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IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case no: **149/2021**

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED Plaintiff

[Registration number: 1[...]]

and

MARTHINUS TOBIAS MEYER

[Identity number: 6[...]] Defendant

CORAM: P R CRONJÉ, AJ

HEARD ON: 15 JUNE 2023

DELIVERED ON: 22 JUNE 2023

JUDGMENT BY: P R CRONJÉ, AJ

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 12h30 on 22 June 2023.

I BACKGROUND

- [1] The Plaintiff is a Commercial Bank ("*the Bank*") which instituted action against the Defendant (Mr Meyer) pursuant to Mr Meyer's default in payment of instalments under a home loan agreement and bond. On 28 September 2020, Mr Meyer was R35 434.04 in arrears and the balance outstanding was R207 151.84. Clause 1.1.3 of the bond provides that the Bank shall be entitled to attorney and own client costs for recovery of the debt.
- [2] The only material defence to the liability in the plea was that Mr Meyer was not in arrears as advised by an advocate. It would appear that the advocate was later found guilty on a charge of fraud and theft under false pretences.

II THE SUMMARY JUDGMENT APPLICATION

- [3] On 19 October 2021, an application for summary judgment was issued wherein the bank claimed R219 581.09, interest and to have the immovable property be declared as executable.
- [4] The application was set down for hearing for 18 November 2021. On 18 November 2021, Page AJ, by agreement between the parties, removed the matter from the roll and paragraph 2 of the order states that Mr Meyer will pay the cost of the application for summary judgment.
- [5] On 4 August 2022, one Elsie Wall deposed to a supplementary affidavit on the Bank's behalf wherein she gives an overview of attempts to settle the matter with Mr Meyer.

- [6] On 27 October 2022, Pohl AJ, by agreement between the parties removed the matter from the roll with Mr Meyer to pay the costs occasioned by the removal. On 1 December 2022, Mathebula J postponed the matter to 26 January 2023, with no order as to costs.

III MR MEYERS' DEFENCE

- [7] Mr Meyer had by then not yet filed an opposing affidavit. On 24 January 2023, Mr Meyer's attorney at Krugersdorp, Mr Kapp, served a notice to oppose and an opposing affidavit deposed to by himself.
- [8] It is stated that the majority of the litigation against Mr Meyer became settled, which includes the claims of the Bank. A property at Mossel Bay was sold with the intention of settling creditors and to avoid Mr Meyer from losing all his properties. According to Mr Kapp, the parties entered into an agreement on 18 November 2021 with the understanding that Mr Meyer would be granted an opportunity to pay all his creditors and that the creditors would be treated equally. Subsequent to that agreement, Mr Meyer made payment of R50 000.00 on 18 November 2021. He states that the Bank then issued a *second application* for summary judgment whereafter Mr Meyer made payment of R50 000.00 on 26 October 2022. It is stated that the Bank neglected and/or refused to make mention of the payment arrangement or monies received. He states that the Bank persisted with the *second application* and it was postponed to 27 October 2022. According to him, the Bank's attorneys was requested to deal with the payments already received, which the Bank's attorneys allegedly refused to do and notified Mr Meyer that they will proceed with the application. After he sent a letter to the Bank, to which a judgment in *Standard Bank of South Africa Limited v Young and Another*¹ was attached, the application was removed from the roll on 1 December 2022. In the *Standard Bank* matter the Court emphasized judicial oversight to ensure that a Plaintiff make full and frank disclosure of all relevant

¹ (D8880/2021) [2022] ZAKZDHC 30 (4 August 2022)

circumstances and that the Bank in that matter failed to inform the Court that a prior arrangement was made to settle the arrears.

- [9] Thereafter Mr Meyer made payment on 20 December 2022 of R20 000.00 which settled the arrears leaving Mr Meyer with between R3 500.00 and R4 000.00 in credit, costs excluded. The only issue that needs to be addressed is costs.

IV CONCLUSION ON THE ALLEGED AGREEMENT

- [10] I am satisfied, comparing the versions of the parties, and considering the various orders granted after the alleged settlement was reached, that there was no agreement to settle the debt to the extent that it would obviate the summary judgment application from proceeding.

- [11] It is apparent that the Bank was resolute to get paid and that it would not allow a situation to develop where the sword no longer dangled over Mr Meyer's head. His intermittent payments indicate that the Bank granted him an indulgence but did not abandon its rights to enforce payment.

- [12] I could not find any support for the allegation that there was more than one summary judgment application. The Bank merely re-enrolled the existing application and supplemented the papers when the Court made such a request.

V COSTS

- [13] On 5 January 2023, the Bank's attorneys informed Mr Kapp that the cost of the summary judgment application up to that date would be R93 597.43. Mr Meyer's view is that the Bank is not entitled to the costs subsequent to the payment arrangement. He advised that the matter must be referred to the opposed roll and that the Bank would only be entitled to cost on party and party scale on an unopposed basis to date of issue of the *first application*.

- [14] Mr Meyer tenders the cost of litigation “*which will be confirmed in a formal tender up to the stage of the issuing of the first application for summary judgment and the parties entering into a payment arrangement*”. Reference is made to three (3) applications for summary judgment which is not correct. No formal tender could be found in the Court file.
- [15] On 26 January 2023, Boonzaaier AJ, by agreement removed the matter from the roll with costs to stand over.

VI ARGUMENTS ON COSTS

- [16] Ms Macakati appeared for the Bank when the matter came before me. In her Heads of Argument she set out the background facts referring to the dates of engagement between the parties. She submits that the matter was removed from the roll on 1 December 2022 as the Bank was requested to deliver a supplementary affidavit with updated statements and an updated certificate of balance. Mr Meyer only remedied his default on 20 December 2022. The matter was set down for 26 January 2023 only in respect of costs. Only two days prior thereto did Mr Meyer file his opposing affidavit.
- [17] Ms Macakati refers to *Ferreira v Levin N.O. and others; Vryenhoek and others v Powell N.O. and others*²:

“[155] ... One of the general rules is that, although an award of costs is in the discretion of the Court, successful parties should usually be awarded their costs and that this rule should be departed from only where good grounds for doing so exist.”

- [18] She submits that when the last payment was made, the credit agreement was re-instated but that there was no offer to settle the costs of the whole application. The matter was removed from the unopposed motion court roll

² 1996 (2) SA 621 (CC); Also reported at (CCT5/95) [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (6 December 1995)

on various occasions either at the instance of Mr Meyer or in an attempt to settle the matter. The matter was not finalized when it came before Page AJ. She submits that Clause 5.3.7 of the home loan agreement provides that costs shall be on attorney and own client scale. The alleged settlement agreement was merely an indulgence granted to Mr Meyer to make payments to regularize his arrears and could not be seen as a waiver of any of the Bank's rights. There has always been only one summary judgment application which was re-enrolled. There was no reason to have a full-blown application only on costs as now occasioned by Mr Meyer's insistence.

- [19] Mr Chaka, who appeared for Mr Meyer, argued that when the alleged settlement was reached, the summary judgment application became moot. The only reason why the matter continued was the Bank's persistence and to penalize Mr Meyer with costs. The Bank had an obligation to place all the correct information before the Court and Mr Meyer now has to pay costs. The Bank is no longer seeking summary judgment and the Respondent has successfully shown that the matter is moot. He submits that costs is always in the discretion of the Court and a successful party should as general rule be awarded his/her/its costs. He submits that the matter was removed from the roll as Mr Meyer extinguished the arrears and that the Bank should be penalized for setting the matter down on several occasions and persisting despite payments made. Mr Meyer should be entitled to his costs on punitive scale as between attorney and client. The cost of R93 597.43 is exorbitant. The Court is not bound to the provisions of the underlying contract which provides for the scale of costs. Mr Meyer did not exhibit any malice and one has to look at his circumstances. He submitted that the costs of the opposed application should be borne by each party itself/himself.

VII CONTRACTUAL AGREEMENT ON COSTS – EXERCISING A DISCRETION

[20] *In Intercontinental Exports (Pty) Ltd v Fowles the Supreme Court of Appeal affirmed that the discretion to award costs remains, notwithstanding an agreement, unfettered and equitable:*

“[25] The basic rule is that, statutory limitations apart, all costs awards are in the discretion of the court (Kruger Bros & Wasserman v Ruskin 1918 AD 63 at 69, a decision which has consistently been followed). The court’s discretion is a wide, unfettered and equitable one. It is a facet of the court’s control over the proceedings before it. It is to be exercised judicially with due regard to all relevant considerations. These would include the nature of the litigation being conducted before it and the conduct of the parties (or their representatives). A court may wish, in certain circumstances, to deprive a party of costs, or a portion thereof, or order lesser costs than it might otherwise have done, as a mark of its displeasure at such party’s conduct in relation to the litigation. Is it to be precluded by agreement from doing so? A court should not be obliged to give its imprimatur to an order of costs which, in the circumstances, it considers entirely inappropriate or undeserved. In my view, 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.

[26] Because a court exercises its discretion judicially, not capriciously, it would normally be bound to recognise the parties’ freedom to contract and to give effect to any agreement reached in relation to costs. But good grounds may exist, depending upon the particular circumstances, for following a different course. This might result, on a proper exercise of discretion, in a party being deprived of agreed costs, or being awarded something less in the way of costs than that agreed upon.”

[21] The fact that Mr Meyer was advised by an advocate that he is not obliged, for whatever reason, to honour his commitments to the Bank is unfortunate for him. It is, however, not a sufficient consideration to exercise my discretion in respect of costs in his favour.

[22] I find nothing in the papers or in the conduct of the Bank that would justify a diversion from the contractual agreement to pay costs on the scale agreed on.

[23] Orders as to costs were previously made. To the extent that costs stood over, and in respect of the balance of the proceedings, I grant the Bank costs on the scale sought.

[24] I make the following order.

ORDER

1. The Defendant pays the costs of the Plaintiff on attorney and client scale.

P R CRONJé, AJ

On behalf of the Applicant/Plaintiff: Adv I Macakati
Instructed by:
Bokwa Inc.
BLOEMFONTEIN

On behalf of the Respondents: Adv.PG Chaka
MJ Kapp (Heads of Argument)
Instructed by:
Horn Van Rensburg
BLOEMFONTEIN