LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT DURBAN MAGISTRATE COURT

CASE NO: LCC 18/2002

In the matter between:

MM NDLELA AND OTHERS	**Applicants**
And	
LJ NEL	**1st Respondent**
MINISTER OF LAND AFFAIRS	**2nd Respondent**
DIRECTOR GENERAL OF LAND AFFAIRS	**3rd Respondent**

JUDGMENT

A. INTRODUCTION

[1] The parties in this matter settled the issues that gave rise to this application when they appeared before Court on 28 February 2014. The only issue on which they could not reach agreement was that of costs. Consequently, the issue that remains to be decided is who must pay the costs. This matter has a long and rather unfortunate history, which is set out in some detail hereunder.

B. BACKGROUND

[2] The applicants lodged claims in terms of the provisions of section 16 of the Land Reform (Labour Tenants) Act No 3 of 1996 (the Act). The first respondent, as the owner of the farm Winterhoek, in the district of Mooi River, Kwa-Zulu Natal, opposed the application.

[3] The third respondent referred the application to this Court, which in turn, referred the matter to arbitration, where a conditional determination was made by the arbitrator on 25 January 2005. The conditional determination read as follows:

> " 48.1 Applicant One, Two, Three, Four, Five, Six, Seven and Eleven are declared to be labour tenants.
>
> 48.2 Joint ownership of the land coloured orange on map 1 of the farm Winterhoek on page 15 of Exhibit "C" approximately 85 hectares in size is awarded to Applicants, One, Two, Three, Four, Five, Six, Seven and Eleven.
>
> 48.3 The award in paragraph 48.2 is conditional upon the fact that if water is not drilled on the awarded land yielding at least 4900 liters per day then paragraph 48.2 is not to be implemented and the matter has to be referred back to the arbitrator for further consideration.
>
> 48.4 there will be no order as to costs. "

This determination was made an Order of Court on 12 May 2005.

[4] The third respondent failed to comply with the court order and this Court, upon application by the first respondent on 23 April 2007, ordered the second and third respondents to give effect to the arbitrator's conditional determination by a certain date and set a time limit by which the third respondent had to report the outcome of the drilling exercise to it. The Court also, in a show of its displeasure at their inaction, ordered the second and third respondents to pay the first respondent's legal costs on a scale as between attorney and client.

[5] The second and third respondents failed to comply timeously with the court order of 23 April 2007 in that the drilling exercise was only concluded on 17 September 2007. The drilling exercise was successful as the water yield complied with the arbitrator's conditional determination, with the result that paragraph 48.2 of the determination could be implemented.

[6] Sections 23, 26 and 28 of the Act oblige the second and the third respondents to compensate a land owner for awarded land, grant advances or subsidies for acquisition of the awarded land and provides that a court order awarding land should be lodged with the Registrar of Deeds who must note the court order against the title of the land concerned. The second and third respondents failed to comply with any of the abovementioned provisions of the Act.

[7] The first respondent then launched an interlocutory application on 19 November 2007, for an order to give effect to the court order dated 12 May 2007 against the applicants, the second and third respondents. The latter respondents opposed the application on the basis that, *inter alia*, the applicants had failed to apply for the advance or subsidy and that the second respondent could not grant an advance or subsidy without there first having been an application therefor. Furthermore, they argued that various impact studies had to be conducted and the land developed before the applicants could occupy it and that it was in fact the first respondent's responsibility to relocate and compensate the applicants.

[8] The applicants also opposed the application and expressed a reluctance relocate to the alternative land.

[9] The interlocutory application was heard on 14 April 2008 and the parties' settlement agreement was made an order of court on the following day. The salient terms of the order for purposes of this judgment are the following:

> "…5. On or before 20 June 2008, the applicants are directed, if assistance is required to apply from date of service of this order by the Sherriff, for advances and subsidies envisaged in terms of section 26 and section 27 of the Land Reform Act 3 of 1996.
>
> 6. The Sheriff is ordered to serve this court order to each of the Applicants and advise each of the Applicants to approach Mr Sbaningi

Mngadi, an official of the Department of Land Affairs in respect of the applications to be made in terms of section 26 and section 27 of the Land Reform Act of 3 of 1996.

7. The Sheriff is hereby instructed to notify and to provide proof of service of the said order to Mr Mngadi of the Department of Land Affairs.

8. The Second and Third Respondents are directed to:

(a) Consider all applications for advances and subsides by the Applicants from the receipt of each such application.

(b) To notify this court and the attorney of the First Respondent of the date of receipt of each such application and of the final decision of the Second Respondent within 10 days from receipt of each such application and within 10 days of the final decision of the Second Respondent.

9. Failing compliance by the Applicants with paragraph 1 above or failure to grant Applicants such advances and subsidies, leave is granted to the First Respondent to approach this court on the same papers as supplemented for appropriate relief, including an appropriate cost order.

10. Should the Second and Third Respondent fail to comply with any part of this order, the First Respondent is granted leave to approach this court on the same papers as supplemented for appropriate relief including an appropriate costs order.

11. The costs in respect of 14 April 2008 are reserved…"

[10] The applicants and the second and third respondents failed to comply with the 15 April 2008 court order. The first respondent then approached this Court on 17 February 2009 for appropriate relief against the applicants and the second and third respondents given their failure to comply with that order.

[11] The applicants opposed the application on the basis that they wanted to pursue an appeal or review of the previous proceedings. The application, which was

due to be heard on 17 February 2009 was postponed to 18 May 2009. On 15 May 2009, applicants launched an urgent application for postponement of the hearing set down for 18 May 2009 and the matter was then set down for 28 July 2009. However, on 21 July 2009, the applicants launched an application for the setting aside of the arbitration hearing including the determination made by the Arbitrator, which incidentally had been made an order of Court. This application was set down for hearing on 9 March 2010.

[12] On 9 March 2010, the applicants requested a postponement of the matter as their attorney was not able to attend court on that day. The postponement was refused with costs, and the applicants' counsel having withdrawn from the matter when the postponement was refused, their application for the setting aside of the arbitrator's determination was also dismissed with costs. The matter was heard by the late Judge Bam and his written judgment was handed down on 3 March 2011.

[13] Driven by the applicants' failure to, yet again, comply with the orders of this Court, the first respondent in July 2011 filed a notice in terms of Rule 22(2) whereby he amended the relief sought in his interlocutory application launched in November 2007. The first respondent now sought the eviction of the applicants from the farm in terms of section 7(2)(b) of the Act.

[14] In the intervening period the applicants had launched an abortive application against the first respondent with regard to grazing rights over the farm. The Court refused to hear that application stating that it would only do so once the other matters had been finalised.

[15] Although the Court issued an order on 13 September 2011 directing that this matter would be heard on 27 October 2011 and that no further postponements would be entertained, it did not proceed. The second and third respondents, 3 days before

the hearing of the matter on 27 October 2011, filed an affidavit opposing the eviction of the applicants from the first respondent's farm. The basis of their opposition being, inter alia, that a more up to date study had to be conducted to determine the borehole's daily yield of water, that various obligatory impact assessment studies had to be conducted on the alternative land before it could be made habitable for the applicants and that to relocate them, without there being proper facilities on that land, would cause the applicants undue hardship and suffering.

[16] The applicants' attorneys of record, Sundeep Singh & Associates, for reasons that are not apparent from the court file withdrew as the applicants' attorneys on 6 March 2012. The first respondent then set the matter down for hearing 27 August 2012.

[17] Sundeep Singh & Associates, who had, once more, placed themselves on record on 12 July 2012 as the applicants' attorneys of record, then brought an application for the postponement of the hearing due to take place on 27 August 2012. The notice of motion for this application, which appears from the Registrar's date stamp to have been filed at this Court on the date of the hearing, was accompanied by an affidavit by Mr Sundeep Singh, a partner in the firm Sundeep Singh & Associates to which was attached a Notice of Motion, ostensibly to bring an application to review the late Judge Bam's 3 March 2011 judgment in the Supreme Court of Appeal. There is no indication in the file that this alleged review was ever directed to the Supreme Court of Appeal. It was in any event bound to fail as no review lies in law against a judgment of a High Court. See *Gentiruco AG v Firestone SA (pty) Ltd 1972(i) SA 589(A) at 601 E F; Pretoria Portland Cement Co Ltd v Competition Commission 2003(2) SA 385 SCA at 402C*

[18] I pause to comment on some of what can only be described as scurrilous and unjustified averments made against the late Judge Bam by the deponent to the founding affidavit in the review application papers which were annexed to Mr Singh's

affidavit referred to above. Firstly, the applicants in that matter, in taking issue with the refusal to grant a postponement due to the non-availability of their attorney on 9 March 2010, accused the late Judge President of conduct that was unbecoming, irrational, unfair, prejudicial and biased resulting in a violation of their constitutional rights. They then went on to further accuse the learned late Judge of handing down a judgment that was a senseless attack on their attorney rather than one that dealt with the merits and that he was malicious in granting a punitive costs order against them.

[19] The conduct of Mr Singh, at the time still an officer of the Court, in not only allowing one of his clients to depose to an affidavit which was so obviously in contempt of this Court and the late Judge President Bam, but to also annex it to his own affidavit, would, *prima facie*, deserve the strongest form of censure by this Court. Given the result of the proceedings brought against him by the Natal Law Society, he is no longer in a position to explain his actions and no further comment regarding his behaviour is therefore apposite. However, those applicants who made themselves party to that application cannot escape blame as one must assume that they instructed their attorney to prepare the affidavit, or were at the very least *au fait* with its contents.

[20] It is not clear from the contents of the court file why the matter did not proceed on 27 August 2012, but I shall assume that the application for postponement was successful. An order granted in chambers by Loots AJ on 21 September 2012 postponed the matter *sine die* with the applicants ordered to pay the wasted costs.

[21] Then, in what can only be described as highly unusual, some of the applicants, in July 2013, brought review proceedings, in this Court under case number LCC102/2013, against the judgment of the late Judge Bam dated 3 March 2011 which dismissed their application for the setting aside of the arbitrator's determination. The application was unusual because it is trite law that, as a general

rule, once a court has pronounced a final judgment it becomes *functus officio* and that its jurisdiction in that case ends.[1] An appeal of its decision then lies with a court with a higher jurisdiction, while no review lies against a High Court judgment, a fact that should have been known to the applicants' attorneys.

[22] This application(for an order to give effect to an earlier court order) was eventually set down for hearing and came before this Court on 28 February 2014 when the parties settled their dispute save for the issue of costs.

[23] The first respondent has asked, in view of what he considers to have been malicious conduct aimed mostly at obstructing the course of justice, that this Court award a punitive costs order against the applicants on a scale of attorney and own client. When the issue of costs was argued before this Court, the first respondent asked for a costs order against the second and third respondents as well. The applicants and the second and third respondents oppose any costs order against them.

C. IS A COSTS ORDER JUSTIFIED IN THIS MATTER?

[24] This Court in *Singh and Others v North Central and South Central Council and Others* 1999 (1) ALL SA 350 (LCC) held that it will generally decline to make a costs order unless there are special circumstances present. In the Singh matter, the applicant's attorney's conduct was so inappropriate that, deviating from the general rule, the court held that a costs order was necessary in that instance. See also the dicta of Gildenhuys J *in Midlands North Research Group and Others v Kusile Land Claims Committee and Another* LCC21/2007, para 15 and the cases cited therein where the learned Judge states, *inter alia*, that:

[1] Combrinck v Nhlapho 2002 (5) SA 611 (LCC); Firestone South Africa (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A)

> " It has in the past been the practice of this Court not to make costs orders in cases where restitution of land rights are claimed unless there are special circumstances which warrant a costs order. The practice of not making costs orders is based on the litigation being ' in the genre of social litigation' or being ' public interest litigation'. The practice conforms with the general rule applicable in court constitutional litigation that in the absence of special circumstances an unsuccessful litigant ought not to have to pay his opponents costs'.

[25] The main application in this matter dealt with labour tenancy and consequently falls within the ambit of constitutionally protected human rights. Ngcobo J in discussing the general rule that in constitutional litigation an unsuccessful litigant ought not to be ordered to pay costs said that:

> " the rationale for this rule is that an award of costs might have a chilling effect on the litigants who might wish to vindicate their constitutional rights. But this is not an inflexible rule. There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the court which may influence the Court to order an unsuccessful litigant to pay costs. The ultimate goal is to do that which is just having regard to the facts and circumstances of the case." See *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 at 297 H-C.

[26] Sachs J in *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) 232 at 246 C quoted with approval the principle established in the *Affordable Medicines* case that ordinarily, if the government loses, it should pay the costs of the other side and if it wins, each party should bear its own costs. The learned Judge also went on to state at page 247A that " if an application is frivolous or vexatious, or in any other way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunise it against an adverse cost award". The principles to be applied in deciding the issue of costs in constitutional litigation is, in view of the above, settled.

[27] There is no doubt that the applicants, in brazenly stating that they were “not prepared to relocate to the alternative land” and that “ they do not want to relocate…’ are in contempt of a number of this Court’s orders in this matter. Their erstwhile legal representatives have in my view, engaged in actions that, *prima facie,* amount to an abuse of this Court’s process, particularly when regard is had of the fact that the applicants sought to bring review proceedings against an order by the former Judge President of this Court, in itself an abortive procedure. The applicants did not succeed in any of the interlocutory applications and as already stated, they deliberately and repeatedly refused to comply with orders of this Court. I am satisfied that the applicants’ behaviour was manifestly inappropriate and thus deserves censure by this Court.

[28] The first respondent asked for a costs order on the scale as between attorney and client but, correctly in my view, did not pursue this when the matter of costs was argued. He limited his claim to one of an order for costs as between party and party. In the circumstances, I find that the applicants should be visited with a costs order.

[29] Although they deny any wrongdoing, the second and third respondent are said to have contributed to the delay in implementing the ruling of this Court’s orders and in particular the order dated 12 May 2005. They are also accused by the first respondent of having made common cause with the applicants by seeking to re-open the enquiry presented to the arbitrator and therefore, having supported the applicants, ought to suffer the same fate befalling them in respect of the costs.

[30] It is common cause that the second and third respondents failed to comply with the 12 May 2005 order which necessitated the second respondent to bring an application compelling compliance therewith in April 2007. Even this order was not timeously complied with by the second and third respondents. Their argument that their hands were tied insofar as the granting of an advance or subsidy until applicants had lodged an application is not convincing. The third respondent, by virtue of having been seized with this matter since before 2002, ought to have played a more active role in assisting the applicants and the first respondent in having the

matter finalised. As an organ of state, the third respondent carries the burden of ensuring both the interests of the applicants and those of land owners are protected. The inaction by the third respondent and, generally, the lack of urgency in bringing this matter to finality, has the real potential of making the general public lose faith in our state institutions. They originally opposed the first respondent's present application on grounds that had been found to be without merit at an earlier stage of these proceedings by this Court already. I am satisfied that in the circumstances of this case and in light of principles set out in the *Affordable Medicines* case, the second and third respondents should pay the costs of the first respondent in this matter.

[31] It is obvious, however, that the applicants are impecunious and that their cattle present the only true asset they possess. Should the first respondent be allowed to levy execution against the applicants by attaching the animals and sell them to satisfy the costs order, the relationship between the parties will indubitably sour further. As the first respondent and the applicants must share the same farm it is in nobody's interest to cause additional strain to their co-existence. It is therefore ordered specifically that the applicants' cattle may not be attached to satisfy the costs order in first respondent's favour.

D. CONCLUSION

[32] In the result:

The applicants and the second and third respondents are ordered to pay the costs of this application and the application of 14 April 2008, jointly and severally, taxed as between party and party, the one paying, the other to be absolved. It is specifically declared that the applicants' cattle may not be attached to satisfy this order by way of execution.

Signed at Randburg on this 07 day of April 2014.

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CANCA AJ
Acting Judge of the Land Claims Court

I agree.

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E BERTELSMANN J

Judge of the Land Claims Court