IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable: YES/NO Of Interest to other Judges: YES/NO Circulate to Magistrates: YES/NO

Application number: 4027/2021

In the application between:

KENA MEDIA (PTY) LTD Applicant

and

MANGAUNG METROPOLITAN MUNICIPALITY Respondent

CORAM: VAN ZYL, J

DELIVERED ON: 16 AUGUST 2022; 10 OCTOBER 2022

---

[1] This is the return date of a rule *nisi* which was issued on an urgent basis by one of my colleagues. In terms of the Court Order the following relief was, *inter alia*, ordered:

"1. That this application be enrolled and heard as an urgent application in terms of Rule 6(12) ...

2. A rule *nisi* is granted calling upon the respondent to show cause ... as to why an order in the following terms should not be granted:

   2.1 That the respondent be ordered to restore possession of and replace the applicant's electronic billboard to its location at Protea Hotel, corner Parfitt and Henry Streets, Bloemfontein and to its former state;

   2.2 The respondent be ordered to pay all such costs as are necessary for the restoration and replacement of the Applicant's electronic billboard as per 2.1"

[3] Although the Applicant in its notice of motion requested that the aforesaid *rule nisi* should serve as an interim interdict with immediate effect pending the finalization of the application, the Court Order does not reflect such relief.

Background:

[4] The bone of contention is an electronic billboard ("the billboard") situated at the corner of Parfitt Avenue and Henry Street, Bloemfontein. It is common cause that the Applicant has an interest in the billboard, although the nature of its interest is in dispute.

[5] On 1 September 2021 the respondent, as applicant, issued an application against the respondent, as first respondent, in which the respondent, *inter alia*, sought the following relief against the applicant:

"1. Directing the First and/or Second Respondent to remove or cause to be removed at their own cost, within 7 (seven) days of this order, the outdoor advertising sign described as a permanent single sided externally eliminated flashing electric billboard with a digital screen, measuring approximately 6 (six) metres in height and 3 (three) metres in width, and located at corner Henry Street and Parfitt Avenue in Bloemfontein, Free State Province.

2. Directing the First and/or Second Respondent to rehabilitate at their own cost .... the soil which was affected by the erection of the abovementioned outdoor advertising sign on the Applicant's land...

3. Failing compliance with the above orders, authorising the Sheriff of this Court .... to take all such steps as are necessary to ensure complete and proper compliance with such orders, and directing that the costs attendant thereupon shall be borne by the First and/or Second Respondent.

4. Restraining and interdicting the First and Second Respondents from erecting or installing the abovementioned outdoor advertising sign, or any other advertising sign, anywhere within the Applicant's municipal area or jurisdiction, unless and until such time as consent therefore has been granted by the Applicant or its counsel in the prescribed form, following compliance with the applicable by-laws and statutes.

5. Directing the First and Second Respondents, alternatively the First Respondent, to pay the costs of the application on the scale of attorney and own client, alternatively on a party and party scale."

[6] I will refer to the aforesaid application as the first application. However, for the sake of clarity, I will henceforth refer to the present applicant as Kena Media and to the present respondent as the

Municipality, both in relation the first application and the present application.

[7] From a reading of paragraph 5 of the founding affidavit filed in the present application, read in conjunction with paragraph 30.3.1 of the answering affidavit thereto, the parties appear to be *ad idem* that the first application was brought in terms of section 10 of the Mangaung Metropolitan Municipality Outdoor Advertising By-laws, published in Provincial Gazette Notice No. 77 of 21 November 2008, as amended, published in Provincial Gazette No. 101 of 9 October 2015 and as further amended, published in Provincial Gazette Notice No. 38 of 19 July 2019 ("the By-laws").

[8] Kena Media opposed the first application and filed an answering affidavit and counter-application on 8 October 2021. In terms of the counter-application Kena Media is seeking an order for the review and setting aside "*as unlawful and constitutionally invalid the promulgation of the Mangaung Metropolitan Municipality Outdoor Advertising By-law, issued in the Provincial Notice No. 46 of 2019 and purportedly passed by Council of the Municipality on Tuesday, 5 March 2019, to the extent that the By-law did not go through a process of public participation*", as well as further consequential relief.

[9] At the time of the hearing of the present application no further exchange of application papers had occurred in the first application.

<u>The founding affidavit:</u>

[10] The deponent to the founding affidavit filed in the present application is Mr Matsepe, a director of Kena Media. According to his affidavit he received a call from a friend on 20 December 2021 who informed him that it appears that the panels of the billboard had been removed and that a huge crane was located in close proximity to the billboard, purportedly to remove same. According to him he knew that there was no Court Order which authorised the removal of the billboard and that the purported removal by the respondent was consequently *prima facie* unlawful. The deponent immediately contacted his attorney to inform him of the imminent removal of the billboard. On the very same date a letter of demand was addressed to the office of the respondent's Municipal Manager in which letter, *inter alia*, the following was stated:

> "2. We have received instructions that the Municipality has authorised the unlawful removal of the billboard of our client located at Protea Hotel, Corner Parfitt Avenue and Henry Street.
>
> 3. The removal of the billboard without a court order is both unlawful and undermines the court process initiated by the Municipality under case number 4027/2021 in the High Court, Free State Province.
>
> 4. Should we not receive your undertaking to stop the unlawful removal of the billboard by no later than 12:00 pm on Tuesday, 21 December 2021, the subject of litigation under case number 4027/2021, we hold instructions to bring an urgent application for the spoliatory relief."

[11] The deponent to the founding affidavit further alleged as follows:

"17. Kena Media was in peaceful and undisturbed possession of the electric billboard sign prior to the unlawful conduct of removal of panels of the billboard.

18. I am not aware of the contractor's details contracted by the Municipality to remove the billboard. I therefore seek an urgent order preventing the removal against whoever is on site, whether by the Municipality or by any person or entity contracted for the purpose of the removal of the electronic sign at Protea Hotel.

19. Our attorneys have never, despite being on record, been informed of the intention to remove the electronic billboard and sign.

20. Kena Media has been unlawfully dispossessed by the Municipality and its only remedy to prevent imminent destruction and removal of the billboard is to approach the Court to maintain the status quo pending the hearing of the case 4027/2021".

[12] Later in the founding affidavit the deponent also alleged as follows:

"24. Kena Media has a *prima facie* right to the relief sought, also buttressed by the pending litigation before the Honourable Court under case number 4027/2021.

25. There is no alternative remedy available to Kena Media, other than spoliatory relief and interdictory relief to stop the Municipality`s under-hand tactics of self-help ...

26. The balance of convenience, in the light of the pending matter in case 4027/2021 in which the Municipality seeks an order for the removal of the billboard which they are now removing without a court order, favours the applicant."

The answering affidavit:

[13] The deponent to the answering affidavit is Mr Moore, the "*Acting City Manager*" of the Municipality at the time.

[14] In the answering affidavit the Municipality raised a number of issues in opposition to the application, some of which can be considered to be points *in limine* and others which pertain to the substantive merits of the application. In order to prevent the repetition of allegations, I will deal with the detail of the issues which I deem relevant when I consider the merits of the application.

The basis of the application:

[15] Kena Media in its founding affidavit dealt with the requirements for a spoliation order, on the one hand, but also for interdictory relief, on the other hand, and the Municipality followed suit in its answering affidavit. However, the legal representatives of both parties approached the matter in their respective heads of argument on the basis of a spoliation application and also directed their oral arguments accordingly, in my view correctly so.

Points *in limine*:

Lack of urgency:

[16] The alleged lack of urgency and the grounds therefore were raised both in the Municipality`s answering affidavit and in the heads of argument of Mr Ress, who appeared on behalf of the Municipality. Mr Ress also addressed the point in his oral argument.

[17] Mr Mfazi, who appeared on behalf of Kena Media, submitted that because the order pertaining to urgency had already been granted by the court who issued the *rule nisi*, same cannot be revisited or re-considered at this stage of the proceedings, since that would be tantamount to me sitting as a court of appeal on the issue.

[18] In support of his aforesaid contention, Mr Ress relied on the unreported judgment of **Tiprow Controls (Pty) Ltd v Beeftech Botswana (Pty) Ltd** (A3125/2018) [2019] ZAGPJHC 96 (19 March 2019). In that matter the Magistrate in the court *a quo* granted an urgent *ex parte* order, which it confirmed on the return date thereof. The appellant (the respondent in the court *a quo)* noted an appeal against the whole of the judgment and the order. The court of appeal found at paras [12] and [13] of the aforesaid judgment that the respondent (the applicant in the court *a quo)* failed to make the necessary allegations in its founding affidavit filed in the court *a quo* so as to have justified the hearing of the application on an urgent *ex parte* basis and that the court *a quo* ought to have dismissed the application on that score alone. With regard to the confirmation of the *rule nisi,* the court found that the court *a quo* further erred by having confirmed the *rule nisi* in circumstances where it ought to have discharged the *rule nisi* due to the non-disclosure of all material

facts and also because the relief sought on the merits was incompetent as the court had no jurisdiction in relation thereto.

[19] In my view the aforesaid judgment cannot serve as support of the contention by Mr Ress. Firstly, that was a judgment on appeal and therefore it was competent for that court to have found that condonation should not have been granted by the court *a quo*. I am not sitting as a court of appeal. Secondly, the finding that the *rule nisi* should not have been confirmed on the return day, clearly relates to the *rule nisi* pertaining to the substantive relief sought in the application and not the condonation order. It was not found that the court *a quo* ought to have re-visited the condonation order on the return day. Similarly, in the present matter the condonation order was issued as a substantive order on its own – it is not part of the *rule nisi*. It is therefore not competent for me to re-visit or re-consider it at this stage of the proceedings.

[20] This point *in limine* can consequently not be upheld.

<u>The attestation of the founding affidavit:</u>

[21] It was argued on behalf of the Municipality that the founding affidavit is fatally defective in that the attestation thereof by the Commissioner of Oaths reflects that the deponent to the founding affidavit is female whilst it is evident from the contents of the affidavit that the deponent is male. Mr Ress relied on the judgment in **<u>Absa Bank Limited v Botha N.O.</u>** 2013 (5) SA 563 (GNP) **<u>[Absa Bank]</u>**

and submitted that the application should be dismissed due to the non-compliance with the Regulations Governing the Administration of Oath or Affirmation, issued in terms of section 10 of the Justices of the Peace and Commissioners of Oaths Act, Act 16 of 1963. Mr Mfazi, on the other hand, submitted that there had been substantial compliance with the requirements of the aforesaid Regulations and that this point *in limine* should therefore be dismissed.

[22] Regulation 2(1) determines as follows:

> "2(1) Before a commissioner of oaths administers to any person the oath or affirmation prescribed by regulation he shall ask the deponent,
>
> (a) whether he knows and understands the contents of the declaration;
>
> (b) whether he has any objection to taking the prescribed oath; and
>
> (c) whether he considers the prescribed oath to be binding on his conscience."

[23] In the present matter the certificate of attestation was typed and formed part and parcel of the contents of the affidavit, with open spaces to have been completed by the Commissioner of Oaths with regard to where and when the commissioning occurred and with further open spaces for the signature of the Commissioner of Oaths, his or her full names, designation and business address. It is evident that a constable of the South African Police Services commissioned the affidavit. The affidavit also bears an official stamp of the SAPS. The said certificate reads as follows:

> "Sworn to and signed before me at SANDTON on the 21 day of DECEMBER 2021 after the deponent had acknowledged that she –

a. knows and understands the contents hereof;

b. has no objection to taking the prescribed oath; and

c. considers the oath as binding on her conscience."

[24] The aforesaid **Absa Bank** – matter dealt with an affidavit filed in support of an application for summary judgment. In the said matter the Commissioner of Oaths certified that the deponent to the affidavit is a male whilst it was evident that she is a female. The Court found that in those circumstances the inference was justified that the deponent had not signed the verifying affidavit in the presence of the Commissioner of Oaths. The Court further found that the situation was compounded by the reference in the certificate of balance to the deponent as a manager and not as a "*manageress*" like the deponent described herself in the affidavit. The Court subsequently found as follows at para [13]:

"…the Court should not be placed in a situation where it is required to speculate as to the gender of the deponent to an affidavit and, more particularly, whether the deponent had, in fact, sworn to and signed the affidavit in the presence of the commissioner of oaths. Simply put, the Court should not be called upon to speculate on the question of whether the verifying affidavit, in an application for summary judgment, is an affidavit or not. Accordingly, on the face of it, the plaintiff's verifying affidavit is inherently contradictory and irregular, and for that reason I find that it does not constitute an affidavit as contemplated in rule 32(2) of the Uniform Rules of Court."

[25] In my view the said judgment needs to be considered against the background that it is trite that because of the stringent nature of

summary judgment the courts have often emphasized the need for strict compliance with the rule. See **Maharaj v Barclays National Bank Limited** 1967(1) SA 418 (A) at 423.

[26] In **Malan v Minister of Police N.O. and Others** 2019 (2) SA 469 (GJ) the Court stated at para [42] of the judgment as follows with regard to the aforesaid **Absa Bank**-judgment:

"I have some doubts about the correctness of the approach which was adopted by the Court in the Absa Bank-matter because the approach adopted therein seems, with due respect, highly technical and based on elevating form over substance. ..."

The Court further pronounced as follows at paras [43] to [44]:

"[43] In the present matter the commissioner, as indicated earlier, does not indicate the gender of Makgoka. In the certificate he uses both pronouns 'he/she'. Although he (Makgoka) does not indicate whether he is a male or female in his affidavit, it is, however, apparent from the reading of the affidavit in its totality and from its context, that Makgoka is a male and that it is logical to conclude that the pronoun 'he' should be read into it. ...In any case, in my view, the fact that the correct pronoun was not used to indicate the gender of the deponent does not detract from the contents of the affidavit which were deposed to by a person. Reading it in its context it is clear that its purpose was to persuade the court that the police officer had a reasonable belief that an offence was committed, in that the applicant was conducting the business of gambling without complying with the law.

[44] In light of the above, I find that failure by the commissioner to indicate that Makgoka is a male or a female is not a material non-compliance as to warrant exclusion of the evidence in his affidavit for that reason."

[27] In **Firstrand Bank Limited v Briedenhann** 2022 (5) SA 215 (ECGq) at para [49] the Court determined as follows:

"The authorities referred to earlier make it plain that the Regulations, safely couched in negative terms, are directory. Accordingly, where those Regulations have not been followed and adhered to, a court has a discretion in whether or not to admit the affidavit. In such circumstances a court will determine whether there has been substantial compliance with the Regulations. That determination is one of fact, having regard to the circumstances of the case."

[28] In **Land and Agricultural Development Bank of South Africa v Winsbeslis Vyf (Pty) Ltd** (28604/21) [2022] ZAGPPHC 117 (16 February 2022) the applicant sought an order for the final liquidation of the respondent. The attestation clause in the founding affidavit referred to "he/she" and the respondent relied on the **Absa Bank** – decision and submitted that the affidavit was not properly commissioned which rendered the application defective. The Court found as follows at paras [11] to [12]:

"[11] In my view the decision in Absa Bank v Botha is distinguishable to the decision in Malan v Minister of Police N.O. and Others where the court held that reference to the pronouns 'he\she' in the attestation clause was of no consequence if it is apparent from the affidavit and the context that the deponent was a male, and that it was logical to conclude that the pronoun 'he' should be read into it.

[12] I, agree with the remarks by the Judge in the decision in Malan v Minister of Police N.O. and Others that what is important in the affidavit is the contents thereof rather than failure to delete one of the pronouns namely 'she\he', of course it depends on the nature of the matter.

[13] In my view the defence of the respondent that the founding affidavit is not properly commissioned must fail."

[29] In the present matter, the deponent to the founding affidavit, Mr Matsepe, is no stranger with regard to the pending dispute between the parties. He was also the deponent to the answering affidavit filed in the first application. It is not denied that he is a director of Kena Media and therefore it is by no means strange that he would depose to an affidavit on behalf of Kena Media. Like I have already mentioned earlier, the attestation certificate had been pre-typed as part of the affidavit. It is not as though the Commissioner of Oaths, on his own accord, indicated the deponent to be female. When the totality of the facts and circumstances are considered I have no reason to question whether Mr Matsepe is in fact the person who signed the affidavit and/or whether he signed it in the presence of the Commissioner of Oaths.

[30] In my view there was substantive compliance with the Regulations and this point *in limine* can therefore not be upheld.

<u>The authority of Mr Matsepe:</u>

[31] In the founding affidavit Mr Matsepe stated that he is a director of Kena Media and he further averred as follows in paragraph 1.2 of the founding affidavit:

"I am duly authorised to depose to this affidavit in an application brought by Mangaung Metropolitan Municipality under the above case number. As proof of my authority I annex hereto the resolution of meeting of the Directors of the first respondent (sic) marked Annexure 'TM1'."

[32] The aforesaid Annexure "TM1" bears a heading "*Kena Media Proprietary Limited*" and reads as follows:

"**ROUND ROBIN RESOLUTION:**

On this the 21st day of December 2021 held at Johannesburg we Lerumo Maisela and Tshepo Matsepe, the Directors of Kena Media Proprietary Limited ('the company') hereby approve the following resolution:

THAT

Mr Tshepo Matsepe is hereby authorized to sign all documents necessary and to do all things necessary relating to the current litigation against Mangaung Meropolitan Municipality and further to institute any further action, should same be deemed necessary."

At the foot of the resolution, both on the left hand side and on the right hand side thereof, it reflects a short line which appears to be a space for signatures and underneath the two respective lines, both on the left side and on the right side, the word "Director" is reflected underneath each of those lines. On the line on the left hand side the typed name "*Lerumo Maisela*" appears above the line and on the right hand side a signature appears above the line.

[33] In response to the aforesaid allegations on behalf of Kena Media, the Municipality responded as follows in his answering affidavit:

"27. **AD PARA 1**

27.1 It is denied that Matsepe is duly authorised to depose to this affidavit on behalf of the applicant.

27.2 The Resolution annexed to the founding affidavit marked annexure 'TM1' is fatally defective.

27.3 Further legal argument will be rendered at the hearing of the application in this regard.

27.4 It is accordingly denied that Matsepe has locus standi or is duly authorised to depose to the founding affidavit on behalf of the applicant.

27.5 Accordingly, it will be requested at the hearing of the application that the current application for spoliation be dismissed on this basis alone."

[34] Although the aforesaid challenge of the deponent's authority was also referred to as the said deponent's lack of *locus standi*, authority and *locus standi* are two different issues. In this regard the following is stated in **Erasmus: Superior Court Practice**, D.E. van Loggerenberg, Jutastat at RS 18, 2022, D1-96:

"It is submitted that authorisation to institute action or motion proceedings should not be conflated with locus standi in iudicio. Authorisation concerns a question whether a party is properly before the court in legal proceedings. Locus standi materially concerns a direct interest of a party in the relief sought in the legal proceedings."

[35] The deponent's authority to have deposed to the affidavit on behalf of Kena Media, is neither here nor there. No such authority is necessary. In **Ganes and Another v Telecom Namibia Limited** 2004 (3) SA 615 (SCA) [**Ganes**] at para [19] the Supreme Court of Appeal determined as follows:

"…. In my view, it is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised."

[36] Insofar as the Municipality attempted to challenge the authority of the deponent to the founding affidavit to have launched/instituted the application on behalf of Kena Media, the Court found in **Ganes**, *supra*, at para [19] as follows:

"… In any event, Rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant. The appellants did not avail themselves of the procedure so provided. (See Eskom v Soweto City Council 1992 (2) SA 703 (W) at 705 C – J.)"

[37] In **<u>Unlawful Occupiers, School Site v City of Johannesburg</u>** 2005 (4) SA 199 (SCA) the authority of the person who deposed to the affidavit on behalf of the respondent (the applicant in the court *a quo*) was challenged. In the said matter the appellant directed its attack against a resolution of the municipal council which authorised the deponent to have launched proceedings of the kind in that matter. The Court determined as follows at para [14]:

"At the hearing of the appeal, council for the appellants conceded that she could not support this kind of appeal. I think the concession was fairly made. The issue raised had been decided conclusively in the judgment of Flemming DJP in Eskom v Soweto City Council 1992 (2) SA 703 (W), which was referred to with approval by this Court in Ganes and Another v Telecom Namibia Limited 2004 (3) SA 615 (SCA) at 624 I – 625 A. <u>The import of the judgment in Eskom is that the remedy of a respondent who wishes to challenge authority of a person allegedly acting on behalf of the purported applicant is provided for in Rule 7(1) of the Uniform Rules of Court.</u> ..." (Own emphasis)

[38] The Court further stated as follows at paragraph [16] of the said judgment:

"However, as Flemming DJP has said, now that the new Rule 7(1) remedy is available, the party who wishes to raise the issue of authority should not adopt the procedure followed by the appellants in this matter, i.e. by way of argument based on no more than a textural analysis of the words used by a deponent in an attempt to prove his or her authority. This method invariably resulted in the costly and wasteful investigation, which normally leads to the conclusion that the application was indeed authorised. After all, there is rarely any motivation for deliberately launching an unauthorised application. In the present case, for example, the respondent's challenge resulted in the filing of pages of resolutions annexed to a supplementary affidavit followed by lengthy technical arguments on both sides. ..."

[39] The judgment in the matter of **ANC Umvoti Council Caucus and Others v Umvoti Municipality** 2010 (3) SA 31 (KZP) dealth with all three the aforesaid judgments and determined as follows at paras [14] and [27] to [29]:

"[14] The question is, rather, whether an applicant is obliged to prove, on the papers, that authority has been given to initiate litigation where the applicant is an artificial person. ...

[27] ... Whether or not the litigation has been properly authorised by the artificial person named as the litigant would not be dealt with by means of evidence led in the application. If clarity is required, it should be obtained my means of Rule 7(1) since this is a procedure which safeguards the interests of both parties. ....

[28] ... It is further my view that the application papers are not the correct context in which to determine whether an applicant which is an artificial person has authorised the initiation of application proceedings. Rule 7(1) must be used. This means that I disagree with Mr Gajoo's submission that Rule 7(1) provides only one possible procedure and that, if the respondents elects to challenge the matter of authority on the application papers, the applicant is required to prove such authority on the papers.

[29] There was no challenge in terms of Rule 7(1) in the application which is the subject of this appeal. The appropriate procedure was therefore not used by the appellants. It was accordingly not necessary for the applicant to prove the authority to initiate the application, nor appropriate to attempt to do so on the papers. It was also not necessary for the court a quo to make a finding

relating to authority on affidavits delivered in the matter. Since there was no challenge in the required manner to the authority of the respondent's attorney who signed the notice of motion and initiated the application in the accepted way, this court does not have to deal with the question of authority. I am therefore of the view that the appeal on this issue must fail."

[40] In the present matter there was no challenge of the deponent's authority by means of Rule 7(1) and I therefore do not have to deal with the question of authority.

[41] This point *in limine* can consequently not be upheld.

Merits of the application:

Locus standi of Kena Media, non-joinder of PACOFS and "peaceful and undisturbed possession":

[42] In paragraph 29.16 of the answering affidavit the Municipality averred as follows:

"PACOFS have not been cited as a party to these proceedings and the applicant accordingly does not possess the required locus standi to bring this current application alone as it was PACOFS, alternatively PACOFS and the applicant jointly who were in alleged peaceful and undisturbed possession."

[43] Although the issues of *locus standi* and non-joinder are in essence also points *in limine*, I deem it apposite to deal with them in conjunction with the substantive requirement of whether Kena

Media was in peaceful and undisturbed possession of the billboard, since in the present matter the three issues are intertwined.

[44] In paragraph 22 of the answering affidavit the Municipality referred to Annexure "TM3" attached to the affidavit filed on behalf of Kena Media in the counter-application, which forms part of the first application. It is alleged by the Municipality that in terms thereof Kena Media "*concedes that it is not the owner of the sign but that its function was merely to refurbish the sign*". The Municipality further alleged in paragraph 29.15 of the answering affidavit that Kena Media entered into a Joint Venture Agreement with PACOFS and that it appears that the sign belongs to PACOFS.

[45] In its replying affidavit Kena Media alleged as follows:

"8.1 I am advised that in the spoliation application, all Kena Media needs to establish is that it was in peaceful and undisturbed possession at the time it was dispossessed. These elements, I am told, appear from the face of the papers because the Municipality launched an application [the first application] against Kena Media for the removal of the signage as owner and possessor of the signage.

8.2 I am advised and contend that ownership of the signage need not be established in this application…

8.3 I however wish to highlight to this court that in terms of the agreement between the applicant and PACOFS, the 'refurbishment of the site' entails replacing the old PACOFS signage with a digital signage belonging to Kena Media, it is accordingly the applicant who had the undisturbed possession of the signage."

[46] From a reading of the Memorandum of Understanding entered into between Kena Media and PACOFS, attached to the counter-application in the first application as Annexure "TM3", the parties recorded that they have identified a number of PACOFS notice boards which were to be converted into billboards for the purpose of third party advertising. It was further recorded that PACOFS gives consent to Kena Media to convert its notice boards into billboards.

[47] The first application was directed at Kena Media as first respondent and one Paseka Molelengoane as second respondent. In the said first application the Municipality alleged that Mr Molelengoane "*was at all relevant times acting on behalf or on instructions of the first respondent*". From the totality of the papers it is evident that Mr Molelengoa was the manager of Kena Media at the time. On the Municipality's own version in the first application Molelengoane, on behalf of Kena Media, submitted an "*application for outdoor advertising sign*" to the Municipality on behalf of Kena Media during or about May/June 2021 in relation to the present billboard. This application is annexed to the founding affidavit filed in the first application as Annexure "FA3". It was indicated that the billboard was to be situated at the corner of Henry Street and Parfitt Road, the owner of which property is "*Mangaung Metropolitan Municipality PACOFS*". The application further indicated that it related to the replacing of an existing sign. The Municipality further alleged in the said affidavit that Molelengoane, acting on behalf of Kena Media, erected the billboard or caused it to be erected on the Municipality's

land at the corner of Henry Street and Parfitt Avenue. This was during or about May 2021, alternatively June 2021. The Municipality considered the billboard to be an illegal structure and therefore sent an e-mail on 30 June 2021 to Mr Molelengoane, annexure "FA1" to the founding affidavit in the first application (also attached to the answering affidavit in the present application as annexure "MMM3"), requesting him to remove the "*illegal structure (electronic billboard) erected on council property*". When he failed to do so, a letter dated 14 July 2021, attached to the founding affidavit filed in the first application as Annexure "FA4", was addressed by the Municipality`s attorneys at the time Mr Molelengoane in his capacity as "*General Manager*" of Kena Media. In the said letter reference was made to an application by "*Kena Media*" to have the sign erected and displayed at the said property. It was demanded that the structure be removed since it was in contravention of section 10(1) of the By-laws of the Municipality. From the follow-up events and the subsequent correspondence between the attorneys of the Municipality and the attorney of first instance of Kena Media, it is evident that it was accepted by the Municipality that Kena Media was the entity who was in control and possession of the billboard. This is further confirmed by the fact that the Municipality issued the first application against Kena Media. The Municipality itself did not make any mention of any rights and/or obligations pertaining to the billboard by PACOFS.

[48] It is trite that in order to obtain a spoliation order two allegations must be made and proved:

(a) that the applicant was in possession of the property; and

(b) that the respondent deprived him of the possession forcibly or wrongfully against his consent.

See **Blendrite (Pty) Ltd and Another v Moonisami and Another** 2021 (5) SA 61 (SCA) at para [6]. The said prove needs to be on a balance of probabilities.

[49] In spoliation proceedings a court does not question the lawfulness of an applicant's possession, nor the question of ownership. In **Erasmus: Superior Court Practice**, *supra*, at RS 18, 2022, D7-7 the following is stated with regard to the requirement of possession:

> "In spoliation proceedings the court is not concerned with the lawfulness of the applicant's possession. In other words, the applicant must show not that he was entitled to be in possession, but that he was in de facto possession at the time of being despoiled. ... The possession which must be proved is not possession in the juridical sense; it may be enough if the holding by the applicant was with the intention of securing some benefit for himself, accompanied by the physical element of corpus ordidentio. The physical element 'implies physical control rather than physical apprehension'. It is therefore, not necessary that the possession be continues".

[50] Based on n the totality of the facts and circumstances of this matter, I am satisfied that Kena Media proved on a balance of probabilities that it is the entity who was in peaceful and undisturbed possession of the billboard at the time when it was removed by the Municipality. It consequently also had the necessary *locus standi* to have

launched the application. In the circumstances it was not necessary to have joined PACOFS.

[51] Even should I be wrong in my last-mentioned finding to the extent that both Kena Media and PACOFS were in peaceful and undisturbed possession of the billboard at the time when the Municipality removed same (which I do not find), that would not have deprived Kena Media of its *locus standi* to have launched the application. The possession for purposes of spoliation need not be exclusive possession. A spoliation claim is also available to a person who holds jointly with others. See **Nienaber v Stuckey** 1946 AD 1049 at 1056. In such instance it would still not have been necessary to join PACOFS, since PACOFS would not have had a direct interest in the subject matter of the application, namely the alleged unlawful deprivation of Kena Media`s possession of the billboard by the Municipality.

Wrongful deprivation of possession:

[52] It is common cause between the parties that the billboard was removed by the Municipality/on instructions of the Municipality.

[53] The parties also appear to be *ad idem* that the first application was brought by the Municipality in terms of section 10 of the By-laws.

[54] In the answering affidavit filed in the present application the Municipality alleged that in terms of section 25(5) of the By-laws it

was entitled to have removed the billboard. The Municipality relied on the following facts and circumstances in support of its contention:

1. When the first application was launched, the billboard was not fully operational yet.

2. On 30 June 2021 at 11:05 the Municipality received an email from the First Engineer: Traffic Engineering of the Mangaung Traffic Department with regard to the billboard, which email, *inter alia*, stated the following:

   "We have received complaints and enquiries regarding this obviously unsafe and non-compliant installation from members of the public and concerned safety specialists in the city. It is unclear at this stage whether this installation had been approved in some way by the municipality, or whether it is a rogue advertiser that is acting in contravention of the Mangaung Outdoor Advertising By-laws. However, it is clear that the installation violates the municipal by-laws, SAMOAC provisions and national legislation. Of concern is the fact that the latest billboard is being erected within the functional boundaries of the relevant traffic intersection and directly in the sight line of the traffic signals at the intersection. It is thus obviously non-compliant with a very high traffic safety risk factor.

   You are kindly requested to take the necessary steps to have the installation removed as a matter of urgency, before the advertised has the opportunity to start advertising. The by-laws provide the necessary backing for the municipality to remove the installation at the cost of the advertiser, should the advertised refuses or fails to remove the installation."

3. On the same date, 30 June 2021, at "02:51 PM" the Municipality addressed an email to Mr Molelengoane regarding *"Kena Media structures in MMM*" and requested documentation and information regarding such structures at certain specified locations. The following was also stated in the said email:

> "Also, as discussed and explained to you, the Illegal structure (Electronic Billboard) erected on Council property on Erf 18/26408, Corner of Henry Street and Parfitt Avenue should please be removed as soon as possible."

4. On or about 25 November 2021 an inspection *in loco* was held at the corner of Henry and Parfitt Street by, *inter alia,* Mr Paul Monama of the Legal Department of the Municipality and Mr Suleman, the attorney of record of the Municipality. According to the Municipality the following findings were made during the inspection:

> "30.3.4 The electronic billboard is operational and is situated on an arterial road (i.e. Parfitt Street).
>
> 30.3.5 The distance of the electronic billboard from the centre of the intersection (Parfitt Street) to its current location is approximately 46 metres.
>
> 30.7 As the sign electronically flashes it distracts motorists and road users as it is not 100 metres in distance from the intersection of the arterial road. Furthermore, it is situated directly behind the traffic signal and has regular changing animations and displays as well as subliminal flashes."

Confirmatory affidavits of Mr Monama and Mr Suleman regarding the observation of the aforesaid findings during the inspection were attached to the answering affidavit of the Municipality.

5. On the basis of the aforesaid findings the Municipality, *inter alia,* stated as follows in its answering affidavit:

"30.6 Furthermore, and in total contravention of section 7(e) of Schedule 4 of the By-laws, the electronic billboard does not comply with the requirements as stipulated therein in respect of the distance from the centre of the intersection at which a sign is permitted to be erected and/or displayed on an arterial road. This By-law was introduced for the benefit and safety of all motorists and all pedestrians utilising the intersection.

30.11 Furthermore, section 25(5) of the By-laws states as follows:

'The Municipality may, without prior notice and without a Court Order, remove, confiscate and destroy any sign if the sign constitutes a danger to life or property or causes an obstruction of visibility to traffic or to a road traffic sign on or adjacent to any public road.'

30.12 The respondent was entitled to remove the sign without a Court Order and the respondent accordingly did so as the signage constituted an immediate danger to all motorists and users of the relevant intersection. The decision to remove the signage immediately in terms of section 25(5) of the By-laws was taken by the respondent after the findings of the inspection on the 25th November 2021 were conveyed to it.

30.19 In such circumstances and despite the previous application [the first application] having not been finalised, there is nothing precluding the respondent from proceeding in terms of section 25(5) of its By-laws in circumstances where it deems that immediate action is necessary.

30.22 Accordingly, the Respondent has throughout this application acted lawfully and was fully entitled in terms of its By-laws to remove the sign."

6. The Municipality also dealt with certain other aspects of the billboard and the erection thereof which, according to the Municipality, constituted transgressions of different sections of its By-laws. However, in view of the findings I will be making later in the judgment, I do not deem it necessary to deal with same.

[55] Mr Mfazi referred to the judgment in **Van Rhyn and Others N.N.O. v Fleurbaix Farm (Pty) Ltd** 2013 (5) SA 521 (WCC) at para [7] where the Court confirmed that:

"Deprivation is unlawful if it takes place without due process of law, or without a special legal right to oust the possessor."

He submitted that a spoliation order is meant to prevent the taking of possession other than in accordance with the law. Since the Municipality resorted to self-help when it removed the billboard without a Court Order, it constituted unlawful deprivation of Kena Media`s peaceful and undisturbed possession of the billboard.

[56] Mr Ress relied on the unreported judgment of **Midvaal Local Municipality v Meyerton Golf Club** (A3038/14) [2014] ZAGPJHC 235 (15 October 2014) **[Midvaal]** and submitted that spoliation cannot be found to have occurred in circumstances where a respondent acts in terms of a statutory right to dispossess.

[57] In **African Billboard Advertising (Pty) Ltd v North and South Central Local Councils, Durban** 2004 (3) SA 223 (N) **[African Billboard]** the applicant erected advertising signs on property owned by Spoornet, situated in the Durban area. The respondent local authority, acting under its building By-laws in force at the time, placed the applicant on terms to remove the offending signs. When the applicant did not comply with the notice requesting such removal within 14 days, the respondent authorised a contractor to remove the signs. That prompted a spoliation application which served before the Court *a quo.* It was common course that the respondent did not obtain a Court Order prior to the removal. The Court *a quo* dismissed the spoliation application. The question which served before the Court *a quo* and also before the Full Court on appeal was whether the respondent was entitled to enter upon Spoornet`s property and remove the signs without such a Court Order. The Court (of appeal) found as follows at 228 E – 229 A:

"The by-law in question confers a discretion on the city engineer to direct any person who has erected a sign either in contravention of the by-laws or without having received permission to erect such sign in the first place to remove the sign within 14 days from the date on which notice is given. In the event of non-compliance s 7(3) empowers the city engineer to remove the sign. I am not persuaded that the framers of the bylaws intended that this should occur without a Court order. It was a simple matter to say that no Court order would be required. Our Courts have in the past applied rules against self-help strictly. ...The canons of construction laid down by our Courts require the statutory provision to stipulate in clear language that the dispossession of an individual's property can take place without an order of Court. The by-law in the present case does not do so and I am of the view that the removal in question ought not to have been done without an order of Court." (Own emphasis)

The appeal was consequently upheld, the order of the Court *a quo* was set aside and it was declared that the removal of the signs was unlawful.

[58] The principles enunciated in **African Billboard** were confirmed and followed in **Midvaal** whereupon the Court found at paragraph [14] of the judgment that *"the appellant is not exonerated from obtaining a court order; the by-laws do not absolve the appellant...."*

[59] Contrary to the circumstances in the last-mentioned two cases, section 25(5) of the By-laws in the present matter explicitly makes provision for action by the Municipality without notice and without a Court Order in certain specified circumstances. I deem it necessary to repeat the contents thereof:

"25(5) The municipality may, without prior notice and without a Court order, remove, confiscate, and destroy any sign if the sign constitutes a danger to life or property, or causes an obstruction of visibility to traffic or to a road traffic sign on or adjacent to any public road." (Own emphasis)

[60] Based on the contents of the answering affidavit with regard to the danger the location of the billboard caused to motorists and pedestrians who utilised the intersection, already alluded to above, it is evident that it is the Municipality's case that it was entitled to have removed the billboard without a Court Order in the circumstances.

[61] The necessity for section 25(5) of the By-laws becomes evident when considered against the background of the preamble to the By-laws and its purpose, which are stipulated, *inter alia,* to be the following:

"…**WHEREAS** the Constitution authorizes and empowers municipalities to administer the local government matters listed in Part B of Schedules 4 and 5, which include Billboards and the display of advertisements in public places and any other matter assigned to it by national or provincial legislation, by making and administering By-laws for the effective administration of these matters; and

WHEREAS the National Road Traffic Act of 1996, as amended, and the Regulations thereto, aim to promote traffic safety, the By-laws is [*sic*] also aimed at contributing towards an advertising environment which does not increase traffic risks or endanger the lives of pedestrians and motorists; …" (Own emphasis) and

"2. **Purpose of By-laws**

The Mangaung Metropolitan Municipality must exercise its powers under these By-laws in the interests of amenity, public safety and business interests, and must take into account the considerations that this By-Law is to ensure that: -

(a) signs or advertisements may not constitute a danger or nuisance to members of the general public, whether by way of obstruction, interference with traffic signals or with the visibility of the signals, light nuisance or otherwise, thereby promoting the image of the Municipality and enhancing the civic pride of its inhabitants.

(b) ..." (Own emphasis)

[62] The aforesaid considerations of traffic safety and hence public safety also find expression in section 7 of Schedule 4 (Electronic Sign) to the By-laws, which Schedule the Municipality contends is applicable to the billboard in this instance:

"The provisions of sections 21(1)(a)–(c), and the following conditions apply to the position of a sign:

(a) No more than one sign may be displayed on a site;

(b) a sign consisting of a single board must be displayed perpendicular to or at an angle of up to 30 degrees to the direction of oncoming traffic;

(c) where two boards are joined together, the sign must be displayed with the axis of symmetry perpendicular to the direction of oncoming traffic;

(d) a maximum of two signs may be displayed in the vicinity of a road intersection; when the signs are located on different sides of the road;

(e) the display of a billboard is not permitted within a radius of 100 meters from the centre of an intersection on an arterial road and within a radius of 50 meters from the centre of an intersection on any lower-order road."

[63] In my view section 25(5) is precisely the type of By-law which the Court in the **African Billboard**-judgment had in mind when it stated as follows at 229 B – C of the judgment:

"I am mindful of the fact that there may be urgent cases such as a sign which is erected in such a way that it constitutes a danger to the public or causes an obstruction of visibility to traffic moving on a public road. Such a situation may call for removal forthwith. It seems to me that the by-law in question, inasmuch as it affords 14 days' notice, is not intended to cater for the above type of urgent situation. In my view the respondent should give consideration to amending the by-law in question which should provide for an approach to Court in all situations save for those as envisaged above where the public interest would require immediate removal."

[64] There is consequently no reason why the Municipality could not have relied and acted upon section 25(5) subject to the factual circumstances mentioned therein being present. In this regard Mr Ress correctly pointed out that Kena Media did not in its replying affidavit challenge the correctness of the findings made during the inspection conducted by the Municipality, nor the correctness of the allegations that the billboard constituted an immediate danger to all motorists and users of the relevant intersection.

[65] The Municipality's reasons and entitlement to have utilized section 25(5) in the circumstances therefore remain unchallenged.

[66] In view of the explicit and clear wording of section 25(5) of the By-laws that the Municipality may remove a sign in the stipulated circumstances without an Order of Court, the Municipality was, in my view, entitled to have removed the billboard in the present circumstances.

[67] Kena Media therefore failed to prove on a balance of probabilities that it was wrongfully deprived of its peaceful and undisturbed possession of the billboard.

Conclusion:

[68] The rule *nisi* consequently stands to be discharged.

Costs:

[69] Mr Ress contended that should the application fail, Kena Media should be ordered to pay the costs of the application on a scale as between attorney and client since the application was bad in law and Kena Media could rather have enrolled the first application and continued with its counter-application therein.

[70] The usual order pertaining to costs is that costs follow the outcome of the matter. However, it is also trite that the awarding of costs is in

the discretion of the Court, which discretion is to be exercised judicially.

[71] I take cognisance of the fact that section 25(5) authorises the Municipality to have removed the billboard without prior notice to Kena Media. However, it is important to note that the word "*may*" is used in the said section, which is indicative of the exercise of a discretion by the Municipality, both in relation to the absence of prior notice and the absence of a Court Order.

[72] In the answering affidavit the Municipality referred to the email sent by the Municipality to Kena Media, dated 30 June 2021, Annexure "MMM3" to the answering affidavit, which I already referred to in paragraph [47] above. It further stated in its answering affidavit:

> "30.4 However, despite the written request to the applicant to remove the structure, the applicant failed to do so. In terms of section 25(5) of the bylaws, there was no obligation upon the respondent to request the applicant to remove the signage."

[73] It is evident from the date and the contents of the aforesaid email that it did not emanate from the findings made during the inspection by the Municipality, nor was it intended to be any form of pre-cursor to the Municipality`s actions in terms of section 25(5) of the By-laws.

[74] At the time when the Municipality removed the billboard, the first application was pending between the parties. Written communication had been exchanged between the parties

themselves, as well as between their respective attorneys at the time. It would therefore have been very easy for the Municipality to have addressed a notice to Kena Media prior to the removal of the billboard. This is moreover so considering that the inspection occurred on 25 November 2021 and the removal of the billboard only occurred on 20 December 2021. There was consequently ample time and opportunity to have addressed a notice of demand to Kena Media and/or its attorney of record in the pending application, advising it of the findings made during the inspection and of the Municipality`s intention to remove the billboard.

[75] In my view the Municipality`s failure to have done so in the light of the above circumstances constituted, in my view. an improper exercise of their discretion in terms of section 25(5) in so far as prior notice is concerned. Had proper notice been given to Kena Media, the present application may have been prevented.

[76] In the circumstances I consider it fair and reasonable that each party is to pay its own costs, which costs are to include the reserved costs of 23 December 2021.

Order:

[77] I consequently make the following order:

1. The rule nisi is discharged and the application is dismissed.
2. Each party is to pay its own costs.

C. VAN ZYL, J

On behalf of the applicant: Adv. L. Mfazi
Instructed by:
Mlozana Attorneys
Bloemfontein

On behalf of the respondent: Adv. S.L. Ress
Instructed by:
Ngwane Attorneys
Bloemfontein

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No: **4027/2021**

Before the Honourable Justice **C VAN ZYL**

On the **16th** day of **AUGUST 2022**

In the matter between:

KENA MEDIA PTY LTD Applicant

and

MANGAUNG METROPOLITAN MUNICIPALITY Respondent

Having considered the documents before the court and having heard the legal practitioner/s,

IT IS ORDERED THAT:

1. The rule *nisi* is discharged and the application is dismissed;

2. Each party shall pay its own costs.

BY ORDER OF THIS COURT

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION,
BLOEMFONTEIN

Private Bag X20612, Bloemfontein 9300

2022 -08- 16

FSD-BFT-004

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION,
BLOEMFONTEIN

COURT REGISTRAR

MLOZANA ATTORNEYS INC.
NGWANE ATTORNEYS INC.