

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at Randburg on 27 March 2001
before **Meer AJ**

CASE NUMBER: LCC 51/2000

Decided on: 18 June 2001

In the case between:

ABEL OUPANYANA MOTLHAUDI First applicant

ZEHIR OMAR ATTORNEYS Second applicant

and

C LE CORDEUR ROSSOUW First respondent

P D NEL (Cited in his capacity as Learned Magistrate) Second respondent

L G DREYER (Cited in his capacity as Learned Magistrate) Third respondent

JUDGMENT

MEER AJ:

[1] This matter comes before me as an application to review and set aside two cost orders granted against the first and second applicants respectively in eviction proceedings in the Springs Magistrate's Court under case number 12900/98.¹ The original proceedings were for the eviction of the first applicant, Mr A O Motlhaudi, who is the former employee of the first respondent, Mr C L Rossouw. The second applicant, Mr Z Omar, is the legal representative of Mr Motlhaudi. The second respondent, Mr P D Nel, was the magistrate presiding over the first stage of the proceedings in the Springs Magistrate's Court. The third respondent, Mr L G Dreyer, presided over the second stage of the proceedings in the Springs Magistrate's Court, an application for leave to appeal against the decision of Magistrate Nel. For convenience I will refer to all the parties by name.

¹ Whilst the first respondent initially argued that the review proceedings were inappropriate, the first respondent ultimately withdrew that objection and it was agreed that this Court could consider the matter in its present form.

[2] The first costs order was granted by Magistrate Nel on 10 March 2000. He awarded costs on a scale as between attorney and client against Mr Motlhaudi in an application brought by Mr Rossouw to transfer the case from the Springs Magistrate Court to the Land Claims Court. Mr Motlhaudi opposed the transfer application and costs were awarded against him when the application was granted. The second costs order was granted by Magistrate Dreyer on 19 May 2000. He awarded costs against Mr Omar *de bonis propriis* also on an attorney and client scale. This award was made when Mr Motlhaudi's application for leave to appeal against Magistrate Nel's decision to transfer the case to the Land Claims Court was dismissed. The facts and circumstances pertaining to both these applications are set out below. It was agreed that the review application before me would be heard together with the hearing to determine Mr Motlhaudi's labour tenancy status. The labour tenancy hearing is as yet only partly heard.

The award of costs on an attorney and client scale by Magistrate Nel

[3] In December 1998 Mr Rossouw issued summons in the Springs Magistrate Court for the eviction of Mr Motlhaudi, his former employee, from his farm Vischkuil, in the district of Springs. The particulars of claim sought Mr Motlhaudi's eviction under the common law on the ground that he was residing unlawfully on the farm. It stated that Mr Motlhaudi had been employed as a farm worker by Mr Rossouw in terms of an agreement which provided Mr Motlhaudi with housing on the farm subject to the condition that upon the termination of his employment, he would vacate the farm within a month. Mr Motlhaudi's employment was terminated by Mr Rossouw on 28 February 1998 but despite having been being given notice to vacate, Mr Motlhaudi had refused to do so. The particulars of claim were subsequently amended in October 1999 to seek Mr Motlhaudi's eviction in terms of the Extension of Security of Tenure Act² (hereinafter referred to as the "ESTA") as opposed to under the common law.³

2 Act 62 of 1997, as amended.

3 The amended particulars (pages 21 - 24 of Volume 2 of the record) sought Mr Motlhaudi's eviction on the grounds that he is an occupier under ESTA.

[4] In response to the eviction action, Mr Motlhaudi filed a special plea to the effect that he is a labour tenant as envisaged in the Land Reform (Labour Tenants) Act⁴ (hereinafter referred to as the “Labour Tenants Act”) and that the proceedings for his eviction were premature. This was so because he had applied in terms of section 17 of the Labour Tenants Act,⁵ for an award in land, the application was pending before the Director-General of Land Affairs, and section 14 of the Labour Tenants Act⁶ had not been complied with. The special plea also claimed that the Springs Magistrate’s Court lacked jurisdiction to hear the matter, as section 5 of the Labour Tenants Act⁷ confers exclusive jurisdiction on the Land Claims Court to make an order for the eviction of a labour tenant. The special plea stated in the alternative that Mr Motlhaudi was an occupier as envisaged in ESTA.

4 Act 3 of 1996, as amended.

5 Section 17(1) of the Labour Tenants Act provides: “An application for the acquisition of land and servitudes referred to in section 16 shall be lodged with the Director-General.”

Section 16(1) of the Labour Tenants Act provides: “Subject to the provisions of this Act, a labour tenant or his or her successor may apply for an award of-

- (a) the land which he or she is entitled to occupy or use in terms of section 3;
- (b) the land which he or she or his or her family occupied or used during a period of five years immediately prior to the commencement of this Act, and of which he or she or his or her family was deprived contrary to the terms of an agreement between the parties;
- (c) rights in land elsewhere on the farm or in the vicinity which may have been proposed by the owner of the farm; and
- (d) such servitudes of rights of access to water, rights of way or other servitudes as are reasonably necessary or are reasonably consistent with the rights which he or she enjoys or has previously enjoyed as a labour tenant,

or such other compensatory land or rights in land and servitudes as he or she may accept in terms of section 18 (5): Provided that the right to apply to be awarded such land, rights in land and servitudes shall lapse if no application is lodged with the Director-General in terms of section 17 on or before 31 March 2001.”

6 Section 14 of the Labour Tenants Act states: “No labour tenant may be evicted while an application by him or her in terms of Chapter III is pending: Provided that the Court may order eviction if it is satisfied that special circumstances exist which make it fair, just and equitable to do so, taking all circumstances into account.”

7 Section 5 of the Labour Tenants Act provides: “Subject to the provisions of section 13, a labour tenant or his or her associate may only be evicted in terms of an order of the Court issued under this Act.”

[5] In the light of the special plea Mr Rossouw brought an application to transfer the case to the Land Claims Court in terms of section 13(1A)(a) of the Labour Tenants Act. At that time section 13(1A) read as follows:⁸

“(1A) If an issue arises in a case in a magistrate’s court or a High Court which requires that court to interpret or apply this Act and-

- (a) no oral evidence has been led, such court shall transfer the case to the Court and no further steps may be taken in the case in such court;
- (b) any oral evidence has been led, such court shall decide the matter in accordance with the provisions of this Act.”

Section 1 of the Labour Tenants Act defines “court” as the Land Claims Court.

[6] Mr Motlhaudi opposed the application to transfer the case to the Land Claims Court. On 15 December 1999 Mr Omar deposed to an opposing affidavit in support of Mr Motlhaudi’s opposition. The pertinent paragraphs of the opposing affidavit provide *verbatim* as follows:

- “4 Annexures ‘X1’, ‘X2’ and ‘X3’ hereto, letters exchanged between Plaintiff’s/Applicant’s Attorneys of record and the Department of Land Affairs is confirmation of the mechanism of Chapter iii Section 16 and 17 of Act 3 of 1996 having been put into operation. Chapter iii of Act 3 of 1996 and in accordance with the prevailing policy of reconciliation contains inquisitorial mechanisms to resolve a dispute envisaged therein through mediation or arbitration. (See Section 19 and 36 of Act 3 of 1996).
- 5 In terms of Section 18(7) the Director-General may in any event at the request of either the Applicant or Respondent refer the application to the court i.e. Land Claims Court.
- 6 The referral of this matter to the Land Claims Court in terms of Section 13 of Act 3 of 1996 will be pre-mature and will have the effect of rendering the provisions of Chapter iii of Act 3 of 1996 more specifically the provisions embracing arbitration and mediation nugatory.

8 Section 13(1A) was introduced by s 34 of the Land Restitution and Reform Laws Amendment Act 63 of 1997 on 21 November 1997. The section was amended in March 2000 by Land Affairs General Amendment Act 11 of 2000 and now reads:

“(1A) With the exception of issues concerning the definition of ‘occupier’ in section 1(1) of the Extension of Security of Tenure Act, 1997 (Act 62 of 1997), if an issue arises in a case in a magistrate’s court or a High Court which requires that court to interpret or apply this Act and-

- (a) no oral evidence has been led, such court shall transfer the case to the Court and no further steps may be taken in the case in such court;
- (b) any oral evidence has been led, such court shall decide the matter in accordance with the provisions of this Act.”

- 7 In addition the prompt referral of all disputes emerging from the provisions of Act 3 of 1996 to the Land Claims Court will have the effect of inundating the Land Claims court with cases which could well be resolved through mediation / arbitration.”

[7] Mr Omar filed heads of argument to support his opposition to the transfer application in which he stated (*verbatim*):

“ . . . In the reported decision *Mosehla versus Sancor* 1999(1) SA 614 Learned Judge Van Dijkhorst in rejecting our Mr Omar’s submission similar to that of Mr Theron in these proceedings inter alia found the following:-

‘A Magistrate’s Court is specifically empowered to hear actions for ejectment and summary judgment applications pursuant thereto. Where there is a provision in another Act which limits that jurisdiction in certain circumstances (for example in the case of labour tenant) the Magistrate’s Court must have jurisdiction to enquire and decide whether the jurisdiction is in fact limited in that particular case. To hold otherwise would be absurd.’

It is submitted that during the proceedings if an issue arises obliging this Honourable Court to interpret or apply the provisions of the Land Reform Labour Tenant’s Act No.3 of 1996 then, and only then may this Honourable Court refer the matter to the Land Claims Court. (See Section 13 of Act No. 3 of 1996).

WHEREFORE it is respectfully prayed that Applicant’s application be dismissed with costs on an Attorney / own client scale, taxed and payable immediately.”

[8] The application to transfer the matter to the Land Claims Court was heard on 10 March 2000. Mr Theron, acting for Mr Rossouw, referred to two Transvaal Provincial Division judgments, *Mosehla v Sancor CC*⁹ and *Chris Carlyol (Pty) Ltd v Sindane and another*,¹⁰ in support of the application to transfer the proceedings to the Land Claims Court. He drew the magistrate’s attention to the fact that Mr Omar had appeared in both cases and therefore had knowledge of the courts’ attitude to section 13(1A)(a). In the circumstances he asked for costs on an attorney and client scale against Mr Motlhaudi.¹¹

[9] At the hearing before Magistrate Nel Mr Omar did not argue the opposition to the application himself. Instead he sent a candidate attorney to argue the case for Mr Motlhaudi. Astonishingly the

9 1999 (1) SA 614 (T).

10 Unreported Transvaal Provincial Division case 15761/97, delivered on 4 December 1998.

11 In doing so Mr Theron made a point of stating that he was not asking for costs *de bonis propriis*. Volume 1 of the record at page 141.

candidate attorney did not even argue or attempt to argue the issues raised in Mr Omar's opposing affidavit, and heads of argument, and eventually withdrew the argument on the provisions of section 13(1A). As appears from Magistrate Nel's reasons for judgment, the candidate attorney appeared to be out of her depth and unable to deal with the matter. Alarming, the candidate attorney, who could not understand Afrikaans, seemed to have come to court without an English copy of the Labour Tenants Act, and seemed not to have familiarised herself with the contents of the very section upon which Mr Motlhaudi's opposition was based.

[10] Magistrate Nel granted the application to transfer the matter to the Land Claims Court and ordered Mr Motlhaudi to pay the costs on an attorney and client scale. In his reasons Magistrate Nel found that the provisions of section 13 were compulsory and the section required him to transfer the case to the Land Claims Court. It was abundantly clear to him that the magistrate's court could not decide the issue on the merits, and there was no option but to transfer the case as prayed for in the application. He found that there were no other legal issues or arguments involved. He expressed the view that there was no merit whatsoever in Mr Omar's legal argument and noted that Mr Omar's opposing affidavit was not even argued or attempted to be argued.

[11] Magistrate Nel went on to explain why he had granted a penal costs order. The reasons read verbatim as follows:

- “1. Mr Omar is well aware of the decision in *Mosehla vs Sancor CC 1999(1) SA 614*. He was the instructing attorney and the facts in the above matter are on all fours with the facts of this case. The ruling of the court on page 614 F is clear and to the point :- '*Land Claims Court given power to exclusion of any court contemplated in terms of section 166(c), (d) or (e) of the Constitution of the Republic*'.
2. As instructing attorney the court accepted that he is fully aware of the above decision. In the above matter costs was awarded against his client.
3. In his plea, par. 3, he pleaded that the magistrate court has no jurisdiction to hear the case but nevertheless, decided to oppose the transfer application.
4. Instead of appearing himself, he sent a candidate attorney to argue the matter. He should have realized that Mr Theron's argument would be in Afrikaans, because all the plaintiff's pleadings are in Afrikaans.
5. At the conclusion of Mr Theron's argument the court asked the candidate attorney to reply thereto. She stood up and said that she could not follow the argument as she did not understand

Afrikaans. The court then asked her to read section 13(a) of Act 3/1996 to the court and comment thereon. She then stated she cannot read Afrikaans.

6. The court then adjourned to afford her the opportunity to get hold of the English version of the Act, and then to argue the matter. All this is borne out by the notes on page 2 and 3 of the record.
7. She stayed away and at 11:15 when the court resumed the court had to conduct a search to find her. She eventually came to court and stated that she now withdraws her argument on the provisions of section 13(a). She was asked by the court whether she had any further argument and she said no, she has no other facts she wishes to advance in argument.
8. Miss Bebane was therefore asked to argue the costs aspect. She admitted costs should be awarded against the respondent on party and party scale.
9. Mr Theron thereafter argued for a penal costs order.
10. The court came to the conclusion that Mr Omar's oppositions to the transfer of this case was not only frivolous but indeed vexatious in terms of section 33(8)(c) of the Rules of Court.
11. The court then took all the facts into account. It was also considered that the defended could have consented in writing to the transfer of the case, which would have eliminated the necessity of the bringing of an application.
12. Furthermore, Mr Omar's failure to argue the matter himself was detrimental in the conduct of the case, and cause his client to be loaded with additional costs.
13. The court is after reconsidering all the facts, of the opinion that the correct order should have been a costs order de *bonis propriis* against Mr Omar himself. Mr Omar did not act with the diligence required by his client and his profession. He embarked on a venture which he knew would never succeed in an arrogant disregard of the clear provisions of the law.
14. The court therefore made a penal costs order to prevent the plaintiff from being 'out of pocket' in regard to expenses incurred in arguing the application namely, costs on attorney and client scale, which cost to include travelling from Delmas to Springs and costs of preparation. The court also ordered that the cost of the application is taxable and payable immediately and that the costs of the action proper be costs in the cause."

[12] The costs order made by Magistrate Nel came before me for the purposes of review on 27 March 2001. Magistrate Nel has unfortunately passed away since granting his order,¹² there were no submissions from him for the purpose of this review. In reviewing the order of Magistrate Nel, regard being had to the pleadings as well as to the argument presented at the hearing before him, I am of the view that the award of costs on a scale as between attorney and client was appropriate under the circumstances. I am also in agreement with Magistrate Nel's reasons for granting such an order as appears from the following assessment of the legal arguments and hearing.

12 This was conveyed by the clerk of the Springs Magistrate's Court to the Registrar of this Court.

[13] The quotation from the *Mosehla* case which appears in Mr Omar's heads of argument¹³ is taken out of context and inappropriately referred to. The quotation in the context of that judgment refers specifically to the jurisdiction of magistrates' courts in summary judgment applications where the eviction of labour tenants is sought. It asserts that for the purpose of a summary judgment application a magistrate's court has jurisdiction to enquire and decide if its jurisdiction is in fact limited. In *Mosehla* the court was mindful of the provisions of section 22(1)(cC) of the Restitution of Land Rights Act¹⁴ in terms of which the Land Claims Court has the power to the exclusion of any other court contemplated in section 166(c), (d) or (e) of the Constitution¹⁵ to determine any matter involving the interpretation or application of that act or the Labour Tenants Act.¹⁶ The learned Judge nonetheless found that in summary judgment proceedings in order to establish whether there is a *bona fide* defence, a magistrate's court has jurisdiction to consider the facts upon which a defendant relies for the allegation that he is a labour tenant (facts which if eventually are proved at the trial, will lead to the conclusion that he is a labour tenant).¹⁷ In so doing the magistrate does not determine whether the defendant is a labour tenant but merely whether a *bona fide* defence has been demonstrated.¹⁸ It is important to note that the *Mosehla* case did not concern itself with section 13(1A)(a) as the case was heard before section 13(1A) came into being. It is therefore inappropriate in the extreme that this case was so pivotal to Mr Omar's argument pertaining to section 13(1A). I note that the Supreme Court of Appeal confirmed van Dijkhorst's view that a labour tenancy defence may be analysed in summary judgment proceedings for purpose of establishing whether a *bona fide* defence has been proved.¹⁹ I assume that the judgment of the Supreme Court of Appeal must be taken to apply only to cases in which evidence had already

13 See para [7] above.

14 Act 22 of 1994. This section is quoted in para [34] below.

15 The Constitution of the Republic of South Africa, Act 108 of 1996.

16 *Mosehla* above n 9 at 623C-D.

17 *Mosehla* above n 9 at 618I-J.

18 *Mosehla* above n 9 at 622F-G.

19 *Mosehla v Sancor CC*, Supreme Court of Appeal case no 52/99, 27 March 2001, as yet unreported.

been led on 21 November 1997, thereby permitting the interpretation of the Labour Tenants Act by a court other than this one.²⁰

[14] I note also that in the *Mosehla* case it was held that the fact that there had been an application for an award in land in terms of Chapter III did not preclude a summary judgment eviction.²¹ A similar finding was made in the *Chris Carlyol* case²² and the unreported Transvaal Provincial Division case *Loock v Dhlamini*²³ where the argument that a Chapter III application precludes an eviction was rejected. Mr Omar appeared in all three cases but inexplicably, he took no cognisance of these findings when he developed his legal argument in opposition to the transfer of the matter to the Land Claims Court.

[15] I observe also that Mr Omar's legal argument surprisingly failed to bring to the attention of the magistrate the Land Claims Court case of *Van Zuydam v Zulu*²⁴ which has been in the law reports since September 1999. That decision is of direct relevance to Mr Omar's argument in the special plea that a referral to the Land Claims Court would be premature, given that Mr Motlhaudi had applied for an award in land²⁵ and Mr Rossouw had not established that special circumstances existed to make an eviction equitable.²⁶ *Van Zuydam* found that the protection afforded by section 14 of the Labour Tenants Act only applied to persons whose labour tenancy status had already been established.²⁷ An

20 See another Supreme Court of Appeal judgment wherein Vivier JA handed down a unanimous judgment stating that "section 13(1A) was . . . clearly intended to apply to all cases pending at 21 November 1997, save those for cases where oral evidence had already been led, where practical and procedural difficulties necessitate the exception." *Dhlamini v Loock and another* Case No 676/98, 27 March 2001, as yet unreported at para [17].

21 Above n 9 at 622F-623H.

22 Above n 10.

23 Transvaal Provincial Division case no 17454/1997.

24 1999 (3) SA 736 (LCC); [1999] 2 All SA 100 (LCC).

25 Under Chapter III of the Labour Tenants Act.

26 In accordance with the requirements of section 14, quoted above n 6.

27 At paras [7] - [15].

aspirant labour tenant (like the defendant in the *Van Zuydam* case, and indeed Mr Motlhaudi in this case) whose labour tenancy status is disputed and yet to be determined, who applies for an award in land, does not enjoy the protection from eviction accorded by section 14. In the *Van Zuydam* case the court was perplexed by the fact that the defendant had not welcomed the early determination of his labour tenancy status by the Land Claims Court (in terms of a section 13(1A)(a) referral), given the lack of response by the Director-General to his application for an award in land. In the present case too, where there is no indication that the Director-General is attending to Mr Motlhaudi's application for an award in land, the opposition to transfer to the Land Claims Court, which would similarly occasion an early determination of Mr Motlhaudi's labour tenancy status, is difficult to comprehend or must invariably give rise to speculation that it is a delaying tactic.

[16] Frivolous, vexatious and indeed ill-conceived proceedings are well established grounds for awarding costs on an attorney and client scale even in the absence of intent²⁸ and as I have stated above Magistrate Nel was correct in awarding such costs. I note that in Magistrate Nel's reasons for granting such an order he indicated that after reconsidering the facts the correct order should have been costs *de bonis propriis* against Mr Omar who he said "did not act with the diligence required by his client and his profession. He embarked on a venture which he knew would never succeed in an arrogant disregard of the clear provisions of the law." Mr Theron had specifically indicated at the hearing that he was not applying for costs *de bonis propriis*²⁹ and this clearly influenced Magistrate Nel's decision to award the costs against Mr Motlhaudi rather than against Mr Omar.

28 *Simmons NO v Gilbert Hamer & Co Ltd* 1962 (2) SA 487 (D) at 496H-497A: "Such costs have also been awarded where the proceedings are vexatious, although the intent may not have been that they should be vexatious and where the application should never have been brought."

In re Alluvial Creek Ltd 1929 CPD 532 at 535 ". . . I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being 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 to bear."

29 See above n 11.

[17] At the hearing of the review application before this Court I questioned Mr Omar about Mr Motlhaudi's legal representation, and why he, Mr Omar, had not appeared personally at the hearing to argue the case. Mr Omar responded that he was unable to attend to the matter himself as he had a case in Middelburg that day, and he trusted that his candidate attorney understood the points to be argued and was competent to argue the case.

[18] Legal representation of the kind afforded to Mr Motlhaudi, which designs a complex legal argument in opposition, puts the court and the opposing party to the trouble and costs of having to prepare for the hearing thereof, and then withdraws the argument when called upon to reply thereto, (on account of unpreparedness and inability) may well be categorised as improper conduct constituting circumstances which justify an award of costs *de bonis propriis*. Mr Omar was fortunate that such an order was neither asked for nor imposed. He would do well in future to steer clear of conduct which gives rise to perceptions of improper conduct on his part. He may not escape a *de bonis propriis* costs order the next time.

[19] As I have stated above the circumstances and considerations pertaining to the transfer application justified an order of costs on an attorney and client scale against Mr Motlhaudi. The order of Magistrate Nel is accordingly confirmed on review.

The order of costs *de bonis propriis* on an attorney and client scale against Mr Omar

[20] Within a month of Magistrate Nel granting the application to transfer the matter to the Land Claims Court Mr Omar applied for leave to appeal to the High Court against the whole of the judgment and order. Mr Rossouw opposed the application, took issue with the manner in which the application had been brought, the forum in which it was lodged and called for the application to be struck off the roll. Mr Rossouw also argued that the application had no prospects of success in the light of the case and statute law, and sought costs *de bonis propriis* on the scale as between attorney and own client. Mr Rossouw's reasons for opposition were set out in comprehensive heads of argument prepared by Mr Rossouw's counsel, Mr Botha.

[21] Magistrate Dreyer dismissed the application for leave to appeal and awarded costs *de bonis propriis* on an attorney and client scale against Mr Omar on the grounds that the application was without merit, a waste of time and money and ought not to have been brought. Instead of furnishing separate reasons for his judgment, to save time, Magistrate Dreyer incorporated Mr Botha's heads of argument as his reasons for judgment. In the review application these heads were also referred to with approval by Mr Tee, who had replaced Mr Botha as counsel for Mr Rossouw in the proceedings before me. Mr Tee did not, however, support the costs order.³⁰ Save for this, he submitted that Magistrate Dreyer's decision was correct. I propose reviewing Magistrate Dreyer's reasons by dealing *seriatim* with the pleadings and proceedings before him as well as those presented in this Court by Messrs Tee and Omar.

[22] The crux of Mr Motlhaudi's argument³¹ as enunciated in the application for leave to appeal and thereafter repeated before me on review is as follows: The Magistrate erred in finding that an issue had arisen which required the case to be transferred to the Land Claims Court in terms of section 13(1A) of the Labour Tenants Act by virtue of the fact that Mr Motlhaudi had pleaded, in a special plea, that he was a labour tenant. That allegation in the special plea did not, on its own, mean that an issue had arisen. It was only once the special plea had been ventilated and considered by the magistrate that the court would have been placed in a position to investigate whether a proper defence had been put forward. Only at that stage could it be decided whether an issue had arisen for the purpose of transferring a case to the Land Claims Court in terms of section 13(1A). To refer the case before this had occurred would be premature. Once again Mr Motlhaudi relied on the extract from the *Mosehla* case³² in support of this proposition.

30 As appears below Mr Tee argued that the costs order *de bonis propriis* was inappropriate.

31 On review Mr Motlhaudi did not persist with the argument (raised in the first application before Magistrate Nel) that court proceedings ought to be suspended by the invocation of section 14 of the Labour Tenants Act (due to the application by him for an award of land), as this submission was rejected by the Supreme Court of Appeal in *Dhlamini v Loock* above n 20 at para [20]. I note that this particular argument was for no apparent reason also not pursued in the application for leave to appeal before Magistrate Dreyer.

32 See above n 9.

[23] I have already explained in paragraph [13] above why I believe Mr Motlhaudi's reliance on the *Mosehla* case, in his argument opposing the transfer application, was misplaced. I believe that reliance on the *Mosehla* judgment is inappropriate and misdirected too in the context of Mr Motlhaudi's argument as enunciated in the application for leave to appeal. The argument stated that an issue does not arise requiring a transfer to this Court under section 13(1A), when a defence of labour tenancy is pleaded in a special plea.

[24] The *Mosehla* case is distinguishable from the present case by the fact that in the *Mosehla* case the court was concerned to establish whether a *bona fide* defence had been established purely for the purposes of a summary judgment application. It was not concerned with whether an issue had arisen which required a transfer to the Land Claims Court because the defence of labour tenancy had been pleaded in a special plea. As explained in paragraph [13] above the *Mosehla* case did not concern itself with section 13(1A)(a) as it predated the introduction of section 13(1A).

[25] I have already noted, in my assessment of the transfer application before Magistrate Nel, that Mr Motlhaudi's opposition to the section 13(1A) transfer took little cognisance of the existing case law. Similarly in pursuit of the contention that an issue had not arisen for the purposes of section 13(1A) when labour tenancy was raised in the special plea, Mr Motlhaudi and Mr Omar's legal arguments in both the leave to appeal and review applications either paid scant regard to or misconstrued existing and accessible case law. Inappropriate reliance on judicial pronouncements was moulded to suit their argument. An analysis of the relevant case law indicates this. What emerges is that whilst section 13(1A) of the Labour Tenants Act has earned considerable critical comment for being ambiguous and confusing,³³ there is nonetheless clarity from the applicable cases, that for the purposes of section 13(1A) an issue arises once labour tenancy is pleaded. At that stage a matter stands to be transferred to the Land Claims Court. On that point I believe there to have been no lack of clarity despite Mr

33 In *Chris Carlyol* (see above n 10) the section was criticized for being ambiguous. In *Van der Walt and others v Lang and others* 1999 (1) SA 189 (LCC) the confusion caused by section 13(1A)'s curtailment of the jurisdiction of the courts was commented upon. In *Loock* (above n 22) and *Makhomboti v Klingenberg* 1999 (1) SA 135 (T) the question arose whether pending cases which commenced before section 13(1A) came into being, ought to be transferred to the Land Claims Court. See paras [26] - [29] of this judgment for a fuller discussion.

Omar's repeated suggestions to the contrary. What there were conflicting judgments about, was the unrelated issue as to whether section 13(1A) applied to pending cases which commenced before section 13(1A) came into effect on 21 November 1997.³⁴

[26] To begin with the Land Claims Court decisions of *Van der Walt*³⁵ and *Van Zuydam v Zulu*,³⁶ endorsed the proposition that section 13(1A)(a) obliges a court to refer a matter to the Land Claims Court³⁷ when labour tenancy is raised as a defence. The Transvaal Provincial Division decisions similarly support the proposition that an issue arises when a defence of labour tenancy is raised and this requires a transfer to the Land Claims Court. In the *Chris Carlyol*³⁸ case (Mr Omar acted for the defendant, an aspirant labour tenant) the court did not question that an issue arose when the defence of labour tenancy was pleaded. Du Plessis J, whilst critical of section 13(1A),³⁹ found that the court is required to do what the section provides. The court interpreted section 13(1A) only to determine what the Labour Tenants Act required it to do, and found that it was required to transfer the case to the Land Claims Court, which it did. Clearly in transferring the case it was of the view that an issue had arisen when the aspirant labour tenant filed a plea alleging that he was a labour tenant. The court did not find that a prerequisite for transferring the case to the Land Claims Court had to be an investigation by it into whether there was a defence of labour tenancy and only at that stage would an issue arise.

34 *Chris Carlyol* (above n 10) and *Mngomezulu v Böhmer and another; Masondo and others v Shawe* [1998] 4 All SA 643 (N) held that section 13(1A) applied in such cases. Conflicting with these decisions were the unreported case of *Loock* (above n 22) and *Makhomboti v Klingenberg* (above n 32).

35 Above n 32. Whilst this case raised the uncertainty pertaining to the jurisdiction which the Land Claims Court had in respect of the matters referred to it under section 13(1A)(a), it never questioned that the section required matters to be transferred to the Land Claims Court.

36 Discussed at length at para [15] above.

37 *Van Zuydam* above n 23 at para [2].

38 See above n 10.

39 Du Plessis J stated at page 3 as follows: "Read literally that very section precludes this court from either interpreting or applying the act and section 13(1A). The section is absurd. This court cannot do what the act requires it to do if it cannot interpret the act. Having interpreted section 13(1A) (against the will of the legislator), this court cannot apply it. The legislator may be well advised to reconsider these provisions. For the time being I shall interpret section 13(1A) to mean that this court can interpret the section at least in order to determine what the act requires it to do and that it can apply the act at least to such an extent."

[27] Likewise in *Loock v Dlamini*⁴⁰ (in which once again Mr Omar was the instructing attorney for the aspirant labour tenant) Preiss DJP did not question that an issue arose when a replying affidavit was filed on 20 November 1997 in which a factual dispute about the defendant's labour tenancy was raised. What Preiss DJP was concerned with was whether section 13(1A) which came into effect a day after the replying affidavit was lodged, applied in that case because an issue had already arisen before the commencement of section 13(1A). The concern was therefore whether section 13(1A) applies to cases in which the interpretation or application of the Labour Tenants Act arose as an issue before the commencement of section 13(1A). The court's concern with this issue arose precisely because the defence of labour tenancy was pleaded in the replying affidavit, whereby an issue arose which brought section 13(1A) into play. Preiss DJP concluded that the section did not apply in that case and declined to transfer the case to the Land Claims Court. Although the court incorrectly concluded that section 13(1A) did not apply in that case⁴¹ because the issue arose before the commencement of section 13(1A) on 21 November 1997,⁴² the court did not question the fact that section 13(1A) obliges a court to transfer a matter to the Land Claims Court nor that an issue arises when labour tenancy has been pleaded.

[28] Similarly in *Makhomboti*⁴³ whilst Le Roux J declined to refer the matter to the Land Claims Court because the proceedings before him were initiated before the enactment of section 13(1A) of the Labour Tenants Act, and also because the proceedings were on appeal and not in the first instance, he did not question the fact that section 13(1A) obliges a court to refer a matter to the Land Claims Court once labour tenancy is raised as a defence. Nor was it ever questioned that at that stage an issue arose which brought section 13(1A) into play.

40 Above n 22.

41 This decision was overturned on appeal see above n 20.

42 Du Plessis J disagreed with the finding of Preiss DJP in *Loock* (above n 22) that section 13(1A) applies only to matters in which the interpretation or application of the Labour Tenants Act arises or arose as an issue after 21 November 1997, ie after the commencement of section 13(1A), see *Chris Carlyol* above n 10 at page 5. McCall J disagreed with this contention, see *Mngomezulu* (above n 33).

43 Above n 32.

[29] In addition I note that in the Natal Provincial Division decision of *Mngomezulu*⁴⁴ the court transferred the matter to the Land Claims Court because the landowners were seeking declaratory orders that the occupiers were not labour tenants. McCall J correctly concluded that an issue had thereby arisen which brought section 13(1A) into play.

[30] The applicants clearly were wrong to insist time and again in pleadings generated at each stage of this case that only once the special plea is ventilated will the court be able to determine if an issue has arisen. Mr Rossouw correctly countered the argument by stating that the ventilation of the special plea and a determination on the *bona fides* of the Motlhaudi's claim that he is a labour tenant, would require the leading of evidence, which would be an irregular circumvention of section 13(1A). The applicants' persistence with this argument despite its twice failed impact is difficult to understand.

[31] Mr Omar's failure to take cognisance of and appreciate the context in which the evidence pertaining to labour tenancy status was admitted in the *Mosehla* case, unfortunately resulted in argument after convoluted argument on when an issue arises, something about which the position in my view was quite clear when the arguments were made. The final word on when an issue arises was pronounced by the Supreme Court of Appeal in the successful appeal, *Dhlamini v Loock*⁴⁵ delivered on 19 March 2001, in which it was found that section 13(1A) was clearly intended to apply to all cases pending at 21 November 1997. The decision was delivered about a week before the hearing of the review in this Court but failed to deter the applicants from their argument. Olivier JA said:

“An issue ‘arises’ in a case when it is raised on the pleadings or affidavits. It can, however, also be said that an ‘issue arises’ when it arises during argument or for decision at the end of the case. In the present case the factual dispute in regard to the issue of whether or not the appellant was a labour tenant still required a decision by the court at the end of the case and in this sense it can be said that it was an issue arising for decision within the meaning of the words ‘an issue arises’ in sec 13(1A). Para (b) of the subsection in fact recognises that an issue can arise in a case after it has been raised on the pleadings or affidavits.”⁴⁶

44 Above n 33.

45 Above n 20.

46 *Dhlamini v Loock* above n 20 at para [14].

[32] It also needs to be borne in mind that in keeping with the doctrine of *stare decisis* the aforementioned decisions of the Transvaal Provincial Division as well as those of the Land Claims Court were binding on the Springs Magistrate's Court. Mr Omar ought to have known that the Springs Magistrate's Court was prevented from overturning High Court and Land Claims Court decisions and that the magistrate's court was the wrong forum in which to argue the points he raised. The points fell to be argued in the Land Claims Court. It surprises me that it appeared not to have occurred to Mr Omar that the magistrate's court was powerless to overturn the decisions of higher courts and that he persisted with his arguments in the wrong forum even after they were rejected the first time round.

[33] In the review application before me another inappropriate quotation was offered by Mr Omar, this time from the Supreme Court of Appeal case *Ngcobo and Others v Salimba CC; Ngcobo v Van Rensburg*,⁴⁷ in support of the proposition that the High Court can interpret and apply the provisions of the Labour Tenants Act and inexplicably also in support of the views expressed by the court in the *Mosehla*⁴⁸ case. The quotation which Mr Omar used states:

“If the High Court correctly found that the appellants were not labour tenants then it could correctly grant an ejection order, there being no other ground upon which they claimed a right to occupy. If, on the other hand, the Court *quo* had correctly found that the appellants were labour tenants, then not it, but only the LCC could adjudicate upon a claim for their ejection..”⁴⁹

The *Salimba* case⁵⁰ was heard on 4 November 1997, and was concerned with the definition of a labour tenant. It therefore predated the introduction of section 13(1A),⁵¹ which section effectively excluded the jurisdiction of courts other than the Land Claims Court. The Supreme Court of Appeal was referring to the High Court's jurisdiction as it was prior to the introduction of section 13(1A) at a time when High Courts could deal with matters pertaining to labour tenants. The copious legal arguments emanating from Mr Omar in all the pleadings and proceedings generated by this case have been

47 1999 (2) SA 1057 (SCA); [1999] 2 All SA 491 (SCA).

48 See above n 9.

49 *Salimba* above n 46 at para [3].

50 *Salimba* above n 46.

51 Introduced on 21 November 1997, see above n 8.

peppered with references that are both inappropriate, inapplicable and have extended the legal proceedings unnecessarily.

[34] In addition to the above mentioned cases, the statute law makes it clear that the Land Claims Court has exclusive jurisdiction to determine issues pertaining to labour tenants. This is elucidated at section 22(1)(cC) of the Restitution of Land Rights Act, the companion as it were to section 13(1A) of the Labour Tenants Act. Up until March 2000⁵² section 22(1)(cC) stated:

“(1) There shall be a court of law to be known as the Land Claims Court which shall have the power, to the exclusion of any court contemplated in section 166 (c), (d) or (e) of the Constitution-

...

(cC) to determine any matter involving the interpretation or application of this Act or the Land Reform (Labour Tenants), 1996 (Act 3 of 1996);”

The magistrates’ courts are referred to in section 166(d) of the Constitution.

[35] The next major argument by the applicants which loomed large in both the leave to appeal and review applications was that Magistrate Nel erred in entertaining the application to transfer the matter to the Land Claims Court. This is, so the argument went, because a magistrate’s court is a creature of statute which does not enjoy the inherent jurisdiction of High Courts, permitting of such a transfer. The rules of the magistrates’ courts, the argument continues, do not make provision for such an application and it therefore cannot be entertained. I do not agree. For, as was argued for Mr Rossouw it is trite law that magistrates’ courts may have jurisdiction assigned to them by any other law.⁵³ It is also trite law that the magistrates’ courts may have their jurisdiction specifically ousted by statute.⁵⁴ The obligation which

52 This subsection was amended in March 2000 and presently reads as follows:

“(1) There shall be a court of law to be known as the Land Claims Court which shall have the power, to the exclusion of any court contemplated in section 166 (c), (d) or (e) of the Constitution-

...

(cC) to determine any matter involving the interpretation or application of this Act or the Land Reform (Labour Tenants) Act, 1996 (Act 3 of 1996), with the exception of matters relating to the definition of ‘occupier’ in section 1(1) of the Extension of Security of Tenure Act, 1997 (Act 62 of 1997);”.

53 See section 28 of the Magistrates’ Courts Act 32 of 1944 and the commentary in Erasmus *Jones and Buckle: Civil Practice of the Magistrates’ Courts in South Africa* 9th ed Vol 1 Service Issue 5 (Juta, Cape Town 2000) from page 39.

54 For example Insolvency Act 24 of 1936. See *Jones and Buckle* above n 52 at page 40.

the magistrate had to transfer the matter arose by virtue of section 13(1A) of the Labour Tenants Act. The section assigned the requisite jurisdiction to the magistrate to transfer the matter. It was also correctly argued by Mr Rossouw that the absence of rules notwithstanding, a court has the necessary incidental jurisdiction to carry out the law. Section 13(1A) cannot be disregarded simply because no particular procedure is prescribed in the rules.

[36] The applicants argued also that Magistrate Nel erred in conducting the proceedings in a language (Afrikaans) that Motlhaudi's legal representative (the candidate attorney who appeared at the hearing) could not understand. Given that no objection was made by her to the fact that the transfer application was conducted in Afrikaans, I cannot understand on what basis it can be said that the magistrate erred in this regard. On the contrary, I commend Magistrate Nel for adjourning and affording her an opportunity to consult the English version of the Labour Tenants Act which she inexplicably failed to bring with her.

[37] In addition to responding to the arguments raised by the applicants, Mr Botha took issue with various procedural and technical matters pertaining to the application for leave to appeal and asked that the application be struck off the roll for these reasons alone. Magistrate Dreyer accepted all the arguments offered by Mr Botha on these procedural matters but did not strike the matter off the roll. I proceed to deal with those arguments.

[38] Firstly Mr Botha submitted that the referral order in which leave to appeal was being sought was not an order subject to appeal because it did not pronounce a final verdict on any of the issues between the parties in the main action.⁵⁵ This argument disregards the literal interpretation of section 13(2) of the Labour Tenants Act which states:

55 The test for appealability is succinctly set out in *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 523J -533B: "A judgment or order is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second it must be definitive of the rights of the parties; and third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. . . The second is the same as the oft stated requirement that a decision, in order to qualify as a judgment or order, must grant definite and distinct relief."

“(2) Any decision or order made by a magistrate’s court in proceedings referred to in subsection (1) or (1A), shall in its entirety be subject to appeal to the [Land Claims⁵⁶] Court if any of the grounds of appeal relates to the application or interpretation of this Act in such decision or order.”

Magistrate Dreyer erred in unquestioningly accepting Mr Botha’s argument and paying no heed to section 13(2) of the Labour Tenants Act

[39] Mr Botha further submitted that where Mr Motlhaudi maintains that the matter was wrongly transferred to the Land Claims Court, the proper procedure would have been to raise the legality of the transfer in the Land Claims Court. This, I believe to be correct, given that by virtue of section 13(2) the Land Claims Court would have been the correct court of appeal.

[40] The next issue raised by Mr Botha points to the procedural complexities and uncertainties on appeal in a case such as this which commences under ESTA, but into which the Labour Tenants Act is introduced. Mr Botha argued also that the main action was in terms of ESTA to which the High Court Rules apply.⁵⁷ The appeal should, so the argument went, have been brought in terms of section 19(2) of ESTA which provides for appeals from the magistrates’ courts to the Land Claims Court under that act. Thus, Mr Botha argued, Mr Motlhaudi was wrong to seek leave to appeal, as section 19(2) does not require an application for leave to appeal. Furthermore Mr Botha argued that rule 49(1) of the Uniform Rules prescribes a procedure to be followed when leave to appeal is required, but as leave to appeal was not required in an appeal of the present nature, rule 49 (1) was not applicable. I disagree. Once the Labour Tenants Act was brought into the equation, more specifically the decision to transfer the matter to the Land Claims Court in terms of section 13(1A) thereof, any appeal against that decision fell to be brought under section 13(2) of the Labour Tenants Act. The matter, if one likes, moved into the domain of the Labour Tenants Act. Magistrate Dreyer erred in unquestioningly accepting Mr Botha’s argument on this aspect and in not taking cognisance of the fact that an appeal fell to be brought in terms of section 13(2). However Mr Botha’s stance on the necessity for leave to appeal in respect of section 19(2) of ESTA would I believe apply equally to section 13(2) of the Labour Tenants Act. Section 13(2) also does not require leave to appeal. The correct route for Mr Motlhaudi

56 See definition of “court” in section 1 of Labour Tenants Act.

57 In terms of section 17(4) of ESTA.

to have followed in the circumstances would have been to simply lodge an appeal to the Land Claims Court.⁵⁸

[41] Fourthly, Mr Botha correctly pointed out that the incorrect procedure which Mr Motlhaudi followed leads to a multiplicity of actions. It would entail at least two unnecessary court appearances, the application for leave to appeal in the magistrate's court and the appearance in the High Court (the correct court in Mr Motlhaudi's view) if leave to appeal had been granted.

[42] Mr Botha submitted that the application should be struck off the roll for the reasons set out in the preceding four paragraphs alone. If a decision sought to be appealed against is not appealable (as was argued) the matter stands to be struck off the roll.⁵⁹ Magistrate Dreyer agreed with the contention that the order appealed against was not appealable. One would have expected him to have struck the matter off the roll, which strangely he did not. Nor did he deal with the request that the matter be struck off the roll.

[43] I now turn specifically to the question of costs. Magistrate Dreyer accepted the following submissions by Mr Botha in granting the cost order *de bonis propriis* against Mr Omar on an attorney and client scale:

“12.1 The applicant follows the following course of action:

- (i) He seeks leave to appeal where such leave is not necessary.
- (ii) He seeks leave to appeal in the wrong court.
- (iii) He seeks leave to appeal against an order which is not appealable.
- (iv) He has no merits in his proposed appeal.
- (v) He raised fatuous and unfounded arguments in the face of clear authority.

58 Rule 71(1) of the Land Claims Court rules provides:
 “Any party that has appealed against a decision of a magistrate's court over which the Court enjoys appellate jurisdiction must prosecute such appeal in the Court in the same manner as a civil appeal from a magistrate's court to the Supreme Court.”
 The Land Claims Court rules were originally published in Government Gazette 17804, 21 February 1997, The original rules and all the amendments can be found at www.law.wits.ac.za/lcc.

59 See for example *Wellington Court Shareblock v Johannesburg City Council; Agar Properties (Pty) Ltd v Johannesburg City Council* 1995 (3) SA 827 (A) at 835E-F.

- (vi) He raises defences which he himself alleges can only be adjudicated by the Land Claims Court and then embarks on vigorous opposition to transfer of the matter to the Land Claims Court.”⁶⁰

For reasons which are evident from my analysis of the law I am in agreement with all but the third of the above submissions made by Mr Botha. I disagree with the contention that Mr Motlhaudi seeks leave to appeal against an order which is not appealable given that section 13(2) permits of an appeal. With regard to submissions (i) and (ii), I note that given the procedural complexities and uncertainties in a case like this traversing two acts, and the lack of precedent guiding procedure, there was no obvious route for Mr Omar to have followed. This poses the question whether in the circumstances *ade bonis propriis* order was not unduly harsh..

[44] Notwithstanding the fact that he had asked for costs *de bonis propriis* in the application for leave to appeal, on review Mr Rossouw argued against such an order. Mr Tee, who appeared for Rossouw in the review application, expressed a view different from that of Mr Botha and submitted that the order of costs *de bonis propriis* by Magistrate Dreyer, was inappropriate. Mr Tee said that Magistrate Dreyer did not fully appreciate the crisp argument submitted by Ms Naidoo in respect of the inherent jurisdiction of the magistrate’s court. Whilst he agreed that the argument had no merit, he thought it was clever, not frivolous and did not warrant an award of costs *de bonis propriis*. Save for this Mr Tee submitted that the decisions of the magistrates’ in both applications were correct, for the reasons set out in the heads of argument by Mr Botha, and elaborated upon by him.

[45] I have no doubt that the disregard by Mr Omar of the case law and the doctrine of *stare decisis*, as well as his insistence on arguing twice rejected ill-conceived and untenable points was vexatious, reckless and even frivolous. I am of the view that Magistrate Dreyer correctly exercised his discretion in awarding costs on an attorney and client scale. Magistrate Dreyer however erred in exercising his discretion to award costs *de bonis propriis* against Mr Omar. There were no special circumstances which justified such an order. The principle pertaining to such an award are succinctly set out by M T Steyn J in *Waar v Louw*:

60 Heads of argument on behalf of Mr Rossouw in the application for leave to appeal.

“Die prokureursberoep is 'n geleerde beroep wat groot vaardigheid van sy lede verg. Foute wat 'n prokureur in gedingvoering begaan en wat onnodige koste tot gevolg het, moet derhalwe nie ligtelik oorsien word nie. En 'n gedingvoerder behoort nie altyd verplig te word om self die koste te betaal wat deur die nalatigheid van sy prokureur veroorsaak is nie.

Maar daar moet ook nie te streng teen 'n fouterende prokureur opgetree word nie. Die regspleging is soms 'n tergende dissipline, en selfs die mees behendige praktisyns kan foute begaan wat onnodige koste meebring. Die prokureursberoep moet nie deur 'n te toeskietlike houding beweeg word om die leisels slap te laat lê nie, maar moet ook nie met te veel sweepklapperery demoraliseer word nie. Soos gewoonlik in menslike sake is die middeweg die beste.”⁶¹

The words of James J in *Nkosi v The Caledonian Insurance Company*⁶² are particularly apt in this case:

“... in a proper case the Court will mark its disapproval of an attorney's improper or negligent conduct by ordering him to pay a portion of the costs of the opposite side. Whether the present is a proper case is a matter for my discretion, which must be judicially exercised. In my judgment no order should be made against Mr. Mason in the present case. My reasons are as follows. I am satisfied that Mr. Mason acted in the genuine belief that he was doing the best he could for a client whom he had been appointed to represent by the Court, and that his conduct was not influenced in the slightest degree by the fact that if the proposed settlement had been accepted he would have been able to recover a small portion of his heavy out of pocket expenses and of the fees he would normally have charged. I am satisfied that he at no time considered that what he was doing was in any way irregular or improper. . . But however free from reproach Mr. Mason's motives may have been, I am satisfied that he has been guilty of a considerable amount of muddled thinking and that this has led him into conduct which I am certain he will, on reflection, appreciate is incorrect.”⁶³

[46] I have no reason to believe that Mr Omar’s conduct arose from anything other than “muddled thinking” and that he operated in the misguided belief that he was acting in his client’s best interest. Nor am I able to find malice or negligence to a serious degree on his part.⁶⁴ I am dissuaded also from confirming the order *de bonis propriis* by the fact that Mr Rossouw has reconsidered the appropriateness of that order. Another fact which bears on my decision is the fact that Magistrate Dreyer was wrong to penalise Mr Omar because of the procedural and technical problems which I have already dealt with.

61 1977 (3) SA 297 (O) at 304 D-G.

62 1961 (4) SA 649 (N).

63 Above n 61 at 663C-H. See also the cases referred to above n 27.

64 Cilliers *Law of Costs* 3rd ed (Butterworths, Durban 1997) at 10-25.

[47] Mr Omar would nonetheless do well to pay heed to my comments pertaining to his disregard for and misconstruction of judicial pronouncements and statute. Should this recur the time may well come when he will not be able to escape an order of costs *de bonis propriis*.

[48] In the circumstances I set aside the order for costs *de bonis propriis* on an attorney and client scale against Mr Omar. I substitute an order of costs on an attorney and client scale against Mr Motlhaudi.

[49] The question of costs of the review application will stand over for determination at the end of the hearing to determine the labour tenancy status of Mr Motlhaudi.

JUDGE Y S MEER

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