



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO. 1582/2023

In the matter between:

BLUE CRANE ROUTE MUNICIPALITY

APPLICANT

and

MANDILAKHE MELVILLE STORM

FIRST RESPONDENT

MELISIZWE FANI

SECOND RESPONDENT

SIMPHIWE KHAKANA

THIRD RESPONDENT

WAYNE GOLIATH

FOURTH RESPONDENT

SIYABONGA MGXASHE

FIFTH RESPONDENT

ALL OTHER PERSONS ACTING

WITH COMMON PURPOSE

WITH THE ABOVE RESPONDENTS

SIXTH RESPONDENTS

JUDGMENT

Rugunanan J

[1] The events occasioning the applicant's approach to this court occurred in Somerset East within the period 8 to 17 May 2023 and concerned alleged unlawful conduct by the respondents when they entered the applicant's offices, threatened and intimidated its staff to vacate their workplaces, disrupted services (water, sanitation, electricity, and refuse removal), threatened business owners, dispersed litter in the business centre, and engaged in unlawful gatherings and demonstrations (the activities/disruptions).

[2] The applicant's founding affidavit gives the idea that the respondents' demand to have the mayor at Somerset East removed from office prompted the unlawful activities. On the contrary, the opposing respondents (i.e. the first, fourth and fifth respondents), while denying their involvement in the activities maintained that these stemmed largely from discontent within the community concerning the applicant's lack of service delivery. It is not in dispute that the activities ceased upon the interim order being granted – hence, at the time of argument for final relief urgency was a non-issue.

[3] The applicant is a statutorily recognised municipal authority. It is mandated and obligated to provide accessible services entailing waste management control, refuse removal, water and sanitation and electrical services for the maintenance of public health and safety to the community including routine administrative services to the members of the general public. Cookhouse and Somerset East are among the towns within the applicant's municipal boundaries. The applicant's offices are located in Somerset East where much of the disruptions occurred.

[4] The first, second, third, fourth, and fifth respondents are adult males whom the applicant implicates in the events aforementioned. The first respondent is a

Resident of Somerset East and is a ward committee member within the local community. The fourth respondent, also a resident of Somerset East, owns and operates a driving school. The fifth respondent is similarly resident in Somerset East and is the owner of a construction business. The second and third respondents' residential and vocational details are unknown. The sixth respondents (presumably persons in Somerset East or perhaps Cookhouse) are a collective of nondescript community members who are implicated in the unlawful activities on the basis of a common purpose with the other respondents.

[5] The applicant's approach to this court, initially on 22 May 2023, was for the express purpose of seeking urgent interim relief to restrain the respondents from participating in, encouraging, facilitating and/or promoting the unlawful activities within the municipal boundaries of the applicant. A rule nisi issued and after two extensions, both by agreement, on 13 June 2023 and 27 June 2023, the matter was heard on 27 July 2023 – the applicant ostensibly seeking final relief but in argument appearing to shift ground by contending as an alternative to have the matter referred to oral evidence.

[6] The order of 13 June 2023 directed that costs be reserved and the order of 27 July 2023 directed that costs are to be costs in the application.

[7] Following the grant of the interim order the first, fourth and fifth respondents entered their opposition and filed opposing affidavits in the matter (where these were late, condonation was granted). They opposed any form of relief sought by the applicant and sought to have the application dismissed with costs. The second, third and sixth respondents did not file notices to oppose these proceedings.

[8] With regard to the fourth respondent, the applicant conceded a discharge of the rule nisi with costs up to and including 23 June 2023. This issue will be dealt with later in this judgment.

[9] As against the first and fifth respondents the applicant seeks a referral of the matter to oral evidence, alternatively final relief based on the court adopting a robust approach to the matter.

[10] Final relief is sought against the second, third, and sixth respondents.

The case against the first and fifth respondents

[11] The starting point would be to consider the referral to oral evidence. The founding affidavit deposed to by the applicant's municipal manager, Mr Mzwandile Nini, as duly appointed accounting officer identifies 8, 11, 12, 15, 16 and 17 May 2023 as the days on which events occasioning the unlawful activities did occur.

[12] Relevant to the first and fifth respondents, the crux of the case against them is set out by Mr Ntini as follows:

‘22. On Thursday, 11 May 2023, the first, fourth, fifth and unknown members of the sixth respondents arrived at the municipal officers in Somerset East and in a threatening and intimidating manner forced the applicant's staff to vacate their workstations and leave the municipal offices.’

[13] Elsewhere Mr Ntini goes on to say:

‘34. [O]n Monday 15 May 2023 the respondents threatened and intimidated the applicant's employees in Somerset East and demand[ed] that they stop working and vacate their offices.

35. In order to deal with this issue, the Mayor Mr Bonisile Manxoweni of the applicant was called by Colonel Beje Station Commander of the SAPS together with Mr Ayanda Gaji

(Director: Technical Services) as well as Mr Nigel Delo, the Chief Financial Officer of the applicant, arranged to meet with *inter alia* the first and fifth respondents at or near the Town Hall in Somerset East.

36. Members of the local police services were present at this meeting as well.
37. There were approximately twenty respondents present at the meeting including the first and fifth respondents.
38. At the aforesaid meeting ... the respondents were adamant that the Mayor must vacate his office. They stated further that unless the Mayor leaves his office and resigns, they would cause the whole of Somerset East and Cookhouse will come to a standstill ... that no car would be allowed to leave the depot where municipal vehicles are kept and that no services would be able to operate. However, they did indicate that they would allow essential services to continue.'

[14] The first respondent denies being part of a group of community members who participated in the activities mentioned in the founding affidavit. He denies that he was part of a group that unlawfully gathered, protested or entered the applicant's property, or that he threatened, intimidated or obstructed its employees and/or local business owners, or disrupted services, or damaged property or caused any littering in the streets.

[15] The fifth respondent similarly puts up a denial along these terms.

[16] Dealing specifically with events of 11 May 2023, the first respondent states that he became aware that a group of community members were heading peacefully towards the traffic department and learnt that they would be addressed by Mr Ntini.

[17] His involvement in the events of that day is summed up as follows:

- ‘12. I peacefully walked to the traffic department along with a group of other dissatisfied members of the community, as I have an interest in what the officials intended to say.
13. On the 11th of May 2023, Mr Ntini and the Speaker indeed addressed a small group of people who walked peacefully and lawfully to the traffic department.’

[18] Relevant to 15 May 2023 he states:

- ‘19. ... I, together with a small group of people peacefully walked to the Municipal Offices in Nojoli Street seeking to be addressed by the Mayor. Upon our arrival there I noticed police officers being present, namely the public order police services (POPS). Whilst we were sitting on the pavement two unknown police officers approached us and asked us to move backwards and we cooperated and followed their orders.
20. [They] asked if we needed any help, we responded and said that we want Mr Manxolweni to address us....
21. Mr Manxolweni then arrived thereafter and some of the group of people asked him when he would vacate his office.
22. In reply [he] said that it is only his organisation (the ANC) which can remove him from office.
23. Thereafter be dispersed and I was not involved in any further meetings or protests and I cannot understand why I am even a respondent in this matter.’

[19] Elsewhere in the applicant’s founding affidavit mention is made in general terms to the respondents engaging in disruptions in the business centre. While no specific mention is made of the first respondent, he denies his involvement or association with the group save to state that he was in town to withdraw cash but spent the rest of the day at home.

[20] In summary, the fifth respondent states that on 11 May 2023 he drove to the traffic department because he has an interest in the improvement of service delivery in Somerset East. The group of people whom Mr Ntini and the Speaker addressed were a peaceful group, and as for his presence the fifth respondent states:

‘I listened with interest to what they had to say.’

[21] As for events of the day, he saw no protests but overheard people saying that municipal employees should be prevented from working. He took the initiative of directing a letter to the ANC offices recording the demand by the community that the mayor be removed from office. On 15 May 2023 he presented himself at the applicant’s offices to submit a tender but noticed that the offices were closed. A group of people were present and were enquiring about when the mayor would vacate his office. The mayor’s response was that it is only his organisation (the ANC) that can remove him from office. For the rest, the fifth respondent maintained that he was not involved in any further meetings or group activities.

[22] On 17 May 2023 the fifth respondent maintains that he left Somerset East in the early hours of the morning to attend a meeting in Adelaide – the meeting concerned renewable energy projects on local wind farms. The meeting commenced at approximately 10h00. Proof of his attendance in the form of an extract from a signed register is attached to his answering affidavit. When he returned to Somerset East later the afternoon he noticed that litter was strewn in the streets. No protesters were present and he maintained that he was not involved in any protest action.

[23] In reply, Mr Nini disputes the versions of the first and fifth respondents essentially on the basis that they were active participants on the days in question.

In placing store on a sequence of confirmatory affidavits by Mr Manxoweni, Mr Gaji, and Mr Delo, Mr Nini contends that:

‘11. ... [They] can all confirm that the first respondent was an active participant, particularly in the meeting on Monday, 15 May 2023, and in trying to remove the applicant’s staff from their workstations.’

and,

‘24. ... [They] can all confirm that the fifth respondent was an active participant, particularly in the meeting on Monday, 15 May 2023, and in trying to remove the applicant’s staff from their workstations.’

[24] Although confirmatory affidavits are attached¹, in each instance the deponent to the confirmatory affidavit merely states that he confirms the replying affidavit insofar as it pertains to him. He does so without further elaboration and notably without specific reference to the first and fifth respondents. The confirmatory affidavits offer no detail of how the first and the fifth respondents had committed or threatened to commit the alleged unlawful activities complained of.

[25] While courts have taken the view that confirmatory affidavits may at times have their place, this by and large, has been condemned as ‘a slothful means of placing evidence before a court which is entitled to expect that the actual witnesses to an event deposes to the facts’.² In circumstances where several individuals are said to have witnessed the activities complained of it might reasonably be expected of them to substantiate detail of their personal observations. The applicant argued that this is what the maker of each confirmatory affidavit did.

¹ The applicant filed two sets of replying affidavits and in the aggregate the number of confirmatory affidavits completes the sequence.

² *Kalil v Mangaung Municipality* 2014 (5) SA 123 (SCA) 137B.

[26] I disagree.

[27] The argument is at odds with what Mr Nini states in the founding affidavit at paragraphs 11 and 24 which have been quoted above. Where Mr Nini pertinently states that these persons can confirm the involvement of the first and fifth respondents, then that is what one would have expected them to have said – in which event detail ought to have been tendered regarding the conduct of the respondents mentioned and their alleged participation in the events with which they are said to have associated themselves.

[28] For that reason I am of the view that there are insufficient facts in the applicant's founding papers to substantiate the first and fifth respondent's alleged unlawful conduct. Furthermore, and for reasons already dealt with, the confirmatory affidavits are of no assistance.

[29] The first respondent and the fifth respondent each contended that his presence on the days in question was passive. This must be evaluated against the following considerations: The first respondent is a community ward councillor who has a genuine concern about the applicant's lack of service delivery and in its failure to maintain infrastructure that would foster the growth of local businesses and the community in general. The fourth respondent is a local businessman. By his own admission he was (during 2022) part of a group of dissatisfied community members who voiced concerns about service delivery issues. His involvement became curtailed because it impacted negatively against his business interests. The fifth respondent is also a businessman. His sentiment is that the applicant can do better to provide services that would be conducive for small businesses to prosper.

[30] It is inconceivable (given, I emphasise, the presentation of the applicant's papers in the circumstances of this matter) that persons of standing with vested

interests in the community would present themselves and conduct themselves in the manner alleged by the applicant. The applicant would have this court infer that the mere presence of these respondents (as well as the fifth respondent having penned a letter of dissatisfaction) translates to the conclusion that they were engaged in the activities complained of. There is no credible version to prove that the first and fifth respondents were involved in the incidents/activities occasioning the applicant's complaints and harm suffered to justify final relief.

[31] It is my view that the present state of the applicant's papers rendered a dispute of fact reasonably foreseeable³ as regards the first and fifth respondents' presence and alleged involvement. To suggest, as is was in argument, that their involvement was one of degree is speculative. The applicant had to make out a clear case that the first and fifth respondents were involved in the activities mentioned.

[32] It did not do so.

[33] A referral to oral evidence would be a mere fishing expedition.

[34] This brings me to the crisp issue of the approach to be adopted in dealing with the matter. It was determined decades ago that a court should not allow a respondent to raise 'fictitious' disputes of fact to delay the hearing of the matter or to deny the applicant its order. There had to be 'a *bona fide* dispute of fact on a material matter'. This means that an uncreditworthy denial or a palpably implausible version, can be rejected out of hand without recourse to oral evidence. In *Plascon Evans-Paints Ltd v Van Riebeeck Paints (Pty) Ltd*⁴ the ambit

³ It is well established in our law that an application may be dismissed with costs when the applicant should have realised when launching the application and that a serious dispute of fact was bound to develop. See *Amandla GCF Construction CC v Tresso Developments (Pty) Ltd and Another* [2023] ZAWCHC 209 para 10 and the authorities referred in the footnote thereto.

⁴ 1984 (3) SA 623 (AD at 634E-635C).

of uncreditworthy denials was extended to encompass not merely those that fail to raise a real, genuine or *bona fide* dispute of fact but also allegations or denials that are so farfetched or clearly untenable that the court is justified in rejecting them merely on the papers.⁵

[35] In argument the applicant submitted that the versions presented by the first and fifth respondents did not create a *bona fide* dispute of fact for the reason that they placed themselves at the scene of events on 11 and 15 May 2023. Their denials are implausible and it was urged that the court should adopt a robust approach in rejecting their respective versions.

[36] The so-called ‘robust, common-sense, approach’ was adopted in cases such as *Soffiantini v Mould*⁶ in relation to the resolution of disputed issues on affidavit. The approach is usually employed in a situation where a respondent contents himself with bald and hollow denials of factual matter confronting him.

[37] The present is not such a case where the first and fifth respondents have merely been content to deny what is said about them in the applicant’s papers. I am satisfied that they have seriously and unambiguously addressed the issues confronting them, that they conscientiously justified their presence on the days in question and vindicated themselves of the conduct which the applicant attributes to them.

[38] On the other hand the applicant’s version in reply – supported as it is by inadequate confirmatory affidavits – does not raise a substantive rebuttal to the first and fifth’s respondents allegations concerning to their conduct and whereabouts on 11, 15 and for that matter, 12 and 17 May 2023. I am not satisfied

⁵ *Fakie NO v CII Systems (Pty) Ltd* 2006 (4) 326 para 55.

⁶ 1956 (4) SA 150 (E).

that the applicant's version pertaining specifically to the involvement of the first and fifth respondents has any inherent credibility.

The case against the fourth respondent

[39] This brings me to the applicant's case against the fourth respondent. The only occasion when specific reference is made to him is 11 May 2023. In all circumstances pertaining to the events of 12, 15, 16 and 17 May 2023, Mr Nini merely makes general reference to 'the respondents'. While imputing unlawful conduct to the group, Mr Nini's suggestion by inference is that the fourth respondent⁷ was included among them.

[40] In response to his alleged involvement in the events of 11 May 2023 the fourth respondent states that he arrived at the traffic department that morning at about 08h49 because he booked out his truck to a client who was scheduled to undergo a Code 10 driver's licence test. The client successfully passed the test and was awarded the licence. The booking confirmation certificate from the traffic department is attached to the fourth respondent's opposing affidavit.

[41] The fourth respondent also goes on to relate that at about 09h15 he noticed a large group of people arriving at the traffic department. They threatened to bring the department to a standstill. He listened to Mr Nini and the Speaker address the group but due to focussing on his own business affairs he did not associate himself with the group. Because of the threat by the crowd, the fourth respondent's booking with a second client at about 12h00 noon that day was cancelled. The booking confirmation certificate from the traffic department is also attached as proof of the client's Code 10 driver's licence test scheduled for that day.

⁷ And presumably, the others.

[42] For the remainder of what is alleged in the founding affidavit the fourth respondent states:

‘23. I was not part of any protests on any of the dates mentioned in the applicant’s founding affidavit and I challenge the applicant to provide proof that I was indeed part of the interdicted protestors.’

[43] Concerning events of 12, 15, 16 and 17 May 2023, where Mr Nini makes a generalised reference to ‘the respondents’ and their threats, the fourth respondent makes the following statement:

‘53. I cannot meaningfully respond to these allegations as I was not one of the protesters who disrupted services and businesses ...’

[44] The fourth respondent’s denial of the allegations against him and specifically of the events that occurred on 11 May 2023 leaves it open to question Mr Nini’s professed belief in the fourth respondent’s involvement in the events of that day. Indeed, Mr Nini’s ambivalence is conveyed by his sentiment that he was ‘confused and disappointed’ as to the fourth respondent’s presence among the crowd.

[45] This observation I make is also augmented by Mr Nini’s disclosure:

‘17. [T]he applicant’s attorneys addressed an email to the fourth respondent’s attorney on 29 May 2023 after notice of opposition was delivered, inviting the fourth respondent’s attorney to engage in a discussion on whether the parties could perhaps reach a settlement of the matter, without the fourth and /or fifth respondent being required to deliver an answering affidavit. A copy of this email is annexed hereto marked ‘A’. Unfortunately, the fourth and fifth respondents’ attorney did not respond to this request, and instead submitted to the answering affidavits.’

[46] This is certainly an odd stance for the applicant when under the apprehension of imminent harm which – in seeking the relief it claims– forms the basis of its cause of action. Moreover, that Mr Nini entertained uncertainty is

fortified by the applicant's disinclination to obtain final relief against the fourth respondent (parenthetically, a similar request as mentioned in the above extract from Mr Nini's affidavit was also made in respect of the first respondent). I have no hesitation in saying that Mr Nini's uncertainty, throws doubt on his perception of the involvement of first, fourth and fifth respondents. It is trite that an interdict will be refused if there is doubt as to precisely who is responsible for the alleged offending conduct.⁸ In the circumstances I cannot be satisfied that the founding affidavit is inherently credible in its narrative of the involvement of these respondents. For reasons already traversed, the confirmatory affidavits are to no avail.

The case against the second, third, and sixth respondents

[47] None of these respondents have filed opposing papers in these proceedings. The second and third respondents were among a group of persons who entered the applicant's offices on 8 May 2023. Mr Nini states that he was able to identify them. While not referring to them specifically, Mr Nini refers to the respondents as a collective regarding the events of 11, 12, 15, 16 and 17 May 2023. In the absence of any opposition or submissions made on behalf of these respondents, the case in support of interim relief against them has not been rebutted and it follows that the rule nisi previously issued must be confirmed.

Conclusion and costs

[48] The award of costs proceeds from two basic principles: the first is that the award is in the discretion of the presiding judicial officer, and the second is that the successful party should, as a general rule, be awarded its costs. The applicant was successful against the second, third and sixth respondents.

⁸ See *Prinsloo v Ned Hervormde or Gereformeerde Church* (1890) 3 SAR 220 referred to in Van Loggerenberg, Superior Court Practice fn1 at D6-7 [Original Service, 2015].

[49] The first, fourth and fifth respondents were successful in discharging the rule nisi against them. For that reason the general rule does not favour the applicant. They are awarded the costs of these proceedings including those attendant on the order of 27 June 2023.

[50] None of the parties addressed me on the reserved costs of 13 June 2023. Accordingly I make no order in respect thereof.

[51] Much was made in argument for the applicant that the costs of the fourth respondent be limited to 23 June 2023. The fact of the matter is that a purported withdrawal (assuming that 23 June 2023 is the correct date) ought to have been done properly in accordance with the uniform rules of court. The applicant's argument does not read persuasively with me.

[52] In the result I make the following order:

1. The referral to oral evidence is refused.
2. The rule nisi issued on 22 May 2023 is discharged as against the first, fourth and fifth respondents.
3. The applicant shall pay the costs as between party and party of the first, fourth and fifth respondents – such costs to include those attendant on the order of 27 June 2023.
4. The first, fourth and fifth respondents shall pay their own costs in relation to their condonation applications.
5. The rule nisi issued on 22 May 2023 is confirmed against the second, third, and sixth respondents.

6. The second, third, and sixth respondents, jointly and severally, the one paying the other/s is to be absolved shall pay the applicant's costs of the application as between party and party.

M S RUGUNANAN
JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: *A C Moorehouse*, Instructed by Pagdens c/o Cloete & Company, Makhanda (Ref: L Jolobe)

For the First, Fourth and Fifth Respondents: *C G T Cordell*, Instructed by Wheeldon Rushmere & Cole, Makhanda (Ref: C Keese)

Date heard: 27 July 2023

Date delivered: 24 October 2023