IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 21199/13

In the matter between:

CRAIG ALAN LEVINTHAL N.O.	First Applicant
JEANNE TAUBE LEVINTHAL N.O.	Second Applicant
BRIAN NEVILLE GAMSU N.O.	Third Applicant

And

THE CITY OF CAPE TOWN MUNICIPALITY	First Respondent
CHRISTINE MATTI	Second Respondent

JUDGMENT DELIVERED ON 28 OCTOBER 2015

BOQWANA, J

Introduction

[1] This is an application in terms of Rule 41(1)(c) which was brought by the first and second respondents seeking legal costs against the first, second and third applicants ('the applicants') in circumstances where the applicants had withdrawn the review application, without tendering to pay the costs incurred by the respondents. The parties are cited as they appear in the review application for purposes of convenience.

[2] On 18 June 2015 the parties appeared before Judge Fortuin, who gave an order by agreement between the parties withdrawing the review application and postponing the issue of costs to 13 October 2015 and incorporating a timetable regarding delivery of papers relating to the application in respect of costs.

[3] The application with respect to costs was opposed by the applicants. At the hearing of this matter the applicants were represented by the first applicant in person who confirmed that he was authorised to represent all trustees. A resolution of the Kerry Trust ('the Trust') passed on 23 June 2015 which recorded such authority was handed up in Court. The resolution stated that:

> '1. The Trustees confirm that Craig Allan Levinthal, a Trustee was and is authorised to withdraw the High Court application on 18 June 2015, against The City of Cape Town and Christine Matti, respectively, launched in the High Court of South Africa, Western Cape Division, Cape Town under case number: 21199/13, and to attend to all further proceedings as he deems fit relating to said case including the issue of costs..;
>
> 2. The Trustees ratify and confirm the past actions of Craig Levinthal in respect of the aforementioned High Court case in so far as it may be necessary.'(Underlined for emphasis)

[4] It appears from the record that the applicants subsequently delivered a notice of withdrawal of opposition in respect of the first respondent's application tendering the first respondent's party and party costs.

[5] At the hearing of this matter the applicants and the first respondent submitted a draft order by agreement recording the applicants' withdrawal of their opposition to the first respondent's application for costs in terms of Rule 41(1) and their liability for first respondent's party and party costs as taxed or agreed in respect of opposing the review application and the application for costs in terms of Rule 41(1). This draft order was made an order of Court by agreement between the applicants and the first respondent.

[6] The hearing of the application in respect of costs brought by the second respondent continued.

General principle

[7] The general principle applicable when a party withdraws its action or application is that such party is in the same position as an unsuccessful litigant, and therefore the other party is ordinarily entitled to costs. A departure from the principle that costs must be awarded to the party which has been put to the expense of defending withdrawn proceedings is only warranted in exceptional circumstances. In this regard, see **ABSA Bank and others vs Robb** 2013 (3) SA 619 (GSJ) at paragraph [8]; **Germishuysvs Douglas Besproeiingsraad** 1973 (3) 299 (NKA) and **Waste Products Utilisation (Pty) Ltdvs Wilkes and Another (Biccari Interested Party)** 2003 (2) SA 590 (WLD) at 597 A – B.

[8] In the matter of **Gamlan Investments (Pty) Ltd and Another vs Trilion Cape (Pty) Ltd** 1996 (3) SA 692 (CPD) at 700G the court referred with approval to the judgment of **Jenkins vs SA Boiler Makers, Iron& Steelworkers &Ship Builders Society** 1946 WLD 15 where it was held (as paraphrased by the court in Gamlan) that 'where a disputed application is settled on a basis which disposes of the merits except insofar as the 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 must, with the material at its disposal, make a proper allocation as to costs.'

[9] The Court expressly associated itself with the conclusion adopted by Price J in **Jenkins,** and, in particular, its findings (at 17 and 18) that:

> 'It seems to me to be against all principle for the Court's time to be taken up for several days in the hearing of a case in respect of which the merits have been disposed of by the acceptance of an offer, in order to decide questions of costs only.
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> ...
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> 'I cannot imagine a more futile form of procedure than one which would require Courts of law to sit for hours, days, or perhaps even for weeks, trying dead issues to discover who would have won in order to determine questions of costs, where cases have been settled by the main claims being conceded.

[10] The court in **Gamlan** then went on to draw attention to the finding in the **Jenkins** matter, as the former put it, that 'Costs ... must be decided on broad general lines and not on lines that would necessitate a full hearing on the merits of a case that has already been settled. This approach is certainly to be commended. Costs, more particularly at present, play a very important role in litigation and the presiding judicial officer should, in my view discourage the incurring of unnecessary costs by making an appropriate order in this respect.'

[11] I fully align myself with the remarks of van Niekerk J in the **Gamlan Investments** case. This particular matter was withdrawn by agreement as appears in the order of 18 June 2015. The merits of the review case have accordingly been 'settled' by agreement. That however does not mean that the Court should totally ignore the merits as they must be considered to a limited extent in order for the court to make its findings on costs. Merits would also play a role in answering the question of whether any exceptional circumstances existed to warrant deviation from the general principle alluded to above.

Background

[12] The applicants brought an urgent application on 27 December 2013 seeking a review of the decision of the first respondent made on or about 5 October 2012 approving certain building plans submitted by or on behalf of the second respondent in respect of Erf 907, Tamboerskloof, also known as 12 De Hoop Avenue, and the proceedings which culminated in the making of that decision.

[13] The applicants are all trustees of the Trust which is a registered owner of the property Erf 908 situate at Tamboerskloof, which is adjacent to Erf 907, the second respondent's dwelling which was the subject of the review application.

[14] The first ground of review relied upon by the applicants was that the first respondent approved plans for a building which was to be used as a guest house and as a residential building, in conflict with the use of rights attaching to the property in terms of the zoning scheme, 'which was limited to a dwelling house'. The applicants contended that the first respondent's decision was in contravention

of section 7 (1) (a) of the National Building Regulations and Building Standards Act 103 of 1977 ('the NBR Act'), which required that building plans comply with the 'applicable law', which includes the zoning scheme.

[15] The second ground for review was that first respondent could not have satisfied itself that the building plans do not trigger the disqualifying factors listed in section 7 (1) (b) of the NBR Act, and consequently ought to have refused the application. The review application was opposed by both the first and second respondents.

No condonation application

[16] The basis for the opposition was firstly that the review proceedings were instituted contrary to the requirements of section 7(1) of the Promotion of Administrative Justice Act, 3 of 2000 ('PAJA') outside the 180 day period following on from the date on which the applicants became aware of the administrative action or might reasonably have been expected to have become aware of such action.

[17] The review application was launched on 12 December 2013 which was 11 months after the building plans were approved, that is on 01 February 2013. According to the respondents, the first applicant stated that he was aware of the approval of the building plans since construction commenced in April 2013 which is some 8 months prior to the institution of the proceedings. The first applicant had engaged with the first respondent since April 2013 in respect of the building plans and did not take any steps to review and set aside the plans, until the building was completed. Furthermore, there is no application for condonation nor is there any reasonable explanation given for the delay.

[18] The applicants in their own version acknowledged that more than 180 days had elapsed since the first applicant became aware of the 'probable' approval of the building plans in respect of Erf 907 by the first respondent. They acknowledged that the period of 180 days is as contemplated by section 7 (1) of PAJA. The applicants further indicated in their founding papers in the review

application that the first applicant would request that the period be extended by agreement with the first respondent in terms of section 9(1) of PAJA and that if the first respondent did not agree he would apply to Court in terms of the same section to grant the necessary extension permitting the review application to proceed on the basis that the interest of justice required such contemplated extension be granted.

[19] There is no agreement between the parties for the extension of the time period. The applicants did not bring any application to this Court to extend the period for the launching of the application as required in section 9 (1) of PAJA.

[20] It was submitted by Ms Van Zyl on behalf of the second respondent that the review application would not have been entertained by the review Court. She referred to the recent decision of **Opposition to Urban Tolling Alliances vs South African National Roads Agency Limited** (2013) 4 All SA 639 (SCA) ('**OUTA**') at para 26 where Brand JA stated the following:

> '[26] At common law, application of the undue delay rule required a two-stage enquiry. First, whether there was an unreasonable delay and, second, if so, whether the delay should in all the circumstances be condoned (see e.g. *Associated Institutions Pension Fund and others v Van Zyl and others* 2005 (2) SA 302 (SCA) at paragraph 47 [also reported at [2004] 4 All SA 133 (SCA) – ed]). Up to a point, I think, section 7(1) of PAJA requires the same two-stage approach. The difference lies, as I see it, in the Legislature's determination of a delay exceeding 180 days as per *se* unreasonable. Before the effluxion of 180 days, the first enquiry in applying section 7(1) is still whether the delay (if any) was unreasonable. But after the 180-day period the issue of unreasonableness is pre-determined by the Legislature; it is unreasonable per *se.* <u>It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of section 9. Absent such extension the court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters. The decision has been "validated" by the delay</u> (see eg *Associated Institutions Pension Fund* (supra) at paragraph 46). That of course does not mean that, after the 180-day period, an enquiry into the reasonableness of the applicant's conduct becomes entirely irrelevant. Whether or not

> the delay was unreasonable and, if so, the extent of that unreasonableness is still a factor to be taken into account in determining whether an extension should be granted or not (see e.g. *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] 2 All SA 519 (SCA) at paragraph 54).' (Underlined for emphasis)

[21] Brand JA went on to state at paragraph 43 that:

> '[43] Hence, I believe that despite the appellants' various arguments to the contrary, we are not authorised to enter into the merits of the review application. Contrary to this approach, the court *a quo* first dealt with the review application and dismissed it on its merits. In consequence, the court found it unnecessary to consider the effect of the delay rule. Although, for the reasons I have given, I do not agree with this approach, the conclusion I arrived at on the outcome of the review application happens to be the same, namely that it could not succeed. This means that in substance the appeal must fail.'

[22] In the present instance, the fact that there is no condonation application would have presented the applicants with difficulty. The court would not have been able to even get to the question of whether the interests of justice dictated that an extension be granted (because no application to extend the period to launch the review was brought).

[23] Furthermore, it cannot be said that paragraphs 67 to 70 of the founding affidavit in respect of the review application amounted to an attempt to explain the delay. In these paragraphs the applicants simply listed dates when the first applicant communicated his concerns with the first respondent. The applicants also allege that they voiced an objection to the second respondent as to her conduct and requested information from her to assess the unlawfulness of her conduct through their attorney in June 2013. Firstly, this is not stated as a reason for the delay; secondly, it is not stated how that information would have assisted in the review of the first respondent's decision; and, thirdly, it does not appear that the applicants did anything beyond June 2013 to press for such information.

[24] It seems to me the review application would have been dismissed on that basis alone.

Merits of the review

[25] If one has regard to the merits of the review, the second respondent made common cause with the first respondent on why the grounds for review should fail. The first applicant alleged in the review application that the building plans which were presented to and considered by the first respondent pertained to the alterations of a 'dwelling house', whereas it was manifest from the outset that the second respondent proposed to conduct the business as a guest house and thus intended to alter the original house for that purpose and that the first respondent must have known this.

[26] According to the respondents, the property is zoned as general residential, which permits a 'dwelling house' as a primary use right and the building approved and erected on the property complies with a zoning requirement for a dwelling house which applied at the time of the approval of the building plans. The property is being utilised as a bed & breakfast, which is a permissible additional use right in terms of the zoning scheme currently in force.

[27] The first respondent contended in its review papers that it considered the building plans that served before it objectively in order to assess whether they complied with the zoning scheme, the NBR Act and building regulations. It found that the building plans were compliant with the zoning scheme. According to the first respondent, the subjective intention of the second respondent in submitting the plans was irrelevant. The first respondent alleged that it inspected the property on three occasions to establish the actual land use and whether it was in terms of the additional use rights as a bed & breakfast. It found no illegal activities. It maintained that until a departure from the zoning scheme is granted the property remains zoned as a dwelling.

[28] It was submitted by Ms Van Zyl that the subjective intention of the second respondent is irrelevant. She referred to an unreported judgment of this division, **Kenneth Bruce Sinclair – Smith and Another vs The Trustees for the Time**

Being of the Saphrey Trust and the City of Cape Town, case number: 9987/2009, where the Court held as follows at paragraphs 8.1.3 to 8.2:

'...[8.1.3] Mr Rosenberg argued that the application to have the plans approved, was not **bona fide,** in that the First Respondent has a disguised intention which was not disclosed when the application was made. The disguised agenda, so it was argued, should have been disclosed to the municipality so as to enable it to consider the application in the light of the purpose for which the building was to be used. The fact that the building qualified as a single residence according to the zoning thereof and the applicable building regulations, did not render the decision by the Municipality a lawful one.

[8.1.4] It was argued that even if the official who considered the plans was probably not aware of the First Respondent's concealed agenda, the decision was nevertheless invalid because of the First Respondent's failure to disclose its true motive.

[8.2] I cannot agree with this contentions advanced by Mr Rosenberg, I am of the view that it is incumbent on the Municipality to consider whether the plans objectively comply with the zoning and building regulations and that the subjective intention on the part of the person who submits the plans is irrelevant. I according conclude that the Applicants have not established a prima facie case that they likely to succeed on this ground.'

[29] Firstly, I agree with Ms van Zyl that the second respondent's intention was irrelevant. She was entitled to operate a bed & breakfast establishment and this is not contested by the applicants. Furthermore, to the extent that the applicants were unhappy with her conduct that she was not adhering to the parameters set by the zoning scheme for such establishments, the appropriate course of action was to complain to the first respondent, as they apparently did, who would have taken steps to prevent any unlawful land use by the second respondent. The first respondent explained in its papers that it in fact did conduct an investigation, inspected the property on three occasions and discovered that there was no land use contravention as the property was being used as a bed & breakfast within the parameters of the additional use rights in the new City of Cape Town Zoning

Scheme ('the CCTZS'). The first respondent alleged further that the plans and documentation submitted by the second respondent were evaluated and the second respondent's application was found to be compliant with the Scheme Regulations, the National Building Regulations and other applicable law.

[30] It is common cause between the parties that in order for the property to be utilised as a guest house, the second respondent would have been required to obtain a further permission, namely, a departure from the city zoning scheme. It is contended by the second respondent that the applicants' attempt to rely on a subsequent departure application is misplaced as the review application was about the building plan approval and not the departure application and the applicants' attempt to introduce a new ground of complaint in the cost application concerning the departure application is not permissible. I agree with this contention.

[31] It appears from the first respondent's answering affidavit to the review application that an application [for departure] was submitted by Tim Spencer Town Planning CC on behalf of the second respondent in respect of the property in question on 29 August 2008. That application was not processed further by the first respondent upon the failure of the second respondent to provide the first respondent with outstanding information and necessary documentation. That application was superseded by a further application by Tim Spencer Town Planning CC on 18 December 2013 for a departure to permit the use of a new dwelling erected on the property for a guest house, which was revised again on 09 May 2014 and had not yet been determined. As has been stated the departure application was not the subject of the review application.

[32] The applicants did not file any replying affidavit to the review applications. The version of the respondents should be accepted if one has regard to the **Plascon-Evans** rule[1].

[33] The applicants referred to a recently reported decision of **Aboobaker NO vs Serengeti Rise Body Corporate and Another** 2015 (6) SA 200 (KZD) and

[1] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H – 635C

submitted that that decision was on all fours with their case. The **Aboobaker** case dealt with a situation where a property was rezoned in the absence of proper notice being given to the affected parties. The applicants' contention in the present matter is that they were similarly not given proper notice. The court in Aboobaker found that the portion of the building constructed based on the deviation plan was illegally constructed and ordered its demolition.

[34] I am not convinced that the **Aboobaker** case is similar to this one on the facts. This case deals with the approval of the building plans and not the departure application. Furthermore, as stated above, the applicants cannot raise a new ground for review in the affidavit opposing costs.

Are there exceptional circumstances?

[35] The applicants could not on plausible grounds, point to the existence of any exceptional circumstance in respect of their case against the second respondent. As such, I could not find any reason why they would tender payment of the first respondent's costs and persist with their opposition to the application in respect of the second respondent. The first applicant submitted that they brought the review because of the second respondent's unlawful conduct. He contends that had it not been for her the first respondent would not have approved the building plans and no review application would have been brought.

[36] It must be remembered that the decision challenged on review was that of the first respondent. None of the relief sought was against the second respondent. She was cited by the applicant as a party to the review simply because she had an interest in the outcome of the review as the owner of the property in question. She was justified in opposing the matter. It seems unjust in my view that she should be expected to pay her own costs, having been forced to incur them; moreso, in a case where she enjoyed good prospects of success on review if the matter were to be decided. Apart from that, the applicants' opposing affidavit largely deals with the interaction that the first applicant had with the first respondent's officials and very little with why the second respondent should not be awarded costs in her favour.

Costs of 18 June 2015

[37] As regards costs for the hearing of 18 June 2015 which stood over for later determination, the applicants submit that they were only notified about the set down of the matter five days before the hearing. At that stage they were not prepared to argue the matter. It would appear from the opposing affidavit that the applicants instructed one Jean-Claude Barrish ('Barrish') to act as their legal representative in their negotiations with the first respondent about a possible withdrawal of the matter. The applicants' attorneys of record, Lamprecht Attorneys, withdrew as attorneys of record in February 2014. The notice of set down was apparently sent by the registrar to such attorney (Lamprecht).

[38] He forwarded the notice of set down *via* email to Barrish on 13 May 2015, Lamprecht alleges that he had no reason to believe that Barrish had not received his email. Lamprecht's notice of withdrawal as attorneys of record clearly stated the applicants' last known address. The error appears to have occurred on the side of the registrar's office. The first applicant alleges that the notice was served at his house on 10 June 2015 but he received it on 12 June 2015. He claims that Barrish only advised him that he received the notice on 16 June 2015.

[39] Whilst it may be argued that the applicants would possibly not have been able to proceed on 18 June 2015 as they did not have enough time to prepare, they did not attend the hearing on that day with the view to postponing the matter in order to prepare. They attended with the purpose of withdrawing the matter. They were not forced to do so. They also gave no indication to the second respondent of their intention to withdraw the matter on 18 June 2015. The second respondent was represented by counsel who was prepared to argue the matter on that day. It is worth noting from the applicants' affidavit that Barrish continued to communicate on behalf of the applicants with the first respondents on 15 June 2015. It does not seem just in my view to exclude the costs incurred by the second respondent in respect of 18 June 2015.

Expert costs

[40] The second respondent alleges that she employed the services of Tim Spencer of Tim Spencer Town Planning CC, a qualified town planner, in preparation for her answering affidavit in the review application. Her affidavit was delivered after the first respondent's, which essentially adopted the same approach as hers. It therefore became unnecessary to refer to Spencer's expert advice and opinion in her answering affidavit. According to her Spencer spent 10 hours in consultation and advice in respect of the review application at the tariff of R1542.00 per hour, as recommended by the South African Council for Planners. Ms Van Zyl referred to the decision of **Transnet Ltd t/a Metrorail and Another v Witter** 2008 (6) SA 549 (SCA) where it was held at para 15 that an expert witness's preparation fees will only be allowed on taxation if authorised by the court or with the consent of all interested parties. Item 5 of part D under Uniform Rule 70 makes this clear as it provides that:

> 'Provided that the preparation fees of a witness shall not be allowed without an order of the court or the consent of all interested parties.'

[41] Based on the technical nature of the application, I am satisfied that the use of an expert was reasonable and justified. It follows therefore that such costs should be borne by the applicants.

Appropriate cost scale

[42] The second respondent sought costs on an attorney and client scale on the basis that the applicants failed to advance a case on review but instead made unfounded allegations against her, painting her as being dishonest in her dealings with the first respondent, without any evidence to support such allegations.

[43] Such allegations are indeed rather unfortunate and unsubstantiated. I am however not persuaded that a punitive cost order is justified. It seems to me, whilst

those were unacceptable, they were based on emotion and raised by a neighbour who was motivated by anger. I take into account that the first applicant is a lay person who was affected by the decision of the first respondent. This is not to condone such frivolous averments. I am mindful of the fact that the court, when appropriate, ought to show its displeasure with a litigant's conduct by awarding costs on an appropriate scale. I however find that, in spite of these allegations, the lack of prospects of success in the review would not have warranted a special cost order. I am disinclined to impose it under these circumstances.

Conclusion

[44] For the reasons set out above, the second respondent's application should succeed. No exceptional circumstances have been shown warranting deviation from the general principle that a party that withdraws a matter must be liable to pay the costs.

[45] I therefore make an order in the following terms:

1. The applicants shall pay the second respondent's costs incurred in her opposition to the application for judicial review instituted by the applicants under case number 21199/2013.
2. The cost order referred to in paragraph 1 above shall include the preparation costs of the second respondent's expert witness, Mr Tim Spencer of Tim Spencer Planning CC, which costs shall be allowed on taxation.
3. The applicants shall pay the costs of the application in terms of Rule 41(1) (c).

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N P BOQWANA

Judge of the High Court

APPEARANCES

FOR THE FIRST, SECOND & THIRD APPLICANTS: Mr C Levinthal in person

FOR THE FIRST RESPONDENT: Adv M O'Sullivan

INSTRUCTED BY: Hayes Incorporated, Cape Town

FOR THE SECOND RESPONDENT: Adv S van Zyl

INSTRUCTED BY: C & A Friedlander, Cape Town