IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR 210/14

In the matter between:

MR OBED BESSERGLIK	**APPELLANT**
and	
MR BRIAN BENIONS	**1ST RESPONDENT**
BENCON PROJECTS	**2ND RESPONDENT**

JUDGMENT

Delivered on : 11 MAY 2015

OLSEN J (D PILLAY J concurring)

[1] This is an appeal and cross appeal against a judgment of the learned magistrate at Pinetown delivered on 31 January 2014. The litigation commenced in February 2009 in the High Court at Durban. There the appellant launched motion proceedings against the first and second respondents claiming payment of two amounts; and the rendition by the respondents of an account, with payment of any amount found to be due to the appellant upon debatement of that account. The application was opposed and it was referred to oral evidence. The parties decided at that stage that the matter ought to be removed to the magistrates court, which is what happened.

[2] The magistrate listened to evidence and closing argument for some ten days over a period of a year. He delivered a lengthy and considered judgment

which bears testimony to his patience. For reasons which will become apparent this judgment will be brief by comparison.

[3] There is some land in or near Richards Bay owned by the uMhlatuze Municipality. It is divided into areas, some of which are referred to as "camps". These camps are used for the accommodation of visiting workers, principally, it seems, from the construction industry. This situation had obtained for some time prior to the period with which this case is directly concerned. The municipality did not itself administer or run these camps for the accommodation of workers. That was done by private enterprise under lease agreements concluded with the municipality.

[4] The appellant, on the one hand, and the first and second respondents, on the other, participated in these business enterprises. They did not do so in quite the same way. At all times material to this case the appellant held a lease over an area known as camp B. The first and second respondents held a lease over an area known as camp A which they managed for themselves. The appellant lived in Johannesburg and had therefore engaged the services of the respondents (the first respondent apparently being the controlling interest in the second respondent, which is a close corporation) since 2001 to manage the letting enterprise at camp B.

[5] By 2006 these camps were occupied through monthly tenancies, and the municipality had decided not to renew the leases. The businesses were apparently profitable; and the appellant and the respondents wished to continue their operations. In the result the appellant was mandated to negotiate with the municipality with a view to getting it to change its mind about closing down the operations, and concluding lease agreements in respect of the camps. The appellant discharged this mandate as a result of which written leases were concluded with the municipality. The commencement date under each lease was 1 June 2007. During the course of this process the appellant secured for himself a lease not only over camp B but also one over an area known as camp C. Each of the leases (in respect

of camps A, B and C) was for an initial period of 5 years with the tenant having an option to renew the agreement for a further 5 years.

[6] Prior to the conclusion of the leases with the municipality, and during June 2006, the appellant and the respondents concluded a written agreement in terms of which the respondents would continue to manage the appellant's camp B under the then anticipated new lease agreements with the municipality. For the sake of convenience I will refer to this agreement as "the management agreement".

[7] The management agreement recorded how the funds generated by the enterprise on camp B would be divided between the parties. The respondents guaranteed the accommodation of 10 workers at least on the premises, and the remittance by the respondents to the appellant of an amount of R12 000,00 per month for these ten guaranteed occupants of camp B. The funds generated by the occupation of camp B by workers in excess of 10 would be shared as to half to the appellant and half to the respondents. However clause 2.1.4 provided as follows.

> "All risks and expenses, of whatsoever nature in relation to the camp shall be paid by [the first respondent] and [the second respondent].

[8] It was anticipated that the duration of the new leases in respect of camps A and B would be the same, because clause 3.1 of the management agreement provided that its duration would be the same as the duration of those two leases.

[9] The management agreement also contained a clause headed "Suspensive Condition" to which I will revert shortly.

[10] The appellant's first claim is for payment of a sum of R72 000,00 being the guaranteed minimum payment per month due under the management agreement for the period September 2008 to February 2009 (the month during which the application was launched in the High Court). It was common cause between the parties that the amount had not been paid. The

respondents resisted an order for payment on a number bases which I will deal with separately.

[11] The first of these has to do with the clause in the management agreement headed "Suspensive Condition". It reads as follows.

> "4 Suspensive Condition
> 4.1. That the lease is renewed for a period of at least 10 years.
> 4.2. That we are permitted to make the necessary improvements to your camp in line with those which we envisage carrying out to our camp."

The contents of sub-clause 4.2 are clearly not part of any condition, despite their inclusion in paragraph 4 of the management agreement. They form no part of the respondents' argument.

[12] The respondents argue that the lease agreement with the municipality was not for a period of at least 10 years, with the result that the suspensive condition was not satisfied; and that the management agreement was accordingly not binding. However in his answering affidavit the first respondent went on to admit that the parties had nevertheless conducted their affairs in respect of camp B in accordance with the management agreement "bar what is stated hereinafter". What was stated thereinafter was that there was in operation a tacit agreement between the parties substantially in accordance with the terms of the management agreement, save that it included a warranty that camp B would be habitable. The significance of this difference lay in the fact that the appellant had discovered that whereas the respondents' accounts delivered to the appellant reflected that all workers accommodated in camp B were paying R28,00 per night for their accommodation, in fact at least some of them were paying R32,00 per night. (The appellant had obtained certain invoices which had been delivered by the respondents to the employers of those workers which revealed this fact.) The false accounts had to be explained and the explanation tendered (which the magistrate correctly rejected as untenable) was that, without having told the

appellant, the respondents had deducted R4,00 per person per night from the income they received from workers in camp B in order to compensate them for the cost of replacing certain beds in the camp. From the perspective of the respondents the enforceability of the written management agreement had to be challenged because under it all costs and expenses were for the respondents' account; thus the contention that the suspensive condition had failed.

[13] The appellant's version is that it struck him at some point during his negotiations with the municipality that it would be in the interests of the lessees of these camps, including the respondents, that the leases be for 5 years with an option to renew for a further 5 years, in case it should turn out at the end of the initial period that there were insufficient workers needing accommodation to justify the continuance of the businesses. He accordingly consulted with the respondents and they agreed, thereby amending the terms of the suspensive condition. It is overwhelmingly probable that the appellant's version is correct, and that is what the magistrate found. I hasten to add, however, that the magistrate's decision was not supported by a finding that the appellant was a credible and reliable witness. The magistrate made no such finding, and I see nothing in the record which would justify criticising the magistrate's restraint in that regard.

[14] The magistrate reasoned along the lines that the business sense in the appellant's proposal of a renewable lease for 10 years in all was not challenged; and pointed out that all of the tenants had signed similar leases. I would add to that the fact that the management agreement actually contemplated that the leases for camps A and B would be of the same duration, which was also sensible and business-like from the perspective of the respondents. Furthermore the respondents had a motive to deny the amendment of the suspensive condition. They had to find an excuse for their misconduct in having represented to the appellant that they were collecting R28,00 per person per night whereas the sum was R32,00 per person per night. The excuse that they had spent the difference on beds in camp B could not have been tendered if they were bound by all the terms of the written

management agreement which obliged them to carry such costs themselves. (Of course the "excuse" offered does not explain why these deductions were hidden from the appellant.) The magistrate cannot be faulted for his decision that the suspensive condition was varied orally and then satisfied.

[15] The second basis upon which the respondents resist the claim for payment of R72 000,00 due under the management agreement is that, properly analysed, it is a sublease agreement forbidden by the lease agreement in respect of camp B between the municipality and the appellant. This dispute took up a fair amount of time in the case. The magistrate found that the management agreement was just that, and not a lease agreement. In my view that decision cannot be faulted. A more direct answer to the proposition that a claim under it cannot be sustained because it was a sublease forbidden by the terms of the agreement between the municipality and the appellant lies in the fact that in our law a tenant has no right to challenge the title of the landlord. (See *Frye's (Pty) Limited vs Ries* [1957] 3 All SA 473 (A) at 475.)

[16] The respondents' third broad line of resistance to the appellant's first claim (for payment of the sum of R72 000,00) lies in

(a) a claim of set off with regard to loans made to the appellant in an amount of R84 500,00, and

(b) the existence of certain counterclaims asserted by the respondents which exceed all of the claims made by the appellant.

The original papers in the High Court did not include a notice of a counter-application. In his judgment the magistrate treated these claims as counterclaims. There appears to have been no objection to this in the magistrate's court, and none was made in this court either.

[17] Dealing first with the loans, it must be stated immediately that the evidence concerning them was most unsatisfactory. The principal witnesses during the long course of this trial were the appellant and the first respondent. The comment made earlier about the quality of the appellant's evidence is the best that can be said about the evidence of the first respondent. Both of them

were witnesses who thought themselves free to say anything in order to advance their respective principal causes; which, it seems to me, had rather more to do with a desire on the part of each to discredit and vilify the other, than with the advancement of their respective cases. Unfortunately counsel representing the parties got caught up in this, which was a factor contributing to the inordinately long duration of the trial. Dealing with the claim for repayment of loans, the magistrate concluded, after an attempt at analysing the evidence, that he was unable to "say the conflict of fact at present under consideration can be resolved upon the merits of the witnesses on one side [and] the demerits of the witnesses on the other side." Counsel who represented the respondents before us (who had not represented the respondents at any earlier stage in the proceedings) informed us that he also was unable to unravel the mess and conflict of evidence dealing with these loans. There is no reason to be anything but sympathetic with these views. Nevertheless, the magistrate decided that R30 000,00 of the money lent had not been repaid and granted judgment for the respondents accordingly. In my view he erred in that regard.

[18] The question of the loans was first raised by the respondents in the first respondent's answering affidavit where he claimed that nothing had been repaid. He referred to a letter dated 7 October 2001 in which the appellant recorded that he owed R24 756,69 being the balance of monies previously lent, and to an acknowledgment of debt dated 6 March 2002 in which the appellant acknowledged a loan of R30 000,00. He said that a further amount of R29 743,31 was lent and advanced by him to the appellant, without furnishing any particulars of it.

[19] In his evidence in chief the appellant acknowledged having borrowed R50 000,00 (more or less) but asserted that the loans dated from 2001/2 and pointed to documents evidencing the repayment of those loans in part, and gave evidence as to an arrangement that the balance would be repaid by way of set-off against amounts due by the respondents to the appellant arising out of their management of camp B which, it will be recalled, actually commenced in 2001. The appellant pointed out, correctly, that there was no evidence at

all of any demands having been made for repayment of money lent between 2002/3 and the date of delivery of the answering affidavit. (The appellant's evidence was that set-off would have seen the loans repaid in full during 2002 or 2003.)

[20] On a cursory reading of his evidence under cross-examination it would appear that the appellant contradicted himself by saying that the sum of monies lent in 2001/2 was about R80 000,00. However the letter of 7 October 2001 which recorded a balance owing of some R24 756,69 illustrates that at that time some R25 000,00 had already been repaid. There was accordingly no contradiction.

[21] Throughout the challenges made under cross-examination to the appellant's assertion that the monies lent in 2001/2 had long since been repaid in full by set off against monies due to him from the business managed at camp B, the appellant protested that no sane business person in the position of the respondents would have let the loan lie unpaid for all those years, during which monies were being paid on a regular basis by the respondents to the appellant arising out of the respondents' management of the business conducted at camp B. That point was well made and no answer to it was offered by the first respondent when he gave evidence. On the contrary, the first respondent's evidence on this subject was most unsatisfactory. When it was put to him that the money had been repaid his typical answer was "please show me the proof of payment"; or "can we see that proof of payment, please?". As I understand the judgment of the magistrate, he concluded that for absence of proof of repayment, R30 000,00 of the amounts lent in 2001/2 should be held to be unpaid. In my view it is probable on the available evidence that the monies lent during that period were in fact repaid, and that it happened long before the events which gave rise to the launch of the application in 2009.

[22] That still leaves the sum of R29 743,31 which, according to the first respondent's answering affidavit, had been lent; but with respect to which no particularity at all was provided in the affidavit. It is improbable that such a

precise amount would be lent and advanced by one person to another without there being a particular reason for the amount being calculated to the last cent. None was advanced by the respondents. But ultimately under cross-examination the first respondent said that two cash payments totalling R30 000,00 had been made by him to the appellant, for which no records had been kept. He could not explain the false allegation in his answering affidavit, but did explain why no records had been kept : that was because, he said, the monies had been given to the appellant to be used to bribe corrupt officials in the municipality. This had not been put to the appellant when he gave evidence. On the other hand once it was said it was not pertinently challenged as to its truth either. The magistrate decided that it had not been proved that the money had been advanced; but that if it had been advanced he would not enforce its repayment given the illegality of the transaction. In my view he was correct. His decision on this issue was not challenged in argument.

[23] The question of the appellant's claim for an accounting aside, which I will deal with last, the remaining issues in this case concern camp C. None of the parties had access to camp C in advance of the leases which were concluded in 2007. The appellant secured the lease in respect of camp C for the same purpose for which the other camps were let, but it appears from the record that the site was not then endowed with everything necessary in order to use it for the accommodation of workers.

[24] It is common cause that during the course of negotiations between the appellant and the municipality for the new leases, the appellant and the first respondent discussed the proposition that the first respondent should manage camp C for the appellant in much the same way as it was to manage camp B. The appellant made a proposal that all income from camp C should be divided between the parties as to 70% for the appellant and 30% for the respondents, but it is common cause that no agreement in that regard was reached.

[25] On 11 July 2007 the appellant and his son (who appears to have assisted the appellant in business) left South Africa to visit Israel. For some

reason, despite the fact that the appellant's leases in respect of camps B and C were to run from 1 June 2007, the agreements were not signed in advance of their departure. They were in fact signed by the appellant on 25 September 2007 after he had returned to the country on 23 September 2007. In the meantime, and whilst the appellant was away in Israel, the respondents continued to manage camp B as they had done before. However the respondents' camp A and camp B were filled to overflowing, as a result of which the respondents decided that they needed to lodge some workers in camp C. This they did in the absence of the appellant. They spent some money buying beds and making some alterations to the buildings (or certainly to one building) in order to accommodate the workers. They earned money by accommodating workers at camp C.

[26] The appellant's evidence is to the effect that all of this was done without his knowledge. The first respondent's evidence is to the effect that he contacted the appellant over the telephone whilst the former was in Israel, and got permission to occupy camp C. The magistrate held on the evidence that there was some communication between the appellant and the first respondent whilst the appellant was in Israel, and that camp C was raised; but found that it had not been established that any agreement was concluded allowing the respondents to occupy camp C. I am not sure that the record supports the magistrate's conclusion that there was communication on the subject of camp C between the appellant and the first respondent whilst the former was in Israel. But there appears to me to be no need to decide that question. In my view the magistrate was correct in his finding that no agreement was concluded at that time for the occupation by the respondents of camp C. In my view the first respondent's evidence on this issue falls to be rejected. In his answering affidavit the first respondent said that he "approached" the appellant during August 2007 requesting consent to utilise camp C, and that he obtained it. The words used in the affidavit seem to me to indicate that, when he attested to it, the first respondent had forgotten that during August 2007 the appellant was not in the country. His affidavit goes on to allege that it was expressly agreed that the appellant and the respondents would share the proceeds generated in camp C equally and that the appellant

would pay the costs which would be incurred in order to render camp C habitable. His oral evidence on the subject was not to the same effect. According to his evidence before the magistrate he asked the appellant (over the telephone) whether camp C was available because he (the first respondent) had more people to accommodate that he could house. According to the respondents the appellant's response was that he had not yet concluded a lease with the municipality but that it was going to happen so "just do what you have to do". According to the first respondent's oral evidence that was the basis upon which the respondents took occupation of camp C. The magistrate was clearly correct in concluding that no agreement was concluded with respect to camp C.

[27] According to the appellant when he returned from Israel he eventually discovered towards the end of October that the respondents had used camp C. When he challenged the first respondent the latter said that he had to do that because the other camps were full. The appellant says that in the circumstances he told the first respondent that he would have to pay the appellant for the accommodation of workers in camp C and that the response was that "we will find a way to get about it". The appellant's son (who also gave evidence) says that he went to camp C to undertake building work himself in November and found that the first respondent's workers were not present on the site. (However it does appear that third party workers were still being accommodated on the site at the instance of the first respondent until the end of December 2007.)

[28] By this time whatever level of trust might have existed between the first respondent and the appellant appears to have been squandered. The appellant decided to run camp C himself and he asked the first respondent to furnish an account for what had been going on in camp C (and for the business conducted under the management agreement on camp B). He received an account and was not happy with it. He asked for another and received it. It was available when a meeting took place between the parties in June 2008. At some stage earlier than that the appellant had received copies of invoices which had been rendered by the respondents to Murray and

Roberts for the accommodation of their workers in camp B. These reflected that Murray and Roberts had been charged R32,00 per person per night whereas the account reflected a charge of R28,00.

[29] The account which was discussed at the meeting of June 2008 did not only deal with the amounts received by the respondents from the employers of those accommodated in camp C. It also reflected claims for expenses made by the first respondent against the appellant with the result that, after splitting the disclosed income in respect of camp C (R140 490,00) between them, the first respondent's account reflected a balance owing by the appellant to the respondents of R72 609,00. The expenses in question turned out (in these proceedings) to be construction expenses and the cost of beds installed in camp C.

[30] The appellant did not accept that the account under consideration at the meeting in June 2008 was accurate in any respect. His evidence is that he required the first respondent to produce another one reflecting rates actually charged, and vouchers for the expenses claimed for camp C, whereafter the appellant would decide on what was to be done. Before us counsel for the appellant argued that a proper conclusion regarding the meeting in June 2008 was that the first respondent was to revert with a full, better and proper account, duly vouched, which might lead in due course to an agreement between the parties as to how to settle their dispute over what was owing and not owing both in respect of camp B and camp C. No agreement was struck beyond that. The first respondent did not revert with anything more by way of an account, and during the course of the present litigation continued to support the accuracy of the account he had provided, and which was discussed in June 2008. But it should be observed that whilst at the trial the first respondent produced invoices and the like in an attempt to vouch his claims for expenses, he refused to produce invoices to vouch the income side of the equation, adopting the view throughout that he was not in law obliged to account to the appellant, and therefore not in law obliged to produce those documents.

[31] It is against that background that

(a) the appellant claimed the money which the respondents had received in respect of those accommodated in camp C; and

(b) the respondents counter-claimed for reimbursement of the money they had expended on improving the buildings on camp C, and buying beds for it.

The magistrate granted the appellant judgment for R70 245,00 (being half the amount collected in respect of camp C by the respondents). After making a careful examination of the expense claims he found that a sum of R77 175,86 had been established by the respondents, but only allowed R70 245,00, recording that the balance could be considered when the respondents produced their account in accordance with the further order made by the magistrate that the respondents should deliver an account to the appellant reflecting their dealings both with respect to camps B and C. The magistrate did not state the basis upon which he was allowing the appellant half the income earned at camp C by the respondents, despite the fact that he had found (correctly) that there was no contract in terms of which that income would be shared.

[32] Anticipating that the magistrate may come to the conclusion that no agreement had been established with regard to camp C, the respondents in the alternative said that they were entitled to their expenses under an enrichment action. That is the basis upon which the magistrate granted the respondents judgment for their expenses. The evidence on the quantification of these expenses took up days of the hearing.

[33] In my view both parties overlooked fundamental flaws in the cases advanced by them with respect to camp C.

[34] The appellant's claim against the respondents with regard to camp C is that the respondents should pay to the appellant all the money they had earned from accommodating workers on camp C. It is the appellant's case that there was no contract between him and the respondents regarding the

accommodation of those workers. In the circumstances no contractual claim could arise. On the assumption that the appellant did establish that he had a right to possession of camp C by the time he left for Israel (and it is not clear that he did), and that he was exercising that possession by placing a security guard on camp C (which is also not perfectly clear), did the appellant suffer any loss by reason of the respondents' occupation of camp C for that short period which could be recovered under what in effect would be a delictual claim for trespass? This issue was not raised at trial. No evidence was led as to any obstruction to the appellant's earning capacity or progress with regard to camp C whilst he was away. On the contrary, all the evidence supports the proposition that camp C would lie unused until the appellant returned and commenced whatever was necessary in order to render it habitable. The appellant did not lose the income which the respondents earned from camp C. No loss at all was suffered. Counsel for the appellant was asked repeatedly to identify the appellant's cause of action for payment of the amount that the respondents were able to earn during their brief period of occupation of camp C, and was unable to answer the question. In my view the magistrate erred in granting judgment in favour of the appellant on this claim.

[35] Insofar as the respondents are concerned their claim with respect to camp C falls into two categories. Firstly they claim the cost of beds. But beds are movable property. They do not contend for a contract in terms of which those beds were sold to the appellant. Their only claim with regard to the beds would be for the return of them. (In fact the appellant's evidence was to the effect that the respondents did take the beds away; but there is no need to deal with the question as to whether that was credible evidence.)

[36] Insofar as the respondents' claim for enrichment arising from the improvement of the property is concerned, that lies against the owner of the property, not against the appellant as a mere tenant on the property. Counsel for the respondents accepted the correctness of these propositions in argument.

[37] Dealing finally with the question of an accounting, the respondents' objection to the order granted by the magistrate with respect to camp B rests on the respondents' contentions that the management agreement was in reality a lease, or that it was an ordinary business transaction of some sort or the other which would not generate an obligation to render and vouch an account. The management agreement was described earlier in this judgment. In my view it must have been a tacit term of the agreement that the respondents would be obliged properly to account to the appellant, at least on demand, for what they were doing in the course of their management of camp B. Any other conclusion would mean that the appellant would be at the mercy of the respondents, and obliged to accept anything said by them to him as to the number of persons accommodated in camp B and as to the rates paid by the employers of those persons, without any recourse. The respondents had discretionary power with regard to the management of camp B. The exercise of that discretion affected the legal and practical interests of the appellant. Without the right to an accounting the appellant's financial interests were vulnerable to any wrongful exercise of the respondents' discretionary powers; or any non-disclosure of income earned in the exercise of those powers. In my view these circumstances gave rise to a fiduciary obligation on the part of the respondents, which justifies the claim for a vouched account of their activities with respect to camp B. (See *Phillips v Fieldstone Africa (Pty) Ltd and Another* 2004 (3) SA 465 (SCA), para 34.) However, no case was made for an account with respect to the respondents' activities on camp C.

[38] In the circumstances both the appeal and the cross appeal succeed in part.

[39] Before dealing with the order to be granted in this matter, it is necessary to say something about the procedure which was followed. Putting aside the issue as to whether it was possible to identify the causes of action relating to camp C in the affidavits delivered in the original motion proceedings, those papers revealed a substantial number of disputes of fact, and real challenges to the credibility of the deponents. The parties listed 13 issues to be referred to oral evidence. The affidavits had little worth as

devices for determining the issues : their value could only lie in their usefulness as tools for cross-examination. (See *Lekup Prop Co No. 4 (Pty) Ltd v Wright* 2012 (5) SA 246 (SCA), para 32.) The general rule, which ought to have applied here, is that a referral to oral evidence should only be employed as the suitable method to arrive at the determination of a dispute where the issues are clearly defined, relatively narrow in compass and capable of speedy resolution. (See *Standard Bank of SA Limited v Neugarten and Others* 1987 (3) SA 695 at 698-699.) Otherwise, where a dismissal of the application is not warranted, the matter should be referred to trial. In a case where that course is warranted, the additional costs which will be incurred in pleading the case are likely to be insignificant in the greater scheme of things. But the advantages to the parties will often be substantial. Pleadings focus the case and the minds of the lawyers responsible for it. Legal and other obstacles to success are more easily discerned in pleadings than they are in the fog of allegation and counter-allegation so often present in a set of affidavits. When the flow of evidence, or preparation for its presentation, reveals that a party needs to change tack, a ready set of rules and precedents governing the right to amend pleadings is available to be employed in a just manner. This case would not have taken anything like the time it did in the court below, and would probably have been confined as to the range of disputes to be resolved, if the claims had been properly pleaded. Those relating to camp C may very well not have been prosecuted because the flaws in them would have been realised when attempting to plead them.

[40] The only substantive orders made in the court below which survive this appeal are the orders in favour of the appellant with regard to his first money claim and with regard to the account he sought. The latter order must be amended by the deletion of any reference to camp C. We heard no argument to the effect that the order needs to be amended in any other respect, as a result of which it must be left intact.

[41] Insofar as costs are concerned the magistrate ordered the parties to pay their own costs incurred in the motion proceedings in the High Court. He gave as his reason the fact that there were so many disputes of fact apparent

from the papers that the proceedings were futile. Whilst I have some sympathy for the magistrate's attempt to render an equitable order with regard to costs, it would not be proper to overlook the fact that when an application is referred to oral evidence the premise is that the motion proceedings survive as the mode of determining the dispute. If the appellant's fault with respect to the institution of motion proceedings instead of an action was such as to justify him being deprived of costs which he would otherwise have been awarded as the successful party, then that ought to have been reflected in the dismissal of the application. The costs incurred in the High Court ought accordingly to be costs in the cause.

[42] However through the fault of both parties something like half of the time this case occupied in the magistrates court was taken up with the claims and counterclaims arising out of the respondents' occupation of camp C. Both parties were unsuccessful. It would be unjust if, in relation to such costs, the appellant was to enjoy the benefit of an order in his favour.

[43] As some success was enjoyed in both the appeal and the cross-appeal it is just that the parties should bear their own costs in the appeal proceedings before this court. An award of costs in each of the appeal and cross-appeal would give rise to a dispute over the division of the expenses incurred in connection with these appeal proceedings, which would be very difficult indeed to determine on taxation. Nevertheless, the costs of preparing the record (but not perusing it) should be shared between the parties.

The following order is made.

1. Each of the appeal and the cross-appeal is upheld in part.

2. The parties are to pay their own costs in each of the appeal and the cross-appeal, save that the respondents are to pay one half of the costs incurred by the appellant in producing (but not

perusing) the appeal record, the liability of the respondents being joint and several.

3. The orders of the magistrate made on 31 January 2014 are set aside and are substituted as follows.

"(a) The respondents are ordered to pay the applicant R72 000,00 together with interest thereon at the rate of 15.5% per annum from 31 January 2014 to date of payment.

(b) (i) The first and second respondents are ordered to render a full account of the business conducted between them and the applicant in relation to camp B upon the immovable property described as Portion of Erf 5333, Richards Bay, KwaZulu-Natal for the period extending from 1 June 2007 to 1 February 2009. The accounting is to be provided within 14 days from the date of this order and is to be properly supported by invoices, a detailed income statement and supporting vouchers.

(ii) The first and second respondents are to provide the applicant with access to the books and accounts of the business in relation to camp B for purposes of an inspection upon 3 days notice by the applicant.

(iii) The first and second respondents are to debate the accounts with the applicant, and the applicant is granted leave to set the matter down for judgment for such sum as may be found to be due to him.

(c) The counterclaims made by the respondents are dismissed.

(d) The costs of the proceedings are to be paid by the respondents, save for one half of the costs incurred by the applicant in the hearing and presentation of oral evidence and argument before this court. The costs thus awarded shall include those incurred in the High Court and those incurred by the employment of counsel.

(e) The liabilities of the respondents flowing from paragraphs (a) and (d) of this order shall be joint and several."

OLSEN J

D PILLAY J

Date of Hearing:	MONDAY, 04 MAY 2015
Date of Judgment: :	MONDAY, 11 MAY 2015
For the Appellant :	Mr H P Jeffreys SC
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