

Reportable: Yes / No Circulate to Judges: Yes / No
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Circulate to Magistrates: Yes / No

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division)

Case no: 79/02

Date heard: 2003-06-13

Date delivered: 2003-06-20

In the matter of:

JOHANNES SEREBOLO

APPLICANT

versus

THEOPHILUS CECIL PATON

1st RESPONDENT

KLIPDRIFT HOUSING CC

2nd RESPONDENT

Coram: **MAJIEDT J**

JUDGEMENT ON COSTS

MAJIEDTJ:

1. In this matter the applicant's Counsel had, during the course of his argument, withdrawn the applicant's application and has asked me to decide the matter of costs. The respondents seek a special costs order on the scale as between attorney and client as far as the main application is concerned and an order that the applicant pays the costs of the respondents' application for security for costs.

2.1 In order to decide the matter of costs, it is necessary to set out very briefly the facts of this matter.

2.2 The applicant sought an order in his notice of motion for a declarator that he is entitled to a transfer of a 50% member's interest in the second respondent and further an order for specific performance to give effect to the aforementioned declarator.

2.3 In the alternative the applicant sought an order declaring

that first respondent is bound by a certain written agreement annexed to his founding papers and also an order interdicting the first respondent from disposing of certain immovable property until a dispute between the applicant and the first respondent has been finalized.

2.4 In addition to the foregoing the applicant sought an order that he is entitled to return to certain property and a house situated thereon and in the alternative thereto an order declaring that his eviction from the said property by the first respondent is unlawful.

2.5 As a further alternative the applicant sought an order directing the first respondent to compensate him for certain improvements made to the property. He also sought an order for the restoration of the possession of certain movables which he alleged had been spoliated from him by the first respondent.

2.6 The applicant also sought an order that the aforementioned relief (par. 2.4 and 2.5 above) operate as interim orders until the final resolution of a dispute. He also sought the usual costs orders as against the first respondent.

3. The dispute between the parties arises from the fact that the second respondent close corporation had purchased certain immovable property known as the farm *Mount Rupert* and certain business situated thereon, *inter alia* a

hotel, liquor store and a general merchant store. This property had been purchased from another close corporation in the sum of R560 000.00, of which an amount of R410 000.00 was raised through a mortgage bond from a financial institution.

4. It is the applicant's case that there is an oral agreement between him and the first respondent that the applicant was to hold a 50% member's interest in the second respondent close corporation. The respondents on the other hand aver that certain preconditions had to be met before the applicant would become entitled to the aforesaid 50% member's interest. These conditions were that the applicant was to pay an amount equal to half of the purchase price of the aforementioned Mount Rupert or sign surety for such amount.

5. Prior to the aforesaid oral agreement between the

applicant and the respondents, it is common cause (or at least not seriously disputed) that the applicant had:

5.1 Been a lessee on Mount Rupert in terms of an agreement of lease with the sellers of the said property; and

5.2 Concluded a number of written agreements in terms whereof it was envisaged that he would purchase the property from the sellers.

All these agreements mentioned in 5.2 above had come to nought, because the applicant was not able to raise finances on his own to purchase the property. As a consequence he thereafter approached the first respondent with a view of purchasing the property together. There is a dispute as to what the terms of the further agreement was between the applicant and the first respondent with regard to the purchase of the property as I have already alluded to in par. 4 above.

6. This application was doomed to certain failure from the very start. There are a myriad of reasons for this, but the following will suffice:

- a) In electing to proceed by way of application the applicant who, as I will show, had been very well aware of a possibility of a serious dispute of fact arising in this matter, ran the risk that a Court would have to consider the matter on the facts as averred by the respondents together with those facts which are common cause between the parties;

See: **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3)SA 623 (A)** at 634 (H).

- b) This particular application was preceded in 2001 by an urgent application for an interdict *pendente lite* brought by the applicant against the very same respondents as well as the sellers of the immovable

property (the farm *Mount Rupert* referred to above) and the Registrar of Deeds. As fate would have it, I had also presided in the said urgent interdict application. In that matter the applicant sought to restrain the present two respondents from having the property transferred into the second respondent close corporation's name, pending the finalization of an action to be instituted by the applicant. That application for an urgent interdict was dismissed with costs. Of considerable importance are the reasons for dismissing the application, which entailed the following:

- i) that the applicant has alternative remedies readily available at his disposal, *inter alia* **a claim for damages** and
- ii) that any action for specific performance would be

bereft of any reasonable prospects of success.

As a matter of interest-- the applicant had foreshadowed the institution of an action against the respondents in that application, which invariably raises the question why the application route was followed herein.

- c) The applicant's claim for specific performance would be untenable in law, since it is common cause between the parties on the papers before me that the applicant and the first respondent were at extreme loggerheads with each other and would never have been able to co-operate properly within a close corporation as co-members.
- d) On the applicant's own papers it was clear that the applicant had in writing abandoned his claim for improvements to the property.

7. During the course of applicant's counsel's argument, it became very clear to all concerned, more particularly to the applicant himself and to his legal representatives, that their application was stillborn. After a short adjournment, I was informed by the applicant's counsel that he was instructed to withdraw the application and that I should decide the matter of costs.
8. Mr. Van Niekerk, who appeared for the respondents, has motivated the respondents' claim for a special costs order on the following grounds:
 - a) That it should have been apparent to the applicant and to those advising him that, based on my judgement in 2001 on the urgent interdict application, a claim for specific performance was not feasible at all.

- b) That a number of matters of considerable importance had not been disclosed in the applicant's founding affidavit in the main application and when these were disclosed in the respondents' answering affidavits, the applicant made no effort to reply thereto at all.
- c) That the applicant had expressly in writing abandoned and/or waived his claim for compensation for improvements, yet he persisted in seeking such relief in the main application.
- d) That the applicant had already during 1999 been aware that there was a genuine dispute of fact on material aspects between him and the first respondent.

Mr. Van Niekerk emphasized that he was not seeking a special costs order so as to punish the applicant, but

rather to ensure that the respondents are not left out of pocket through this litigation.

9. The leading authority on special costs orders is **Nel v Waterberg Landbouwers Ko-operatieve Vereeniging 1946AD 597** at 607 wherein it was held that

“the true explanation of awards of attorney and client costs not expressly authorised by statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just by means of such an order, to ensure more effectually that it can do by means of a judgement for party and party costs **that a successful party will not be out of pocket in respect of the expense caused to him by the litigation**” (my emphasis).

10. I have great sympathy with the applicant in this matter, a sentiment which I also conveyed to his counsel during the course of his argument. I hold the very firm view that the applicant has a clear remedy as against the sellers of the immovable property (*Mount Rupert*), at least for the sum

of R129 000.00 which the applicant has paid in terms of a written agreement to certain third parties, as part of a purchase price negotiated between the applicant and the said sellers of the immovable property. I also hold the *prima facie* view that the clause in the written agreement whereby the applicant had expressly abandoned and/or waived his right to compensation for improvements which I had referred to herein before, may very well be an unfair or excessive penalty stipulation, subject of course to the provisions of the Conventional Penalties Act of 1962. It may even be that the applicant has a claim for damages as against the present respondents arising from the oral agreement between them.

11. Mr. Mokhari, who appeared for the applicant herein, has urged upon me not to make a special costs order as sought by the respondents. Notwithstanding my

considerable sympathy towards the applicant, I am not persuaded that this is a case where I should cause litigants such as the respondents to be out of pocket as a consequence of litigation which had been ill-conceived and ill-prepared. From what I have mentioned herein before, it is quite apparent that the respondents are not to blame for the predicament in which the applicant finds himself. In order to ensure fairness and justice between the parties, I am of the view that I should exercise my discretion with regard to the matter of costs of the main application in favour of the respondents.

12. As far as the application for the security for costs is concerned, I am of the view that for the reasons set out above, the respondents were justified in seeking security for their costs as against the applicant. It must have been quite apparent to the applicant and to those advising him:

- a) That they had adopted the wrong procedure in litigating by way of application; and
- b) That the application was, in any event, doomed to failure from the very start.

Consequently I am of the view that the applicant should also be ordered to pay the costs of the respondents' application for security for costs.

13. I therefore issue an order as follows:

- a) The applicant is ordered to pay the respondents' costs in the main application on a scale as between attorney and client.**
- b) The applicant is ordered to pay the respondents' costs in the application for security for costs.**

**SA MAJIEDT
JUDGE**

ADVOCATE FOR THE APPLICANT	:	ADV W MOKHARI
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ADVOCATE FOR THE RESPONDENTS:	ADV JG VAN NIEKERK
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ATTORNEY FOR THE APPLICANT	:	MAGABANE INCORPORATED
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ATTORNEY FOR THE RESPONDENTS:	AB HORWITZ
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DATE OF HEARING	:	2003-06-13
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DATE OF JUDGEMENT	:	2003-06-20
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