IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case No.: **1348/2021**

In the matter between:

AMC PROPERTY (PTY) LTD First Applicant
(Registration number: 2015/368420/07)

HUGHES PROPERTIES (PTY) LTD Second Applicant
(Registration number: 2019/380293/07)

and

CHRIS KLEYNHANS First Respondent
(Identity number: [....])

ANY OTHER UNLAWFUL OCCUPIERS Second Respondent
OF THE FARMS DESCRIBED AS REMAINDER
OF PORTION 6 OF THE FARM MIMOSA GLEN 885,
BLOEMFONTEIN, DISTRICT BLOEMFONTEIN
AND PORTION 7 OF THE FARM MIMOSA GLEN 885,
BLOEMFONTEIN, DISTRICT BLOEMFONTEIN,
FREE STATE PROVINCE.

ANY OTHER UNLAWFUL OCCUPIERS Third Respondent
OF THE FARMS DESCRIBED AS PORTION 3 (OF2)
OF THE FARM FAIRVIEW 1756, BLOEMFONTEIN,
DISTRICT BLOEMFONTEIN AND PORTION 7 OF
THE FARM FAIRVIEW 2845, BLOEMFONTEIN,
DISTRICT BLOEMFONTEIN,
FREE STATE PROVINCE.

MANGAUNG METROPOLITAN MUNICIPALITY Fourth Respondent

JUDGMENT BY: I VAN RHYN, AJ

HEARD ON: 19 OCTOBER 2021

DELIVERED ON: 3 NOVEMBER 2021

INTRODUCTION.

[1] On 26 March 2020, the applicants issued an application for an order authorizing the institution and service of proceedings in terms of section 4(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act , Act 19 of 1998 (the "PIE Act") and declaring the first to third respondents to be unlawful occupiers of portion 6 and 7 of the farm Mimosa Glen 885, district Bloemfontein ("Mimosa Glen"), portions 3 (of 2) of the farm Fairview 1756 and portion 7 of the farm Fairview (Fairview") situated in the district, Bloemfontein, Free State Province.

[2] On the 1st of April 2021 Naidoo J granted an order authorizing the service of the application upon the respondents whereafter the matter became opposed by the first, second and third respondents. The application was heard on 5 August 2021 by Voges AJ. An order was granted that the matter is referred for *viva voce* evidence to determine the terms of the oral agreement reached between the applicants and the first respondent in respect of the occupation of the farms Mimosa Glen and Fairview.

[3] It was furthermore ordered that 4 specified witnesses may be called by the parties to testify and be cross examined. Costs stood over for later determination.

[4] Although relief is sought in the notice of motion for the eviction of the first to third respondents which include “any other unlawful occupiers” it is not in dispute that only the eviction of the first respondent, Mr Chris Kleynhans and his family are sought.

[5] The matter was enrolled for hearing of oral evidence on 20 October 2021. An agreement was reached between the applicants and the first respondent in respect of the merits of the application. The terms of the agreement are contained in a draft order which was handed up to be made an order of court. The only aspect to be decided upon is who is liable for the costs including the reserved costs.

THE SALIENT FACTS AND ARGUMENTS.

[6] The first applicant purchased the farm Mimosa Glen from the first Respondent on 3 December 2020 for an amount of R 5 000 000.00 (Five Million Rand). The second applicant, on the same date, purchased the farm Fairview from the first respondent for the purchase price of R6 500 000.00. (Six Million Five Hundred Thousand Rand) The two farms are adjacent to one another.

[7] The respective farms were transferred to the first and second applicants on 11 February 2020 by the Registry of Deeds, Bloemfontein. It was agreed that the first respondent and his family will be entitled to occupy Mimosa Glen and Fairview, free of rent for some period of time whereafter the first respondent and his family will vacate the farms and remove all their belongings.

[8] It is furthermore not in dispute that the first respondent and Mr Hughes, the representative of the applicants, concluded a verbal agreement regarding the further occupation of the farms subsequent to the purchase of the farms. However, the material terms of the agreement are in dispute. The applicants contend that the first respondent had the right to reside on the farms until the end of December 2020 whereas the first respondent contends that he was and still is, entitled to reside and occupy the farms until 31 December 2021.

[9] Mr Els, who appeared on behalf of the applicants, argued that the applicants launched the usual proceedings for the eviction of unlawful occupiers of land in accordance with the PIE Act by way of application. The first respondent opposed the application. The issue for adjudication was whether the first respondent and his family are unlawful occupiers of the farms owned by the applicants.

[10] The applicants contend that, even though a factual dispute arose regarding the period of occupation, it has to be taken into consideration that the first respondent and his family remained in occupation of the farms for a period of two years without paying any rent. With reference to Stark v Soares[1] Mr Els argued that it will be fair and proper that each party pays its own costs due to the fact that it can neither be argued that the applicants' application for the eviction of the first respondent is baseless nor can it be argued that the opposition to the application was frivolous.

[11] Mr Van der Merwe, counsel on behalf of the first to third respondents, argued that the court should take cognisance of the chronology of events regarding the merits of the application in order to arrive at a fair and just order in relation to the costs. The applicants sought an order premised upon the deponent to the founding affidavit, Mr Hughes' version that occupation of the farms by the first respondent and his family would only be for a period of one (1) year until the end of December 2020. On 27 January 2021 the applicants caused the issue of an automatic rent interdict summons out of the Regional Court, Bloemfontein and appended copies of invoices for the rental of the farms for the period March 2020 to November 2020.

[12] The summons was issued due to a misunderstanding between Mr Hughes, the applicants' administration department and the attorney acting on behalf of the applicants. The summons was withdrawn. Prior to the issue of the application for eviction it was well-known by the applicants that the terms of the agreement regarding the occupation of the farms were in dispute. The

[1] 2013 JDR 1887 (GSJ)

applicants nevertheless proceeded with the application for the eviction of the first respondent and his family. The contention that a factual enquiry which cannot be resolved on the papers, was fully canvassed in the answering affidavit as well as in the heads of argument filed by the first to third respondents. This culminated into the application being referred for the hearing of oral evidence.

[13] It is argued that the first respondent is the successful party and should be indemnified for the expenses which he has been put through having been unjustly compelled to oppose the application. The applicants did not proceed with presenting their case but, in reality conceded the merits and capitulated on the exact claims made in their application for eviction of the first respondent and his family. The applicants and the first respondent agreed that:

13.1 The first and second respondents be ordered to vacate the following farms by 31 December 2021:

13.1.1 Remainder of portion 6 of the farm Mimosa Glen 885, district Bloemfontein, Free State Province;

13.1.2 Portion 7 of the farm Mimosa Glen 885, district Bloemfontein, Free State Province;

13.2 The first and third respondents be ordered to vacate the following farms by 31 December 2021:

13.2.1 Portions 3 (of 2) of the farm Fairview 1756, Bloemfontein, district, Bloemfontein, Free State Province.

13.2.2 Portion 7 of the farm Fairview 2845, Bloemfontein, district Bloemfontein, Free State Province.

LEGAL PRINCIPLES APPLICABLE TO THE FACTS.

[14] It is well established that the general rule regarding costs is that the unsuccessful party pays the costs of the successful party on the party and

party scale.[2] In determining who is the successful party, the court will attempt to ascertain which of the parties has been substantially successful. The determination of an appropriate costs order is in the discretion of the court, which discretion is informed by a number of factors in order that such discretion be exercised judiciously. These factors include consideration of the facts of each case, weighing the issues in the case, the conduct of the parties and any other circumstance which may have a bearing on the issue of costs and then make such order as to costs as would be fair and just between the parties.[3]

[15] These are proceedings for final relief and therefore the application falls to be determined on the version of the respondents, taken together with those facts which are admitted by the applicants, unless the respondents' version is so far-fetched and untenable that it must be rejected on the papers as they stand in accordance with the trite Plascon-Evans rule.[4] The merits of the application concern the question whether the first respondent and his family are found to be in unlawful occupation of the farms. The first respondent denies that he is in unlawful occupation of the farms. He was the previous registered owner of the farms and together with his family have been residing on the farms for approximately 24 years.

[16] During 2018 the first respondent decided to sell the farms (including another piece of land) for the minimum amount of R15 000 000.00 (Fifteen Million Rand) excluding Value Added Tax. The separate piece of land was sold for an amount of R2 6000 000.00 (Two Million Six Hundred Thousand Rand). Mr Jordaan, a real estate agent, contacted the first respondent regarding an offer received from Mr Hughes to purchase the farms. The offer of R11 500 000.00 (Eleven Million Five Hundred Thousand Rand) was R900 000.00 (Nine Hundred Thousand Rand) less than the amount which the first respondent was willing to accept as selling price for the farms.

[17] On 3 December 2019, at the request of Mr Jordaan, the first respondent attended the offices of Symington & De Kok Attorneys, Bloemfontein where

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[2] Maloney's Eye Properties v Bloemfontein Board Nominees 1995 (3) SA 249 at 257 F-G.
[3] Erasmus Superior Court Practice D5 -6.
[4] Plascon -Evans Paints (TVL) Ltd v Van Riebeeck Paints (Pty) LTD 1984 (3) SA 623 (A).

Mr Jordaan presented the two written offers to purchase the respective farms, signed by Mr Hughes, in his representative capacity on behalf of the applicants. The first respondent indicated that the offer made by the applicants was less than the amount set as the minimum purchase price and indicated that he needed time to consider the offer. Evidently Mr Jordaan then telephonically contacted Mr Hughes who indicated that the offer will only be open for a period of 30 minutes.

[18] The first respondent thereafter accepted the offer made by the applicants subject to the following conditions:

18.1 He and his family would acquire the right to occupy the farms for a period of 24 months from the date of the agreement;

18.2 That occupation of the farms will be rent free,

18.3 That the first respondent will be liable for the actual electricity usage on the farms for the 24-month period.

18.4 That the first respondent will remove all movable assets belonging to him from the farms within the 24-month period.

[19] According to the first respondent, Mr Jordaan indicated that Mr Hughes has agreed to the sale subject to the conditions whereafter the first respondent requested that the verbal occupation agreement be put in writing. The first respondent signed the two offers to purchase the farms. Unfortunately, the terms and conditions in respect of the verbal agreement concluded between the first respondent and Mr Hughes in respect of the occupation of the farms by the first respondent and his family were not put in writing.

[20] The applicants deny any knowledge regarding the first respondent’s dissatisfaction with the fact that the offer made to purchase the farms were

R900 000.00 (Nine Hundred Thousand Rand) less than he was actually willing to accept. The applicants aver that at the time when Mr Hughes telephonically informed Mr Jordaan that the offer would only remain valid for 30 minutes, the first respondent had already asked to remain in occupation of the farms for a period of two years. Mr Hughes however informed Mr Jordaan that the period of two years is declined and that he would only be willing to accept a period of one year and that the offer must be accepted within 30 minutes failing which the offer would expire.

[21] It is evident that an acrimonious relationship developed as a result of the dispute regarding the continued occupation of the farms. Mr Els, in reply argued that the applicants did not concede the merits of the application. The parties settled the matter and therefore the actual result of the settlement should not determine the issue as to costs.

[22] Whenever a decision in regard to costs is separated from the decision on the merits of an application because an order on the merits is no longer applied for, it still does not mean that the decision regarding the costs must be reached in total isolation from the considerations regarding the merits. Where cases are settled on the merits without an agreement regarding the costs, the merits of the matter will have to be considered in order to determine who the successful litigant is. The general rule is that costs follow the event, in other words, the successful party should be awarded costs.[5] The fact that the merits were settled without the court having heard any evidence, and with the applicants accepting that the first respondent and his family remain in occupation of the farms in accordance with the first respondent's contentions, do not change the position that, in essence, the first respondent is the successful party. I have come to the conclusion that costs should be decided by having regard to the contents of the settlement agreement. To my mind the applicants are the unsuccessful party and consequently the general rule that costs follow the result must apply.

[5] Gamlan Investments (PTY) LTD v Trilion Cape (PTY) LTD 1996 (3) SA 692 at 700 E-F.

[23] **ORDER:**

Consequently, the following order is made:

1. The draft order marked “X” is made an order of court.
2. The applicants shall pay first respondent’s costs including the reserved costs of 5 August 2021, jointly and severally, payment by the one, the other to be absolved.

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I VAN RHYN, AJ

On behalf of the Applicants: ADV J ELS
Instructed by: PHATSHOANE HENNEY ATTORNEYS
BLOEMFONTEIN

On behalf of the First – Third Respondents: ADV. R VAN DER MERWE
Instructed by: VAN WYK & PRELLER ATTORNEY
BLOEMFONTEIN