

delivered 16/2/18



REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

9/2/2018

E. M. Abusi

CASE NUMBER: A444/2016

In the matter between:

PHINEUS MATHOLO MOTSEPE

REUBEN NELSON

DAMONS BEDRAMS

ALL UNKNOWN UNLAWFUL OCCUPIERS

OF PORTIONS 6, 11, 16, 23, 24, 60, 64, 97 &

119 OF THE FARM ELANDSFONTEIN 440

JQ & FARM ELANDSFONTEIN 570 JQ

FIRST APPLICANT/APPELLANT

SECOND APPLICANT/APPELLANT

THIRD APPLICANT/APPELLANT

FOURTH APPLICANT/APPELLANT

and

LOCAL MUNICIPALITY OF MADIBENG

RESPONDENT

JUDGMENT

KUBUSHI, J

[1] The respondent brought an interdict application against the appellants for restraining occupation and stand allocation at Portions 6, 11, 16, 23, 24, 60, 64, 97 and 119 of the Farm Elandsfontein 440 JQ and Farm 570 JQ ("the stands") at the magistrates' court Madibeng held at Brits. A *rule nisi* in respect thereof was granted returnable on 21 October 2015 whereat, *per* agreement between the parties a final order was granted.

[2] It transpired that the respondent had also launched an eviction order application against the appellants in respect of the same stands. The eviction order was granted unopposed on 21 October 2015, which is the same date on which the final order for the interdict application was granted. It is this eviction order that is the basis for the rescission application and subsequent appeal.

[3] The appellants subsequently instituted a rescission application against the eviction order. The appellants' rescission application had Section A and B. Section A was to stay the eviction order pending the rescission application whilst Section B was to rescind the eviction order. Section A was set down for hearing on 18 November 2015. On that day, *per* agreement between the parties the stay of execution was granted and the rescission application postponed. Section B of the notice of motion, that is, the rescission application was heard on 10 February 2016. The trial court having listened to the arguments by the respective parties found in favour of the appellants. The trial court granted the rescission application and ordered costs to be in the cause. The appellants noted an appeal against the cost order.

[4] The cost order sought by the appellants in regard to Section A of the notice of motion was for an attorney and client cost; and in regard to Section B was for a party and party cost.

[5] Before the trial court, the appellants' submission was that the general rule is that costs follow the event, that is, the successful party should be awarded her or his costs. It was further argued on behalf of the appellants that if costs are granted in favour of the appellants they should be awarded on a punitive scale of attorney and client. When awarding a cost order on an attorney and client scale, the trial court was urged to take into account the misleading actions by the respondent and his legal representatives in failing to place relevant information before the trial court to enable it to come to a just and equitable decision; in not affecting proper service of the application and not informing the trial court about it; as well as misleading the applicants by not informing them of the eviction application even though the respondent was aware that the appellants did not want to be evicted from the stands, which makes it clear that the respondent abused the court process and as such the court's disapproval of this conduct was reflected in the cost order.

[6] The respondent did not argue costs in its written heads of argument but did so in its oral argument. In its argument before the trial court, the respondent contended that the conduct complained of by the appellants was not meant to mislead the court nor was such conduct unbecoming in any way as it was not outside the parameters of the law.

[7] In its judgment the trial court granted an order for costs in the cause. The trial court later provided its reasons for judgment as to costs in terms of rule 51 of the Magistrates' Court Rules. The reasons for judgment indicate that the trial court considered the oral arguments of the parties before it and case law dealing with the discretion of the court in awarding costs in particular awards of punitive cost orders on an attorney and client scale. It, on that basis, could not find that there was bad faith or reprehensible conduct justifying a punitive cost order against the respondent. And, relying on the general rule in the law of costs that the ultimate victor at trial may get her or his costs against the loser and including all interlocutory applications, the trial court accordingly granted costs in the cause.

[8] Before us only the cost order is appealed. The respondent's argument in its heads of argument is based on the attorney and client cost order sought by the appellants in Section A of the notice of motion. The trial court could not have decided on the costs sought in Section A of the notice of motion since that part was not before it. The only section before the trial court was Section B which sought a relief on party and party costs. It is apparent from the record that even though the cost order sought by the appellants in the notice of motion in Section B was for party and party costs, before the trial court what the appellants argued for was a cost order on an attorney and client scale.

[9] It was contended on behalf of the appellants that the merits of the cost order were adjudicated by the trial court without proper consideration of the appellants' basis or entitlement to be awarded costs. It was further submitted that the trial court

erred in finding that there is no basis to award the appellants costs despite being substantially successful and considering the conduct of the respondent and its legal representatives.

[10] In my understanding, the trial court did not disallow costs to the appellants it only disallowed such cost to be awarded on an attorney and client scale. The trial court was well aware that the appellants as the successful parties were entitled to their costs of suit. It should be remembered that in Section B of the notice of motion the appellants sought a cost order on a party and party scale but when arguing before the trial court the appellants urged the court to award costs on attorney and client scale. The trial court having found in favour of the appellants declined to order costs on an attorney and client scale and instead the award was for costs in the cause.

[11] A 'costs in the cause' cost order is an award of costs made in interlocutory proceedings which are to stand over and to be paid by a party who is ultimately ordered to pay the costs of the main action.¹

[12] It means that the trial court awarded costs in favour of the appellant as a successful party but the costs are deferred to the end of the matter and then only to be paid to the appellant if they succeed in the main application. The costs are awarded with a proviso that the appellants first prove that they are the legal

¹ See Erasmus: Superior Court Practice Vol. 2 p D5-3.

occupants of the stands in issue. In such an instance, it will not be necessary for the parties to argue the costs afresh at the end of the main application as they have already been awarded. This is different from an order for reserved costs that will have to be argued afresh at the hearing in due course.

[13] In terms of the cost order granted, the appellants are entitled to the costs of the rescission application only if it can be found that they are legally entitled to occupy the stands in issue. It would be unfair to order the respondent to pay the costs of the application only to find later that the appellants were in illegal occupation of the stands and should not have in the first place been allowed to defend the main application.

[14] The parties are agreed, correctly so, that the issues in this matter are constitutional issues and an order of costs should be granted along those lines. Having concluded that the appellants have been granted costs I see no reason to delve into these issues. What requires further adjudication is whether the cost order as granted by the trial court is final in nature and thus appealable.

[15] A rescission of judgment application is interlocutory in nature. The order granted as a result is purely procedural and disposes of no issue in the main litigation between the parties. The issues raised therein do not in any way bind the court that will in due course, if the litigation continues, be seized of the main

litigation. In the circumstances such an order would not be appealable.² The issue before us, however, is not the application itself but the cost order granted.

[16] In its heads of argument, the appellants state that the cost order granted by the trial court is final in nature and thus appealable. Whereas the respondent's submission is that the order is not final since it is an interlocutory application and the matter is part heard.

[17] Normally such costs as granted by the trial court are granted in interlocutory proceedings where the matter is still to be decided at a later stage. I would think that the general principle of finality of an order which renders it appealable is not appropriate for applicability herein. The final award of costs is dependent on the final outcome of the main application. At this stage of the proceedings, it cannot be determined whether the appellants are justified in occupying the stands in issue. It is rather premature to decide, at this stage, whether a particular litigant was justified to institute or defend the main action because the rescission of judgment outcome is not a focal point on the awarding of costs. As far as the award of costs is concerned, the rescission application cannot be decided in isolation to the occupation of the stands by the appellants. I would in that regard rule that the cost order is not appealable at this stage of the proceedings and has to await the final outcome of the main application.³

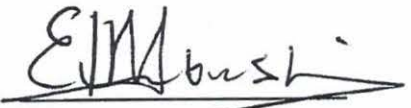
² Adams & Adams v Pointer Fashion International (324/2013) [2014] ZASCA 11 (19 March 2014) para 14.

³ Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban, and Others 1986 (2) SA 663 (A) at 683A and Macassand CC v Macassar Land Claims Committee & Others (594/03) ZASCA [2004] (30 November 2004).

[18] Both parties were late in filing their heads of argument. Each party applied at the commencement of argument and was granted condonation for such late filing.

[19] I would in the circumstances propose the following order:

1. The appeal is dismissed with costs.


E.M. KUBUSHI
JUDGE OF THE HIGH COURT

I concur and it is so ordered


T. MAUMELA
JUDGE OF THE HIGH COURT