REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case Number: 2023-074113

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
30 October 2024	______________________
DATE	SIGNATURE

In the matter between:

TOTALENERGIES MARKETING SOUTH AFRICA (PTY) LTD First Applicant

KTB INVESTMENTS (PTY) LTD Second Applicant

And

LEBA SOLUTIONS (PTY) LTD Respondent

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 30 October 2024.

JUDGMENT

MUDAU, J:

[1] This is an application for eviction as well as costs against the respondent.

[2] On 26 July 2023, the first applicant issued an application against the respondent for an order seeking, inter alia, the eviction of the respondent from a property situated at Cnr Witkoppen and Newmarket, Northland Corner, Northriding, Johannesburg, and more fully described as Portion I of Erf […] H[…] Township, Registration Division IQ, Province of Gauteng, registered under T64939/95 ("the property").

Background

[3] It is the applicant 's case that the respondent had no legal basis for its continued occupation of the premises from June 2022 to February 2024. The property is owned by the first applicant. The property is zoned for commercial use and is used as a garage. The applicant leases out the property to approved dealers for purposes of operating the fuel filling station. The respondent entered into a verbal lease agreement from the erstwhile dealer, Mr Dayalan Perumal ("Perumal"), who operated the filling station situated on the property. In terms of such verbal lease agreement, the respondent let a portion of the property, from Perumal, for purposes of conducting a vehicle repair business ("the business"). On 20 July 2022, Perumal ceased trade, and vacated the property.

[4] On 25 July 2022, the applicant placed a new dealer on the Property, KTB Investments (Pty) Ltd ("KTB"), Mr Ravi Govender ("Govender"), the director of KTB, agreed to continue with the verbal lease agreement with the respondent. The respondent however failed to comply with its payment obligations, and accordingly, KTB, it is common cause, cancelled the verbal lease agreement with the respondent. Notwithstanding the written notice of the cancellation of the lease agreement, the respondent failed to vacate the property.

[5] The respondent, in opposing the motion, delivered its Answering Affidavit, which included a point *in limine,* regarding the non-joinder of the current operator of

the fuel service station. Upon an application for the joinder of the second applicant, the respondent filed a notice to oppose the joinder. Subsequently, the respondent delivered a notice of intention to abide. The first part of the relief sought pertaining to eviction is now an academic exercise.

[6] On 31 January 2024, this court (per Bokaba AJ) made an order, inter alia, joining KTB as the second applicant. Not long thereafter, and at the end of February 2024, the respondent vacated the property consistent with the relief as outlined in prayer 1 of the Notice of Motion nearly two years after the first eviction demand, but without tendering costs for opposing the motion, which must be construed as a withdrawal from the litigation. The resultant implication being that the applicants ought to be deemed as having succeeded in its claim. In any event, there is plainly no merit for opposing the relief in the first instance. It its trite that a successful party to litigation ordinarily would be awarded costs of the suit.[1]

[7] However, the subletting agreement, albeit contrary to the main agreement, as it was not with approval of the first applicant, is silent regarding the scale of costs following court processes. It is trite that the court makes an order of attorney and client costs to mark its disapproval of the conduct of the losing party. It is trite that in awarding costs, the court has a discretion to be exercised judicially upon a consideration of the facts in each case, and that in essence the decision is a matter of fairness to both sides. However, the respondent in opposing this application in the first place acted unreasonably thereby caused the applicants to incur unnecessary costs.

[8] In *Public Protector v South African Reserve Bank*[2] the majority of the Constitutional Court, with reference to *Orr v Solomon*, stated at para 223:

> "More than 100 years ago, Innes CJ stated the principle that costs on an attorney and client scale are awarded when a court wishes to mark its disapproval of the conduct of a litigant. Since then this principle has been

[1] *Merber v Merber* 1948 (1) SA 446 (A) at 452.
[2] [2019] ZACC 29; 2019 (6) SA 253 (CC); See also *Zuma v Democratic Alliance* 2021 (5) SA 189 (SCA) at paras 47-52; *MultiChoice Support Services (Pty) Ltd v Calvin Electronics and Another* 2021 JDR 2529 (SCA) at para 33; *Mkhatshwa and Others v Mkhatshwa and Others* [2021] ZACC 15; 2021 (5) SA 447 (CC) at para 21.

endorsed and applied in a long line of cases and remains applicable. Over the years, courts have awarded costs on an attorney and client scale to mark their disapproval of fraudulent, dishonest or mala fides (bad faith) conduct; vexatious conduct; and conduct that amounts to an abuse of the process of court."

[9] In opposing the application and eventually vacating the leased premises without tendering costs is an abuse of court process justifying censure.

Order

[10] That the respondent pays the applicants' costs on the scale as between attorney and client, which include the reserved costs occasioned by the joinder application.

MUDAU J
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

Counsel for the Applicants:	Adv. Tumelo Qhali
Instructed by:	Messina Inc.
Counsel for the Respondent:	Mr Peter Zwane
Instructed by:	Peter Zwane Attorneys

Date of Hearing:	28 October 2024
Date of Judgment	30 October 2024