

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

Case No. : 5008/07

In the matter between:-

ZUKO MACK MICHAEL NONXUBA

Applicant

and

JUSTICE REICHLIN RAMSAMY

Respondent

HEARD ON: 6 MARCH 2008

JUDGMENT BY: EBRAHIM, J

DELIVERED ON: 3 APRIL 2008

[1] This matter commenced with an application for an order to compliance with a notice in terms of Rule 14 of the Uniform Rules of this Court but has resolved itself into a spat about costs.

[2] Both the applicant and the respondent are attorneys who acted for one Mgoduka in an action for delictual damages against the Road Accident Fund.

[3] Pursuant to the merits being conceded by the Road Accident Fund, Mgoduka terminated the respondent's mandate to continue acting for him and engaged the services of the applicant who furnished the respondent with an unconditional undertaking on 2 May 2006 to settle the respondent's taxed attorney/client bill of costs upon finalisation of the litigation.

[4] The respondent's bill of costs was taxed in May 2007 and in October 2007 the respondent instituted action against the applicant in this Court for payment thereof. The action was defended by the applicant and thereafter an application for summary judgment was enrolled for hearing. That application was dismissed with costs on an attorney/client scale in favour of the applicant in this matter and has no relevance to this application save for the role it played in the chronology of events leading up to the delivery by the applicant of his Rule 14(5)(a) notice requiring disclosure of the names and addresses of the proprietor/proprietors or partner/partners of the respondent. That notice was delivered on 19 December 2007 and notice of the set down of the summary judgment application for hearing for 24 January 2008 was served on the applicant on 11 December 2007.

[5] The respondent failed to reply to the Rule 14(5)(a) notice within the stipulated ten days and the applicant then launched the present application on 24 January 2008 for an order directing the respondent to comply therewith and pay the costs of the application on an attorney/client scale. On 19 February 2008, after the dismissal of the summary judgment application, the respondent delivered its reply to the Rule 14(5)(a) notice, thus making an order for compliance with the Rule 14(5)(a) notice superfluous. This application then proceeded to be argued on the question of costs only.

[6] On behalf of the applicant, Mr. Schuring's main contention was simply that the respondent had ignored the provisions of Rule 14(5)a) which required compliance within ten days of the receipt of the notice and on that ground alone had to be visited with a punitive costs order. He referred me to the well known authority of **REID N.O. v ROYAL INSURANCE CO** 1951 (1) SA 713 (T), in support of this submission and in

particular to p. 720 C – D thereof where Roper J had the following to say:

“In the present case the application has been brought under a complete misconception as to the function of particulars, and it also had the effect of unnecessarily delaying the further prosecution of the action, and in the circumstances I feel that the plaintiff ought to have his costs as between attorney and client.”

Mr. Schuring likened the circumstances of the present application to the circumstances prevailing in the **REID** matter, albeit that that case dealt with a request for further particulars, and argued that the respondent's delay in furnishing a response to the Rule 14 notice had the effect of delaying the further prosecution of the action, causing the applicant prejudice and to incur unnecessary costs by having to launch the present application. He urged this Court to make a special costs order on an attorney/client scale against the respondent as a mark of its displeasure at the respondent's conduct. Such an order, he argued, would also protect the applicant and cure the applicant of any prejudice

it suffered as a result of what he termed was the respondent's wilful disregard of the Rules of this Court.

- [7] Mr. Gilliland, on behalf of the respondent, submitted that the present application was entirely misconceived as there was no obligation upon the respondent to reply to the applicant's Rule 14 notice as that notice was an irregular step in the main proceedings in view of the fact that it was filed with the registrar and served on the respondent on 19 December 2007 at a time when the applicant was fully aware that a summary judgment application had been enrolled for hearing on 24 January 2008 and that, consequently, all further steps in the prosecution of the main action would be stayed pending the outcome of the summary judgment application. He submitted that these circumstances would effectively then have absolved the respondent from replying to the applicant's notice in terms of Rule 14 at least until the dismissal of the summary judgment application. In support of these submissions I was referred to the decision in **VAN HEERDEN v SAMARKAND MOTION PICTURE PRODUCTIONS** 1979 (3) SA 786 (T) where it was held by

Myburgh J at 789 C – E:

“It seems to me that the purpose of the summary judgment proceedings is to test the *bona fides* of the entering of appearance to defend, meaning that the right to defend is in issue in such proceedings. Reference has also been made to Rule 32 (7) which provides as follows:

‘(7) If the defendant finds security or satisfies the Court as provided in subrule (3), the Court shall give leave to defend, and the action shall proceed as if no application for summary judgment had been made.’

The meaning of this sub-rule, in my view, includes by implication that the action shall not be proceeded with pending the Court's finding that it has been satisfied in terms of sub-rule (3).”

At p. 789 G – H and at p. 780 A – B the learned Judge went on to state the following:

“The judgment by BOSHOFF J in *Louis Joss Motors (Pty) Ltd v Riholm* 1971 (3) SA 452 (T) deals with the rescission of a summary judgment claimed under Rule 31 (2) (b). The relevant passage appears at 454D which reads as follows:

‘A defendant must, under Rule 21 (1), deliver a plea within a stated period of time and, if he fails to deliver the plea within that period of time, or within any extended time allowed by the Rules, the plaintiff may, in terms of Rule 26, by notice served upon him require him to deliver the plea within three days after the day upon which

the notice is delivered. If the defendant fails to deliver the plea within the three days, or within such further period as may be agreed upon between the parties, he is in default of filing such plea and is ipso facto barred. It is only then that it can be said that the defendant is in default of a plea in the sense the words are used in sub-rule (2) (a) of Rule 31. A defendant is certainly not in default of a plea where he has delivered notice of an intention to defend and is prevented from proceeding with his defence by an application for summary judgment under and by virtue of the provisions of Rule 32. The fact that he was absent and not represented in Court when the application for summary judgment was heard and granted, does not make the judgment a default judgment of the kind contemplated by Rule 31. In actual fact the defendant had an attorney acting for him, notice of the application was delivered to him and the plaintiff had complied with the requirements of the Rule entitling him to summary judgment. The judgment is a final judgment and there is nothing in the Rules making it provisional.'

From this judgment it is clear that the election by the plaintiff to bring summary judgment proceedings stays the running of any period in terms of Rule 22."

This judgment was relied on and quoted with approval by

Levinsohn J in the matter of **KHAYZIF AMUSEMENT**

MACHINES CC v SOUTHERN LIFE ASSOCIATION LTD

1998 (2) SA 958 (D).

- [8] I am in agreement with counsel for the respondent that although these decisions were concerned primarily with the provisions relating to the filing of a plea in terms of Rule 22 of the Uniform Rules of Court, the same principles would be instructive when it come to the filing of an exchange of notices and pleadings in terms of Rule 14. He urged me to dismiss the application and award costs on a punitive scale

of attorney and client against the applicant on account of the latter's abuse of the process of the Court in bringing an application which is both vexatious and unreasonable in the circumstances of this case.

[9] On analysing the chronological sequence of events which preceded the hearing of the summary judgment application, the following was common cause between the parties:

1. That a firm of attorneys in Bloemfontein known as Andries Spangenberg was the attorney of record on behalf of the respondent in the main action and that the applicant's firm Nonxuba Inc represented the applicant.
2. On 23 November 2007 the respondent's attorneys, undoubtedly acting on the respondent's instructions, wrote to the applicant's attorney. I quote from the body of that letter:

"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 instructions that the main action will proceed.”

3. On 7 December the respondent issued an instruction to Andries Spanenberg. I quote from the body of that letter:

“Your correspondence dated 6 December 2007 refers.

The respondent wants to argue the matter.

Please set the matter down for argument on the 2....th of January 2008 and serve a notice on the other side.

Kindly advise us about the rules regarding the filing of Heads of Arguments.”

The precise date of hearing requested is not clear but is irrelevant for the purposes of the present application.

- [10] Mr. Gilliland argued that this letter was an indication of the insistence of the present applicant, who was the respondent in the summary judgment application and to whom the present respondent referred in his aforesaid letter to Spangenberg dated 7 December 2007, that the summary judgment application proceed despite the present

respondent's instruction that the main action be proceeded with. Mr. Gilliland contended that the reason for this was the respondent's obvious acceptance of the *bona fides* of the applicant's defence to the summary judgment application. Despite this, the present applicant chose to proceed with the summary judgment application on an opposed basis for reasons best known to himself.

[11] Mr. Schuring, in reply, contended that there was no proof before this Court that it was in fact the case that the summary judgment application proceeded at the instance of the present applicant and referred me to the judgment of my colleague Musi J in that application and specifically to the order for attorney/client costs made in favour of the present applicant.

[12] I am loath to comment on the said judgment and will merely confine myself to making the comment in passing that a different costs order might have resulted in that case had the learned Judge been favoured with the correspondence I

have referred to in this judgment. On the probabilities it is clear to me that the present respondent would not have had reason to enrol the application for summary judgment unless urged to do so by the applicant himself.

[13] With this in mind, I turn now to the specifics of this application and have concluded that the application was indeed misconceived and should never have been lodged. I say so for the following reasons:

1. In accordance with the authorities I have quoted, the summary judgment application stayed all further procedural steps in the action.
2. The applicant's Rule 14 notice was thus an irregular step and should not have been taken prior to the dismissal of the summary judgment application.
3. Having been taken, there was no obligation on the respondent to reply thereto, and any obligation to do so would only have arisen on dismissal of the summary judgment application and then only upon the expiry of ten days from the date of such dismissal.
4. The applicant took a further procedural step at a time when he was aware that the summary judgment application had been set down for hearing. The notice of set down was dated 10 December 2007 and served on the applicant on 11 December 2007. The Rule 14 notice was dated 19 December 2007 and served on the respondent's attorneys on even date. It was the applicant, therefore, who evinced a wilful and contemptuous disregard for the process of court and for the Uniform Rules of this Court. He then went ahead and compounded that abuse by launching this application. Such conduct must rightly be visited with a punitive costs order.

[15] In the result the application is dismissed and the applicant is ordered to pay the respondent's costs on an attorney/client scale.

S. EBRAHIM, J

On behalf of Applicant:

Adv. C. Schuring
Instructed by:
Nonxuba Inc.
BLOEMFONTEIN

On behalf of Respondent:

Adv. J.G. Gilliland
Instructed by:
Andries Spanenberg Inc.
BLOEMFONTEIN

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