REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

CASE NO: 32500/2020

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

SIGNATURE: PD. PHAHLANE

DATE: 22-11-2022

In the matter between**:**

WESTHILLS 379 DEVELOPMENT (PTY) LIMITED
Applicant
(Reg No. 2017/155033/07)

and

BUNTU FOODS (PTY) LTD
Respondent (Reg No. 2017/479535/07)

JUDGMENT

PHAHLANE, J

[1] This is an opposed application that commenced as an application for the eviction of the respondent who has since vacated the premises effectively abandoning its defences and rendering this matter academic. The facts and history of the matter are extensively set out in the judgment of Madam Justice Kubushi dated 28 May 2021, and need not be repeated herein. I am required to adjudicate only the issue of costs.

[2] It is common cause that on 25 October 2021, the applicant's attorneys wrote a letter to the respondent's attorneys and enquired whether the respondent had secured alternative premises and intended to vacate the premises. The following is noted on the letter:

"1. We refer to the above matter and the trial set down for hearing on the 9th November 2021.

2. *We have been instructed by our client that it appears that your client is in the process of vacating the premises which forms the subject matter of the trial action.*

3. *Kindly advise whether your client is in fact in the process of vacating the premises and/or if it intends to vacate.*

4. *You will appreciate that substantial costs will now be incurred for the preparation and the trial which may be unnecessary if your client vacates the premises.*

5. *Kindly respond hereto as a matter of extreme urgency and by 17:00 pm tomorrow, failing which we will have no alternative but to proceed with the trial preparation and, in the event that the trial is rendered moot, seek a punitive costs order against your client for wasted costs".*

[3] In a response thereto in an email dated 26 October 2021, the respondent's attorneys wrote to the applicant's attorneys and denied

that the respondent intended vacating the premises and stated the following:

"We have consulted with our client and it is our instruction that our client is not in the process of vacating the premises and has no intention of doing so without the matter proceeding to trial which is scheduled for 9 November 2021.

As such we confirm that the matter will be proceeding to trial and trust your client will be guided accordingly.

All our client's rights are strictly reserved".

[4] It is common cause that on 15 December 2021 the applicant launched a separate application under case number 63764/21 against the respondent in which the applicant sought an order interdicting the respondent from removing from the premises, "any movable property or any movable property, except those input goods and final goods owned by third parties that are identified and proven by the respondent". That application was opposed when the respondent served its Notice of Intention to Oppose around January 2022.

[5] It is not in dispute that the respondent vacated the premises of the applicant around December 2021 without notifying the applicant, and that it had as well removed all goods from the premises. The applicant stated in its supplementary affidavit that the respondent's vacation of the premises rendered both the application for eviction and the application launched under case number 63764/21 moot and academic, and thus on 2 February 2022, the applicant filed and served a Notice of Removal as the matter had at the time already been set down for hearing for 7 February 2022.

[6] Mr. Watson on behalf of the applicant submitted that the respondent's lack of candor when stating that it had no intention of vacating the premises while it in fact did that without any notification to the applicant and opposing the application itself, amounts to constructive contempt and the dishonest and evasive escalation of legal fees which could have been avoided rather than causing the applicant to incur unnecessary enormous expenditure in the preparation of trial, which included consultation with six witnesses that had to be prepared to meet the various allegations.

[7] In this regard, relying on the case of ***Nkume v FirstRand Bank Ltd t/a First National Bank***[1], Mr. Watson further submitted that the court should consider the manner in which the respondent conducted itself throughout the process, including the fact that the court had been unduly burdened by a significant late supplementary affidavit that was submitted very late on a Friday afternoon when the matter was to be heard the following Monday at 10:00

[8] Regarding how costs should be treated in a moot matter, a costly trial simply to determine which party should pay the costs of the proceedings which have been rendered academic when the trial is set down, must be avoided[2].

[9] Mr. Dorning on behalf of the respondent argued that in considering the issue of costs, the court should consider the respondent's

1 2012 (4) SA 121 (ECM) at para 9.

2 See: Jenkins v South African Boilermakers, Iron & Steel Workers' & Ship Builder's Society 1946 WLD 15;

supplementary affidavit referred to at paragraph 7 *supra*. He however conceded that the court was in circumstances where the rules do not provide for further affidavits other than the original set of three.

[10] Despite there being no explanation in the supplementary affidavit as to why the court should consider the affidavit outside of the standard number of affidavits allowed in terms of the rules or why it was submitted extremely late, Mr. Dorning submitted that the court should have regard to this supplementary affidavit because the respondent will be unduly prejudiced if its version was not placed before court. Be that as it may, from the reading of the respondent's supplementary affidavit, it proffers nothing, save to say that it relates to the full pleadings based on the merits of the case; the reasons why the respondent opposed the merits; a repetition of Justice Kubushi's order and judgment; as well as the full new lease agreement, all of which were unnecessary for purpose of the costs to be determined by this court.

[11] It should be noted that this matter was enrolled on 15 February 2022 on the opposed motion roll and the respondent was notified of same, the following day on 16 February 2022. Notice of set down was served on the respondent on 18 March 2022.

[12] Mr. Dorning submitted that the fact that Justice Kubushi had referred the matter to trial because there was a dispute of fact and reserved costs for determination by the trial court, this court should find with regards to the dispute of fact in favour of the respondent, as the costs are also disputed, and accordingly award

cost to the respondent. Relying on the case of ***Gamlan Investments (Pty) Ltd and Another v Trillion Cape (Pty) Ltd and Another***[3]***,*** he insisted that the court should consider the merits to determine whether the respondent conceded the merits of the application and whether the applicant would have been successful or not in its eviction application.

[13] I do not agree with the respondent's submissions because when Justice Kubushi reserved the issue of costs for later determination, it did not necessarily mean that there was also a dispute regarding the costs, but that the costs will be decided at the end of the trial. Having said that, I can find no reason why this court should entertain what could have been the issues for determination by a trial court, had the matter proceeded. As clearly stated in the ***Nkume*** matter, there is absolutely no need for this court to decide whether the applicant would have been successful in its application against the respondent since the merits of the application have become academic. On the other hand, the ***Gamlan*** matter to which the respondent relies on is distinguishable from the current matter because there the respondent had already accepted a tender, but the court further stated that when a matter becomes academic, it is inappropriate to ventilate and run a full trial to hear evidence to decide disputed facts in order to decide who is liable for costs.

[14] In dealing with the issue of costs, the court in ***Nkume*** stated the following:

> *"[9] It would then appear that the real issue for determination is one of costs. To that end I must have regard to all the affidavits filed on the merits of the application. Of course there will be no need for the court*

3 1996 (3) SA 692 (C).

to decide who the winner is, since the merits of the application have

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become academic. ..... In the circumstances the universal rule, that a party who succeeds should be awarded costs, cannot apply. In the exercise of the court's discretion I have to consider the manner in which the parties conducted themselves in this application, both before and after the application was brought..... I must also consider which of the parties took unnecessary steps or adopted a wrong procedure, any misconduct by a party, and any other relevant
factors".

[15] What is unbecoming of the conduct of the respondent is the fact that despite the issues in dispute between the parties and the fact that the applicant sought for the respondent to vacate it premises, - the respondent stated in no uncertain terms that it had no intention of vacating the premises of the applicant knowing very well that it had by then sought new accommodation and was in the process of signing a new lease agreement with another landlord, - a copy of which was procured by the applicant on 1 December 2021.

[16] Having said that, counsel on behalf of the respondent argued that at the time when the letter was sent, the respondent did not know that it would be vacating the premises and that by the middle of December, the respondent had already started vacating the premises. It is evident that when the premises were vacated, the applicant who had been preparing for trial and being open about every step it took in the process of starting litigation, was not even given the curtesy of being informed about the respondent's actions.

[17] In considering the circumstances of this case, I am mindful of the advice given at paragraph 4 of the applicant's letter of 25 October 2021 written by the applicant's attorney. It is clear that this correspondence was communicated with a trial date in mind, which was set down two weeks thereafter, as a means of trying to prevent both parties from incurring unnecessary costs of litigation.

[18] In my view, had the respondent been candid with its behavior, there would not have been any need for the matter to be placed on the roll. This is type of conduct which the court in ***Nkume*** referred to, that the court must consider in the exercise of its discretion when determining costs. As regards the other factors to be considered by this court, I am inclined to agree with the applicant's counsel that the respondent has in fact been in constructive contempt of court proceedings. This is so because after the applicant became aware of the respondent's new lease agreement, which the respondent confirms in its supplementary affidavit that it had already signed but was waiting on the new landlord to also sign, the respondent's attorney had during that period, send correspondence to the applicant's attorney indicating that his client had no intention of vacating the premises of the applicant. Not only is the rrespondent's conduct in these circumstances unconscionable, having misled the applicant about the intention not to vacate the premises, but it has caused undue financial burden on the applicant in preparation of both applications it instituted against the respondent.

[19] It suffices to say that the relief sought by the applicant had been achieved because the applicant had from the onset, wanted the respondent out of its premises, though I am of the view that the reasons for that are immaterial for purpose of these proceedings.

Having considered the circumstances of this case, I therefore align myself with the submission that the respondent's conduct in opposing the eviction proceedings, when harbouring a secret and undisclosed intention to vacate the premises, is dishonest and a misuse of the court's procedures, even at

this late stage when it sought to unnecessarily expand the issues and put the court to unnecessary and academic investigation of collateral matters.

[20] In the exercise of this court’s discretion on costs, the question is whether a punitive costs order should be granted against the respondent. Mr. Watson for the applicant submitted that the cumulative consideration of all circumstances of this case, and the fact that lease agreement concluded by the applicant and responded provides for costs to be on the attorney client scale against the tenant, the court is empowered by the lease agreement to order such costs because a proper case for costs has been made by the applicant.

[21] Generally speaking, awards of costs are of course in the discretion of the court and that discretion must be judicially exercised whenever the need arises. But accepting this to be the position, I am of the view that there can be no objection, in principle, to a court giving effect to an agreement between parties concerning their liability for legal costs arising out of a dispute between them and for the court to make awards in terms of such agreements[4].

4 Sapirstein and Others v Anglo African Shipping Co (SA) Ltd 1978(4) SA 1 (A) at 12D.) [5] 1999 (2) SA 1045 (SCA).

[22] Smalberger JA elaborated on the nature of the court's discretion as follows (in the context of an agreement between parties that attorney client costs be paid) in ***Intercontinental Exports (Pty) Ltd v Fowles***[5] at para 25:

> *"The court's discretion is a wide, unfettered and equitable one. It is a facet of the court's control over the proceedings before it. It is to be exercised judicially with due regard to all relevant consideration. These*

would include the nature of the litigation being conducted before it and the conduct of the parties (or their representatives). A court may wish, in certain circumstances, to deprive a party of costs, or a portion thereof, or order lesser costs than it might otherwise have done as a mark of its displeasure at such party's conduct in relation to the
litigation".

[23] I have seriously considered the circumstances of this case, as well as the arguments and submissions made by both parties. In light of the circumstances of this case, and applying the above principle, I am persuaded that a punitive costs order would be appropriate. In the premises, I am of the view that costs should be awarded in favour of the applicant on the attorney and client scale.

[24] In the circumstances, the following order is made:

1. The respondent is ordered to pay the costs of the application on an attorney and client scale. Such costs shall include the costs of 28 May 2021.

PD. PHAHLANE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

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