IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

Not Reportable

Case No: 11890/2015

In the matter between:

BIDVEST BANK LIMITED **PLAINTIFF**

and

JACOBS CAPITAL (PTY) LIMITED **DEFENDANT**

JUDGMENT

Delivered on: 29 June 2018

Gorven J

[1] The plaintiff sued out a provisional sentence summons. It relied on what it said were liquid documents. These it alleged were bills of exchange issued at Lausanne, Switzerland, drawn by Tradeflow on the defendant and endorsed to the plaintiff. The defendant opposed the grant of provisional sentence. The plaintiff thereafter sought to withdraw the provisional sentence summons and tendered the costs of the provisional sentence proceedings on a party and party scale. It then proceeded by way of action.

[2] The defendant was prepared to consent to the matter being withdrawn only on condition that the plaintiff tendered costs on the attorney and client scale. This stance of the defendant necessitated the present application under Rule 41(1)*(a)* of the Uniform Rules of Court. In it the plaintiff seeks leave to withdraw the provisional sentence summons and repeats its tender of costs on the party and party scale. It also tenders to pay the costs of the application if unopposed. If opposed, it seeks the costs of the application on a scale as between attorney and client.

[3] The withdrawal is not in issue. The only issue on which the parties are at odds is the scale of the costs which the plaintiff must pay. This is one of two matters with identical issues. I have been informed by counsel that the parties agree that only one judgment is necessary. The applicant is the plaintiff and will be referred to as such. The respondent is the defendant and will be referred to as such.

[4] Many of the facts are common cause. The application runs to 71 pages. This is most unfortunate since courts do not encourage the exchange of papers when only the issue of costs arises. The normal approach is that, unless matters outside the realm of the papers are relevant, the question of costs is argued on the papers. A robust approach is warranted so as to reserve court time for substantive matters. However, both parties felt the need to put up evidence in support of their position in the light of the disputes on the issue.

[5] The provisional sentence summons allowed the defendant 15 January 2016 to file an affidavit. The defendant filed an affidavit that day. This raised the defence that the documents did not meet the legal requirements of bills of exchange under s 2 of the Bills of Exchange Act 34 of 1964 (the Act). It contended further that they were subject to Swiss law, having been issued in

Switzerland and also did not meet the requirements of Swiss law. This prompted the plaintiff to obtain an opinion from an expert in Swiss law. The plaintiff took the view thereafter that the documents should have been embodied in one composite document, and that it was not possible to have the original document executed and endorsed to the plaintiff in one composite document. This step would be permissible in both Swiss and South African law but, since it could not be done, it was thought advisable to withdraw the provisional sentence summons and to institute action on the underlying cause of action.

[6] In correspondence, the basis of opposition to the notice of withdrawal was that it was fatally defective since it was issued after the provisional sentence matter had been set down. As such, it was not competent to issue a notice, even if it contained a tender for costs. It was further contended that the provisional sentence summons amounted to 'entirely frivolous if not vexatious proceedings' warranting a punitive scale of costs. This because, submitted the defendant, 'it was glaring that [the provisional sentence proceedings] had absolutely no prospects of success.' In the affidavit opposing the costs order in this application, the defendant supported this contention by claiming that the plaintiff knew in advance that the bills of exchange relied upon did not meet the criteria required in the Act. Since the launch of the application, the defendant added a third ground for the scale of costs contended for. This is that an order for costs on the party and party scale would mean that it would be precluded from recovering the bulk of its costs. It is worth setting out the basis fully:

'In this regard it is apposite to mention that in order to overcome the Plaintiff's abusive litigation the Defendant was compelled to engage the services of a Swiss law-firm in order to obtain an expert opinion on the Swiss legal position for reasons fully set out in the Rule 8(5) Affidavit. The expert in Swiss law, apart from commanding a substantial fee in Euro was also not prepared to travel to South Africa in order to discharge his mandate and insisted on having the Defendant's Attorney at hand in Geneve to consult with him over several days. As a result the Defendant incurred the costs of business-class airfare and costly hotel charges to

have its Attorney travel to Switzerland to consult with and draft the expert report. Those unavoidable costs, which stand in the sum of several hundreds of thousands of Rand, are entirely irrecoverable on the Party-Party scale.'

[7] As to the first point, the notice of withdrawal amounted to a request that the defendant consent to the withdrawal. It contained a tender for costs and, if the scale of costs was not objectionable to the defendant, would have been accepted. Had the defendant done so, this application would not have been necessary. The only basis on which the defendant claimed that the notice was defective was that the scale of costs tendered was inadequate. The defectiveness or otherwise therefore rests on the outcome of this application which deals with that issue.

[8] The second point is that the provisional sentence proceedings were frivolous or vexatious. The defendant's affidavit in this matter claimed that the plaintiff was aware of the flaws in the documents relied on as bills of exchange prior to issue of the provisional sentence summons. This is the only particularity supplied in support of the contention expressed in correspondence that it was 'glaring' that there were no prospects of success. The affidavit in this application claims that the plaintiff was aware of this based on a communication to the defendant that the process followed by the plaintiff's trading desk was flawed. The communication was annexed to the defendant's affidavit opposing provisional sentence. There is no reference or admission in this communication that the documents were not bills of exchange. The plaintiff testified that it was only after receiving the affidavit of the defendant in opposition to the provisional sentence summons that it sought an opinion from an expert in Swiss law and reached the conclusion that it would be best to withdraw the provisional sentence summons. There is nothing before me to gainsay that evidence. The defendant took precisely that step so as to arrive at its conclusion. If it was not

‘glaring’ to the defendant, I cannot see how it can be contended that it was ‘glaring’ to the plaintiff that there were no prospects. I see no basis for concluding that the provisional sentence proceedings were frivolous or vexatious.

[9] This leaves the third basis on which the defendant relies for a costs order on the attorney and client scale. In the first place, this was raised only in the present application. No mention was made of this in correspondence save for an unfocussed assertion that the defendant was ‘burdened with exorbitant costs that are irrecoverable under the party-party scale’. Secondly, this is not a traditional basis for the award of attorney and client costs. In some instances, a case along those lines may be made out. But it cannot by any stretch of the imagination be contended that there was only one expert in Swiss law from which the defendant could obtain an opinion. It can also not be contended that it was necessary to fund a face to face consultation, with the attendant expenses of an airfare (in whatever class of travel) and hotel accommodation. The defendant has said nothing about whether attempts were made to secure the opinion of a different expert and whether any travel would have been necessary had it done so. This is the only remaining basis for requiring costs to be paid on the attorney and client scale. I do not consider that there is sufficient evidence before me to warrant the grant of such an order on this evidence.

[10] The plaintiff tendered costs of this application if unopposed. That was generous in the light of what I have found was the defendant’s baseless refusal to accede to the withdrawal by consent and costs on the party and party scale. The plaintiff requests that the defendant be ordered to pay the costs of the application on an attorney and client scale if it is unsuccessfully opposed. Despite the outcome of this application, in my view the conduct of the defendant falls short of warranting a punitive costs order. Both parties employed

two counsel to argue the matter and agreed that any costs order should include the costs occasioned by such employment where it was done.

In the result, the following order is granted:

1 The plaintiff is given leave to withdraw the provisional sentence summons.

2 The plaintiff is directed to pay the wasted costs occasioned in the provisional sentence proceedings.

3 The defendant is directed to pay the costs of this application, such costs to include those consequent upon the employment of two counsel where this was done.

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Gorven J

Date of Hearing: 21 June 2018

Date of Judgment: 29 June 2018

Appearances

For the Plaintiff:	LN Harris SC (with him D Ramdhani), instructed by Norton Rose Fulbright South Africa Incorporated
For the Respondents:	AWM Harcourt SC (with him SK Dayal), Instructed by Maharaj Attorneys