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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 6592/2016

In the matter between:

**ARUMUGAM PADACHIE**

**APPLICANT**

**AND**

**BODY CORPORATE OF CRYSTAL COVE**

**FIRST RESPONDENT**

**ROYSTON ARTHUR WAYNE WILSON**

**SECOND RESPONDENT**

**THE REGISTRAR OF DEEDS, KWAZULU-NATAL**

**THIRD RESPONDENT**

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### **ORDER**

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1. The Applicant is ordered to pay the Second Respondent the costs occasioned by the hearing on 1 June 2017 such costs to include the costs of preparation and of the Heads of Argument from 8 May 2017 to the date of hearing on 1 June 2017.
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### **JUDGEMENT**

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**RADEBE J**

### **INTRODUCTION**

[1] The Applicant is an adult male accountant and is an owner of two units within the First Respondent's sectional scheme, namely unit 21 and unit 35. The Second Respondent is an adult male and chairperson of the First Respondent. The latter is a Body Corporate of Crystal Cove, duly established in accordance with the terms and the provisions of Sectional Title Act, 95 of 1986, having its address at Flat 3, 186 South Beach Road, La Mercy, KwaZulu-Natal.

[2] On 11 July 2016 the Applicant launched the application in question by way of Notice of Motion, , seeking an order against the First Respondent to the effect that the First Respondent: (a) be directed to make available for an inspection by the Applicant at the offices of the Registrar of the Honourable Court, on a date and time to be arranged with the Registrar, certain documents listed in the said Notice of Motion;<sup>1</sup> (b) be directed to agree to the aforesaid inspection within 30 (thirty) days of the granting of the order; (c) be directed to provide to the Applicant, at the aforesaid inspection, copies of all the documents referred to in (a) hereof. Further, against the Second Respondent the Applicant sought an order for costs of the application on an attorney-and-client scale. The First and Second Respondents opposed the application.

[3] When the application came before me for hearing on 1 June 2017 the first issue, namely, the Applicant's entitlement to inspection and copying of the documents sought had become academic. The second issue namely, that of costs, remained to be decided. At the conclusion of the argument presented by Mr Edy, for the Applicant and Mr Boule, for the First and Second Respondents, I gave an order in line with paragraphs 1 and 3 of the Notice of Motion.<sup>2</sup> Judgement in respect of costs of the application was adjourned to 15 June 2017.

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<sup>1</sup>. Record, page 2 para (a) to (c) of Notice of Motion

<sup>2</sup>. Court Order of 1 June 2017.

## **BRIEF HISTORY**

[4] During 2010 the Applicant's brother requested the documents in question on behalf of the Applicant. It is common cause that by that time there already existed an acrimonious relationship between the Collin Padayachie, the Applicant's brother, the Applicant and the Second Respondent with vulgar utterances hurled between them.<sup>3</sup>

The Second Respondent invited the inspection of the documents but declined to permit the making of copies. The email from the Second Respondent to the Applicants brother reads as follows:

"As you should be well aware, you may INSPECT these documents and make notes. Copies will not be provided... As previously advised you may inspect documents relating to the BC in my presence. The earliest time available for this Monday, 4<sup>th</sup> October"<sup>4</sup>

The Second Respondent thought it prudent that he should be present in order to safeguard the documents against unlawful removal or defacing.

[5] The Second Respondent addressed the said correspondence as chairman of the Crystal Cove Body Corporate (BC). There are of course other email correspondence between the Applicant's brother and the Second Respondent which are in their respective personal capacities. These are the ones that contain unsavoury language.<sup>5</sup>

[6] It is apparent from Annexures 0<sup>1</sup>; 0<sup>2</sup>; 0<sup>4</sup>; 0<sup>5</sup> and o<sup>6</sup> that the Second Respondent extended an invitation for inspection only, and this to be done in his presence (i.e putting aside the unsavoury utterances by BOTH parties. The Applicant did not deny these invitations in his Replying Affidavit.

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<sup>3</sup>. Record, page 159 to 164, Annexures "01" to "06" –Founding Affidavit "01" to "06" – Founding Affidavit.

<sup>4</sup>. Record, page 160, Founding Affidavit, Annexure O<sup>2</sup>; o 178, para 17.1 Answering Affidavit

<sup>5</sup>. Annexures 01 (page 159); 03 (page 161) 05 (p 163)

[7] On 1 July 2015 the Applicant sent an email to the Second Respondent, requesting inspection, pursuant to the Trustees' Report and the tabled Annual Financial Statements for the year ended 30 November 2014; and, the publication of the AGM documentation and the Chairman's Report. The Second Respondent's response was *inter alia* that the Trustees have no problem with regard to any matters pertaining to the BC and that any owner has always been free to ask *bona fide* questions relating to the management of the complex, however, there were time constraints within which the request could be addressed. As on 27 July 2015 the time and date of the inspection had not been possible to be set.<sup>6</sup> The Applicant does not deny this as it is not addressed in his.

[8] On 14 July 2015 the Applicant revived his request for an inspection.<sup>7</sup> Correspondence by emails again ensued, culminating in correspondence through attorneys Rhugbeer & Associates, dated 1 September 2015, demanding inspection and the making of copies of the documents by not later than 4 September 2015.<sup>8</sup> This followed upon several other email requests in the intervening period. The demanding was considered by the Second Respondent to be unrealistic, given the time frame of three days, vis-a-vis the volume of documents.

[9] On 2 September 2015 the First Respondent's Attorneys replied to the letter of demand for inspection, reiterating that the inspection of documents may be done, but no copying would be permitted. It further invited the Applicant to suggest a suitable time and date. It is significant to mention that the First Respondent's attorneys drew Applicants' attention to the provisions of the Management Rules of the Body Corporate, specifically Rule 34(3) and 35(2). In terms of Rule 35(2) inspection by an owner is allowed.

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<sup>6</sup> Record, pages 27 to 29 para 64 of Founding Affidavit; pages 179 to 180, paragraph 19 of Answering Affidavit;

<sup>7</sup> Record, page 29, Paragraph 64.6 of Founding Affidavit; p. 180 para 20 of Answering Affidavit.

<sup>8</sup> Record page 35, para 75.8 of Answering Affidavit (Annexure K6) p 18, para 20.2 of Answering Affidavit

In terms of rule 34(3) the Trustees shall make all Minutes of the proceedings and the Minutes of the Body Corporate available for inspection by an owner on the written application by that owner. Both rules do not allow for copying.<sup>9</sup>

[10] On 9 October 2015 the inspection was ultimately scheduled to take place under strict conditions placed on the Applicant, namely:

- 10.1 that no laptop computer and cellular phone was allowed into the room where inspection was to take place at the managing agent's office in Ballito;
- 10.2 that the Applicant would not be allowed to take notes as according to the Act and the Prescribed Management Rules only inspection of documents was allowed.

[11] After some brief argument between the Second Respondent and the Applicant, the latter decided to leave the Ballito offices as he found it impossible to inspect voluminous documents, without the use of his laptop and cellular phone in order to make notes.<sup>10</sup>

[12] Notwithstanding the complaint alluded to above, in his Replying affidavit the Applicant's complaint centres mainly around the limited space as well as the insufficiency of documentation available for inspection;<sup>11</sup> the Second Respondent's action in preventing him from exercising his rights owner; and the Second Respondent making it as difficult as humanly possible for him to inspect the documents.

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<sup>9</sup>. Record page 36 para 75.10 read with Annexure K10 on page 135, page 180 para 20.3 Answering Affidavit.

<sup>10</sup>. Record page 42 para 89 to p. 43 para 90 and 91 of Founding Affidavit .

<sup>11</sup>. Record, page 44, page 94 to 96 of Founding Affidavit. Record, page 202, para 34-36 of Replying Affidavit.

## **EVALUATION**

[13] The Applicant launched this application on 11 July 2016. The exchange of affidavits was completed soon after the filing of the Applicant's Replying Affidavit on 28 September 2016. The Applicant's Notice of Set-down for 1 June 2017 was served and filed on 26 October 2016.

[14] On 11 June 2011 the Sectional Titles Schemes Management Act, No.8 of 2011("the New Act") was assented to, and its commencement date is 7 October 2016; ("two weeks prior to Set Down"). Its preamble is to *inter alia*, provide for the establishment of bodies corporate to manage and regulate sections and common property in sectional titles schemes and for that purpose to apply rules applicable to schemes. Section 10 of the New Act provides for the management rules. Under the revised management regulations, effective from 7 October 2016, the body corporate is obliged to provide copies of the documents upon request by the Applicant for specified records.<sup>12</sup> Regulation 27 provides:

**"27 Governance documents and records.**

- (1) ...
- (2) ...
- (3) ...
- (4) **On receiving a written request, the body corporate must make the records and documents referred to in this rule available for inspection by, and provide copies of them to:- a member..."**

[15] The set of records permitted to be made available are tabulated in section 27(2) of the Regulations, and include the nature of the documents which are the subject matter of this application.

[16] Pursuant to the provisions of the New Act and Regulation 27(4) the First Respondent has tendered to comply with the request and to provide copies to the Applicant, hence my order dated 1 June 2017

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<sup>12</sup>. Sectional Titles Schemes Management Regulations, 2016

## COSTS ISSUE

[17] In paragraph 4 of the Notice of Motion the Applicant asked for the cost order against the Second Respondent only, on the attorney-and-client scale. On 8 May 2017 the Applicant filed his Heads of Argument dated 4 May 2017.

In paragraphs 2.2 of the Applicant's Practice Directive, the Applicant reiterated his cost order sought against the Second Respondent only. In paragraph 10 of his Heads of Argument the Applicant again asks for a costs order against the Second Respondent only. Applicant basis his prayer for costs on what he perceives to be the Second Respondent's conduct in persistently obstructing the Applicant's entitlement to inspect the documents and refusing, without just cause, to permit him to make copies of the documents.

[18] However, in a surprise twist, when the application came before me for hearing on 1 June 2017, Mr Edy submitted that the Applicant seeks an order against the First and Second Respondents jointly and severally, the one paying the other absolved. He further argued that if the First Applicant is to pay the costs, then the Applicant is to be exempted from the Special Levy that may be raised to cover costs of the application; and that therefore each member must pay according to the participation quota. Further, he argued that the First and Second Respondents could have withdrawn their opposition in October 2016 after the commencement of the New Act, instead of waiting until 15 May 2017, when it made the afore-mentioned tender. (see para 16 *supra*)

He referred me to the decision in ***NXUMALO AND ANOTHER vs MAVUNDLA AND ANOTHER***<sup>13</sup> where it was held that:

"... Although the first applicant had been entitled to seek legal advice regarding the validity of the will in order to make an informed decision as to whether or not to resort to litigation, ... there was nothing more the first applicant could have done to secure a copy of the will that to request the first respondent to furnish him with it, and it was thus clear that, had the applicants or their attorneys had sight of the will on or before 18 November 1999 (the day before the instant application had been launched), the application could have been avoided altogether."

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<sup>13</sup>. 2000 (4) SA 349 (D) at 350 E

Held further: "that the fact that the first respondent's neglect to let the Applicants or their attorneys have sight of the will on or before 18 November 1999 was the fundamental cause of the litigation meant that the first respondent was not entitled to the costs of the Application. The first respondent therefore had to pay the costs of the application up to 19 November 1999."

See also: **GAMLAN INVESTMENTS (PTY) LTD and ANOTHER v TRILION CAPE (PTY) LTD AND ANOTHER**,<sup>14</sup> where it was held that a party must pay such costs as have been unnecessarily incurred through his failure to take proper steps or through his taking wholly unnecessary steps.

[19] Mr Boule argued that the Applicant asked costs against the Second Respondent only, and that the only opposition mounted to the application is based on that cost order sought, at whatever scale. He argued that the Second Respondent's summary of the incidents at issue stands to be accepted both because it has not been properly refuted in the Applicant's Replying Affidavit and because based on the application of the Plascon-Evans decision, there is no scope to contend that the Second Respondent acted *mala fide*, grossly negligently, dishonestly or recklessly.

[20] In the NXUMALO decision (footnote 13 *supra*)<sup>15</sup> Mbenenge AJ stated that...

"where a disputed application is settled on a basis which disposes of the merits except insofar as costs are concerned, the Court should not have to hear evidence to decide the disputed facts in order to decide who is liable for costs, but the Court has, with the material at its disposal, to make a proper allocation as to costs."

[21] Having regard to the principle enunciated in PLASCON-EVANS PAINTS LTD<sup>16</sup> the issue whether or not the instant application was necessitated by the Second Respondent's failure to allow the Applicant to make copies and or take notes using his laptop computer and his cellular phone should be decided on the Second

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<sup>14</sup>. 1996 (3) SA 692(C) at 701 G to H

<sup>15</sup>. At 356 e. (see also GAMLAN(*supra*) at 700 G-J)

<sup>16</sup>. 1984 (3) SA 623 (A)

Respondent's version, which has not been refuted by the Applicant in its Replying Affidavit.

[22] It is common cause that the Applicant was permitted to inspect the documents. It was on 9 October 2015 that the Applicant abandoned the inspection after the Second Respondent prevented him from entering the inspection room at Ballito with his laptop and cellphone. Applicant's complaint was based on a number of factors which vary from his being barred from making copies, to taking notes to limited space vis-a-vis the volume of documents.

[23] The Second Respondent's version is that both the First and Second Respondents took the position of not permitting copying of documents, by whatever means based on:

23.1 the then management rules which at that stage clearly differentiated between the right to copy and the right to inspect. The Second Respondent alleges that he always genuinely believed that it was not permissible to make copies.

23.2 the Second Respondent had refused permission to anyone to copy document because such was not expressly permitted in the management regulations, and the First Respondent, being creature of statute, had been bound by the powers defined and limited in the Act.

23.3 the Second Respondent believed that he position the took was reasonable and cannot be regarded as *mala fide*.

[24] Mr Boulle argued that the evidence does support the contention that the Second Respondent's actions in refusing the Applicant to copy the documents show any *mala fides* on his part; and, that therefore he cannot be burdened with a cost order against him.<sup>17</sup>

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<sup>17</sup>. Record, page 52

[25] In terms of Rule 12(1) (a) of the Prescribed Management Rules at the time immediately before the launching of this application the following provision prevailed:

“12(1)(a) subject to the provisions of sub-rule (2) every trustee, agent or other officer or servant of the body corporate shall be indemnified by the body corporate against all costs, losses, expenses and claims which he may incur or become liable to by reason of any act done by him in the discharge of his duties, unless such costs, losses, expenses or claims are caused by the *mala fide* grossly negligent act or omission of such person.”

[26] Mr Edy did not argue on this point, save to submit that the decision to refuse the Applicant permission to make copies of the document was that of the Second Respondent, personally as shown by the general tenor of the Answering Affidavit as well as the contents of annexures “O<sup>1</sup>” to “O<sup>6</sup>” of the Founding Affidavit. The applicant did not elect to refer the matter to oral evidence so as to cross-examine the Second Respondent in order to establish *malice* or *mala fide* and or gross misconduct on his part.

[27] There are various instances in papers that may be looked at to find whether there is any malice or gross negligence on the part of the Second Respondent:

27.1 the Second Respondent does admit that there exists a general history of acrimony between him and Applicant. He alleges that, - notwithstanding that acrimony, he had done whatever he had done to address the requests for documents. However, the Applicant would not have been satisfied and would have sought to impugn his name.<sup>18</sup> This is not denied by the Applicant in his Replying Affidavit.

27.2 On 1 July 2015, in response to the Applicant’s request for inspection, the Second Respondent promptly responded within an hour and seventeen minutes, pointing out the difficulties the Body Corporate has with his requests, as well as spelling out the Body Corporate’s policy regarding dissemination of private information regarding owners of sectional units.<sup>19</sup>

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<sup>18</sup>. Record, page 182, para 23 of Answering Affidavit

<sup>19</sup>. Record, page 110, to 111, Annexures “H<sup>1</sup>” and “H<sup>2</sup>” to the Founding Affidavit

27.3 On 29 July 2015, the Second Respondent replied to the Applicant's threat to seek Court assistance to achieve the aforesaid inspection, as follows:

"Your mail below refers.

You will be advised of available dates in due course."<sup>20</sup>

(In response to this the Applicant proposed various dates to look at)

27.4 In ***FAKIE N.O v CC 11 SYSTEMS (PTY) LTD 2006 (4) SA 326 (SCA)*** at [9] it was held that:

"A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction.

27.5 On 2 September 2015 the First Respondent's attorneys responded to the Applicants' erstwhile attorneys pointing out that neither Rule 34(3) nor 35(2) of the Management Rules made allowance for copying of documents; and, that the Applicant may however, inspect the documents.<sup>21</sup>

They were clearly wrong but that does not mean that the Second Respondent's actions were a *mala fide*. Even if it were to be said that the Second Respondent's actions were deliberate that would still not be enough to conclude that he acted *mala fide*.

27.6 The Applicant bases the allegations of *mala fides* on the contents of Annexures "0<sup>1</sup>" to "0<sup>6</sup>", of which refer to events that happened during 2009. This period is irrelevant to the events which surround the request for inspection and copying of documents as these happened in 2015/2016.

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<sup>20</sup>. Record, page 127 to 128 Annexure "K2 & K3" of the Founding Affidavit;

<sup>21</sup>. Record page 135, Annexure K10 of the Founding Affidavit.

[28] With regard to the irrelevant annexures, it is not permissible for the Applicant to merely annex irrelevant annexures, like Annexures 0<sup>1</sup> to 0<sup>6</sup> without identifying portions upon which the court should rely to arrive at a just decision.

[29] In **HELEN SUZMAN FOUNDATION v PRESIDENT OF THE RSA**.<sup>22</sup> It was stated that:

“it would have been difficult for any of the parties to determine whether it was not a free-for –all insult-trading and political point-scoring contest, sanctioned by a court of law. A court of law should never serve as a platform for that kind of engagement.”

[30] The Founding Affidavit includes other annexures which are not necessary to decide the application, thereby unnecessary burdening the papers with documents which the Applicant does not need to refer to.<sup>23</sup> This utterance clearly has racial connotations.

There are instances of racial point-scoring, insult-trading which are contained in Annexures “0<sup>1</sup>”, “0<sup>3</sup>”, “0<sup>5</sup>” and “0<sup>6</sup>”.

30.1 The Applicant says to the Second Respondent

“Let me break this down for benefit of those whose eyes and minds are jaundiced with their past history.” (Annexure “0<sup>1</sup>” on page 159)

30.2 The Second Respondent writes to the Applicant and *inter alia* says the following:

“If I was violent Padachie, you would long ago have been a lot more disabled than you now boykie... how did I get in and out of the country smartarse?...you will soon be seeing your anus from that angle you never thought possible ...” (Annexure “0<sup>3</sup>” page 161).

30.3 The Applicant writes to the Second Respondent and says *inter alia*:

“Don’t you realise that your violent and aggressive words or actions affects no one but only your pussy attitude.” (Annexure “0<sup>3</sup>”, page 161).

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<sup>22</sup>. 2015(2)SA 1 (cc) AT 18f (see also National Director of Public Prosecutions v Zuma 2009(1) SACR 361(SCA) para 361[47]. Swissborough Diamond Mines (Pty) Ltd and others vs Govt of RSA 1999(2) SA 279(T) at 324G

<sup>23</sup>. For instance, the Conduct Rules, the Financial statements, the extract from the arbitration proceedings.

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A court of law cannot be expected to consider this kind of free – for – all hurling of insults, racial slurs and inuendos which are irrelevant for purposes of this application.

[31] The Regulations changed with the advent of the New Act on 7 October 2016, allowing for copying of documents. Nothing prevented the Applicant from making a fresh request based on the New Act and new regulations.

[32] Mr Edy referred me to the decision in **THE BODY CORPORATE OF FASCADALE HEIGHTS vs DAVID L.G. BAYNE AND TWO OTHERS**<sup>24</sup> an arguing that both Respondents are to pay the costs as the First Respondent also opposed the application; and that both were slow in making the tender to allow inspection and copying. Mr Boule referred to this decision submitting that Lopes J concluded that both sides have a measure of blame.<sup>25</sup> In *casu* the measure of blame is limited to the events after 7 October 2016. This is a factor that ought to be taken into account in deciding the issue of costs.

[33] In **KALIL NO AND OTHERS v MANGAUNG METROPLITAN MUNICIPALITY AND OTHERS**<sup>26</sup> in which the first respondent obstructively sought to deny the *locus standi* of certain of the appellants, (a point which was later abandoned) Leach JA criticised the obstructive conduct of the Respondent's officials and warded an adverse costs order against the First Respondent.

[34] In *casu*, Mr Edy argued for an adverse cost order against both Respondents because of what he alleges to be obstructionist conduct of the Second Respondents because of what he alleges to be First Respondent firstly, the Second Respondent as an official of the First Respondent.

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<sup>24</sup>. Unreported decision of this Division, case no. 2907/13 dated 28 August 2013

<sup>25</sup>. Fascadale Heights (*supra*) para [6] to [8] on page 5.

<sup>26</sup>. 2014(5) SA 123 (SCA) at 136 [31] and at 137 [34]

However, in this matter, the Second Respondent has not abandoned anything; secondly; the Applicant has overburdened the papers with unnecessary annexures in certain respects; thirdly the Applicant has failed to show any malice, *mala fides* or gross misconduct on the part of the Second Respondent. Lastly, the Applicant did not do anything further to make a fresh request and to have the matter removed from the opposed motion roll after the 7 October 2016 when the New Act was ushered in.

[35] Mr Edy argued that the concession or tender was only made on 16 May 2017. However, that does not negate the fact that nothing was done by the Applicant, who bears the onus of proof between the 7<sup>th</sup> October 2016 and 16 May 2017. As at 1 June 2017, when the matter came before this Court, the relief sought had become academic; there was insurmountable dispute of fact; and, the Applicant attempted to draw the First Respondent into arena by seeking a cost order against it, despite the tender by the First Respondent, and contrary to the cost order sought in paragraph 4 of the Notice of Motion.

[36] For these reasons the following cost order is made:

1. The Applicant is ordered to pay the Second Respondent the costs occasioned by the hearing on 1 June 2017 such costs to include the costs of preparation of the Heads of Argument from 8 May 2017 to the date of hearing on 1 June 2017.

  
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RADEBE J

DATE: 14 June 2017

DATE OF HEARING : 01 JUNE 2017

DATE OF DELIVERY : 15 JUNE 2017

COUNSEL FOR APPLICANT : ADV. C. EDY

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