IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG **CASE NO: 22380/05**

2006-04-26

In the matter between:

BODY CORPORATE - MONTPARK DRAKENS AND OTHERS Applicants

and

MICHIEL SMUTS Respondent

J U D G M E N T

MARCUS, AJ:

INTRODUCTION

1. This application concerns an unfortunate dispute that has arisen between an occupant and the trustees of a sectional title scheme known as Montpark Drakens. The first applicant is the body corporate of Montpark Drakens constituted in terms of section 36(6) of the Sectional Titles Act 95 of 1986 ("the body corporate"). The second to fifth applicants are all members of the board of trustees of the body corporate ("the trustees"). The sixth applicant is the appointed managing agent of

the body corporate. The respondent is Michiel Smuts ("Smuts"). He is an owner of the one of the units in the building in question.

2. The applicants seek the following relief:

"1. Interdicting the respondent from disrupting or unlawfully interfering in any manner with the proper and efficient administration of the affairs of the first applicant.

2. Interdicting the respondent from creating a nuisance in any manner to any persons (including without limiting the generality of the aforegoing, any trustee or group of trustees of the first applicant and including any managing agent appointed by the first applicant in terms of Rule 46 of Annexure 8 to the Sectional Titles Act 95 of 1986 or any other provision of a statutory nature governing the appointment of a managing agent by the first applicant) in the discharge of any statutory and/or contractual duty towards the first applicant and interdicting the respondent from disrupting or interfering in any manner with the proper and efficient discharge of any such duty.

3. Interdicting the respondent from disrupting or unlawfully interfering in any manner with the proper and efficient conduct of business at any annual general meeting or special general meeting of the first applicant and at any meeting of trustees for the time being of the first applicant.

4. Interdicting the respondent from defaming any trustee or group of trustees of the first applicant from time to time and from behaving in any manner which is injurious to the dignity of any such trustee or group of trustees.

5. Interdicting the respondent from defaming any managing agent appointed by the first applicant in terms of Rule 46 of Annexure 8 to the Sectional Titles Act 95 of 1986 or in terms of any other provision of a statutory nature governing the appointment of a managing agent by the first applicant and from behaving in any manner which is injurious to the dignity of any such managing agent.

6. Interdicting the respondent from distributing to any owner, resident or group of owners or residents in the sectional title

scheme known as Drakens (alternatively Montpark Drakens) any note, letter, circular or other written communication pertaining to any matter concerning the affairs of the administration of the Drakens Sectional Title Scheme without the prior leave of the Witwatersrand Local Division of the High Court of South Africa.

7. Interdicting the respondent from defaming any service provider to the first applicant (including without limiting the generality of the aforegoing, any auditors appointed by the first applicant, any managing agent appointed by the first applicant and any legal advisor or sectional title consultant to the first applicant) and from behaving in any manner which is injurious to the dignity of any such service provider.

8. Interdicting the respondent from lodging any complaint against any service provider to the first applicant (including without limiting the generality of the aforegoing, any auditors appointed by the first applicant, any managing agent appointed by the first applicant and any legal advisor or sectional title consultant to the first applicant) with any body or institution exercising any supervisory and/or disciplinary power over such service provider without the prior leave of the Witwatersrand Local Division of the High Court of South Africa.

9. Interdicting the respondent from instituting any legal proceedings (whether by means of arbitration or by means of action or application in a court of law) and from threatening to institute any such proceedings against the first applicant against any trustee or group of trustees of the first applicant in the latter's official capacity as trustees and/or against any service provider to the first applicant in connection with the provision of any service by such person to the first applicant without the prior leave of the Witwatersrand Local Division of the High Court.

10. Interdicting the respondent from lodging any complaint against the first applicant or against any trustee or group of trustees of the first applicant in the latter's official capacity as such with any institution or body having statutory or other powers to investigate such complaint without the prior leave of the Witwatersrand Local Division of the High Court.

11. Interdicting the respondent from lodging, seeking and/or procuring any adverse publicity in any newspaper or any other mass medium (whether such newspaper or mass medium is distributed or broadcast locally, regionally or nationally) in connection with any matter relating to the affairs and/or the administration of the first applicant without the prior leave of the Witwatersrand Local Division of the High Court.

12. Interdicting the respondent from communicating (whether orally, in writing or both orally and in writing) with any trustee or group of trustees of the first applicant, any managing agent appointed by the first applicant and/or any legal advisor or sectional title consultant to the first applicant in connection with the identity or the legal validity of any of the rules (including management rules and conduct rules) or any other statutory provision governing the first applicant without the prior leave of the Witwatersrand Local Division of the High Court of South Africa.

13. Interdicting the respondent from communicating (whether orally, in writing or both orally and in writing) with any trustee or group of trustees of the first applicant, any managing agent appointed by the first applicant and/or any legal advisor or sectional title consultant to the first applicant in connection with the validity of the appointment by the first applicant of any managing agent (whether past, present or future) without the prior leave of the Witwatersrand Local Division of the High Court of South Africa.

14. Directing that the costs of the application be paid by the respondent on the scale as between attorney and client."

3. At the hearing of this application, Mr Dendy who acted on behalf of the applicants, sought to revise the relief sought. For purposes of this judgment it is not necessary to refer in detail to such revised relief as will become clear in due course.

4. The saga goes back several years to 1996 when Smuts was appointed as a trustee

of the body corporate. During 1997 he was elected chairman of the body corporate, a position he held for approximately one week until he resigned. Since then, so it is alleged, Smuts has waged a vendetta against the body corporate, the trustees and the managing agent. The voluminous papers detail these events over the last eight years. They run to some 700 pages. In summary, over a lengthy period, Smuts is alleged to persist in:

4.1 undermining the authority and position of the trustees by questioning the validity of their appointment usually by referring to the trustees as "purported" or "professing" trustees, when in truth the trustees have been duly and properly elected as such;

4.2 addressing a barrage of scurrilous, injurious and defamatory correspondence to the trustees and to the sixth applicant concerning the manner in which the trustees and/or the sixth applicant conduct the affairs of the body corporate and the manner in which they attempt to carry out their duties in terms of the Sectional Titles Act;

4.3 distributing to members of the body corporate on an ongoing basis a number of injurious and defamatory letters which he addresses to the trustees and/or the managing agent and/or circulars attacking the trustees and/or the managing agent concerning the manner in which the affairs of the body corporate are being conducted;

4.4 launching unfounded attacks of an ongoing nature upon the body corporate's auditors and upon the accounting practices followed by the managing agent in conducting the financial affairs of the body corporate including the laying of vexatious charges of misconduct against the body corporate's auditor before the Public Accountants and Auditors Board;

4.5 continually threatening legal action arising out of alleged failures on the part of the trustees and the managing agent to comply with demands made by him which threatened action is generally not brought despite non compliance with the demands;

4.6 making unreasonable demands of the trustees and the managing agent including demands for the furnishing of documentation that he already has, demands for information that he already knows, demands for meetings with trustees other than the normal monthly trustees meeting, demands for the inclusion on agendas of trustees meetings of items which have already been disposed of or dealt with and demands for the inclusion in the published and audited accounts of the body corporate of admissions of bad faith, disregard of the rules governing the running of the sectional title scheme and unlawful conduct on the part of the trustees when no such misconduct on the part of the trustees has taken place;

4.7 threatening adverse press publicity over the conduct of the trustees and the managing agent;

4.8 unreasonably questioning and attacking decisions made by trustees and thereby undermining the confidence of trustees in their own ability to manage properly the affairs of the body corporate and to carry out the duties imposed upon them by the Sectional Titles Act;

4.9 taking up the time of the trustees and the managing agent with petty, unnecessary and frivolous complaints;

4.10 finding fault with professional service providers other than the auditor to the body corporate such as legal advisors, the architect and a municipal building inspector;

4.11 launching injurious personal attacks upon current and former trustees, threatening legal action against them in some cases, and threatening to "expose" the conduct of current and former trustees;

4.12 distorting facts so as to convey a message that is either a half truth or a blatant lie and thus discrediting trustees of the body corporate, the managing agent and service providers to the body corporate and harping on an ongoing basis about the alleged deficiencies and inadequacies in the management rules and the conduct rules by which the body corporate is governed.

5. Although much of this is denied by Smuts, he does so frequently in a bald and evasive manner. I am satisfied that in broad terms these allegations have been sufficiently established. Smuts claims that he has done nothing more than to assert his lawful rights as a unit holder. He has assumed something of a self-appointed watchdog over the administration of the sectional title scheme. In a note addressed to a previous chairperson of the body corporate, it emerged that Smuts hoped "to make some money" out of a sectional title management system he was devising which he considered would be a useful tool for eliminating what he described somewhat euphemistically as the "clash" that was occurring at Montpark Drakens.

6. The body corporate has a number of important duties which are set out principally in section 37(1) of the Sectional Titles Act. Chief among these, is the duty to establish for administrative expenses, a fund sufficient in the opinion of the body corporate for the repair, upkeep, control, management and administration of the

common property, for the payment of rates and taxes and other local authority charges, for the supply of electric current, gas, water, fuel and sanitary services, for the payment of premiums of insurance and for the discharge of any duty or fulfilment of any other obligation of the body corporate. The body corporate must require the owners of units, whenever necessary, to make contributions to that fund for the purposes of satisfying claims against the body corporate and must determine, from time to time, the amounts to be raised for the purposes of section 37(1). The body corporate must levy contributions upon owners of units and must open and operate a banking account or accounts. It must properly maintain the common property and keep it in a state of good and serviceable repair. It must keep in good and serviceable repair and properly maintain machinery, fixtures and fittings used in connection with the common property. In general it must control, manage and administer the common property for the benefit of all owners. See generally *Body Corporate of Fish Eagle v Group Twelve Investments (Pty) Ltd* 2003 (5) SA 414 (W).

7. The functions and powers of the body corporate are subject to the provisions of the Sectional Titles Act and the Rules which govern sectional title developments. Various duties are imposed upon trustees by the management rules set out in Annexure 8 to the Sectional Titles Act. Rule 46(1) of Annexure 8 empowers trustees to appoint a managing agent to control, manage and administer the common property and to exercise such powers and duties as may be entrusted to the managing agent including the power to collect levies and to appoint a supervisor or caretaker. Mr Dendy submitted that the Sectional Titles Act and the management rules set out in Annexure 8 to the Act not only impose all the aforementioned duties upon trustees and managing agents, but also by necessary implication confer upon trustees and upon managing agents the clear right in law to perform those functions without unnecessary or improper interference. I agree with this submission.

8. It is against this background that I turn to consider the relief sought by the applicants. The relief sought is self evidently far-reaching. It can conveniently be

divided into three categories. The first category, comprising prayers 6,8, 9, 10, 11, 12 and 13 seeks to impose various restraints which can be relaxed only with the prior leave of this Court. I shall refer to this category as the "screening interdicts". The second category, comprising prayers 4, 5 and 7 seeks to restrain Smuts from defaming a wide range of individuals. I shall refer to this category as the "defamation interdicts". The third category, comprising prayers 1, 2 and 3 seeks to restrain Smuts from various forms of interference with the management and affairs of the body corporate. I shall refer to this category as the "improper interference" interdicts. These are categories of convenience inasmuch as all the relief is aimed at stopping Smuts' disruptive behaviour.

THE SCREENING INTERDICTS

9. It is appropriate to deal first with the relief sought in prayers 6, 8, 9, 10, 11, 12 and 13 of the original notice of motion. Similar relief is sought in the recast draft order presented to me by Mr Dendy. All of these prayers have in common the requirement that Smuts be restrained from doing a variety of things save with the prior leave of this Court. Mr Dendy submitted that since the possibility cannot be excluded that Smuts might at some time in the future have good cause to distribute letters or notices to owners or residents in the sectional title scheme or to complain about service providers or to institute or threaten to institute legal proceedings against any trustee or a service provider or to lodge a complaint against the body corporate or any of its trustees or to threaten newspaper publicity in relation to the conduct of the affairs of the body corporate, provision should be made to allow Smuts to do these things provided that he obtains prior leave of this Court. To dispense with the requirement of prior leave, so the argument goes, would be to leave the door open to Smuts to persist in vexatious or frivolous complaints for the *mala fide*

purpose of disrupting the affairs of the body corporate. On the other hand to provide that he may not do any of these things at all would be too extreme a solution because it might shut the door on legitimate complaints or grievances.

10. As far as I can ascertain this form of relief is unprecedented, except in circumstances where a person is declared a vexatious litigant in terms of the Vexatious Proceedings Act 3 of 1956. Where that Act is involved, however, there are a number of prerequisites. The application to have a person declared a vexatious litigant can only be instituted by the state attorney or by a person acting under his or her authority. A declaration is only competent where a person has "persistently and without reasonable ground instituted legal proceedings" in a High Court or magistrate's court.

11. The constitutionality of the Vexations Proceedings Act was considered in *Beinash & Another v Ernst & Young & Others* 1999 (2) SA 116 (CC). The Constitutional Court observed at paras 15-16:

> "15. This purpose is 'to put a stop to persistent and ungrounded institution of legal proceedings'. The Act does so by allowing a court to screen (as opposed to absolutely bar) a person who has persistently and without any reasonable ground instituted legal proceedings in any court or inferior court. This screening mechanism is necessary to protect at least two important interests. These are the interests of the victims of the vexatious litigant who have repeatedly been subjected to the costs, harassment and embarrassment of unmeritorious litigation and the public interest that the functioning of the courts and the administration of justice proceed unimpeded by the clog of groundless proceedings.
>
> 16. The effect of section 2(1)(b) of the Act is to impose a procedural barrier to litigation on persons who are found to be vexatious litigants. This serves to restrict the access of such persons to courts. That is its very purpose. In so doing it is inconsistent with section 34 of the Constitution which protects the right of access for everyone and does not contain any internal limitation of the right. The barrier which may be imposed under section 2(1)(b) therefore does limit the right of access to court protected in section 34 of the Constitution, but in my view such a limitation is reasonable and justifiable." (footnotes omitted)

12. The present matter is not concerned with allegedly vexatious proceedings in

courts of law at all. The conduct complained of has nothing to do with litigation. There is accordingly no room for the invocation of Act 3 of 1956 or the court's inherent jurisdiction (now regulated by section 173 of the Constitution) to prevent the abuse of its process.

13. In my view therefore the relief sought in prayers 6, 8, 9, 10, 11, 12 and 13 and their counterparts in the revised draft order is not competent. For the sake of completeness I propose to deal specifically with prayer 9.

14. The papers reveal that since April 2001 Smuts has issued some 35 threats of legal action. I do not propose to address the details of these threats. It suffices to state that in this sphere the law offers a remedy for such conduct, namely, an edict of perpetual silence. This is a remedy designed to put one who threatens legal action on terms to proceed with the action or else to be subjected to an edict of perpetual silence. See *Garber NO v Witwatersrand Jewish Aged Home* 1985 (3) SA 460 (W). No such remedy has yet been sought against Smuts. I mention this as a possible avenue of recourse should Smuts' conduct in this regard persist.

THE DEFAMATION INTERDICTS

15. The relief sought under this heading involves a range of matters. These include the threats of press publicity, the distribution of defamatory circulars, attacks on the auditor of the body corporate and defamatory correspondence.

Examples of defamatory letters going back many years were annexed to the founding affidavit. In these letters Smuts refers, *inter alia,* to "trustees taking kickbacks", "ineptitude of trustees bordering on dishonesty", "trustees serving their own interests" and the like. Smuts' defence to these claims is scarcely convincing. Thus in relation to the very serious allegation of "trustees taking kickbacks" he states that this concerned a request by him to erect an awning on his veranda for which he obtained permission from one Suffling on condition that he used a particular service provider. Smuts states that he "got the clear impression that this service provider passed on a kickback to the relevant trustee". This is not a justification for a slur on all trustees, nor does it justify the slur on Suffling. In another case, Smuts referred in a letter to the second respondent's "Hitler-like approach to the administration of the body corporate's affairs". This (together with many other examples) was put up as evidencing attacks by Smuts of a scurrilous, injurious and defamatory nature. It was met with nothing more than a bald denial. To unjustifiably compare somebody with one of the most evil tyrants in recorded history is seriously defamatory. (Cf *Sachs v Werkerspersmaatskappy (Edms) Bpk* 1952 (2) SA26 (W) and *Chesterton v Gill and Others* 1970 (2) SA 242 (T). These are but two examples of an insufficient attempt to justify a serious and defamatory attack. There are many others, too numerous to mention. Mr Branford who represented Smuts quite properly conceded in argument that not all the defamatory attacks which have been detailed in the founding affidavit could be

justified.

16. What emerges from the papers is that Smuts is given to the use of unnecessarily extravagant and hurtful language and that even legitimate complaints are couched in offensive terms. It will serve no useful purpose to attempt to analyse each and every complaint against Smuts. Some of these are wholly unanswered save by way of a bald denial. Smuts seems incapable of resisting the use of snide remarks, exaggeration and a general tone of pettiness and nastiness.

17. My concern about the relief sought in relation to the defamatory attacks by Smuts is that they span a long period of time, some five to six years. On the face of it many of these utterances would have been actionable, yet no claims for defamation were instituted. The subject matter of Smuts' attacks is varied. While they broadly concern the administration of the sectional title scheme, the individuals and events involved are different.

18. It is probably for this reason that the applicants have couched their relief in such broad and general terms. This is true of most of the prayers but for present purposes I confine myself to the prayers relating to defamation. These are prayers 4, 5 and 7. They also have their counterparts in the revised proposal handed to me by Mr Dendy. Both the original prayers and the revised prayers are couched in such wide terms that they would, in my opinion, impermissibly restrict Smuts' right to freedom of expression. To grant an order interdicting freedom of expression is a drastic remedy. The extent to which the common law rules in this sphere are compatible with the Constitution is a matter on which the Constitutional Court is yet to pronounce. At present the leading decision is *Hix Networking Technologies v System Publishers (Pty) Ltd & Another* 1997 (1) SA 391 (A) in which Plewman JA observed in the context of an interim interdict at 401D that:

"the proper recognition of the importance of free speech is a factor which must be given full value in all cases."

19. The importance of freedom of expression in an open and democratic society has been recognised by courts the world over and stressed by the Constitutional Court in several decisions. See, for example, *South African National Defence Union v Minister of Defence & Another* 1999 (4) SA 469 (CC) and *Khumalo v Holomisa* 2002 (5) SA 401 (CC). It is in recognition of the importance of the right to free expression that courts in other jurisdictions are loath to place prior restraints on speech. For the position in English law, see *Frazer v Evans* [1969] 1 QB 349 and *Greene v Associated Newspapers* [2005] 1 ALL ER 30. In the United States prior restraints on speech are virtually impossible. See *New York Times v United States* 403 US 713. For a similar approach in South African law, albeit in a different context, see *Government of the Republic of South Africa v Sunday Times Newspaper & Another* 1995 (2) SA 221 (T). Although under existing South African precedents a prior restraint on speech is competent, it has been recognised that "there must be compelling reasons to justify the prior restraint" and that "reasons of a speculative nature will not be sufficient" - per Zondi AJ in *Director of Public Prosecutions (Western Cape) v Midi Television (Pty) Ltd t/ a e tv* 2006 (3) SA 92 (C) at para 31. The reason is obvious: a prior restraint is a "drastic interference with freedom of speech" (*Attorney-General v British Broadcasting Corporation* [1981] AC 303 at 362) and "has an immediate and

irreversible sanction" (*Nebraska Press Association v Stuart* 427 US 539 at 559). In argument Mr Dendy stressed that the Constitutional guarantee of freedom of expression was not paramount and that the right to dignity had to be brought into the equation. He is correct in this regard, but it should not be assumed that the right to dignity and the right to free expression are always and axiomatically in conflict. Where a balancing of rights is required, "the value whose protection most closely illuminates the constitutional scheme to which we have committed ourselves should receive appropriate protection" (per Cameron J in *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W) at 607I-608A). I proceed, however, on the basis set out in the *Hix Networking* case (supra) and accept that an interdict to restrain a defamation is to be determined by the test laid down in that case.

20. Apart from the potentially stifling effect that the breadth of the orders sought would place on Smuts' free expression, there are two factors which militate against the grant of a permanent interdict in the terms prayed for. As indicated above many of the complaints go back several years. Some relate to persons who are not even before the Court. The example of Suffling to which I have referred is such a case. I have indicated that on the face of it many of the examples relied upon would have given rise to actions for defamation. Those that have not prescribed may yet do so. I am of the view that there are alternative remedies to the interdicts prayed for. Indeed an action for defamation which results in an award of damages and costs would probably achieve the desired result and have the salutary effect of curtailing Smuts' excesses. The second factor which militates against the grant of interdictory relief is the difficulty in tailoring the relief to guard against the apprehended injury. This is not a case where there is an apprehension that Smuts will repeat, in similar terms, some or other defamatory utterance. On the contrary, his defamatory utterances are many and varied. While his past conduct is to be put in the reckoning, it cannot be ascertained with any degree of certainty what he might do next.

21. I can understand that the present and past trustees have felt demoralised by

Smuts' persistent attacks. Living in proximity with one another creates inevitable tensions, but these have been exacerbated by the tone and content of Smuts' attacks. For a community to enjoy a relatively harmonious existence members abide by an unwritten code of mutual respect and forbearance. They recognise that compromises must be made for the greater good and that some measure of inconvenience will be tolerated so that all can enjoy peace and tranquillity. Smuts does not seem to abide by these rules. Under the guise of raising legitimate complaints he has behaved in an offensive manner over several years. In so stating, I do not wish to be understood as suggesting that he is without his rights. I merely stress that by his own conduct he has created something of a war with his neighbours. He should know, however, that he faces the risk of an action for damages for his defamatory utterances. In my view this will prove to be an adequate alternative remedy. Mr Dendy has sought to impress upon me that an action for damages is not an effective alternative remedy because if regard is had to the history of this matter, the applicants will in all likelihood be swamped in litigation. Whether or not this will occur remains to be seen. As I understand it, this is the first occasion upon which the body corporate and trustees have instituted proceedings against Smuts. I have been advised by both counsel that the very institution of these proceedings has had the effect of silencing Smuts, at least for the time being. In suggesting that there are adequate alternative remedies I am also fortified in my view by the decision in *Tsichlas & Another v Touch Line Media (Pty) Ltd*

2004 (2) SA 112 (W).

THE IMPROPER INTERFERENCE INTERDICTS

22. Prayer 1 (as revised) seeks an order interdicting Smuts from disrupting or unlawfully interfering in any manner with the proper and efficient administration of the affairs of the body corporate. Related to this is prayer 3 (as revised) which seeks an interdict restraining Smuts from disrupting or unlawfully interfering in any manner with the proper and efficient conduct of business at any annual general meeting or special annual general meeting.

23. It is alleged that the disruption which these prayers are designed to prevent takes a variety of forms. For example, demanding documentation which Smuts already has, demanding information which he already knows, demanding the inclusion on the agenda of items which have already been disposed of or dealt with and demanding urgent meetings other than the scheduled monthly meetings of the body corporate. Some of these allegations are denied. These demands must, however, be seen in conjunction with Smuts' general attitude and behaviour to the trustees and their administration of the scheme. It must be emphasised that the trustees are unpaid volunteers who give of their own spare time and do so willingly. What is clear is that the trustees have been put under intolerable strain by a combination of factors including defamatory attacks, unreasonable demands and making demands on the trustees' time with frivolous requests. Falling into this latter category were demands to be furnished with information regarding the system, if any, by which the body corporate monitors comparative water consumption of the different units; information concerning the water consumed by the gardening service together with a copy of the contract authorising the gardening service to use the water and information regarding whether there are any rules or prospective rules governing the use of water in the visitors' toilets.

24. Smuts has also directed his venom at the service providers employed by the body corporate. Thus, for example. he described the body corporate's sectional title consultant as being one of a number of "backyard legal

mechanics who cannot run their own affairs properly". He described the advice given by an attorney as "not legal advice at all", as being "dangerous" and "the sort of homily put out by persons who hold themselves out as peacemakers in sectional title arguments". At the 2004 annual general meeting he referred to the original architect of the scheme as a "liar". Although this is reflected in the minutes, Smuts denied the allegation in his answering affidavit.

25. On at least one occasion Smuts deliberately taunted the trustees. He had withheld payment of his levies and when asked why he had done so, his answer was that he wanted to see how far the trustees would go and what the trustees would do. In his answering affidavit he does not deny making the comment. He merely says that he wanted to ascertain whether the trustees would take legal action against him without first obtaining legal advice. This is scarcely a convincing explanation.

26. Smuts' conduct has had a deleterious effect on the administration of the scheme. People are understandably reluctant to act as trustees in the face of these continual attacks and the proper administration of the scheme is in jeopardy. The tranquillity of those who live in the units has been fundamentally disturbed. In March 2004, a letter signed by 47 people all of whom were either owners or residents of the 45 units, was delivered to the trustees. The letter complained bitterly of Smuts' behaviour. It took exception to Smuts' defamatory remarks and suggested that the time had come for him to sell and vacate his unit in the light of his attitude to fellow owners. Smuts states in answer that he believed the letter was written in collaboration with the trustees who had taken the advice of an attorney. It was pointed out in reply that the letter was drafted by a number of residents and owners, some of whom were trustees or past trustees. The obvious point, which was apparently lost on Smuts, however, is that it was signed by 47 residents. This gives some indication of Smuts' lack of insight to the effect of his own behaviour on his fellow

residents and the way in which his conduct is perceived.

27. In my view a substantial case has been made out for the relief claimed in prayers 1 and 3. In reaching this conclusion I have had regard to the totality of the evidence. In light of this conclusion it is unnecessary to grant the relief claimed in prayer 2 which raises the interesting argument advanced by Mr Dendy as to whether the hitherto traditional limits of the law of nuisance can be extended to a case such as the present.

COSTS

28. This leaves the question of costs. Although I have refused the majority of the orders prayed for, prayers 1 and 3 encapsulate the case against Smuts. In granting these prayers, it has been necessary to have regard to all the evidence. It follows that Smuts must bear the costs of this application. The only issue is whether I should make a punitive order for costs as contended by Mr Dendy.

29. The leading case regarding the award of costs on the attorney and client scale is *Nel v Waterberg Landbouers Koöperatiewe Vereeniging* 1946 AD 597 where Tindall JA stated at 607:

> "The true explanation of awards of attorney and client costs not expressly authorised by statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation."

30. Mr Dendy suggested that there were five considerations which militate in favour of a punitive order of costs.

30.1 First, the considerable length of time over which this course of conduct has occurred. This saga has endured for close to six years.

30.2 Second, the range of people who have been attacked. Every board of trustees since their inception has been targeted as well as managing agents, the auditor and virtually everyone who has had anything to do with the administration of the scheme.

30.3 Third, there is a history of persistent rejection of complaints lodged by Smuts, including complaints lodged by him to the Estate Agency Affairs Board, the Public Accountants and Auditors Board and to a municipal building inspector.

30.4 Fourth, previous requests and warnings to desist have been unheeded. In the petition from the residents the following is stated in the concluding paragraph:

> "We can no longer allow one owner to hold the body corporate to ransom and hereby demand that you stop this behaviour, failing which we will have no alternative but to consider taking drastic steps which may include legal action. Should this become necessary a punitive costs order will be sought against you in respect thereof."

In an arbitration proceeding instituted by Smuts, the arbitrator not only dismissed the complaint but went on to state the following:

> "I have no doubt in finding that the conduct of the claimant in regard to the litigation in question was vexatious."

Moreover the arbitrator marked her disapproval of Smuts' conduct with a punitive order of costs.

30.5 Fifth, the persistence by Smuts despite the rejection of his complaints by the various professional bodies referred to.

31. Mr Branford acknowledged this argument to be compelling but emphasised that I had a discretion whether or not to order a punitive order of costs. In this regard he is correct, but it seems to me that the five factors mentioned by Mr Dendy are powerful indications as to why a punitive order of costs is indeed appropriate. In the circumstances I make the following order:

ORDER:

1. The respondent is interdicted from disrupting or unlawfully interfering in any manner with the proper and efficient administration of the affairs of the first applicant.

2. The respondent is interdicted from disrupting or unlawfully interfering in any manner with the proper and efficient conduct of business at any annual general meeting or special annual general meeting of the first applicant and at any meeting of trustees for the time being of the first applicant.

3. The respondent is ordered to pay the costs of this application on the scale as between attorney and client.

MARCUS AJ

ON BEHALF OF APPLICANTS: MR DENDY
ON BEHALF OF RESPONDENT: ADV BRANFORD