

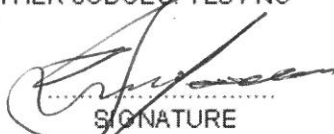


**IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG**

CASE NO: LCC 49/2013

Heard on: 05 March 2019

Delivered on: 10 May 2019

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED: YES / NO	
10/05/2019 DATE	 SIGNATURE

In the matter between:

MHEBEDU PAULUS SHABANGU

First Plaintiff

THOKOZANI SHABANGU

Second Plaintiff

and

PETROS BOSHOFF

First Defendant

**DEPARTMENT OF RURAL DEVELOPMENT
AND LAND REFORM**

Second Defendant

EERSTEGELUK BOERDERY CC

Third Defendant

JUDGMENT

NCUBE AJ

INTRODUCTION

- [1] On 20 July 2018 a settlement was reached in this matter. The matter had been set down for hearing over five (5) days commencing from 16 to 20 July 2018. When the settlement was reached, the issue of costs was left over for future determination by this Court after parties had filed their heads of argument in respect of costs. Therefore, this judgment concerns the issue of costs only. Heads of argument were filed and argument presented on 05 March 2019.

BACKGROUND HISTORY

- [2] Initially this matter started as an application which was later converted to an action by order of this court. On 19 March 2013, the two Applicants (Plaintiffs) issued a notice of motion against the First and Second Respondents. In that notice of motion, the Applicants sought an order declaring them labour tenants on the Eerstegeluk Farm in the district of Utrecht, in the province of KwaZulu-Natal.
- [3] In his answering affidavit, the First Respondent averred that he was misjoined as he was not the owner of Eerstegeluk Farm on which Applicants were claiming to be resident. The First Respondent averred that the farm in question was owned by Eerstegeluk Boerdery CC. As a

result of the said averment by the First Respondent, the Applicants filed a joinder application on 05 June 2014. That application was not opposed and it was accordingly granted on 29 August 2016.

- [4] As a result of factual disputes which could not be resolved on the papers, the application was referred to trial. On the third day of the trial, the Second Applicant / Plaintiff withdrew his claim against the Defendants. Costs were reserved. Later the First Applicant / Plaintiff reached a settlement with the First and Third Respondents / Defendants. Costs were also reserved. The First Plaintiff has subsequently passed on and was substituted herein by Marrie Nonhlanhla Shabangu, a duly appointed representative in the estate of the First Plaintiff.

REQUEST FOR AN AWARD OF COSTS

- [5] The First and Third Defendants ask for an award of costs on a scale as between attorney and client against both Plaintiffs. The First and Third Defendants base their claim for punitive costs on at least three grounds. Those grounds are:

- (i) misjoinder
- (ii) the existence of factual disputes
- (iii) withdrawal of claim against the first defendant

Basically, the First and Third Defendants claim an award of punitive costs because of the reckless style of litigation adopted by the two Plaintiffs.

MISJOINDER

[6] In his answering affidavit, the First Defendant averred that the correct name of the farm in respect of which the Plaintiffs were claiming labour tenancy was Schurvepoort and not Eerstegeluk as it was stated in the founding affidavit. However, the First Defendant averred that he was not the owner of Schurvepoort, the owner was Eerstegeluk CC. It was that averment which led to an application for the joinder of Eerstegeluk CC as a Third Defendant. The question to be asked is whether it is just and equitable to order an award of costs against the Plaintiffs in favour of First and Third Defendants on the basis that the First Defendant was initially misjoined.

[7] Ms Shazi, counsel for the Plaintiffs, argued, correctly in my view, that the First Defendant had, in all correspondence relating to this matter, held himself out to be the owner of Eerstegeluk farm. On 29 October 2017, the First Defendant addressed a letter to the First Plaintiff. In paragraph 1 of the letter, the First Defendant states:

“You have been requested at various and different occasions during the past year (2012) that you must ensure that your cattle and goats do not stray into my lands (my own emphasis) and camps not allocated to you. On 29 October 2012, your goats have again been found straying in my newly planted pasture lands.”(my own emphasis).

[8] In that letter the First Defendant did not indicate that he was writing on behalf of the Close Corporation and he clearly referred to himself as being the owner of the farms. It is the same with the letter dated 27 November 2012 addressed to the First Plaintiff. Again in all

correspondence addressed to the First Plaintiff, the First Defendant signed off as:

*"Petrus Boshoff
Owner – Farm Eerstegeluk".*

Any person reading these letters would have concluded that the First Defendant was the owner of the farms concerned . Again in his opposing affidavit the First Defendant stated:

"I can also confirm that an incident had occurred during 2010 when I told the First Respondent (sic) that I did not want his goats on my neighbouring farm". (my own emphasis).

Therefore, the claim by the First Defendant that he was initially misjoined, is without merit.

FACTUAL DISPUTES

- [9] It should have been clear to the attorney drafting the papers that there might be a dispute of fact which could not be resolved on the papers. However, in my view, it can never be just and equitable to require any indigent litigant to pay costs because an attorney made a mistake in the drafting of the papers or because an attorney proceeded by way of an application instead of an action. Costs *de bonis propriis* can be sought against the attorney concerned. However, the attorney must be given an opportunity to make representations. That was not done in this case. The Defendants never sought costs *de bonis propriis* against the attorney concerned. In any event, as a result of the existence of factual disputes, the court ordered that the application be referred to trial. The Defendants have not shown that the referral caused them prejudice, justifying an award of costs on a punitive scale.

WITHDRAWAL OF THE CLAIM AGAINST THE FIRST DEFENDANT

[10] The Plaintiffs reached a settlement agreement with the Third Defendant being the owner of the farm. It is common cause that the First Defendant is the member of the Third Defendant. In terms of the settlement agreement, the Third Defendant was going to sell Schurvepoort Farm to the Department of Rural Development and Land Reform (“the Department”) for the benefit of the First Plaintiff as an occupier. It did not make sense to pursue the claim against the First Defendant when the Third Defendant had agreed to sell the farm, hence the action was withdrawn against the First Defendant.

[11] It cannot be said that the First Plaintiff was unsuccessful. The Plaintiff sought a declaration to the effect that he was a labour tenant and he asked for an award of the land which he was using on 02 June 1995. The Third Defendant agreed to sell the farm to the Department for the ultimate benefit of the First Plaintiff as an occupier. It is unusual for a party to seek an award of costs after the matter has been settled. In *casu*, as already mentioned earlier in this judgment, it would make no sense not to withdraw the action against the First Defendant, a member of the Third Defendant, after the Third Defendant had agreed to sell the farm to the Department for the ultimate benefit of the First Plaintiff. In my view, there is nothing in this matter which justifies an award of costs.

ORDER

[12] In the result, I make the following order: -

1. The application for an award of costs is dismissed.
2. No order as to costs.

A handwritten signature in black ink, appearing to read 'T M NCUBE', is written over a horizontal line.

T M NCUBE
Acting Judge
Land Claims Court

APPEARANCES

For Plaintiffs:

Adv. K Shazi

Instructed by:

Dludlu Attorneys

Glenwood

Durban

For First and Third Defendants:

Adv. S Guldenffening SC

Instructed by:

Velile Tinto and Associates Inc

210 Amorand Avenue

Pretoria