REPUBLIC OF SOUTH AFRICA

**SOUTH GAUTENG HIGH COURT**
**JOHANNESBURG**

**CASE NO: 38097/2012**

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

2013-04-09
DATE

SIGNATURE

In the matter between:

**ELLMORE COURT (PTY) LTD** Applicant

and

**NGWENYA P V** Respondent

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**J U D G M E N T**

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**KGOMO, J:**

INTRODUCTION

[1] On 9 October 2012 the applicant launched this application for an order:

1.1 evicting the respondent and all persons in occupation by, through or under her from Flat 1, Ellmore Court, 68 Isipingo Street, Bellevue, Johannesburg ("*the property*");

1.2 that this Court determine a just and equitable date on which the respondent and those occupying the property by, through or under should be ordered to vacate the property;

1.3 in the event of the respondent and the occupiers not vacating the property by the date set by the court when and how such eviction should be effected;

1.4 further and/or alternative relief; and

1.5 costs on a scale as between attorney and client.

[2] The respondent is opposing the application.

THE PARTIES

[3] Applicant, Ellmore Court (Pty) Ltd, is a limited liability company registered and incorporated under the company laws of the Republic of South Africa ("*RSA*") with its principal place of business situate at c/o Boost Property Management CC, Suite 3, First Floor, 31 Princess of Wales Terrace, Parktown, Johannesburg.

[4] The respondent, P V Ngwenya, is an adult female whose full and further particulars were not furnished but who occupied Flat 1, Ellmore Court, 68 Isipingo Street, Bellevue, Johannesburg ("*the property*" or "the premises")

[5] Boost Property Management CC is the instance managing the affairs of the property on behalf of the applicant and it is based at the property.

HISTORICAL BACKGROUND AND FACTUAL MATRIX

[6] On 3 September 2008 the respondent entered into a lease agreement over the property with its previous owners, Ms T Msimang who were acting through their agents, Kaye-Eddie Estates. According to the respondent, the property was occupied by her pensioner parents from about 2007. The pensioner parents abdicated their responsibility to sign the lease agreement with Ms Msimang as they alleged they were old. The initial lease agreement was for a period of 12 months.

[7] This property serves as a residence.

[8] From the context, it appears as if the respondent never occupied the property herself but signed the lease so her parents can live in the property, being responsible for the payment of rentals and for services.

[9] From June 2010 Polkadots Properties of Wierda Park, Centurion took over management of the property, collecting all moneys due by and from the

occupants. According to the respondent, Polkadots' mandate expired or ended in July 2011. However, it (Polkadots) continued collecting rentals and service fees from the occupants.

[9] In January 2012 the respondent, for reasons known to herself started withholding payments. Through her attorneys, Dube Attorneys, during February or March 2012 the respondent enquired from Polkadots who she should make her payments to. Polkadots replied on 30 March 2012, furnishing her with the particulars of Ms N Msimang, the owner.

[10] For reasons known to the respondent alone again, despite Polkadots having furnished her with N Msimang's particulars, her attorneys sent a letter to the caretaker of Ellmore Court Building (the applicant) allegedly trying to establish the exact office location of the owner. This letter has no addressee. Neither was it ostensibly hand delivered. It also does not indicate if it was ever sent as there is no forwarding address or fax or e-mail reports.

[11] Another letter was dispatched through Q Dube Attorneys to Polkadots Properties. As advised by their aforementioned attorneys the respondent and other occupants of the property started depositing their rentals into the trust account of Q Dube Attorneys. This was a unilateral decision which was allegedly also recommended to them by a body calling itself, the Gauteng Housing Secondary Co-operative Ltd ("*GHSC*").

[12] It is not clear who this GHSC is. However, from their letterhead attached to the answering affidavit, it is not a state owned enterprise or body as there is no logo on it. As such, the contention by counsel for the respondent that it is a state owned enterprise or government affiliated body cannot be sustained.

[13] Furthermore, there are no confirmatory affidavits from Q Dube Attorneys, the other occupants of the property and/or Polkadots Properties. As such the respondent's allegations about or by them are unconfirmed thus remaining unsubstantiated and hearsay.

[14] The applicant purchased the property from the owner, Ms Msimang, on or about 11 July 2011. Transfer of ownership to it occurred on 3 August 2012.

[15] On 6 August 2012 the applicant, through its attorneys, Messrs Savage, Hurter Louw and Uys, hand-delivered a letter to the tenant(s) of the property notifying them of the new ownership. In the same letter the applicant's attorneys stated the following:

> "6. *We are further instructed that our client's Managing Agent furnished you wish your rent slips for the month of August 2012. Please ensure that your rentals are made timeously.*"

[16] The property management company alluded to above is the self-same Boost Property Management. This meant that the respondent became aware of Polkadots' replacement as managing or the collector of rentals and rates by Boost Property Management by 6 and 7 August 2012.

[17] On 14 August 2012 again, the applicants, through their attorneys addressed another letter to the respondent, which was also hand-delivered, in which the respondent was again reminded of the change of ownership of the property. The letter also reminded the respondent that since the formal rental agreement with the previous owners had expired or fallen through due to effluxion of time, the rentals were now on a month-to-month basis, entitling either party to give the other party one (1) month notice of termination of the lease agreement. The respondent was also reminded of the amount of rental being R3 500,00 per month plus water, electricity and effluent charges that should be paid as per invoices or statements showing consumption.

[18] The respondent was also reminded of the fact that she was in arrear with her August 2012 rental which ought to have been paid on or before 7 August 2012. This letter was also a notice or letter of demand, indicating to the respondent that if the arrear amount of R4 907,68 was not paid within 7 days of date of receipt of that notice being 14 August 2012, then the applicant reserved itself the right to cancel the lease agreement.

[19] It is common cause that the respondent did not make good her default by settling the arrears. From the totality of circumstances in this matter, it is also clear that to date the respondent has not paid anything towards rentals and services, be it to the applicant or its management company.

[20] On 27 August 2012 the applicant addressed another letter to the respondent, also hand-delivered, in which certain misdemeanours by the respondent are pointed out and which also served as proof of immediate cancellation of the lease agreement.

[21] It is so that in the applicant's letter to the respondent dated 6 August 2012, among others the respondent was advised that it will be carrying out a general inspection of all flats and installing prepaid electricity meters for each flat as well as re-doing the plumbing so that each flat receive water separately through its individual water meter. The respondent was notified of the building manager's impending visit(s) subject to prior notification.

[22] From the letter of 27 August 2012 it is clear that the respondent has ignored the applicant's request that payments for rentals and services be made. It also appears from this letter that the respondent had persistently refused the building manager access to the premises, more specifically on 10 August 2012 and 24 August 2012. The applicant also decried the fact that due to the fact that the respondent did not allow its workers or manager access to the premises to do the requisite plumbing works, which fact led to

water to her flat not going through, she unlawfully or illegally connected the water supply to the new plumbing system being installed.

[23] She was afforded until 30 September 2012 to vacate the premises, failing which she would be in unlawful occupation of the property or premises.

[24] From the above, it is thus common cause that the respondent became aware of the new owners or the identity of Boost Property Management's management contract by 6 or 7 August 2012, they were warned about their default on those days as well as on 14 August 2012 but they chose do pay nothing about it.

[25] It is trite law that payment to a third party other than the instance that should be paid is not a valid tender to discharge obligations. Consequently, even if this Court could accept that the respondent paid whatever payments due by it to the applicant into Q Dube Attorneys' trust account, all those moneys due and payable should have been transferred to the applicant from the moment she became aware who the new owners or management company were.

[26] The respondent is still in occupation of the property despite the above exposition.

[27] The respondent in her answering affidavit confirms what the applicant stated in relation to the events after 6 August 2012. She however avers that

she did not trust the communication enunciated in the letter purporting to have come from the applicant's attorneys. The respondent contends that she would have been satisfied with physical or hard copy proof of ownership confirming the applicant's claim. Why this is so or why the respondent or her attorneys did not do a Windeed search to verify ownership has not been cleared. Furthermore, the reason(s) why the respondent did not make good her default after verifying ownership of the applicant is another point. The respondent argued that she was intending to do so but stopped regularising the situation after she was served with court papers in this application and after she was advised by the abovementioned amorphous or dubious Gauteng Housing Secondary Co-operative Ltd ("*GHSC*") and her lawyers not to do so as the GHSC was allegedly investigating the property ownership.

[28] The respondent conceded that to date no tender was made for settling the outstanding amounts.

RESPONDENT'S DEFENCES

[29] The respondent relied on the following defences:

29.1 Point *in limine* : the non-joinder of the Municipal Authority; and

29.2 Non-compliance with Rule 30(2) of the Uniform Rules of Court.

NON-JOINDER

[30] The respondent averred that her parents, who are pensioners occupying the premises are indigent people who if evicted would be rendered homeless. She contended that they would require emergency accommodation. She further argued that the failure to join the Johannesburg City Council vitiates these proceedings which are in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 (Act 19 of 1998) as amended ("*PIE Act*"). She further contended that as the City of Johannesburg has a direct and substantial interest in the subject matter of this action, the City should be joined as a necessary party before the main application for eviction can be heard by this Court. She thus asked that these proceedings be stayed until the City of Johannesburg is joined as a party.

[31] The issue of the joinder of the Johannesburg City Council came up in this Court before my brother, Bashall AJ on 15 February 2013. On that date the court gave the following order:

> "*1. The application for eviction is stayed pending an application to join the City of Johannesburg Metropolitan Municipality.*
>
> *2. Such application to join may be instituted by the Applicant or the Respondent but must be made no later than 1 March 2013 failing which the application may be set down for hearing.*"

[32] It has always been the applicant's case and argument that the joinder of the Johannesburg Metropolitan Municipality is not necessary in this case. It

was thus incumbent on the respondent who contended it was necessary, to set those joinder proceedings into motion subject to the court's condition that that process be under way by 1 March 2013, failing which the matter can be re-enrolled for argument on the merits of the eviction itself.

[33] After 1 March 2013 passed without the joinder being proceeded with the applicant re-enrolled this matter for 26 March 2013 on 5 March 2013. The section 4(2) notice and court order dated 13 November 2012 issued upon *ex parte* application by Horn J was served on both the respondent and the Johannesburg Metropolitan Municipality on 7 March 2013.

[34] It is common cause that the respondent only started those joinder proceedings on 20 March 2013. Needless to state that that application came far too late or contrary to the directives issued by this Court on 15 February 2013.

[35] In *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA), Wallis JA settled, in my view, this aspect as follows:

> "*[38] Whenever the circumstances alleged by the applicant for an eviction order raise the possibility that the grant of that order may trigger constitutional obligations on the part of a local authority to provide emergency accommodation, the local authority will be a necessary party to the litigation and must be joined ...*"

[36] There are no such circumstances in the applicant's founding and replying affidavits that could trigger the local authority's constitutional

obligations *vis-à-vis* emergency accommodation for the respondent's parents herein. The respondent's parents may be pensioners but they are not, even by the respondent's own averred standards, indigent people for purposes of emergency accommodation. It can be assumed without it being decided, that they may be state pensioners who acquired and rented this property in their own right before a formal lease agreement became a requirement for occupation in 2008. They were paying for themselves and the respondent only stepped in to take over the issue of a formal lease agreement.

[37] Even after that, it is the respondent's case that rentals are there, paid into an attorney's trust account, instead of to the lessor straight or through its agents.

[38] In *Swissborough Diamond Mines v Government of the RSA* 1999 (2) SA 279 (T), the court held among others at 323F-324D that indigence is a conclusion, a secondary fact, which must be supported by primary facts. In the absence of the primary facts, the secondary facts or conclusions are entirely meaningless.

[39] In our case here, the respondent's parents cannot be said to be indigent or the so-called poorest of the poor. They even tendered, albeit by verbalising it only, payment of rentals which are allegedly there with the attorneys. Counsel could not explain to this Court why the respondent's attorneys Q Dube Attorneys, (the principal whereof was in court and he was allowed to take instructions from before he could respond to this question for

clarity,) he did not communicate this simple fact to the applicant through its attorneys with whom they were in constant communications.

In this instance it should have been in the Answering Affidavit.

[40] In a still unreported judgment of this Court in *Unlawful Occupiers of Newtown*, Case No 20368/11, the following excerpts illustrate the above point:

> *"No case has been set out by the applicants in order to consider whether they fall into the category of poorest of the poor or homeless persons, which would require a report from the municipality. The requirements of a joinder of a party to proceedings are well known. Such a party must be shown to have a real and substantial interest in the main application. A case for such joinder needs to be fully set out in the founding affidavit ..."*

[41] The court went further to state the following:

> *"These are arguments. The above allegations, in my view, do not constitute a factual basis for the joinder. They are conclusions. The founding affidavit lacks the evidence in support of the allegations made by the applicants. It has been held that a municipality does not necessarily have an interest in eviction proceedings ... A basis for its joinder must be shown.*
>
> *In the present matter the applicants have failed to set out facts to show that the applicants are indeed indigent. They have failed to show that an emergency situation will arise. They have failed to show that the applicants are persons who are entitled to assistance for accommodation by the second respondent. There is no attempt to show that the applicants will be homeless should they be evicted. Indeed, there are induciae to the contrary, i.e. that the occupiers are persons who can afford to pay monthly levies, rent and costs of security guards."*
>
> (Per Wepener J, South Gauteng High Court.)

[42] The above are apposite to the respondent or her parents in this matter. It is so that the respondent's answering affidavit as well as the application for joinder are littered with words such as "*indigent*" or "*homeless*". However, the facts coming from the totality of circumstances here point to the contrary, i.e. that the respondent's parents are not indigent. They can afford to rent another place of abode on their own. They have the money to pay the applicant but just do not want to pay.

[43] It is also so that the court should equally play an active role when a determination is to be made that it is dealing with indigent "*poorest of the poor*" who deserve to be accorded emergency accommodation by the local authority.

See: *The Occupiers, Shaluna Court, 11 Hendon Road, Yeoville, Johannesburg v Mark Lewis Steele* (SCA) Case Numbers 102/09 and 499/09, para [9].

[44] Unfortunately, the facts coming out of this case, even from the respondent's side did not make it necessary to dig or delve deeper into whether there were facts that triggers the requisite constitutional obligations.

LEGAL FRAMEWORK AND DEFENCE TO EVICTION

[45] Section 4(7) of the PIE Act provides that an eviction order may be granted if it is just and equitable to do so, after the court had been called upon

to have due regard to all relevant circumstances, such as availability of land or premises as well as the rights and needs of the elderly, children, disabled persons and households headed by women.

[46] He who alleges the existence of such facts and circumstances is enjoined to bring them forth. The court is also duty bound to raise or question their existence *mero motu* if it is just and equitable to do so.

[47] In *Changing Tides (supra)* the court held that:

> "[i]*f the requirement of s. 4 are satisfied and no valid defence to an eviction order has been raised, the court 'must', in terms of section 4(a), grant the eviction order.*"
>
> (Ad para [11].)

[48] At para [13] the learned judge held further that:

> "*In most instances where the owner of the property seeks the eviction of unlawful occupiers, whether from land or building situate on the land, and demonstrates a need for possession and that there is no valid defence to that claim, it will be just and equitable to grant an eviction order. This is consistent with the jurisprudence that has developed around this topic ...*"

[49] It is settled law now that by "*valid defence*" is meant "*... a defence that would entitle the occupier to remain in occupation as against the owner of the property, such as the existence of a valid lease*".

[50] Correspondingly this Court is called upon today to determine whether the defence proffered by the respondent constitutes a defence that:

> *"... would entitle the respondent to remain in occupation as against the owner of this property."*

[51] The respondent concedes that she has no lease with the applicant. She also concedes that she owes rent which remains unpaid despite demand being levelled at her to so pay same. This invariably, in my considered view and finding, translates to the fact that she has no valid title or no right to reside on the property, more so that the month-to-month lease it was operating on had been cancelled.

[52] In the papers, the respondent is also asking this Court to order the parties to enter into a new lease agreement. It is so that during argument in this Court counsel for the respondent attempted to wriggle out of the tight situation precipitated by the above contention by putting a big spin to the effect that the respondent was not actually saying the court should compel the parties to enter into a new lease agreement. Spin or no spin, the request was clear and unambiguous : the respondent submitted that:

> *"... it would be just and equitable to allow the Ngwenya's to enter into a rental agreement with the Applicant."*

[53] There is no authority in our law for a proposition like or that a court, or any party whatsoever, may order, direct and/or compel another party to conclude a contract with the other.

[54] I am thus satisfied that:

> "... *absent obvious lacunae the information placed before me* [the court], *the court is entitled to accept that the parties have each placed before the court what they consider to be relevant equitable circumstances and can proceed to deal with the matter on that basis.*"
>
> See: *Modderkop Boerdery (Pty) Ltd v Modder East Squatters* 2001 (4) SA 385 (W) at 392G-H, per Marais JA.

[55] This is not a case where indigent masses of people have to be relocated and/or where only the local authority can supply information of available land or suitable premises as emergency accommodation for large numbers of people or families. It is my finding that this eviction application does not constitute a complex legal proceeding regarding eviction and access to adequate housing. It would not be commensurate or fair to expect the Johannesburg Municipality to embark upon a costly and time-consuming exercise to investigate this matter and report to the court on it. I am satisfied that the occupiers of this property are well aware of their rights in terms of the PIE Act, they are legally represented and have the means to acquire alternative accommodation for themselves.

[56] It is my further finding that the circumstances and the nature of the dispute herein do not render it necessary for the appropriate or relevant municipal authority to have been joined in this application. As a consequence, I find further that the local authority here has no duty to report to this Court before this matter is finalised or to appoint a mediator to facilitate any housing needs.

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to this Court before this matter is finalised or to appoint a mediator to facilitate any housing needs.

NON-COMPLIANCE WITH RULE 30(2)(b)

[59] The respondent is contending that the Rule 30(2)(b) notice issued by the applicant was not regular, more so that it was served on Flat 3 instead of Flat 1. She further contends that she only became aware of it on 16 November 2012. Her attorney reacted on it on 21 November 2012. Her notice to oppose was only served on 22 November 2012. The applicants served a Rule 30(2)(b) notice labelling the notice to oppose an irregular step.

[60] I have weighed the applicant's actions against those of the respondent hereon and have arrived at a conclusion that a decision over this aspect would be academic as both parties dealt with this matter as if no irregularity had occurred. In fact this aspect was not pursued with any conviction during argument.

[61] It is my considered view and finding that this application can and will be decided on its facts without any technical issues being a hindrance or aberration.

CONCLUSION

[62] It is common cause that the applicant is the registered owner of the property and the respondent is the lessee with people living at the premises under her.

[63] The legal prerequisites set in terms of the PIE Act have been complied with or satisfied. The question is whether the respondent has any defence that could defeat the applicant's case that she and all those occupying the premises through her be evicted.

[64] The respondent was the author of her own woes : She knew she had to pay rentals to the owners of the property, be it Ms Msimang or the applicants. She was notified through an attorney's letter of the new ownership in August 2012. The new property managers, i.e. Boost Property Managers were also introduced to her. Instead of doing what was expected of her, being settling the arrears she had accumulated, she listened to her attorneys, Q Dube Attorneys not to. She also sought the counsel of a body which I guardedly categorise as being of a dubious origin or character, who encouraged her not to pay her dues. Even after she became sure of the identity of the applicant, she still failed to pay her dues to date. Her reasons among others are that since legal proceedings have been instituted, she wanted to fight them first. She insisted the local authority must be joined, yet when this Court afforded her that opportunity, she flouted it and did not act within the time allowed.

[65] The respondent is obviously a person with means. It is so that her parents are pensioners. However they have the means to service the rentals for these premises. The respondent even stated that this Court should rather allow or cause the parties to enter into a fresh lease agreement.

[66] The occupiers of this property are not indigent. They cannot by any stroke of the imagination be categorised as the poorest of the poor, thus triggering the constitutional obligations or imperatives that should make it essential that the Johannesburg Metropolitan Municipality be joined hereto as a party. The occupiers on their own evidence have proved to this Court that they can obtain for themselves alternative or other accommodation. Their money lies in the trust account of Q Dube Attorneys.

[67] They are staying rent free and without paying for the services they get at the premises. The totality of the circumstances here point to it being just and equitable that the respondent and those occupying the property through her be evicted.

[68] The respondent's verbalisation of an eagerness to normalise the situation between her and the applicant is not borne out by or balanced by her actual conduct. When given notice to vacate the premises, instead of normalising the situation by paying the arrears, she instructs her attorneys to defiantly tell the applicant to first serve section 4(2) notices on her before she can be evicted. The applicant did just that. Still, instead of now causing the money she has allegedly been paying into Q Dube's trust account to be

transferred to the applicant, she instructs her lawyers to fight to the death. It is my view and finding that this "*fight to the death*" was in the peculiar circumstances of this case a suicidal step. One is even tempted to say : "*volenti non fit iniuria*". However I stop shy of saying so. If the monthly rental of R3 500,00 is taken as a base, the respondent could be having R28 000,00 at the least in the attorneys' trust account. That is for rentals alone.

[69] The respondent argued that she was not aware of renovations undertaken by the applicant to the premises. Yet, she could illegally connect her flat to the new plumbing system after water stopped flowing in her flat as a result of her refusal to allow the applicant's workers to enter the property to do the necessary.

[70] This is a typical situation where trust between the two parties would have been eroded to a point that there cannot be normal relations of lessor and lessee between them.

[71] Every citizen in this country has a right to have his or her day in court. However, to insist on such a day in court when you have a hopeless case is not only self defeating but also very expensive.

[72] The respondent's defence that they withheld payment until they had verified the lessor's identity is very flimsy, if not entirely transparent when the facts in this matter are anything to go by.

[73] I sympathise with the respondent's counsel for the day, Adv Phetla. He fought valiantly but it was unfortunately for a lost cause. His attorney did not even bring his file to court. As such Adv Phetla could not ascertain issues as they arose during argument. I dare say this attorney may have led the respondent up the alley! Meaning one can be wont to say he misled his client, leading her, the poor unwitting client, down a precipice to nowhere. He should have simply written to the applicant's attorneys or mentioned in the various letters he exchanged with them, that the applicant had the necessary funds to cure her default in his trust account and he was tendering same. With our knowledge of collegiality rules between such professionals that would have been the end of the story. These proceedings would not have been instituted.

[74] I therefore find that the applicant had properly or validly cancelled the lease agreement between it and the respondent. As a result of such cancellation the respondent's sojourn, together with all those occupying the premises through her, became unlawful from that moment.

[75] The respondent has not come up with a valid defence to defeat the eviction application herein.

COSTS

[76] The applicant has asked that should its prayers be granted, the respondent be ordered to pay the costs hereof on a scale as between attorney and client.

[77] The respondent asked that this application be dismissed, also with costs including the costs of counsel. In the alternative, if I understood Adv Phetla's closing argument, if the applicant succeeds, this Court should not make an order as to costs because the occupiers of the property are indigent, hard of hearing and hard of sight.

[78] Suffice to state that the last-mentioned physical attributes were not ventilated in the papers or sufficiently in the arguments. Nevertheless, the respondent is not the same person as the elderly occupiers alluded to here. Furthermore, I have already found that those occupiers are not indigent people.

[79] The question now is whether the respondent alone should bear the costs of this application.

[80] The purpose of an award of costs to a successful litigant is to indemnify him for the expense to which he has been put through having been unjustly compelled to initiate or defend the litigation, as the case may be.

*Zeelie v General Accident Insurance Co Ltd* 1993 (2) SA 776 (E) at 779D-F.

*Die Meester v Joubert en Andere* 1981 (4) SA 211 (A) at 218G-H.

[81] Attorney and client costs are the costs that an attorney is entitled to recover from his client for the disbursements made by him on behalf of his client, and for the professional services rendered by him. Where the court awards a litigant costs against his adversary on an attorney and client basis, the successful party becomes entitled to recover from the unsuccessful party all the costs that on taxation are due by him to his attorney.

*Nel v Waterberg Landbouwers Ko-operatiewe Vereniging* 1946 AD, 597.

*SA Druggists Ltd v Beecham Group Plc* 1987 (4) SA 876 (T) at 882H-J.

[82] In the *Nel v Waterberg Landbouwers* case (*supra*), Tindall JA (Schreiner JA and Feetham AJA concurring) held that by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case may consider it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party-and-party costs that a successful party will not be out of pocket in respect of the expense caused to him by the litigation.

See also: *SA Druggists Ltd v Beecham Group (supra)* at 882H-J.

[83] A word of caution : an award of attorney-and-client costs cannot, however, be justified merely as a form of compensation for damage suffered,

and it is not granted lightly by courts. Courts are loath to penalise a person who has exercised his right to obtain legal redress or a judicial decision genuinely on the facts. This form of costs order is reserved for litigants who abuse the process of court or instigate or defend cases where they know or ought to have known that their chances are hopeless, thus unnecessarily mulcting the other party.

> *Mediterranean Shipping Co Ltd v Speedwell Shipping Co Ltd and Another* 1989 (1) SA 164 (D) at 170F-F.
>
> *Pieter Bezuidenhout – Larochelle Boerdery (Edms) Bpk en Andere v Wetorius Boerdery (Edms) Bpk* 1983 (1) SA 233 (O) at 237D.
>
> *Pienaar v Boland Bank and Another* 1986 (4) SA 102 (O) at 116B-C; 117A-C.

[84] The respondent's conduct as well as that of her attorneys of record, Messrs Q Dube Attorneys, left much to be desired in this matter. They were the direct or proximate cause of this application being instituted under circumstances where it should not have been. As stated above, a simple line in the numerous letters exchanged between Q Dube Attorneys and the applicant's attorneys would have laid this issue to rest way before litigation could be contemplated as an option. As a result, the respondent should bear the costs of this application on the punitive scale as prayed for by the applicant.

[85] The issue of the grant of an order of costs is the exclusive domain of the trial court which should exercise that discretion judiciously as guided by the facts and circumstances of the case. It is an inherent power the trial court has which brings me to the aspect of the role the in-the-law unlettered respondent's attorney of record has played in guiding or misleading him with his counsel to him.

[86] From the totality of the circumstances herein, it is clear in my considered view, that the respondent, on the advice of Q Dube Attorneys through whoever dealt with this matter, proceeded to precipitate the introduction a substantial issue(s) on which he was put in the wrong ultimately, and which had legitimately put the applicant to considerable expense unnecessarily.

[87] The applicant was obliged to institute these proceedings under circumstances created by the respondent with the attorney's advice, which proceedings were unwarranted, and reckless to the extent that they can also be categorised as being malicious and frivolous. It is my view and finding that the attorneys should bear part of the costs themselves.

*Van Dyk v Conradie & Another* 1963 (2) SA 413 (C) at 418E-F.

*Rautenbach v Symington* 1995 (4) SA 583 (O) at 588A-B.

[88] The conduct of the respondent and her attorneys in my view was tantamount to stubbornness bordering on vexatiousness and was highly reprehensible.

*Delfante & Another v Delta Electrical Industries Ltd & Another* 1992 (2) SA 221 (C) at 233A-F.

*Hawkins v Gelb & Another* 1959 (1) SA 703 (W).

[89] It also smacked of petulance and as stated above, an abuse of the process of the court. The conduct of the respondent's attorneys is open to serious censure. I toyed with the idea of reporting it to their professional body but decided against it. The order of costs would in my view adequately compensate for that and would in my further view also serve as a warning to them to ensure that they do not repeat similar conduct in future. It was ill-advised to defend this application. It ought not to have reached the stage where proceedings are instituted.

See: *Makhuva & Others v Lukoto Bus Service (Pty) Ltd & Others* 1987 (3) SA 376 (V) at 399A-C.

*Valken v Berger* 1948 (3) SA 532 (W).

ORDER

[90] The following order is made:

90.1 The respondent's application for the joinder of the Johannesburg Metropolitan Municipality as a party to these proceedings is dismissed.

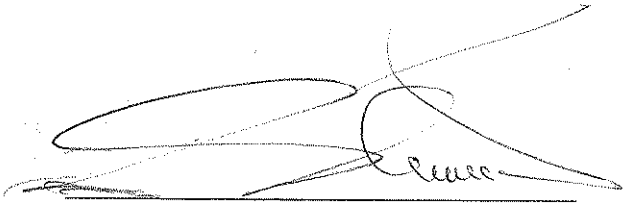
90.2 The respondent and all persons in occupation by, through or under her are ordered to vacate Flat 1, Ellmore Court, 68 Isipingo Street, Bellevue, Johannesburg ("*the property or premises*") within two (2) months of date of handing down of this order.

90.3 Should the respondent and/or all those in occupation of the premises by, through or under her fail or refuse to vacate the premises on or before 9 June 2013, the sheriff of this Court is authorised and mandated to evict them, with or without outside or additional help from the authorities.

90.4 In the event of the applicant being obliged to enlist the services of the sheriff or any other competent persons or institutions to carry out this order, the respondent shall be liable for all the expenses incurred in that respect on a scale as between attorney and own client.

90.5 The respondent and her attorneys, Messrs Q Dube Attorneys shall be liable in equal shares (of 50% each) of the

costs of this application on a scale as between attorney and client.



**N F KGOMO**
**JUDGE OF THE SOUTH GAUTENG**
**HIGH COURT, JOHANNESBURG**

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|---|---|
| FOR THE APPLICANT | ADV A W PULLINGER |
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| FOR THE RESPONDENT | ADV N S PHETLA |
| INSTRUCTED BY | Q DUBE ATTORNEYS<br>SANDTON, JOHANNESBURG<br>TEL NO: 011 036 6316 |
| DATE OF ARGUMENT | 28 MARCH 2013 |
| DATE OF JUDGMENT | 9 APRIL 2013 |