CASE NO. (P) A 245/2006

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE COUNCIL OF THE MUNICIPALITY OF SWAKOPMUND

APPLICANT

and

VANTRIMAR PROPERTIES CC

RESPONDENT

CORAM: FRANK, A.J.

Heard on: 2007.11.19
Delivered on: 2007.11.28

JUDGMENT

FRANK, A.J.: [1] Applicant seeks an order in the following terms against respondent.

1. Applicant is authorized to remove and pull down the new structure erected by respondent on the existing

building situated on Erf 228C to the extent indicated in annexures “H42” and “H43” to applicant’s founding affidavit and to alter the structure in order to restore the building to its previous state;

2. Applicant is authorized to recover the costs incurred to execute the works contemplated in prayer 1 from respondent;

3. Respondent is ordered to pay the costs of suit;

4. Further and/or alternative relief.”

[2] In terms of the Town Planning Scheme of Swakopmund, Amendment Scheme 12 of 2002 (The Scheme) no building may be erected in the business zone unless Council permits it taking cognisance of whether or not it will form on “integral part of a comprehensive and co-ordinated development of the business zone.”[1] Further a person intending to erect building must, in addition to plans, supply certain further information to Council if so requested which may include a plan indicating the “external appearance of the proposed building.”[2] Council have 60 days

[1] Clause 7.14 of the Scheme
[2] Clause 7.1.1 of the Scheme

from submission to either approve or not approve such intended building operations.[3] To commence with the erection of such building works prior to the aforesaid approval is prohibited.[4] Where a refusal to approve such building works are subject to an appeal it is prohibited to commence with such building works.[5]

[3] It is common cause that the work done by respondent which forms the subject matter of this application constituted work for which approval was needed and that the building is situate in the business zone of Swakopmund.

[4] It needs to be stated that in terms of the Scheme where one intends to do work on buildings one must "submit drawings to the Council which sufficiently indicate the external appearance of the proposed building"[6] and that the wilful contravention of the provisions of the Scheme constitutes a criminal offence pursuant to section 48 of the Town Planning Ordinance (The Ordinance)[7]

[5] It is also common cause that respondent commenced and completed it's building works without ever obtaining the

[3] Clause 7.1.2 of the Scheme
[4] Clause 7.1.3 of the Scheme
[5] Clause 7.1.3 of the Scheme
[6] Clause 7.13.1 of the Scheme
[7] Sec. 48 of The Town Planning Ordinance, No. 12 of 1954

necessary approval from Council and that at time of the hearing of this application still did not have the necessary approval in place. At the hearing of the application certain appeals flowing from decisions by applicant in connection with the building operations had been launched with the Minister of Regional and Local Government and Housing.

[6] Respondent, through an architect, submitted plans for approval in the beginning of December 2005. These plans were returned to the architect during January 2006 without being approved. Although there is a dispute as to what exactly the architect was informed when the plans were returned it is clear that by the end of January 2006 beginning February 2006 the issue of approval in terms of the National Heritage Act, No. 27 of 2004 had been raised. Thus in a letter dated 15 February 2006 under the heading “Municipal Approval” the architect writes that she has taken the matter up and would submit the approval to applicant. It later turned out that the building was not listed and the “heritage consent” was not needed. In the meantime the building operations had started and were continuing despite the differences between the parties as to what was required of respondent in respect of their building operations. On respondent’s version it continued with the work as a town planning officer had given them the go ahead. This officer avers that he indicated that the work could continue as long as it was renovations that were being done as this would not cause any changes to the exterior appearance of the building. Anyway the work continued and on 10 May 2006 the respondent was orally informed to cease building operations. Respondent admits this but as the oral communication according to it had “no legal pedigree “and the works had progressed to such a stage of completion that only “minor matters” still had to be attended to it continued with it’s building operations. In addition to the oral communication the applicant also in writing informed respondent per letter delivered on 11 May 2006 (incorrectly dated 29 November 2005) that it was acting illegally with reference to the provisions of the scheme and the Ordinance and the “National Building Regulations” and required respondent to submit “as built” plans together with the consent of the neighbour or face

further steps.

[7] The respondent through the legal practitioners D F Malherbe and Partners per Mr van der Merwe responded to the above letter. I interpose here to mention all but one of the partners of the said firm are members of respondent and that Mr van der Merwe is the person who deposed to the answering affidavit of respondent. In the letter Mr van der Merwe denies that respondent is acting contrary to the scheme as it was only executing renovations and that what respondent was doing "in no way whatsoever, constitute the erection of a new building and therefore no approved plans are necessary for the renovations" Had Mr van der Merwe taken the time to look at the relevant definitions especially the one of "erection" contained in the scheme he would have known that what the respondent was doing did fall within this definition and required approved plans. In view of the history of the dispute and him being a lawyer I would have expected him to have done this. Indeed this aspect is so self-evident from the reading of the scheme that it was common cause at the hearing of this application that approval for the plans had to be obtained.

[8] Subsequent to the aforegoing exchange of letters certain further developments took place, none of which however led to the resolution of the dispute between the parties or caused the construction work to be terminated. Per letter dated 9 June 2006 the lawyers for applicant informed respondent that it was acting illegally in that it was building without an approved plan (including wrongly indicating that it also needed heritage consent) and that in terms of the National Heritage Act it was informed to cease all building activities (this was incorrect as the

building was not listed). More importantly the letter also served as a notice in terms of section 28(4) of the Ordinance informing respondent that applicant "intends" exercising it's powers in terms of section 28(2)(b) upon the expiring of the period of 1 month as envisaged in section 28(4)". (I deal with section 28 of the Ordinance below). In response to this letter the respondent averred that the building works had been authorised by the Town Planning Officer and that the building was not listed and hence "heritage consent" was not a prerequisite and that for unspecified reasons the section 28 notice was invalid. Proposals were also made by respondent so as to resolve the matter. It is also of relevance to indicate that according to respondent "no construction work has taken place subsequent to the 9th of June 2006 and that our clients have merely proceeded with the finishings, the nature and extent of which do not fall within the scope of your ……authority or concern".

[9] Be that as it may on 27 July 2006 applicant resolved as follows:

(a) that a relaxation sought by respondent in respect of

parking requirement in respect of the building not be approved.

(b) That the changes to the external appearance of the building were conditionally approved. The conditions were that applicant had to comply with the scheme, that the parking requirements be complied with and that the requirements of the building regulations be complied with and that applicant to submit new building plans once the conditions had been met.
(c) That the illegal building operations could not be condoned and that the building had to be restored to the condition it was prior to the commencement of the building operations and if this was not done to approach this Court for the necessary relief.

[10] Respondent has lodged appeals to the Minister of Regional, Local Government and Housing against all three the above decisions as well as against an earlier refusal by applicant to approve the plans at a meeting of June 2006 and the failure to deal with a parking relaxation application submitted during March 2006.

[11] Counsel for respondent raised three issues *in limine* in respect of the relief sought. These were that the relief sought was vague and uncertain, that as appeals had been lodged with the Minister the Courts jurisdiction in respect of the matter has been ousted or deferred, and that as no notice of the intended restoring of the building to it's original appearance had been given to occupiers thereof the relief sought was incompetent in law. I now turn to deal with these aspects.

[12] The relief sought is set out at the outset of this judgment. What respondent complains of is the fact that a removal of the newly built roof structure is sought (per annexures H42 and H43 to the founding affidavit) “and” whatever other alterations that may be necessary to restore the building to it’s previous state. Applicant in it’s replying affidavit and through it’s counsel at the haring indicated that it only seeks the order in respect of the roof structure and nothing more. Respondent, not surprisingly in view of the wording of the order sought, dealt with the issue as if more than the roof structure was included as it is common cause that work was done on other areas of the building as well, especially at ground floor level. To the extent that it dealt with more than was necessary it may have been prejudiced in the sense that it may have occurred costs and spent time that it would not otherwise have done. It is not suggested that it would have a different defence or that it would have dealt with the matter differently had it known that the relief that would be sought was more limited than indicated. It was not prejudiced at all in the

sense that because of the way the relief was formed it did not raise a defence it otherwise would have raised or because of the uncertainty in the relief sought it was not clear what the issue(s) was (were) that it had to address. The relief sought was clear and this is not a case where the respondent did not know what issues to address and hence disadvantaged. It is thus unlike the position in the Weber-Stephen Products case referred to by counsel for respondent.[8]

[13] The relief sought was neither vague nor uncertain and respondent addressed the issues raised flowing from such relief. The fact that it thereafter transpired that more limited relief was sought did not prejudice respondent at all in it's case save for costs and time and in fact favours applicant in that, if granted, it will not be as extensive, expensive and invasive as the original relief sought. This point *in limine* is thus dismissed.

[14] Section 28 of the Ordinance reads as follows:

"28(1) Upon the coming into operation of an approved

[8] *Weber-Stephen Products Co v Alrite Engineering (Pty) Ltd* 1990 (2) SA 718 (T) at 724 H-I

scheme the responsible authority shall observe and enforce the observance of all the provisions of the scheme.

(2) Subject to the provisions of this Ordinance, the responsible authority may at any time -

(b) remove, pull down or alter so as to bring into conformity with the provisions of the scheme, any building or other structural work erected or carried out in contravention of any provision of the scheme; or

(f) generally do anything necessary to give effect to the scheme.

(3) Before taking any action under sub-section (2) the responsible authority shall serve a notice on the owner and on the occupier of the building or land in respect of which the action is proposed to be taken and on any other person who, in its opinion, may be affected thereby, specifying the nature of, and the grounds upon which it proposes to take that action.

(4) Where a building or work which the responsible authority proposes to remove, pull down or alter under this section was in existence, or where a building or land use of which it proposes to prohibit was being put to use for the same purpose, before the scheme came into operation, the responsible authority shall serve the notices referred to in subsection (3) not less than six months before it takes any action and, in any other case, one month before it takes any action."

[15] The main argument by counsel for respondent was that notice was not given to the occupier of the premises. It was common cause that notice was not given to the occupiers of the property. It is further common cause that were two occupiers of the premises. Counsel for applicant stated that it was not aware of the occupiers. This is disputed by respondent. Even if applicant was not aware in the sense that they were not informed they had a duty to establish this. Occupation is a physical action and it was up to applicant to establish whether there were persons occupying the building. It is clear in my view that no action in terms of sec. 28(2)(b) can be taken until notice in this regard has been given as stipulated, i.e. to both owner and occupier. I mention in passing that it was common cause that the relevant notice period for the building in question would be one month pursuant to the provisions of sec. 28(a).

[16] The above conclusion puts an end to the relief as it was claimed. Counsel for applicant submits however than insofar as respondent disputed applicant's entitlement to act under sec. 28 I should consider the matter from this aspect and issue a declarator to the effect that applicant is entitled to act pursuant to the provisions of the section in this matter provided the

requisite notice is also given to the occupiers prior to the work in terms of sec. 28(2)(b) commencing. Applicant would have been entitled to act in terms of section 28 without the Court order provided the necessary facts allowed them to do so and an order was sought not so much as to seek the powers in the order but to ascertain their right to exercise those powers under the current circumstances. As already mentioned this right is disputed by the respondent. The applicant is a public body and the powers it seeks to exercise will interfere extensively with the interests and right of enjoyment to the property concerned of both the owner thereof and potentially also with those of the occupiers and in such circumstances I am of the view that one should not penalise the applicant for seeking clarity as to it's rights prior to exercise it's powers.[9] In the result I shall deal with the matter on this basis as requested by counsel for applicant.

[17] The alleged insufficiency of the notice with regard to whether applicant would "remove" or "pull down" or "alter" the building are in my view without merit. It is clear that the roof structure referred to in the annexures are to be removed and that the original roof structure must be re-instated. Respondent was

[9] Wastville Township Board v Stedman 1947 (2) SA 1019 (D) at 1024-1025

informed that applicant intended to act per sec 28(2)(b) which means that it would “remove, pull down or alter so as to bring in conformity with the provisions of the scheme…” For respondent who was represented by a lawyer and who was not adverse to taking points that were clever by more than half to state that the notice was not clear to it is simply incredulous. The intended work by necessary implication encompasses all three the elements referred to and any literate person will comprehend this. The notice was sufficient and a valid notice to the owner in terms of section 28 insofar as this section was validly invoked (This issue I deal with below)

[18] The Scheme makes provision for appeals to the Minister in the following terms:

> “8.7.1 Any person who is aggrieved by the decision of Council in terms of an application made under this Scheme, may appeal to the competent authority.
>
> 8.7.2 If the decision is one which the Council is required to give upon application of any person or upon the submission by any person of plans or proposals, an appeal shall in addition lie against a refusal of the Council to give, or unreasonably delay on its part in giving a decision, as if it were an appeal against a decision of Council.”

[19] To determine whether the appeal provided for in clause 8.7.2 of the Scheme and quoted above is *ultra vires* it's enabling statute (the Ordinance) as contended for by counsel for applicant it is necessary to refer to two sections of the Ordinance, namely sec's 18 and 19 thereof. Counsel for applicant relied on the former as the premise for her submissions whereas counsel for respondent relied on the latter as the premise for his submissions.

[20] Section 18 reads as follows. I refer only to the relevant portion relied upon by counsel for the respondent.

> "18(1) Every scheme shall define the area to which it applies and specify in accordance with the provisions of the next succeeding subsection, the authority or authorities who are to be responsible for enforcing and carrying into effect the provisions of the scheme and –
>
> (a) <u>shall contain such provisions as are necessary or expedient for prohibiting or regulating the development of land in the area to which the scheme applies and generally for carrying out</u>

any of the objects for which the scheme is made, and in particularly for dealing with any of the matters mentioned in the Second Schedule to this Ordinance and; (emphasis that of counsel for respondent)

(b) ……”

[21] Section 19 reads as follows:

“The provisions to be inserted in a Scheme with respect to buildings and building operations may include provisions –

(a) prescribing the space about buildings;

(b) limiting the number of buildings;

(c) regulating or enabling the Local Authority to regulate the size, height, design and external appearance of buildings;

(d) imposing restrictions upon the manner in which buildings may be used including, in the case of dwelling houses, the letting thereof in separate tenements; and

(e) prohibiting building operations or regulating such operations in respect of matters others than those specified in this sub-section:

Provided that, where a Scheme contains a provision enabling the responsible authority to regulate the design or external appearance of buildings, the Scheme must also provide that any person aggrieved by any decision of the responsible authority under such provision shall have a right of appeal to the Minister against such decision and the grounds of such an appeal may include the ground that compliance with the decision would involve an increase in the cost of the building which would be unreasonable having regard to the character of the locality and the neighbouring buildings." (emphasis that of counsel for applicant)

[22] It is clear from section 19 that the appeals mentioned in that section only relates to matters of "design or external appearances of buildings". This follows from the ordinary and plain grammatical meaning of the words used in this section. Not surprisingly counsel for respondent thus did not attempt to support his submissions that a wider appeal was sanctioned in

the Scheme by reference to this section. His submissions was that such wider appeal was sanctioned by section 18 insofar as that section in subsection (a) thereof authorises to be included in the Scheme “provisions that are necessary or expedient” in relation to the scheme and “generally for carrying out any of the objects” for what the scheme was designed.

[23] I do not agree that the right of appeal can be read into or implied in section 18. The appeal procedure are not necessary or expedient in relation to the development of land or in the carrying out of any of the objects of the scheme. An appeal would only make the decision making process more lengthy but will not detract from the fact that decisions must be made in the furtherance of the objects (or one of them) of the scheme. It furthermore cannot in itself be said to be necessary or expedient in regulating the development of land. The second schedule referred to in section 18 states what Schemes must deal with and there is nothing in the quite extensive list which suggest appeals to the Minister is to be included nor does it flow naturally from the matters itemised in the schedule or is it essential, necessary or even expedient to provide for appeals in respect thereto and these matters will be included and implemented with the scheme. In contrast section 19 specifically and expressly deals with

appeals and limit these appeals to certain matters. It also deals specifically with what the scheme may contain in respect of "building and building operations" and the express provision with regard to appeals thus also relate to this. As is evident from the two sections section 18 is to establish the contents of the Scheme and the authorities responsible for enforcing and executing the scheme whereas section 19 is to deal with building and building operations and it is clear in this latter regard it was intended that a limit right of appeal would exist. There is no question in my mind that a Scheme can be effectively implemented without the general power of appeal contended for and hence such power is thus also not ancillary to the regulation of land development envisaged in section 18[10]. In short the Ordinance does not contemplate the wide appeal mentioned in the Scheme and the reference in the scheme must be interpreted to mean a reference to appeals from decisions concerning "the design or external appearance of building". In this regard an appeal would then also lie where there is an undue delay or refusal to give a decision in such a matter.

[10] City of Cape Town v Claremont Union College 1934 AD 414 at 420-421

[24] In the result it is not necessary to declare the appeal provisions in the scheme by *ultra vires* it's enabling legislation. (the Ordinance) Properly interpreted appeals are limited to those decisions dealing with applications pertaining to "the design or external appearance of buildings". A decision that is appealable in terms of the Scheme is only a decision relating to design or external appearance of buildings.

[25] In view of the conclusion reached as to the limited ambit of what decisions can be taken on appeal there is only one valid appeal pending and that relates to a conditional approval of the changes to the external appearance of the building. This appeal even if successful cannot release respondent of it's obligation to have had approved building plans prior to the commencement of the building operations which is the crux of this application. Counsel for respondent's attempt to bring all the appeals under the ambit of decisions relating to the external appearance of the building cannot in my view be entertained. Those issues and decisions were clearly not based on this aspect and the fact that the general plans or drawings contained the external appearance of the building is neither her nor there as this was not the issue that had to be decided.

[26] Even if I am wrong in my conclusion that there is only one valid appeal pending I still do not agree that the pending appeals in any manner detract from the jurisdiction of this Court to hear this application. The fact that the appeals (or any of them) may eventually be successful and thus grant the applicant some relief

which is contrary to the relief that is sought in this application, eg. to allow respondent to lodge “as built” plans for approval, must of course be considered by the Court in the exercise of it’s discretion when it decides on what relief to grant. It is in my view not a bar to the Court’s jurisdiction nor is such jurisdiction deferred pending such appeal. This is so because there is simply no order that is stayed pending the appeals. Building without plans is illegal and this illegality remains. Even if “as built” plans are eventually accepted respondent’s conduct remains illegal and it is only one of the consequences of the illegality (removal of the structure) that are legitimised. At the moment however there is no order in favour or against respondent that can be suspended pending the appeal. Respondent’s conduct is unlawful and the Court can deal with it. What the appropriate sanction must be may be influenced by the prospects on appeal and in this context the appeal must be taken cognisance of.

[27] As is apparent from what is stated above the points *in limine* raised on behalf of respondent insofar as it had merit was not of such a nature so as to disentitle applicant to relief albeit in a different form from that sought in the Notice of Motion. These points *in limine* are thus dismissed to the extent indicated in this judgment above.

[28] In inviting respondent to make representations to applicant the Chief Executive Officer informed respondent that the Council meeting would be held in camera as the documentation involved were of a non-public matter. In this regard reference is made to section 14(2)(a)(iii) of the Local Authorities Act, No. 23 of 1992. From the minutes of the meeting attached to the founding affidavit it is clear that this is what happened. The minutes refer to an “Ordinary Council Meeting (In Camera)”. Counsel for

respondent submits that the fact that the meeting was in camera has the effect that the entire decision-making at this meeting was a nullity.

[29] In terms of section 14(2)(a) of the Local Authorities Act, No. 23 of 1992 the general rule, which can be negated from by a two-thirds majority is that all meetings of a local authority "shall be open to the public". This section 14 also creates three further exceptions to the general rule of which the only one relevant to the present enquiry is that where the institution of legal proceedings are to be discussed and decided a council may meet in camera. This exception is contained in section 14(2)(a)(iii) referred to by the Chief Executive Officer in his letter inviting respondent to make representations to the applicant. From the minutes of the meeting it is apparent that there was no resolution to hold the meeting in camera which as indicated above would have required the assent of at least two thirds of the members present. It is also further apparent from the minutes that various other matters not related to legal proceedings were discussed and decided upon eg. alienation of property to staff members, cancellation of sale and the position of a taxi rank. As far as respondent was concerned the approval for the changes to the

external appearance as well as the relaxation of parking requirements were considered. In addition to all this respondent's "Illegal building Activities" were considered culminating in the decision to seek the present relief claimed. Council for respondent submits the mere fact that one of the decisions involved the institution of legal proceedings cannot justify the in camera meeting and as pointed out above submits this the entire decision making at this meeting was *ultra vires* and a nullity. [30] In my view it is correct that all the decisions not relating to matters specified in section 14(2) was a taken *ultra vires* and amounted to nullities.[11] I do not agree however that in respect of those decisions for which in camera meetings are expressly provided for it was nullity. On the contrary as the meeting was in camera those were the only matters it could legally consider. One of the matters was whether to institute legal proceedings against respondent in view of the fact that it did not act pursuant to the notice in terms of section 28 of the Ordinance forwarded to it by applicant's lawyers. I cannot agree

[11] *Nkisimane and Others v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) at 434 B

that because some of the matters that was decided upon could not be dealt with at an in camera meeting this means everything decided at the meeting was tainted. The decisions were not interlinked and nor is it alleged the meeting itself was invalidly called. This being so the meeting could validly deal with matters that fell within what section 14 of the Local Authorities Act stipulates to be matters that can be dealt with in camera. The decision to institute the present proceedings was thus validly taken.

[31] Counsel for respondent submits that the principle of *audi alterem* should have been adhered to prior to the notice to restore the building to it's original state. I have no hesitation to find that the principle of *audi alterem* had to be adhered to given the drastic consequences of a decision such as the present. The only question that I had was whether the notice period provided for in section 28 (4) did not provide for *audi* after the decision had been taken. In conjunction with this the effect of the *audi* prior to instituting these proceedings and the effect of respondent's

undoubted *audi* in these proceedings was matters that I thought worthy of consideration. I should just add that it is common cause that no *audi* took place prior to the notice in terms of section 28 (4) of the Ordinance contained in a letter dated 9 June 2006 emanating from applicant's lawyers.

[32] As a general rule it is accepted that a hearing should take place prior to the decision.[12] That this also applies in the present context is borne out by the case law[13] where it had been held that despite a notice period in the decision itself a hearing was still a requirement. These decisions dealt with similar provisions to the one under consideration. In view of these precedents, with which I might add I have no quarrel with, and which were not referred to by counsel, I agree with counsel that a hearing should have taken place prior to the issuing of the notice. It seems that the notice period provided for in the notice itself is to allow an owner or occupant time to arrange their affairs so as to minimise the

[12] Baxter: Administrative Law at 587-582

[13] *Pretoria City Council v Osman Omar* 1959 (4) SA 439 (T) at 440B and 441D-442A
Cape Town Municipality v Abdulla 1974 (4) SA 428 (C) at 438H-439D

inconvenience or disruption to them during the remedial work or to take such steps to vacate the premises prior to the remedial work commencing. I point out that in terms of the notice by the lawyer the applicant had already decided to act in terms of the section in that it was stated that it "intends exercising it's powers in terms of section 28(2)(b) upon expiring of the period of 1 month as envisaged in section 28(4)"[14]. Ironically for applicant it did not have to allow for a hearing prior to it's decision to launch the present application.[15]

[33] Even assuming that the hearing granted to respondent prior to launching these proceedings was a proper hearing it would not rectify the fact that no hearing was granted prior to the issuing of the notice. Respondent was called upon to make representations as to why the application should not be launched and not why the applicant should not proceed to restore the building to it's original state. It is clear that the basis of the decision was that a valid notice had already been served. This was denied by respondent.

[14] Cape Town Municipality case above at 439F
[15] *Huismenu v Port Elizabeth Municipality* 1998 (1) 477 (E) at 482C-483E

Once again the decision was predicated on a valid notice already served and not whether a notice needed to be given. The hearing was thus not for the purposes of whether or not to serve a notice which should have been the purpose of a hearing prior to the decision to forward a notice. This hearing thus did not constitute compliance with the *audi* requirement prior to the notice being given. The current proceedings suffers from a similar defect in that it assumes the validity of the notice and as is evident from respondent's answer the defence is basically an attack on the validity of the notice. It is in any event not for the Court to consider the respondent's representations. This is what applicant had to do prior to it's decision to serve a notice through it's lawyers.

[34] In view of the fact that no hearing was afforded the respondent prior to the issuing of the notice in terms of section 28 of the Ordinance the notice of 9 June 2006 was invalid and no consequences can flow from it. It thus follows that applicant is not entitled to the relief claim or to a declarator to the effect that the notice was a valid one *vis a vis* the respondent. The application is accordingly dismissed.

[35] The point that the *audi alterem* principle was not adhered to prior to the issuing of the notice in terms of section 28 of the

Ordinance was not raised by respondent in it's dealings with the officials of applicant nor was it raised in the answering affidavit. I should mention that the point was taken but not in the context of the said notice but in the context of certain other decisions with which I did not have to deal in my judgment. The point was raised at the hearing of this application when counsel for respondent handed up what he termed was a "Supplementary Note".

[36] As is evident from my judgment it is this *audi* point belatedly taken that saved respondent's bacon as far as the validity of the section 28 notice is concerned. None of the other points which were the points raised in the answering affidavit and in the Heads of Argument and with which I dealt with above were raised successfully. It goes without saying that the papers filed and arguments advanced in respect of the issues unsuccessfully raised by respondent made up the bulk of the record of the proceedings and took up the bulk of the time in the arguments addressed to me.

[37] For the reason set out in the preceding two paragraphs I'm *prima facie* of the view that it would not be equitable to let the costs follow the result and that it is an appropriate matter where no costs order should be made.

[38] Should either party wish to make submissions as to why the abovementioned *prima facie* view as to costs is not appropriate in this matter this should be indicated to the Registrar within 10 days of this order so that the matter can be set down for argument with regard to this aspect. Should no such request be forthcoming the prima facie view indicated shall become final, i.e. there shall be no costs order.

In the result I make the following order:

1. The application is dismissed.
2. Subject to what is stated in the judgment there shall be no order as to costs.

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FRANK, A.J.

ON BEHALF OF THE APPLICANT	**Adv S Vivier**
Instructed by:	**Kirsten & Co Inc**
ON BEHALF OF RESPONDENT	**Adv R Tötemeyer**
Instructed by:	**Dr Weder, Kauta & Hoveka Inc**