

**SPECIAL INTEREST**

**COENRAAD JOHANNES BIERMAN NO v JOHANNES COMBRINCK (JNR)**

CASE NO.: (P) I 912/2005

**MULLER, J**

22 September 2006

- o Application for Summary Judgment removed, payment of costs on an attorney and client scale and stay of the action postponed on 30 May 2006 by order of court as a result of an agreement
- o Question of costs and stay heard on 18 September 2006

Issues considered:

- o Defendant gave notice in terms of Rule 23(1) of exception to Particulars of Claim;
- o Objection in respect of Rule 23(1) Notice of one of the grounds raised in Defendant's affidavit to oppose Summary Judgment;
- o Despite Rule 23(1) Notice and knowledge of Defendant's defence, the plaintiff continued with its application for Summary Judgment causing defendant to incur expenses and costs;
- o After defendant filed an opposing affidavit the plaintiff agreed to remove the application for Summary Judgment o Rule 32(10)(a) applicable;
- o Cases approved: *Floridar Construction Company (SWA) (Pty) Ltd v Kriess* 1975 (1) SA 875 (SWA); *Lemore v African Mutual Credit Association and Another* 1961 (1) SA 195 (C); *South African Bureau of Standards v G G S /AU (Pty) Ltd* 2003 (6) SA 588 (T); *Absa bank Ltd (Volkskas Bank Division) v S J du Toit & Sons Earthmovers (Pty) Ltd* 1995 (3) SA 265 (C).

**Held:** Conduct of the plaintiff vexatious and justifying an order of attorney and client costs.

**Ordered:** Plaintiff to pay defendant's attorney and client costs, as taxed or as a result of an agreement and that the main action is stayed until payment of such costs.

CASE NO.: (P) I 912/2005

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**COENRAAD JOHANNES BIERMAN NO**

**PLAINTIFF**

and

**JOHANNES COMBRINCK (JNR)**

**DEFENDANT**

**CORAM: MULLER, J**

Heard on: 18 September 2006

Delivered on: 18 September 2006

**JUDGMENT**

**MULLER, J.** [1] This is an application arising from the second paragraph of an order made on 30 May 2005 by this Court. That order was made as a result of an agreement between the parties. The order reads as follows:

**"IT IS ORDERED**

1. *That the application for summary judgment is removed from the roll.*

2. *That question to stay the action and payment for costs on attorney and client scale is postponed to a date to be arranged with the Registrar."*

[2] Heads of argument in respect of this issue were filed by the defendant, represented in this Court by Adv. JJ Swanepoel. The plaintiff failed to file heads of argument and there was also no appearance on behalf of the plaintiff today.

The Court was, however, not afforded the courtesy of being informed by the plaintiff that it will not oppose this application and had to peruse the documents in the file.

[3] The history of this matter is that after the defendant entered appearance to defend the action instituted by the plaintiff, it applied for summary judgment on 10 May 2005. On the same day, namely 10 May 2005, the defendant gave notice of exception to the plaintiff's Particulars of Claim in terms of Rule 23(1). In response the defendant opposed that the application and simultaneously filed an opposing affidavit on 25 May 2005. The defendant's opposition against the application for summary judgment was based on lack of personal knowledge of the facts deposed to by the plaintiff who acted in a representative capacity for the person who entered into a loan agreement with the defendant and on the basis of his complaint as set out in his Rule 23(1) notice, which complaint was not removed because notice of amendment of the Particulars of Claim was given.

[4] As mentioned, the plaintiff agreed, on the date when the summary judgment was supposed to be heard by this Court, to remove it from the roll. Because the plaintiff did not withdraw its application for summary judgment earlier, despite having had the notice in terms of Rule 23(1), the defendant had to furnish the required security or file an affidavit in terms of Rule 32 (3)(b). Two matters stood over, namely stay of the action and payment of costs on an attorney and client scale basis. The reason for the removal of the application for summary judgment

from the roll seems quite obvious, namely the objections embodied in the defendant's opposing affidavit. This is further proved by the plaintiff's notice to amend its Particulars of Claim subsequent to the 30 May 2005 and the filing of its Amended Particulars of Claim.

[5] The whole process came to a halt because the stay of the proceedings and the question of the payment of costs on a special scale had to be finalised.

[6] The relevant Rule of Court is Rule 32(10)(a), Rule 32 (9)(a) of the South African High Court Rules, which is now relevant and which provides as follows:

*"The court may at the hearing of such application make such an 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 sub-rule (1), or where the Plaintiff, in the opinion of the court, knew that the defendant relied upon a contention which would entitle him or her 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) ....."*

[7] I agree with Mr Swanepoel's submission that this amendment of the plaintiff's Particulars of Claim constitutes a clear confession that his original Particulars of Claim were excipiable as pointed out by the defendant in the Notice in respect of rule 23(1) and as alleged in his opposing affidavit, to the effect that the Court would not have granted Summary Judgment to the plaintiff on 30 May 2005. The plaintiff knows that and knew in advance what the defendant's defence would be, but notwithstanding this knowledge, continued with his application for Summary

Judgment. The defendant also knew that he may be liable for costs on an attorney and client scale.

[8] I was referred to a decision of this Court namely, *Floridar Construction Company (SWA) Pty Ltd v Kriess* 1975 (1) SA 875 (SWA) where the judge dealt with a similar situation and where costs on an attorney and client scale was awarded. The learned judge approved of the decision by Banks AJ in *Lemore v African Mutual Credit Association and Another*, 1961 (1) SA 195 (C) where it was held that the conduct of a litigant who puts his opponent into unnecessary trouble and expense by opposing an application, which should never have been brought, is vexatious and justifies an order of costs of an attorney and client scale. On page 1996 G-H of that judgment, Banks AJ is reported to say:

*"The case I am considering is, in my view, almost identical. The plaintiff should have never have brought the application for summary judgment. I can see no good reason why, under the circumstances, defendant should have to bear the expense of his own attorney and client costs.*

*I am accordingly of opinion that defendant is entitled to the order it prays for."*

[9] Another more recent case in point that I have been referred to is that of *South African Bureau of Standards v G G S / AU (Pty) Ltd* 2003 (6) SA 588 (T). In that case the plaintiff was also ordered to pay the defendant's costs on an attorney and client scale and the Court stayed the action pending taxation by the defendant of its costs and payment thereof. Today Mr Swanepoel also referred to the case of *Absa Bank Ltd (Volkskas Bank Division) v S J du Toit & Sons Earthmovers (Pty) Ltd* 1995 (3) SA 265 (C) where a similar order was given.

[10] I agree with the submission that the plaintiff should pay the defendant's costs in respect of the Summary Judgment proceedings on a attorney and client scale and that the action be stayed until such payment, which may be taxed or agreed upon, had been paid by the plaintiff to the defendant. When such payment has been received, the defendant will have the normal times to request Further Particulars or plead as provided for in the Rules of Court.

[11] In the result the following order is made:

1. The plaintiff is ordered to pay the defendant's costs, as taxed or as a result of an agreement, on an attorney and client scale.
2. The action instituted by the plaintiff is stayed until payment thereof by the plaintiff to the defendant.

**MULLER, J**

**ON BEHALF OF THE PLAINTIFF:**

**No appearance**

**ON BEHALF OF THE DEFENDANT:**

**Mr JJ Swanepoel**

**Instructed By:**

**Kirsten & Co**