

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 22049/18

In the matter between:

HENDRIK STEFANUS BOTHA First Applicant

(Identity number: [....])

HENDRIK STEFANUS BOTHA NO Second Applicant

(Identity number: [....])

JASMINE BOTHA Third Applicant

(Identity number: [....])

and

DAVID SENYANE MASHISHI First Respondent

(Identity number: [....])

ALL THE UNLAWFULL OCCUPIERS OF ERF Second Respondent

231 RIVIERA, CITY OF TSHWANE METROPOLITAN

MUNICIPALITY, BETTER KNOWN AS 113B

SOUTPANSBERGWEG, MAIN HOUSE, PRETORIA

JUDGMENT

Brand AJ

Not reportable and Not of interest to other judges.

- [1] This matter came before this court as an application for the eviction of the first and second Respondents from the property of the HS Botha Trust (IT 1573/08) ('the Trust'), brought by the first Applicant, a trustee of the Trust, in his capacity as such.
- [2] At the hearing of the matter there was appearance for the Applicants only. Mr. Diamond, for the Applicants, informed me from the bar that the Respondents had two weeks prior to the hearing date voluntarily vacated the property in question, so that the matter had become moot.
- [3] Accordingly, it remained only to decide the issue of costs. Mr. Diamond moved for cost to be ordered against the first Applicant as between attorney and client.
- [4] In motivation of this punitive costs order he pointed to the dilatory fashion in which the first Respondent prosecuted its opposition to the application for his eviction and submitted that the first Respondent had opposed the application only in order to delay his eviction, without any intention to proceed to argue the matter at the hearing. In particular, he pointed to the fact that the answering affidavit initially filed by the Respondents had none of the attachments referred to in it indeed attached; that, once these attachments were indeed filed, those were signed neither by the Respondent nor the commissioning officer, so that they never formed part of the documents properly before court; that the answering affidavit was only eight paragraphs and five pages long and answered to none of the procedural or substantive allegations raised in the founding affidavit; and that the answering affidavit did not deal at all with the fact that the lease agreement on strength of which the Respondents occupied the property had been cancelled so that the Respondents no longer had any right of occupation.
- [5] In addition, Mr. Diamond pointed to a clause of the rental agreement concluded between the Trust and the first Respondent, in terms of which the first Respondent had agreed that, should any litigation ensue from the

agreement, he would be liable for costs of such litigation as between attorney and client.

[6] The determination of a costs order remains in the discretion of the court, despite the presence of the kind of costs agreement that Mr. Diamond relies on. Mr. Diamond submitted that, although in light of the court's discretion an agreement of this nature is not binding on a court, the importance of the principle of *pacta sunt servanda* in our law requires courts to enforce such an agreement absent very exceptional circumstances.

[7] I agree. In this matter there are no exceptional circumstances that persuade me that a punitive costs order as prayed for is not warranted.

[8] Accordingly, I order as follows:

ORDER:-

The first Respondent shall pay all costs related to the application, as between attorney and client.

JFD BRAND

Acting Judge of the High Court

Appearances:

For the applicants - Mr. AC Diamond, instructed by Nelis Britz Attorneys

For the respondents - No appearance

Date of Hearing : 29 October 2018

Date of Judgment : 09 November 2018