FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A170/2008
A171/2008
A172/2008

In the matter between:-

MATJHABENG LOCAL MUNICIPALITY Appellant

and

JOHANNES LODEWIKUS ERASMUS (A170/08) Respondent
SCHANDOR VAN SCHOOR (A171/08) Respondent
EWART FREDERICKS POTGIETER (A172/08) Respondent

CORAM: RAMPAI, J *et* MOLEMELA, J

HEARD ON: 22 FEBRUARY 2010

JUDGMENT BY: RAMPAI, J

DELIVERED ON: 4 MARCH 2010

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[1] Three different civil appeals served before us in these proceedings. As the formal heading shows, the same local authority is involved as the appellant in each and every one of the appeals. In the court below, the respondent, as the plaintiff, were separately represented by the same lawfirm,

Peyper Attorneys, and the appellant, as the defendant, was represented by the same lawfirm Moroka Attorneys.

[2] These appeals originated from the district magistrate court of Welkom. All of them concerned the orders made by the district court magistrate, which were delivered on Tuesday 29 April 2008.

[3] The issue which arises in each of these appeals is also the same which is why we decided to hear them together. To grant or not to grant summary judgment – that is the question.

[4] As regards the Erasmus appeal – the facts as alleged in the summons were as follows:

The respondent was in the employ of the appellant. On 15 November 2006 the appellant suspended the respondent pending the outcome of a disciplinary enquiry. He then appointed a certain Ms Juan Adendorff, an attorney practising under the name and style of Peyper Attorneys, to represent him at a disciplinary enquiry in terms of clause 12 of the collective agreement relative to disciplinary proceedings within the sphere of local government (annexure "A").

[5] The respondent gave his attorney a written mandate, which specified the parameters of the instructions the lawyer was required to carry out as well as the professional fees the respondent was required to pay (annexure "B").

[6] The appellant scheduled the enquiry for hearing on Tuesday 5 February 2008. The respondent held three consultations with his attorney preparing for the hearing. At the request of the appellant the hearing was postponed. The respondent claimed R27 531,00 from the appellant in respect of wasted costs he unnecessarily incurred as a result of the postponement (annexure "E"). This is the respondent's first claim.

[7] The disciplinary hearing was then rescheduled for three days from 18 February 2009 to 20 February 2008. Again the respondent held various consultations with his attorney to prepare for the hearing. On 18 February 2008, in other words, the first day of the disciplinary hearing, which had

been rescheduled for three days, the chair whose responsibility it was to preside over the disciplinary hearing indefinitely postponed the hearing. Apparently no reason was given for the postponement. The respondent subsequently claimed R59 023,50 from the appellant in respect of the wasted costs he unnecessarily incurred for the second time as a result of the appellant's unreadiness to proceed with the enquiry (annexure "F"). This is the respondent's second claim.

[8] As regards the Van Schoor appeal, the facts, as alleged in the respondent's summons, were substantially and materially the same as those in the Erasmus appeal save for the amounts of the claims. In this appeal the amount of the respondent's first claim is R9 006,00 (annexure "E") and in respect of the second claim R19 009,50 (annexure "F"). These two claims represented the alleged wasted legal costs relating to the abortive one day hearing of 5 February 2008 and the abortive three day hearing which was supposed to have commenced on 18 February 2008 respectively.

[9] As regards the Potgieter appeal, the facts, as alleged in the respondent's summons, were also substantially and materially the same as those in the Erasmus appeal, except for the amounts of the claims. In this instance the amount of the respondent's first claim was R20 577,00 (annexure "E") and the second claim R38 275,50 (annexure "F"). These two claims represented the alleged wasted costs relating to the same dates as I have previously specified.

[10] The summons in respect of each case was issued on 28 March 2008. It is a voluminous pleading which, together with the annexures thereto, consists of no less than 42 pages. Similarly, the notices of intention to defend were all served and filed on the same day, 4 April 2008. On 9 April 2008 the three applications for summary judgments were served for hearing on 29 April 2008. Five days before the application for summary judgment was due to be heard, on 24 April 2008, to be precise, the appellant served and filed notices of its intention to oppose the applications for summary judgment.

[11] On Tuesday, 29 April 2008, the three applications for summary judgments served before Ms Jonas, the district court magistrate of Welkom. On behalf of the appellant, an application was made to have each one of these matters postponed or stood down. The reason for the request was to enable the appellant to serve and file affidavits in terms of Rule 14(3)(c) in support of its opposition to the applications for summary judgment. The court *a quo* refused to postpone any case or to let it stand down. Instead it forthwith granted summary judgment in respect of them all. The appellant was aggrieved - hence these appeals.

[12] The common issue in these appeals is whether the claims, as I earlier particularised or outlined, were amenable to the grant of summary judgment or not. On behalf of the appellant Mr. Steenkamp submitted that the court *a quo* erred in granting summary judgment in respect of all the claims since none of them was based on a liquidated amount of money. On behalf of the respondent there was no appearance.

[13] Rule 14 of the Magistrates' Courts Act 32 of 1944, as amended, provides that: ... the plaintiff may apply for summary judgment in certain limited circumstances. Among those specified circumstances are cases where the plaintiff sues the defendant for a liquidated amount in money – sub-rule 1(b). These appeals are concerned with this provision. The rule also provides that an application for summary judgment founded on a liquidated amount must be accompanied by a supporting affidavit – sub-rule 2(a). Lastly the rule provides that the defendant who intends opposing an application for summary judgment may taken certain prescribed steps to avoid it. For instance he may deliver an affidavit to satisfy the court that he has a *bona fide* defence and disclose the nature and the grounds thereof – sub-rule 3(c).

[14] In **SUTTER v BROWN** 1926 AD 155 on 171 Innes CJ had this to say about legal fees:

> "But to treat costs between attorney and client as patrimonial damage would not, I think, be justified. See remarks of MASON, J, in *Kingswill v Robinson* (1913, W.L.D at p. 152). To do so

> would involve the introduction into the calculation in all such cases of an uncertain factor, uncontrolled as to amount by the Court, and liable to vary with the skill and the standard of ethics of the client and his adviser."

[15] When, in a claim based on damages suffered, a judgment is given in favour of a litigant with costs, such costs of the action remain an uncertain factor until the bill of thereof has, not only been drawn up, but also taxed and allowed by the taxing master or official.

See: **WOLHUTERSKOP BELEGGINGS (EDMS) BPK v BLOEMFONTEIN ENGINEERING WORKS (PTY), LTD** 1965 (2) SA 122 (OPD) at 123 H;
LOOTS v VAN STADEN 1962 (1) SA 152 (OPD) at 159 H;
NATIONAL BANK v MARK AARONSON 1923 TPD 69 on 71.

[16] In **BOTHA v W. SWANSON AND CO. (PTY.) LTD.** 1968 (2) P.H. F85 Corbett J, as he then was, held that a claim would not be regarded as one for a liquidated amount in money

unless it was based on an obligation to pay an agreed some of money or it was so expressed that the ascertainment of the amount so claimed was a matter of a mere calculation.

[17] The aforesaid formulation of the phrase "a liquidated amount in money" was accepted as the correct test by Howard J in **LEYMAC DISTRIBUTORS LTD v HOOSEN AND ANOTHER** 1974 (4) SA 524 (D) at 527 F – G. Over the years it has been followed in numerous decisions.

[18] It has been stated on numerous occasions that summary judgment is, by its very nature, an extraordinary and a stringent remedy - **LEYMAC DISTRIBUTORS LTD v HOOSEN AND ANOTHER**, *supra*, at 257 F.

[19] The authors Van Niekerk, Geyer & Mundell: **Summary Judgment, A Practical Guide** say the following about the defendant's rights to resist an application for summary judgment on technical grounds without filing an opposing affidavit:

> "In conclusion: The defendant may *in limine* and without having to deliver an opposing affidavit, advance any legal argument in order to show that the application does not comply with the requirements for validity of a summary judgment application, whether pertaining to the time, author, form, content or purpose thereof. In the event of the court upholding the argument, summary judgment cannot be granted. Should the court reject the point, it must follow that summary judgment be granted if the defendant has not availed himself to one of the other methods of avoiding summary judgment."

[20] The case of each of the respondents against the appellant consisted of two separate claims. However, the nature of the cause of action was, but for the dates and amounts, identical. The respective amounts of the claims were agreed upon between attorney and client. As between attorney and client, the amounts of the fees would be regarded as liquidated amounts in money within the meaning of the rule should a dispute arise between the respondents and their attorney and the court called upon to adjudicate it. As regards the appellant, the same cannot be true. None of the claims is for any liquidated amount. The amounts of such claims were damages that have not been liquidated by any

agreement between the parties herein. Accordingly, the appellant, was as a third party, not contractually obliged to pay a sum of money not agreed upon with him. This is so because the appellant was not a party to the agreement between the respondent and his attorney, which agreement liquidated the fees we are here dealing with - **LEYMAC DISTRIBUTORS LTD v HOOSEN AND ANOTHER**, *supra*.

[21] Even if the appellant had accepted that it was liable and obliged to make good the damages suffered by the respondents, such an admission alone would not have liquidated the damages suffered by the respondents. None of the amounts is capable of being figured out by way of a simple mathematical calculation - **BOTHA v W. SWANSON AND CO. (PTY.) LTD.**, *supra*. For instance, the fees for consultation, preparation or the skill levels of the lawyer concerned or attendance and appearances at the hearing or the duration and number of consultations, preparation and attendances are, in the absence of an agreement, not mere matters of calculation. There are several unknown factors in the equations. Those unknown factors must first be interrogated and assessed, taking into account a number of

considerations such as I have previously mentioned in order to have them quantified and their monetary value ascertained.

[22] The quantum of the damages claimed necessarily has to be assessed by a court on the basis of what the court itself considers to be reasonable, fair and just - **LEYMAC DISTRIBUTORS LTD v HOOSEN AND ANOTHER**, *supra*, at 527 H. The court cannot assess the quantum of damages in a vacuum. It has to hear evidence of the attorney concerned to the effect that the fees charged were, in his or her opinion, reasonably and necessarily incurred and therefore fair and just. The costs become liquidated through taxation - **LAW AND OTHERS v KIN AND ANOTHER** 1966 (3) SA 480 (W).

[23] The quantum of a monetary claim is regarded as liquidated if, firstly, the amount thereof has, prior to the application for summary judgment, been agreed upon by the parties. Secondly, if the amount thereof can be readily ascertained by way of simple mathematical calculation or, thirdly, if the

amount thereof has been determined by a court of law – Van Niekerk *et alii*, *supra*, p. 3 – 7.

See: **OOS-RANDSE BANTOESAKE ADMINISTRASIE-RAAD v SANTAM VERSEKERINGSMAATSKAPPY BPK EN ANDERE** (2) 1978 (1) SA 164 (W) at 168 H.

[24] None of the claims we are here concerned with falls under any of the categories I enumerated in the aforegoing paragraph. All of them are unliquidated damages. They are manifestly not claims for liquidated amounts in money. They represent the various amounts of money expended by the respondent. They allegedly incurred the legal costs by defending themselves through an attorney against the disciplinary charges brought against them by the appellant. The hearing and finalisation of such charges has, on two occasions, been aborted by the appellants' appointed functionaries, allegedly for no apparent or sound reasons.

[25] In **LEYMAC DISTRIBUTORS LTD v HOOSEN AND ANOTHER**, *supra*, the plaintiff applied for summary judgment. The second claim was based on the towing costs pertaining to a repossessed bus. The court found that a

claim for the cost of towing incurred by the plaintiff was not a liquidated claim. Accordingly the upshot of the finding was that an application for summary judgment was not competent in respect of such an unliquidated claim.

[26] In dismissing summary judgment application in respect of the towing costs Howard J said the following at 528 E – F:

> "Applying the test which I consider to be the correct one, the plaintiff's other claim (b) is manifestly not a claim for 'a liquidated amount in money'. It is for damages in an amount of R80, representing expenditure allegedly incurred by the plaintiff in having the bus towed from Braemar to Durban. Clearly, the amount of these damages will not be liquidated until the Court has assessed the quantum thereof, by the exercise of its own judgment on the question whether the alleged expenditure, in whole or in part, was reasonably and necessarily incurred as a result of the first defendant's breach of contract.."

[27] There is no justification for treating the untaxed legal costs between attorney and client as liquidated claim - **SUTTER v BROWN**, *supra*. That being the case, it follows that

summary judgment is not competent in respect of such a claim. When a claim is unliquidated it remains unliquidated. It cannot be liquidated by the court exercising a discretion. No judicial discretion can liquidate what is intrinsically unliquidated. In the instant case no evidence was tendered to have the unknown factors factorised or assessed to determine their fair and reasonable monetary values.

[28] Summary judgment is a drastic remedy which is sparingly granted by our courts. The appellant had delivered a notice of its intention to defend. Its attorney applied for a postponement, if not, an adjournment so that the appellant could deliver opposing affidavits. It is not clear why such affidavits were not delivered before noon on 28 April 2009, as the rule requires. I have to point out that these matters were on motion roll of the court *a quo* for the first time on 29 April 2008. In my view, the appellant's neglect or its attorney's remissness, whatever the case might have been, was not in the circumstances of this case, an omission or default of such a serious magnitude as to warrant such an outright rejection of the appellant's first and modest request

for an adjournment or let alone to justify the drastic order made against the appellant.

[29] If the court *a quo* was of the opinion that no satisfactory and acceptable explanation was proffered for the appellant's default, the proper course of action, in the circumstances, would, in my view, have been to postpone the matter and to visit the appellant's remissness with an adverse order of costs instead of taking such a drastic action in the form of summary judgment against the appellant. Better still, if the court viewed the matter in a very serious light, the least it could have done would have been to briefly adjourn the matter and ordered the appellant to file the outstanding affidavits later on the same day.

[30] In the case of **<u>JOEL'S BARGAIN STORE v SHORKEND BROS (PTY) LTD</u>** 1959 (4) SA 263 (E) on 265 A De Villiers JP said the following about the drastic nature of a summary judgment:

> "It will therefore be seen that summary judgment is an extremely extraordinary and drastic remedy. It shuts the mouth of the

defendant finally. A party who seeks to avail himself of this drastic remedy must in my view strictly comply with the requirements of the Rule."

See also **NORTHERN CAPE SCRAP & METALS (EDMS) BPK v UPINGTON RADIATORS & MOTOR GRAVEYARD (EDMS) BPK** 1974 (3) SA 788 (NC) at 793 C – D Van Rhyn J quoted the aforesaid passage with approval as I do. In these three appeals before us none of the respondents strictly complied with the rule.

[31] A party can resist summary judgment without delivering an opposing affidavit by raising certain technical or preliminary objections *in limine* – Van Niekerk *et alii*, *supra*. Had the application for summary judgment been postponed for argument, the appellant might have decided to deliver no affidavits at all, but to argue that the summons of the respondents were excipiable in certain respects. In **GUNN AND ANOTHER, NNO v VICTORY UPHOLSTERERS (PTY) LTD** 1976 (1) SA 127 (D) at 128 E – G the court held that summary judgment cannot be granted on an excipiable claim. Before us it was contended that the respondents'

summons was excipiable. I refrain from expressing any firm view on the point.

[32] In **GULF STEEL (PTY) LTD v RACK-RITE BOP (PTY) LTD AND ANOTHER** 1998 (1) SA 679 (O) at 683 H – 684 B Gihwala AJ, as he then was, held that in view of the extraordinary nature of the remedy, a plaintiff who seeks summary judgment must meet two basic requirements, namely, a clear claim and pleadings which are technically correct. By a clear claim for the purposes of summary judgment and leaving aside cases of delivery and ejectment, I understand a liquid or a liquidated claim. If either of these basic requirements is not met, summary judgment has to be refused, so concluded the learned judge. I am in respectful agreement.

[33] In the instant case counsel for the appellant also contended that the claims were unclear; that the summons was unusually voluminous; that allegations were not concisely and pertinently averred; that annexures were numerous and premature at that initially stage; that multiple fragments of evidence were extensively pleaded and that issues were not

succinctly and crisply stated in accordance with the rules of pleadings. Accordingly, he submitted that all these claims were in many ways technically defective – **Morris, Technique in Litigation**, 4th Edition, p. 69 by H Daniel. Once again I express no view one way or the other on this point.

[34] Mr. Steenkamp made several submissions as to why the court *a quo* erred in granting summary judgment in these three matters. There was substance in those submissions. His principal submission was that none of the six claims, as particularised in the three summonses, fell within the ambit of the legal phrase “a liquidated amount in money” as envisaged in the rule. I am persuaded. This contention is one which I, on appeal, cannot hold to be wrong.

[35] Perhaps it is apposite to conclude with the following passage by Gihwala AJ:

> “In view of the nature of the remedy the Court must be satisfied that a plaintiff who seeks summary judgment has established its claim clearly on the papers and the defendants have failed to set

up a bona fide defence as required in terms of the Rules of this Court. There are accordingly two basic requirements that the plaintiff must meet, namely a clear claim and pleadings which are technically correct before the Court. If either of these requirements is not met, the Court is obliged to refuse summary judgment. **In fact, before even considering whether the defendant has established a bona fide defence, it is necessary for the Court to be satisfied that the plaintiff's claim has been clearly established and its pleadings are technically in order. Even if a defendant fails to put up any defence** or puts up a defence which does not meet the standard required of a defendant to resist summary judgment, **summary judgment should nevertheless be refused if the plaintiff's claim is not clearly established on its papers** and its pleadings are not technically in order and in compliance with the Rules of Court."

GULF STEEL (PTY) LTD v RACK-RITE BOP (PTY) LTD AND ANOTHER, *supra*, at 683 I – 684B.

[36] There remains one more matter to deal with – this is the question of costs. At times it may be unfair to make an adverse costs order against a party who did not oppose the relief sought. Although I sympathise with the respondent I do

not think this is a matter where the appellant can be deprived of the fruits of its success. The appellant was hard done by the order given by the court *a quo*. The only way in which the appellant could seek justice in the matter was by taking the matter on appeal. The appeal was successful. There are no exceptional circumstances why the costs should not follow success. By not opposing the appeal, the respondent, to a large extent, minimised the quantum of costs that he now has to pay. I am therefore inclined to award the costs of this appeal in favour of the appellant. This is in keeping with the way our civil justice system operates.

[35] Accordingly I make the following order:

(a) The appeal succeeds with costs.

(b) The summary judgment granted in favour of the plaintiff (respondent) against the defendant (appellant) is hereby set aside and it is substituted with the order stated below.

(c) The plaintiff's application for summary judgment is refused.

(d) The defendant is granted leave to defend the action.

(e) The costs relating to the application for summary judgment shall be costs in course.

(f) This order applies to all of the appeals as described in the formal heading hereof.

M.H. RAMPAI, J

I concur.

M.B. MOLEMELA, J

On behalf of appellant:	Adv. M.D.J. Steenkamp Instructed by: Moroka Attorneys BLOEMFONTEIN
On behalf of respondent(s):	No appearance.

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