

IN THE HIGH COURT OF SOUTH AFRICAGAUTENG LOCAL DIVISION, JOHANNESBURGCASE NO: 00966/2022DATE: 11-09-2024**DELETE WHICHEVER IS NOT APPLICABLE****(1) REPORTABLE: NO.****(2) OF INTEREST TO OTHER JUDGES: NO.****(3) REVISED.****DATE 11 September 2024**

In the matter between

**SIGNATURE**

VIWE SAMUEL NOTSHE

Applicant

and

STATE ATTORNEY

Respondent

J U D G M E N T E X T E M P O R E

WILSON, J: The applicant, Mr Notshe, is a senior counsel at the Johannesburg Bar. He sues for payment of various invoices which were presented to the State Attorney in Johannesburg and approved for payment. Those invoices are set out and the amounts that they reflect are particularised at Annexure A of Mr Notshe's founding affidavit.

The first respondent, the State Attorney, resists the

claim for payment on the basis that the Special Investigating Unit (SIU) has conducted an investigation into the payment of some R27 million worth of invoices previously submitted by Mr Notshe, and that this investigation has not been concluded. It is these previously submitted and paid invoices that form the focus of the SIU investigation. This is acknowledged in the answering affidavit. The invoices of which Mr Notshe now claims payment are not, as far as the issue is taken on the papers at least, the subject of an SIU investigation. Nor has any other basis been laid in the answering papers to refuse to pay them.

Mr Mhambi, who appeared for the State Attorney, submitted that the essence of the State Attorney's opposition is that until the SIU investigation into the payments previously made is completed, the State Attorney does not know what amount, if any, of the R27 million that is already paid to Mr Notshe will have to be paid back.

Mr Mhambi submitted that this represents an intolerable risk to the State Attorney. On the basis of that perception of risk, it was submitted, the State Attorney is entitled to withhold payment in relation to any invoices submitted by Mr Notshe, even ones that are not the subject the SIU investigation, until the SIU investigation is completed.

While I understand the State Attorney's concerns, that is no basis on which to resist a claim for payment based on invoices that are otherwise due and payable. If any of the R27 million that has already been paid to Mr Notshe subsequently becomes repayable, the State Attorney will have its remedies then.

The State Attorney is not entitled to speculate that Mr Notshe may have to pay some of that money back, and on the basis of that speculation refuse to pay amounts due in terms of invoices that it has accepted and approved, and in respect of which it has no genuine basis to repudiate liability.

In the course of the exchange of papers it became clear that one of the invoices in respect of which Mr Notshe claimed payment, tax invoice number 202 in the matter of *PP Molefe on behalf of K Molefe versus the MEC for Health*, had already been paid by the State Attorney. The amount due in respect of that invoice has been subtracted from the amount claimed in Mr Notshe's notice of motion. Mr Notshe nonetheless persists in a claim for payment of the amount in his notice of motion nett of the amount set out in tax invoice number 202.

There was a suggestion during argument that the SIU has a direct and substantial interest in these proceedings, but I do not think that contention can be sustained. If the

invoices in respect of which Mr Notshe claims payment are not invoices in which the SIU is interested or in respect of which it has opened an investigation, there is no basis to join the SIU to these proceedings.

In a draft order handed up to me, Mr Vobi, who appeared for Mr Notshe, asked for interest to run on the amount due in terms of each of the invoices from 30 days of their presentation. It is not clear to me on these papers when the invoices were presented, and I take Mr Mhambi's point that a number of queries may well have been raised in relation to them. Those queries may well have been raised in good faith given the background facts that I have mentioned in this matter. They may also have postponed the date on which each of the invoices fell due.

In the circumstances it seems to me that the wiser course is to grant the claim for payment with interest to run from the date on which the application papers were issued, on 14 January 2021. Mr Vobi also asked for an order for costs on the attorney and client scale, but later accepted that the scale of costs should be left in my discretion.

I do not think that this is a proper case for attorney and client costs. While misguided, I do not think the opposition to this application has been in bad faith. I do not think that the respondents have conducted themselves in any way inappropriately in the presentation of the case.

There is, of course, no agreement to pay costs on the attorney and client scale in the event of successful litigation. There is accordingly no contractual basis on which to claim attorney and client costs. Costs will be on the party and party scale.

Mr Vobi asked for an order for counsels' costs on scale B. Given that this is in essence a simple claim for payment I do not think such an order is justified. Rule 67A makes clear that if a Court makes an ordinary party and party costs order without mentioning a scale set out there, the default position is that costs are granted on scale A. I think that is the appropriate outcome.

For all those reasons I will make an order in terms of the draft Mr Vobi handed up, which I have signed, dated and marked X. I have also amended the order in the respects canvassed in my judgment delivered *ex tempore*.



WILSON, J
JUDGE OF THE HIGH COURT
11 September 2024