

SOUTH AFRICA / JUDGMENT

Van Der Merwe v Lues and Others (58207/2012) [2013] ZAGPPHC 554 (29 November 2013)

[2013] ZAGPPHC 554**COURT**

North Gauteng High Court, Pretoria

BEFORE

N M Mavundla

CASE / FILE NUMBER

58207/2012

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

**IN THE NORTH GAUTENG
HIGH COURT, PRETORIA
[REPUBLIC OF SOUTH
AFRICA]**

CASE NUMBER: 58207/2012**DATE: 29 November 2013****NOT REPORTABLE****Not of interest to other****judges****Revised****In the matter between:**

CHRISTOFFEL JOHANNES VAN DER
MERWE.....APPLICANT
And
CORNELIUS STEPHENUS
LUES.....1ST
RESPONDENT
CHANEL
LUES.....2ND
RESPONDENT
CITY OF
TSHWANE.....3RD
RESPONDENT

JUDGMENT

MAVUNDLA J,

- [1] The applicant on the 8th October 2012 launched an application for an interim interdict to restrain the first and second respondent from conducting dog-breeding activities on certain plot known as Portion 67 (a portion of Portion 6) of the farm Kameeldrift, with ancillary and alternative reliefs.
- [2] The matter came before me on the 3rd June 2013. A preliminary issue which had to be decided concerned the filing of a duplicate affidavit by the first and second respondents. After hearing submissions on behalf of both parties, I expressed myself to the parties that leave to file the duplicate affidavit should be granted and that the applicant to file its replication within the time frames agreed upon by the parties and that the matter be postponed sine die and that the first and second respondents are ordered to pay the applicant's costs of the postponement inclusive the costs of the employment of senior counsel. The matter was stood down to the 4th June 2013 to allow the parties to prepare a draft order along the lines indicated herein above. The parties have since provided me with, a draft order which was then marked "X" and made an order of the Court.
- [3] I proceed to set out the reasons for granting the aforesaid order in particular mulcting the first and second respondents with the costs occasioned by the postponement.
- [4] The respondent contended that the applicant raised new material in its replying affidavit. Their sound engineer was not available as a result they sought an extension to file their sound engineering's affidavit. Their sound engineer was not available from the 08th October 2012. It needs mentioning that, however, the letter of the respondents attorneys dated the 19th December 2012 says nothing about the sound engineer not being available. The respondents further contended that when their sound engineer became available, applicant was obstructive and would not allow access into his premises. They had to bring an application to have the applicant ordered to grant access to the property to scientifically measure the sound frequency. The opposition to access was only withdrawn in April 2013. It was further submitted on behalf of the respondents that the matter was prematurely set down for

hearing.

- [5] The respondents filed their opposing affidavit on the 22nd November 2012. The applicant filed his replying affidavit on the 6th December 2012. All these steps were in accordance with the uniform Court rules. The pleadings were accordingly closed on the 6th December 2012. The applicant was as at this stage entitled to set the matter down for hearing.

- [6] The matter was set down for hearing on the opposed roll of the 3rd June 2013. The applicant's heads of argument were filed on the 7th March 2013. The respondent's heads were only filed on the 29th May 2013. The submission on behalf of the respondents that the matter was prematurely set down for hearing, is in my view incorrect and not persuasive to sway me from exercising my discretion to grant a costs order against them.
- [7] The applicants were trial ready on the 3rd June 2013. On the morning of the trial, the respondents wanted to file a duplicating affidavit. The purposes of this duplicating affidavit was to obtain special permission to file a fourth set of affidavits dealing with alleged new facts contained in the replying affidavit of the applicants. Essentially the intention was to permit the respondents an opportunity to place before the court the evidence of their sound engineer.
- [8] It is trite that supplementary affidavits can only be filed with the leave of the Court in the exercise of its judicial discretion¹. However, a party who seeks the court's indulgence must be prepared to bear the costs attendant thereto.
- [9] The respondents contended that the applicant raised new material in its replying affidavit. Their sound engineer was not available as a result they sought an extension to file their sound engineering's affidavit. The respondent further contended that applicant only gave a week's extension to file. Their sound engineer was not available from 08 October 2012. When he became available in 2013 the applicant was obstructive because he refused to allow access into his premises. According to the respondents, this obliged them to bring an application to have the applicant ordered to grant access to the property to scientifically

¹ Vide *James Brown & Hamer (Pty) Ltd v Simmons*, N.O. 1963 (4) 656 (AD) at 660E; *Standard Bank of SA Ltd v Sewpersadh and Another* 2005 (4) SA 148 (CPD) 148 at 154.

measure the sound frequency. The applicant withdrew the opposition to access only in March 2013. The report of the sound engineer could only be available in May 2013.

- [10] The respondents did not state what steps they took to secure the services of another sound engineer since the 8th October 2012. The respondents also did not explain why the report of the sound engineer could not have been available in April 2013. In my view, a party who seeks to file additional evidence, when he is aware that the matter has already been set down for hearing in the foreseeable future, must respond to the exigency of the situation and act with haste in procuring whatever additional evidence he seeks to rely upon.
- [11] The applicant in its founding affidavit, which was deposed to in September 2012, contended that the respondent's dog-breeding business is causing a nuisance to him in that the dogs on the property bark incessantly and continuously at unacceptable noise levels. So the issue of noise levels could not have come as a surprise to the respondents. They should have as early as in October 2012 secured the services of a sound engineer to counter the allegations of the applicant in regard to the noise levels.

- [12] The respondents did not state what steps they took to secure the services of another sound engineer since the 8 October 2012. The respondents also did not explain why the report of the sound engineer could not have been available in April 2013. I am of the view that the respondents failed to respond well in time to the exigency of the situation.
- [13] I, however, held the view that for proper adjudication of the matter and in the interest of the parties, I should allow the filing of the fourth set of affidavits by the respondents, subject to the applicant replicating thereto. In my view, the respondents were the primary cause of the matter having to be postponed and therefore had to be mulcted with costs occasioned as a result of the postponement.
- [15] I therefore hand down the reasons for the order mark “X” granted on the 4th June 2013.

N. M.MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF HEARING : 19 JULY 2013

DATE OF JUDGMENT : 29 NOVEMBER 2013

APPLICANT'S ATT : MACROBERTS INC.

APPLICANT S ADV : D. A. PREIS S.C.

RESPONDENTS' ATT : JACQUES VAN DER MERWE ATTORNEYS

RESPONDENTS' ADV : ADV. C.J. COLLIER & ADV C VAN COLLIER

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2013/554.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/unknown-plaintiff-v-unknown-defendant-interim-interdict-agpphc-2013-58207-2012>

Prepared on 12 October 2026 · Esheria