

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION – PORT ELIZABETH)**

**CASE NO: 2732/2011
DATE HEARD: 13/06/2013
DATE DELIVERED: 20/06/2013**

In the matter between

WILMA EMMERENTIA VAN RENSBURG N.O

1ST APPLICANT

PHILIPPUS STEPHANUS VAN RENSBURG N.O

2ND APPLICANT

and

PERAPANJAKAM NAIDOO N.O

1ST RESPONDENT

PURSOTHAM NAIDOO N.O

2ND RESPONDENT

SHASHI NAIDOO N.O

3RD RESPONDENT

ANTHOSH NAIDOO N.O

4TH RESPONDENT

**NELSON MANDELA BAY
METROPOLITAN MUNICIPALITY**

5TH RESPONDENT

JUDGMENT

ROBERSON J:-

[1] The applicants are the trustees of the Hobie Property Trust, which owns erf 104 Summerstrand, Port Elizabeth. The first to fourth respondents (the respondents) are the trustees of the Shan Trust, which owns erf 105 Summerstrand. The parties have been involved in a long history of litigation and hopefully the order I intend making in this application will be the last word in their dispute.

[2] On 3 April 2007, Froneman J ordered the respondents to demolish certain structures on their property, which had been erected in contravention of certain restrictive title deed conditions.¹ On 20 December 2012 Smith J declared the respondents to be in contempt of Froneman J's order and sentenced each of them to six months' imprisonment. The sentence was not to be implemented if the respondents demolished the structures within two months from the date of the order. Smith J's order further provided that if the respondents did not demolish the structures within that time, the sentences would become operative and the deputy sheriff was authorised to demolish the structures.²

[3] The respondents did not demolish the structures within two months of Smith J's order. On 20 February 2013 they launched an application to vary Smith J's order to the extent that the sentences would not be implemented if they had not demolished the structures within four months of the date of the order.

¹ The judgment is reported as *Van Rensburg and another v Nelson Mandela Metro Municipality and others* [2007] 4 All SA 950 (SE)

² Smith J's judgment is reported as *Van Rensburg NO and another v Naidoo NO and another* [2012] ZAECPHC 94

On 5 March 2013, by agreement Revelas J granted an order varying Smith J's order, in terms of which the sentences would not be implemented if the respondents demolished the structures on or before 31 March 2013.

[4] The present application, launched on 4 June 2013, is for an order declaring that Smith J's order, as varied, is now in operation, although during argument it emerged that the applicants were prepared to agree to one further extension of the time within which the structures were to be demolished, that is to 15 July 2013, on condition that the court ordered that this be the final extension, and that the respondents should pay the costs of the application on the attorney and client scale, such costs to include the costs of two counsel. The respondents agreed to an order extending the time for demolition to 15 July 2013 (this was asked for in the answering affidavit) and that such extension be the final extension. They were however not prepared to pay the costs of the application and in any event objected to a punitive costs order and the costs of two counsel.

[5] As was correctly submitted on behalf of the applicants, Smith J's order was not solely for the benefit of the applicants, but was also to vindicate the honour of the court and the legitimacy of the judicial system. Taking into account the terms of the order sought and the extent to which the structures have now, eventually, been demolished, I am of the view that a relatively brief extension of time until 15 July 2013 on the terms proposed, will not do further harm to the honour of the court.

[6] In considering the issue of costs, it is necessary to have regard to the attitude of the respondents towards Froneman J's order, as found by Smith J in his judgment. At paragraph [28] he said the following:

"In my view it is abundantly clear that the Respondents never intended to demolish the property in compliance with Froneman J's order. Even after they realised that they had exhausted all their legal remedies, they were nevertheless determined to avoid compliance with the order through political intervention. To this end they have resorted to enlisting the assistance of various political office bearers."

[7] In her founding affidavit the first applicant recounted the events which had taken place since Revelas J's order. On 28 March 2013 the respondents' attorney telephoned the applicants' attorney and requested a further extension of time. The request was based on information which indicated that the municipality intended to pursue a "blanket" application for the removal of restrictive title deed conditions relating to all properties in Summerstrand extension 1. The applicants' attorney responded by letter advising that an application should be brought for such further extension. No application was brought. Demolition commenced on 29 March 2013. On 2 April 2013 the respondents' attorney informed the applicants' attorney that "I advised my client (the first respondent) to comply strictly with the law and she is accordingly demolishing and regularizing her affairs on her property."

[8] Demolition proceeded at a slow pace and on 8 May 2013 the applicants' attorney wrote to the respondents' attorney putting the respondents on terms to complete the demolition by 31 May 2013, failing which an application to declare

Smith J's order operative would be brought. The respondents' attorney responded by stating that certain portions of the structures had been demolished and that the respondents would continue to comply with Froneman J's order. The first applicant deposed to her affidavit on 4 June 2013 at which time, so she alleged, and attached photographs in support of her allegations, considerable portions of the structures to be demolished were still in place. One or two labourers, at time assisted by the second respondent, were carrying out the demolition.

[9] The first respondent deposed to the answering affidavit on 11 June 2013. By this time considerably more demolition work had taken place, and there was apparently only one wall of one of the structures remaining. She requested further time until 15 July 2013 to complete the work.

[10] The first respondent apologised to the Court "insofar as I have been disrespectful in respect of these actions". She stated that after Smith J's order she fully intended to comply with Froneman J's order. There were delays because of the festive season and time was needed to find a suitable contractor to carry out the work, and to obtain a demolition permit from the municipality. It was for these reasons that a two month extension was sought. The first respondent agreed to an extension until 31 March 2013 because she was undergoing emotional stress and did not properly consider the practicalities of the demolition.

[11] On 11 January 2013 a quotation for R380 000 was obtained from the contractors Stu Davidson & Sons. The first respondent was advised by their representative that the machinery would cause damage to the paving on the property and the common boundary wall, and that heavy machinery could not be used to demolish the top storey of one of the structures because it would endanger the boundary wall and the remaining portion of the structure. According to the first respondent, as a result of the depletion of their financial resources caused by the ongoing litigation, the respondents were unable to afford the price quoted by Stu Davidson and could not retain their services. Thereafter, on 21 March 2013, labourers were employed to do the work. The work took longer than was expected, because some of it had to be performed by hand and in a confined area. The deadlines of 31 March 2013 and 31 May 2013 could therefore not be met.

[12] The first respondent expressed surprise at the applicants' "demands for a quicker pace of demolition." According to her no-one else has complained. She believed that what had been done so far was sufficient to satisfy the Court order and added that the respondents could not afford further litigation. Accordingly no application for a further extension was brought. She said that she had built her hopes on an application by the municipality for a blanket removal of restrictive title deed conditions, the foundation for her hopes being a resolution passed by the municipality to the effect that a task team was to assess the impact of the demolition order. Her attorney was informed of this resolution on 28 March 2013.

However because action on the part of the municipality remained uncertain, demolition was commenced.

[13] The first respondent believes that the reason why the applicants brought the present application is because she has brought an application against several respondents, amongst whom are the applicants and the municipality, for various forms of relief flowing from alleged transgressions of restrictive title deed conditions.

[14] In my view there is no basis for finding that this was the reason for the application. If one has regard to the history of the matter, since Smith J's order was made the applicants have behaved in a fair and reasonable manner towards the respondents. Revelas J's order was made by agreement, and the applicants themselves offered a further extension until 31 May 2013, even though in spite of the extension until 31 March 2013, demolition work did not start until 29 March 2013. Given these circumstances, it cannot be said that they resorted to a Court application with undue haste. It was submitted on behalf of the respondents that the application was unnecessary because the applicants would have seen the demolition taking place. I cannot accept such a submission, which I find startling. The extent of demolition as at 4 June 2013 was not impressive, especially considering that more than five months had passed since Smith J's order and that two extensions were agreed to by the applicants. The pace of demolition appears to have increased significantly following the service of the notice of

motion on the respondents. Further, in resisting the application, the respondents asked for an indulgence, namely yet a further extension within which to comply with Froneman J's order and to vindicate the honour of the Court. The respondents should have brought an application for an extension of time. The applicants have, for the third time, agreed to an extension. In all these circumstances, it is appropriate that the respondents should pay the costs of the application. It also seems to me that it would be unfair, given the course of events since Smith J's order, for the applicants to have to bear any legal costs in relation to this application.

[15] There are other considerations. In spite of the respondents' assertions of logistical problems in carrying out the demolition, it is apparent that up until 29 March 2013 no demolition work was done, and the reason for this was the respondents' hope that the municipality would bring its "blanket" application. The first respondent said as much. In my view this attitude is consistent with Smith J's finding, quoted above, that, at least up to that stage, the respondents never intended to obey Froneman's J's order.

[16] As if this was not enough, in the application before Revelas J, the respondents made no mention of this hope. The motivation for an extension of time in that application indicated an intention to demolish the structures, but more time was needed because of various unavoidable delays, including the obtaining of a demolition permit from the municipality.

[17] Further still, in her affidavit in the application before Revelas J, the first respondent said that she advised Stu Davidson that its quotation was acceptable and that it could begin the demolition. In the present application, as mentioned, she stated that the respondents could not afford the price quoted, and had to resort to the hiring of labourers.

[18] In my view these contradictory aspects to the respondents' resistance to the application cast serious doubt on their bona fides with regard to obeying Froneman J's order. Their effect leads me to conclude that the respondents, up until 4 June 2013, were determined to drag this matter out for as long as they could. The dramatic increase in the rate of demolition since that date demonstrates as much.

[19] In all these circumstances, an award of costs on the attorney and client scale is justified. I am also of the view that the costs of two counsel should be allowed. This application is the culmination of protracted and at times complex litigation, which has wide implications not only for the parties, but also for the honour of the Court and the administration of justice.

[20] The following order is made:

[20.1] The order of Revelas J dated 5 March 2013, is varied to the extent that the date 31 March 2013 where it appears in paragraphs 3, 4 and 5 of that order, is replaced with the date 15 July 2013.

[20.2] It is declared that the extension until 15 July 2013 constitutes the final extension that will be granted in order for the first, second, third and fourth respondents to comply with paragraphs 2 and 3 of Froneman J's order dated 3 April 2007 under case number 1668/2006, by demolishing the structures referred to therein.

[20.3] The first, second, third and fourth respondents are to pay the applicants' costs in the present application on the attorney and client scale, such costs to include the costs of two counsel, jointly and severally, the one paying the others to be absolved.

J M ROBERSON
JUDGE OF THE HIGH COURT

Appearances:

**For the Applicant: Adv A M Breitenbach SC, and Adv T M G Euijen,
instructed by De Villiers & Partners, Port Elizabeth**

**For the 1st to 4th Respondents: Adv A Moorhouse, instructed by Robert J
Martindale, Port Elizabeth**