IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLY)

Reportable:	~~YES~~ / NO
Circulate to Judges:	YES / ~~NO~~
~~Circulate to Magistrates:~~	~~YES / NO~~
~~Circulate to Regional Magistrates:~~	~~YES / NO~~

Case No:	1423/2018
Matter Heard:	28/02/2020
Judgment delivered:	20/03/2020

In the appeal of:

NTSU TRADING 601 (PTY) LTD	Applicant
and	
TIMASANI (PTY) LTD (IN BUSINESS RESCUE)	First Respondent
WERNER CAWOOD N.O	Second Respondent
SIKHOVA IMPORTERS CC	Third Respondent
AND 53 OTHER RESPONDENTS	Fourth to 53 Respondents

JUDGMENT

MAKOTI AJ

[1] On 13 July 2018 the applicant instituted this application asking that it be heard on an urgent basis. With the first respondent being a company under business

rescue, the applicant first prayed to be granted leave in terms of s133(1) of the Companies Act[1] to institute the legal proceedings against the company.

[2] The main relief that was sought by the applicant was that the court should order the first respondent, alternatively the first and second respondents to comply with the obligations contained in clause 8.6 of the written sale agreement of the immovable property. The sale agreement was concluded between the parties on 7 March 2018 and the applicant purchased a property known as the Remaining Extent of the Farm 738 RD, Kuruman.

[3] Furthermore, the applicant prayed for additional orders *inter alia* that the respondents be directed to grant it possession and vacant occupation of the property. The essence of the orders sought by the applicant were for specific performance by the respondents of the arrangements that were made in the sale agreement.

[4] Clause 8.6 of the agreement reads as follows:

> *"It is agreed that the seller shall be obligated to ensure that all the aforesaid assets are removed from the Property within a period of 2 (two) months calculated from 12 April 2018, being the date of the sale in execution."*

[5] It is common cause that the first respondent did not comply with the obligations in terms of the said clause 8.6 of the agreement. When it became apparent that the first respondent, alternatively the second respondent, were not adhering to the agreement, going to an extent of denying it access into the property, the applicant approached court to vindicate its rights and entitlements as owner.

[6] This was not the first attempt by the applicant to vindicate its rights. On 21 June 2018 the court, per Stanton AJ, dismissed the first urgent application that was

[1] Act No. 71 of 2008.

brought on similar grounds as this matter. When dismissing the application, the court stated amongst others that:

> *"[15] I was not persuaded that access and occupation of the immovable property could be granted without placing the movable assets at risk. In my opinion, the creditors of the first respondent have a direct and substantial interest in the outcome of the application, which rights may be affected if they are not joined."*

[7] Based on the foregoing, the court upheld the point *in limine* of non-joinder and dismissed the urgent application with costs. In the ensuing time after the dismissal of the initial application, the applicant requested to be furnished with a list of the first respondent's creditors, which was duly provided by the second respondent. Although the court expressed a view regarding access and occupation of the property, which could affect the rights of other parties, it did not decide the urgency nor the merits of that initial application. To suggest otherwise is simply wrong.

[8] Upon receipt of the list of the first respondent's creditors, the applicant launched this application, also on urgent basis. Once again, the application was a means for the applicant to assert its ownership rights over the property. The right of ownership was passed on to the applicant on 5 June 2018 when the property was transferred into its name. In terms of clause 8.6 of the agreement, **supra**, the respondents were required to hand over the property to the applicant on or before 12 June 2018. As indicated, that did not happen, as the respondents needed more time to remove all the immovable assets from the property.

[9] Several attempts by the applicant to gain entry into the property were thwarted by the respondents. The respondent instructed security at the main entrance of the property not to grant access to the applicant and its directors or personnel. The gates to the main entrance of the property were locked with chains and

padlocks[2] in order to ensure that the applicant did not gain entry into the property. The main reason for denying the applicant access into the property was that the third respondent needed time to remove the movable assets.

[10] The first and second respondents admitted denying the applicant access and vacant occupation of the property. They filed their answering papers on or about 11 December 2018. Their justification for denying the applicant access and for opposing the application was based on *inter alia* what was stated in paragraph 8 of the answering affidavit, which reads:

> *"9. The applicant relies on the same grounds for urgency as in the previous application. These grounds are simply not enough to allow for urgency to exist on the second time around. The applicant has throughout been made to understand the practical problems the Third Respondent faced as far as removal of the assets were concerned. The applicant was informed of the fact that the process of removal of the movables were underway and that same would be completed as soon as possible, an undertaking that was made good on. The removal of all the assets was completed by 13 August 2018, the first date on which finalisation of the mammoth task could be finalised."*

[11] On the respondents' version, they were only able to grant the applicant access and vacant occupation to its property after 13 August 2018. I am not sure as to whether that justification helps the respondents. It seems to me an admission of their failure to adhere to their obligations as contained in the written sale agreement. Somehow, as I understand their argument, because they kept informing the applicant of their challenges, the applicant was not entitled to insist on being granted access to the property, which is something that they envisaged would happen on 18 June 2018.

[12] The respondents also stated that, in justification of the applicant not being entitled to the orders, was that its sole director Mr Posthumus and his brother had been aware since May 2018 that access to the property was restricted. In my view, what had happened prior to 5 and 18 June 2018 are of little

[2] Annexure JP 36.

significance. The applicant could not, before it became the registered owner and before the date agreed to by the parties, insist on vacant occupation. Beyond those dates the applicant was within its right to take full ownership and have unencumbered access to its property. While access may have been properly restricted before 12 June 2018, I believe that the respondents should then have asked the applicant to allow them further use of the property and not to treat it as an intruder on its property. The respondents adopted the wrong attitude by asserting rights which they did not have.

[13] I do not intend to entertain the issues raised on the merits between the applicant and the respondents as the matter has become moot. It begs logic why the parties have persisted with this application when they have been aware as far back as 13 August 2018 that the case is moot. The respondent's filing of the answering affidavit on 11 December 2018 was unwarranted. They could have just sent a letter to the applicant to propose a closure of the matter as it was obvious that the further conduct of the application no longer had any live implications. For that reason, the respondents are not entitled to be awarded the costs of this application.

[14] The filing of the answering papers, some five months after the issuing of the urgent application was not only opportunistic but amounts to an abuse of the court's processes. Parties need to respect the fact that the court should rather deal with live matters instead of being made to read papers in matters of an academic nature.[3] I do not agree with the submission that the business rescue practitioner was duty bound to oppose this application. That could have been the case if the matter had not become moot. I do not believe that the practitioner had any greater duty to oppose the application even where reasonableness dictated otherwise. To suggest the contrary is misapplication of the legal authorities. What is worse is that the respondents have displayed disregard of the ownership rights of the applicant to take up occupation of the property when in fact their further occupation and access to the property, after

[3] Legal-Aid South Africa v Mzoxolo Magidiwana (1055/13) [2014] ZASCA 141 (26 September 2014). The court held: *"[2] Courts should and ought not to decide issues of academic interest only. That much is trite."*

12 June 2018, ought to have been authorised by the applicant. Simply informing the applicant about their difficulties, when it was clear that the applicant wanted to take occupation, is not enough for this court to award costs in favour of the respondents.

[15] The next question that I have to deal with is whether the applicant itself is entitled to the costs of the application. I have no doubt that the applicant was entitled to insist that the respondents should comply with the terms of the sale agreement, in particular clause 8.6 thereof. However, I am not convinced that the urgent manner in which they approached court for relief was warranted. This is because they were regularly made aware of the difficulties that the respondents were experiencing with finalising the removal of the movable assets. In my view, there were other mechanisms that they could have employed to ensure that the respondents pay rental or other charges for staying on the property beyond 12 June 2018.

[16] As for the reason why the merits of the case were never argued, that seems to me obvious that that would have served no practical purpose. I cannot blame the applicant for it, especially in that on 13 August 2018 the respondents finally granted that which was the subject of the application, being vacant access to the property. A sensible approach that was required from the parties was to put an end to the litigation. Regrettably, that was not to be the case. I do not agree with the applicant's line of contention. That the application was met with a technical defence of lack of *locus standi* does not mean that the first respondent indeed lacked the capacity to pass the impugned resolution. That question will be answered when this court deliberates the merits of the application.

[17] In the matter of *Deutsches Altersheim Zu Pretoria v Roland Heinrich Dohmen*[4] the court stated as follows:

[4] (34/14) [2015] ZASCA 3 (5 March 2015).

"[12] Finally, that the parties chose, when the writing was clearly on the wall, to forego pragmatism for obdurateness is to be decried. The intransigence on the part of both, no doubt, must have further inflated considerable costs already incurred, leaving one to wonder whether the game was indeed worth the candle. In that regard the following dictum by Harcourt J in Mashaoane v Mashaoane 1962 (2) SA 684 (D) at 687G is apposite:

> *'However, … when a case has to all intents and purposes been settled, apart from the question of costs, it is undesirable to permit the question of such costs to become an occasion for incurring a great many further costs and, incidentally, to occupy the time of the Court which could perhaps have been better spent in the disposal of other litigation. I naturally accept that the interests of the litigating public are superior to those of the Court in this but the true interests of the public and the Court probably coincide in this regard and may best be indicated by repeating the latin phrase: interest rei publicae ut sit finis litium.'"*

[18] The court has been told that the application would have failed on the ground of urgency and on the merits, which the reason why the respondents are praying for costs. I disagree with sentiment that, just because a party has reported its failure to adhere to contractual obligations, the innocent party becomes non-suited and may not vindicate its right. On the contrary, such party becomes entitled to vindicate its rights if it feels aggrieved by the non-compliance. I am not persuaded that, because the initial application was dismissed in terms of the orders granted by Stanton AJ, this application also stood to fail. One cannot subject the application to that court order and to determine what a different court would have found on the question of urgency, or the merits of the application, because the court in the initial application only addresses the issue of non-joinder.

[19] Mr Van der Merwe contended that the application stood to be struck from the urgent roll and that the grounds for opposing the urgency remained uncontested. That argument lost sight of the fact that the matter had become completely academic as at that time the respondents had filed their papers and raised objections against urgency. Should the applicant have filed its replying papers, and burden the court with an academic case? I do not think so. The

filing of papers in a matter that had become moot in no way entitles the respondents to costs.

[20] The contention that the applicant has abandoned the case is not supported by the turn of events. In any case, Mr Benade for the applicant indicated that the parties themselves had agreed that the case had become academic and had rolled it over to the roll of 24 August 2018. It begs reasoning as to why the parties did not simply bring an end to the application, seeing that they were *ad idem* that the case was moot. Reasonableness was lacking from both sides who, instead of adopting a pragmatic approach, kept rolling the matter over until it was heard on 6 March 2020. A moot case remained active on the court's roll for a period of more than 18 months, which is a serious abuse of the court's time.

[21] Finally, when dealing with the question of costs, it is trite that this court is vested with the discretion to award or not to award same. Equally trite is the principle that the court has to exercise its discretion judiciously, taking into consideration the full circumstances of the case. This position was confirmed by the court in *Biowatch Trust v Registrar Genetic Resources and Others*[5] where it was held amongst others that:

> *"[29] It is clear that the court of first instance has a discretion to determine the costs order to be awarded in the light of the particular circumstances of the case, …"*

[22] The circumstances of this case were briefly summarised above. I do not proffer a view as to whether the application would have succeeded or failed on merit. I am merely prepared to say that the applicant was in my opinion entitled to insist that the respondents comply with their obligations in terms of the sale agreement. As to why the respondents elected to file papers in a matter that had become moot defeats logic. In the premise, it would be fair to make an order as to

[5] 2009 (6) SA 232 (CC).

costs which would not leave any party burdened. The consideration of fairness dictates that none of the parties are entitled to the costs of the application.

[23] I accordingly make the following order:

"Each party is to pay its own costs, including the costs occasioned by the hearing of the application on 28 February 2020."

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MAKOTI, MZ
ACTING JUDGE
NORTHERN CAPE HIGH COURT
KIMBERLEY

Representation:

For Applicant: Adv. H.J. Benade (oio Roux Welgemoed & Du Plooy)

For Respondent: Adv. L.K. van der Merwe (oio Duncan & Rothman)