

SOUTH AFRICA / JUDGMENT

Seabush Investments (Pty) Ltd v Cook and Another (3668/2014) [2020] ZAECHGHC 56 (5 June 2020) [2020] ZAECHGHC 56

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Rugunanan

CASE / FILE NUMBER

3668/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

CASE

NO. 3668/2014

Date

heard: 12 March 2020

Date

delivered: 05 June 2020

In

the matter between:

SEABUSH
INVESTMENTS (PTY) LTD
Applicant
and
GEOFFREY
MARTIN COOK
First Respondent
NDLAMBE
MUNICIPALITY
Second Respondent

JUDGMENT

RUGUNANAN, J

- [1] In motion proceedings instituted on 10 September 2014 the applicant, acting through its sole director and shareholder Murray Craig Morrison (“Morrison”), resorts to the rei vindicatio and seeks the ejectment of the first respondent, Geoffrey Martin Cook (“Cook”) and all persons who occupy through or under him from certain immovable property described as:

“Portion 23 of the Farm The Gorah No. 398, Ndlambe Municipality, Division of Bathurst, Province of the Eastern Cape, in extent 315, 3893 hectares,

(“hereinafter referred to as “the farm property” or “the property”).

FACTUAL**BACKGROUND**

- [2] It is common cause that the property is owned by and registered in the name of the applicant [1] and that there are three residential units constructed thereon. Cook is in occupation of a residential dwelling unit known as “Top House”. It is alleged that he has also taken over the unit known as “The Cottage” and as for the dwelling known as “the original farmhouse”, this unit is derelict and is uninhabitable. The farm property abuts onto other pieces of land collectively known as the Sibuya Game Reserve and is understood to have economic potential in the eco-tourism business sector.
- [3] Cook and Morrison have a history that goes back well before the institution of these proceedings. They were co-shareholders in the issued share capital of the applicant and were its co-directors. Following Cook’s resignation as co-director in the circumstances set out in the swop agreement mentioned below, Morrison had full and complete access to the property, including keys, access control units and security codes. Morrison is presently the sole shareholder and director of the applicant and is also the deponent to its founding affidavit.[2] He acts in accordance with a resolution to finalise these proceedings, to commence maintaining the property and to operate all

or any tourism business therefrom in order to generate income for payment of the applicant’s creditors and expenses.[3]

- [4] In his answering papers Cook gives detail of his exit as co-director and shareholder in the applicant in what he describes as a “swop agreement” on which he relies for opposing the present application. A signed copy codifying the terms of this agreement is attached to the applicant’s founding affidavit.[4] Omitting insignificant wording, the relevant paragraphs in the answering affidavit in which Cook summarises the terms of the agreement are repeated as follows:

“12. ... on or about the 2nd of August 2010 in Johannesburg, Morrison and I concluded an oral agreement which I refer to as the “Swop Agreement”. The material express terms of the Swop Agreement have been pleaded by me in my Main Action. ... the following pleaded issues are relevant to this application:

12.1 I would sell my shareholding in both Seabush and SGR&L [Sibuya Game Reserve & Lodge (Pty) Ltd] together with all my claims against both companies to Morrison for a mere R1.00 each;

12.2 I would resign as a director of both Seabush and SGR&L;

12.3 I would give Morrison about R1.1 million to settle a debt owed to Investec Bank Ltd by Seabush;

12.4 I would pay R900 000.00; and

12.5

13. In exchange for all of this Morrison and I agreed that we would subdivide the land owned by Seabush to create the subdivided portion known as the Swop Land on which the “Top House” is situated. Morrison was supposed to give me a written contract of sale on terms agreed to by us, within two days, to enable us to create the Swop Land by subdivision and so thereafter to have it transferred into my name. I could not apply for the subdivision without Morrison giving me this contract and co-operating with the subdivision.

14. However, Morrison failed to give me a contract on the terms that we had mutually agreed. He did not provide me a contract within the time period agreed and then when he did eventually send me a contract some 6 weeks after the agreed date he tried to incorporate additional terms that we had never agreed to. He tried to make the contract far more restrictive than we agreed it would be. I had already done what I said I would do, I delivered my shares in both Seabush and SGR&L to Morrison. I had resigned my directorships. I had given Morrison R1 161 984.00 to settle the debt owed by Seabush to Investec. But I never got the Swop Land in return. Morrison kept all that I gave him and failed to deliver to me what I should have received in return.”

[5] Having accepted Morrison’s alleged failure to perform on the swop agreement [5] as amounting to a breach or repudiation Cook cancelled the agreement on 29 September

2010. On 17 April 2014, and in the High Court of the South Gauteng Local Division [6] Cook instituted action proceedings to which he refers in his papers as the “main action”.

[6] Morrison, Seabush and six other defendants were suited in the main action wherein Cook essentially claimed (i) re-transfer of his 50% shareholding in the applicant, (ii) restoration of his board seat as co-director, and (iii) in the alternative, damages [7] for breach of contract. Holding that each of these claims constituted a debt under the Prescription Act,[8] the High Court upheld a special plea of prescription and dismissed them.[9] In successive judgments on appeal to the Full Court of the Local Division concerned,[10] the Supreme Court of Appeal,[11] and on application to the Constitutional Court for leave to appeal, the outcome

on the prescription issue was effectively undisturbed.

THE

ISSUES

- [7] Inherent in the nature of the remedy invoked by the applicant is that possession of a thing should be restored to the owner and it follows that no other person may withhold it from the owner unless they are vested with some right enforceable against the owner (such as a right of retention or a contractual right).[12]
- [8] The substantial issue for determination in these proceedings is whether Cook's has a right to occupy Top House and by extension whether he has an underlying enrichment claim. Fundamental to this is the cancellation of the swop agreement (such cancellation having occurred before the main action was instituted), and Cook's written undertaking to vacate the property by declaring that the main action will be dispositive of the various disputes between the parties. Quoting from paragraph 40 of the answering affidavit, Cook's undertaking states:

"My main action commenced prior to this application and once finally determined it will in fact resolve all the issues in this eviction application. If I get my shares in Seabush back in my Main Action then there can be no dispute regarding my occupation of its property. If I do not get my shares back in my Main Action then I hereby undertake to vacate Seabush's property within 30 days of the final outcome of my trial in the Main Action, after all rights of appeal have been exhausted."

(my own emphasis is in bold)

THE ARGUMENTS

The onus

- [9] While acknowledging that the onus is on Cook to allege and prove his entitlement to occupy the property[13] his counsel, Mr Cassim SC, submitted that it was incumbent on the applicant to disclose how Cook acquired occupation. I do not agree with this submission. Except for the averment that Morrison abandoned his obligations and responsibilities for the property, the circumstances in which Cook alleges to have been its caretaker since 2010 [14] are insufficiently detailed in his papers.
- [10] Morrison's version begins with an inspection of the property during February 2014. Although he gained entry to the property with access control codes he could not utilise his set of keys for Top House. On that occasion he discovered that the locks to the house had been changed. He encountered Cook in residence at Top House and was told that a former general manager had changed the locks after a break in and had given replacement keys to Cook before

leaving the employ of the applicant. Morrison specifically states that Cook had no authorisation from the applicant to receive keys from the general manager or to use them for occupying Top House. Cook merely denies this but elsewhere in his papers he makes reference to a “right to stay” without giving content to its factual or legal foundation. The denial is implausible and amounts to a failure to disclose facts falling within his exclusive knowledge.

[11] In *Bekker and Another v Jika*[15], Harms JA put the matter thus:

“... the owner is entitled to approach the court on the basis of ownership and the respondent’s unlawful occupation. Unless the occupier opposes and discloses circumstances relevant to the eviction order, the owner, in principle, will be entitled to an order for eviction. Relevant circumstances are nearly without fail facts within the exclusive knowledge of the occupier and it cannot be expected of an owner to negative in advance facts not known to him ... ”.

Reciprocity

[12] Turning to the written agreement of 2 August 2010 attached to the applicant’s founding affidavit, Mr Cassim referred to the following clause:

“5.1 Seabush will transfer to you and you will become the owner of certain land on which the residential dwelling known as “Top House” is constructed (“the swop land”).”

[13] Pointing out that the obligation to transfer ownership arises from this clause and that once Cook complied with his part of the agreement - he relinquished all his interest in Seabush in return for which he would acquire Top House - Mr Cassim submitted that Morrison (on a plain showing of the applicant’s founding affidavit per se) is contractually obliged to reciprocate by transferring the swop land. From this perspective, and through the application of the principle of reciprocity, it was submitted that Cook acquired a contractual right to claim transfer of the property and is a lawful occupier. In support thereof Mr Cassim placed reliance on *Botha and Another v Rich N.O. and Others* [16] in which the Constitutional Court explained that the reciprocity principle is a flexible notion for achieving fairness in the law of contract. It has an interrelationship with the principle of good faith and is rooted in historical concepts of justice, reasonableness

and fairness. In our constitutional dispensation good faith associates with a recognition of the dignity freedom of contract and

equal worth of others and is the lens through which contracts come to be understood. The reciprocity principle acquires expression through good faith, and so too does the *exceptio non adimpleti contractus*. [17]

Enrichment

- [14] On the facts contended for in support of a contractual claim for transfer, Mr Cassim submitted that the same facts support the argument that Cook is a bona fide possessor with an enrichment lien that entitles him to remain in occupation of the property until he is compensated.[18] Acknowledging that there is no recognition of a general action for enrichment in our law,[19] Mr Cassim referred to the judgment in *McCarthy Retail Ltd v Shortdistance Carriers CC*
- [20] in which Schutz JA held, albeit obiter, that the recognition of a general enrichment action in an appropriate case would be favoured. [21] Taking his argument further Mr Cassim urged that the generic requirements [22] for an enrichment claim were present in casu and submitted that a general enrichment action be extended to Cook to enable him to secure payment of his claim relating to the expenditure of money on the property. The motivation for extending such an action to Cook is based on affording him an equitable remedy for which a court has a wide discretion (see *Grobler N.O. v Boikhutsong Busines Undertaking* [23]).

Issue estoppel and res judicata

- [15] The application of these prescripts, Mr Cassim submitted, did not affect the merits of the contractual claim or the claim based on the recognition of a general enrichment action, which claims have hitherto not been finally determined. They are substantive claims stemming from the swap agreement and are unaffected by the special plea of prescription that extinguished Cook's right of action for the debts mentioned in paragraph 5 supra. Neither the contractual claim nor the enrichment action were among the issues dealt with by the High Court nor in the subsequent

appeals. For this reason, Mr Cassim submitted, issue estoppel, a derivative of res judicata, does not apply to these claims.[24]

- [16] In summary, the argument for Cook is that a recognition of the principles of equitable relief and reciprocity will accord Cook respectively an enrichment action or a contractual claim resulting in the present vindictory proceedings being suspended until his rights have been finally determined. I will revert to this aspect later in this judgment since it deserves final comment once the effect of the cancellation of the swop agreement is dealt with.
- [17] In his argument Mr Paterson SC who appeared for the applicant correctly submitted that the contractual claim and the claim based on an enrichment lien are contextually distinct. In substance the submission is that Cook's contractual claim argued on the premise of a reciprocal obligation arising from the swop agreement is unsustainable because Cook cancelled the agreement. As for the enrichment lien, such a claim has not been made out due to the paucity of information in the answering affidavit - and for reasons dealt with hereunder, it cannot be extended to Cook on the premise of granting him equitable relief.

The contractual claim grounded in the principle of reciprocity

[18] Clause 5.5 of the written agreement, quoted in relevant part states:

“As the transfer of swop land to you constitutes a sale of immovable property, the parties will conclude a written land sale agreement as expeditiously as possible ... within 2 days.”

[19] The clause conveys that a further agreement will be concluded in respect of the swop land. It is not in issue that the sale agreement contemplated by the clause was never concluded between the parties. On Morrison’s version, he provided Cook with a written agreement but Cook did not react thereto.[25] The obvious inference is that neither of them signed the agreement and this simply meant that the provisions of the Alienation of Land Act [26] have not been complied with.[27] Moreover, Cook’s reliance on clause 5.1 runs contrary to the Subdivision of Agricultural Land Act.[28] Relying on *Geue and Another v Van Der Lith and Another*,

[29] Mr Paterson submitted that an agreement for the sale of agricultural land without the prior approval of the Minister, [30] is invalid.

[20] Clause 5.5 contemplated an agreement discrete from clause 5.1. For this reason clause 5.1 does not offer scope for contending that the principle of reciprocity finds application because what Cook seeks to enforce by way of an obligation on Morrison to transfer the swop land does not arise from the same agreement. This submission by Mr Paterson is persuasive. My sense however is that Clause 5.1 did not create rights and obligations so closely connected that the principle of reciprocity should apply. The objective meaning of clause 5.5 evidenced by the language used in the light of the ordinary rules of grammar and syntax, seems to me rather that the overriding intention

[31] of the parties was that they would enter into a further agreement in the form of a formal document. Because the condition in clause 5.5 remains unfulfilled, I am unable to agree with the submission that the founding affidavit, which by itself incorporates the swop agreement, confers upon Cook a legal right of occupation of the property. In the absence of a contractual right to enforce transfer of the property, there cannot be a legal right to occupy.

[21] Also militating against the recognition of a contractual right in favour of Cook is his non-payment of the amount of R900 000 in terms of clause 12.4 of the swop agreement. Our law recognises that where a contract creates reciprocal obligations own performance or tender of performance by a claimant is a requirement for the enforceability of his or her claim for counter-performance based on reciprocity.[32] Cook has not explained his default in his answering papers, nor has he offered to purge it. In this context I am not persuaded that the principle of reciprocity should be relaxed to the extent that transfer of the property be made conditional on payment of the said amount. To accord recognition of a contractual right in Cook’s favour is to trample the very notion of good faith which he seeks to exact from Morrison.

- [22] In the circumstances, without Cook establishing a contractual right to exact transfer of the property, he does not enjoy a contractual right to occupy it.

Enrichment lien

- [23] Whether Cook can claim a lien based on enrichment is a matter on which a court has a wide discretion in the assessment of equitable relief (*Grobler N.O. v Boikhutsong Business Undertaking (Pty) Ltd and Others*[33]). To a significant extent this will depend on whether Cook had been a bona fide or mala fide occupier and in either case this depends on his state of mind (*Grobler supra* [34]).
- [24] Mr Paterson submitted that there are several considerations that weigh against the recognition of such relief. Once the swop agreement was cancelled, Cook's occupation of the property became conditional upon the success of his main action. This is implicitly recognised in his undertaking. When the appeals process became exhausted at the threshold of the Constitutional Court, Cook could no longer be said to have been a bona fide occupier and ought to have had doubt about his right to occupy. On the papers, his state of mind pointing to this is supported by his knowledge of these proceedings.
- [25] I do not think that a person such as Cook who remains in occupation when it is clear that the appeals process has been exhausted and once he has given an undertaking (to which he must have applied his professional judgment as an attorney), can be said to be bona fide pending the decision of a suit to eject him from property of which he is not the registered owner. Cook, as Mr Patterson correctly

submitted, must have known he had no right to the property once the Constitutional Court ruled against him. A person in these circumstances cannot lay claim to being bona fide in his occupation. Allied to this is the further consideration that one of the difficulties with the answering affidavit is that it speaks of a "right to stay" but fails to disclose what this right is or where its content is derived from. The inescapable conclusion is that Cook has not identified a right to stay; his occupation of the applicant's property is unlawful and mala fide.

- [26] On the issue whether Cook as a mala fide occupier has a right of action to claim compensation for improvements, Mr Paterson quoted the following extract from Visser, *Unjustified Enrichment*: [35]

"The right of mala fide occupiers who claim compensation for improvements made to the property of another is, like that of mala fide

possessors, not entirely certain. There are indications that the courts would definitely grant a claim for necessary expenses, while the position with regards to useful expenses is less certain, although a variety of cases also recognise such claims. ... it is appropriate that the court should not award compensation for useful improvements to mala fide occupiers but should allow a claim for necessary expenses, because this encourages the preservation of property. In other words the approach suggested in respect of mala fide possessors should also form the treatment of mala fide occupiers."

[27] It is unnecessary to elaborate any further on what the learned author states. Several factors outweigh the equitable recognition of an enrichment lien in favour of Cook. The case made out in the answering affidavit, [36] Mr Paterson submitted, presumes that Cook is a bona fide occupier; but once it is found that he is mala fide the partitioning between useful and necessary expenses has not been classified nor discretely quantified. Apart from an omission to account for the value of his decade-long rent free use and occupation of the property,[37] the enrichment lien is sparsely pleaded and precludes me from evaluating the cogency of the evidence in the light of the submissions made by Cook's counsel. The further affidavit for which Cook sought leave to introduce is silent on the enrichment lien contended for. Seemingly, Cook does not have the necessary evidence and may justifiably be censured for not having pursued his claim for

enrichment since 2014.[38] The submission by Mr Paterson that Cook's claim for a right of retention fails is unassailable.

THE EFFECT OF THE CANCELLATION OF THE SWOP AGREEMENT

[28] Mr Paterson strongly relied on Cook's cancellation of the swop agreement on 29 September 2010 which he submitted put an end to every aspect of the arguments made in support of an enrichment lien and a contractual claim. The cancellation effectively terminated the swop agreement and supplants the argument of a reciprocal contractual right as a basis for Cook seeking relief. The reliance on *Botha v Rich* is therefore insupportable. In a similar vein, the enrichment claim was not left unaffected by the cancellation of the swop agreement. Once cancellation occurred Cook forewent any claim to ownership of the swop land. This undermines the argument that these substantive claims stemmed from the swap agreement. The cancellation simply meant that the claims were no longer live issues when the main action was instituted.

[29] Regard being had to the foregoing submissions by Mr Paterson, it is apposite to say something about the undertaking quoted earlier in this judgment. Its composition reflects that Cook could not have expressed himself in terms any clearer. The undertaking contains no scope for an unexpressed *reservatio mentalis* (such as that the undertaking was on the premise that the main action would involve a hearing on the merits) that would entitle him to avoid its effect. The purported reliance on an enrichment lien or a reciprocal contractual right is at odds with both his statement pertaining to the "[resolution] of all issues in this eviction application", and his affirmation to vacate the applicant's property.

[30] In this scenario no development of the common law is necessary to enable Cook to pursue defences on the pretext of equity. The development of the common law was an argument raised from the bar. I was not addressed on whether section 39(2) or section 173 of the Constitution is applicable.[39] The context of the matter is of significance. We have a litigant who has cancelled his agreement and given an undertaking to vacate property of which he is not an owner and of which he is in unlawful occupation. It is within that context that it is impermissibly argued that the common law should be developed.

- [31] I do not think Cook is able to avoid the consequences of his cancellation of the swop agreement and the undertaking to vacate. His defences are a smokescreen in contemplation of a (full-scale) new trial that might conceivably span another interminable period of time. It is the priority of the applicant as lawful owner to be restored its property. To afford Cook another day in court would be to sanction an abuse of the process of court. This is but one of the compelling considerations against granting him the relief contended for.

THE COUNTER APPLICATION

- [32] Simultaneously with delivery of his answering affidavit Cook launched a conditional counter-application. Its notice of motion prays that in the event of this Court being inclined to uphold the ejectment application Cook seeks an order that such application be stayed pending the final determination of his main action. The prescription issue was decisive in bringing the action to finality and so did the series of appeals. It is also evident from the analyses undertaken hereinabove that Cook enjoys no prospect of being afforded substantial redress, neither on the basis of applying the reciprocity principle for exacting transfer of the property, nor on the basis of this Court exercising its discretion to grant him equitable relief in pursuit of a claim for enrichment. In the circumstances the counter-application is decidedly rendered ineffective.

THE FURTHER AFFIDAVIT

- [33] A few days prior to the hearing of this matter Cook delivered an interlocutory application the purport of which was to seek orders for leave to file a further affidavit and the costs of the application. The application attracted an opposing affidavit. In this - the main application - the applicant's replying affidavit was delivered on 4 September 2019 (some five years after these proceedings were instituted on 10 September 2014). Cook's further affidavit sought to introduce information which he states was not available at the time of delivery of his answering affidavit (on 14 October 2016) and to deal with events in the interval leading up to the delivery of the replying affidavit.
- [34] It is the norm in application proceedings that affidavits are limited to three sets. For this reason care must be taken to fully set out the case of a party on whose behalf an affidavit is filed. A court will exercise its discretion in permitting the filing of a further affidavit where there is good reason for doing so.[40] This is assessed on the premise that a matter should be adjudicated upon all the facts relevant to the issues in dispute.[41]
- [35] Neither of the parties' counsel referred to any aspect in the further affidavit that could have been of assistance to this Court. On a fair conspectus of its contents, the affidavit does not contain new information that was not available on delivery of the answering affidavit.[42] The affidavit contains a mere recitation of argument lacking in evidential content and probative value and is unrelated to the matters raised by Mr Cassim during his address. Furthermore, it makes reference to issues on which the Supreme Court of Appeal had already made factual and legal findings. [43] It is also mystifying why reference is made to other portions of land neighbouring upon the applicant's property and to rehash the

outcome of the main action and the subsequent appeals.

- [36] Precisely where in the scheme of Cook's opposition to these proceedings do these matters assume any relevance is something I was not addressed on. One is left with nothing more than a sense that the intended purpose of the further affidavit was obfuscation and prolixity. Since neither of the parties' counsel referred to any aspect in the affidavit that could have been of assistance to this Court, Mr Paterson correctly characterised the affidavit as irrelevant. He submitted that opposition to its filing was justified. There is no good reason for accepting the affidavit since it makes no

contribution to adjudicating the issues in dispute. A court may justifiably express its displeasure for being burdened with obfuscatory material such as was done in this matter.

CONDONATION FOR THE REPLYING AFFIDAVIT

- [37] Cook's main action was instituted several months before the applicant launched these proceedings. At the time of delivering his answering affidavit the action had not been finally determined – hence his recourse to a conditional counter-application for securing a stay of this matter. Somewhat marginally, the answering affidavit incorporated detail of issues relevant to the main action. On this point, paragraph 40 of the answering affidavit (quoted earlier in this judgment) assumes relevance. Not only does Cook implicate his main action in these proceedings but he confidently asserts that the action will resolve all issues herein.
- [38] In seeking condonation Morrison explains that the applicant decided out of an abundance of caution that it should wait for the finalisation of the main action, then deliver its replying papers and proceed with this matter to finality. The course adopted by the applicant commends itself to prudence and avoided this Court from being burdened by detail of litigation taking place in another court with the risk of pre-empting findings on issues still to be decided in that court. By implicating his main action in this matter, along with his reference to exhausting his rights of appeal, Cook ought to

have foreseen and in effect caused the delay in finalising it. On these facts I am satisfied that good cause exists for condoning the applicant's delay.

THE EXTENSION OF SECURITY OF TENURE ACT 62 OF 1997 ("ESTA")

- [39] In raising this issue Mr Cassim merely adopted the stance that the applicant was obliged to comply with the requirements of ESTA. In *MEC for Health, Gauteng v 3P Consulting (Pty) Ltd* [44] the Court, quoting with approval the dicta of Joffe J in *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others*, [45] reiterated that it is trite law that in motion proceedings the affidavits serve not only to place evidence before the court but also to define the issues between the parties and that this applied to all issues and applied equally to answering and replying affidavits. The court added however, that a party in motion proceedings may advance legal arguments in support of the relief or defence claimed by it even where such arguments are not specifically raised in the papers provided that all relevant facts have been placed before the court and no

prejudice is caused to the other party.

[40] The issue constitutes a new argument raised from the bar and was not dealt with in Cook's answering papers. No relevant facts are detailed as to whether he and those occupying the property under him possessed the rights of an occupier as defined in ESTA[46], nor was this Court addressed on what requirements of ESTA were wanting, or on whether it has jurisdiction in terms of ESTA.[47]

[41] The absence of the issue being dealt with in the papers precludes me from dealing with the matter in a manner other than what the lis explicitly makes out as a case between a property owner that seeks the return of its property from someone who occupies it unlawfully.

It would be prejudicial to the applicant to allow the introduction of an issue that was not ventilated, even to a trifling extent, in the answering affidavit. The point was conceived and raised belatedly. It amounts to opportunism and is an ambush on the applicant.

COSTS

[42] In its notice of motion the applicant seeks an attorney and client costs order against Cook. Such an order is not lightly granted. The ordinary rule is that the successful party is awarded costs as between party and party.[48] The following dictum, quoting only where relevant, in *Zodin Investments (Pty) Ltd v Kemp*

[49] is apposite:

"Costs, whether party and party or attorney and client, are matters for the discretion of the Court, to be exercised judicially upon a consideration of all the facts; as between the parties it is a matter of fairness to both sides. Attorney and client costs may be awarded when unscrupulous, dilatory or mendacious conduct on the part of an unsuccessful litigant has burdened his opponent with attorney and client costs. Ethical considerations too may influence the exercise of the Court's discretion to award such costs. But the examples given above as to when attorney and client costs may be awarded are certainly not exhaustive and such costs may indeed be awarded whenever special considerations or special circumstances exist justifying the grant of such an order ..."

[43] There is a latent undercurrent to the parties' versions giving rise to nothing but a suspicion that neither of them has committed to telling the full story. Following conclusion of the swap agreement in 2010, Cook has since been occupying the applicant's property [50] and Morrison acquired full shareholding in the applicant and became its sole director. Morrison is located in another province and although explaining his absence from the property he makes an appearance several years later in February 2014.

[44] Referring to Cook, he complains that the income of the applicant accrues to someone who is neither a director nor a shareholder in the applicant and that it is being channelled into an unknown bank account.[51] The entire interval of Morrison's absence leaves it open to speculate on whether he could have been ignorant of Cook's

presence on the property considering that there was a general manager and a neighbour (“Fox”) whom Morrison alleges was a caretaker (but without stating exactly when Fox was so installed).

[45] As for Cook, nowhere in his papers does he disclose how he came to assume occupation save that he avers a “right to stay” without indicating the legal basis therefor. His approach to the matter while flouting his undertaking was to put his back against the wall and fight from any available vantage point.

[46] Then there is the strident criticism from both sides along with the onslaught of being enmeshed in litigation and counter litigation. In the total conspectus of the matter, I am cognisant that I am dealing with allegations on paper untested by cross-examination. If this had been a trial, where disputed issues are largely dependent on considerations of probability and credibility, the conduct and motives of both parties would have invited trenchant condemnation. I think it is fair to state that a departure from the ordinary rule that the successful party is awarded costs as between party and party is not warranted.

ORDER

[47] In the result the following order issues:

- (a) The first respondent, Geoffrey Martin Cook, and all persons who occupy and / or claim occupation of the applicant’s property through or under him, the said property being Portion 23 of the Farm The Gorah No. 398, Registration Division Bathurst Road, Eastern Cape Province, are hereby evicted from the property;
- (b) The date on which this order shall be carried out if the first respondent and all persons who occupy and / or claim occupation of the applicant’s property through or under him have not vacated the property is 30 September 2020;
- (c) Should the first respondent and all persons who occupy and / or claim occupation of the applicant’s property through or under him fail to vacate the applicant’s property on or before the abovementioned date the Sheriff of the Court or his / her lawfully appointed Deputy is hereby authorised and directed to take such steps as may be necessary to procure the eviction of the first respondent and all persons who occupy and / or claim occupation of the applicant’s property through or under him, from the property and, if necessary, to obtain the assistance of the South African Police for assistance in giving effect to this order;
- (d) The first respondent is ordered to pay the costs of this application on the High Court scale as between party and party;
- (e) The first respondent’s application for the introduction of a further affidavit is dismissed with costs on the same scale.

S. RUGUNANAN

JUDGE OF THE HIGH COURT

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This judgment was handed down electronically by circulation to the abovementioned legal representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 09h30 on 05 June 2020.

- [1] As per Certificate of Consolidated Title attached to Founding affidavit as Annexure “MM1”, pages 24-28
- [2] The records of the Companies and Intellectual Property Commission reflect Morrison as the sole director of the applicant, and the applicant’s share register extracts indicate that the authorised share capital of 100 shares are held by him. See Founding affidavit, pages 31 to 34
- [3] Replying affidavit, page 266
- [4] Annexure “MM2”, pages 29-30
- [5] Answering affidavit, page 91, paragraph [15]
- [6] Case No. 14342/2014
- [7] A component of such damages comprised of the amount of R1 161 984 which in terms of clause 12.3 of the swap agreement Cook paid over to Morrison to settle a debt owed to Investec Bank (see Replying affidavit, Annexure “MM11”, page 201, paragraph 26.2.2 and page 202, paragraph 31B)
- [8] Act No. 68 of 1969, as amended
- [9] Cook v Morrison and Others (1434/2014)
- [2016] ZAGPJHC 222 (4 August 2016)
- [10] Cook v Morrison and Another (A5058/16)
- [2017] ZAGPJHC 330 (18 August 2017)
- [11] Cook v Morrison and Another 2019
- (5) SA 51 (SCA)
- [12] Silberberg and Schoeman, The Law of Property, LexisNexis 5th ed at page 243
- [13] Woerman and Schutte N.O. v Masondo 2002
- (1) SA 811 (SCA)
- [14] Answering Affidavit, page 97 paragraphs 24 and 25 and page 98 paragraph 26
- [15] 2003

- (1) SA 113 (SCA) at 124E. See also *De Villiers v Potgieter and Others* NNO 2007
- (2) SA 311 (SCA) at paragraph [12]
- [16] 2014
- (4) SA 124 (CC) at paragraphs [45] and [46]
- [17] a party from whom performance is claimed may raise their own non-performance as a defence
- [18] LAWSA “Licensing to Malicious Proceedings” 2nd ed, Vol 15 Part 2, paragraph 50
- [19] See further Sonnekus JC, *Unjustified Enrichment in South African Law* (2nd ed) LexisNexis at pages 32-33 and fn 159
- [20] 2001
- (3) SA 482 (SCA)
- [21] *McCarthy supra* at paragraphs [8] and [10]
- [22] (i) the defendant must be enriched; (ii) the plaintiff must be impoverished; (iii) the defendant’s enrichment must be at the expense of the plaintiff; and (iv) the enrichment must be without cause (*sine causa*). See *McCarthy supra* at page 490 D read with page 496E
- [23] 1987
- (2) SA 547 (BGD) at 576G
- [24] see *Gold Circle (Pty) Ltd v Maharaj* (1313/17) [2019] ZASCA 93 (3 June 2019) at paragraph [20]: “Following the decision in *Boshoff v Union Government* 1932 TPD 345 the ambit of the *exceptio rei judicata* has over the years been extended by the relaxation in appropriate cases of the common law requirements that the relief claimed and the cause of action be the same (*eadem res* and *eadem petendi causa*) in both the case in question and the earlier judgement. Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same (*eadem actor*) and that the same issue (*eadem quaestio*) must arise. Broadly stated, the latter involves an enquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed. Where the plea of *res judicata* is raised in the absence of a commonality of cause of action and the relief claimed it has become commonplace to adopt the terminology of English law and to speak of issue estoppel. But, as was stressed by Botha JA in *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (A) at 699D, 670J-671B, this is not to be construed as implying an abandonment of the principles of the common law in favour of those of English law; the defence remains one of *res judicata*. The recognition of the defence in such cases will however require careful scrutiny. Each case will depend on its own facts in any extension of the defence will be on a case-by-case basis (*Kommissaris van Binnelandse Inkomste v Absa Bank supra*) at 670E-F). Relevant considerations will include questions of

equity and fairness not only to the parties themselves but also to others. As pointed out by De Villiers CJ as long ago as 1893 in *Bertram v Wood* ‘unless carefully circumscribed, [the defence of *res judicata*] is capable of producing great hardship and even positive injustice to individuals’.”

[25] Replying affidavit, page 175, paragraph 26.4

[26] Act No. 68 of 1981, as amended

[27] Section 2 of which states: “No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.”

[28] Act No. 70 of 1970, as amended

[29] 2004

(3) SA 333

[30] i.e. the Minister of Agriculture, Forestry and Fisheries

[31] *Man Truck and Bus (SA) (Pty) Ltd v Dorbyl Ltd t/a Dorbyl Transport Products and BUSAF* 2004

(5) SA 226 (SCA) at paragraph [12]; see also *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012

(4) SA 593 (SCA) at paragraph [18] and *Unica Iron and Steel v Mirchandani* 2016

(2) SA 307 (SCA) at paragraph [21] for the current state of the law regarding the interpretation of written contracts

[32] *Botha and Another v Rich N.O. and Others* at paragraph [43]

[33] 1987

(2) SA 547 (B) at 576G

[34] At page 568B

[35] *Juta & Co*, 2008 at page 615. See also LAWSA “Energy to Environmental Management”, 3rd ed Vol 17, paragraph 241

[36] pages 101-102, paragraphs 35-36

[37] per Grobler N.O. *supra*

[38] In this regard see the letter dated 15 April 2014 attached to the founding affidavit as Annexure “MM8” at pages 48-54

[39] The judgment in *MEC for Health and Social Development, Gauteng v DZ obo WZ* 2018

- (1) SA 335 (CC) includes an extensive discussion on the proper approach for developing the common law
- [40] Hano Trading CC v JR 209 Investments (Pty) Ltd 2013
- (1) SA 61 (SCA) at 165A-C
- [41] Erasmus, Superior Court Practice, Vol 2 at D1-67
- [42] Compare in this regard paragraphs 6 and 7 on pages 86-87 of the Answering affidavit with paragraphs 7, 8 and 9 on page 5 of the further affidavit.
- [43] The SCA judgment in footnote 11. See also page 16, paragraph 6.2 of the Opposing affidavit in the interlocutory application
- [44] 2012
- (2) SA 542 (SCA) at paragraph [28]
- [45] 1999
- (2) SA 279 (T) at 323F-324C
- [46] See Pieterse v Veneter and Another (A5016/2011)
- [2012] ZAGPJHC (10 February 2012) at paragraphs [17] and [18] on the components of the definition of an “occupier”
- [47] See Agrico Masjinerie (Edms) Bpk v Swiers 2007
- (10) BCLR 1111 (SCA) at paragraph [20]
- [48] LAWSA “Co-operatives to Courts and Tribunals” 3rd ed Vol 1, paragraph 281
- [49] 1983
- (4) SA 483 (C) at 486C-E
- [50] Further Affidavit, Cook, page 5, paragraph 10
- [51] Replying affidavit, page 169, paragraph 24.4 and page 172, paragraph 25.5

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