

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 2020/28164

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED YES

22 April 2022

Date


Signature

In the matter between:

G J MACLACHLAN

First Applicant

B R MACLACHLAN

Second Applicant

and

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY

First Respondent

EXECUTIVE MAYOR, CITY OF JOHANNESBURG:

GEOFF MAKHUBO

Second Respondent

CITY MANAGER, CITY OF JOHANNESBURG:

NDIVHONISWANI LUKHWARENI

Third Respondent

Heard: 24 January 2022

Judgment: 22 April 2022

JUDGMENT

MOVSHOVICH AJ:

Introduction

1. This was originally an application for a mandamus to compel the City of Johannesburg ("**the respondent**") to issue clearance figures for a property. With the merits of the dispute now being academic, given the delivery and payment of those figures, the only remaining issue is costs. The applicants seek punitive costs against the respondent; the respondent seek the dismissal of the application with costs. Both parties allege malfeasance or abuse of process by the other.

Background

2. On 22 June 2020, the applicants entered into an agreement to sell the Remaining Extent of Portion 5 of Erf 1085, Bryanston ("**the property**"). For the transfer of the property to be effected, in accordance with section 118(1) of the Local Government: Municipal Systems Act, 2000, the respondent was required to issue a rates clearance certificate. To this end, the respondent was first required to deliver a statement setting forth what are in conveyancing practice referred to as "clearance figures", which would have to be paid by the applicants prior to the issue of the certificate.
3. In light of the above, the applicants applied to the respondent on 5 or 7¹ August 2020 for the respondent to issue clearance figures in respect of the property. In terms of the respondent's own general conditions listed on the clearance figures application form, "*[s]ubject to there being no outstanding council levies or queries on services the application will be processed within five (5) working days.*" There is no suggestion in

¹ The date is disputed on the papers. 5 August 2020 appears to be the correct date, but little turns on this.

this case that there were any outstanding council levies or queries on services which would have delayed the release of clearance figures.

4. When no clearance figures were provided, the applicants on 27 August 2020 sent a demand to the respondent's officials, including the respondent's legal advisers, officials who deal with clearance figures and clearance certificates, and the general contact email address for the respondent.
5. No response was received to this communication and the applicants launched a court application on 29 September 2020 to compel the respondent to deliver clearance figures for the property, and related relief.
6. The application was then, on 21 October 2020, supplemented pursuant to a request by Wanless AJ, which is not germane for present purposes.
7. On the same date, 21 October 2020, the respondent furnished the applicants with rates clearance figures. Those figures, in their terms, were stated to be payable by 1 October 2020. The obvious defect in those figures was pointed out by the applicants to the respondent on 22 October 2020.
8. On 22 October 2020, the respondent filed a notice of intention to oppose the application.
9. On 26 October 2020, the application came before this Court, but was postponed *sine die*.
10. After further follow up correspondence from the applicants, the respondent furnished the corrected clearance figures to the applicants on 13 November 2020, and these were paid by the applicants on 23 November 2020. The respondent then issued the rate clearance certificate on or about 24 or 26 November 2020.

11. It appears that nothing further happened in the matter until the filing of the answering affidavit on 22 December 2020, followed by a reply on 18 January 2021. The respondent's answer dealt with the totality of the applicants' case. The answer sought to lay the blame for the matter landing up in court on the applicants. In particular, the answering papers suggested that the applicants failed to pay clearance figures furnished by the respondent prior to launching these proceedings. It is unclear to what "figures" the respondent was referring here, but it appears to be alleged by it that clearance figures were communicated to the applicants between 7 August 2020 (when, according to the respondent, the application for clearance figures was lodged) and 29 September 2020 (when the current court proceedings commenced).
12. The allegations in the answering papers are vague and bald. They are also not accompanied by any evidence of these alleged "clearance figures" or the communication which was purportedly sent to the applicants in this regard. It appears that the allegations are not a serious and veritable attempt to answer the case, but have the effect of diverting attention from the key issues and sowing confusion. The only document on which the respondent relies for its (novel) version is a printout from its system ("**TM1**") which shows two entries: one on 7 August 2020; the other on 21 October 2020. The averment appears to be that these were two separate clearance figures applications. But, there is no evidence of two separate applications. No second application is disclosed by the respondent. Indeed, as illustrated in the replying affidavit, the rate clearance figures were furnished to the applicants on 21 October 2020 under the reference number (2200605662) reflected on TM1 as relating to the entry dated 7 August 2020. The email from the respondent is annex "**R1**" to the replying affidavit, and the clearance figures are "**R2**". The clearance figures delivered on 13 November 2020 likewise bore the same reference number, not the reference

number reflected next to the 21 October 2020 entry (2200619862). The respondents' vague version was responded to in detail in the applicant's replying affidavit. The respondent has not sought leave to deliver a fourth set of affidavits to deal with the issues raised in reply, even though it was open for it to do so.²

13. While a court will be slow to reject a respondent's version simply on paper,³ in my view, the present case is one in which a robust, common-sense approach⁴ to apparent disputes of fact is warranted. Given the vagueness of the respondent's allegations (the date and content of the alleged first clearance figures are unknown) and the lack of supporting material, its version amounts to no more than a bald, unsubstantiated denial of the applicants' version. But, in any event, the version (to the extent that its meaning may be understood) is far-fetched and palpably untenable. The robust, common-sense approach is in any event commended by the fact that the respondent has not sought to file a fourth set of affidavits (with the result that the substantive allegations in reply are uncontradicted in further filings) and the fact that this matter now only concerns costs. It would be wasteful for any potentially disputed issues to be referred to oral evidence. The respondent is also the party which would be in possession of documentation which corroborates its version in the answering papers; its failure to produce the evidence renders its version even less plausible.
14. It also beggars belief that the applicants would write a lengthy email to the respondent on 27 August 2020 if they had already received clearance figures on 7 August 2020 which could simply be paid.

² *Tantoush v Refugee Appeal Board and Others* 2008 (1) SA 232 (T), para [51]

³ *National Scrap Metal v Murray & Roberts* 2012 (5) SA 300 (SCA).

⁴ *Soffiantini v Mould* 1956 (4) SA 150 (E), 154

15. In all the circumstances, I find that there were no clearance figures issued by the respondent prior to 21 October 2020.
16. There was no dispute that clearance figures should generally be provided within five working days of application.

Analysis

17. Generally speaking, costs follow the result. Ordinarily, they are awarded on the party-and-party scale. In circumstances where the conduct of one of the parties was abusive, *mala fide* or vexatious, the Court may award punitive costs against that party. The term "vexatious" has a broad meaning in this regard, and includes situations where a party has in fact been put to unnecessary trouble and expense by the conduct of the other party,⁵ even where there was no ill-intent by the first-mentioned party.
18. In my view, given that the respondent failed to carry out its regulatory and other legal responsibilities within five working days or any other reasonable period and its silence in response to the follow up email of 27 August 2020, the launch of this application was justified. The substance of the application became moot on or about 13 November 2020. Up to that point, while the conduct of the respondent as a state body had not been exemplary, a costs award on the ordinary scale is warranted.
19. The next question is what is to be done about the subsequent process. It may have been preferable at that stage, in mid-November 2020, for the applicants to liaise with the respondent about the termination of these proceedings, and to signal that they will only be persisting with the costs prayer.

⁵ *In re Alluvial Creek* 1929 CPD 532, 535.

20. That evidently did not occur, but it is unclear that such an engagement would have yielded any helpful results, given the position adopted by the respondent in the answering papers. The principal contributor to the unnecessary prolonging of this dispute and processes after mid-November 2020 is the respondent. This has not only diverted judicial resources, but also caused undue expense to be incurred and effort to be expended by the applicants. Given the vexatious effect of the respondent's conduct, I believe that a punitive costs order for the period after the filing of answering papers is warranted. In my estimation and given the role played by each party, it is fair and reasonable for the respondent to bear 80% of the applicants' costs on a punitive scale for the period 22 December 2020 onwards.

Order

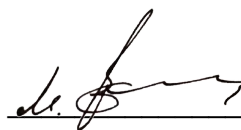
21. I thus make the following order:

- 21.1 The first respondent is declared liable for the applicants' costs of this application in the following respects:

- 21.1.1 100% of the costs on a party-and-party scale for the period up to and including 21 December 2020;
- 21.1.2 80% of the costs on the scale as between attorney and client from 22 December 2020 onwards.

Hand-down and date of judgment

22. This judgment is handed down electronically by circulation to the parties or their legal representatives by email and by uploading the judgment onto Caselines. The date and time for hand down of the judgment are deemed to be 11:45 on 22 April 2022.



VM MOVSHOVICH**ACTING JUDGE OF THE HIGH COURT**

Applicant's Counsel: C Van Der Merwe

Applicants' Attorneys: KG Tserkezis Inc.

Respondents' Counsel: S Magaqa

Respondents' Attorneys: Madhlopa & Thenga Inc.

Date of Hearing: 24 January 2022

Date of Judgment: 22 April 2022