IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

Case No: 10874/2008

In the matter between

Annamalay Pillay	**First Applicant**
Vijayluxmi Pillay	**Second Applicant**

versus

Parsuraman Pillay	**First Respondent**
Poobathy [a.ka. Dolly] Pillay	**Second Respondent**
Kasval [a.k.a. Deon] Pillay	**Third Respondent**
Perumal [a.k.a. Brian] Pillay	**Fourth Respondent**
Gonasagren [a.k.a. Trevor] Pillay	**Fifth Respondent**

JUDGMENT

Delivered on: 2 February 2010

STEYN J

[1] This application is triggered by an initial eviction application wherein the applicants applied for the abovementioned Respondents to vacate the immovable property described formerly as LOT 195 Cliffdale, situate in the Cliffdale regulated

area and in the Pinetown Regional water services area, Administrative district of Natal and presently described as Erf 195 Cliffdale, Registration division FT Province of KwaZulu-Natal, in extent 7,9111 hectares and which is physically situated at LOT 195 Cliffdale. Hereinafter I shall refer to the aforementioned immovable property as 'the Property'. In order to put the initial application in its context, I shall refer to it in this judgment as the main application. The Respondent's in the main application challenged the Applicants' right to evict them from the property and subsequent to the main application before this Court, lodged an action out of KwaZulu-Natal High Court, Pietermaritzburg under case 4426/09 for an order, declaring that:

> *"(i) The first Applicant holds the property as a nominee for the benefit of the First Respondent, one Linga Pillay and himself; and*
>
> *i) An order directing the Second Defendant to relinquish all her rights, title and interest in the property."*

[2] Before me the Applicants lodged an interlocutory application to stay the proceedings of the main application, pending the outcome of case 4426/09, before the Pietermarizburg High Court.

[3] Mr Naidu, acting for the Applicants, in the main application strongly opposed the interlocutory application and argued that this Court should not stay the proceedings but should dismiss it and decide upon the merits of the main application. Furthermore that the main application should be decided on the papers filed. He contended that the Applicants of this application have no lawful basis to continue living on the property and that the Respondents who are the applicants in the main application have complied with the procedural requirements of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No. 19 of 1998, and that they are entitled to be in possession of the said property and to the relief sought.

[4] Mr Choudree SC, acting for the Applicants in this interlocutory application, asked that this Court should stay the proceedings in the main application. He forcefully submitted that there are a number of factual disputes, which *inter alia* include the issue of the Second Respondent's *locus standi* to be an applicant in the main application. In addition I was referred to page 4 of the Deed of Transfer, which clearly differs from the Special

Conditions clause on page 3, which specifically excluded the Second Applicant from the donation. This is a donation from the mother, Potiakka, to the First Applicant and who is now deceased. Other issues that are in dispute is the consent given for extensions to the property and whether the property has been used as a business premises. It is abundantly clear to me that there are a number of factual disputes, having considered the papers.

[5] In my view the balance of convenience certainly should favour an order staying the proceedings in the main application. Such an order would take care of the disputes that exist at the moment. I am not persuaded by Mr Naidu, acting for the Respondents in this interlocutory application, that the main application could and should be entertained without having had the opportunity and benefit of oral evidence.

[6] It goes without saying that if I am persuaded that the balance of convenience favours a staying of the proceedings, then I cannot consider the merits of the main application.

[7] In my view the papers convincingly make out a case to stay

the proceedings. I foresee that there is a real likelihood given all the factual disputes between the parties that the main application at a later stage would be referred for oral evidence, in future.

The principles applicable to the proper exercise of discretion to grant a stay of proceedings has been succinctly stated by Levinsohn DJP in *Berrange N.O. v Hassan and Another* 2009 (2) SA 339 (NPD) at 358. The issue that remains, is the issue of costs.

Costs

[8] The Applicants (Respondents in the main application) sought an order for attorney and client costs to be granted against the Respondents. It has been repeatedly laid down by our courts however that such an award of attorney and client costs will only be granted on rare occasions, (See *Moosa v Laloo* 1957 (4) SA 207 (D) at 225). It is trite law that such an award is generally used by a Court to show its disapproval of some conduct which should be frowned upon. (*Koetsier v SA Council of Town & Regional Planners* 1987 (4) SA (W) at

744J-745A). This principal was also repeated by *Lombard J in Rautenbach v Symington* 1995 (4) SA 583 (O) at 557I:

> *"Dit is erkende reg dat 'n prokureur en kliënt kostebevel nie ligtelik toegestaan word nie en dat vir die verlening daarvan buitengewone omstandighede moet aanwesig wees."*

[9] As the granting of attorney and client costs remains fully in a court's discretion there can be and neither should there be an exhaustive list of such "buitengewone omstandighede". Some examples of such conduct cited in *The Law of Costs AC Cilliers* para 4.13 – 4.19, amongst others, are an absence of a *bona fide* defence, dishonesty or fraud, vexatious and frivolous conduct or any conduct that amounts to an abuse of the process of court. The question that remains is whether the Respondents (the Applicants in the main application) should have anticipated that there remains a dispute of fact and henceforth consented to an order that would have stayed the proceedings in the main application. On the papers, it appears that they should have been concerned about the disputes but there remains a possibility that they could have been misguided as to their rights. I shall give them the benefit of that doubt. Their failure to respond to letters of demand does

not *per se* impute *male fide* conduct.

[10] I am therefore not persuaded that there are sufficient grounds to award punitive costs, and hence I will follow the general rule.

[11] Order

11.1 The application for eviction is hereby stayed pending the final determination of an action instituted under Pietermaritzburg case no: 4426/2009;

11.2 The matter is adjourned *sine die*; and

11.3 Respondents in this interlocutory application are hereby ordered to pay the costs, of this application.

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Steyn, J

Date of Hearing:	4 June 2009
Date of Judgment:	2 February 2010

Application

Counsel for the applicants:	Adv R Choudree SC with Adv M Sewpal
Instructed by:	Sunitha Sewpal Attorneys c/o Naidoo Maharaj Inc
Counsel for the respondents:	Adv K Naidu
Instructed by:	Shun Pillay Attorneys