IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU NATAL DIVISION, DURBAN

CASE NO. 3497/14

In the matter between:

DONALD WALTER PFOTENHAUER	APPLICANT
And	
HELEN BUTCHER	FIRST RESPONDENT
JOHN BUTCHER	SECOND RESPONDENT
THE ETHEKWENI MUNICIPALITY	THIRD RESPONDENT

J U D G M E N T

MARKS AJ

[1] INTRODUCTION

1.1 The applicant Donald Walter Pfontenhauer, an adult male, is the lawful owner of immovable property situated at 9 Malden Estate, Hillcrest, KwaZulu-Natal.

1.2 The first and second respondents, Helen Butcher and John Butcher, are the tenants residing in the abovementioned premises.

1.3 The third respondent is the Ethekweni Municipality against whom no relief is sought.

[2] RELIEF SOUGHT

2.1 The application was initially one for the eviction of the first and second respondents in terms of section 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 ("Pie Act").

2.2 The first and second respondents have vacated the premises, and accordingly that relief sought has now been overtaken by circumstances.

2.3 The only issue that requires determination by the court is that of costs.

[3] BACKGROUND

3.1 The applicant leased the premises to the first respondent for a period of two years which was recorded in a written lease agreement concluded between the parties on 13 July 2010.

3.2 On 21 June 2012 the lease agreement was renewed for a further period of one year on the same terms and conditions. This lease was concluded in a written agreement duly signed by the parties. According to this agreement the first and second respondents were to vacate the premises on 31 July 2013.

3.3 It was thereafter agreed between the parties that the lease would be extended. This agreement was an oral agreement which was not in compliance with the written lease agreement terms.

3.4 The first and second respondents vacated the premises on 31 July 2014 after notice of eviction had already been served upon them and approximately 19 days before oral argument was heard on 19 August 2014.

[4] DISPUTE OF FACTS

The applicant avers that the oral lease agreement ended on 28 February 2014, whereas the first and second respondents contend that the oral lease agreement was extended for a period of one year until 31 July 2014.

[5] LEGAL ARGUMENT

5.1 The first and second respondents in their heads of argument and Mr Pretorius in oral argument have contended that the applicant is not entitled to costs as there exists a dispute of fact, the matter should not have proceeded by way of application but rather by way of action, or at least a referral to oral evidence.

5.2 Further that paragraphs 3-14 of the applicant's replying affidavit should be struck out in terms of Rule 6(15) of the Uniform Rules of Court.

5.3 Furthermore, the applicant adopted the incorrect procedure when bringing the initial application in terms of the Act (Pie).

5.4 The applicant, in their heads of argument and Mr Hoar, in oral argument, indicated that the paragraphs mentioned do not fall to be struck out. Moreover, there is no need to refer the matter to oral evidence as the court can make a decision on costs based on the material at its disposal. Furthermore, the correct procedure was adopted by the applicant in seeking the eviction order.

[6] APPLICATION TO STRIKE OUT

6.1 There are two requirements to be satisfied in order for a matter to be struck out. The matter sought to be struck out must indeed be scandalous,

vexatious or irrelevant and the court must be satisfied that if the matter is not struck out, the party seeking such relief will be prejudiced thereby[1].

6.2 The first and second respondents' complaint is directed at paragraphs 3-14 of the replying affidavit which they contend is scandalous, vexatious and irrelevant.

6.3 It is trite that a new matter cannot be raised in a replying affidavit and that generally, an applicant is required to make out a case in its founding affidavit.

6.4 Upon perusal of the applicant's replying affidavit generally and paragraphs 3-14 particularly, the court is not satisfied that the content thereof either introduces new material or is scandalous, vexatious or irrelevant. I state this as paragraphs 3-10 simply highlight the first and second respondents' conduct in opposing the present application, which facts are self-apparent from the contents of the court file. Paragraphs 11-12 merely deal with the failure of the first and second respondents to apply for condonation for the late delivery of their opposing affidavit. Paragraphs 13 and 14 refer to the fact that the first and second respondents had failed to pay rental in terms of the "base agreement" contended by them.

6.5 Furthermore, for the most part, the facts contained in the aforementioned paragraphs are self-apparent from the court file. Any prejudice to the first and second respondents is of their own making. The application to strike out falls to be dismissed.

[1] NDPP v Zuma 2009 (2) SA 277 (SCA) at 308B Uniform Rules of Court, Rule 6(15).

[7] INCORRECT PROCEDURE

7.1 The first and second respondents, in their heads of argument and Mr Pretorius in oral argument, contended that the applicant adopted the incorrect procedure when applying for eviction in terms of the Pie Act.

7.2 In his argument Mr Pretorius quoted extensively from the judgments of *Cape Killarney Property Investments v Mahamba*[2] and *Kanescho Realters (Pty) Ltd v Maphumulo and Others* and three similar cases[3].

7.3 Mr Hoar in oral argument, quite correctly referred to *Ubunye Co-Operative Housing Association Incorporated under Section 21 v Joyce Mbele and 31 Others*[4].

7.4 I do not propose to deliver an extensive judgment in respect of the correct procedures to be followed in respect of the Pie Act. Suffice to say that in the Division of KwaZulu-Natal the procedure followed is in line with the case of *Ubunye Co-op (supra)*. In other words, the allegation that the incorrect procedure was adopted cannot be sustained as the procedure adopted by the applicant as highlighted in the applicant's heads of argument and which is evident from the papers as the correct procedure

[8] DISPUTES OF FACT

8.1 It is established law that where the merits of opposed applications have been "settled" the court must not refer the matter to oral evidence for the purposes of hearing evidence on disputed facts solely for the purposes of determining

[2] 2001 (4) SA 1222 (SCA).
[3] 2006 (5) SA 92 (D).
[4] [2006] JOL 17317 (N).

costs. Rather, the court must make a decision on costs based on the material at its disposal[5].

8.2 In considering the issue of costs, the court has a discretion which is to be exercised judicially. The court is required to take into consideration the circumstances of the case, the issues at hand, the conduct of the parties and any other relevant circumstances[6].

8.3 On the papers there does not appear to be a real dispute of fact. I state this as the contents of the respondents' affidavit consists of bare denials. The first and second respondents have failed to deal pointedly with the various allegations made against them by the applicant in his founding affidavit. Moreover, the second respondent in paragraph 21 of his affidavit, admits that he only assumed (my underlining) that the period of the lease was being extended for one year as it had been the previous year. However, the previous extension for one year had been reduced to writing in compliance with the original lease agreement. It is clear that the oral lease was extended on the terms and conditions as those stated by the applicant. I state this because if it was to be extended for one year, it would have been reduced to a written agreement as was done previously. Moreover, it is highly improbable that the applicant, having no abode from February 2014 would have consented to the first and second respondent remaining in the premises.

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[5] *Gamlan Investments (Pty) Ltd v Trillon Cape (Pty) Ltd*1936 (3) SA 692 © at 700G – 701G; *Chen v Association of Arbitrators of South Africa & Others* 2003 (4) SA 96 (D).

[6] *Fripp v Gibbon & Co* 1913 AD 354.

[9] RESPONDENTS' CONDUCT AND MALA FIDES

9.1 The applicant, in his heads of argument, alleges that the manner in which the first and second respondents have conducted themselves in opposing the relief sought is indicative of their *mala fides* and that their clear intention was to simply delay the finalisation of the proceedings. The argument is based on all those factors mentioned including but not limited to the first and second respondents' disregard of the rules in failing to deliver notice of opposition and opposing affidavits within the time frames provided for by the Rules of Court and the absence of any explanation for their failure. Further to this is the first and second respondents' failure or reluctance to deal pointedly with the various allegations made against them in the applicant's founding papers.

9.2 Whilst such conduct on the part of the first and second respondents could have arisen from the "legal advice" given to them by a relative, it is no excuse when clearly the "legal advice" was completely incorrect or rather based on incorrect information. The result is that the conduct of the first and second respondents did indeed lead to a delay of the proceedings to such an extent that at the time of the hearing the principal relief sought (eviction) was no longer an issue as the first and second respondents had vacated the premises.

9.3 In *Minister of Land Affairs and Agriculture v DPF Wevell Trust*[7] the Supreme Court of Appeal cautioned that a court should be astute to prevent an abuse of its process by unscrupulous litigants intent simply on delaying proceedings.

9.4 Notwithstanding the fact that the court need not determine the initial relief sought, in the present matter the first and second respondents have not in the papers included circumstances that would indicate that the unlawful occupation from February 2014 until 30 July 2014 did merit protection. Accordingly, on the papers the applicant had discharged the *onus* upon him that it was just and equitable that the first and second respondents be evicted.

[10] COSTS

In the present circumstances and for reasons mentioned in this judgment, the applicant is entitled to costs. The written agreement entered into initially between the parties indicates acceptance of costs on the scale of attorney and client and I find no reason to deviate therefrom in light of the circumstances aforementioned.

[7] 2008 (2) SA 184 (SCA) at 205 B-C.

[11] **Order**

Costs are awarded to the applicant on the scale of attorney and client, in the present application, including the reserved costs occasioned on 2 June 2014.

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MARKS AJ

Application heard on :	19 August 2014
Counsel for the Applicant :	Mr S Hoar
Instructed by :	Smith & Swales Attorneys
Counsel for the Respondents :	Mr JP Pretorius
Instructed by :	ER Browne Inc.
Judgment handed down on :	19 September 2014