



**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: 4078/2016

In the matter between:

CHANGING TIDES (PTY) LIMITED N.O.

Applicant

and

NIEKIE ENGELBRECHT

First Respondent

[Identity number: [7...]]

SONETTE ENGELBRECHT

Second Respondent

[Identity number: [7...]]

HEARD ON: 9 FEBRUARY 2017

JUDGMENT BY: RAMPAL, J

DELIVERED ON: 20 APRIL 2017

[1] By agreement between the parties, the court, per Mbhele J, granted the respondents, as the defendants, leave to defend the action instituted by the applicant, as the plaintiff. The question of

costs was reserved for later adjudication. This judgment concerns that sole issue.

[2] The historical background will help to elucidate the issue.

2.1 On 3 August 2016 the applicant caused the summons to be issued against the respondent;

2.2 On 9 September 2016 the sheriff served the summons;

2.3 On 20 September 2016 the respondents filed notice of intention to defend the action;

2.4 On 29 September 2016 the applicant applied for summary judgment.

[3] The application was initially unopposed.

3.1 On 20 October 2016 the matter was on the unopposed court roll. Bokwa AJ postponed it for a week. The costs were for the respondents' account.

3.2 On 27 October 2016 the matter was again on the unopposed court roll. Molutsoane AJ postponed it for a week. The costs stood over.

3.3 On 3 November 2016 the matter appeared on the unopposed court roll yet again. Tsatsi AJ postponed it for six weeks. The costs were to be costs in cause. The respondents were ordered to file their opposing affidavit before or on 25 November 2016.

3.4 On 25 November 2016 the respondents' opposing affidavit was filed.

3.5 On 9 December 2016 the respondents' heads of argument were filed. The applicant had not filed its heads by then in accordance with the rules.

[4] The application was now on the contested terrain. The events of that phase are also significant. On 15 December 2016 the application for summary judgment was on the opposed court roll. Mbhele J was seized with the matter. The applicants' heads of argument were still outstanding. By agreement between the parties, the following order was made:

- "1. The defendants are granted leave to defend the main action;
2. Costs in respect of 15 December 2016 to stand over for adjudication on 9 February 2017;
3. Costs of the application to stand over for adjudication on 9 February 2017.
4. Plaintiff/applicant to file heads of argument on/before 27 January 2017;
5. Defendants/respondents to file supplementary heads of argument on/before 3 February 2017."

The matter was then postponed for 56 days to 9 February 2017.

[5] The application remained on the opposed court roll for the sole purpose of having the unresolved issue of costs adjudicated.

5.1 On 27 January 2017 the applicants' outstanding heads of argument were ultimately filed in accordance with the court order.

5.2 On 27 January 2017 the respondents' supplementary heads of argument were filed. They were filed seven days before the deadline, 3 February 2017, according to the court order.

5.3 On 3 February 2017 the first respondent filed his practice note.

5.4 On 8 February 2017 the applicants' supplementary heads of argument together with its practice note were filed.

[6] On 9 February 2017 I was seized with the matter. Only the first respondent was before me although leave to defend had been granted to both. Therefore, I shall say no more about the second respondent. Having heard argument for and against the awarding of costs in favour of the applicant, I reserved judgment. This completes my synopsis of the historical background of the application. Ms Olivier, counsel for the respondent, submitted that the applicant had presented an incorrect exposition of the factual background. I do not wish to labour the argument save to say there was substance in the critique.

[7] The sole issue that I am called upon to adjudicate is whether I should make a cost order adverse to the applicant.

[8] Mr Hendriks, counsel for the applicant, submitted, that although the allegations made by the respondent were just enough to satisfy the requirements of Rule 32(3) with regard to the nature and the grounds of the defence raised, there still remained one great difficulty. The opposing affidavit, counsel contended, lacked particularity regarding all material facts relied upon. In his

opinion, the respondent's opposing affidavit fell short of what the rule required to enable the court to assess their *bona fides*.

- [9] The applicant decided on 15 December 2016 not to proceed with its application for summary judgment. It is important to note that the applicant took such a decision 20 days after the respondent had filed his opposing affidavit. On 15 December 2017 Mbhele J granted the respondents leave to defend the action. She did so with the consent of the applicant. This was a material consideration.
- [10] The applicant proffered no sound explanation as to why it persisted for so long with its determination to obtain summary judgment against the respondent. It cannot be that the applicant became aware of the merits of the respondent's *prima facie* defence for the very first time on 15 December 2016. It is not unreasonable to say that, by the exercise of reasonable diligence, the applicant should, within seven days after the respondent had served his opposing affidavit, have become aware of the substantive merits of his opposition.
- [11] As regards the postponed of 15 December 2016, the circumstances were simple and straight forward. The application was supposed to be finalised on 15 December 2016 by Mbhele J but it was not. Although leave to defend was granted to the respondent on that day, the application was postponed to deal with reserved costs of three previous postponements. I have to mention that the applicants' heads of argument were not filed in accordance with the rules. As on 15 December 2016 they were

still outstanding. Whereas the respondent was ready to argue on that day the applicant was not. Because of the applicant's state of unreadiness the application had to be postponed yet again. Mbhele J ordered that it be argued on 9 February 2017; that the applicant's heads of argument be filed by no later than 27 January 2017; that the respondent's supplementary heads of argument be filed by no later than 3 February 2017 and that the costs of that day be adjudicated on 9 February 2017.

- [12] In the light of those circumstances, it is clear and obvious that the postponement of 15 December 2016 was the necessary consequence of the applicant's unpreparedness. I would, therefore, award the wasted costs occasioned by such postponement in favour of the respondent.
- [13] As regards the postponement of the application on 3 November 2015 the order by Tsatsi AJ becomes relevant. The application was removed from the unopposed roll of the day; it was postponed to the opposed roll of 15 December 2016; the respondent was called upon to file his opposing affidavit before 26 November 2016 and the cost of the postponement were reserved as cost in cause.
- [14] The aforesaid order was precipitated by the respondent's notice of intention to oppose filed 4 days earlier, on 29 October 2016 to be precise. The order was obviously sought and obtained by mutual agreement between the parties even though that was not apparent on the face of the order itself.

- [15] It has to be accepted, therefore, that the parties agreed beforehand that the cost of the postponement be reserved in favour of the party that would emerge successful as far as the application for summary judgment was concerned. Put differently, the parties contemplated that the outcome of the contested application would naturally and automatically determine which party would be entitled to the cost of the postponement.
- [16] The cost reserved on 3 November 2016 have to follow success. Seeing that the respondent ultimately emerged victorious on 15 November 2016, he is entitled to reap the fruit of his success. The fruit of the postponement reserved as cost in cause on the day in question ripened six weeks later when the respondent was granted leave to defend the action.
- [17] It was certainly the outcome of the application and not the action which was within the common contemplation of the parties at the time the cost of the postponement were reserved as cost in cause. Ordinarily the legal phrase “cost in cause” is used in connection with interlocutory proceedings where main proceedings remain on course irrespective of the outcome of such interlocutory proceedings. In this instance, the main proceedings were not on course. The applicant did not want the matter to proceed that far. The respondent wanted that avenue to be opened. The applicant wanted that avenue to remain shut.
- [18] Neither Mr Hendriks nor Ms Olivier submitted that the cost of the postponement were reserved as cost in the cause of the action. I merely ventured to debate with myself in order to clarify the point.

It has to be accepted, therefore, that the parties envisaged that the outcome of the application would determine which party was liable to bear and pay the cost of the postponement of 3 November 2016.

- [19] In arriving at this conclusion, I am also fortified by the order made on 15 December 2016. On that day the respondent was granted leave to defend the action. In such a scenario, it is customary to reserve the costs of an application for summary judgment as cost in cause. But that was not the case here. Here the parties expressly elected to have the cost of the application adjudicated up front. Mostly important, they specifically mentioned the cost relative to the postponement of 15 December 2016. They said nothing about those of previous postponement. It was understandable. They had already agreed about those cost six weeks earlier.
- [20] In the light of those considerations, I am inclined to award the cost of the postponement of 3 November 2016 to the respondent.
- [21] As regards the postponement of 20 October 2016 the order by Bokwa AJ becomes relevant. He postponed the application for a week but reserved no cost. According to the order, the cost occasioned by the postponement are supposed to be borne and paid by the respondent.
- [22] The aforesaid remains in force. I have no jurisdiction to reconsider it let alone to set it aside. Therefore, the respondent is liable to pay the applicant's cost in terms of the order in question.

- [23] As regards the postponement of 27 October 2016, the order by Molutsoane AJ in the motion court becomes relevant. The application was postponed for a week. The cost of the postponement stood over.
- [24] At the time, there was nothing filed to indicate that the respondent intended to oppose the application for summary judgment. However, the application was not heard on 27 October 2016 but was simply postponed to 3 November 2016. Still it remained on the unopposed roll. On 3 November 2015 it became clear that the respondent intended opposing the application. The deadline for the filing of the opposing affidavit was then fixed.
- [25] As earlier pointed out, the application was filed on 29 September 2016 and the opposing affidavit on 25 November 2016, some 57 days later. In the respondent's heads of argument that period of almost two months was underplayed.

"The gist of the First Respondent's contentions are that the Affidavit Resisting Summary Judgement had been filed **25 November 2016** just short of **three (3) weeks** prior to the date scheduled for the hearing of the opposed motion."

The contention creates the impression that the first date scheduled for the hearing of the application was 15 December 2016 and that the respondent's opposing affidavit was filed almost three weeks before such an important date.

[26] The contention was, however, not consistent with the respondent's own averment. At par 3.2 the respondent averred:

"The application for summary judgment was to be heard by the above Honourable Court on **03 November 2016**."

Now according to respondent's own say-so, on 27 October 2016 Molutsoane AJ postponed the application for summary judgment to 3 November 2016 for argument. The application could not be argued on 3 November 2016 primarily because the respondent had failed to file the opposing affidavit in terms of the rule.

[27] The respondent subsequently explained his failure some 22 days later. He said:

"Up until date on which the application was to be heard my attorney of record, on my behalf, attempted to negotiate with the Applicant in order to limit litigation costs and to avoid unnecessary costs and so as to not waste the courts time, said negotiations however on the day the matter was to heard failed and was my attorney of record informed that the Applicant will be persisting in (sic) the Application for summary judgment on **03 November 2016**;

At which stage my attorney of record instructed counsel and proceeded to oppose the application at court on the day, however an agreement was reached between the parties and as is evident from the Court order dated **03 November 2016**, and was it ordered that the matter be postponed to the opposed roll on **15 December 2016** and that I file my opposing affidavit on/before **25 November 2016**".

The postponement of the application on 3 November 2016 for 42 days was, in my view, occasioned by the respondent's exclusive neglect to play the game according to the rules of procedure. It was not his case that the parties had, by mutual agreement, consented to relax the operation of the rules in order to entertain the alleged negotiations. It would, therefore, appear that the respondent did so on his own accord. However noble his intentions were, he did so at his own peril.

[28] I repeat that the application was filed on 29 September 2016. Molutsoane AJ was seized with the application 28 days later, on 27 October 2016. Instead of immediately filing the opposing affidavit to resist the grant of summary judgment, the respondent disobeyed the rule and embarked on some negotiations with the intention of limiting litigation cost. Had he filed his opposing affidavit in accordance with the rule, the chances were that the application would probably not even have been placed on the unopposed roll on 27 October 2016. In which event it would probably have been enrolled on the opposed roll and argued on 27 October 2016. I have demonstrated that there were inordinate delays concerning the hearing of this summary judgment application. For this particular one, the respondent was certainly to blame.

[29] Given the circumstances which prevailed for 27 days prior to the postponement of 27 October 2016, I am of the firm view that the reserved cost of that postponement have to be borne and paid by the respondent.

- [30] As regards the general cost of summary judgment application, two dates are relevant. The first was 29 September 2016, being the date on which these summary proceedings were initiated. The second was 9 February 2017, being the date on which the issue of cost was argued. This then is the remaining aspect of the issue I am called upon to adjudicate.
- [31] In his opposing affidavit the respondent denied the applicant's allegations that he had no *bona fide* defence to the applicant's action; that he entered appearance to defend for the sole purpose of delaying the action and that it would serve no practically useful purpose to let him defend the action. The respondent did not deny the applicant's claim as such. Although he admitted his indebtedness to the applicant, he averred that he was declared to be over-indebted; that a debt restructuring order "anx oa1", was granted by the local district court on 11 March 2010 and that the applicant unsuccessfully applied to have such order rescinded as fully set out in the court order, "anx oa2", dated 24 July 2015; that he continued to comply with the debt restructuring order and that the applicant was aware, all along, that he was not in arrears as alleged in the applicant's summons.
- [32] The respondent's defence was certainly based on facts by virtue of which material facts alleged by the applicant were disputed. Moreover, new facts constituting a defence are alleged. Where, as in this case, the court faces such a factual conflict, the court neither attempts to decide the issues nor attempts to determine whether or not there was a balance of probabilities in favour of the one party or the other. All that the court has to enquire into is,

firstly, whether the defendant has ‘fully’ disclosed the nature and grounds of his defence as well as the material facts upon which it is grounded, and secondly, whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is *bona fide* and good in law. **Tesven CC & Another v South African Bank of Athens** 2000 (1) SA 268 (SCA) pars [19] and [22].

- [33] The principle is that if the court is satisfied on those cardinal indicators, it has to refuse summary judgment. In the instant matter I do not have to embark on such arduous enquiry. This is so because the applicant implicitly conceded on 15 December 2016 that summary judgment could not, on the facts, be granted. The respondent has already been granted leave to defend with the express consent of the applicant. Consequent it was no longer open to the applicant to contend that the respondent’s opposing affidavit fell short of what the rule required. By consenting to the grant of leave to defend, the applicant implicitly admitted that the respondent’s *bona fides* were beyond reproach.
- [34] The question which now arises is whether the applicant with all the knowledge it had of the respondent’s defence and the material facts upon which it is grounded, should or should not have applied for summary judgment. It seems to me that there was nothing new, about the respondent’s defence and the material facts upon which it is grounded, which applicant now knows which it did not know before it brought this summary judgment application. Its change of heart on 15 December 2016 tends to strengthen this view. Such backtracking was belated. I

am of the view that the question has to be answered in the negative. With the knowledge the applicant had or ought to have had, the applicant should not even have thought of bringing such an application at all as was done on 29 September 2016.

[35] It will be readily appreciated that there was a causal correlation between the launch of the summary judgment application on 29 September 2016 and the rendering of argument on 9 February 2017. The argument was the necessary consequence of the ill-conceived launch. It follows, as a matter of logic, that if I am correct, the applicant has to be held liable for the respondent's cost in respect of both dates.

[36] Usually the winner takes it all. However, there was no outright winner in this contest for cost. On the facts, none of the parties was the sole cause of the wasted cost occasioned by the postponements. Consequently it would not be fair, just and equitable for any of them to be held exclusively liable for the payment of the entire cost of the application and its postponements.

[37] Accordingly I make the following order.

37.1 The reserved costs of the following postponements shall be borne and paid by the respondent:

- (a) Thursday 20 October 2016
- (b) Thursday 27 October 2016

37.2 The cost of the postponement reserved on the following dates shall be borne and paid by the applicant.

(a) Thursday 3 November 2016 and

(b) Thursday 15 December 2016.

37.3 The general cost of the summary judgment application, relative to 29 September 2016 and 9 February 2017, shall be borne and paid by the applicant.

MH RAMPAI, J

On behalf of applicant: Adv. CJ Hendriks
Instructed by: Strauss Daly Inc
Bloemfontein

On behalf of 1st respondent: Adv. I Olivier
Instructed by: Shardelow Smith
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