

**IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)**

CASE NO: 4342/2008

DATE: 23 MARCH 2010

In the matter between:

IXIA FARMING (PTY) LTD

APPLICANT

and

DIPALESENG MUNISIPALITEIT

RESPONDENT

J U D G M E N T

PHATUDI (AJ)

- [1] The applicant instituted this application seeking an order ordering the Respondent, Dipaleseng Municipality, to, within 7 days, issue clearance certificates in terms of Section 118(1)(b) of the Local Government, Municipal Systems Act 32 of 2000 in respect of immovable properties set out in the Notice of Motion.

- [2] The Applicant sold the said seven (7) immovable properties as fully described in the Notice of Motion. A firm of Attorneys and conveyances, Haarhof Fourie & Singh Attorneys (the attorney) were instructed to effect transfer of the said properties.
- [3] The Attorneys requested the Respondents to cause issue of the clearance certificate as per their letter dated 19 November 2007, as annexed to the Applicant's founding affidavit marked "IF05". The required fees were, subsequent thereto, paid by the Attorneys on the 15 January 2008.
- [4] The Applicant submitted that numerous letters were issued to the Respondent requesting urgent attention to the issuing of certificates but to no avail. It is noted, as per annexure, that at least 3 letters were issued on the 21, 22 and 29 January 2008 respectively.
- [5] Mr Jacobs, counsel for the Applicant, submitted that the Respondent's non response instigated the Applicant to cause issue of this application on the 31 January 2008.
- [6] Mr Jacobs further submitted that the Applicant's application be regarded as unopposed on the basis that the deponent of the Respondent's answering affidavit did not have the authority to do so. He submitted that the resolution

by Municipal Council as annexed to the answering affidavit marked “**PBM1**” be regarded as *pro non scripto* resulting in the Respondent **not** being properly before court. He referred me to **BESTENBIER v GOODWOOD MUNICIPALITY 1951 (4) SA 199 (C)**, where, he submitted, it was held that where there is no proper resolution taken to oppose an application nor that anyone should file affidavits on behalf of municipality, then the municipality is not proper before court.

- [7] He lastly submitted that the Respondent is not proper before court and thus, this court should struck the opposing affidavit off and the matter be considered on an unopposed basis and further submitted that the relief sought be granted.

- [8] He finally submitted that the municipal manager, Mr Patrick Baromeng Malebye, be personally held liable for the costs of the Applicant on Attorney and client scale for having acted without authority.

- [9] In rebuttal, counsel for the respondent, Mr Sibeko, submitted that the deponent to the opposing affidavit, Mr Patrick Baromeng Malebye, is the Municipal Manager, duly appointed in terms of the **Local Government: Municipal System Act 32 of 2000** and is duly authorised to depose to the affidavit in opposing the Applicant’s application.

[10] He emphasised that the resolution of the Municipal Council marked “**PBM1**” is valid and authorised the Municipal Manager to act on behalf of the Respondent. He referred with emphasis to paragraph two (2) of the said resolution that provided:

“2. that the Delegation Register as label separately, be approved by Council as a system of delegation in terms of Section 59(1) of the Local Government System, Act 2000 (Act 32 of 2000)”.

[11] Section 59(1) provides for the powers the Municipal Manager has which I accept to be the necessary authority the Municipal Manager had to depose to the affidavit. Mr Sibeko submitted on that premise that the Municipal Manager, Mr Patrick Baromeng Malebye, had necessary authority to so represent and act on behalf of the Respondent. He further submitted on that basis that the Respondent is proper before court. He further submitted that in the event the Respondent is found not to be proper before court, then the Respondent cannot be mulcted with costs.

[12] Mr Sibeko, conceding to the letters issued by the Applicant’s attorneys persuading the Respondent to issue the certificate, he however submitted that the clearance certificates were issued on the 25 January 2008. He

further submitted that the said certificates were collected by the employee or member of the Attorneys Firm on the same day.

[13] He further submitted that the time the Applicant caused issue of this application on the 31 January 2008, the Applicant's attorneys had already received the certificates and thus the Applicant had no legal basis to bring this application.

[14] In my evaluation of the evidence tendered and the submissions made by both counsel for the Applicant and Respondent, I find that the clearance certificates are a necessity to effectuate the transfer as per Section 118(1)(a) of the Local Government; Municipal System Act 32 of 2000 that provides:

“(i) A registrar of deeds may not register the transfer of property except on production to that registrar of deeds of a prescribed certificate,

(a) issued by the Municipality or municipalities in which that property is situated.”

[15] Section (1A) of the Act further provides that:

“A prescribed certificate issued by a municipality in terms of subsection (1) is valid for a period of 120 days from the date it has been issued.”

- [16] It is expected, I find, as a matter of common practice, from conveyancers that they ought to effectuate transfer within 3 months from date of receiving instructions. The conduct of the Attorney of persistently persuading the Respondent by letters to cause issue of certificate cannot be found to be vexatious.
- [17] I further find that, the certificates required and requested by the Applicant were issued on the 25 January 2008. It has been submitted by the Respondent's counsel that the said certificates were collected by an employee of the Attorneys on the same day (i.e 25 January 2008). The Applicant denied the delivery date but indicated that they only received the certificates some time in February 2008.
- [18] I find it reasonable the submission by the Respondents of their lack of knowledge of the Attorneys internal administration and despatch of documents to the desk of the file handler. This aspect was not contested by the Applicants.
- [19] The issuing of certificates by the Respondents rendered the Applicants application a non-starter. The Applicant ought not to have caused issue of the application on the 31 January 2008. I find the Applicants persistence on persuading the matter even after it came to their knowledge of compliance by the Respondent as being uncalled for. The proceedings ought to have

been stopped immediately after it came to the attorneys (file handler's) attention. The parties ought not to have incurred these costs.

[20] Accordingly, I make the following order:

[20.1] The application is dismissed with costs.

**AML PHATUDI
ACTING JUDGE OF THE HIGH COURT.**

Date of hearing: 12 AUGUST 2008

For the Applicant: Adv G Jacobs

Instructed by: Bertus Vertus Attorneys

For the Respondent: Adv Z S Sibeko

Instructed by: TM N Kgomo & associates

Date of Judgment: 23 MARCH 2010