub-rule seems to pre-suppose that a Court would in such a case order the plaintiff to pay the defendant's costs."

[13] In the current matter Jurrie Henrie, the sole member of the plaintiff deposed to an affidavit, in support of the application for summary judgment, and stated that he represented plaintiff in all its dealings with the defendant. In paragraph 1.5 of the affidavit he states the following:

> "1.5 Ek is die persoon wat te alle tye met die Verweerder se verteenwoordigers ten opsigte van die onderhawige aangeleentheid namens Eiser kontrakteur het. Ek het ook alle onderhandelinge in die verband namens Eiser met Verweerder gevoer. Ek dra gevolglik persoonlik kennis van die aangeleentheid en is in staat om daaromtrent te getuig."

[14] It is clear from the above that the deponent had personal knowledge of defendant's payment history and status of its account. He knew of the invoices issued to the defendant and should have acquired personal knowledge of the outstanding amount payable by the defendant. The plaintiff, at all material

times, had direct knowledge of the invoices that would form the basis of the defendant's defence. Notwithstanding this knowledge defendant was put through the trouble and expense of drafting opposing affidavit which resulted in the plaintiff withdrawing the summary judgment application. I am persuaded that this is a type of matter that justifies a cost order as contemplated in rule 32 (9)(a).

[15] In view of the above the following is made:

Order:

1. Application for summary judgment is struck off the roll.
2. Plaintiff is ordered to pay defendant's costs of opposing the summary judgment application on the attorney and client scale, such costs to be taxable and payable forthwith.

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NM MBHELE, J

On behalf of plaintiff:	Adv Els
Instructed by:	Symington & De Kok Bloemfontein

On behalf of defendant:	Adv Lechwano
Instructed by:	Fixane Attorneys Bloemfontein