IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD IN RANDBURG

CASE NUMBER: LCC 07R/2010

In Chambers **MAGISTRATES COURT CASE NUMBER:** 92/2010

Decided on: 9 June 2010

In the matter between:

RICA PIGGERY AND ABATTOIR (PTY) LTD **APPLICANT**

and

PHATSOANE MOSES DIRELLO **RESPONDENT**

JUDGEMENT

SABA AJ

[1] This matter came by way of automatic review in terms of section 19(3) of the Extension of Security of Tenure Act 62 0f 1997, as amended ("ESTA")

The Magistrate, Koster granted an eviction order against the respondent on 8 February 2010 as requested by the applicant in his notice of motion. The order requested was as follows:

"1 …….
2……
3 the respondents to pay the costs of this application, and
4 further and/or alternative relief".

[2] After perusal of the record I am satisfied that the provisions of section 9(2)(a), 9(2)(b), 9(2)(c), 9(2)(d), 9(3) as well as sections 10 and 12 of ESTA were complied with, but I am not able to support the magistrates order for costs against the respondent for reasons that will follow hereunder.

[3] On 16 April 2010 a query by Conjwa AJ, asking why a cost order was granted against the respondent, having regard to the practice of this Court that such an order should be granted when there are compelling reasons to do so, was forwarded to the Magistrate. In his response on 30 April 2010, the magistrate stated the following:

> " The general rule is that the successful party is entitled to his costs. Jones and Buckle in commentary of rule 33 indicates that this general rule should not be departed from except where there are good grounds for doing so. There were no good grounds to depart from this general rule. The Magistrate also referred to the following cases:
> - Haakdoornbuilt Boerdery CC and others v Mphelo and others 2007(5) SA 596 (SCA),
> - Hurenco Boerdery (PTY) LTD and others v Regional Claims Commissioner, Northern Province and another 2003(4) SA 280 (LCC)
> - Germishuys v Douglas Besproeiingraad 1973(3) SA 299 NC
> - Hlatshwayo and other v Hein 1999(2) SA 834 CC……..
>
> and lastly stated that the respondent was illegally occupying the property after he was dismissed from employment".

I had an opportunity of looking at these cases and I found them to be relevant to the present case in that they do not change the practice of this court that costs orders should only be granted when compelling circumstances demand so.

[4] Rule 61(1) of the Land Claim Court Rules provides as follows:

"The Court may make orders in relation to costs which it considers just, and it may, in exercising that discretion-

(1) elect not to award costs against an unsuccessful party- who has put a case or made submissions to the Court in good faith in order to protect or advance his or her legitimate interest; or

(2) for any other sufficient reason".

[5] In Hlatshwayo and Others v Hein[1], this Court, per Dodson J (As he then was) then developed a practice not to make costs orders in social interest litigation. The learned Judge stated the following on the question of costs:

"[32] I am of view that this Court must adapt its approach on costs orders to take into account certain factors which are peculiar to it. I am reinforced in my view by the decision of Ackerman J in *Ferreira v Levin NO and Others; Vrykenhoed and Others v Powell NO and Others (No.2)*[2], He refers to the basic rules regarding costs developed by the Supreme Court, including the exceptions to the rules, and goes on to say-

' I mention these examples to indicate that the principles which have been developed in relation to the awards of costs are by their nature sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation. They offer a useful point of departure. If the need arises the rules may have to be substantially adapted'

Although this was said in the context of constitutional litigation, this case can in my view be described as falling under a new area of public interest litigation. This tends to set it apart from conventional litigation".

He continues at paragraph 35 and states the following:

"The court can in my view take judicial notice of the fact that most rural black people have, by reason of a barrage of discriminatory laws applied to them over the years, in most instances been prevented from accumulating any substantial wealth. Given the current costs of litigation, potential applicants will always be faced with the risk of losing what few capital assets they might have managed to accumulate when approaching the court if the "costs follow the result" rule is generally applied……..In my view, this is a case where the general rule must yield to considerations of equity and fairness". (See also National Union of Mineworkers v East Rand Gold and Uranium Co Ltd[3] and Mahlangu v De Jager)[4].

.

[6] Harms ADP, in Haakdoornbuilt Boerdery CC and others v Mphela and others[5]

1 1999 (2(SA 834 (LCC)
2 1996 (4) BCLR 441 (CC)
3 1992 (1) SA 700 (A) at 738A – 739G.
4 2000 (3) SA 145 LCC at 161G – 162B
5 2007 (5) SA 596 (SCA) at page 618A-D

(a Supreme Court of Appeal case), had this to say about the practice of this Court on cost orders:

> "[75] The LCC ordered the participating owners to pay the costs of the proceedings. For this the LCC relied on what it perceived to be a new principle laid down by the Constitutional Court in Alexkor LTD v The Richtersveld Community[6] and it decided to disregard its own practice of not ordering costs in land claim cases in the absence of special circumstances. The Constitutional Court did in my view not purport to lay down any rule and any such rule would in any event have been contrary to its general approach to costs in Constitutional Court matters…..
>
> [76] ….This Court has not yet laid down any fixed rule and there are judgements that have ordered costs to follow the result and others that have made no cost orders. I believe that the time has come to be consistent and to hold that in cases such as this there should not be any costs orders on appeal absent special circumstances".

[7] In Affordable Medicines Trust and Others v Minister of Health and Another[7], Ngcobo J set down the general approach to the award of costs in Constitutional litigation as follows:

> "The award of costs is a matter which is within the discretion of the Court considering the issue of costs. It is a discretion that must be exercised judicially having regard to all the relevant considerations. One such consideration is the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs. The rationale for this rule is that an award of costs might have a chilling effect on the litigants who might wish to vindicate their constitutional rights. But this is not an inflexible rule. There may be circumstances that justify the departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs. The ultimate goal is to do that which is just having regard to the facts and circumstances of the case".

[8] In a recent Constitutional Court judgment, Biowatch Trust v Registrar, Genetic Resources and Others, 2009 (6) SA 232 (CC), Sachs J dealing with the issue of costs said the following:

> "[9] During the thirteen years that have passed since *Ferreira v Levin* (mentioned supra) was decided we have indeed gained considerable experience of costs awards made on a case-by-case basis. A number of signposts have emerged. Without departing from the principle that a Court's discretion should not be straitjacketed by inflexible rules, it is now both possible and necessary to develop some general points of departure with regard to costs in Constitutional litigation…….

6 2004 (5) SA 460 (CC)

7 2006 (3) SA 247 (CC) at page 296G-H and at 297A-B

[20] ….. What matters is not the nature of parties or the causes they advance but the character of the litigation and their conduct in pursuit of it. This means paying due regard to whether it has been undertaken to assert constitutional rights and whether there has been impropriety in the manner in which the litigation has been undertaken.

He referred to section 9(1) of the Constitution which provides that everyone is equal before the law and has the right to equal protection and benefit of the law and then said the following:

"No party to Court proceedings should be endowed with either an enhanced or a diminished status compared to any other. It is true that our Constitution is a transformative one based on the understanding that there is a great deal of systemic unfairness in our society. This could be an important, even decisive factor to be taken into account in determining the actual substantive merits of the litigation. It has no bearing, however, on the entitlement of all litigants to be accorded equal status when asserting their rights in a Court of law. Courts are obligated to be impartial with regards to litigants who appear before them. Thus, litigants should not be treated disadvantageously in making costs and related awards simply because they are pursuing commercial interests and have deep pockets. Nor should they be looked upon with favour because they are fighting for the poor and lack funds themselves. What matters is whether rich or poor, advantaged or disadvantaged, they are asserting rights protected by the Constitution.

[9] Section 5 of ESTA provides:

" Fundamental rights. - Subject to limitations which are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, an occupier, an owner and person in charge shall have the right to-

a) human dignity;
b) freedom and security of the person;
c) privacy;
d) freedom of religion, belief and opinion and of expression;
e) freedom of association; and
f) freedom of movement,

with due regard to the objects of the Constitution and this Act".

This means that when an occupier and/or owner or person in charge of property assert their rights in a Court of law, they should be afforded equal treatment and benefit of the law even on the question of costs, depending on the circumstances of each case.

[10] The general rule laid down in Affordable Medicine (supra) and the point of departure raised by Sachs J in Biowatch Trust regarding costs orders in

Constitutional litigation is still in line with Rule 61(1) as well as the practice of this Court, that costs should only be awarded when there has been an impropriety in the manner in which the litigation has been undertaken or where the conduct of one of the parties has been vexatious or frivolous. The discretion of the Court to award or not to award costs is not taken away either.

[11] I am of view that the respondent in this particular case resisted the application for his eviction in good faith, to protect what he believed to be his right or interest. One will bear in mind that he stayed on the farm for a period of 16 years. The respondent was legally represented throughout the proceedings. It would therefore not be fair and just to punish him with a cost order based on the ill-advice of his legal representative. The record on the other hand reveals that the respondent currently works part time on neighbouring farm. One can only assume that he does not earn much to be able to afford costs.

[12] In the circumstances, I am not satisfied that the considerations of equity and fairness justify the granting of a cost order against the respondent.

[13] In terms of the Magistrate's order, the respondent had to vacate the farm 30 days after the granting of the eviction order. The eviction order was granted on 8 February 2010, 30 days have elapsed. That necessitates the substitution of the dates.

[14] The eviction order is confirmed, save for the substitution of dates and the order for costs which is as follows:

14.1 The date on which the respondent is to vacate the premises in terms of section 12(1)(a) of ESTA (if he has not yet done so) is to be 12 July 2010.

14.2 The date on which the eviction order may be carried out if the respondent has not vacated on 12 July 2010, is the 19 July 2010 (section 12(1)(b).

14.3 No order as to cost.

ACTING JUDGE N SABA

LAND CLAIMS COURT

10(1) (c)

[8] In the circumstances, I am not satisfied that considerations of equity and fairness justify the granting of a cost order against the respondent.

[9] In terms of the Magistrate's order, the respondent had to vacate the farm 30 days after the granting of the order. The order was granted on 8 February 2010. 30 days have elapsed. That means dates have to be substituted.

[10} The eviction order is confirmed, save for the substitution of the dates and order for costs which is as follows:

10.1 The date on which the respondent is to vacate the land in terms of section 12(1)(a) of ESTA (if he has not yet done so) is to be 12 July 2010

10.2 The date on which the eviction order may be carried out if the occupier has not vacated on 12 July 2010, is the 19 July 2010.(section 12(1)(b))

10.3 no cost order is made.

Given this Monday 7 June 2010

REGISTRAR: LAND CLAIMS COURT

1) BY REGISTERED POST TO:

The Magistrate Private Bag X22 Koster 0348 **Fax no.: 0865072647**