

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 40424/2021

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES:</u> <u>YES/NO</u>
(3)	<u>REVISED.</u>
.....
SIGNATURE	DATE

In the matter between:

N M **FIRST APPLICANT**

Z M **SECOND APPLICANT**

F M **THIRD APPLICANT**

And

MALAPA MOLETELO CAROLINE **FIRST RESPONDENT**

SHERIFF OF THE COURT, TEMBISA **SECOND RESPONDENT**

JUDGMENT IN RESPECT OF COSTS OF THE APPLICATION

MAKUME J:

BACKGROUND

- [1] The first and second Applicants are the daughters of the third Applicant. All three lived together at [...], Tembisa.
- [2] During or about April 2021 the first Respondent obtained an eviction order against the third Respondent in the Magistrate's Court Kempton Park (Case No 3388/17).
- [3] On the 19th August 2021 the second Respondent executed the order and the three Applicants were evicted from the property.
- [4] On the 25th August 2021 the first Applicant deposed to an affidavit in support of an Urgent application to be heard in this Court on the 31st August 2021 in which application the Applicants sought an order declaring the eviction that took place on the 19th August 2021 unlawful and that they be restored to occupation of the property.
- [5] That application was served not on the Respondent but at the address of Thobejane Inc Attorneys who had acted for the Respondent in the matter before the Magistrate Court.
- [6] In the notice of motion the first Applicant indicated not only her home address as [...], Tembisa but also provided a fax number and an email address of a certain Aaron De Frened.

- [7] On the 31st August 2021 the first Respondent appeared in person and told the court that her former attorney Mr Thobejane told her to come to this Court on the 31st August 2021. She had not had an opportunity to consult and required time to do so.
- [8] The first Applicant appeared in Court assisted by a Mr David De Frennd who described himself a community leader who helps people with problems. Mr De Frennd confirmed that he was the author of the notice of motion and the affidavit before me.
- [9] Mr De Frennd told the Court that the reason for this application was because the first and second Applicants were not cited as parties in the order by the Magistrate hence he says the eviction was unlawful. He did not say anything about the same order against the third Respondent.
- [10] I stood the matter down to the following day the 1st September 2021 to enable the first Respondent to get hold of her legal representative.
- [11] On the 1st September 2021 Attorney Ngoetjane appeared for the first Respondent. In Court was an attorney by the name of Shivambu who informed the Court that he is not on record because he does not have the right of appearance in the High Court and advised the Applicant to withdraw the application after advising them that there are no

prospects of success in the matter. He told the Court that the Applicants were not in Court but that Mr David De Frennd who drew the papers was present in Court.

[12] The Court record of the 1st September 2021 reads as follows:

Court: The Applicants themselves are they here in Court,
N M

Mr Shivamvu : No my Lord they are not present

Court: Who is that gentlemen?

Mr De Frennd: It is Mr David De Frennd M'Lord.

Court: Was it the man who appeared yesterday with the
Applicants?

Mr De Frennd: That is correct, M'Lord

Court: Okay, so you confirmed instructions that this
matter has now been withdrawn.

Mr De Frennd: Correct M'Lord as I was advised by this first
Applicant yesterday after the findings of the whole
matter.

[13] Advocate Ngoetjane then insisted on the Applicants paying costs. I raised the issue that the Applicants are not in Court and from what transpired the day before they were acting on the advise of Mr De Frennd who actually settled the application I enquired if it is not appropriate that Mr De Frennd bear the costs of the application.

[14] I then made an order confirming the withdrawal of the application by agreement and postponed the issue of costs to be argued before me on the 17th September 2021. I further directed that Mr David De Frennd file an affidavit by the 10th September 2021 and give reasons why he should not be held liable for the costs of the application. The Respondent will file their answering affidavit on the 14th September 2021.

[15] On the 17th September 2021 the matter took a different turn. Mr De Frennd told the Court that Mr Shivambu was never instructed to withdraw the application and that the instructions were that he should proceed and argue the matter.

[16] It was pointed out to Mr De Frennd that the application was bound to be struck off the roll as it did not comply with requirements of Rule 6(12) of the Uniform Rules of Court and that because he is the one who advised the Applicants and drafted their papers he must now explain why he should not be held liable for the wasted cost of the application.

[17] It is clear that Mr De Frennd has been dishonest in this matter when he now told the Court on the 17 September 2021 that Mr Shivambu was not instructed to withdraw the application. His own evidence in Court was to the contrary. He confirmed in Court on the 1st September 2021

in the presence of Mr Shivambu and Mr Ngoetjane that the Applicants were now withdrawing the application. He is trying at all costs to extricate himself from the consequences of his bad advise to the Applicants.

THE LAW ON COSTS

[18] The Supreme Court has frequently emphasised 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 (See Fripp v Gibbon & Co. 1913 AD).

[19] Erasmus in Superior Court Practice Second Edition explains as follows:

“In leaving the Court a discretion the law contemplates that it should take into consideration the circumstances of each case carefully weighing the issues in the case, the conduct of the parties and any other circumstances which may have a bearing on the issue of costs and then make such order as to costs as would be fair and just between the parties.”

[20] I have taken into consideration that even though I have found that Mr De Frennd was dishonest he is for all intends and purposes a lay person and cannot be compared to the position of a trained lawyer who is expected to know the Rules of Court. His motive was to assist the Applicants and for which no fees were paid. He described himself as a

community leader whose aim was to see that the Applicants were restored to possession of their house.

[21] Costs *de boniis propriis* are unusual See: **Kenton-on-Sea Ratepayers Association vs Ndlambe Local Municipality 2017 (2) SA 86 (ECG) at 118F**). Such costs should be awarded only in exceptional circumstances.

[22] After having applied my mind carefully to the circumstances in this matter I do not think that it would be appropriate to mulct Mr De Frennd with a costs order. I however hope that he has now leant a lesson that he should leave serious High Court litigation to trained lawyers.

[23] I have also taken into consideration that the Applicants themselves were indigent people and that Mr De Frennd acted pro-bono for them. It would therefore be not proper to make any costs order against them. I have taken into consideration also that the second and third Applicants did not file any confirmatory affidavits to indicate their interest in the matter.

[24] In the result I make the following order:

ORDER

1. No order as to costs.

DATED at JOHANNESBURG this the day of JANUARY 2022.

**M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

APPEARANCES

DATE OF HEARING : 31 AUGUST 2021
DATE OF JUDGMENT : 21 JANUARY 2022
APPEARANCES :
INSTRUCTED BY :
FOR RESPONDENTS : Adv Motchana
INSTRUCTED BY : Thobejane Inc. Attorneys