

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE CIRCUIT DIVISION, EAST LONDON]**

CASE NO: EL 1730/2022

In the matter between:

**NAHOON ESTUARY MANAGEMENT
FORUM NPO
(BATTING BRIDGE PICNIC SITE)**

Applicant

And

**BUFFALO CITY METROPOLITAN
MUNICIPALITY**

1st Respondent

**THE MUNICIPAL MANAGER BUFFALO
CITY METROPOLITAN MUNICIPALITY**

2nd Respondent

JUDGMENT

ZONO AJ

INTRODUCTION

[1] The Applicant approached this court on a notice of motion for a relief more fully set out in paragraph 1 to 9 thereof which is the following:

“1. That the respondents be ordered to implement its protocols, operating procedures, management systems and resources to ensure access control, limit access, open and locking the boom gate at designated times as stipulated in terms of the standard

Bylaw relating to Municipal Parks within 90 days of the granting of this order;

- 2. That the respondents be ordered to maintain and keep the park free of litter by regularly cleaning the park and/or providing more bins in the park area;*
- 3. That the respondents be ordered within 90 days of the granting of this order to ensure that the lock at the boom gate of the picnic site is replaced with a more suitable lock;*
- 4. That the respondents be ordered to fence the boundary of the picnic area to avoid unauthorized access to the picnic site within 90 days of the granting of this order;*
- 5. That the respondent be ordered to take measures to ensure that it monitors and controls the use of liquor and excessive music being played at the picnic site;*
- 6. That the respondents be ordered to comply with the Operational Environment Management Plan by erecting a sign within 90 days of the granting of this order which indicates the following:*
 - 6.1 All users of the Batting Bridge public launch site do so at their own risk;*
 - 6.2 The hours of operation of the batting Bridge launch site;*
 - 6.3 The name and contact number of the operator; and*

6.4 *Indicating that users of the launch site must obtain a launch permit to launch a boat from the operator and complete a formal register*

7. *That respondents are ordered to ensure compliance with par 3.1.3 of the Operational Environment Management Plan in respect of providing adequate access control to the Batting Bridge launch site by inserting a boom gate at the front of the launch site or any other manner the respondents deem fit in terms of the Operational Management Plan within 90 days of granting of this order;*

8. *That the respondents appoint an operator for the batting bridge launch site whose details appear on the sign to be inserted as per prayer 6 above;*

9. *The first respondent be ordered to pay costs of the application.”*

[2] The applicant brings this application in terms of section 38(1)(d) of the Constitution in that it is acting in the public interest. It is complaining of an alleged dilapidated state of public places which are allegedly neglected by the respondents. The two public places complained about are the following: Batting Bridge Picnic site hereafter referred to as “*Picnic site*” and Batting Bridge Launch site, hereafter called “*Launch site*”. The picnic site and launch site are sharing the same entrance. The two sites conform or conduce to the definition of the “*Park*” as defined in the Standard ByLaw relating to Municipal parks¹.

[3] With regard to picnic site, the applicant states that it has complained to the respondent regarding its state and that it is left with the members of public

¹ “*Park*” means any premises or public place as defined in section 2 of the Municipal Ordinance, 1974 (Ordinance 20 as Botanical, which have or has been set apart for use as pleasure resort, recreation resort, playpark or sports ground under the control of the council.

who are overcrowding it, playing loud music and indulging in intoxicating liquor and thereafter leaving the area with their dumped used goods. No Law Enforcement Officer is present in the site to monitor same. On 22nd May 2022 and 26th May 2022, the deponent to the founding affidavit Mr Christo Theart, applicant's Chairperson attended and inspected the site and took photographs of the state thereof. With a view to enforce the relevant legal prescripts, the applicant caused the correspondence to be penned and delivered upon the respondents. No response thereto had been forthcoming. The picnic site was causing nuisance to the residents who reside next to it.

[4] The boom gate that is providing access to both picnic and launch sites had a broken lock and the boom gate is closed with a piece of wire that can be removed at any time. Launch site does not have separate access as its access is linked to the picnic site.

[5] The launch site had no sign board to warn people who wish to use launch site, to complete register, nor there is indication as to where such register can be found. The sign board would also indicate the name and contact number of the operator as required by the law and it must be erected at the parking area or at the entrance to the public launch site. According to the applicant the sign boards would indicate the following:

“(a) warning people that they use the launch site at their own risk;

(b) indicate hours of operation of the launch;

(c) indicate the name and contact details of the operator and

(d) indicate to the users the need to obtain a launch permit to launch a boat from the operator and to complete a formal register.”

- [6] The applicant ultimately seeks the respondents to provide access control to the launch site as cars are not permitted to access the picnic site and launch site. The applicant seeks an appointment of an operator for the launch site.
- [7] The applicant seeks to enforce the provisions of standard Bylaw relating to Municipal Park published by the **Beacon Bay Municipality on 21st August 1987 Provincial Gazette No 4494 of 21st August 1987**. Section 3 of the said Standard Bylaw provides as follows:

“Any person who, other than in the course of his duties as an employee of the council or, where he is duly authorized by council to do so-

- (a)
 - (i) *damages property*
 - (ii) *places or affixes a placard, notice or any other object;*
 - (iii) *lights or in any other manner causes a fire at a place other than that specially provided by the council, as indicated in terms of section 2;*
 - (iv) *drives, rides, draws or propels any vehicle other than a manually operated wheeled chair or perambulator when used for the conveyance of an invalid or a child;*
 - (v) *in any way interferes with the animal life or garden or with nature;*
 - (vi) *fires a fire arm or an air gun, discharges any firework, catapult or sling or throws a stone or other missile*

;

- (vii) *drinks intoxicating liquor or begs;*
- (viii) *sells or offers or exposes for sale or hire any article or distributes any pamphlet, book, handbill or other matter;*
- (ix) *enters upon abduction or sanitary conveniences indicates as having been provided for persons of the opposite sex;*
- (x) *plays a musical instrument, sings or addresses a meeting;*
- (xi) *washes any article at a tap or in a pond or foundation or in ornamental water feature or otherwise pollutes water, or*
- (xii) *in any other manner causes a nuisance, obstruction, disturbance or annoyance to the public in a park;*
- (b) *removes or disturbs any soil or water in a park at a place other than that specially provided by the Council;*
- (c) *enters or in a park or any part thereof during the hours when such park or part thereof is closed to the public in accordance with a notice displayed in terms of section 2*
- (d) *parks a vehicle or cross a booth, tent swing or other like structure in a park;*
- (e) *deposits any refuse or rubbish in a park at a place other than that specially provided for such purpose;*

(f) *enters or leaves a park or any part thereof other than by an entrance or exit provided for that purpose, or*

(g) *takes a dog or any other animal into a park or allows it to enter a park.”*

It is therefore plain from the reading of the Standard ByLaw that it proscribes all of the acts or conducts listed therein.

[8] Section 2 of the Standard ByLaw provides as follows:

“The council may by means of notices prominently displayed at every entrance of a park or at every entrance to any part thereof indicate the days and hours during which such park or part thereof shall be open to the public and the places where fires may be lit”.

[9] Similarly and in addition to the above, the applicant seeks to invoke the provisions of the Buffalo City Municipality Waste Management ByLaw, Published on the **Provincial Gazette extraordinary dated 04th November 2005 under Gazette No 1448**. Reliance is placed on the provision of Section 37 of the ByLaw which reads as follows:

“37 Prohibitions of littering

(1) *No person may –*

(a) *Cause litter;*

(b) *Sweep any waste into a gutter, onto a road reserve or onto any other public place;*

- (c) *Disturb anything in, or remove anything from any receptacle which has been placed for the purposes of collecting litter in such a manner as to cause the contents of the receptacle to spill or fall onto the ground around it; and*
- (d) *Allow any person under his control to do any of the acts contemplated in paragraphs (a), (a) or (b) above.”*

[10] Section 38 of the same ByLaw reads as follows:

“38 Prohibitions of dumping and abandoning articles

- (1) *No person may, without authorization, deposit or permit the depositing of any waste whether for gain or reward or otherwise, upon any land or in any building of which he is the owner or occupier except where such deposits are made in accordance with the provisions of this By-law.*
- (2) *Subject to any provisions to the contrary contained in this By-law, no person may leave any article or allow any article under his or her control to be left at a place with the intention of abandoning it.*
- (3) *No person may dump waste.*
- (4) *Any article, other than a motor vehicle deemed to have been abandoned in terms of section 114 of the Road Traffic Act, 1989 (Act 29 of 1989), which, in the light of such factors as the place where it is found, the period it has been lying at such place and the nature and condition of such article, is reasonably regarded by the council as having been abandoned, may be removed and disposed of by the council as it may deem fit.*

(5) The council may remove and dispose of any article which is chained or fastened to any pole, parking meter or any other property belonging to the council, without authorization as it may deem fit.”

- [11] The applicant in its papers seeks to invoke the provisions of Operational Environmental Management Plan (hereafter refer to as Management Plan) for the Batting Bridge Public Launch Site allegedly compiled and completed by the MEC of Environmental Affairs and Tourism. The Management Plan was completed in terms of section 2 of Management of Public Launch sites in the Coastal Zone Regulations published by the Minister of Environmental Affairs on 27th June 2014 in the Government Gazette R497 of 27th June 2014.
- [12] The respondents deposed to an answering affidavit on 06th June 2023 about the attendance and inspection of the picnic site by the applicant on 21st May 2022. The respondents posit a case that, 21st May 2022 was a Saturday, a day on which most of the East London residents attend the Picnic Site. They state that the Municipality cleans the Picnic site three (3) times per week and once on Sundays. The Municipality deploys employees to the Picnic Site. The employees collect the litter that is left over and place it in the Municipality's truck. The employees empty the rubbish bins four (4) times per week.
- [13] The Municipal Manager, the deponent to the answering affidavit states that the Municipality has erected a sign board at the entrance of the Picnic Site. He further states that the sign board states that the Municipality and its employees will not be held liable for injury or loss, theft or damage to persons or their property. He confirms that the Picnic and Launch site share common entrance.

- [14] The Municipal Manager states in the answering affidavit that the boom gate is working and further states that the lock depicted in the annexure **G6** to the applicant's founding affidavit is an old lock. There is no overcrowding at the Picnic Site.
- [15] With regard to the Management Plan and Compliance therewith the Municipality states that, it has complied therewith. It has within its available resources erected a sign board as required. About the sign board the Municipality states also that a signboard was erected and stolen. Boom gate has no old pad lock as depicted in the annexure. Boom gate is working between 07h00 to 18h00.
- [16] Surprisingly, after having alleged that they have complied with the Management Plan, the respondents state that there is no valid Management Plan warranting compliance as there is none signed and approved by Municipality. The respondents do not submit that it is a legal requirement that the Management Plan must be signed and approved by the Municipality for it to be legally effective. A common cause fact is that the Management Plan was compiled by the relevant MEC in terms of the law. The Municipality does not even say that a signed copy was sought from the relevant MEC.
- [17] About the relevant Bylaws, the Municipality, whilst not disputing its existence, states that they only criminalize the conducts listed therein. The applicant should have reported the criminal conduct to the members of South African Police Services. The ByLaw does not impose an obligation on the Municipality. Accordingly, the Municipality does not have a duty to enforce the law.
- [18] In conclusion, the Municipality states that it is regularly cleaning the Picnic Site. In doing so it is complying with its ByLaw. However, Constitutional

and legislative mandate to prevent and remove the waste from the park area and clean up same seem not to be in dispute.

CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK

[19] In addition to the provisions of the ByLaws cited above, section 155(6) provides as follows:

“6. Each Provincial Government must establish Municipalities in its Province in a manner consistent with the legislation enacted in terms of subsections (2) and (3) and, by legislative or other measures, must-

(a) provide for the monitoring and support of local government in the province; and

(b) promote the development of local government capacity to enable Municipalities to perform their functions and manage their own affairs.”

[20] Section 156 of the Constitution provides that:

“1. A municipality has executive authority in respect of, and has the right to administer –

a. the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and

b. any other matter assigned to it by national or provincial legislation.

2. A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.

3. *Subject to section 151(4), a by-law that conflicts with national or provincial legislation is invalid. If there is a conflict between a by-law and national or provincial legislation that is inoperative because of a conflict referred to in section 149, the by-law must be regarded as valid for as long as that legislation is inoperative.*
4. *The national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if –*
- (a) that matter would most effectively be administered locally; and*
 - (b) the municipality has the capacity to administer it.*
5. *A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions”.*

Part A of Schedule 4 referred to in subsection 4 above prescribes functions of environmental and pollution control for the Municipality.

- [21] Part B of Schedule 5 referred to in section 156 of the Constitution provides and lists *inter alia*, the following matters as the responsibilities of the Municipality;

“(a) Billboards and the display of advertisements in public places,

(b) Cleaning

- (c) *Control public nuisance*
- (d) *Fencing and fences*
- (e) *Municipal parks and recreation,*
- (f) *Noise pollution*
- (g) *Public places*
- (h) *Refuse removal, refuse dumps and solid waste, etcetera.”*

[22] Section 24 of the Constitution provides as follows:

“24. **Environment**

Everyone has the right-

- (a) *to an environment that is not harmful to their health or well-being; and*
- (b) *to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-*
 - (i) *prevent pollution and ecological degradation;*
 - (ii) *promote conservation; and*
 - (iii) *secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”*

These rights are enjoyable by everyone in the Republic.

[23] Section 4 of the Local Government: Municipal Systems Act 32 of 2000 provides:

“ Rights and Duties of Municipal Councils

2. *The council of a Municipality within the Municipality’s financial and administrative capacity having regard to practical considerations, had the duty to-*

- (a) A exercise the municipality’s executive and legislative authority and use the resources of the municipality in the best interests of the local community;*
- (b) provide, without favour or prejudice, democratic and accountable government;*
- (c) encourage the involvement of the local community;*
- (d) strive to ensure that municipal services are provided to the local community in a financially and environmentally sustainable manner;*
- (e) consult the local community about—*
 - (i) the level, quality, range and impact of municipal services provided by the municipality, either directly or through another service provider: and*
 - (ii) the available options for service delivery:*
- (f) give members of the local community equitable access to the municipal services to which they are entitled:*

- (g) *promote and undertake development in the municipality;*
- (h) *promote gender equity in the exercise of the municipality's executive and legislative authority;*
- (i) *promote a safe and healthy environment in the municipality;*
- (j) *and contribute, together with other organs of state, to the progressive realization of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution."*

From this it is clear that the rights enshrined in Section 24 of the Constitution quintessentially obliges the Municipality to ensure that they are realised.

[24] These provisions help provide a broader scope of Municipality's Constitutional and legislative powers, duties or responsibilities.

[25] The Municipal Systems Act 32 of 2000 is the national legislation that seeks to give effect to the Constitutional provisions referred to above. Similarly, the Bylaws referred to above are those referred to in the Constitutional provisions adverted above. These provisions give Citizen's rights and impose obligations, by and large on the Municipality.

DISCUSSION

[26] The Court is called upon to determine whether the Municipality is legally obliged to perform all of the functions which the applicant seeks them it to perform.

[27] Even prior to the advent of the constitutional dispensation, powers conferred on administrators were inevitably accompanied by an implied duty to exercise the power.² **Plasket J**³ held that:

“35. Public powers and functions such as the power to decide on an entitlement to social assistance are given to administrative officials for a purpose: they are intended to be exercised in the furtherance of the public interest. As a result, when officials fail to exercise their powers or perform their functions, affected parties may require defaulting officials to perform their duties.”

In those cases, as in here, an order may be issued to compel the administrative official to take a decision or perform duties.

[28] Even the foreign jurisdictions⁴ agree that where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out and with regard to whom a definition is supplied by the legislature of the conditions upon which they are entitled to call for its existence, that power ought to be exercised, and the court will require it to be exercised.

[29] The Constitution imposes *inter alia*, the following obligations on the Municipality like the respondents:⁵

“(1) A municipality has executive authority in respect of, and has the right to administer—

² Baxter L: Administrative Law, Juta (1984) at 414; (**Minister of Justice and Registrar of Asiatics** 1911 AD 13 at 31; **Luynch v Union Government (Minister of justice)** 1929 AD 281 at 285.

³ **Vumazonke and Others v Member of Executive Council for Social Developmnet, Eastern Cape and others** 2005 (6) SA 229 (SC) Para 35.

⁴ **Julius v Lord Bishop of oxford** [1880] 5 AC 214,225.

⁵ Section 156(1) of the Constitution.

(a) *the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and*

(b) *any other matter assigned to it by national or provincial legislation.*

(2) *A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.*

[30] Part B of schedule 5 referred in section 156(1) of the Constitution lists *inter alia*, the following responsibilities of the Municipalities: Billboards and the display of the advertisements in public places, cleaning control of public nuisances, fencing and fences, Municipal parks and recreation, noise pollution, public places, refuse removal, refuse dumps and solid waste disposal. It is a constitutional responsibility of the Municipality to monitor and control public places and noise pollution. Cleaning, refuse removal, refuse dumps and solid waste disposal are Constitutional obligations imposed on the Municipality.

[31] It is important to note that the Municipality has a Constitutional responsibility to make and administer ByLaws for the effective administration of matters which it has the right to administer. ByLaws give effect to the provisions of section 156(1) and (2) of the Constitution. They seek to ensure that the Constitutional obligations imposed by the Constitution are fulfilled.⁶Significantly this application is about fulfilment of the aforesaid constitutional obligations.

[32] In giving effect to these Constitutional responsibilities, section 3 of the Municipal Standard ByLaw proscribes the occurrence of certain

⁶ Section 2 of the constitution provides that: This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

antithetical conducts and behavioral tendencies. It is worth repeating that the administration of the Municipal Standard ByLaw is the responsibility of the Municipality.

- [33] Courts are themselves subject to the fundamental principle of legality as they are bound to uphold the Constitution⁷. Failure to exercise the power where exigencies of a particular case require it, would amount to undermining the legality principle which is intrinsically linked to the Rule of Law. The Court has a duty to uphold the doctrine of legality, by refusing to countenance an ongoing statutory contravention and criminal offence⁸.
- [34] It is the Municipality that is enjoined to enforce and administer section 3 of the standard ByLaw. It does not avail the Municipality of any defence to hold that it does not have a duty to enforce the law especially its standard ByLaw relating to Municipal Parks. The Municipality in its staff establishment has Law Enforcement Officers. Accordingly, I find that it is the responsibility of the Municipality to enforce the provisions of section 2 and 3 of its standard of ByLaw.
- [35] Section 37(2) of ByLaw on Waste Management makes it plain that the Council must within a reasonable time after any litter has been discarded, dumped or left behind, remove such litter or cause it to be removed. A reasonable time may mean that period of time before the litter becomes a nuisance or cause for complaint. Subsection 1 of the same ByLaw prohibits litter and sweeping of any waste into a gutter or onto any other public place. The removal or disturbance of bins which are for purposes of collecting litter is prohibited. Section 38 of the Municipal Bylaw on Waster Management Prohibits the dumping and abandoning of articles.

⁷ *Cools Ideas 1186 v Hubbard and another* 2014 (4) SA 474 (CC) Para 58.

⁸ *Lester v Ndlambe Municipality* 2015 (6) SA 283 SCA Para 26 and 27.

[36] The purpose of the ByLaw on Waste Management is to regulate collection and disposal of waste. It is to promote *inter alia*, effective delivery of council services and commercial services. Lastly it is to promote and ensure environmentally responsible council services and commercial services⁹.

[37] Local Government: Municipal Systems Act 32 of 2000 crystallizes Municipal Council's duties¹⁰. About the environment¹¹ the provisions prescribe a duty to promote a safe and healthy environment. The Municipal Council has a duty to use its resources in the best interest of the local community.¹² It has a duty to strive to ensure that Municipal services are provided to the local community in a financial and environmentally sustainable manner¹³. It must give members of the local community equitable access to the Municipal services to which they are entitled¹⁴.

[38] The Local Government: Municipal Systems Act 32 of 2000¹⁵ was enacted to give effect to provisions of section 24 of the Constitution referred to in paragraph 21 above. It is unequivocally the responsibility of the Municipality to ensure that the rights enshrined in section 24 of the Constitution are realised.

[39] In the light of the ByLaws referred to above and the provisions of the Local Government: Municipal Systems Act read together with the abovementioned Constitutional provisions, it is plain that the Municipality is obliged to perform duties set out therein and exercise such powers as may be prescribed by the law. All the legislative obligations set out in the ByLaws and the Municipal Systems Act are legislative mechanisms to give

⁹ Section 1 of ByLaw on Waste Management

¹⁰ Section 4 of Local Government: Municipal System Act 32 of 2000

¹¹ Section 4(2)(i) of Local Government: Municipal Systems Act 32 of 2000

¹² Section 4(2)(a) of the Local Government: Municipal Systems Act 32 of 2000

¹³ Section 4(2)(d) of Local Government: Municipal Act 32 of 2000

¹⁴ Section 4(2)(f) of Local Government: Municipal Systems 32 of 2000

¹⁵ Section 4 of Local Government: Municipal Systems Act 32 of 2000

effect to Constitutional provisions set out in section 24 and 156 of the Constitution. The contextual and purposive reading of all of these provisions come to a conclusion that the Municipality is obliged to perform those duties; and has failed to discharge its constitutional and legislative obligations, and that has taken place for a long time. All constitutional obligations must be performed diligently and without delay.¹⁶

[40] In ***Natal Joint Municipal Pension Fund v Endumeni Municipality***¹⁷ Wallis JA held that:

“[18] ... Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of

¹⁶ Section 237 of the Constitution.

¹⁷ 2012 (4) SA 293 (SCA) Para 18.

the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[41] A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

- (a) that statutory provision should always be interpreted purposively;
- (b) that the relevant statutory provision must be properly contextualised;
- (c) all statutes must be construed consistently with the constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their Constitutional validity.¹⁸The Municipality's responsibility is to perform the duties constitutionally and legislatively placed on its shoulders.

[42] The applicant is justified to approach this court to seek a relief directing the Municipality to keep the park free of litter by regularly cleaning the park and providing more bins in the park area. That is consistent with the Constitutional provisions in section 156(1) and Part B of Schedule 5 thereto. Section 37 and 38 of ByLaw on Waste Management are equally on point. Section 2 and 3 of Standard ByLaws relating to Municipal parks are equally enforceable against the Municipality. The fencing of the Municipal parks is the responsibility of the Municipality. Fencing is aimed at preventing unauthorised access to the parks. Fencing invariably includes erecting proper and working boom gates. General monitoring and

¹⁸ **Cools Ideas 1186 CC v Hubbard and another** 2014 (4) SA 474(CC) Para 28

controlling of public places like Municipal parks is the responsibility reposed to the Municipality. Control of public nuisance, noise pollution and use of liquor in public places or parks is the responsibility of Municipality.

[43] The applicant makes the following undisputed allegations in paragraph 10, 11, 12, and 13 of its founding affidavit:-

“11. I confirm that Anthony Balshaw has on the 06th September 2021 completed a report and submitted it physically and expressed it verbally at a meeting between stakeholders in the area of the picnic site as well as the respondents which meeting was conducted on the 07th September 2021. Mr Balshaw on behalf of the surrounding property owners made submissions with regards to locking the boom gate over the weekends and daily specified time, police public alcohol consumption at the picnic area and further recommend that steps taken by the respondents to:

11.1 Prevent overcrowding at the picnic site, exercise access control to restrict numbers.

11.2 Control excessively loud music, clean up and prevent excessive litter tat neds up in the Nahoon river and sounding residential properties and bush;

11.3Refuse bins within the picnic site be emptied regularly;

11.4 prevent broken glass from being thrown all over the picnic areas paving a risk of injury to others such as cutting bare feet or bathers, fisherman and paddlers;”

12.I am advised that Anthony Balshaw further put forward a proposed plan of action and I am informed by Mr Blashaw that at the time of the meeting

there was a representative of the respondents' offices who had minuted the meeting. I confirm and am advised by Anthony Balshaw that respondents are in possession of the minute of the meeting held. I annex a confirmatory affidavit of Anthony Balshaw as well as his proposed plan of action as annexure C.

13.I confirm that on 21st May 2022 I attended at the Batting Bridge picnic site and took photographs of the state that the picnic site has been left in. As annexure D1 to D11 I annex photographs of the picnic site and the state that it has been left in with no Law Enforcement being present to monitor the site.”

The respondents do not dispute these allegations. Any partial compliance, if any, might have occurred after the institution of the instant proceedings.

- [44] In the foregoing it is plain that the respondents have failed to do what the law demands of them. In ***Head of Department, Department of Education, Frere State Province v Welkom High School and Another; Head of Department, Department of Education, Frere State Province v Harmony High School and another***¹⁹ it was held that

“1 State functionaries, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, and has long been enshrined in our law.”

- [45] The primary function of the courts is to ensure that those who are charged with the duty to perform public functions in terms of legislation act within the parameters of the Law.²⁰ Courts have a duty to ensure that the limits

¹⁹ 2014 (2) SA 228 (CC) Para 1

²⁰ Baxter Administrative Law Page 305; ***Mwelase v Minister of Social Development and Others*** (CA 74.16) [2018] ZAECHMHC 16 [22March 2022] Para 25

to the exercise of public power are not transgressed. A repository of power may not exercise any power or perform any function beyond that conferred upon it by law and must not misconstrue the nature and ambit of the power.²¹ The respondents misconstrued the ambit of their power and responsibility when they thought that they do not have duty to enforce the law, or that they have no responsibility to implement their ByLaws which ByLaws are made in terms of the Constitution.

[46] About the implementation of the Management Plan, the applicant makes the following allegations in its founding affidavit.

“24. In terms of this plan specifically 2.2.2 of the plan, it indicates as follows. All users of the public launch site must be notified by any means, including but not limited to a sign board, that they use the public launch site at their own risk.

25. In terms of paragraph 3.1.3 it indicates as follows,” There must be adequate access control of the launch site to prevent unauthorized use of the site.”, in this regard there is no access control. I confirm that there is a boom gate providing access to the bridge picnic site and the launch site. However, the lock is broken and the boom gate is closed with the piece wire that can be removed at any time. Access to the launch site is linked to access to the picnic site. The launch site does not have separate access.

26. In terms of paragraph 3.1.6 of the plan it indicates as follows, there must be a sign board to indicate the hours of operation of the launch site. At the Batting Bridge Launch Site there is no such sign which has been erected.

²¹ **Fedsure life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others** 1999 (1) SA 374 (CC) Para 56-58

27. in terms of paragraph 4.3.1 all users must be made aware of and agree to comply with the Operational Environmental Management Plan where registering to launch on the site and where to obtain a launch permit. No sign has been inserted to make people who wish to launch complete a register nor is there any indication as to where such register can be found

28. In paragraph 9.1.1 of the aforementioned plan, it indicates as follows, a sign board must be erected to indicate the name and contact number of the operator which must be erected

29. As indicated above as per the 5 paragraphs alluded to in the Operational Environmental Management Plan it is clear that the respondents are not Batting Bridge Public site. I annex photographs as annexure G1 to G6 of google map images as to where the public launch site is situated together with what the public site currently looks like. It is proposed that the respondents are to do the following to ensure compliance with the Operational and Environmental Management Plan:

(1) Erect sign boards which indicate the following

- i. Warning people that they use the launch site at their own risk;*
- ii. Indicating the hours of operation of the launch;*
- iii. Indicating the name and contact details of the operator; and*
- iv. Indicating to users that they need to obtain a launch permit to launch a boat from the operator and to complete a formal register.*

(2) Provide access control to the launch site as cars are not permitted to access the picnic site and launch site; and

(3) appoint an operator for the launch site.”

The provisions relating to the display or erection of sign or notices are shared with the provisions of section 2 of Standard ByLaw relating to Municipal Parks.

[47] Two answers to these assertions are given, namely, that the Municipality has substantially complied with the requirements of the Management Plan; Secondly that the Management Plan is invalid for it has not been signed and approved by the Municipality. That is said in the wake of the submission that the Management Plan was compiled and completed by the Member of Executive Council for Economic Development and environmental affairs in terms of section 2 of the Management of Public Launch Sites in the Coastal Zone Regulations, published by Minister of Environmental Affairs on 27th June 2014 in Government Gazette R497 of 27th June 2014.

[48] There are numerous difficulties with the later assertion. The respondents do not offer or state a scintilla of explanation for their reason to comply with an invalid Management Plan. They do not explain why they felt obliged to comply with it, if their assertion is not an afterthought or farfetched. Secondly, they do not make an assertion that the Management plan compiled and completed by MEC for Economic Development and Environmental Affairs can only be valid when it is signed and approved by the Municipality. There is no assertion that, as a legal requirement, the Management Plan depends for its validity on the signature of the Municipality. On the contrary, at page 65 of the papers it is shown that the approval of the Management Plan is provided to be made by a General

Manager of the Department of Economic Development and Environmental Affairs, which Department is its compiler. Accordingly, there is no merit in respondents' version and I accordingly find that the respondents failed to comply with the Management Plan too. The Management Plan share some similarities with Section 2 of Standard ByLaw referred to above.

[49] The Management Plan was compiled and completed in terms of the section 2 of the Management of Public Launch sites in the Coastal Zone Regulations. Accordingly, it has the same force and effect as the Regulations in terms of which it was made.²²It is admitted in the respondent's answering affidavit that the Management Plan was completed in terms of the aforesaid regulations.

[50] The respondents have raised a point of misjoinder of the second respondent, who is the Municipal Manager. There is no merit on this contention too. The second respondent is cited in his official capacity as an accounting officer of the Municipality and as a functionary who has power to implement court orders. As an accounting officer the Municipal Manager is responsible for all assets, income, liabilities and expenditure of the Municipality. If there are liabilities that need to be discharged, the Municipal Manager is responsible for that too. The Municipal Manager is reposed with power to comply with Municipal Finance Management Act²³.

[51] The relief sought in this application involves not only the income and expenditure of the Municipality, it may lead the Municipality to incur liabilities as a result of putting into effect contents of the court order that may ensue herefrom. Some external service providers may be required to do some or all of the things the Municipality is required to do, and as a result of that the Municipality may incur liabilities. In discharging its

²² **National Pride Trading 452(Pty) Ltd v Media** 24 Ltd 2010 (6) 587 (ECP) Para 31.

²³ Section 55(2) of the Local Government Municipal Systems Act 32 of 2000.

liabilities and expending on Municipality's income, it must certainly comply with the prescripts of the Municipal Finance Management Act. The Municipal Park in question is the Municipality's asset for which the Municipal Manager is responsible.

[52] Misjoinder is the joining of several plaintiffs or defendants in one action in circumstances which the law does not sanction; that is, objection is that wrong plaintiffs are suing or the wrong defendants are being sued.²⁴ In this case the joinder of the Municipal Manager is sanctioned by Law as it would be of no practical value to seek an order in matters that are entirely the responsibility of the Municipal Manager without him having been joined. Otherwise, the applicant would be penalized by a plea of non-joinder. Misjoinder issue cannot succeed. The Municipal Manager has direct and substantial interest in the subject matter of litigation.²⁵

[53] In conclusion the site users and the community around the sites have a right to an environment that is free of crime, as envisaged in section 3 of the standard ByLaw relating to Municipal Parks. They have a right to enjoy the parks that are clean, secured or fenced, without noise pollution or excessive loud music. They have a right not to experience uncontrolled intoxication of liquor in the park by other site or park users. They have a right to notices prominently displayed at the entrance to any part of the park indicating the days and hours during which such park or part thereof shall be open to the public and places where fire may be lit.²⁶ They have a right to protection of these rights by the Municipality by means of enforcing and administering its ByLaw relating to parks and ByLaw on Waster Management. They have a right to use park or site that is not overcrowded.

²⁴ Erasmus: Superior Court Practice, 2nd Edition, Volume 2 Page D₁ Rule 10-2.

²⁵ **Amalgamated Engineering Union v Minister of Labour** 1949(3) SA 637 at 657.

²⁶ Section 156(1)(2) of the Constitution; Section 2 and 3 of the Standard ByLaw relating to Municipal Parks.

[54] The Municipality has failed to protect these rights and as a result of that the park or site users are unable to enjoy those rights. It is common cause that endeavours were made by Anthony Balshow to amicably resolve this matter by complaining to the respondents. Anthony Balshow prepared and completed a report which was submitted to the respondents on 06th September 2021. The report was tabled and discussed in a meeting that was held on 07th September 2021 with *inter alia*, the respondents. Subsequently a proposed plan was submitted to the respondents. All those endeavours did not assist to resolve the issue of the Municipal parks or sites in question. This court was resorted to as there was no other remedy available to the applicant. The letter that was penned and delivered to the respondents was in vain.

ORDER

[55] In the following result I grant the following order:

- 55.1. That the respondents are hereby ordered to take measures to ensure access control, limit access, open and locking the boom gate at designated times at the park area within 90 days of the granting of this order;
- 55.2. That the respondents are hereby ordered to maintain and keep the park free of litter by regularly cleaning the park and providing more bins in the park area;
- 55.3. That the respondents are hereby ordered within 90 days of the granting of this order to ensure that the old lock at the boom gate of the picnic site is replaced with a working and more suitable lock;

- 55.4. That the respondents are hereby ordered to fence the boundary of the picnic area to avoid unauthorized access to the picnic site within 90 days of the granting of this order;
- 55.5. That the respondents are hereby ordered to take measures to ensure that they monitor and control the use of liquor and excessive music being played at the picnic site;
- 55.6. That the respondents are hereby ordered to comply with the Operational Environment Management Plan by erecting a sign within 90 days of the granting of this order which indicates the following:
- 55.6.1 All users of the Batting Bridge public launch site do so at their own risk;
- 55.6.2 The hours of operation of the batting Bridge launch site;
- 55.6.3 The name and contact number of the operator; and
- 55.6.4 Indicating that users of the launch site must obtain a launch permit to launch a boat from the operator and complete a formal register
- 55.7. That respondents are hereby ordered to ensure compliance with par 3.1.3 of the Operational Environment Management Plan in respect of providing adequate access control to the Batting Bridge launch site by inserting a boom gate at the front of the launch site or any other manner the respondents deem fit in terms of the Operational Management Plan within 90 days of granting of this order;

55.8. That the respondents are hereby ordered to appoint an operator for the batting bridge launch site whose details appear on the sign to be inserted as per order granted in 55.6 above.

55.9. That the respondents are hereby ordered to pay costs of the application on a party and party scale.

A.S ZONO
ACTING JUDGE OF THE HIGH COURT

APPEARANCES

Counsel for the Applicant : **ADV TARR**

Instructed by : **NIEHAUS McMahon INC**

Applicant's Attorneys

43 Union Avenue

Selborne

East London

5219

Tel: 043 721 3322

E-mail: mkombos@niehausmcmahon.co.za

Ref: B. Blignaut/mk/MAT

Respondent's Counsel : **ADV MAFU**

Instructed by : **DYUSHU MAJEBE INC**

Respondent's attorneys

No 20 Smart Road

Nahoon

East London

Tel: 043 726 4616

Email: admin@dmlaw.co.za

Ref: MKD/LIT471

Date heard : 22nd February 2024

Date Delivered: :02nd April 2024