IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

CASE NO: 41880/16

DATE: 10 August 2022

In the matter between:-

HENDRIK FRANCOIS VAN NIEKERK Applicant

V

FA COETZEE First Respondent

CITY COUNCIL OF MATLOSANA Second Respondent

JUDGMENT

KOOVERJIE J

[1] The dispute in this matter revolves on a costs issue. The respondents seek a punitive costs order, on an attorney and client scale, in their favour. The applicant, Mr van Niekerk, had tendered party and party costs upon the withdrawal of his application (main application).

[2] I am mindful that in the exercise of my judicial discretion I should have regard to not only the conduct of the parties, but the facts of this matter as well as ensure that the costs order is fair and just between the parties. For the purposes of this judgment, the second respondent will also be referred to as the City Council. The applicant will also be referred to as "Mr van Niekerk" and the first respondent as "Mr Coetzee" in this judgment.

[3] This costs dispute emanated from the aforesaid main application instituted by the applicant where he sought certain interdictory relief. In essence, the applicant sought to interdict the first respondent, Mr Coetzee, from hosting functions such as weddings, conducting a catering business on his property as well as other illegal uses. The applicant further sought that Mr Coetzee be prevented from using his property in the said manner until such time he obtained the necessary land use rights from the second respondent (City Council). This entailed that the restrictive conditions contained in the title deed be removed.

[4] Both respondents opposed the said main application and filed their respective answering affidavits. The applicant, however, failed to file his replying affidavit and pursue the matter to finalisation thereof.

[5] The thrust of the respondents' case was that the applicant had no basis for instituting the said application. It was pointed out at the time the applicant was well aware that the restrictive use on the property was removed; and secondly, the applicant was negligent in not first enquiring from the City Council as to the status of the restrictions before the lodgment of this application.

[6] The first respondent strongly contended that the "lodging of the fruitless application post approval" could have been avoided if the applicant made the necessary enquiries from the authorities (including the second respondent as to whether the rezoning application was approved or not. In fact, it was argued that there was every reason to do so since the applicant was well aware that the removal of the restriction was imminent. More particularly, that a recommendation was already in place. [1]

[7] The respondents relied on Annexure 'CM6' being the relevant correspondence which informed the applicant that the removal of the restriction was approved. The approval letter from the City Council, dated 9 May 2016, was attached to the letter, addressed to the applicant's attorneys dated 13 May 2016.[2]

[8] The relevant extract from the said letter appears in paragraph [9]:

"(9) the removal of the restrictive title conditions (j) of the Title Deed T40210/2008 on page 3, is approved. A formal application should be submitted to the North-West Department of Local Government and Traditional Affairs in terms of the Removal of Restrictions Act, 1967. The new land use rights may only be exercised after the approval of the removal of

[1] 001-25 of the record
[2] Annexure 'CM6', p 169

restrictive conditions application by the North-West Department of Local Government and Traditional Affairs."

[9] It is clear from the reading of the said letter that the City Council approved the upliftment of the restriction. However, the correspondence went further and qualified the use of the property. The recommendation was conditional in that the land use rights could only be exercised after approval from provincial authority, that is North-West Department of Local Government and Traditional Affairs.

[10] It is not in dispute that the correspondence, 13 May 2016 letter read with 9 May 2016 letters were communicated to the applicant. He was therefore aware of the status of the land use by virtue of the said correspondence.

[11] It is further not in dispute that during this period, and prior to the approval from the provincial authority, Mr Coetzee held events on his property without the rezoning certificate applied for. Final approval was granted on 13 April 2016.

[12] It is, however, necessary to have regard to the circumstances the applicant found himself in prior to the lodgment of the application. The applicant attested to his affidavit on 24 May 2016. In his founding affidavit he explained that he is the first respondent's next door neighbour and unlawful use of the property caused unsettling disturbance to his home and family life.

[13] He further explained that when he initially complained, the unlawful activities seized for a period. For approximately 18 months thereafter there was peace in the

neighbourhood. However, Mr Coetzee returned and ensued with the prohibited activities once again.[3]

[14] The applicant complained that the business in conducting wedding functions included loud music and the serving of alcohol without the prescribed liquor license. It was only after the applicant complained to the City Council, did the first respondent take steps to apply for his rezoning licence.

[15] I have taken cognisance of the applicant's argument that even though he was aware of the application for the rezoning, which entailed, "running a business of a guesthouse, place of refreshment, professional offices, public worship, conference facility and other uses with special consent of the local authority", final approval was however not in place. The restrictions in the title deed had to be formally removed by the provincial authorities.

[16] It cannot be gainsaid that if the applicant made the necessary enquiries from the City Council before the lodgment of the main application, he would have learnt that final approval was obtained from the provincial authority. The approval was in any event imminent and the applicant should at least have made the enquiries.

[17] It is not in dispute that the first respondent was well within his rights to conduct the business activities under the rezoning licence after 13 April 2021.

[18] During argument and importantly, the respondents conceded that the applicant was not aware that the provincial authority had in fact formally approved the removal of

[3] Founding Affidavit par 4.11 and 4.12

the restrictions at the time he deposed to his affidavit.[4] The final approval letter of 13 April 2016 was not brought to his attention.

[19] The approval, as stipulated in the 13 April 2016 letter read:

"Herewith the MEC's written consent in terms of the provisions of condition (j) (page 3) in Deed of Transfer T40210/08 that erf 8 may be rezoned from "special" to "special" for the purposes of a guest house, place of refreshment, professional offices, public worship, conference facilities, as well as other uses with special consent of the local authority."

[20] Our courts have over the years given guidance and have exhaustively set out circumstances when attorney and client costs are justified. As alluded to above, one should give consideration to the facts and circumstances in each matter. Although litigants are not barred from approaching court for relief, they would be penalized If they abuse the time and processes of the courts.

[21] More recently, in the ***Public Protector*** matter[5] the court defined circumstances when a costs order on an attorney and client scale is warranted. It was pointed out that fraudulent, dishonest and/or vexatious conduct on the part of a litigant justifies such punitive costs order.

[22] In considering this matter, I have further taken the following into consideration, namely:

[4] Annexure CM4 page 161
[5] Public Protector v South African Reserve Bank, 2019 (6) SA 253 CC at par 8

(i) Annexure 'W15', which constitutes a letter addressed from the City Council to the applicant's attorney dated 30 March 2016, set out:

"The applicant will only be allowed to exercise the new land use rights after the approval of the restrictive conditions (i) and (j) of the Title Deed T40210/2008 …".

(ii) Moreover, at the time when the first respondent's rezoning licence was still subject to the provincial authority's approval, Mr Coetzee was unlawfully continuing with his business activities, despite him expressly made aware that he was prohibited from doing so.

[23] Having regard to the facts as they stood at the time, particularly that on the applicant's knowledge the rezoning licence was not finally approved, I find that punitive costs are not warranted. The applicant had reason to have instituted the main application.

[24] I, however, hold a different view post the institution of the said application, more particularly, after the answering affidavits were filed.

[25] Upon receipt of the said application, the respondents duly filed their respective answering affidavits. The answering affidavits informed the applicant there was final approval. The approval was communicated on 13 April 2021.

[26] The first respondent had further attached the rezoning certificate to his papers and made reference to the second respondent's answering affidavit where the said rezoning certificate was attached as 'CM1'[6]. The applicant was further advised that

[6] 05-129

the property was now being zoned for business as a guesthouse, place of refreshment, professional offices, public worship, conference facility as well as other uses with the consent of the local authority.

[27] Further, in the second respondent's affidavit, the applicant was made aware that the property was rezoned as applied for and that the restriction was removed from the title deed of the property by the MEC. The applicant was further advised that the area where Mr Coetzee's property is located had been designated as mixed use land development by virtue of the Spatial Development Framework of the City Council. Hence the first respondent's rezoning application was for mixed land uses was in place.[7]

[28] Upon receipt of the answering papers, the applicant failed to file his replying affidavit. The second respondent filed its affidavit on 15 July 2016 and the first respondent on 19 July 2016.

[29] Being aware of the said facts, the applicant failed to react, either by withdrawing his application or persist therewith. The respondents then took the initiative to enroll the application for hearing. In the 5 years, the respondents attempted to do so, the applicant remained silent.

[30] It was only on 25 March 2021 that the applicant filed his notice to withdraw the interdict application. This was as a result of him being made aware that the application was enrolled for hearing for 12 April 2021. The applicant proposed to tender party and party costs at the time. The respondents refused such offer.

[7] Page 94 of the second respondent's answering affidavit

[31] Due to this impasse, the matter on costs could not be resolved. In that time the respondents persisted with this application demanding costs, which included the necessary processes including holding pre-trial minute proceedings, on a punitive scale.

[32] In this time, the respondents further filed their heads of argument, enrolled the matter, and served the enrolment on the applicant. The applicant ignored all these processes. The applicant, as a reasonable litigant, should have withdrawn the matter upon perusal of the answering affidavits in 2016 already. Such dilatory conduct caused unnecessary expenses to be incurred on the part of the respondents and was most certainly unreasonable.

[33] Moreover, I was made aware that the applicant instituted a further application for review on the same subject matter in another court on 2 May 2018.[8]

[34] I agree with the respondents that the delay of five years before withdrawing the application was unreasonable and had necessitated all the subsequent unnecessary actions on their part. Hence, in these circumstances, a punitive costs order is justified.

[35] In these circumstances, I am of the view that punitive costs for the processes post the filing of the answering affidavits in July 2016 are justified.

[8] 014-10 paragraph 2.4.2

[36] It is trite than an award of attorney and client costs is not lightly granted by our courts. It is only in exceptional circumstances where the court would grant such a punitive costs order. I am also mindful that an award of attorney and client costs is justified if some special consideration exist, either from the circumstances which gave rise to the action or from the conduct of a losing party.

[37] Ultimately, the purpose of an award of costs is to identify a successful party who has incurred expenses in instituting or defending an action. Attorney and client costs are costs which an attorney is entitled to recover from his client in respect of disbursements made on behalf of the client, and for professional services rendered by him to his client.

[38] Although the applicant's conduct may not have been dishonest or fraudulent, it most certainly was not in good faith.[9] In my view, unnecessary and frivolous litigation was ensued. No explanation was proffered as to what caused the delay of five years nor were reasons furnished as to why the applicant failed to correspond with the respondents' various communications and notices.

[39] I therefore find that the following costs orders be awarded in favour of the respondents. Firstly, the applicant is liable for the first and second respondent's costs pertaining to the institution of the application on a party and party scale. Secondly, the applicant is also liable for the costs incurred by the first and second respondents post the filing of the respondents' affidavits on an attorney and client scale.

[40] The following order is made:

[9] Erasmus, Superior Court Practice- Second Edition Vol. 2 Chapter D5

1. The applicant's application is withdrawn in terms of Rule 45(1)(a) with the leave of this court.
2. The applicant is ordered to pay the costs incurred in the main application from July 2016 on a party and party scale.
3. The applicant is ordered to pay the first and second respondents' costs incurred post the filing of the answering affidavits on an attorney and client scale.

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H KOOVERJIE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the applicant:	Adv D Hewitt
Instructed by:	Claasens Van Niekerk Attorneys
Counsel for the first respondent:	Adv JJ Pretorius
Instructed by:	Van Staden, Vorster & Nysschen Attorneys c/o DBM Attorneys
Counsel for the second respondent:	Adv NG Laubscher
Instructed by:	Bernhard van der Hoven Attorneys
Date heard:	28 July 2022
Date of Judgment:	10 August 2022