



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

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED.

23-01-2019

[Signature]

Before: Canca AJ

CASE NO.: LCC 211/2016

In the matter between:

MBUYISELO MZITSHANE

First Applicant

SANAH NONTSIKELELO BOJOSI

Second Applicant

and

FERDINAND KLOPPERS

Respondent

Matter heard: 11 October 2018

Judgment: 23 January 2019

JUDGMENT

CANCA AJ

Introduction

[1] There are two applications in this matter. The main application and one for costs. Both are opposed by the respondent.

[2] In the main application, the applicants seek an order, in terms of the provisions of the Extension of Tenure Act, 62 of 1997 (“ESTA”), for the restoration of water and electricity to the dwellings in which they are residing. These dwellings are situated on property which was owned by the respondent at the launch of the application.

[3] The relief sought in the main application became incompetent as against the respondent when the ownership of the property changed hands prior to the finalization of the application. The new owner is now in the process of being joined as a party to the proceedings in the main application. It is consequently not necessary to consider the merits of the main application at this stage.

[4] In the application for costs, the applicants and their attorney of record aver that they only became aware of the change of ownership of the property after the main application had already been set down for hearing. This resulted in the matter being postponed so as to join the new owner. The applicants contend that, by failing to timeously inform them of the change of ownership, the respondent unnecessarily prolonged the litigation. They also contend the respondent has conducted the litigation in bad faith. Therefore, the Court should show its displeasure at the respondent’s aforesaid conduct by mulcting him with costs, so the averment

continued. The applicants do not, as I understand their case, merely ask for their wasted costs in having the matter postponed due to the respondent's conduct referred to earlier in this paragraph.

[5] Mr. Ogunronbi, for the respondent, launched a three-pronged attack against the application for costs. First, he contends that, being publicly-funded litigants, pursuing a constitutional right against a private citizen, the applicants have not presented facts as to why costs should be awarded in this matter. Secondly, he contends that the applicants have not alleged that the respondent's actions were willful or vexatious. Also, there are no exceptional or special circumstances that warrant a costs order in this case. Finally, he submitted that, as *dominus litis*, the applicants bore the onus of identifying the parties to the litigation.

Background

[6] The first and second applicants and their families have resided on the property for 21 and 36 years respectively.

[7] For reasons that are not necessary for purposes of this judgment, the relationship between the parties soured and this ultimately led to the launch of the main application during October 2016.

[8] In his founding affidavit, the first applicant avers, *inter alia*, that the respondent advised that he had sold the property to a new owner during mid-February 2016. And, soon thereafter, moved to a neighbouring farm. However, despite having been told

this, the first applicant (and the second applicant's deceased husband) remained in the employ of the respondent, who continued to deduct rental from their salaries. As a result, they were not sure who the real owner of the property was at that stage, so the averment continued.

[9] The respondent confirms in his answering affidavit that he informed the applicants that he had sold the property. He also confirms that he continued to deduct rental from their salaries as he remained owner of the property. Ownership would cease upon the registration of the transfer thereof into the name of the new owner, according to the respondent.

[10] Ms. Nkosi, for the applicants, avers, in a supplementary affidavit deposed to on 4 September 2018, that she only became aware that the property had changed owners on 21 August 2018. This was when she was telephonically informed that the registration of the transfer to the new owner, DMGM Prop Inv (Pty) Ltd, had taken place on 31 July 2017. By this time, the matter had already been set down for hearing on 6 September 2018, a date the respondent had agreed to.

[11] However, in the same affidavit, Ms. Nkosi states that she became aware that the property was in the process of being sold during November 2016 upon receipt of the respondent's answering affidavit. This is also evidenced by the contents of a document addressed by her on 5 January 2017 to the respondent's then attorney, Ms. Specht, in which she, *inter alia*, states that *"I just got a call from my clients telling me that Mr. Kloppers and the gentleman who bought the farm are making threats*

against them and asking us to leave.” During March 2017, Ms. Specht advised Ms. Nkosi, via e-mail, that the transfer of the property had not yet been finalized.

Is a costs order warranted in this matter?

[12] This Court, as a general rule, will decline to make a costs order unless there are exceptional or special circumstances. See the dictum of Gildenhuys J, in *Midlands North Research Group and Others v Kusile Land Claims Committee and Another* LCC 21/2007 (30 April 2010) at para 15, where the learned Judge, *inter alia*, states:

“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 general rule applicable in constitutional litigation that in the absence of special circumstances, an unsuccessful litigant ought not to have to pay his opponent’s costs.”

[13] In *Singh and Others v North Central and South Central Council and Others* 1999 (1) ALL SA 350 (LCC), the Court found the applicant’s attorney’s conduct so inappropriate that, deviating from the general rule, held that a costs order was necessary in that instance.

[14] Was the respondent’s conduct or that of his attorneys so egregious that same justifies a departure from the general practice of not awarding a costs order? I am not persuaded that such a departure is justified in this matter.

[15] The applicants knew that the property had been sold as far back as February 2016. Ms. Nkosi, as alluded to in paragraph [11] above, knew well before the matter was set down for hearing that the property had been sold and that the registration of transfer to the new owner, which follows a sale of a property, was pending.

[16] The respondent's current legal representative, Mr. Specht, and his erstwhile attorney, Ms. Specht, who deposed to a confirmatory affidavit, alleges that Ms. Specht telephonically informed Ms. Nkosi, just before she left the employ of Molenaar & Griffiths Attorneys in September 2017, that the transfer had in fact been registered. Ms. Nkosi denies this. It is, however, unnecessary for me to rule on whose version is more probable as nothing turns on this, save to note that Mr. Specht's affidavit refers to an e-mail Ms. Specht allegedly sent to Ms. Nkosi on 26 September 2017 confirming the contents of that telephonic conversation. This e-mail was not attached to the papers.

[17] Whether or not Ms. Nkosi was advised of the registration of the transfer as alleged, I agree with Mr Ogunronbi that, as *dominus litis*, it was the applicants who bore the onus of identifying the parties. They should, either through their own endeavours, or with the assistance of Ms. Nkosi, ascertained the identity of the person or entity which purchased the respondent's property. It was also incumbent on them to obtain the information as to when the registration of the transfer had taken place from the Deeds Registry rather than to rely on the respondent's attorney to furnish them with that information. There is no evidence in the papers that the applicants sought the identity of the purchaser from the respondent or his legal representatives.

[18] The applicants were, in my view, ill-advised to set the matter down for hearing when it was evident that the property had been sold and was in the process of being transferred to the new owner. The fact that the registration of that transfer was delayed, does not change my aforesaid view on the matter nor would evidence that Ms. Nkosi sought the details of the prospective new owner from the respondent or his attorneys. In any event, the applicants knew as far back as February 2016 that the property had been sold, at least seven months prior to the institution of the main application. The applicants should, in my view, have sought to ascertain the details of the buyer then and join that buyer to the proceedings prior to launching the application. This so because the rights which the applicants sought to enforce against the respondent would continue to bind the new owner when the transfer was eventually registered in its name. This the applicants failed to do. The new owner, as Mr. Ogunronbi correctly points out, had a contingent liability in the suit before the registration of the property into its name.


[19] I am not persuaded that the respondent's alleged failure "to timeously inform them [the applicants] that the property had changed ownership" is a valid reason in law to award costs against the respondent. The respondent had no duty to disclose such information to the applicants.

[20] The second reason proffered by the applicants for a costs order, namely that the respondent conducted this litigation in bad faith, also lacks merit. No facts to sustain that contention were offered by the applicants.

[21] In the light of all of the above, I do not regard it as appropriate to exercise my discretion in favour of granting an order for costs against the respondent. No special circumstances which warrant a departure from the general rule exist in this matter.

[22] In the result, I order as follows:

1. The application for a costs order is dismissed.
2. No order as to costs.



MP Canca

Acting Judge, Land Claims Court

Appearances:

For the Applicants:	Adv. Z Ngwenya
Instructed by:	Magagula George Mcetywa Inc. Attorneys, Johannesburg
For the Respondent:	Advocate S Ogunronbi
Instructed by:	De Beer & Claasen Attorneys, Sasolburg