IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 5008/07

In matter between:

JUSTICE REICHLIN RAMSAMY	Plaintiff
And	
ZUKO MACK MICHAEL NONXUBA	Defendant

HEARD ON:	24 JANUARY 2008
JUDGMENT BY:	C.J. MUSI, J
DELIVERED ON:	14 FEBRUARY 2008

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[1] This is an opposed application for summary judgment for the payment of the sum of R104 166.04 plus interest.

[2] The plaintiff and the defendant are attorneys. The plaintiff, who practices in Durban, was the attorney of record for Andile Mgoduka in an action against the Road Accident Fund

(RAF) under case number 5631/2002 in the Durban and Coast Local Division of the High Court of South Africa.

[3] The merits of the matter between the RAF and Mgoduka were settled where after, at the instance and request of Mgoduka, the plaintiff's attorney's firm, Justice Reichlin Ramsamy Attorneys, were substituted by Nonxuba Incorporated, a company with limited liability duly registered as such in terms of the company laws of South Africa. Nonxuba Incorporated proceeded to render professional services to Mgoduka in relation to his claim.

[4] On 02 May 2006 the defendant gave the following written undertaking to the plaintiff.

"

UNDERTAKING

I, the undersigned:

ZUKO MACK MICHAEL NONXUBA

of Nonxuba Incorporated, situated at No: 11 Zeiler Street, Queenstown make an undertaking to settle Messrs Justice Reichlin Ramsamy taxed Attorney and Client Bill of Costs, Rodel Finance Loans and disbursements due to Messer Reichlin Ramsamy Attorneys as previously agreed upon finalisation of the claim of Andile Mgoduka.

THUS DONE AND SIGNED AT QUEENSTOWN ON THIS 2ND DAY OF MAY 2006 IN THE PRESENCE OF THE UNDERMENTIONED.

(Signed) ZMM NONXUBA "

[5] The litigation in the matter between Mgoduka v RAF was finalised on 23 November 2006 when the court awarded Mgoduka the sum of R751 448.62 plus costs including the qualifying fees of experts.

[6] The defendant engaged professional tax consultants to draw a bill for taxation of fees and disbursements due to Nonxuba Incorporated. That bill has not yet been taxed by the Taxing Master.

[7] On 24 August 2007 the plaintiff wrote the following letter to the defendant.

"Nonxuba Incorporated

Per telefax 051 447 8881
Dear Sirs,

Re: Andile Mgoduka / RAF
YOUR CORRESPONDENCE DATED 23 AUGUST 2007 REFERS:

We require an undertaking that our fees and disbursements in the amount of R104 166.04 would be paid upon receipt of the <u>cost</u> herein (my underlining).
Should we not receive the said undertaking within 5 days we would be proceeding with summons against your firm.
Yours Faithfully,

(Signed) JUSTICE REICHLIN RAMSAMY "

[8] The plaintiff's attorney and client bill was taxed in May 2007 and the sum of R104 166.04 represents the balance due and certified under the taxed bill as fair and reasonable for the services rendered by the plaintiff to Mgoduka, less the amount previously received by the plaintiff.

[9] On 25 October 2007 the plaintiff issued summons against

the defendant wherein he requested judgment against the defendant for the payment of R104 166.04 plus interest and costs.

[10] On 25 October 2007 the defendant filed his notice of intention to defend the action. On 12 November 2007 the plaintiff filed a notice that application for summary judgment would be made on the 29 November 2007.

[11] On 23 November 2007 the plaintiff filed a notice of removal from the roll. On the same day the plaintiff informed the defendant by letter about the removal. The relevant portions of the letter read as follows:

"**SUMMARY JUDGEMENT APPLICATION: 29 NOVEMBER 2007 AT 9H30**

We refer to the above matter and the application for summary judgment that was set down for hearing on the above mentioned date.

Kindly take note this matter has been removed from the roll. A copy of the notice of removal from the roll was also delivered at your offices. It is our instruction that the main action will proceed" (my underling)

[12] On 11 December 2007 the plaintiff filed a notice of set down

whereby the same matter was set down for 24 January 2008 for an application for summary judgment. This notice was delivered to the defendant on 11 December 2007. The defendant filed his affidavit in terms of Rule 32(3)(b), together with his plea and Rule 14 notice on 19 December 2007.

[13] The defendant challenged the application on numerous grounds. He alleged that he signed the undertaking of 02 May 2007 on behalf of Nonxuba Incorporated and not in his personal capacity; that the plaintiff also acted on behalf of Messrs Justice Reichlin Ramsamy Attorneys and not in his personal capacity; that the plaintiff's claim will only arise after the RAF has paid the taxed costs of Nonxuba Incorporated; that Andile Mgoduka has a substantial interest in this matter and should therefore have been joined; that the taxed bill of costs is a liquid document and should have been attached to the application and that the letter of 23 November 2007, mentioned in paragraph 11 above, constituted an agreement between the parties.

[14] My conclusion in relation to some of the points raised by Mr Quinn SC, on behalf of the defendant, renders it unnecessary for me to deal with all the issues raised.

[15] Mr Quinn argued that by removing the application for summary judgment from the roll on 23 November 2007 the plaintiff took a further procedural step and must therefore be deemed to have acknowledged the defendant's right to defend the action. Mr Pillay SC, on behalf of the plaintiff, argued that the removal was not a procedural step of the kind that would bar a plaintiff to subsequently apply for summary judgment.

[16] In **ESSO SOUTH AFRICA v VIRGINIA OILS & CHEMICALS CO.** 1972 (2) SA 81 (O) at 83 A – B it was accepted by Klopper J that once appearance to defend has been entered and a plaintiff thereafter takes a further procedural step he thereby waives his right to ask for summary judgment. In **JACOBS v F. T. P Finans (EDMS)**

BPK 1975 (3) SA 345 (O) at 346 B – C Klopper A. J. P , who also wrote the judgment **ESSO SOUTH AFRICA** *supra,* said the following:

> "As in gedagte gehou word die doel waarvoor hierdie praktyk geskep is, nl. vir gevalle waar 'n respondent nie 'n geleentheid gegun moet word om die geding teen hom te verdedig nie en die applikant beweer dat verskyning aangeteken is bloot as tydverkwisting, dan is dit ongerymd dat gemelde eiser prosesregtelike stappe neem wat op die verdediging van sodange eis gemik is ." I agree.

[17] The mere removal of a matter from the roll, however, is not *per se a* further procedural step that leads to the conclusion that a plaintiff has abandoned his right to ask for summary judgment. A matter may be removed from the roll for various reasons unrelated to the party's waiver or abandonment of a right. In fact in many instances it may be removed from the roll in the furtherance of the plaintiff's desire to proceed with the application for summary judgment, e.g. if it is removed from the unopposed roll and put on the opposed roll or where

there is a technical defect in the application which needs to be purged. Where the application for summary judgment is removed and the plaintiff / applicant expressly states that:

"**It is our instruction that the main action will proceed**" then in my view, it is clear that the plaintiff acknowledges the defendant's right to defend the action. If a plaintiff can by taking a further procedural step be deemed to have waived his right to summary judgment there is in my view no reason why the same should not hold true where he expressly and unambiguously informs the defendant that the main action will proceed. The defendant in this matter acted on that undertaking and filed his plea, irrespective of the second notice of set down of the summary judgment application. The defendant regarded it as an irregular step and ignored it. This point *in limine* taken by the defendant ought to succeed.

[18] The defendant contended that the application for summary judgment is abortive because the plaintiff's taxed bill of costs, which according to him is a liquid document, was not attached. This contention is misplaced. A taxed bill of costs

is not a liquid document. **MARTENS v RAND SHARE and BROKING FINANCE CORPORATION (PTY) LTD** 1939 **WLD** 156 at 166 **WOLHUTERSKOP BELEGGINGS** v **BLOEMFONTEIN ENG. WORKS** 1965 (2) SA 122 (O) at 123 C – H.

[19] The other issue that I propose to deal with relates to whether the claim has arisen. I will for the purpose of this judgment accept that the plaintiff, in his personal capacity, has a claim against the defendant in his personal capacity. The defendant argued that it was an express, alternatively an implied, alternatively a tacit term of the undertaking that no payment was due to the plaintiff by the defendant until finalisation of the claim and taxation of bill of costs in relation to the litigation and payment of costs by the RAF to the defendant.

[20] Mr Pillay argued, correctly in my view, that the defendant may not contradict, add to, or modify the written undertaking by means of extrinsic evidence; see **JOHNSTON v LEAL**

1980 (3) SA 927 (A) at 943 B. **RAND REITFONTEIN ESTATES LTD v COHN** 1937 AD 317 at 326 . The language in the document must be given its grammatical and ordinary meaning unless this would result in an absurdity or inconsistency with the rest of the document. The technique of interpreting written instruments was set out by **JOUBERT JA in COOPER & LADYBRAND v BRAYANT** 1995 (3) SA 761 (A) at 767E – 768E as follows:

> "According to the 'golden rule' of interpretation the language in the document is to be given grammatical and ordinary meaning, unless this would result in some absurdity or some repugnancy or inconsistency with the result of the instrument... The mode of construction should never be to interpret the particular word or phrase in isolation (*in vacuo*) by itself…The correct approach to the application of the 'golden rule' of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking to have regard:
>
> (1) To the context in which the word or phrase is used its interrelation to the contract as a whole, including the nature of the purpose of the contract…;
>
> (2) To the background circumstances which explain the

geneses and purpose of the contract, i.e. to matters probably present to the minds of the parties when they contracted…;

(3) To apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, saved direct evidence of their own intentions."260

In applying the technique of interpretation as set out in **COOPERS & LYBRAND** *supra* I must be mindful of the fact that the four steps should not be paced out in succession with military precision, but must be danced with some pirouetting, and an entrechat or two. See **CHRISTIE RH THE LAW OF CONTRACT IN SOUTH AFRICA 5TH EDITION 205 -206.**

[21] Mr Pillay argued that a claim in ordinary language means substantial relief and that cost is a separate issue with a different cause of action. It is dependent on the discretion of the Court. In **ALLEN and OTHERS v DUBE** 1954 (1) SA 213 (N) 215 C- D **BROOME JP** said the following:

> "A judgment, with costs, appears to me to be analogous to a non – judgment debt arising out of two causes of action, rather than to a debt arising out of a single cause of action. After all, in ordinary par lance we speak of "judgment debt" when we mean to include costs. The main judgment represents the court's judgment upon the creditor's pre –existing claim, while the judgment for costs represents the order which the court has made in regard to the expense of enforcing that claim. The two are obviously upon a different footing…"

It must however be remembered that words may be used by parties in a way other than its ordinary meaning. The "ordinary'' meaning of a word or words in a contract will depend inter alia upon the context in which they are used, their interrelation and the nature of the contract as it appears from the entire undertaking. See **<u>LTA CONSTRUCTION LTD v MINISTER OF PUBLIC WORKS & LAND AFFAIRS</u>** 1992 (1) SA 837 (C) at 851 A-C; **<u>LIST v JUNGERS 1979 (3) SA 106 (A) at 119 A-B</u>**. Evidence that words were used in a special or technical sense is admissible even when the contract, reading the words or phrases in their normal sense, is unambiguous on the face of it. See CHRISTIE *supra* at 208. It is also significant to note that in his letter dated 24 August the plaintiff requested an undertaking, from the defendant, that payment of the amount due will be made upon receipt of the costs in the **MGODUKA v RAF** matter.

[22] It is clear that the matter in relation to the interpretation of the contract is something that can only be settled by means of evidence. The plaintiff was fully aware of the defendant's plea when he brought this application. Delivery of a plea is however no bar to an application for summary judgment. **VESTA ESTATE AGENCY v SCHLOM** 1991 (1) SA 593 (C) at 595 B – H.

It has been said, on numerous occasions, by our Courts that summary judgment procedure is an extraordinary procedure which effectively closes the door to a defendant without trial. **AREND AND ANOTHER V ASTRA FURNISHERS (PTY)LTD** 1974 (1) SA 298 (C) at 304 F – G.

The defendant must only satisfy me that he has a bona fide defence to the action. I must merely consider whether the facts alleged by the defendant constitute a good defence in law and whether that defence appears to be bona fide. See **AREND and ANOTHER** *supra* at 303. Before summary judgment can be given the Court should be satisfied that the plaintiff's case is unanswerable. **<u>HIRE PURCHASE DISCOUNT CO. v RYAN SCHOTZ</u>** 1979 (2) SA 305 (SECLD) 308 G. I need not decide at this stage whether the defendant will on a preponderance of probabilities be successful in the main action. **<u>EVELYN HADDON & CO. LTD v LEOJANKO (PTY)LTD</u>** 1967 (1) SA 662 (O) at 667 G. In this matter I am not satisfied that the plaintiff's case is unanswerable. The defendant has a bona fide defence to the action. The application ought to be dismissed.

[23] Mr Quinn requested me to make a cost order as contemplate in Rule 32 (9)(a). Mr Pillay on the other hand requested me to make an order to the effect that cost of these proceedings be reserved for determination by the trial court.

[24] **RULE 32 (9) (a) reads as follows:**

> " The court may at the hearing as such application make such order as to costs as to it may seem just; provided that if the plaintiff make an application under this rule, where the case is not within the terms of sub rule (1) or where the plaintiff, in the opinion of the court, knew that the defendant relied on a contention which would entitled him to leave to defend, the court may order that the action be stayed until the plaintiff has been paid the defendant's cost; and may further order that such costs be taxed as between attorney and client…"

This sub-rule is designed to discourage plaintiffs from bringing unjustified applications for summary judgment. Unjustified applications for summary judgment put a defendant to unnecessary expense and trouble and are a waste of the court's time. **ABSA BANK LTD v SJ DU TOIT & SONS EARTHMOVERS** 1995 (3) SA 265 (C) at 268 I. Costs fall within the discretion of the court and usually, as Mr Pillay argued, costs in summary judgment applications are reserved for determination by the trial judge. **MAHARA J v BARCLAYS NATIONAL BANK LTD** 1976 (1) SA 418 (A) at 428.

[25] The plaintiff in this matter firstly abandoned his right to proceed with the summary judgment application and acknowledged the defendant's right to defend the action. When the plaintiff applied for summary judgment it was fully aware of the defendant's defences to the action. This should have discouraged the plaintiff from proceeding with the application. It must be remembered that the application is in fact made when it is heard by the court and not when the

notice is filed. **<u>HIRE PURCHASE DISCOUNT CO. v RYAN SCHOLZ</u>** *supra* 307 G; **<u>JACOBS v FPJ FINANS (EDMS) BPK</u>** *supra* 346 E. The unnecessary litigation showed scant regard for the defendant's right. The plaintiff endeavoured to show that the defendant's defence should and would be dismissed, knowing fully well that it is not my task to consider whether, on a balance of probabilities, the defences are likely to succeed. The defendant has been put through unnecessary trouble and expense by the initiation of this application. In my view this is a matter in which a costs order should be made at this stage and not by the trial court.

[26] The plaintiff being dominis litis did not ensure that the file is properly indexed and paginated. Crucial documents were not in the file when the matter was called. The original summons, the defendant's plea as well as the Rule 14 notice where placed in my file during argument. This is totally unacceptable. The cost order should also show my displeasure.

[27] It has been said that it is in very special circumstances that the court ought to go the length of exercising its undoubted powers under Rule 32 (9) (a). **H H ROBERTSON LTD v NL BUILDERS & CONSTRUCTION** 1974 (3) SA 776 (NPD) at 777C. The cost order that I intent to make should also not be construed as an indication that I favour the defendant's case on the merits. **FLAMINGO GENERAL CENTRE v ROSSBURG FOOD MARKET** 1978 (1) SA 586 (D) at 588 F-G. **ABSA BANK LTD v SJ DU TOIT** *supra* at 268 D – G .

[28] I am of the view that the circumstances of this matter does not warrant an order that the action be stayed until the plaintiff has paid the defendant's costs.

[29] **I accordingly make the following order:**

(a) Summary judgment is refused and the defendant is granted leave to defend the action.

(b) The plaintiff is ordered to pay the defendant's costs of the summary judgment proceedings on the attorney and client scale such costs to include the costs occasioned by the employ of two counsel.

C.J. MUSI, J

On behalf of the Plaintiff:	Mr Pillay S C instructed by JUSTICE REICHLIN RAMSAMY C/O ANDRIES PANGENGERG INC 1st FLOOR, FAL BUILDING 46 BLOEMFONTEIN
On behalf of the Defendant:	Mr Quinn S C instructed by NONXUBA INCORPORATED 3rd & 7th Floors GROTIUS BUILDING 23 ELIZABETH STREET BLOEMFONTEIN