IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION. BLOEMFONTEIN

Case number: 229/2017

In the matter between:

SOLID BUILD CONTRACTORS CC Plaintiff

[Registration Number: 1998/080073/23]

and

JOHANNES PETRUS JACOBS

[ID NR: [6…]] First Defendant

WE BUILD CC

[Registration Number: 2008/145538/23] Second Defendant

JOHANNES PETRUS JACOBS N.O. Third Defendant

CAREL JACOBUS SWANEPOEL JACOBS N.O. Fourth

Defendant

THE MALUTI TRUST Fifth Defendant

[Registration Number: 1047/1998]

CORAM: SNELLENBURG, AJ

HEARD ON: 11 MAY 2017

JUDGMENT BY: SNELLENBURG, AJ

DELIVERED ON: 18 MAY 2017

[1] The plaintiff issued summons against the defendants for payment of the amount of R1 646 360.57; interest and cost of the suit. Pursuant to the defendants delivering a notice of intention to defend the plaintiff issued an application for summary judgment. It is no longer in dispute that leave to defend should be granted, but the parties remain at loggerheads regarding the appropriate cost order.

[2] The defendants were informed in the summary judgment application that the matter will serve before court on 16 March 2017. The defendants duly opposed the application by delivering an answering affidavit on 9 March 2017. As result the court postponed the application to 11 May 20171 by agreement between the parties, for argument as opposed motion. The costs of the postponement were ordered to be costs in the application. It is apposite to record that the defendants1 attorney already on 13

March 2017,1 prior to the postponement of the matter to the opposed roll for argument, enquired from the plaintiff's attorney whether the plaintiff intended to persist with the application for

summary judgment in light of the answering affidavit. In reply the defendants were advised by the plaintiffs attorney at the seat of the court that his instructions were that the matter should be postponed for hearing, ergo the postponement by agreement referred to earlier.

[3] In terms of this Division's Rules of Practice the plaintiff's heads of argument for the opposed motion were due to be filed on Wednesday, 3 May 2017. On this day (3 May 2017) at 14h02 the plaintiff's attorneys of record, Messrs Smit Sewgoolam, addressed an email to the defendants' attorneys wherein they propose that leave be granted to the defendants; that the plaintiff does not proceed with the summary judgment application;

that the costs involved in the summary judgment proceedings be reserved and that they remove the matter from the opposed roll by notice.

[4] The defendants' attorneys replied to the plaintiff's last-mentioned email on 4 May 2017 at 09h37. The gist of the reply was that the proposal was found in order save for the issue of costs. The defendants' attorneys advised that their instructions were that the plaintiff either tender the costs that the defendants had already incurred as result of the summary judgment proceedings or that the costs be argued. The defendants also recorded that their heads of argument would be finalised by the next day; that they had already incurred preparation costs and were already liable for counsel's reservation to argue the opposed motion.

[5] On 4 May 2017 the plaintiff caused a 'notice of removal' to be filed. The notice informs that the summary judgment application is removed from the roll of the 11th of May 2017 and costs to be costs in the cause. It is apparent that the costs referred to in the notice of removal is substantially different from the costs proposed by the plaintiff in its email of 3 May 2017. The plaintiff thereby rejected the defendants' counter proposal. In addition, for reasons dealt with later in the judgment, the notice of removal was irregular and of no legal consequence.

[6] The defendants duly filed file heads of argument in terms of the Rules of Practice on Friday, 5 May 2017. The heads of argument were signed by counsel on 4 May 2017. In the heads of argument the defendants persist with their opposition to the summary judgment application and argue for costs on the scale as between attorney and client.

[7] The defendants' rely in their answering affidavit on (i) deficiencies in the summons which according to them render the particulars of claim both vague and embarrassing and susceptible to an outright exception for want of allegations to sustain a cause of action; (ii) a bona fide defence set out in detailed manner to the merits of the claim and, (iii) counter

claims for damages allegedly suffered as result of the plaintiff's failure to perform its obligations in terms of the acknowledgment of debt.

[8] In addition to the aforementioned facts the defendants deal pertinently with the issue of costs of the summary judgment application in their answering affidavit. To this end the defendants rely on the fact that the plaintiff had previously issued summons against the first, second and fifth defendant under case number: 1969/2016 in which action the plaintiff relied on the same acknowledgement of debt for payment; had applied for summary judgment and had granted leave to defend to the defendants in that matter after receipt of their answering affidavit.

[9] The summons in the previous action (1969/2016) was withdrawn by means of a notice on 23 February 2017. The current action (229/2017) was however already issued on 17 January 2017, thus whilst the previous action was still extant. The defendants contend that the plaintiff was aware of the exact nature of their defence to the merits of the plaintiff's claim as the same was disclosed in the answering affidavit filed in the previous action to resist the summary judgment application. The defendants therefore contend that the plaintiff should not have made the current application for summary judgment and should bear the costs of the application on an attorney and client scale.

[10] It is essential to consider both the nature of the dispute between the parties and how it was ventilated in the current and erstwhile proceedings in case 1969/2016.

[11] The plaintiff's current action (case 229/2017) is premised on the recovery of the balance amount owing in terms of an acknowledgement of debt and agreement to repay the amount due, executed in its favour by the first and second defendants. The original amount admitted to be due in the acknowledgement of debt is R3 122 917.00 (also described in the acknowledgement of debt as the principle debt). The acknowledgement of debt was signed on 14 May 2015 by the first defendant, acting both in person and also on behalf of the second defendant. The acknowledgement of debt was also signed on the

plaintiffs behalf on 14 May 2015 by its representative.

[12] The first and second defendants declare in paragraph 1 of the acknowledgement of debt that they are bound by the conditions set out in the agreement.

[13] As far as the third, fourth and fifth defendants are concerned, it will suffice to say that the third and fourth defendants are the duly authorised trustees of the fifth defendant ["the Trust"]. The plaintiff relies on a written deed of surety granted by the Trust in its favour as surety, in solidum and joint and several co-principle debtor with the first and second defendant, for due compliance by the first and second defendants with their obligations in terms of the acknowledgement of debt.

[14] Paragraph 2 of the acknowledgement of debt provides as follows regarding the agreed terms of repayment:

> "We offer as payment for the Principle Debt the profit on the Building Contracts entered into by ourselves and the Purchasers of the Properties listed in Annexure B (hereinafter referred to as the Properties), for the building works of the top structures (hereinafter referred to as the "Works") to be carried out by the Creditor. The profit will be paid to the Creditor on receipt of payment of the final draw on the Works by the relevant Financial Institution."

[15] To facilitate the payment as agreed upon the second defendant is obligated, as the appointed builder on all the mortgage bonds that were approved in relation to the properties by the relevant financial institutions, to attend to the handing over and signing of all necessary documents required by the financial institutions to effect the registration of the properties into the name of the purchasers and after registration for the payment of the progress draws on the Works to the plaintiff or his agent. The first and second defendants are not allowed, under any circumstances, to hand in any documents at the financial institutions or request any form of payment pertaining to the properties by the financial

institutions. It is also agreed that the plaintiff will request all progress draws from the financial institutions pertaining to the Works on the properties. Lastly it was agreed that on completion of the top structure of the last of the properties, the plaintiff will do a reconsideration of all the profits earned on Works on the properties and the balance between the principle debt and the profit will be paid to the 'debtor' (both the first and second defendants are referred to in the acknowledgement of debt as "the debtors") within 7 days after completion of the reconciliation statement.

[16] No specific instalments or dates for payment, other than what is summarised above, were agreed upon.

[17] The acknowledgement of debt agreement also imposes obligations on the plaintiff regarding the completion of building Works to properties so that the profit can be generated which is necessary for the repayment of the principle debt. It is equally clear that the profit will be paid to the plaintiff on receipt of payment of the final draw on the Works by the relevant Financial Institution.

[18] In the acknowledgement of debt reference is made to two annexures. In the particulars of claim the plaintiff alleges that it is not able to append annexure B, being one of the two annexures referenced in the acknowledgement of debt1 as it was not appended to the acknowledgement of debt initially I alternatively could not ('currently') be found. The plaintiff fails to deal with the fact that the other annexure that is referenced in the acknowledgement of debt is also not appended. Annexure B's importance appears from the content of paragraph 2 of the acknowledgement of debt referred to in paragraph [14] above.

[19] In case 1969/2016 the plaintiff issued summons against the first and second defendant and the Maluti Trust {currently the fifth defendant in case 229/2017). The plaintiff relied on the same cause of action it currently relies on in the current action. The only material differences between the actions are that the plaintiff in action 1969/2016

claimed the full amount acknowledged to be owed to it, namely R3 122 917.00 (the principle debt in the acknowledgement of debt) and the trustees of the Maluti Trust were not joined in those proceedings, only the Trust in name. If not apparent from what is set out above, the plaintiff also relied on the same suretyship it relies on in the current proceedings.

[20] The plaintiff also applied for summary judgment in case 1969/2016. In response the defendants deposed to an answering affidavit in terms of Uniform rule 32(3)(b). In that affidavit the defendants raised the same defence to the merits of the action than is raised in the current answering affidavit filed in this action, namely case 229/2017. Some of the defences regarding objections to technical deficiencies in the pleading are the same as is disclosed in the answering affidavit in the current proceedings and other objections are similar to the objections raised currently. It is correct that the defendants in case 1969/2016 referred to a counter claim in the tersest of terms, but the defendants had established a bona fide defence without the counter claim which is presumably the reason why leave to defend was granted.

[21] It should be quite apparent that the only difference between the parties in the action is that the trustees have been cited in the current proceedings, as they should have been in case 1969/2016. The trustees however deposed to the answering and supporting affidavit in person and as trustee in those proceedings, as they again did in these proceedings.

[22] As stated above, leave to defend in case 1969/2016 was duly granted by the plaintiff and costs were ordered to be costs in the cause. The notice of withdrawal of the summons, filed in February 2017 as referred to, tendered costs to be reserved in the new action the plaintiff intended to issue, although as pointed out above that action had fact already been issued on 17 January 2017.

[23] There can be no doubt that the plaintiff knew, when it issued the application for summary judgment under consideration (the current case), that the defendants will rely on

a contention which would entitle them leave to defend. In fact, the plaintiff already had comprehensive knowledge of the defendants' defence as the same was set out in detail in the answering affidavit in case 1969/2016.

[24] Uniform rule 32(9) provides as follows:

"(9) 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; and

(b) in any case in which summary judgment was refused and in which the court after trial gives judgment for the plaintiff substantially as prayed, and the court finds that summary judgment should have been granted had the defendant not raised a defence which in its opinion was unreasonable, the court may order the plaintiffs costs of the action to be taxed as between attorney and client."

The defendants rely on the provisions of sub-rule 32(9)(a) for costs on attorney and client scale.

[25] The relevant principle where a plaintiff knows that the defendant has a defence it will raise which would entitle it to leave to defend was explained by Kuper, J, in the case of **RELIABLE REFRIGERATOR SERVICE CO. (PTY) LTD v A. COUVERAS, trading as SPRINGBOK MEAT MARKET,** delivered on 1 October 1957 and quoted with approval insofar as it relates to costs in such event in **PRIMROSE BRICK WORKS (1936) LTD v METROPOLITAN TIMBER CO LTD 1959 (1) SA 35 (W) at 39A D:**

"It is quite apparent therefore that in terms of this Rule the position was contemplated that a defendant would file an affidavit disclosing a defence but that that defence was not a genuine one and that the remedy given to the Court in such circumstances was to direct the defendant to pay the costs of the action as between attorney and client. At the same time it was apparent that the drafters of the Rule considered that where a plaintiff knew that the defendant was going to defend the action and that he had raised a defence which he would repeat in any affidavit that he was called upon to file and that under those circumstances the plaintiff should not apply for summary judgment. It is quite clear that applications for summary judgment under this Rule were not intended to be the normal course of events whenever a defendant entered an appearance to defend. It was never contemplated that a plaintiff should be given an additional advantage because of this Rule of obtaining the defence of the defendant on affidavit and because it is the obligation of the defendant in terms of the Rule to set out his defence fully, that is provided for in sub-Rule 3(c). .... In any other case where he makes the application where he knows that the defendant is going to defend the action and knows what that defence is, he does so at his peril and may in proper circumstances be ordered to pay the costs of the application for summary judgment immediately."

Also see **BODEMER v HECHTER 1962 (4) SA 244 (T).** In the matter under consideration the defence was raised under oath in case 1969/2016 as stated.

[26] In **MAHOMED ADAM (PTY) LTD v BARRETT 1958 (4) SA 507 (T) at 508E F** it was held that:

"It was never contemplated that an application for summary judgment should be the normal course of events whenever a defendant enters an appearance to defend an action. It is a special proceeding which is made available to a plaintiff in respect of certain claims under certain circumstances. It is not intended to prevent a defendant from defending the action, but to prevent sham defences from defeating the rights of the plaintiff by delay."

[27] The passage in **FLORIDAR CONSTRUCTION CO (SWA) (PTY) LTD v KRIESS 1975**

(1) SA 875 (SWA) at 878A, in awarding attorney and client costs in terms of Uniform rule 32(9)(a) is also apposite to the facts of this matter:

"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."

[28] The cases referred to above illustrate that courts have through the years consistently warned plaintiffs who employ the procedure notwithstanding knowledge of a defendant's bona fide defence, that they do so at their own peril, and that the abuse of the summary judgment procedure will not be tolerated. Summary judgment is reserved for a specific salutary purpose, namely it is an important method of preventing defendants who can demonstrate no bona fide defence or furnish security from taking advantage of the unavoidable delays resulting from a matter going to trial by utilising the stratagem of entering an appearance to defend. See **STANDARD BANK OF SOUTH AFRICA LTD v ROESTOF 2004 (2) SA 492 (W) at 497F-G.**

[29] The plaintiff was well aware of the defendants' defence which was dealt with comprehensively in the answering affidavit in case 1969/2016. The plaintiff found itself in a much more advantageous position than the average plaintiff which institutes action.

[30] It was argued on behalf of the plaintiff that the technical objections that the particulars of claim was vague and embarrassing or lacked allegations necessary to sustain a cause of action did not constitute a bona fide defence in this matter due to the nature of the objections and the plaintiff was therefore entitled to issue the summary judgment application in the current case (case 229/2017), notwithstanding the fact that similar

objections were raised in the answering affidavit in case 1969/2016. It was also argued that the reason for the leave to defend was in fact the counter claims which were more thoroughly pleaded although the counter claims were still not pleaded with the required detail. Leave is said to have been granted in Case 1969/2016 out of benevolence in light of the alleged counter claims, not because a true *bona fide* defence was disclosed. The plaintiff is said to have acted reasonable in granting leave to defend in this matter and as such the defendants conduct to persist in arguing costs is unreasonable. The plaintiff submits that the defendants should have dealt with the matter on a different basis instead of escalating the costs of the matter. Lastly it is contended that if it is found that the plaintiff adopted an overly sanguine view, the merits of the case do not justify the inference that the plaintiff abused the process of summary judgment. It is contended that there is no justification to award costs against the plaintiff, much less costs on the scale as between attorney and client.

[31] Save for the criticism regarding the manner in which the counter claims were pleaded in the answering affidavit in case 1969/2016, the remaining contentions on behalf of the plaintiff, ably argued as they were, do not pass muster.

[32] The defendants set out sufficient detailed facts in the answering affidavit in case 1969/2016 to satisfy the requirements in sub-rule 32(3)(b) regarding a bona fide defence to the plaintiff's claim. The same facts were repeated in the answering affidavit in this matter, case 229/2017. The defendants dealt lucidly with the reasons why the balance in terms of the acknowledgement of debt would not be due and payable. The defendants also dealt with the plaintiff's failure or refusal to comply with its obligations in terms of the acknowledgement of debt regarding the finalisation of Works which it was responsible for and which forced the defendants to employ subcontractors to finalise the Works. As result of the fact that the final draw on the Works has not been received the remaining balance in terms of the acknowledgement of debt could not yet be due and payable.

[33] To further compound matters for the plaintiff, in addition to the defence to the merits, the defendants also relied on excipiability of the plaintiff's claim as formulated in case 1969/2016 ["the complaints"]. Not all the complaints which were raised in case 1969/2016 were repeated in the current answering affidavit as some of the complaints were in fact addressed in the current particulars of claim. The complaints were properly pleaded in both affidavits and would constitute a bona fide defence in both erstwhile and current actions for purposes of summary judgment **(see SOUTH AFRICAN BUREAU OF STANDARDS v GGS/AU (PTY) LTD 2003 (6) SA 588 (T) par 9).**

[34] The defence to the merits was pertinently and properly disclosed in the erstwhile action in case 1969/2016 and the plaintiff had knowledge of the defence when it issued the current application for summary judgment. The nature of the dispute did not alter in any material aspect.

[35] In **ABSA BANK LTD (VOLKSKAS BANK DIVISION) v S J DU TOIT & SONS EARTHMOVERS (PTYI LTD 1995 (3) SA 265 (C) at 2688-D Van Riet, AJ** referred with approval to the following explanation by Gardiner, AJ (as he then was) **IN RE ALLUVIAL CREEK LTD 1929** CPD **532 at 535:**

"An order is asked for that he pay the costs between attorney and client. Now sometimes such an order is given because of something in the conduct of a party which the Court considers should be punished, malice, misleading the Court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with the most upright purpose and a most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear."

[36] In **SOUTH AFRICAN BUREAU OF STANDARDS v GGS/AU (PTY) LTD *supra*** Patel, J was also called upon to consider the issue of costs in a summary judgment application where the plaintiff was sufficiently informed, by means of a letter in the case under consideration, of the defendant's defence, prior to the issuing of summons against the defendant. The learned Judge made the following observations in paragraph 10 of the judgment which are equally applicable in this matter:

"Under the circumstances, it should have discouraged the plaintiff from launching the summary judgment application. But it totally disregarded the defendant's right to defend the action by putting the latter to unnecessary trouble and expense to oppose the application and thereafter conceding to give leave to defend. Therefore, if Rule 32(9)(a) is to have any force and effect then it should certainly be applied in this matter which was indeed misconceived under the circumstances and foredoomed to failure."

[37] The application for summary judgment in this instance amounts to an abuse of the procedure. It **was,** to borrow from the judgments cited with approval above, foredoomed to failure. It totally disregarded the defendants' right to defend and was totally unreasonable. As a result the defendants were indeed put through unnecessary trouble and expense.[1] The application should simply never have been made.

[38] It is not in dispute that the defendants did not consent to the removal of the application for summary judgment from the roll. The plaintiff at no time sought to obtain leave from either the defendants or the court to withdraw the application and clearly has no such intention.

[39] The defendants were entitled to persist with their opposition and to argue the matter relating to costs. To this end the plaintiffs attempted removal of the application from the opposed roll was a purported removal without legal consequence. The matter was postponed for hearing by agreement between the parties. The plaintiff did not withdraw its application for summary judgment, as stated. The plaintiff could not in the circumstances

unilaterally remove the matter from the opposed roll as it purported to do without the defendants' consent or leave of court. The notice of removal of the application from the roll was therefore irregular and of no legal consequence. On the same score the defendants' 'notice of re-enrolment' was completely unnecessary and also has no legal consequences. The matter remained on the opposed roll and served for adjudication.

[40] On the day preceding the day on which the application was enrolled to be argued[2] the plaintiff filed heads of argument relating to the issue of costs. The heads of argument were signed by counsel on 9 May 2017. I condoned the irregular filing of the plaintiff's heads of argument so that the matter could be ventilated and finalised.

[41] Although the defendants did not take issue with the irregular filing of the plaintiff's heads of argument, it remains the court's rule of practice which was not complied with. In order to prevent the costs from further escalating should the matter not proceed, I accepted the heads of argument and heard arguments as stated. This must not be seen as a precedent. *Cursus curiae est lex curiae,* the practice of the court is the law of the court.

[42] In light of my conclusions effect must be given to provisions of Uniform rule 32(9)(a).

[43] Accordingly, **IT IS ORDERED THAT:**

1. Summary judgment is refused and leave is granted to the defendants to defend the action.

2. The plaintiff is ordered to pay the defendants' costs of the summary judgment proceedings on the attorney and client scale.

3. The costs incurred by the defendants pertaining to the notice of enrolment of the summary judgment application subsequent to the plaintiffs notice, dated 4 May 2017, of removal of the application for summary judgment from the opposed roll, is excluded from the cost order in paragraph 2 above and is not recoverable from the

plaintiff.

N. SNELLENBURG, AJ

Appearance on behalf of the plaintiff: Adv PC Ploos van Amstel

Instructed by: Mr OJ van Schalkwyk

Lovius Block Attorneys

Appearance on behalf of the defendant: Adv J Els

Instructed by: Mr R Oosthuizen

EG Cooper Majiedt Inc

[1] See also **Ebrahim v Excelsior Shopfitters and Furnishers (Pty) Ltd** (II) **1946 TPD 226 at 236** Lemore v **African** Mutual **Credit Association and** Another **1961** (1) **SA 195** (C) **at 199.**

[2] 10 **May 2017.**