

# IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **RANDBURG** on **31 May 1999**  
before **BAM P** and **GILDENHUYS J**

**CASE NUMBER:** LCC 153/98

In the case between:

**NDHLANGAMANDHLA MHLAULI NOJAME**

Applicant

and

**LADOFF MEYER**

Respondent

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## JUDGMENT

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### **GILDENHUYS J:**

[1] In this matter the applicant made an urgent application to the Court. Sometime later, he withdrew the application without tendering payment of the respondent's costs. The respondent thereupon applied for a costs order. We ordered the applicant to pay the respondent's costs, taxed as between attorney and client. We intimated that we would give reasons later. These are the reasons for the order.

[2] The applicant, in his founding affidavit, alleged that he and his family lived in houses on the respondent's farm Tafelberg, district of Piet Retief. While he was at work, so he alleged, his family was forcibly evicted by the respondent on 2 December 1998, their houses demolished by heavy machinery and their furniture damaged. In the notice of motion, the applicant asked, amongst other relief, for an order that his residence be restored to him on the basis that he is a labour tenant as envisaged in the Land Reform (Labour Tenants) Act<sup>1</sup> or alternatively on the basis that he is an occupier as envisaged in the Extension of Security of Tenure Act.<sup>2</sup> He also asked for an award of damages for the suffering and inconvenience caused by the demolition.

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1 Act 3 of 1996, as amended.

2 Act 62 of 1997, as amended.

[3] The respondent, in his answering affidavit, deposed that the applicant had not been living on the farm Tafelberg for some considerable time and is working for a forestry company at Commondale, where he also lives. His two wives, so the respondent alleged, continued to live on Tafelberg after the applicant left. One of the wives, Ester Zwane, left the farm shortly after a veld fire caused some damage to two of their houses on Tafelberg during the winter of 1998, to go and live with her daughter on the neighbouring farm Vryegunst. The other wife, Mafundo Mazibuko, left the farm during November 1998 to go and live in the Itshelejuba area, approximately sixty kilometres from the farm Tafelberg. The respondent denied that he demolished any of the houses on Tafelberg previously occupied by the applicant and his family, and produced, with his answering affidavit, a set of fourteen photographs which show the houses in good condition, save for some veld fire damage to two of them.

[4] After the answering affidavit was filed, the vigour with which the applicant pursued the application diminished. A month after the filing, the applicant's attorneys wrote to the respondent's attorneys as follows:

“We advise that it appears, from our consultation with our client about your client's Answering Affidavit, that there is a substantial dispute of facts which cannot be decided on papers.

“We have many witnesses that we have difficulty in tracing to enable us to file our client's Replying Affidavit.

We suggest that we convert this matter into an action so that the matter can be decided on oral evidence.

We advise further that the matter is no longer urgent.”

The respondent's attorneys asked the applicant's attorneys to file the applicant's replying affidavits before committing themselves to a decision on the further conduct of the case. Despite the request, the applicant filed no replying affidavit, but some six weeks later filed a notice of withdrawal of the application. The notice of withdrawal did not contain an offer to pay costs. Rule 27(3) of the Rules of this Court provides that should a notice of withdrawal not contain an offer to pay costs, any party may apply to the Court for an appropriate order as to costs.

[5] After receipt of the notice of withdrawal, the respondent's attorneys asked for a date of

hearing to be allocated to the case. This was done by the registrar. Although no formal application for a costs order was lodged, it is clear from correspondence which passed between the parties that the applicant was informed that the respondent would be applying for a “spesiale kostebevel” on the date which the registrar allocated for the hearing.

[6] The applicant’s founding affidavit does not contain the necessary allegations which will enable the Court to find that the applicant is either a labour tenant or an occupier, and as such entitled to the special protection against eviction provided by the applicable laws. It is also trite law that damages cannot normally be claimed in application proceedings.<sup>3</sup> Mr Mokoena, who appeared for the applicant, conceded these shortcomings, but nonetheless asked the Court not to make a costs order on the basis that, in the past, the Court avoided making cost orders in cases under the Land Reform (Labour Tenants) Act and the Extension of Security of Tenure Act, in order not to discourage litigants from bringing cases to this Court.<sup>4</sup> He submitted that the application was brought in good faith, that the factual disputes (which became apparent later) could not have been foreseen, and that the appearance of these factual disputes caused the applicant to withdraw the application instead of filing a replying affidavit.

[7] The assertions by the applicant on how the respondent accomplished the alleged eviction present a picture of arrogant heartlessness. Small wonder that the respondent went to great lengths to refute those assertions. The photographs of the houses (if they are the same houses) clearly show that the houses were not demolished, as the applicant alleged. If the houses are not the same houses, the applicant should have said so in a replying affidavit. His failure to do so, or at least to give some explanation, particularly when his attorney was informed that a special costs order would be sought against him, justifies an inference that the allegations about the demolition of the houses could well be false. This would place in doubt the applicant’s further allegations about the eviction and the damage to the furniture. I need not decide those issues in these

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3 See, for example, *Worcester Court (Pty) Ltd v Benatar* 1982 (4) SA 714 (C) at 724A-B; Visser and Potgieter, *Law of Damages* (Juta & Co Ltd, Cape Town, 1993) at 431.

4 See, for example, *Hlahtswayo and Others v Hein* [1997] 4 All SA 630 (LCC) at 639e-643h; *Serole and Another v Pienaar* [1999] 1 All SA 562 (LCC) at 570; *Van Zuydam v Zulu* [1999] 2 All SA 100 (LCC) at 112; *Skhosana and Others v Roos T/A Roos se Oord*, LCC50/99, 10 May 1999, internet web site address: <http://www.law.wits.ac.za/lcc/1999/skhosanasum.html> at para [30].

proceedings, but I can have regard to the absence of an explanation in deciding on an appropriate cost order.

[8] Mr Mokoena, from the bar, told me that he could not obtain comments from the applicant on the photographs, because the applicant lives in a remote rural area. However, after he received the answering affidavit, he wrote to the respondent's attorney "that it appears, from our consultation with our client about your client's Answering Affidavit, that there is a substantial dispute of facts."<sup>5</sup> From the bar Mr Mokoena said that, despite the letter, there was no actual consultation with the applicant and that the "consultation" referred to in the letter was in reality a telephonic discussion with one Dr Hlatshwayo, a facilitator and relative of the applicant. This being so, the contents of the letter which refer to a consultation with the applicant is misleading and unbecoming for an attorney.

[9] I am of the view that Mr Mokoena had adequate time to get instructions from his client on the contents of the answering affidavit, particularly the photographs. If the applicant had placed himself beyond the reach of his attorney (and I am not saying that he did so), he must suffer the consequences. There are strong indications that some of the very serious allegations against the respondent in the founding affidavit might be false. Faced with these indications, there is a duty on the applicant to provide an explanation. He cannot escape the duty by withdrawing the case. In the absence of an explanation, I have to find that the applicant's conduct is unworthy. This, together with the glaring shortcomings in the founding affidavit to which I have already referred,<sup>6</sup> constitute circumstances which justify a special costs order.<sup>7</sup> Such an order can be made

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5 See par [4] above, where the letter is quoted.

6 In par [6] above.

7 Cilliers, In *Law of Costs*, 3rd ed (Butterworths, Durban 1997) at para 4.15 stated as follows::

"The court may award attorney and client costs against an unsuccessful litigant where his conduct has been unworthy, reprehensible or blameworthy or where he has been actuated by malice or has been guilty of grave misconduct either in the transaction under inquiry or in the conduct of the case."

whenever special circumstances exist under which it is justified.<sup>8</sup> The Court will not follow its usual practise of making no costs order where social issues are at stake, if there is unworthy conduct on the part of any of the parties, or where the papers are palpably defective. The fact that the applicant's attorney may have to shoulder part of the blame, does not absolve the applicant from exposure to a special costs order.<sup>9</sup> We accordingly ordered the applicant to pay respondent's costs, taxed as between attorney and client.

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**JUDGE A GILDENHUYS**

I agree

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**PRESIDENT F C BAM**

**Heard on:** 31 May 1999

**Handed down:** 14 June 1999

For the applicant:

*Mr F Mokoena*, from *Ntuli, Noble and Spoor Attorneys*, Nelspruit.

For the respondent:

*Adv W J Dreyer*, instructed by *Philip du Toit Inc*, Pretoria.

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8 *Herold v Sinclair and Others* 1954 (2) SA 531 (A) at 537C-F; *Ward v Sulzer* 1973 (3) SA 701 (A) at 706H-707A; *Rautenbach v Symington* 1995 (4) SA 583 (O) at 588A-B; *Ntuli and Others v Smit and Another* 1999 (2) SA 540 (LCC) at 553F-554B.

9 See, for example, *Ntuli and Others v Smit and Another*, supra n 7; *Phase Electric Co (Pty) Ltd v Zinman's Electrical Sales (Pty) Ltd* 1973 (3) SA 914 (W) at 918G-919B.