IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE NO: 9645/2023
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED: YES/NO
DATE: 06/11/2025
SIGNATURE: **Naude-Odendaal J**

In the matter between:

VAKANAYENA ENGINEERINGS & SCAFFOLDING (PTY) LTD	**1st APPLICANT**
KENNETH EDWIN NKWAMBA	**2nd APPLICANT**
BUSI ABIGAIL MATHEBULA	**3rd APPLICANT**

and

PEZULA ACCESS SCAFFOLDING (PTY) LTD	**1st RESPONDENT**
MICHAEL JAMES ORGANISATION (PTY) LTD	**2nd RESPONDENT**

JUDGMENT

NAUDE-ODENDAAL J:

[1] This is an application for costs only. On the 31st day of October 2023 an order was made by agreement between the parties which ordered as follows:-

> *"1. The first applicant is ordered to pay into the trust account of Frik van Schalkwyk Attorneys the amount of R166 536.25 (144,814, 13 excluding VAT) within 3 days from the date of this order, in. respect of the maintenance and repair work on the truck previously used on the Foskor site, which payment will be regarded as a payment without prejudice.*
>
> *2. The applicants are interdicted, pending the final determination of the remaining disputes between the parties, from selling, alienating or encumbering the following movable properties:*
>
> *2.1 Portion 0, Erf 2[…], Phalaborwa Extension 8, Registration Division LT, held by deed of transfer T[...]. A copy of [the] deed of Transfer in respect of the immovable property is annexed as Annexure "A".*
>
> *2.2 Portion, Erf 1[...], Phalaborwa Extension 1, Registration Division LT, held by deed of transfer T[...]. A copy of the deed of Transfer in respect of the immovable property is annexed as Annexure "Y".*
>
> *("the immovable properties';*
>
> *3. The first respondent is interdicted from proceeding with the sale of the immovable properties based on the auction of 19 October 2023.*
>
> *4. The costs of this application is reserved."*

[2] The application came before court on the 31st of October 2023 as an urgent application. The parties reached a settlement agreement, which agreement was then made an order of court as per the above court order. This application is therefore in respect of the reserved cost order between the Applicants and the 1st Respondent, as the 2nd Respondent did not oppose the application.

[3] The Applicants submitted that there are several disputes between the Applicants and the 1st Respondent, with a long history, but the immediate cause of action for the urgent application was that the 2nd Respondent, on the instructions of the 1st Respondent, had advertised and put up for sale at a public auction two immovable properties belonging to the Applicants, without a court order or consent to do so from the Applicants.

[4] According to the Applicants, the Applicants ceded the properties to the 1st Respondent in terms of a court order made by this Court, as security for payment obligations due to the 1st Respondent by the 1st Applicant, in respect of a service project with Phalaborwa Mining Company (Pty) Ltd. The Respondents wanted to sell the properties to recover a disputed debt allegedly owed to the 1st Respondent by the 1st Applicant, in respect of an unrelated service project with Foskor Mining (Pty) Ltd.

[5] The Applicants submitted that as it is apparent from the aforegoing, the main objective of this application was to stop the Respondents from selling the Applicants' properties unilaterally and unlawfully, without a court order or consent of the Applicants. The above settlement agreement was then reached which was made an order of court.

[6] The Applicants submitted that it is apparent from the aforegoing that the Applicants achieved the main objective of the urgent application, as the outcome and effect of the Court Order was to immediately stop the 1st Respondent from selling the Applicants' properties or undertaking any related action unilaterally without a court order.

[7] It was further submitted by the Applicants that the order under paragraph 1 of the Court Order for payment of R166 536.25 was not final, and the payment was to be made without prejudice. According to the Applicants the claim for this amount was dubious, fortuitous and had already been strongly disputed by the 1st Applicant before the 1st Respondent set out to sell the Applicants' properties to recover this amount. It was submitted that payment of such claims under the Foskor Project were fully covered and regulated in terms of the court order by the Pretoria High Court.

[8] I pause here to state that from a reading of the Founding Affidavit in the urgent application, it is clear that there is a dispute between the parties in respect of whether or not an amount is due and payable by the Applicants to the 1st Respondent. and if indeed due and payable, what amount.

[9] The Applicants stated in paragraph 10.4 of the Founding Affidavit as follows:-

"The First Respondent's actions are unconscionable; the Honourable Court should consider that even if in the unlikely event the First Applicant was obliged to pay for the repairs of the truck scaffolding after they were repossessed by the First Respondent, this would amount to only R969 420.51."

[10] The 1st Respondent submitted that the Applicants' could never have been successful in enrolling the matter as an urgent application for the following reasons:-

10.1 First, an identical application was launched under case number 9365/2023 and set down for hearing on 17 October 2023. This application was dismissed with costs for lack of jurisdiction. Enrolling an identical matter does not cure the lack of jurisdiction.

10.2 Second, in the first application, the presiding Judge stated that had he not found that the court lacks jurisdiction, he would in any event have struck the matter for lack of urgency. According to the 1st Respondent, this is common cause between the parties.

10.3 Thirdly, the auction was held on 19 October 2023. Both applications served before court after the auction was held. This rendered the relief sought moot.

[11] The 1st Respondent further submitted that the main application was set down for hearing on 31 October 2023 on this court's urgent roll. On the day of the hearing of the matter, the parties agreed on a draft order, which was subsequently made an order of court.

[12] In respect of the relief sought in the notice of motion, it is submitted by the 1st Respondent that the Applicants would not have been successful in respect of prayer 1 as the matter had already been adjudicated on previously and the date for the auction had already passed. In respect of prayers 2 and 3 of the notice of motion, no relief was granted. In respect of prayer 4 of the notice of motion, no relief was

granted. Prayer 4 was an alternative to prayers 2 and 3. In respect of prayer 5 of the notice of motion, as an alternative to prayer 4, was agreed to between the parties.

[13] The 1st Respondent submitted that in respect of the actual relief contained in the order of 31 October 2023, that paragraph 1 of the order was granted in favour of the 1st Respondent and paragraph 2 was granted against the Applicants.

[14] It should be noted that only paragraph 3 of the court order was granted in favour of the Applicants which stipulated that the 1st Respondent is interdicted from proceeding with the sale of the immovable properties based on the auction of 19 October 2023.

[15] The 1st Respondent submitted that there is no reason why the court ought to deviate from the general rule pertaining to costs.

[16] It is a fundamental principle that, as a general rule, the party who succeeds should be awarded costs. and this rule should not be departed from except on good grounds.

[17] The party in whose favour judgment is given is not necessarily the successful party - the other party may, nevertheless, have succeeded on the issues in dispute. In determining who the successful party is, the court will attempt to ascertain which of the parties has been substantially successful. (See **Herbstein & Van Winsen, The Civil Practice of the High Courts of South Africa, Fifth Edition, Volume 2, page 958**)

[18] In the present matter, both parties were equally successful. The Applicants managed to interdict the 1st Respondent from proceeding with the sale of the immovable party, but equally the Respondents managed to secure security in the form of payment for maintenance and repair work on the truck previously used on the Foskor site, although the payment was made without prejudice. The 1st Respondent also obtained an order against the Applicants in the form of security that the Applicants are interdicted, pending the final determination of the remaining

disputes between the parties, from selling, alienating or encumbering the immovable properties as listed in the court order.

[19] In my view, it is against this mutual performance by the respective parties that the settlement agreement was reached which was made an order of court. Both parties were ordered to perform in some way. In light thereof, I am of the view that a justifiable cost order would be that each party should pay his/her/own costs of the application on 31 October 2023.

[20] This then brings me to the costs of the current application for costs, neither party was successful and therefore also in the current application for costs, should each party pay his/her/its own costs.

[21] Accordingly, this court therefore makes the following order:-

1. Each party is ordered to pay his/her/its own costs in respect of both, the application of 31 October 2023, as well as the application for costs on 3 November 2025.

M. NAUDE-ODENDAAL
JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

HEARD ON: **3 NOVEMBER 2025**
JUDGMENT DELIVERED ON: **6 NOVEMBER 2025**

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