IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE

CASE NO. 71/2019

In the matter between:

INTER AGENCIES (PTY) LIMITED **Appellant**
And

CORBAN ELECTRICAL & ELECTRONICS (PTY) LIMITED **1ST Respondent**

THEMBINKOSI NKONYANE **2ND Respondent**

DUDUZILE MAHLALELA-NDLOVU **3RD Respondent**

Neutral Citation: *Inter Agencies (Pty) Limited vs. Corban Electrical & Electronics (Pty) Limited and Two others (71/2019) [2019] SZSC 14 (9th May 2019).*

Coram:

M.C.B. MAPHALALA, CJ
J.P. ANNANDALE, JA
A.M. LUKHELE, AJA

Date Heard: **6TH April 2019**
Date delivered: **9TH May 2019**

Summary: *Appeal against costs order in a refused Summary Judgment application - Costs will be granted against a Plaintiff who applies for Summary Judgment in circumstances where it is aware that the Defendant has a clear defence to the claim - Appeal against costs order dismissed with costs.*

JUDGMENT

A.M. LUKHELE, AJA

[1] This is an appeal against an order for costs issued by the Court *a quo* against the Appellant after the refusal of an application for summary judgement.

[2] The Appellant had applied for Summary Judgment in the Court *a quo*. After hearing of the matter the Court *a quo* dismissed the application for summary judgment and ordered the present Appellant to pay the costs of the aborted application for Summary Judgment.

[3] The Appellant was not satisfied with the Order for costs granted against it. The Appellant then noted an appeal against the Order for costs granted by the Court *a quo* and attacked the granting of Order for costs on a number of grounds, alleging that the Court *a quo* failed to exercise a judicial discretion in issuing the costs Order against it and that the Court *a quo* deviated from the general principle ordinarily applied in applications for Summary Judgment where costs are usually ordered to be costs in the cause.

LEAVE TO APPEAL AGAINST ORDER FOR COSTS

[4] The Appeal Court Act of 1954 provides that:-

"Right of Appeal in Civil Cases"

14 (1) an appeal shall lie to the Court of Appeal:

a) From all final judgments;

b) By leave of Court of Appeal from an interlocutory order, an order made ex-parte or an Order as to costs only."

As the present appeal by the Appellant is against the original costs order only, the Appellant was obliged to first apply to the Supreme Court for leave to appeal against the Order for costs issued by the Court *a quo* in terms of the above section.

[5] On or about the 29th August 2018 the Appellant moved an application before S.J.K Matsebula AJA, where it sought the following orders:-

"a. Granting the Appellant leave of this Honorable Court to appeal the Order for Costs that was granted in favour of the Respondents and against the Appellant by the Court a quo *on the 26th July, 2018 under High Court Case No. 1669/2017 on the following reasons and /or grounds:-*

1.1 The Learned Judge a quo *did not exercise a judicial discretion when awarding the costs order in favour of the Respondents.*

The costs order was unsubstantiated by any adverse findings that Appellant knew prior to launching the Summary Judgment proceedings that

Respondents would rely on a contention which would entitle them to unconditional leave to defend the said proceedings.

1.2 *The Court* a quo *erred in law in the exercise of its judicial discretion in unjustly deviating from the basic principle that costs for summary judgment be costs in the cause.*

1.3 *The Court* a quo *erred in law and in fact when awarding costs to the Respondent and thus failing to take into account the interlocutory nature of a summary judgment order and further the fact that the Respondents were not substantially successfully in the ongoing suit between the parties.*

2. *Directing the Respondents to pay costs of suit hereof at Attorney and own client scale."*

[6] On the 31st October, 2018 after hearing the parties and upon considering the issue of prospects of success, S.J.K Matsebula AJA granted the application for leave to appeal and ordered that costs for such application be costs in the cause.

APPELLANT'S AND RESPONDENTS ARGUMENTS BEFORE THIS COURT.

[7] The Appellant's case in this Court is that the Court *a quo* ought not to have ordered it to pay the costs when refusing the summary judgement application.
Appellant's arguments is that the Court *a quo* failed to correctly exercise its discretion that it had in terms of Rule 32 (7) of The High Court Rules.

Therefore the order of the Court *a quo* regarding costs is liable to be set aside.

[8] In the present appeal, the Respondents argues that the Court *a quo* correctly granted the order for costs in that :-

a) the Appellant had in the Court *a quo* moved an application for summary judgment in circumstances in which it should not have done so. The argument goes that Respondent's had a *bona fide* and valid defence to the claim and that the Appellant was aware of this fact when instituting the summary judgment application:

b) the court *a quo* correctly applied the provisions of Rule 32 (7) of the High Court Rules and thus correctly issued the Order for costs against the Appellant.

Rule 32 (7) of the High Court Rules provides as follows:-

"If the Plaintiff makes an application under sub-rule (1) where the case is not within this rule or if it appears to the court that the plaintiff knew that the defendant relied on a contention which would entitle him to unconditional leave to defend, then without prejudice to any other powers, the court may dismiss the application with costs and may require the plaintiff to pay the costs forthwith."

DEFENDANT'S BONA FIDE DEFENCE TO PLAINTIFF'S CLAIM

[9] The court *a quo* in its judgement found as follows:-

"In any event Plaintiff claims that the 1st Defendant has breached the contract in that it has failed to make any payments for the months of April, May, June, July, 2015 August, September, October and November, 2017.

During arguments it became abundantly clear that at the time of issuance of summons on the 31st October, 2017, the only outstanding instalments were settled on the 20th November 2017 although Counsel for the Plaintiff also tried to include August 2017 from the bar, there is clearly no claim for such month in the summons.

Also, although there are some letters addressed by the Plaintiff to the 1st Defendant and purporting to be letters of demand, none of these letters of demand require any specific amount from the 1st Defendant. These are just reminders requiring the 1st Defendant to update instalments.

At the hearing I asked Counsel if there was any outstanding instalment on the date. Plaintiff's Attorney acknowledged that an instalment was paid on the 6th July, 2018, but he was not sure if the account was up to date. Defendants Attorney stated that his instructions were that the account was up to date.

It appears to me that there is a triable issue regarding whether or not a demand as was anticipated by Clause 6 of the agreement was made. In the result I cannot grant summary judgment."

[10] On reading of the papers filed in the Court *a quo* there can be no doubt that summary judgment was rightly refused by the Court.

[11] There is also no doubt that in the Court *a quo* the Respondents raised a *bona fide* defence. Such defence was honestly advanced and not meant to delay the action instituted by the Appellant.

[12] The Appellant did not appeal against a refusal of the summary judgment. The Appellant was correct in not noting the appeal against the Order refusing the Summary Judgment before this Court.

[13] In the case of Zanele Zwane vs Lewis Stores (Proprietary) Limited t/a Best Electric - Civil Appeal No. 22/07 the Court emphasized the point that the remedy of summary judgement is a stringent one as it has the effect of closing the door to the Defendant without a trial, since it has the potential of causing injustice it must be confined to the clearest of the cases, where the Defendant has no *bona fide* defence and where appearance to defend has been made solely for the purpose of causing a delay

[14] In the present case, the Respondents had raised a defence from the correspondence it has exchanged with Appellant. It was clear that the defence raised triable issues. Summary Judgment ought not to have been applied for.

PRINCIPLES ON AWARDS OF COSTS.

[15] The principles involving the award of costs were stated by Holmes JA - in Ward vs Sulzer 1973 (3) SA 701 at 706 – 707 where the Court stated that:-

> " **a) In awarding costs the Court has a discretion to be exercised judicially upon consideration of all the facts and as between the parties, in essence it is a matter of fairness to both sides:**
>
> **In appeals against costs the question is whether there was an improper exercise of judicial discretion, i.e whether the award is vitiated by irregularity or misdirection or is disquietly inappropriate. The Court will not interfere merely because it might have taken a different view."**

[16] The exercise of discretion must not be affected by questions of benevolence and sympathy. The general rule is that a party who succeeds should be awarded his costs. This general rule should not be departed from, except on good grounds.

[17] In the case Intercontinental Exports (Proprietary) Limited vs Fowles 1999 (2) SA 1045 SCA at 1055 Par. 25 on the issue of costs,
Smallberger J.A. said the following:-

> **"(25) The basic rule is that statutory limitations apart, all costs awards, are in the discretion of the Court** (*Kruger Bros and Wasserman vs Ruskin 1918 AD 63 at 69*, **a decision which has consistently been followed.)**
>
> **The Court's discretion is a wide, unfettered and equitable one. It is a fact of the Court's control over the proceedings before it.**
>
> **It is to be exercised judicially with due regard to all relevant considerations. These would include the nature of the litigation being conducted before it and the conduct of the parties (or their representatives.)**
>
> **A Court may wish, in certain circumstances to deprive a party of costs, or a portion thereof, and order lesser costs that it might otherwise have done as a mark of its displeasure at such party's conduct in relation to the litigation…"**

[18] The Appellant's argument in this Court is that the Court *a quo* erred in not ordering that the costs of the Summary judgments should be costs in the cause.

Analysis

[19] Having regard to the papers filed of record, it is clear in this matter that the Respondents defence to the Appellant's action was not only set out in the opposing affidavit to resist summary judgment, but the defence had been fully canvassed in correspondence that was exchanged between the parties before the issue of the Summons.

[20] The Respondents disputed in such correspondence that there were any amounts that were due, owing and payable. Respondents defence to the claim was thus set out in such correspondence in clear terms.

[21] In the circumstances, it ought to have been obvious to the Appellant that the Respondents had a *bona fide* and valid defence to the claim and that such would be raised in a Summary Judgment application.

[22] In the case of *Hire Purchase Discount Company (Proprietary) Limited vs. Ryan Scholz Compartment and Another 1979 (2) 305 SE - Solomon AJ* at page 309 C.D. Stated as follows:

> *"In the present case I see no reason why, in the light of Plaintiff's early knowledge of the defendants defence, and of the fact that it would be raised, that the defendants should bear the costs of the application which Plaintiff has, in effect of admittance known could not succeed."*

[23] In the present matter the Court *a quo* found that the Appellant was aware of Respondents defence. Such a finding was correct when regard is had to the papers and the affidavits filed on record.

[24] It is clear that the provisions of Rule 32 should be invoked only by a Plaintiff where he is satisfied that the Defendant has no *bona fide* defence and is intent only on delaying payment of the Plaintiff's claim.

[25] In the present case the Respondents had filed an affidavit setting out its defence in an earlier summary judgment application that was dismissed by Hlophe J. In addition to that, the nature of Defendants defence was fully set out in the correspondence exchanged between the parties, long before summons were issued by the plaintiff.

[26] The Appellants therefore knew Respondents defence even before the issue of summons and before the dismissed summary judgment application was moved.

[27] Accordingly, in the instant case, there is no reason why in the light of the Appellant's early knowledge of Respondents defence, the Respondents should be denied the costs of the application for summary judgement.

[28] In Mohamed Adam (Proprietary) Limited vs Barrett 1958 (4) SA. 508 T at 509 Boshoff J. stated the position as follows:-

> "*A Plaintiff should therefore not resort to summary judgement proceedings where the case is not within the Rule, or where he knows that the Defendant relies on a contention which would entitle him to unconditional leave to defend. Such a proceeding would be abrasive and costs be wasted.*

As a safeguard against such a step, the Court is given a discretion to order that an action be stayed until the Plaintiff has paid Defendant's costs. Sub-Rule (9) (a). This sub-rule seems to pre-suppose that a Court would in such a case order the Plaintiff to pay the Defendant's costs."

CONCLUSION

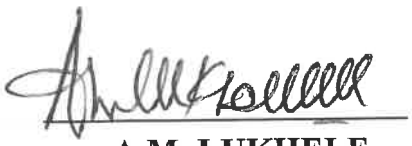
[29] It is therefore this Court's view that the Court *a quo* properly exercised its judicial discretion. There was no misdirection by the Court *a quo* in ordering Appellant to bear the costs of the failed summary judgment application. The order granted by the Court *a quo* was in line with Rule 32 (7) of the High Court Rules 20/1954.

[30] The Court *a quo* was therefore correct in finding that the Appellant ought to bear the cost of the failed summary judgment. The appeal is to be dismissed with costs. The order by Matsebula A.J.A. in the application for leave to appeal, was that the costs must be costs in the cause. As the appeal has been dismissed the Appellant must also bear the costs of the application or leave to appeal

[31] The Court therefore makes the following orders:-

a) **The appeal is dismissed.**

b) **The costs of the appeal in this Court, including the costs for leave to appeal are granted to the Respondents.**



A.M. LUKHELE

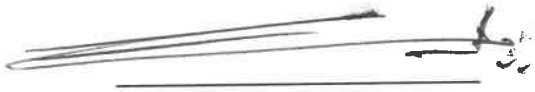
ACTING JUSTICE OF APPEAL

I agree

M.C.B MAPHALALA

CHIEF JUSTICE

I agree



J.P. ANNANDALE

JUSTICE OF APPEAL

For the Appellant	:	**Mr. M. Manyatsi**
For the Respondents	:	**Mr.T. Nhlanze**