



## THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Not Reportable

Case no: 93/06

In the matter between:

**HYPERCEPTION PROPERTIES 572 CC**  
Appellant

and

**WATERHOUSE PROPERTIES CC**  
Respondent

First

**JEAN-MARIE DENIS MAURICE MOORE**  
Respondent

Second

**JUANITA CATHERINE MOORE**  
Respondent

Third

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**Coram:** *Farlam, Navsa JJA et Malan AJA*

Date of hearing: **13 November 2006**

Date of delivery: **21 November 2006**

**Summary:** **Withdrawal of application for condonation for late lodging of an appeal record – in circumstances no basis for exceptional costs order.**

**Neutral citation:** This judgment may be referred to as *Hyperception v Waterhouse* [2006] SCA 137 (RSA).

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**JUDGMENT**

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NAVSA JA

NAVSA JA:

[1] This is an application for condonation for the late lodging of an appeal record in a matter that involves a dispute between the owners of two adjoining properties on the banks of the Vaal River, in Parys, on the Free State Province side. The applicant and the first respondent are the respective owners. The second and third respondents are members of the first respondent. The Bloemfontein High Court ordered the demolition of a structure which the applicant had erected on its property and which the respondents found offensive and had submitted was erected unlawfully. The application for condonation relates to an appeal against that order.

[2] In the midst of submissions on the application for condonation and after requesting a short adjournment to take instructions, applicant's counsel informed the court that he was withdrawing the application as his client conceded the merits. The effect of the withdrawal of the application for condonation is that the Bloemfontein High Court's order that the structure be demolished remains extant. The applicant tendered costs on a party and party scale. The tender included all the costs involved in the prosecution of the now abandoned appeal.

[3] Counsel for the respondents urged us to order the applicant to pay their costs on an attorney and client scale, submitting that from the outset the applicant had behaved recklessly and unreasonably: first, in resisting attempts before the structure had been erected to reach an amicable resolution, and thereafter by adopting a high-handed attitude after litigation commenced until their concession before this court in medias res. Furthermore, it was submitted

on behalf of the respondents that the appeal was prosecuted in an extremely careless and inept manner and that this court should in the totality of these circumstances show its disapproval by ordering that costs be paid on an attorney and client scale.

[4] In respect of the merits of the matter the respondents were rightly unsuccessful in their attempt to persuade the Bloemfontein High Court to order the applicants to pay costs on an attorney and client scale. The applicant resisted the respondents in the court below on the basis of legal advice it obtained. The litigation does not appear to have been conducted in a manner that warranted an exceptional costs order.

[5] It is necessary to consider the time delay in the prosecution of the appeal. The applicant obtained leave to appeal against the judgment of the Bloemfontein High Court on 10 June 2005, lodged a notice of appeal on 11 July 2005, but only lodged the record of appeal on 2 March 2006. The applicant has not provided a proper explanation for this inordinate delay. It is true that the appeal was prosecuted carelessly and that in fact the explanation afforded on behalf of the applicant for the inordinate delay is hardly an explanation at all. However, the circumstances are not such as to warrant the costs order sought by the respondents.

[6] In the result the respondents are constrained to accept the tender by the applicant. No order is made.

M S NAVSA  
JUDGE OF APPEAL

CONCUR:

FARLAM JA

MALAN AJA