In the High Court of South Africa
(Western Cape High Court, Cape Town)

Case No: 16925/12

In the matter between:

WESTERN CAPE FRESH PRODUCE CRISIS COMMITTEE

Applicant

and

CITY OF CAPE TOWN

Respondent

JUDGMENT DELIVERED ON 28 SEPTEMBER 2012

Buikman, AJ:

1. This is an application, brought by way of urgency, in which the Applicant, a voluntary association of fresh produce sellers, applies for an interdict pending review proceedings, to prevent the Respondent from executing demolition orders to take down various permanent stall structures from which produce is sold.

2. The application has a predecessor: an application was brought under similar circumstances by the Applicant under case number 9790/2012 out of this Court. The papers were

placed before me by the Respondent who contended that the application is relevant for the proper determination of the relief sought in this application. In that application, five of the Applicant's members, also sought to restrain the Respondent from impounding and removing the stall structures. The Applicant eventually did not persist with the application and did not institute review proceedings as envisaged in an interim order in terms of which it was required to do so by 6 August 2012.

3. The Respondent resists the relief claimed in this application on the basis that:

3.1 the Applicant has failed to establish that it has a clear right to the relief claimed as there is no merit in the review proceedings now instituted;

3.2 the balance of convenience favours the Respondent;

3.3 the urgency of the application is entirely self created. The application was brought on extremely short notice to the Respondent;

3.4 the Applicant has failed to respond to a notice pursuant to Rule 14 to establish the Applicant's *locus standi*. Accordingly, it is not possible to assess who the true applicants in this application are. As such any order granted by this Court is incapable of execution.

Background facts

4. During April and May 2012 various impoundment notices pursuant to section 22 of the Respondent's Street and Public Places and Nuisance Bylaw as read with section 17 of the Western Province Roads Ordinance 19 of 1976 were issued to five of the Applicant's members which led to the application under case number 9790/2012. The Applicant in that application stated that it had not been given an opportunity of making written representations to the Chief of Law Enforcement Services within the 7 day notice period that they had been given in terms of the impoundment notices and hence sought leave to do so.

5. On 21 May 2012 an order was granted by agreement between the parties to the effect that the five members of the Applicant, whose names are set out in an annexure to the order, were granted an extension until 1 June 2012 to make such representations. Pending the outcome of such representations the Respondent agreed not to remove their illegal structures. A *rule nisi* to this effect was granted and the application was postponed to 26 June 2012.

6. On 11 June 2012, after considering the Applicant's representations, the Respondent made a decision to continue with the demolition of the structures. This decision was communicated in writing to the Applicant on 12 June 2012. In this notification the Applicant's attention was brought to bear on the fact that the Act did not confer a discretion on the Respondent to condone non-compliance with the 21 day appeal period. On 13 June 2012, in response to this letter,

the Applicant's attorney advised that he held instructions to lodge an appeal against the Respondent's decision.

7. On 27 June 2012 a further order was taken by agreement between the parties to the aforementioned application in terms of which the application was postponed to 13 August 2012. The order contemplated an appeal against the Respondent's decision refusing Applicant's representations within a period of 21 days as required in terms of section 62(1) of the Municipal Systems Act 32 of 2000 ("the Act") and, if unsuccessful, an application for review of the Respondent's decision on appeal which, in terms of the Order, had to be launched by 6 August 2012. The *rule nisi* was also extended to 13 August 2012.

8. The Applicant failed to deliver its appeal within the 21 days afforded by section 62 of the Act. The Applicant contends that the reason for its appeal being delivered on 12 July 2012 was that it only received a full set of the reasons for the Respondent's decision on 21 June 2012. It argues that the 21 day appeal period commenced from this date and not 12 June 2012 when the decision was communicated to it. This is disputed by the Respondent who alleges that on 12 June 2012, when advised by the Applicant's attorney that page 5 was missing from the set of reasons, it immediately telefaxed page 5 of the reasons to them. During argument in this application, a copy of the two telefax transmissions was handed up to me under cover of a further supplementary affidavit and to which affidavit the Applicant was also given an opportunity to respond.

9. Excusing the late delivery of the appeal, the Applicant's attorneys directed a letter to the Respondent on 4 July 2012 in which the Applicant raised the fact that its appeal was late by virtue of the fact that a full set of the reasons for the Respondent's decision of 12 June 2012 was only furnished on 21 June 2012 when it was given the missing page 5.

10. It is common cause that the Respondent's answering affidavit under case number 9790/2012 was served on the Applicant's attorney on 12 June 2012 and that a full set of the reasons is an annexure thereto, including page 5 thereof.

11. On 20 July 2012 the Respondent dismissed the Applicant's appeal application.

12. The Applicant failed to file a replying affidavit in the application under case number 9790/2012 and to deliver its review application by 6 August 2012. There being no appearance for the Applicant on 13 August 2012, the *rule nisi* was discharged and the Applicant was ordered to pay the Respondent's costs of the application.

13. On 29 August 2012 the Applicant, this time represented by Achmat Hendricks ("Hendricks"), the deponent to the founding affidavit, filed its review application to set aside the Respondent's decision on appeal. It is to be noted that Hendricks, although he professes to have an interest in the application, is not one of the five named parties to the application under case number 9790/2012. The Applicant states that it was not able to launch its review application on

6 August 2012, as it was required to do in terms of the order of 26 June 2012, due to lack of funds.

14. On 30 August 2012 the Applicant launched this application on three days notice to the Respondent for an interdict pending the final determination of its review application. The urgency is stated to be that demolition of the illegal structures was due to commence on 30 August 2012.

A clear right

15. The review application is based primarily on the procedural unfairness of the dismissal of the appeal. According to the Applicant, the fact that the Act does not make provision for condonation is in and of itself procedurally unfair. The Applicant maintains that it was not afforded a proper opportunity of presenting its appeal given that a full set of reasons for the Respondent's decision were only forthcoming on 21 June 2012.

16. Mr Greig, who appears for the Respondent, argued that the wording of section 62 of the Act is clear and that the Applicant had 21 days from the date when the Respondent communicated its decision to the Applicant. No provision is made in the section to reasons being given. Section 62 (1) of the Act provides:

"*A person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or sub-delegated by a delegating authority to the*

political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision."

17. According to the Respondent, it is not necessary for me to decide whether the 21 days period should run only when full reasons have been given. He contended that the Applicant received a full set of the reasons on 12 June 2012 when page 5 was faxed to the Applicant on that date and furthermore, a full set of the reasons was attached as an annexure to the Respondent's answering affidavit, also served on the Applicant's attorney on 12 June 2012.

18. A detailed account of the events that occurred between 12 June 2012 and 21 June 2012 is given in the founding affidavit to the review application. The Applicant states that on 12 June 2012 the Respondent faxed the reasons to its attorneys of record which did not include page 5. It goes on to state that its attorney then telephoned the Chief Law Enforcement Office on 12 June 2012 who was informed that the reasons were in fact sent erroneously and that this should never have been done. The Applicant's contends that its attorney then contacted the Respondent's attorney to request the missing page. In support of this contention the Applicant refers to its attorney's letter of 13 June 2012.

19. The letter of 13 June 2012 does not however support the Applicant's allegations that this constituted notice that a full set of reasons was required. The letter merely serves to

notify the Respondent that the Applicant intended to appeal the decision within 21 days and sought its response to the Applicant's suggestion that the *rule nisi* be extended pending the appeal process. No mention is made in the letter of the fact that page 5 was missing from the reasons sent to the Applicant.

20. The missing page 5 is also not referred to in a letter despatched by the Applicant's attorney on 15 June 2012.

21. The first time that any mention is made of the fact that the Applicant was unable to deal with the appeal by virtue of an incomplete set of the reasons was in the Applicant's attorney's letter of 4 July 2012.

22. It is also not disputed in the Applicant's replying affidavit in this application that its attorney was aware that the full reasons was an attachment to the answering affidavit served on 12 June 2012 under case number 9790/2012.

23. Mr De Wit argued that although the full reasons were made available to the Applicant's attorney on 12 June 2012, the Respondent cannot contend that it had discharged its duty to make full reasons available to the Applicant in that the reasons were received in a "*by the way*" fashion. He suggested that the Applicant could not have expected the reasons to be made available to it in this manner. This argument is also raised by the Applicant in its founding affidavit to the review application where it is alleged that the Respondent "*never bothered*" to deliver the reasons to the

affected persons. I do not agree. The reasons were attached to an application dealing with the very issue concerning the appeal. Although not originally envisaged in the relief to the application under case number 9790/2012, the interim order of 27 June 2012 specifically referred to an appeal process. The Applicant's attorney was the very person appointed by the Applicant to lodge the appeal and in fact notified the Respondent of this fact on 13 June 2012.

24. In the circumstances, I am not satisfied that the Applicant has made out a case that it has a clear right. The Applicant was in a position to lodge its appeal timeously. This it failed to do.

25. I am also not satisfied that the Applicant has given an adequate explanation as to why it did not file its review application on 6 August 2012 in terms of the order of this Court on 27 June 2012. No explanation is given by the Applicant why it did not persist with its application under case number 9790/2012 save to state that the deponent to the Applicant's affidavits in that application, Mr Bam, was supposed to depose to an affidavit in support of the review application on 13 August 2012 but failed to arrive on that date. One must assume therefore that the affidavit in support of the review application was ready for signature on that date. The fact that the Applicant ran out of funds does not adequately explain why the Applicant waited until 29 August 2012 to bring the review application in circumstances where the review application was already prepared and was ready for signature on 13 August 2012.

26. There is also no explanation at all why there was a delay between the period 20 July 2012, being the date when the Applicant was notified that its appeal had been unsuccessful, and 13 August 2012 when arrangements were made for Mr Bam to depose to the review application.

Balance of convenience

27. I agree with Mr Greig that the Applicant has also not made out a case that the balance of convenience is in its favour.

28. Notwithstanding an allegation to the affect that the structures the Respondent seeks to demolish are not harmful or creating any social ill or disturbance, this conflicts with that stated by the Respondent in its answering affidavit. According to the Respondent the structures "*are large and create obstructions in the relevant areas* .... [and are] *also health hazards as people live permanently there to guard stock, and there are no proper amenities to cater for this as these are road reserves and/or public thoroughfares.*"

29. There is no impediment to the Applicant's members trading on an informal basis from the Respondent's land just that such trading cannot take place from permanent illegal structures.

30. As is clear from United Technical Equipment Company (Proprietary) Ltd v Johannesburg City Council 1987 (4) SA 343 (T), the Respondent has a duty to uphold the law and to enforce compliance with its town planning scheme. In the words of Broome J in Ostrowiak v Pinetown Town Board 1948

(3) SA 584 (D) at 591, private persons are not permitted to erect structures "*in the teeth of the law*" for, to do so would put an end to any sound local government.

31. Accordingly, the balance of convenience in this matter must favour the Respondent.

Locus standi

32. On 23 August 2012 the Respondent served further demolition notices on other members of the Applicant. The recipients thereof were advised that they had 7 days to make representations. It is to be noted that these recipients are not the members of the Applicant who are affected by the review as they have for the first time received their own demolition notices. The Applicant's attitude to these notices is to be found in the founding affidavit in which an averment is made to the effect that the Applicant "*has already done so and is at the appeal stage and thus I cannot see the point of repeating this futile exercise yet again as the Applicant seeks finality and making such representations would merely be another delay.*"

33. It is clear that Hendricks is also not one of the members of the Applicant affected by the previous application and therefore the review application. The demolition notice served on him is dated 23 August 2012 and is an annexure to this application. Although this does not affect his *locus standi* to represent the Applicant in these proceedings inasmuch as he may have been authorised by its members to depose to the founding affidavit, it is not clear that the parties who are

affected by the review application, are indeed the members of the Applicant who are being represented in this application by Hendricks.

34. The Applicant's attitude to the new notices issued on 23 August 2012 is therefore not understood. Those affected by the new notices, including Hendricks, had their own remedy available to them and cannot now be parties to this application.

35. In order to establish the identity of the members of the Applicant who are affected by the relief to this application, the Respondent issued a notice in terms of Rule 14 on 6 September 2012. No response to the notice was received. Mr De Wit, on behalf of the Applicant, indicated during argument on 18 September 2012 that the Applicant might wish to file a further affidavit to respond to the notice in order to demonstrate that at the least the five members affected by the review application were parties to this application. When argument resumed on 20 September 2012, no such affidavit was produced.

36. I can only assume therefore that there is merit in the Respondent's argument that the Applicant would prefer that the real protagonists remain undisclosed to shield them against any costs order were I to dismiss the application.

37. Having regard to the fact that not all the Applicant's members are affected by the review proceedings instituted, it is clear that the Applicant "*has set itself up as a litigator on behalf of individual members whose rights, are allegedly infringed or*

threatened" as contemplated in the case of Western Cape Residents' Association v Parow High School 2006 (3) SA 542.

38. In the circumstances, I am satisfied that the Applicant does not have the necessary *locus standi* to bring this application and has failed to satisfy me that it is representing the very parties affected by the review application.

Costs

39. The Respondent has sought a special costs order against the Applicant on the attorney and client scale. He referred me to the decision of City of Tshwane Metropolitan Municipality v Grobler 2005 (6) SA 61 (T) at 66C which he submitted was comparable to the issues in dispute in this matter.

40. I agree that the Applicant in this matter persisted with its claims well knowing that these are spurious. This is evidenced by the fact that it failed to disclose the names of the parties who it represents. The Applicants have not met any of the time periods imposed on them in an attempt to delay the inevitable demolition of illegal structures for which it has no permission.

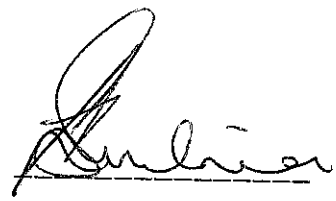
41. In the City of Tshwane's case (*supra*) reference was made by the Court to United Technical Equipment Co v Johannesburg City Council 1987 (4) SA 343 (T) where, at 348I – J, the position was summarised as follows (the respondent in that matter being the City Council):

"The respondent has not only a statutory duty but also a moral duty to uphold the law and to see to due compliance with its town-planning scheme. It would in general be wrong to whittle away the obligation of the respondent as a public authority to uphold the law. A lenient approach could be an open invitation to members of the public to follow the course adopted by the appellant, namely to use the land illegally with a hope that the use will be legalised in due course and that pending finalisation the illegal use will be protected indirectly by the suspension of an interdict."

42. I agree that the Applicant's deliberate flouting of the law in the face of lawful attempts by the Respondent to perform its duties warrants a special costs order. There is no good reason why the Respondent should be out of pocket.

43. In the circumstances, I make the following order:

The application is dismissed with costs, such costs to be paid on a scale as between attorney and client.



BUIKMAN, AJ