



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**

Date: 17 March 2025

Signature: [REDACTED]

Case No: **2023/003435**

In the matter between:

**THE CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY**

Applicant

and

COMMUNITY PROTECTION SOLUTIONS NPC

Respondent

JUDGMENT

GOEDHART AJ:

Introduction

[1] The dispute between the applicant (the City) and the respondent (CPS) concerns the lawfulness of road closures which CPS implemented during December 2022

in the Waverly and Savoy Estate area (*“the affected area”*). The road closures, adjacent to Corlette Drive and Louis Botha Avenue, affect 20 public roads and 17 intersections.

- [2] In this interlocutory application, CPS seeks leave to file a supplementary answering affidavit in terms of Rule 6(5)(e) to its answering affidavit delivered on 24 January 2023 in answer to the City’s urgent application launched on 18 January 2023 (*“the main application”*).

Litigation history

- [3] In the main application, the City seeks an order declaring all the structures installed by CPS in the affected area as unlawful; authorising it to remove the unauthorised structures; interdicting CPS from installing any structures in the affected areas; and setting aside advertisements published by CPS pertaining to the road closures in the affected area on the basis that the advertisements did not comply with section 44 of the Rationalisation of Local Government Affairs Act, 10 of 1998. The date originally envisaged for the hearing of the urgent application was 31 January 2023.

- [4] CPS filed its answering affidavit and counter-application on 24 January 2023. CPS’ contention in its counter-application is that the interim approval by the City of 14 September 2021 to approve the road closures automatically became final as, to CPS’ knowledge, no comments were lodged which negated: (i) the

necessity for a final decision to be taken by the City; (ii) the need to obtain final approval in writing; and (iii) the need for publication of a final approval. Its case is that its implementation of the road closures was lawful based on estoppel, legitimate expectation and established practice. It also seeks interdictory relief that, if it is held that final approval was required, that the City be interdicted from removing the road closure structures pending the final determination of its road closure application.

- [5] The City filed its replying affidavit and its answering affidavit to the conditional counter-application on 30 January 2023.
- [6] CPS filed its replying affidavit in the conditional counter-application on 3 February 2023.
- [7] Consequent upon the conditional counter-application, the large number of papers exchanged between the parties in their respective affidavits (the record now exceeds 2200 pages) and the length of time that would be required for the proper argument of the matter, the parties agreed that the matter was not ripe for hearing on the urgent court roll of 31 January 2023, and further agreed to jointly request a special allocation for the hearing of the matter.
- [8] On 16 February 2023, the parties addressed a joint letter to the Deputy Judge President requesting a special allocation. In this letter, the parties indicated that

all relevant affidavits in the matter had been exchanged. The joint letter proposed that the City would file its heads of argument by 21 February 2023 and CPS would file its heads of argument by 6 March 2023. The parties sought a special allocation of one day for the hearing of argument.

[9] The City filed its heads of argument on 22 February 2023.

[10] Late in February 2023, settlement discussions between the parties ensued. The litigation was held in abeyance pending settlement discussions. The settlement discussions proved unsuccessful, and on 26 April 2023, CPS was placed on terms to file its heads of argument by no later than 6 May 2023. CPS did not file its heads of argument by this date.

[11] On 10 May 2023, CPS' attorney, Mr Duke, requested a final meeting to be agreed to by 11 May 2023, failing which CPS would proceed with a Rule 35(12) notice calling for discovery. Mr Duke is also the attorney who represented CPS in the road closure application.

[12] The threatened Rule 35(12) notice calling for extensive further discovery by the City was served on 12 May 2023. The City's response was that the Rule 35(12) notice was a fishing expedition and that a plethora of irrelevant documents were demanded in an endeavour to delay the adjudication of the main application. The City filed its answer the Rule 35(12) notice on 5 July 2023 refusing further

discovery. CPS did not pursue an application to compel the discovery of the documents sought in the Rule 35(12) notice.

[13] On 4 August 2023, the City launched an application to compel CPS' heads of argument, which CPS opposed. CPS delivered its application to file a supplementary affidavit on 15 August 2023. The City did not pursue its application to compel the delivery of CPS' heads of argument as the supplementation application intervened and fell to be determined first.

CPS' grounds for seeking leave to supplement

[14] CPS asserts that the documents with which it seeks to supplement its answering affidavit to the main application are vital documents relevant to the issues in dispute which only came into its possession after the filing of the last set of affidavits on 3 February 2023. Further, that the documents sought to be introduced will reduce the disputes of fact in the main application.

[15] CPS contends that there are two disputes of fact in the main application:

15.1. first, whether the advertisement placed by CPS inviting comments on the proposed approval of the access restriction application met the requirements of the City. The City's case is that the advertisement is not in accordance with the City's requirements whereas CPS contends that the template it used emanated from the City and is widely used by other

access restriction applicants and is accepted by the City in all those matters;

- 15.2. second, whether final approval of the access restriction application had been granted. The City's position is that no final approval had been granted and no final approval advert had been advertised in the Gazette and accordingly CPS was not entitled to proceed with the construction of the road closure structures in the affected area which are thus unlawful and stand to be removed. CPS contends that, where no objections were lodged pursuant to the advertisement of interim approval, the interim approval as advertised becomes final approval within 60 days from the date of placing the interim approval advertisement and no further approval would thereafter be issued by the City, nor would a final approval advertisement be placed in the Government Gazette;

- [16] The documents sought to be introduced are copies of Government Gazettes published over the period November 2018 to May 2022 containing access restriction advertisements, together with an analysis of these advertisements by Mr Duke. The point that CPS seeks to make with reference to the Government Gazettes is that more than 60% of the interim advertisements placed by access restriction applicants (other than CPS and its agent), utilised the same wording as that utilised by CPS in its dispute with the City, and that only where objections were lodged, was there a requirement for a final approval advertisement.

[17] CPS further contends that there would be no prejudice to the City in permitting the supplementary affidavit and that it would be entitled to file a supplementary replying affidavit and deliver supplementary heads of argument. It sought costs from the City in the event of opposition.

The City's grounds of opposition

[18] The City opposes the application to file the supplementary answering affidavit on the following grounds:

- 18.1. CPS seek to introduce a raft of irrelevant factual matter into what is essentially a legal dispute between the parties;
- 18.2. the application is brought late without a full explanation as to the reasons for its lateness;
- 18.3. no proper case is made out in the founding affidavit for the relief sought;
- 18.4. it is brought to unsettle the City's legal argument and to relieve the pinch felt by CPS once it when it had sight of the City's heads of argument in the main application;
- 18.5. the City would be prejudiced by the further delay which would result from the introduction of the supplementary affidavit;

18.6. CPS sought costs when it was seeking an indulgence.

[19] As to relevance, the City asserts that there are no factual disputes to be determined in the main application but merely legal disputes. The legal dispute is whether CPS' implementation of the road closures contravenes the applicable legislation and the terms and conditions of the letter confirming the City's intention to approve the road closures. In the absence of the authorised official taking a decision to grant final approval, notification of the approval to CPS in writing and publication of the final approval in a newspaper and Government Gazette, the road closures implemented by CPS in the affected area are unlawful.

[20] If they are unlawful, the implementation of the road closures constitutes an offence and the relief claimed by the City must be granted, as the court is enjoined to uphold the rule of law.

[21] The issues raised in CPS' counter-application are also purely legal. In essence, CPS' contention in the counter-application is that the intention to approve the road closures automatically became final as to CPS' knowledge, no comments were lodged and therefore there was no need for a final decision, notification in writing of final approve or for publication of a final approval.

[22] The argument is premised upon the City's alleged historic practice in road closure applications of this nature. Based on this historic practice, the City is estopped

from denying that the intention to approve became final and CPS also asserts a legitimate expectation that the historic practice would apply to CPS' implementation of the road closures after it received interim approval.

[23] The City argues that the interim interdictory relief sought in the counter-application cannot succeed as it would offend against the principle of legality.

[24] Therefore, as the issues before the court in the main application and counter-application are purely legal in nature, CPS' attempt to introduce of a plethora of irrelevant documents relating to prior practice is not warranted.

[25] On CPS' own version, the documents now sought to be introduced relate to the period 2018 to 2022, were in the public domain and were available to CPS when it filed its answering affidavit on 24 January 2023 and its replying affidavit in the counter-application on 3 February 2023. Mr Duke is not only the attorney of CPS, but was also the attorney responsible for the submission of road closure application. CPS' failure to timeously procure the new evidence has not been explained in the founding affidavit to the interlocutory application. The application to supplement at this late stage serves to further delay the proceedings and to obstruct the final determination of the matter.

[26] The City sought a punitive costs order against CPS.

CPS' reply

[27] In its replying affidavit, CPS contends that it was only after the City filed its replying affidavit in the main application and its heads of argument, that it became apparent that the process contended for by the City differed vastly from the process which has been factually applied.

[28] Mr Duke then undertook an inspection of all the Gazettes from September 2018 to May 2022, which revealed more than 60% of the interim adverts placed by independent access restriction applicants utilise the same wording as the disputed advert.

[29] The supplementary evidence is needed to support its defence of legitimate expectation. Further, the supplementary evidence sought to be introduced is material and constitutes objective evidence freely available which is not crafted to fit a particular narrative.

[30] The prejudice to CPS if the supplementary affidavit were disallowed outweighs the prejudice that the City would suffer consequent upon having to file a further supplementary replying affidavit and in having to supplement the heads of argument already delivered.

Legal principles

[31] In motion proceedings, there are normally three sets of affidavits. The affidavits serve the dual function of both pleadings and evidence.¹

[32] The administration of justice is generally best served by the observance of the rules concerning the number of sets and sequence of affidavits.² Rule 6(5)(e) does however provide that it is within the court's discretion to permit the filing of further affidavits. A definition of the ambit of the discretion is not easy or desirable. The discretion is to be exercised judicially upon the consideration of the facts of each case, and it is a question of fairness to both sides.³

[33] A party seeking to tender an affidavit out of sequence is seeking an indulgence. The party seeking the indulgence should explain in the founding affidavit why the affidavit is out of time and satisfy the court that, although late, having regard to all the circumstances of the case, it should nevertheless be received.⁴ The adequacy of the explanation offered for any deviation is always an important factor as is the prejudice that might be occasioned to the other party. If there is

¹ *Radebe and Others v Eastern Transvaal Development Board* 1988 (2) SA 785 (A) 793D-F; *Minister of Land Affairs and Agriculture and others v D & F Wevell Trust and others* 2008 (2) SA 184 (SCA) at para 43; *Absa Bank Ltd v Kernsig 17 (Pty) Ltd* 2011 (4) SA 492 (SCA) at para 23; *Foize Africa (Pty) Ltd v Foize Beheer BV and others* 2013 (3) SA 91 (SCA) at para 30; *Venmop 275 (Pty) Ltd and another v Cleverlad Projects (Pty) Ltd and another* 2016 (1) SA 78 (GJ) at para 8.

² *Broodie N.O. v Maposa and others* 2018 (3) SA 129 (WCC) (**Broodie**) at para 27.

³ *Milne NO v Fabric House (Pty) Ltd* 1957 (3) SA 63 (N) at 65A; *Broodie*, ibid.

⁴ *James Brown & Hamer (Pty) Ltd (previously named Gilbert Hamer & Co Ltd) v Simmons NO* 1963 (4) SA 656 (A) 660D-H.

an adequate explanation that negatives any suggestion of *mala fides* or culpable remissness for the failure to put the evidence before the court at the earlier stage, a court should incline towards allowing the affidavits to be filed.⁵ The court must be satisfied that no prejudice is caused by the filing of further affidavits which cannot be remedied by an appropriate order as to costs.

[34] Supplementation may be justified if something new or unexpected emerged from a reply.⁶

[35] The factors that the court will consider in the exercise of its discretion are:⁷

35.1. the reason why the evidence was not produced timeously;

35.2. the degree of materiality of the evidence;

35.3. the possibility that it may have been filed to “relieve the pinch of the shoe”;

35.4. the balance of prejudice to the applicant if the application is refused in relation to the prejudice to the respondent if it is granted;

⁵ *Transvaal Racing Club v Jockey Club of South Africa* 1958 (3) SA 599 (W) 604A-E.

⁶ *Afric Oil (Pty) Ltd v Ramadaan Investments CC* 2004 (1) SA 35 (N) 38J - 39A.

⁷ *Mkwanazi v Van der Merwe* 1970 (1) SA 609 (A) 626A-G; *Porterstraat 69 Eiendomme (Pty) Ltd v PA Venter Worcester (Pty) Ltd* 2000(4) SA 598 (C) 617A-E.

- 35.5. the stage reached in the litigation proceedings;
- 35.6. the possibility of an appropriate order cost to address the late filing;
- 35.7. the general need for finality in judicial proceedings; and
- 35.8. the appropriateness of visiting the attorney's fault upon the head of his client.

[36] These factors should be considered together, bearing in mind the need for the court to benefit from all the facts before it makes a decision, together with the need to bring finality to a case.

Analysis

[37] CPS' reason for the seeking to introduce the supplementary affidavit is that it relates to vital documents which only came into its possession after the filing of the last set of affidavits. Further, that the new evidence will serve to reduce the disputes of fact in the main application.

[38] Beyond stating that the information was obtained after the last set of affidavits was filed, there was no explanation for the delay in filing the supplementary affidavit, bearing in mind that the last affidavit in the main application and counter-application was delivered on 3 February 2023. In reply, CPS asserts that it appreciated the need for supplementation based on the City's replying affidavit

in the main application and the City's heads of argument. These documents were filed on 30 January 2023 and 22 February 2023 respectively.

[39] In argument, counsel for CPS submitted that the answering affidavit in the main application was delivered with significant time constraints bearing in mind that the main application was launched on 18 January 2023, and the answering affidavit was delivered by 24 January 2023. Whilst the explanation was not contained in the founding affidavit, the sequence of the filing of affidavits and that the main application was instituted on an urgent basis is not in dispute. It also appears that the parties sought to settle the dispute, resulting in the litigation proceedings being held in abeyance until the end of April 2023. The application to supplement was delivered on 15 August 2023.

[40] In this application, there is no agreement between the parties as to the characterisation of the main dispute. The City contends that the dispute is purely legal, rendering the introduction of the introduction of further factual evidence irrelevant. CPS' case is that the City contends for a practice that it did not follow before, and that the introduction of the Government Gazettes published during the period 2018 to 2022 and the analysis of these Government Gazettes is needed for its defence of legitimate expectation. Whether an expectation has been created is a question of fact to be answered in relation to the circumstances of the particular case.⁸ Viewed objectively, the evidence which CPS seeks to

⁸ Hoexter and Penfold, *Administrative Law in South Africa*, 3rd edition, p578.

introduce may have a bearing on its defense of legitimate expectation. I am therefore unable to find that the material sought to be introduced in the supplementary affidavit is wholly irrelevant or immaterial to the issues to be determined in the main application, and that it falls to be excluded on this basis. I consider that it would be in the interests of justice to permit CPS to put before the court evidence which it states is material to its case. The City remains at liberty to argue immateriality in the main proceedings. Whether an expectation was created on the facts, and what weight is to be attributed to the new evidence, is for the court hearing the main application and the counter-application to determine with due regard to all the facts before it.

[41] CPS' case is that it appreciated the need for the supplementary affidavit after receipt of the City's replying affidavit and its heads of argument. The City argues that the introduction of the new material is to relieve the pinch of the shoe and to unsettle the City's legal argument. CPS places significant reliance on the City's heads of argument, and asserts that the issues raised in the heads of argument were not raised in the City's papers. Given that it is the affidavits which constitute the evidence in motion proceedings and not counsel's heads of argument, reliance on the City's heads of argument cannot constitute a basis for supplementation.

[42] Rather, it appears that CPS raised its defense of legitimate expectation timeously, but only fully appreciated the potential consequences of its omission to fully set out the supporting facts underpinning this defense on receipt of the

City's replying affidavit and heads of argument. It was remiss, but there is no evidence that the omission was deliberate or *mala fides*. If, as the City argues, the factual evidence will be found to be immaterial to the legal issues in dispute, the introduction of CPS' evidence ought not to displace the City's legal argument. This is for the court hearing the main application to determine, and does not constitute a basis to exclude the evidence sought to be introduced in the supplementary affidavit at this stage.

[43] In regard to the stage of the proceedings, CPS seeks to introduce its supplementary answering affidavit at a stage when the main application has not yet been heard, and where a date for the hearing of the matter on the basis of a special allocation has not yet been set. CPS only sought to supplement its answering affidavit in the main application. The City envisages that, consequent upon this application to supplement, it will be required to file a supplementary replying affidavit in the main application, as well as a supplementary answering affidavit in the counter-application. The additional costs to be incurred by the City will be provided for in an appropriate costs order.

[44] Both parties assert prejudice and that they have faced complaints about the road closures: the City from persons affected by what it contends are the unlawful road closures and CPS from residents within the affected area who are concerned that there is no finality or certainty regarding the lawfulness of the road closures. The dispute is of significant importance to both parties and the legal issues raised in the main application and counter-application are not without complexity. In this

regard, the City has filed extensive heads of argument dealing with issues of rule of law, legality, the interpretation of the relevant legislation (including the City's policies), estoppel and legitimate expectation. CPS contends that the value of the structures already erected to implement the road closures runs into the millions of rands.

[45] I am persuaded that the prejudice to CPS if it were precluded from presenting evidence which it contends is material, outweighs the prejudice to the City in having to respond to the supplementary answering affidavit, and the delay that will result therefrom.

Costs

[46] CPS seek an indulgence. Despite being the party seeking the indulgence, it did not tender the City's costs in the supplementation application, but sought costs from the City in the event of opposition, and also contended that the City was to file its supplementary replying affidavit within 10 days. The City's opposition was not unreasonable. The proposition that the City is to file its supplementary replying affidavit within 10 days given the volume of new evidence introduced by CPS in its supplementary answering affidavit is manifestly unreasonable.

[47] CPS delayed in bringing the supplementation application timeously. On CPS' own version, it appreciated that it required supplementation after the filing of the City's replying affidavit on 30 January 2023. This notwithstanding, CPS agreed

to a joint letter addressed to the DJP on 16 February 2023 in which it stated that no further affidavits were to be filed. There was no caveat to the submission on the part of CPS. By the time this application was heard, seventeen months had passed from the time that the parties jointly sought a special allocation.

[48] In consequence of CPS' conduct, the City, through no fault of its own, it is now to be put to the additional expense of having to supplement its replying affidavit delivered on 30 January 2023 as well as its heads of argument served on 22 February 2023. The City argues that it may have to file a further additional answering affidavit in the counter-application.

[49] It is common cause that the defense of legitimate expectation was raised at the outset. On balance, CPS' failure to fully explain the delay in bringing the supplementation application is a factor to be taken into account in the award of costs, rather than it be deprived of the opportunity to present evidence which it contends is material and may limit the disputes of fact in the main application.

[50] CPS are to bear the costs of the opposed application to supplement its answering affidavit as well the costs to be incurred by the City in having to supplement its replying affidavit, any further answering affidavit in the counter-application and its heads of argument on scale C, being the appropriate scale with due regard to the complexity of the matter, the volume of the new evidence sought to be introduced by CPS at this late stage and the importance of the matter to both parties.

Order

[51] In the circumstances, the following order is made:

- 51.1. The applicant (CPS) is granted leave to supplement its answering affidavit in the main application with the supplementary answering affidavit attached to the interlocutory application marked “FA1”.
- 51.2. The respondent (the City) is granted leave to file a supplementary replying affidavit in answer to the supplementary answering affidavit (“FA1”) and any supplementary answering affidavit to the counter-application on/or before 17 May 2025.
- 51.3. In the event that the City files a supplementary answering affidavit to the counter-application, CPS is to file its replying affidavit thereto within 10 days thereafter.
- 51.4. The costs of the opposed application to supplement is to be borne by CPS on scale C.
- 51.5. The costs to be incurred by the City in having to supplement its replying affidavit in the main application and its answering affidavit in the counter-application delivered on 30 January 2023, as well as its heads of argument delivered on 22 February 2023 is to be borne by CPS on scale C.



GOEDHART AJ
ACTING JUDGE OF THE HIGH COURT

Date of hearing: 22 July 2024

Date of judgment: 17 March 2025

(This judgment was handed down electronically by circulation to the parties' representatives via email.)

For the Applicant (CPS): Mr R Pottas

Instructed by: Duke Attorneys

For the Respondent: Mr C van der Merwe

Instructed by: Moodie & Robertson Attorneys