

SOUTH AFRICA / JUDGMENT

**Wraypex (Pty) Ltd v Barnes and
Others (25173/05, 30729/05, 32648/05,
32649/05) [2011] ZAGPPHC 20; 2011
(3) SA 205 (GNP) (11 February 2011)
[2011] ZAGPPHC 20**

COURT

North Gauteng High Court, Pretoria

BEFORE

Sapire AJ

CASE / FILE NUMBER

25173/05, 30729/05, 32648/05, 32649/05

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IN THE NORTH GAUTENG HIGH COURT,
PRETORIA (REPUBLIC OF SOUTH AFRICA)

Case Numbers:25173/05

30729/05

32648/05

32649/05

DATE:11/02/2011

Wraypex (Pty) Ltd.....Plaintiff

and

Barnes, Arthur and Others.....Defendants

JUDGMENT

Costs

Coram Sapire AJ

I dismissed the Plaintiffs' claims against the four Defendants in the actions identified by the case numbers above. During argument, and before the outcome of the litigation was known the parties requested to be given an opportunity of arguing what the appropriate order for costs should be depending on the outcome of the cases. No order was made when judgment was given and the question of costs was separately argued.

The four cases were heard together. The four Defendants having succeeded in their defence of the Plaintiffs claims are entitled to their costs including the wasted costs occasioned by the postponement of the hearings of all four matters in 2009.

Such was the nature of the case, that it was not seriously disputed that the employment of two counsel was justified.

Defendants' counsel asked that a special order be made that such costs should be taxed on the scale as between attorney and client.

The submissions in this regard by Plaintiffs counsel were that; the actions were vexatious.

In so arguing he referred to

The timing of the institution of the actions.

The actions were instituted when the Plaintiff had already obtained approval for the establishment of a township and when the Gauteng

Environment Authorities had issued a ROD permitting the Plaintiff to proceed with its project. The Defendants had applied to appeal

against this latter decision and the appeal was pending.

The inference which the Defendants argue should be made is that the purpose of the institution of the actions was either by intimidation

to induce the Defendants to withdraw their appeal, or to punish them for opposing to the end the granting of permission for the

establishment of the golfing estate in the rural area. The inference accords with the probabilities as they emerged during the hearing.

The extraordinarily extravagant amount claimed by the Plaintiff The amounts claimed in the Summons from each of the Defendants are prodigious. Nothing emerged in evidence from which indicate that the plaintiff could have had a bone fide reasonable expectation

that it would succeed in obtaining an award more than an infinitesimal fraction of the amounts claimed. The amounts claimed, in each case between forty to fifty million rand were made severably from each defendant.. The parties had agreed that the

determination

of the question of the amount of damages, if any would stand over and be decided separately, after a decision on the merits. This meant that no evidence of the amount plaintiffs alleged damages was led. This led Plaintiffs counsel to submit that the reasonableness of the amounts claimed could not be assessed merely from the large amounts claimed. There is no force in this argument as the plaintiff failed to prove that the words complained of caused it any loss at all, either as damages for defamation, or from delays in the process of obtaining the requisite authorities to proceed with its development scheme. Limited publication

The statements of which the Plaintiff complains were published by the Defendants as alleged by the Plaintiff in each case to one person. Even if the statements were shown to be defamatory, damages in respect thereof would never be awarded in anything like the amounts claimed by the plaintiff

In the case of Barnes where the allegations of defamation included two instances which if proved might have been serious I did not accept the reliability of the evidence of publication to the one witness who was called. The other witnesses to whom publication is alleged was made were not called to testify. These words were not published to anyone who was involved in the process of obtaining permission for the establishment of the township or in the application for a ROD.

The evidence did not disclose that the procedure of seeking approval had been delayed. Although it was conceded that the making of a complaint could take time the Plaintiff did not even attempt to show- which of the statements complained of caused delay, the length of any such delay . Clearly some of the statements could not have affected the process at all.

The Defendants also made reference to the belligerent tone of Plaintiff's attorney's letters which were calculated to intimidate and create enmity. There is much justification for this view taken by the Defendants.

The generally weak merits of the cases became obvious during the trial. The statements complained of were generally made to public officials mostly in the course of the administrative procedures. In some instances the allegations were trivial.

Plaintiff's counsel likened the case to what is known in other jurisdictions as "SLAPP". The acronym stands for Strategic Litigation Aimed against Public Participation. No instances of cases so described are to be found in local law reports but the concept of vexatiousness corresponds very closely with the features of a "SLAPP" suit.

The Defendants should not have been called upon to contest the Plaintiffs claims especially not in the High Court. The litigation was purposeless from an economic point of view and if anything was more harmful to the Plaintiff than the words complained of. At the same time the four Defendants were unnecessarily involved in heavy expenditure in defending the cases brought against them.

This is a case where the Court should exercise its discretion to make an order as prayed for by the Defendants.

The order made therefore is:

- (a) Costs in all four matters are awarded against the Plaintiff to be taxed on the scale as between attorney and client and to include the costs occasioned by the employment of two counsel.
- (b) The wasted costs occasioned by the postponement of the hearing in all four matters in 2009 are to be paid by the Plaintiff and to be taxed as between attorney and client and including the costs of two counsel.
- (c) Gerhard van Wele is declared to have been a necessary witness.

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