IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 5797/2019

(1) REPORTABLE: NO/~~YES~~

(2) OF INTEREST TO OTHER JUDGES: NO/~~YES~~

(3) REVISED.

16/09/2020

In the matter between:

ANTOINETTE MURRAY N.O	**FIRST APPLICANT**
COURTNEY CHANEL MURRAY N.O	**SECOND APPLICANT**
KEIGHTON MURRAY N.O	**THIRD APPLICANT**

(In their capacities as the trustees of the

Jack Family Investment Trust, IT No 7409/98)

and

LEONE-KELLY BURGER N.O **FIRST RESPONDENT**

KELLY MEYER N.O **SECOND RESPONDENT**

(In their capacities as the trustees of the

Lauyer Trust, IT No 1134/12)

THE SHERIFF OF THE HIGH COURT

FOR THE DISTRICT OF MOOKGOPHONG THIRD RESPONDENT

JUDGMENT

NAUDÈ AJ:

[1] The Applicant ("the Jack Family Trust"), duly represented by Antoinette Murray, and the Respondent ("the Lauyer Trust"), duly represented by Andre Meyer, entered into a lease agreement during August 2017. In terms of the lease

agreement the Respondent would rent the immovable property situated at Erf 9, Erf 8 and Portion 3 on the Farm Buffeldoorns, Registration Division K.R. together with the movable property therein.

[2] On or about 1 August 2019 the Respondent's legal representative, gave the Applicant's legal representative written notice of the Respondent's intention to vacate the property. It was allegedly agreed between the parties that an inspection of the property would be held on Saturday, 31 August 2019.

[3] On 30 August 2019 the 1st Applicant met with Sonja van Rensburg, the maternal mother of the 2nd Respondent and at that stage realised that all the movable property as set out in the Notice of Motion were removed from the immovable property by the Respondents.

[4] Several Whatsapp messages were exchanged between the legal representatives of the parties on 31 August 2019, but the most important crux of the messages were that the movable property were removed and that the Respondents would return the movable property under protest on a date mutually agreeable between the parties. The Applicant's attorney requested from the Respondent's attorney that an undertaking be given by no later than 12h00 (noon) on Monday, 2 September 2019 for the return of the movable property by the Respondents to the Applicants. In the interim, the Applicants proceeded to lay a criminal charge of theft against the Respondents and their representatives.

[5] On 2 September 2019 at 12h37 the legal representative on behalf of the Applicant wrote yet another letter to the Respondent's legal representative wherein the following was requested:-

"Would you please indicate whether your clients have any intention of returning the property belonging to my client to the main house and the cottage situated on the farm, and should your client have same intention, would you please indicate when we can expect your client to return the property".

No response was received to the aforesaid letter.

[6] The Applicants then proceeded to issue an urgent ex parte application for vindicatory relief against the Respondents on 5 September 2019 which application was set down for hearing on 10 September 2019. The Applicants brought this urgent application without service thereof on the Respondents and without any prior notice in the form of a notice of demand to the effect that should the movable property not be returned, the Applicant will proceed to bring an urgent application.

[7] On 10 September 2019 Madavha AJ granted an interim order as per the Notice of Motion returnable on 19 November 2019.

In terms of prayer 9 of the order costs of Part A was reserved until the finalization of Part B. In terms of paragraph 13 of Part B, the Applicants applied that the Respondent be ordered to pay the costs of this application on a scale as between attorney and client.

[8] On 12 September 2019, the movable goods were returned to the Applicants and as from 12 September 2019 the application in terms of Part B, except for costs became academic in nature. The counsels for the parties are ad idem that this application, save for costs, became academic.

[9] The Respondents filed a notice to oppose on 15 November 2019, only 4 (four) days prior to the return date of the interim order and more than 4 (four) weeks after service of the court order and application on the Respondents. This late filing of the Respondents' notice to oppose caused the rule nisi to be extended on 19 November 2019 to 3 March 2020. The

Respondents filed their Answering Affidavit on 29 November 2020. No application for condonation for the late entry of an intention to oppose was applied for by the Respondents. This issue was however not raised by any of the parties before court and am I not going to elaborate thereon except to state that the rules of court in respect of procedure and time frames are to be complied with by litigants.

[10] The application was set down on the unopposed roll of 3 March 2020 by the Applicants despite the rule nisi having become academic on 12 September 2019 (date of return of movable property) and despite the application having become opposed on 19 November 2019 already. The rule nisi was once again extended on 3 March 2020, but this time to the opposed roll of 13 August 2020 for an argument in respect of costs only.

[11] On 8 July 2020 a letter was sent to the Applicant's attorney by the Respondent's attorney which stated as follows:-

"1. *We refer to the matter which is set down for hearing on the opposed roll on 13 March 2020.*

2. *The only issue that needs to be determined is the question of costs.*

3. *My clients remain of the view that your application for an order for costs on attorney and client scale necessitated their opposition to the initial application.*

4. *My clients deny that they stole the furniture and they deny that they were about to dissipate the furniture. In addition, the fact that all the goods claimed by your client were never in their possession also necessitated their opposition of the application.*

5. *At no stage did my clients act mala fide or vexatious. It is our view that the application for a cost order on attorney and client scale is unreasonable. Therefore, after consultation with my client, I have received instructions to offer to your client, which is done herewith, payment of your client's party and party costs on an unopposed*

basis, to be taxed or agreed upon, until date hereof, on condition that the application is removed from the roll of 13 August 2020.

6. *Should your client however persist with the application for costs on an attorney and client scale, we will have no option but to instruct counsel to appear on 13 August 2020 to oppose your application."*

No reply was received from the Applicant's attorneys of record to the aforementioned letter and offer.

[12] On 21 July 2020, the Respondent's attorney sent another letter to the Applicant's attorney which read as follows:-

"My letter dated the 8th instant, which is attached hereto, refers. When can I expect the courtesy of a reply thereto?"

[13] On 26 July 2020, the Applicant's attorneys replied to the Respondent's correspondence in a letter as follows, and I only quote paragraph 3, 4 and 5 thereof:-

"3. *Communication was transmitted in which communication an offer was made that your clients be responsible for the costs which our clients had to incur for the urgent application which your clients were not willing to accept.*

4. *We find it strange to say the least that your clients have now at the 11th hour proposed a settlement offer, which offer our clients rejects at the outset in its totality. Our clients remain steadfast in their approach and have done so accordingly as from the inception of the matter.*

5. *Our clients have instructed us to proceed with the matter which has been enrolled on the opposed motion court roll for the 13th of August 2020."*

[14] This application before me is in respect of costs only as stated here above. 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 litigation, as the case may be. A cost order is not

intended to be compensation for a risk to which a litigant has been exposed, but a refund of expenses actually incurred. See **Payen Components South Africa Ltd v Bovic Gaskets CC 1999 (2) SA 409 (W) 417**.

[15] In **Herbstein & Van Winsen, The Civil Practice of the High Courts of South Africa, 5th Edition, Volume 2, page 954-955** the author stated as follows:-

"The award of costs is a matter wholly within the discretion of the court, but this is a judicial discretion and must be exercised on grounds upon which a reasonable person could have come to the conclusion arrived at. In leaving the magistrate (or judge) a discretion,

... the law contemplates that he should take into consideration the circumstances of each case, carefully weighing the various issues in the case, the conduct of the parties and any other circumstances which may have a bearing upon the question of

costs and then make such order as to costs as would be fair and just between the parties…

Even the general rule, viz that costs follow the event, is subject to the overriding principle that the court has a judicial discretion in awarding costs."

[16] Both, Counsel on behalf of the Applicants and Counsel on behalf of the Respondents in the present application before court, conceded that this matter should not have been on the roll. Counsel for the Applicants argued that the Respondent should not have opposed the matter in November 2019 and that appearance to oppose was only entered into *mala fide*. Counsel for the Respondents argued that the Applicants sought cost on a punitive cost scale and had they not opposed, the Applicants would simply have moved for an order discharging the *Rule Nisi* with costs on an attorney and client scale. I do not agree with this argument by the Applicant's Counsel and am I of the view that the Respondent had an interest which

needed protection in respect of the punitive cost scale award prayed for against the Respondents opposed to a normal cost scale of party and party. When asked by the court whether the Applicants intend to insist on costs on an attorney and client scale, Applicants counsel confirmed that they insist on a punitive cost scale as between attorney and client. When asked by Court on what grounds do the Applicants apply for costs on a punitive cost sale, Counsel for the Applicants could not sufficiently justify, in my view, any grounds for such a higher cost scale order. In my view the Respondents correctly opposed the application and did not act vexatious or malicious in doing so. I do however agree with both parties' Counsel that this matter should not have been on the roll.

[17] I am of the view that the Applicants are not entitled to costs on a punitive cost scale as there exists no reason or grounds for such a higher cost scale especially in light thereof that the Applicants brought this application *ex parte* and without prior

notice or service to the Respondents. Had the Applicants given proper notice and/or served the application, the issue regarding costs might have been a bit different.

[18] The Applicants were however successful in their application in that only after the interim order was granted by the court on 10 September 2020, were the immovable property returned to the Applicants'. It is a fundamental principle that, as a general rule, the party who succeeds should be awarded costs, and this rule should not be departed from except on good grounds. See **Pelser v Levy 1905 TS 466 at 469 and Fripp v Gibbon & Co 1913 AD 354.**

[19] **Innes CJ stated in Pelser v Levy supra** that:

"The question of costs is one largely in the discretion of the court which tries the case. At the same time it is essential that that discretion, which is a judicial one, should be exercised as far as possible in accordance with definite principles. One of

those principles seems to me to be this: where a man is compelled to come to court, and recovers a substantial portion of what he claims, then he should have his costs. Of course, this rule is subject to exceptions; but it is a general rule, and one important to be observed in adjudicating upon a question of costs."

[20] In **Fripp v Gibbon & Co supra , Lord De Villiers CJ held:**

"In appeals upon questions of cost two general principles should be observed. The first is that the court of first instance has a judicial discretion as to costs, and the second is that the successful party should, as a general rule, have his costs. The discretion of such court, therefore, is not unlimited, and there are numerous cases in which courts of appeal have set aside judgments as to costs where such judgments have contravened the general principle that the successful party should be awarded his costs."

[21] In **Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd 1948 (1) SA 839 (A) 863** as follows:

"A litigant's right to recover the costs of an opposed application from his opponent will, in general, depend on whether he was in the right, either in making the application or in opposing it as the case may be (provided always there are no grounds for exercising a judicial discretion to deprive him of these costs). The form in which this rule is usually stated is that the successful party is entitled to his costs unless the Court for good reason in the exercise of its discretion deprives him of those costs. Now, discarding for the moment the idea of discretion, in an appeal against an order for costs the court of appeal does not judge a party's right to his costs in the Court a quo by asking the question was he the successful party in the Court. It asks ought he to have been the successful party in the Court and decides the question of costs accordingly. It may or may not be necessary in such cases to deal with the order which was actually made on the merits. It may even be that no

order on the merits was made in the Court a quo because by the time the matter came before that Court the necessity for an order was gone and the sole question was one of costs. This shows that the merits of the dispute in the Court below must be investigated, in order to decide whether the order as to costs made in the dispute was properly made or not. In deciding whether or not the Court below made the correct order as to costs the reasons which prompted the Court to make its order must be examined and those reasons must be the actual reasons and no others."

[22] In the result the Applicants are entitled to their costs as successful litigants and are awarded costs on a party and party scale up to and including costs for 3 March 2020. The costs incurred from 3 March 2020 to date of hearing of this matter on 13 August 2020 were unnecessary and both parties' legal representatives had a duty to limit or curtail proceedings and costs. I do not see why the Applicants and/or Respondents

should be liable for these costs – both parties legal representatives are at fault and could easily having applied their minds have solved this issue without incurring further costs in order to obtain a cost order and in the result I am of the view that each party should pay his/her own costs from 3 March 2020 up to and including the costs of 14 August 2020.

[23] In addition, I do not view the continuous litigation in respect of costs only, in the best interest of either the Applicants or Respondents. The only parties whom stand to benefit from this continues vexatious and frivolous litigation are the respective parties' legal representatives. Both, the Applicant's counsel and the Respondent's counsel, conceded during the hearing of the matter that the only cost orders a court can make is a cost order on a party and party scale or attorney and client scale and there is no distinction between costs on an unopposed basis and an opposed basis. The issue in respect of the costs

on an unopposed or opposed basis is an issue to be debated before the taxing master.

[24] The Respondent's attorneys made a tender for costs only on 8 July 2020. Respondent's counsel confirmed that the tender for costs is still valid and was it still the Respondents' tender which can be accepted as a formal tender at the hearing on 13 August 2020. Although the cost tender stated that the tender is made on an unopposed basis, this application was on the unopposed roll up to 3 March 2020 and as already stated both counsel conceded that the correct tender would have been costs on a party and party scale. This misunderstanding, in my view, especially in light thereof that both counsels conceded that the correct wording was on a party and party scale, could easily have been resolved through correspondence, but did the Applicants attorney simply not engage in any negotiations after 8 July 2020 in order to attempt to settle the matter.

[25] I therefore make the following order:-

1. The *rule nisi* issued on 10 September 2019 is discharged.
2. The 1st and 2nd Respondents in their capacities as trustees of the Lauyer Trust, It No 1134/12, are ordered to pay the costs of this application on a party and party scale up to and including the costs of 3 March 2020.
3. Each party to pay its own costs from 4 March 2020 to and including 13 August 2020.

M. NAUDÈ

ACTING JUDGE OF

THE HIGH COURT

APPEARANCES:

HEARD ON:	**13 AUGUST 2020**
JUDGMENT DELIVERED ON:	**16 SEPTEMBER 2020**
For the Applicants:	Adv. Jaques H Groenewald
Instructed by:	Dawid H Botha, Du Plessis & Kruger Inc.
For the Respondent:	Adv. J H Mollentze
Instructed by:	Franco Rossouw Attorneys