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

Case no: 2019/08890

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

Signed: ..... Date: 30 December 2022

In the matter between:

SARAH MAHLO	**First Applicant**
NOMSA SIWELA	**Second Applicant**
SAMANTHA JONSON AND OTHERS	**Third Applicant**

and

CITY OF EKURHULENI MUNICIPALITY	**First Respondent**
EKURHULENI METROPOLITAN POLICE DEPARTMENT	**Second Respondent**

JUDGMENT

This judgment is handed down electronically by circulation to the parties' legal representatives by e-mail and by uploading the signed copy to Caselines.

MOULTRIE AJ

[1] This matter involves the determination of the reserved costs arising out of a review application combined with an urgent application launched by the forty-six applicants on 28 February 2019, as well as an urgent interlocutory contempt application launched by them on 14 March 2019.

[2] The applicants are self-employed street traders operating within the jurisdiction of the City of Ekurhuleni. It is common cause that in January and February 2019 officers of the City's Metropolitan Police Department conducted raids during which they evicted the applicants from their stalls and confiscated certain of their goods and equipment on the basis that they were trading without the required permits.

[3] According to the applicants, they had applied to the City for the renewal of their trading permits some time before the raids, but no decision had yet been made in relation to their permit applications. This is admitted by the respondents in relation to all of the applicants other than the first applicant.

[4] On 28 February 2019, the applicants launched a review application seeking (in part B of the notice of motion) orders for the review and setting aside of the respondents' "decision" to evict and confiscate the applicants' goods in the raids (prayer B1) and the City's failure to consider and process the applicants' trading permit renewal applications (prayer B2). The review application was combined with an urgent application in part A: firstly, to compel the respondents to return the applicants' confiscated goods (prayer A3.1) and secondly to interdict the respondents from interfering with their trading activities pending the final adjudication of the review application (prayer A3.2). The applicants also sought costs against the respondents on a punitive scale in both part A and part B.

[5] No opposing papers were delivered by the respondents before the urgent application was heard on 12 March 2019. On that day, Wepener J granted orders compelling the respondents to immediately return the goods confiscated in the raids (paragraph 4 of the order), ordering the respondents to decide on the applicants' permit renewal applications on or before 25 March 2019 (paragraph 2), and interdicting the respondents from interfering with the applicants' trading activities pending that decision (paragraph 5). Wepener J further afforded the

parties an opportunity to supplement their papers before 25 March 2019 should they elect to do so (paragraph 3) and postponed the matter to 26 March 2019 (paragraph 6).

[6] Although the respondents contend that the order of 12 March 2019 was granted "*after the Learned Justice [Wepener] urged the parties to resolve the [matter] amicably and the order came about because of [an] agreement between the parties and what clearly appears is that there was no costs order against the respondents*", the applicants and (more importantly) the order itself states that the costs were reserved. This makes sense, given that the matter was postponed until a date approximately two weeks hence for further hearing following the delivery of further papers.

[7] It is common cause that the respondents did not comply with the order requiring them to return the applicants' confiscated goods immediately. According to the deponent of the respondents' answering affidavit in the costs application (Mr Selven Frank, the City's Divisional Head of Specialist Corporate Legal Services), the non-compliance came about "*because of a misunderstanding of the wording"*. Although Mr Frank's affidavit purports to refer to an affidavit of Mr Hezekiel Ngamlane Nkosi, the Acting head of the Metro Police's by-laws unit explaining the nature of this misunderstanding and the circumstances giving rise to it, no such affidavit was delivered.

[8] On 14 March 2019, the applicants launched an urgent application under the same case number to be heard the following day for orders directing the respondents to return their goods immediately, requiring them to deliver an affidavit explaining why they had failed to comply with the order of 12 March 2019, and declaring them to be in contempt thereof. As before, the applicants sought costs on a punitive scale. On 15 March 2019, the matter again came before Wepener J, who granted orders compelling the respondents to return the applicants' goods by 17h00 that day, and directing the City Manager and the Chief of the Metro Police to file affidavits showing cause why they should not be committed to prison for failing to comply with the order of 12 March 2019.

[9] On the applicant's version, the respondents then "*managed to partially comply with the court order*" requiring them to return the confiscated goods. Although the

applicants had "*since requested the Respondents to fully comply with the court order by returning some of the missing assets and food that were confiscated and our request was in vain*", the respondents state in their answering affidavit in the costs application that when the matter came before Wepener J for the final time on 26 March 2019 the applicants did not pursue either the issue of partial compliance or the order requiring the delivery of affidavits explaining the non-compliance. This is not pertinently disputed by the applicants in reply.

[10] On 25 March 2019, the day before the matter was due for hearing pursuant to the postponement order of 12 March 2019, the respondents filed "supplementary" affidavits (evidently pursuant to the order of 12 March 2019, and not to the order of 15 March 2019) deposed to by Mr Frank and by Mr Thabo Molapo of the City's Customer Relations Management Department who is responsible for processing trading permits. In these affidavits, the respondents indicated that they had processed the trading permit renewal applications of the applicants, with the exception of the first applicant, who they insisted had "*not made an application for the trading permit at the spot she is trading at and … her application would not have been approved as it contravenes the Bylaw*".

[11] It will be apparent that the orders of 12 and 15 March 2019, together with the conduct of the respondents described in the preceding two paragraphs, effectively disposed not only of the relief sought in the urgent application but also of the essence of the review application, thus effectively rendering the entire matter (including the contempt application) moot save as to the question of costs. As such, when the matter came before Wepener J on 26 March 2019, nothing of substance remained to be determined, and the order granted on that date was simply to remove it from the roll and to reserve the question of costs. The applicant's counsel confirmed during the hearing before me that the applicants seek no further substantive relief in the matter and consider that it has been finalised save as to the question of costs.

[12] The usual principle is that a successful party should be awarded their costs. The question of success is considered on an overall conspectus of the case and it is not usually appropriate to apportion costs between the parties based on which of

them has been successful in relation to each individual dispute,[1] except perhaps when such disputes are substantial and raise separate and discrete issues such as counterclaims, or where it is otherwise practicable to do so.[2]

[13] Thus, notwithstanding the relatively insubstantial dispute between the parties as to whether or not the first applicant herself had applied for the renewal of her trading permit, there is no doubt in my mind that the applicants have been successful in all of the proceedings in the matter, and that they should be awarded their costs.

[14] A further question, however, is whether the respondents should be ordered to pay any of the costs on a punitive scale. In advancing the contention that this should be the case, the applicants rely on the Constitutional Court's judgment in the similar case of *South African Informal Traders Forum v City of Johannesburg* 2014 (4) SA 371 (CC), arguing that the raids and confiscations (which effectively deprived the applicants of the means to earn a living) constituted a serious breach of their constitutional rights to human dignity, and because the respondents "*acted without due care and consideration*" of their rights, which "*severely affected*" them.

[15] While I am prepared to assume (without deciding) that it is indeed the case in this instance that the raids infringed the applicants' constitutional rights with severe consequences, I do not accept that this, in itself, is sufficient to justify the award of costs on a punitive basis against the respondents. If that were the case, punitive costs orders would be justified in every matter in which a party successfully litigates against the state to vindicate their constitutional rights. This is clearly not the case: punitive costs were not awarded by the Constitutional Court in *Informal Traders Forum*, and such orders are not granted as a matter of course - even in those instances where litigants have sued the state for damages arising out of unlawful arrest and detention,[3] which arguably results in a more serious violation of human rights than that experienced by the applicants in the current matter.

---

[1] Cf *MC Denneboom Service Station CC and Another v Phayane* 2015 (1) SA 54 (CC) para 19; *Walele v City of Cape Town* 2008 (6) SA 129 (CC) per O'Regan ADCJ at para 143.

[2] Cf *Kondile v Nothnagel NO* [2019] JOL 41520 (GP) paras 101 and 104; Cilliers Law of Costs. Looseleaf (LexisNexis, 2022) at 2.17.

[3] See, for example *De Klerk v Minister of Police* 2021 (4) SA 585 (CC).

[16] I therefore decline to order the respondents to pay the applicants costs on a punitive scale in relation to either Part A or Part B of the initial application, or in relation to the current application regarding costs.

[17] The respondents' failure to comply with paragraph 4 of the order of 12 March 2019 and the consequent need for the applicants to launch the urgent contempt application on 14 March 2019 is, however, another matter. As noted above, the respondents failed to deliver the promised affidavit of Mr Nkosi explaining the nature and circumstances giving rise to the "*misunderstanding*" that led to the non-compliance. It is difficult to conceive what possible misunderstanding could have arisen. The order is framed in clear and unequivocal terms. There is simply no room for a misunderstanding. Unexplained non-compliance by government officials with court orders is a serious matter that justifies the award of costs on a punitive basis.[4]

[18] I make the following order:

1. The respondents are ordered jointly and severally to pay the applicants' costs associated with the urgent contempt application launched on 14 March 2019 and heard on 15 March 2019 on the attorney and client scale.

2. The respondents are ordered jointly and severally to pay the applicants' costs associated with all other proceedings in the matter in relation to which the costs have been reserved on the party and party scale.

RJ Moultrie AJ

Acting Judge of the High Court

Gauteng Division, Johannesburg

[4] *Municipal Manager O.R. Tambo District Municipality v Ndabeni* 2022 JDR 0404 (CC) paras 39 - 44. See also *Paterson NO v Road Accident Fund and Another* 2013 (2) SA 455 (ECP) para 17, in which it was held that and "*it is trite that a party that fails to comply with a court order is visited with a costs order on a punitive scale unless exceptional circumstances exist*".

DATE HEARD: 6 October 2022

JUDGMENT SUBMITTED FOR DELIVERY: 30 December 2022

APPEARANCES

For the Applicants: Attorney M Marweshe of Marweshe Attorneys

For the Respondents: Attorney EM Modiga of Modiga Attorneys