

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

REPUBLIC OF SOUTH AFRICA



CASE NUMBER: 15833/2013

Date of Hearing: 25 May 2015

Date handed down: 17 July 2015

(1)	REPORTABLE: YES / NO	☒ YES
(2)	OF INTEREST TO OTHER JUDGES: YES/NO	☒ YES
(3)	REVISED.	
	17.7.2015	
	DATE	SIGNATURE

In the matter between:
TI AUTO (PTY) LTD

Applicant

And

**THE MUNICIPAL MANAGER: CITY OF
JOHANNESBURG METROPOLITAN MUNICIPALITY**

First Respondent

JOHANNESBURG ROADS AGENCY (PTY) LTD

Second Respondent

**THE MEC OF THE GAUTENG DEPARTMENT
OF PUBLIC TRANSPORT, ROADS AND WORKS**

Third Respondent

**AURMOCO PROP CC
MIDRAND AUTO FITMENT CC**

Fourth Respondent
Fifth Respondent

**THE CHIEF EXECUTIVE OFFICER:
SOUTH AFRICAN SOCIAL SECURITY AGENCY**

Sixth Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] The applicant claims the following relief:

- “1. That the First, Second and Third Respondents, jointly and severally be ordered to, within 5 (five) working days from the date of this order, take all steps necessary to close, and physically prevent any illegal vehicular or pedestrian access from Provincial Road K101 to Erf 374 Randjespark Ext 119 township.*
- 2. That the First, Second and Third Respondents, jointly and severally be ordered to, within 10 (ten) working days from the date of this Order, demolish and remove all paving and structures which have been erected by the Fourth Respondent, its predecessors or tenants, to create the illegal access referred to in prayer 1.*
- 3. That the costs of this Application be paid on a scale as between Attorney and client, by the First, Second and Third Respondents, jointly and severally the one paying the others to be absolved, and by any other Respondent who opposes this Application.”*

[2] The application is opposed by the first, second, third and fourth respondents.

FACTS:

- [3] The applicant conducts numerous motor related franchises under the name and style of Tiger Wheel & Tyre. One of its outlets is conducted at the corner of Old Pretoria Main Road and Road K101, Midrand, Gauteng.
- [4] The fourth respondent is the owner of an adjacent business premises, which premises it leases to the fifth respondent. The fifth respondent conducts a similar business than that of the applicant under the name and style of Supa Quick Tyres on the premises.
- [5] Both business premises (“the premises”) abuts two main traffic routes, to wit the Old Pretoria Main Road and the K101. The businesses are, however, not accessible from these main traffic routes, but from a secondary service road, which access has been procured by virtue of a right-of-way servitude.

- [6] A line of no access running along the border of the property and the K101, appears from a township layout plan of the property, which plan was approved by the first respondent during 2000.
- [7] Subsequent site development plans in respect of the property corresponds with the initial township layout plan.
- [8] Notwithstanding the aforesaid and in contravention of the line of no access, the premises of the fifth respondent is directly accessible from the K101.
- [9] This much is common cause between the parties.
- [10] From approximately July 2012, the applicant has been in constant contact with officials from the first and second respondents ("the local authority") as well as officials from the third respondent ("the province") in order to ensure the closure of the illegal access. All its efforts were in vain and this application was launched during March 2013.

DISPUTE

- [11] The initial dispute between the applicant, the local authority and the province centred on the different functional areas of the two state institutions. Both the local authority and the province denied being responsible for enforcing the line of no access.
- [12] At the hearing of the application, the third respondent admitted that it was responsible to enforce the line of no access and indicated that it was in the process of doing so. The third respondent, however, persists with its defence that the relief claimed by the applicant falls within the ambit of the Promotion of Administrative Justice Act, No 3 of 2000 ("PAJA"). Should PAJA be applicable, the application was brought late and the applicant failed to apply for condonation. In the final instance and if PAJA does not apply, the application should in any event be dismissed due to the inordinate delay in bringing the application.

- [13] Insofar as the first and second respondents are concerned, only the issue of costs remains in dispute.
- [14] The fourth respondent has raised various technical points that remain in dispute and will be dealt with *infra*.

PROMOTION OF ADMINISTRATIVE JUSTICE ACT, NO 3 OF 2000 (PAJA)

- [15] The third respondent avers that its failure to act upon the illegality amounts to administrative action within the meaning of PAJA.
- [16] In support of the aforesaid submission, Mr Halgryn, counsel for the third respondent, referred to the following portion of the definition of administrative action in PAJA:

".... any decision taken, or any failure to take a decision, by

(a) An organ of State, when –

(i) Exercising a power in terms of the Constitution or a Provincial Constitution;

or

(ii) Exercising a public power or performing a public function in terms of any legislation;

or..."

(b).....

- [17] Mr. Venter, counsel for the applicant, quite correctly, indicated that the aforesaid portion of the definition is qualified by the following wording:

"which adversely affects the rights of any person and which has a direct, external legal effect,"

- [18] The Gauteng Transport Infrastructure Act, No 8 of 2001 ("the Act"), regulates transport infrastructure in Gauteng and the enforcement of the provisions of the Act is assigned to the third respondent. Section 43 provides for the access to and exit from provincial roads. On the third respondent's own version, the

access utilised by the fourth respondent is illegal and would therefore be in contravention of section 43. Section 43(10) provides that any person who contravenes the provisions of section 43 commits an offence.

- [19] The third respondent's action, i.e the enforcement of a penal provision in the Act, will only qualify as an "*administrative*" action, if the rights of the fourth respondent is adversely affected by the action. In my view, it is difficult to envisage that the fourth respondent has a right to act illegal. Mr Halgryn did not refer me to case law that holds otherwise.
- [20] Even if the third respondent's action is an *administrative action*" as envisaged in PAJA, section 3(1) still qualifies the right to procedural fairness. In *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313, Nugent JA held as follows:
- "But section 3(1) of PAJA confers a right to procedural fairness only in respect of administrative action that 'materially and adversely affects the rights or legitimate expectations of any person.'"*
- [21] In the premises, I do not agree with the third respondent's submission that PAJA is applicable to the facts of this matter.
- [22] For as long as the access is illegal, the applicant may approach the court for appropriate relief. In the circumstances, delay, if any, in the launching of the application, is not a decisive factor.
- [23] In the premises, the application against the third respondent must succeed and costs should follow the result.

COSTS: FIRST AND SECOND RESPONDENTS

- [24] In order to properly adjudicate on the cost dispute between the applicant and the first and second respondents, it is important to have regard to the events leading to the launching of the application.
- [25] On 23 November 2012, the applicant's attorney addressed a letter to the first and second respondents. The letter addresses the problem with the fifth

respondent's illegal access to the premises and states, *inter alia*, the following:

"Our client has, according to our instructions, in the aforementioned circumstances, for some time, pursued the matter with the Gauteng Department of Roads and Transport (Gautrans) being the authority with jurisdiction over such provincial route i.e. Route K101, without success.

Our client has however recently discovered that, despite the apparent jurisdiction of Gautrans, in respect of Route K101, the obligation and duty to do law enforcement in respect of such illegal access and encroachment, apparently from a statutory point of view, vests in your Municipality and hence the reluctance of Gautrans to act to date hereof."

[26] The first and second respondents were requested to ensure that the illegal access is closed.

[27] According to the applicant, the second respondent responded in writing to the aforesaid letter and confirmed that *"the matter has been referred to JMPD and they have issued the land owner with a legal notice to close down his illegal access. It is now up to the Courts to enforce the legal notice."*

[28] Nothing transpired further and on 29 January 2013, the applicant's attorney addressed a further letter to the first and second respondents complaining about their inaction and stating, *inter alia*, the following:

'We have in response to such enquiry and after intervention by our client's traffic engineer (Mr. Pieter Kruger of Techworld) been informed by Mrs. Esther Schmidt, a Senior Traffic Engineer and employee of your municipality that a contravention notice has been served on the owner of Erf 374 Midrand, and that your Department is in the process of enforcing the legal notice. Mr Emmit from Gautrans confirmed such modus operandi and indicated that the enforcement of the Town Planning Scheme provisions rest exclusively with your municipality."

- [29] No response was forthcoming from the first and second respondents. Upon an enquiry by the applicant's attorney on 4 March 2013, it appeared that the officials in the employment of the first respondent were unaware of the complaint. On 6 March 2013 a certain Soraya Nana, Deputy Director: Legal and Compliance (Urban Development) addressed the following e-mail to the applicant's attorney:

"From the Deed's Office document attached to your e-mail below, the correct description of the property is Erf 374 Randespark Ext 119, and not Midrand , as reflected in your previous correspondence to the City.

This matter has been referred to Mr Colin Edelstein, Acting Deputy Director: Legal and Contracts (Economic Development), who will respond to you shortly."

- [30] Once again, no further action was taken by the first and second respondents. The applicant's attorney as a last resort and prior to the launching of this application, addressed a further letter on 3 April 2013 to the first and second respondents, requesting the courtesy of a reply to the previous two letters.

- [31] In their answering affidavit served on the applicant's attorney on 15 May 2013, the first and second respondents alleged for the first time that they are not the authority responsible for the enforcement of the line of no access.

- [32] The first and second respondents rely on a variety of legislative instruments in support of their contention that they have no authority to enforce the line of no access. The following portion of the answering affidavit succinctly summarises their contention:

"19. A Municipality might impose as a condition of establishment in a township that the requirements of GDARD are to be observed by the township owner. Such a condition would be imposed at the request of another provincial authority. The Municipality cannot, under its duty to enforce the provisions of a town planning scheme, enforce such a

condition of the town planning scheme in operation. Such a condition would have to be enforced by the applicable provincial authority and not the local authority.”

- [33] According to the first and second respondents, the third respondent insisted on the line of no access. When the layout plan was approved by their predecessor, the third respondent's request was reflected on the plan. The line of no access was, however, outside the township and is only enforceable by the third respondent.
- [34] In view of the fact that the aforesaid information was mentioned for the first time in the first and second respondents' answering affidavit, Mr Mitchell, counsel for the first and second respondents, submitted that the first and second respondents are at least entitled to costs from the date of service of the answering affidavit.
- [35] The third respondent's answering affidavit was served on the applicant's attorney on 16 May 2013. In the affidavit, the third respondent insisted that it held due responsibility with the first and second respondents to remove the illegal access.
- [36] This version was persisted with in its supplementary affidavit filed on or about 23 May 2014.
- [37] As stated *supra*, it was only at the hearing of the application on 26 May 2015, that the third respondent accepted responsibility for the removal of the illegal access.
- [38] It is trite that a successful party is entitled to its costs. If a successful party, however, through its conduct, causes the unsuccessful litigation, such party may be deprived of its costs. [See: Herbstein & Van Winsen, *The Civil Practice of the High Courts of South Africa*, Fifth edition, Volume 2 at 963]

- [39] This is clearly a case where the conduct of the first and second respondents prior to the launching of the application, led to the present litigation. I have no hesitation in finding that the first and second respondents are not entitled to costs up and until the filing of their answering affidavit.
- [40] Thereafter, the applicant was, through the assertions of the third respondent, brought under the firm impression that the first and second respondents held dual responsibility for the removal of the illegal assess. The applicant's failure to withdraw the application against the first and second respondents, subsequent to the filing of their answering affidavit, is understandable in the circumstances.
- [41] Where a co -defendant / respondent actively join issue with a plaintiff / applicant against a successful co-defendant / respondent, a court may, in the exercise of its discretion, direct such party to pay the costs of the successful co-defendant / respondent. [See: *Olivier v Botha and Another* 1960 (1) SA 678 O at 687 G – H].
- [42] The only requirement is the reasonableness of the applicant, in instituting the proceedings against the successful litigant. The present matter is a clear example of such a case. On the facts under consideration, I am satisfied that the applicant was reasonable in persisting with the application against the first and second respondents and should for this reason not be mulcted with costs.
- [43] In view of the principle enunciated in *Olivier v Botha and Another, supra* the third respondent would have been liable for the costs of the first and second respondents.
- [44] The first and second respondents, however, did not seek in the *alternative* a cost order against the third respondent.
- [45] In the premises, no order for costs will be granted in favour of the first and second respondents.

COSTS: FOURTH RESPONDENT

[46] The fourth respondent raised the following defences to the relief claimed by the applicant:

- i) lack of *locus standi*;
- ii) material misjoinder and non-joinder;
- ii) no cause of action and/or vague and embarrassing averments made, in respect of the alleged line of no access;
- v) denial that the access is unlawful.

[47] To his credit, Mr Novitz, counsel for the fourth respondent, did not seriously pursue any of the abovementioned defences.

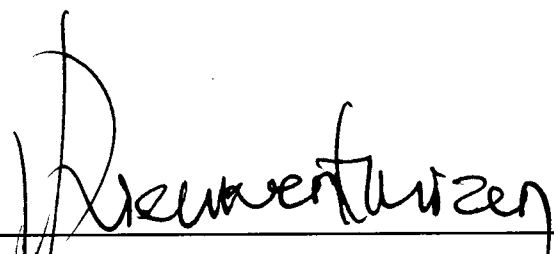
[48] It is clear from the facts mentioned *supra*, that the fourth respondent's utilisation of the access road is illegal.

[49] In the premises, the fourth respondent's opposition to the relief claimed by the applicant is unsuccessful and costs should follow the result.

ORDER

In the premises, I make the following order:

1. The third respondent is ordered to, within 10 working days from the date of this order, take all steps necessary to close, and physically prevent any illegal vehicular or pedestrian access from Provincial Road K 101 to Erf 374 Randjespark Ext 119 Township.
2. The third and fourth respondents are order to pay the costs of the application, jointly and severally, the one to pay the other to be absolved.



JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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ATTORNEYS FOR THE APPLICANT

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Advocate S Mitchell

ATTORNEYS FOR THE FIRST AND SECOND RESPONDENT

MOJELA HLAZO ATTORNEYS

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Advocate Halgryn SC

STATE ATTORNEYS

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