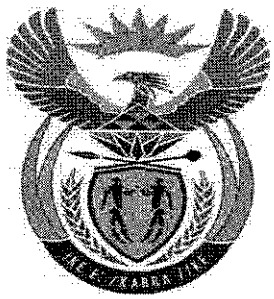


THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 1920/11

In the matter between:

ABSA BANK	Plaintiff/Applicant
and	
ELMA LINTZ N.O	1st Defendant/Respondent
PIETER ALBERTUS DU PLESSIS	2nd Defendant/Respondent

JUDGMENT delivered this11th day of December 2012

NDITA; J

[1] The plaintiff instituted action in this court on 7 February 2012 for recovery of an amount of R869 534.35 with costs on attorney and client scale, lent and advanced to

the defendant pursuant to an agreement. In due course, the defendant entered an appearance to defend. On 27 June 2012, the plaintiff filed an application for summary judgment, and is procedure, the application was supported by an affidavit setting out that in its opinion, the defendant had no bona fidei defence and had delivered notice of intention to defend for the purpose of delaying the proceedings. In response thereto, the defendants on 27 July 2012 filed an opposing affidavit outlining their defence of reckless lending, in line with section 80 of the National Credit Act 34 of 2005. This defence is premised on the following:

1. that the plaintiff failed to conduct an assessment as required by section 81(2) of the Act, or, in the alternative;

2. that having conducted the assessment entered into the credit agreement despite the fact that the assessment indicated that the defendants would be rendered over indebted.

[2] On 31 July 2012, the summary judgment application was by agreement between the parties, postponed to 23 October 2012. The plaintiff filed neither the Practice Note nor heads of argument. These were filed by the defendants on 22 October 2012. During the hearing on 23 October 2012, the application was withdrawn and the defendants granted leave to defend the action. However, the plaintiff did not tender costs. The matter was further postponed to 10 December for a consideration of costs resulting from the withdrawal of the application, thus the present application.

[3] Rule 32(9)(a) provides as follows:

'If a plaintiff applies for summary judgment in respect of a claim not falling within the terms subrule (1), the court may order that the action be stayed until the plaintiff has paid the defendant's costs and may further order such costs be taxed as between attorney and client scale. Such an order may also be made, if in the opinion of the court, the plaintiff knew that the defendant relied on a contention which would entitle him or her to leave to defend.'

Counsel for the plaintiff contended that costs of the summary judgment application should be costs in the cause as is usual practice, or that they be determined later after the action has been finalised as the trial court would better suited to determine whether the defendant's defence was reasonable. It was further submitted on the plaintiff's behalf that this court should be slow to grant costs in circumstances where action is pending and the defendant's defence must still be tested. For this contention Counsel cited the judgment in *Flamingo General Centre v Rossburgh Food Market* 1978 (1) SA 586 (N) where it was held that:

"... the Court must of necessity, be slow to make a special order of costs between attorney and client in such cases because, if the defence is ultimately held to be unfounded and dishonest, it might mean that the defendant has obtained a special order for costs when its own conduct is subject to serious criticism – an order which cannot be corrected at the trial. The risk of such an injustice being perpetrated is increased because the plaintiff is denied the right to reply to the defendant's allegations in summary judgment proceedings."

Furthermore, according to the plaintiff the application does not fall within the circumstances of Rule 32 (9)(a). This contention is understandable, however,. Vermooten AJ, in *Floridar Co. (S.W.A) (Pty) LTD. V Kries* 1975 (1) SA 875 (S.W.A),

explained the purpose of Rule 9 relying on learned authors, Nathan & Brink, Uniform Rules of Court, at p.156 as follows:

"The purpose of sub-rule is, on the one hand, to discourage unnecessary or unjustified applications for summary judgment, and, on the other hand, to discourage defendants from setting up unreasonable defences. In regard to the first of these it is to borne in mind that in many instances the object of bringing up an application for summary judgment is to force the defendant to put his defence on affidavit. A plaintiff is not entitled to do this unless it is clear that there are good grounds for making the application."

[4] In the case I am considering, I am of the view that the plaintiff made an improper use of Rule 32. This I say because when the matter served before Olivier AJ, on 31 July 2012, the parties were directed to file heads of argument in accordance with the Practice Notes. Approximately three months after the defendants had filed the opposing papers, the plaintiff withdrew the application on 23 October 2012, the same it was due to be heard. Had the plaintiff withdrawn the summary judgment in good time, the defendants would have been saved the unnecessary trouble and expense it had to bear in opposing an application the plaintiff did not seriously intend to pursue. Without delving into the merits, I think it is fair to conclude that the plaintiff 's conduct demonstrates that there are no good grounds of making the application. Even on 10 December 2012 when the issue of wasted costs was argued, the plaintiff had still not filed the heads of arguments, instead they were handed up shortly before the hearing. I cannot see any good reason why the defendants should bear costs occasioned by the plaintiff's conduct. After all in *In re Alluvial Creek* Ltd 1929 CPD 532 at 535 Gardiner AJ

considered that conduct of a party in an application such as the present may well attract a costs order on attorney and client scale and stated thus:

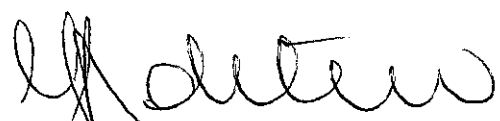
'An order is asked that he pay the costs between attorney and client. Now sometimes such an order given because of something in the conduct of a party which the Court considers should be punished, malice, misleading the Court and things like that, but I think the order may be granted without any reflection upon the party where the proceedings are vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with the most upright purpose and a most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not bear.'

[5] The considerations expressed above apply in this case. In the circumstances, I am of the view that the defendants are entitled the order they pray for.

[6] In the result, the following order will issue:

The plaintiff is ordered to pay the defendant's costs of opposing the summary judgment application on the attorney and client scale, as well the costs of this application, such costs to be taxable and payable forthwith.

T. C NDITA



JUDGE: WESTERN CAPE HIGH COURT