IN THE LAND CLAIMS COURT OF SOUTH AFRICA

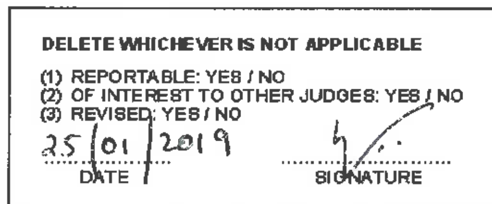
HELD AT RANDBURG

CASE NO: LCC 252/2015 TO
LCC280/2015

LCC 129/2016

Before: **The Honourable Acting Judge President Meer**

Delivered: 25 January 2019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(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED: YES / NO
25/01/2019
DATE
SIGNATURE

In the matter between:

HAZELDEAN FARM (PTY) LTD	**FIRST PLAINTIFF**
OMPHALOS INVESTMENT (PTY) LTD	**SECOND PLAINTIFF**
And	
MARTHA RATSHIDI	**FIRST DEFENDANT LCC252/2015**
PIET MOQWABE	**FIRST DEFENDANT LCC253/2015**

PETRUS MABENA	**FIRST DEFENDANT**
	LCC255/2015
TIMOTHY TLOU	**FIRST DEFENDANT**
	LCC256/2015
MOSES MABENA	**FIRST DEFENDANT**
	LCC257/2015
SOPHIE SKOZANA	**FIRST DEFENDANT**
	LCC258/2015
JOYCE NKOSI	**FIRST DEFENDANT**
	LCC259/2015
MAGDALINE MAHLANGU	**FIRST DEFENDANT**
	LCC260/2015
JOSEPH MAHLANGU	**FIRST DEFENDANT**
	LCC129/2015
MICHAEL MABUKA	**FIRST DEFENDANT**
	LCC261/2015
AARON TSELANE	**FIRST DEFENDANT**
	LCC262/2015
KATHERINE MABUKA	**FIRST DEFENDANT**
	LCC263/2015
GEORGE TSELANE	**FIRST DEFENDANT**
	LCC264/2015
JIMSON MAHLANGU	**FIRST DEFENDANT**
	LCC265/2015
PHILLIP MAHLANGU	**FIRST DEFENDANT**
	LCC266/2015
CORNELIUS MAHLANGU	**FIRST DEFENDANT**
	LCC267/2015

LUCAS PHETLA	**FIRST DEFENDANT**
	LCC268/2015
APRIL MABENA	**FIRST DEFENDANT**
	LCC269/2015
PAULINA MAHLANGU	**FIRST DEFENDANT**
	LCC270/2015
MAGDALINE MAGAGULA	**FIRST DEFENDANT**
	LCC271/2015
MINA SKANKA	**FIRST DEFENDANT**
	LCC272/2015
PALEDI JACK MAHLANGU	**FIRST DEFENDANT**
	LCC273/2015
MORAKE MODIMOLA	**FIRST DEFENDANT**
	LCC274/2015
ABELINAH NGOBENI	**FIRST DEFENDANT**
	LCC275/2015
JOSINAH MAHLANGU	**FIRST DEFENDANT**
	LCC276/2015
THOMAS MONYAGENI	**FIRST DEFENDANT**
	LCC277/2015
LAZARUS LETWABA	**FIRST DEFENDANT**
	LCC278/2015
JOHANNES PAILE	**FIRST DEFENDANT**
	LCC279/2015
PAULOS MAHLANGU	**FIRST DEFENDANT**
	LCC280/2015

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY	**SECOND DEFENDANT**
MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	**THIRD DEFENDANT**
EXECUTIVE COUNCIL FOR HUMAN SETTLEMENT FOR THE GAUTENG PROVINCE	**FOURTH DEFENDANT**

JUDGMENT DELIVERED 25 JANUARY 2019

MEER AJP

Introduction

[1] This judgment considers whether the attorneys representing the First Defendants being some 30 occupiers residing on land known as Hazeldean farms, Gauteng, ("the farms") are liable to pay the costs *de bonis propriis* which were occasioned by the postponement of the hearing that was set down between 10 – 14 December 2018. Such costs are applied for by the Plaintiffs.

[2] The First and Second Plaintiffs own the farms. They launched proceedings for the eviction of the First Defendants in terms of the Extension of Security of Tenure Act 62 of 1997. The Second Defendant is the Municipality with jurisdiction. The Third Defendant, the Minister of Rural Development and Land Reform has expressed a willingness to purchase *inter alia* the land they currently occupy, for the First Defendants. The Fourth Defendant, the

Executive Council for Human Settlement for the Gauteng Province, is cited in its official capacity.

[3] The postponement of the trial was sought by the Plaintiffs and the Second Defendant after the First Defendants, at the commencement of the hearing withdrew an in principle agreement to relocate from the farm to an area known as "Portion 6 Pienaarspoort". The Plaintiffs were willing to purchase this farm for the purpose of relocating the First Defendants thereto. The agreement in principle to relocate had been the stance of the First Defendants up until the hearing was about to commence. This stance had been conveyed in documents filed at Court and communicated to the parties at pre-trial conferences.

[4] The postponement was sought on the basis that the First Defendants had, in changing their stance, changed the case that the Plaintiffs and the Second Defendant had come to Court to meet, as conveyed to them by the First Defendants, up until the run up to the trial date. The Plaintiffs and Second Defendant submitted that, on the understanding as conveyed to them by the First Defendants' attorneys, that the First Defendants had agreed in principle to relocate, they had expected that the case they had to meet comprised matters pertaining to the in principle agreement. They had anticipated from what was conveyed to them by the First Defendants' attorneys, that the agreement was eventually to be made an order of Court and that the eviction case was no longer one they had to meet or prepare for. They were taken by surprise when the Second Defendants' attorneys informed them otherwise just before proceedings were about to commence.

[5] I granted the postponement application and ordered as follows:

"Having heard the parties, the following order is made:

1. The matter is postponed *sine die.*
2. The First Defendants shall pay the costs occasioned by the postponement on a scale as between attorney and client.
3. The First Defendants' attorney shall show cause why they should not pay the costs referred to in paragraph 2 above, de *bonis propriis*, and the First Defendants should be absolved from bearing such costs.
   3.1. The First Defendants' attorney shall show cause by way of an affidavit to be filed by 15 January 2019 as to why the costs referred to in paragraph 2 above should not be awarded de *bonis propriis*, and the First Defendants should be absolved form bearing such costs.
   3.2. Any party wishing to reply to the First Defendants' attorneys' affidavit referred to in paragraph 3.1 above, shall do so by 22 January 2019."

Background Facts

[6] In accordance with this Court's Practice Directions the dates for the trial were agreed between all parties and the Registrar. The Plaintiffs' attorneys filed a notice of set down on 11 June 2018 for the trial to be conducted during the following two week period:

- 29 October 2018 to 2 November 2018; and
- 10 – 14 December2018.

[7] On 29 October 2018 the First Defendants' attorneys applied for and were granted a postponement due to the fact that their Senior and Junior Counsel had withdrawn, for the reason, as conveyed to the Court, that the First Defendants no longer trusted them. New counsel had been briefed shortly before the proceedings were due to commence, without an adequate opportunity to prepare. The trial was postponed to 10 December 2018. By agreement the First and Third Defendants were ordered to pay the costs jointly and severally occasioned by the postponement of the trial set down for five days between 29 October 2018 to 2 November 2018.

[8] Thereafter in an attempt to promote the expeditious, economic and effective disposal of the case I convened a conference on 2 November 2018 in terms of Land Claims Court Rule 30. The minutes of that conference are set out below:

"1. It is recorded that all the occupiers (First Defendants) have agreed in principle to relocate to Portion 6 of the farm Pienaarspoort ("the property") on a date to be determined either by agreement or by the Court, subject to the following matters to be dealt with in the meantime until 10 December 2018:

1.1 The Third Defendant has in principle agreed to acquire Portion 6 of the farm Pienaarspoort after obtaining instructions and reporting to the parties in writing in this regard on or before 16 November 2018;

1.2 The Plaintiffs will subject to the Third Defendant acquiring the property make a substantial amount of money available to be held in a trust account, to be utilised by the Second Defendant to make provision for accommodation on Portion 6 of the farm Pienaarspoort for the First Defendants, in conjunction with the Second Defendant.

1.3 The Second Defendant will subject to the Third Defendant acquiring the property, proceed to subdivide the property to ensure security of tenure is given to the First Defendants in the form of title deeds, who will use the money provided by the Plaintiffs to construct houses for the respective First Defendants and will provide the necessary services such as water, sanitation and electricity etc within approximately 6 months of the Court Order.

1.4 It was agreed that the issue of the graves would be adjourned. The First Defendants' attorneys recorded that a few graves fell outside the area where a cemetery has been proposed to be established, which issue should not prevent an order being granted.

2. The Parties shall continue in their efforts to resolve this matter.

3. DIRECTIVES ISSUED

3.1 A draft order shall be circulated by the Second Defendant by 12 November 2018 setting out the aforesaid issues and the procedure to be agreed upon.

3.2 All parties shall respond to the draft order by no later than 19 November 2018.

3.3 Should any party not agree with the draft order, such party shall communicate their points of disagreement to all the parties and specify solutions to any perceived problems.

3.4 By 26 November 2018 the Plaintiffs' attorney will file a report specifying if an agreement had been reached. In the event of an agreement not being reached, the report shall specify the issues not in dispute and the issues which remain to be determined by the court at the hearing on 10 December 2018.

3.5 A telephonic conference will be held on 28 November 2018 at 9am. The purpose of the conference will be either to make the draft order an order of Court or to plan for the hearing on 10 December 2018.

3.6 If, during the telephonic conference, the parties agree that the draft order be made an order of Court, the draft order will be made an order of Court on 10 December 2018.

3.7 The First Defendants' attorneys shall ensure the attendance of all the First Defendants on 10 December 2018."

[9] Pursuant to the aforementioned conference a draft order as referred to in paragraph 3.1 of the directives, was circulated to all the parties. On 23 November 2018 after perusing the draft order the First Defendants' attorney wrote to all parties recording that the First Defendants had agreed in principle to relocate to Portion 6, Pienaarspoort.

Paragraph 3 of that letter states

"We note that the reasons for our clients agreeing, in principle, to relocate to Portion 6, Pienaarspoort, "Portion 6", was as a result of some of the provisions contained in the plaintiffs open tender which was sent to us on 12 October 2018."

The letter then goes on to state that the draft order does not include a number of provisions contained in the open tender, and lists provisions that parties should consider including.

[10] Thereafter the Plaintiffs' attorney filed a progress report on 30 November 2018, in accordance with the Court's direction. The report states at paragraph 1:

> "1. It is recorded that all occupiers (First Defendants) were agreed in principle to relocate to Portion 6 of the farm Pienaarspoort ("the relocated property") on a date to be determined either by agreement or by the Court, subject to the following matters to be dealt with in the meantime until 10 December 2018:
>
> 1.1 The Third Defendant has in principle agreed to acquire Portion 6 of the farm Pienaarspoort after obtaining instructions and reporting to the parties in writing on or before 6 November 2018."

[11] In response to the progress report and once again in an attempt to promote the expeditious, economic and effective resolution of this matter, the registrar at my request sent the following letter to the parties on 4 December 2018:

> "The progress report of 1 December and the letter from the State Attorney attached thereto refers. Kindly note that at the conference of 2 November 2018 all parties were directed to respond to the draft report. Insofar as the letter from the State Attorney states that the legal representatives of the City of Tshwane do not have instructions to discuss the draft report, this is in violation of the Court direction which must be complied with. The Second Defendant is potentially in contempt of Court if this stance persists.
>
> The Presiding Judge has requested the parties to consider whether in view of the agreement in principle that the Third Defendant is prepared to purchase the land in question, that the occupiers will move to such land and that the Plaintiff is prepared to make funds available to be utilized by the Second Defendant to make provision for accommodation, whether a settlement agreement at this stage should not be entered into pertaining to just these in principle agreements. Such agreement could provide a time

frame for agreement to be reached on outstanding issues such as the value of the land etc. and for the procedure to be adopted.

The Presiding Judge requests that the parties discuss this and other relevant matters in the days leading up to the hearing and certainly on the morning of 10 December 2018 before the hearing commences at 12 noon.

Given the progress that has been made thus far, it would be unfortunate if the entire process is scuppered because the parties are not able to reach agreement on procedural and other matters at this stage."

[12] In view of the aforegoing, the parties and indeed the Court were taken by surprise at the commencement of the proceedings on 10 December 2018, when the First Defendants' legal team, now led by different counsel, for the first time conveyed that the First Defendants were not prepared to relocate to Portion 6 Pienaarspoort.

[13] Due to the First Defendants' changed stance the issue before the Court was not the remaining provisions of the agreement, as conveyed in the First Defendants' attorney's letter, but an action for the eviction of the First Defendants. The Plaintiffs and the Second Defendants applied for a postponement on the basis that this was not the case that had been conveyed by the First Defendants' attorney that they had to meet on 10 December. The case they had come prepared to meet, pertained to the in principle agreement by the First Defendants' to relocate and remaining issues with regard thereto. They had been given the impression that the trial pertaining to the eviction of the First Defendants would not be proceeding and they had not come prepared with their witnesses to meet that case.

[14] Mr Notshe for the First Defendants opposed the postponement application, submitting that the Plaintiffs ought to have been ready for the eviction trial,

and that no settlement agreement had been entered into. In granting the postponement, I stated that the Court had also gained the impression from the conference, and subsequent documents that the case the Plaintiffs and other Defendants were required to meet and prepare for during 10 to 14 December was not the eviction of the First Defendants, but matters pertaining to the in principle agreement.

[15] The minutes of 2 November 2018, the First Defendants' attorney's letter and the progress report, clearly conveyed that the First Defendants had agreed in principle to relocate to the Portion 6 of the farm Pienaarspoort. The letter to the parties from the First Defendant's attorney, whilst requesting that further provisions in the draft order be considered, did not convey otherwise. Hence the letter from the Registrar of 4 December 2018. The Court and the parties had been put under the impression that the matter to be dealt with at the hearing was different to that now presented.

[16] The circumstances in my view warranted the award of costs sought against the First Defendants, on the attorney and client scale, which I granted.

[17] Mr Roberts representing the Plaintiffs sought in addition for such costs to be awarded *de bonis propriis* against the First Defendants' attorney. The order that I granted, as quoted above, gave the First Defendants' attorney until 15 January 2019 to show cause by way of affidavit as to why costs should not be awarded *de bonis propriis,* against them, in which instance the First Defendants would be absolved from bearing the costs occasioned by the postponement. My order also provided that any party wishing to reply to the affidavit should do so by 22 January 2019.

Submissions received from First Defendants' Attorney

[18] The First Defendants' attorney, Evette George, filed an affidavit on 15 January 2019 which sets out her firm's interactions with the First Defendants after the postponement on 29 October 2018 and explains their changed stance as follows:

18.1 On 30 October 2018 the First Defendants' attorneys consulted with them about the Plaintiff's open tender/settlement proposal. The First Defendants decided that they were willing in principle to relocate to Portion 6 Pienaarspoort on the basis that they *inter alia* were provided with proper housing, running water, electricity and that their concerns related to Portion 6 were adequately addressed.

18.2 On 31 October 2018 the First Defendants' attorneys wrote to the Plaintiff's attorneys informing them that the First Defendants had agreed in principle to relocate.

18.3 On 1 November 2018 the Department of Rural Development and Land Reform arranged for the First Defendants and their attorneys to view other alternative accommodation as they were concerned that Portion 6 is located near a squatter camp. The First Defendants identified Donkerhoek as an alternative location.

18.4 Thereafter the First Defendants informed their attorneys that though they agreed in principal to relocate to Portion 6 they still had a number of concerns regarding the said property, *inter alia,* that Portion 6 has a fuel line running through it, concerns of the squatter camp situated nearby and concerns about housing. The stance of the First Defendants was that if all these issues were fully addressed, they would be amenable to relocate, particularly given the progress that had been made thus far.

18.5 The First Defendants' attorneys decided to set-up a consultation in order to ascertain fully the reasons giving rise to their clients' hesitancy. They also

contacted the attorney of the Second Defendant and enquired about the aforementioned fuel line. On 4 December 2018 the latter attorney informed them that there is no fuel line that runs inside Portion 6.

18.6 The First Defendants were unavailable to consult with their attorneys prior to the telephone pre-trial conference of 28 November 2018 in order to discuss their concerns. Hence at that conference the First Defendants' attorneys stated that their clients were still willing to consider relocating. They conveyed that there were still issues that their clients needed addressing and at that conference the Court directed that the parties should engage further.

18.7 The First Defendant's attorneys were only able to finally consult with their clients on Sunday 9 December 2018, the day before the hearing. Not all of the First Defendants were present at the consultation. Those that were there indicated their dissatisfaction with Portion 6, in particular the fuel line. Upon conducting an inspection on Sunday 9 December 2018 the Plaintiff's attorneys located blocks of cement which indicated in writing a warning that there is a Transnet fuel line running through Portion 6.

18.8 On 10 December 2018 when all representatives of each of the First Defendants households were present the First Defendants' legal team consulted with them and learnt that they were not prepared to accept the Portion 6 settlement proposal and Donkerhoek as an alternative option. They did not wish to relocate because of their concerns relating to fuel lines. They communicated moreover that they felt pressurised to accept Portion 6 on the basis of it being an agreement in principle.

18.9 It was as a result of the First Defendants' rejection of the in-principle agreement on 10 December 2018 that the case which the other parties anticipated they would have to meet, had changed.

Submissions received from First Plaintiffs' Attorney

[19] An Affidavit was filed by the Plaintiffs' attorney, Mr Moolman, two days late on 25 January 2019 without the courtesy of a condonation application. I express my displeasure at the liberty taken. Given that the affidavit was received whilst this judgment was still being checked by the Court's researcher, and had not yet been finalised, I was prepared to consider the affidavit. Practitioners are expected to comply with directives and time frames set by the Court and not to expect leniency, albeit my indulgence in this instance.

[20] In his affidavit, Mr Moolman takes issue *inter alia* with the fact that the First Defendants' attorneys failed to annex any affidavits from the First Defendants stating that they were under a misapprehension as to what the relocation had in store for them. He points out also that there are no affidavits from senior counsel recording facts at his disposal when he accepted the brief. He states moreover that it is extremely improbable that the First Defendants stated their unwillingness to relocate to Portion 6 Pienaarspoort on 10 December 2018. He states that the conduct of the First Defendants' attorneys smacks of recklessness and the last-minute change of stance was engineered in an attempt to secure an adjournment. Mr Moolman also contends that there was a serious neglect of duty on the part of the legal representatives of the First Defendants for not consulting properly after the initial postponement was granted.

Finding

[21] It is trite that all relevant information must be placed before a party and the Court to warn of the case that has to be met. In *Naidoo & another v Sunker & others* [2012] JOL 28488 (SCA), the Supreme Court of Appeal held that "[i]t

is a fundamental rule of fair civil proceedings that parties, both plaintiffs and defendants, should be apprised of the case which they are required to meet".[1] Similarly, the Constitutional Court in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (3) BCLR 219 (CC) at paragraph 51 affirmed that the other party must be left in no doubt as to the nature of the case it has to meet and the relief that is sought.

[22] At no stage after the draft order and progress report was circulated did the First Defendants' attorney convey that their clients were no longer in agreement in principle to relocate to Pienaarspoort Portion 6 and that the other parties would have to prepare for the eviction hearing. Whist their attorney's letter dated 23 November 2018 raises issues that should be included in the Draft Order, it does not state that there is no agreement in principle that the First Defendants would relocate. In fact paragraph 3 of that letter confirms the in principle agreement.

[23] Then, after the progress report was circulated to the parties and filed with the Court, at no stage did the First Defendants' attorneys indicate that their clients no longer intended to move. Furthermore after the Court had gained the impression that the issues before it had been narrowed and the Registrar sent a letter on 4 December 2018 reflecting the impression conveyed to the Court that there was an in principle agreement, the First Defendants' attorney continued to be silent on there being no agreement.

[24] Consequently, as aforementioned, at the commencement of the proceedings not only the Plaintiffs and the Second Defendant, but also the Court was of the view that the matter for consideration was the in principle

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[1] *Naidoo & another v Sunker & others* [2012] JOL 28488 (SCA) at para 19.

agreement that there will be a relocation and issues pertaining thereto. The other parties had thus come to Court prepared to deal with that matter alone.

[25] The question arises whether this state of affairs can be attributed to any dishonesty, wilfulness or negligence in a serious degree, factors well recognized for attracting costs *de bonis propriis*,[2] on the part of the First Defendants' attorneys? From Ms George's affidavit I conclude, not. Her affidavit makes clear that the First Defendants' attorneys did not conceal or negligently withhold any information from the parties, and that it was a result of a last minute rejection of the in-principle agreement to relocate, that the other parties as well as the Court, were taken by surprise and were confronted with matters they had not come, prepared to meet. I find there to be no suggestion that her version that the First Defendants' attorneys only learnt about the change in stance on 10 December 2018, is improbable as contended by Mr Moolman, or that the change of stance was engineered to attempt to secure an adjournment. Nor can the First Defendants' attorneys be blamed for not consulting adequately after the first postponement. On the contrary, from Ms George's affidavit, it was the First Defendants themselves who did not make themselves available for consultation.

[26] Ms George has however not explained in her affidavit, why the reasons for the changed stance of her clients, as explained above in her affidavit, was not conveyed fully to the Court on 10 December 2018, especially in the light of the Plaintiffs' seeking costs *de boniis propriis* against her firm. The First Defendants' legal team was remiss in not fully conveying the explanation as contained in her affidavit. Had they done so they might not have attracted an

[222] Factors recognized for which costs *de bonis propriis* are granted. See Cilliers "Law of Costs" chapter 10 at 10.25 (issue 38). See Also *Mathimbane and Another v Normandien Farms (Pty) Ltd* [2014] JOL32048 (LCC).

application for costs *de bonis propriis* and the Court and the parties would have been spared the trouble of having to consider this.

[27] In all of the circumstances, it was not the First Defendants' Attorney, but the First Defendants themselves who were responsible for the other parties coming to Court to answer only to matters pertaining to the agreement in principle to relocate. Whilst the First Defendants were perfectly entitled to reject the settlement agreement at any time, they had a responsibility to apprise their legal team and the other parties of this timeously, so as to enable them to prepare for the changed circumstances. The First Defendants ought to have consulted with their attorneys and conveyed their withdrawal from the in principle agreement timeously after they viewed Pienaarspoort early in November. Their conduct in not being available for consultations, and thereafter only conveying their rejection of the agreement on the morning of the hearing, warranted the cost order granted against them.

Costs

In keeping with the practice of this Court not to award costs except in special circumstances, of which I find none, I shall make no order as to costs.

[28] The following order is granted:

1.The application for the First Defendants' Attorney to pay the costs *de bonis propriis*, occasioned by the postponement on 10 December 2018, is dismissed. Such costs shall be borne by the First Defendants as ordered.

2. There is no order as to costs.

Y S MEER

Acting Judge President

Land Claims Court

For the Plaintiffs	:	Adv. G Roberts SC
		Adv. E Roberts
Instructed by	:	Moolman & Pienaar Incorporated
For the First Defendants	:	Adv. Notshe SC
		Adv. Malatji
Instructed by	:	Magagula George Mcetywa Inc.
For the Second Defendants	:	Adv. Voster
Instructed by	:	Kunene Ramaphala Inc.