REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 3071/2021

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

DATE..... SIGNATURE:.....

In the matter between:

BABSITA FAMILY TRUST **APPLICANT**

And

KAMO JOU TRADING & PROJECTS **FIRST RESPONDENT**

MASILI FLOYD GORDON NAKENG **SECOND RESPONDENT**

MFGN BOSCH SERVICE (PTY) LTD **THIRD RESPONDENT**

JUDGEMENT

KGANYAGO J

[1] The applicant, the first, second and third respondents (respondents) have concluded lease agreements in terms of which the respondents hired a portion of the property from the applicant. The lease agreements were for a period of 5 years commencing on 1st May 2017 and ending on 30th April 2022. The property leased was to be used for the purpose of tyre supply and similar services rendered to motor vehicles.

[2] During January 2021 the applicant requested a meeting with the respondents. The respondents replied the applicant per email suggesting that the meeting be held on 18th January 2021. In that email the respondents notified the applicant that their lease agreements were coming to an end on 30th April 2022, and that they do not see themselves investing more funds into the two companies. The respondents further notified the applicant that they were anticipating closing Tyres and More by 30th April 2021 based on current economical challenges and lease setup.

[3] The meeting between the applicant and the respondents took place on 10th February 2021 wherein the applicant acceded to the respondents' early termination of the lease agreements. The parties agreed that the termination was by mutual agreement, and that the applicant will await to be notified by the respondents as to when they will vacate the premises. On 1st April 2021, the respondents through their legal consultancy wrote an email to the applicant, notifying the applicant that the respondents no longer wish to terminate the lease agreements but that they wish to carry out the remaining term of the leases, and further requested a further extension of 5 years from the date of the expiration of the lease agreements. The applicant responded by notifying the

respondents that the lease agreements have been cancelled and that if they fail to vacate the premises, the applicant will proceed with legal action.

[4] On 6th May 2021 the applicant brought an application seeking orders that the cancellation and immediate termination of the lease agreements be confirmed; and that the respondents be evicted from the properties. The respondents filed their answering affidavit. The respondents in their answering affidavit have stated that in the light of the legal action and harassment received after the legal action was instituted, the respondents have decided to cancel both agreements. Further that the cancellation notices were sent to the applicant on 12th May 2021 and 10th July 2021, and also that they have vacated both properties.

[5] When this matter came before court on 13th October 2022, counsel for the applicant conceded that the respondents have vacated the leased premises, that the orders for confirmation of cancellation of the leases and evictions of the respondents have been rendered moot. That the only issue that the court must determine is the issue of costs. The applicant submitted that the general rule is that costs follow the suite, that since they were substantially successful with their application, the respondents were liable for the costs of the application on a punitive scale of attorney and own client. The respondents on the other hand submitted that the applicant's eviction application was premature. That even though the parties have agreed on a termination, the said termination was conditional, and that the condition was not met, hence the respondents opted to complete the remainder of the term of their lease.

[6] The applicant's application has been rendered moot by the respondents when they vacated the leased premises after been served with the application. There

is no longer any live dispute which the court may determine. The court has a discretion, notwithstanding that the matter has become moot, to hear and dispose it on its merits. The usual ground for exercising that discretion in favour of dealing with it on the merits is when the case raises a discrete issue of public importance that will have an effect on future matters. (See *Tshwane City v Nambiti Technologies*[1]). This matter does not raise any discrete issue of public importance that will have an effect on future matters, and therefore there is no need to deal with the merits which have become moot.

[7] The award of costs is in the discretion of the court, which discretion should be exercised judiciously, having regard to what is fair to both parties. In *Giuliani v Diesel Pump Injector Services (PVT.) LTD*[2] Goldin J said:

"The language used by Lord Justice Bowen in the case of Forster v Farquhar … appears to me to reflect law with regard to costs which is appropriate to this case:

'The measure of what is fair as to costs is not found in a mere consideration of his conduct toward the opposite side. It may have been reasonable from this point of view to do that which it would be unreasonable to make the opposite litigant pay for. Although he has won the action, he may have succeeded only upon a portion of his claim under circumstances which make it more reasonable that he should bear the expense of litigating the remainder than that it should fall on his opponent. The point is not merely whether the litigant has been oppressive in the way he waged his suit or prosecuted his defence, but whether it would be just to make the other side pay. We can get no nearer to a perfect test than the inquiry whether it would be more fair as between the parties that some exception should be made in the special instance to the rule that the costs should follow upon success … 'I cannot entertain a doubt', says Lord Halsbury LC, 'that everything which increases the litigation and costs, and which places on the defendant a burden which ought not to bear in the course of that litigation, is perfectly good cause for depriving the plaintiff of costs.' The language of Lord Watson is to the same effect: 'I shall not

[1] 2016 (2) SA 494 (SCA) at para 6
[2] 1966 (3) SA 451 (R) at 453C-E

attempt,' he says, 'a complete definition of what is meant by these words. They at all events embrace in my opinion everything for which the party is responsible connected with the institution or conduct of the suit and calculated to occasion unnecessary litigation and expense.'

[8] The lease agreements were terminated by mutual agreement, but the respondent wanted to renegade on that agreement, and wanted to unilaterally continue with the lease agreements and continue renting the premises until the initial term of the agreements expires. The applicant was forced to resort to litigation in order to evict the respondents. The respondents vacated the premises only after they were served with the eviction application. Despite having vacated the premises, the respondents proceeded to file their answering affidavit still opposing the eviction application. In their answering affidavit the respondents notified the applicant that they have cancelled the lease agreements and have also vacated the premises.

[9] The respondents answering affidavit was filed on 20th July 2021. From the 20th July 2021, the applicant was aware that there was no longer any live dispute between it and the respondents. The only outstanding issue was costs. That could have been resolved by the parties themselves out of court without clogging the court's roll. The matter could have been set down only if the parties were unable to agree. It does not seem that the parties have attempted to resolve the issue of costs on their own, except for the applicant to state that the respondents did not tender costs in their answering affidavit. Even if the respondents did not tender costs in their answering affidavit, that was not a bar to the parties from engaging each other in trying to resolve the matter on their own, rather to rush to court on a simple issue. It will therefore be just to award the applicant costs up to the time of filing of the respondents answering affidavit.

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

10.1 The respondents are jointly and severally liable for the applicant's costs on party and party scale up to the 20th July 2021.

10.2 Each party to pay its own costs for appearance in court on 13th October 2022.

KGANYAGO J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION,

POLOKWANE

APPEARANCES:

Counsel for the applicant	**: Adv van Gas**
Instructed by	**: AJ Coetzer & de Beer attorneys**
Counsel for the respondent	**: Mr Maja**
Instructed by	**: Maja Attorneys**
Date heard	**: 13th October 2022**
Electronically circulated on	**: 26th October 2022**