IN THE HIGH COURT OF SOUTH AFRICA

EAST LONDON CIRCUIT LOCAL DIVISION

CASE NO: **834/2021**
Date heard: **26 August 2021**
Date delivered: **09 September 2021**

In the matter between:

SHERPA TRADE & INVEST 39 (PTY) LTD	Applicant
and	
TEMBA NKUKHWANA	First Respondent
NOLUNDI NKUKHWANA	Second Respondent
WANDA BRENDA DAYILE	Third Respondent
VUYISWA SIGAJI	Fourth Respondent
ZAMEKA SOGCWAYI	Fifth Respondent
BABALWA ZWENI	Sixth Respondent
TANDEKILE NELISA MAKOSI	Seventh Respondent
ZIZO ZAULA	Eighth Respondent
NOMPUMELEO LERATO TSHONGWENI	Ninth Respondent
SIVUYILE RAMNCWANA	Tenth Respondent
NOKUBONGA NOQOKO	Eleventh Respondent
MASIBULELE THAKATHA	Twelfth Respondent
LINDIWE MANYIKA	Thirteenth Respondent
SIYABULELA MANYIKA	Fourteenth Respondent
ANDILE NJENGA	Fifteenth Respondent
ABONGILE NJENGA	Sixteenth Respondent

ZINGISA NANDIPHA MKULISI	Seventeenth Respondent
TEMBAKAZI NGXENGWENI	Eighteenth Respondent
MBUYISELI NGEMNTU	Nineteenth Respondent
TANDOKAZI NGEMNTU	Twentieth Respondent

JUDGMENT

LOWE, J

INTRODUCTION

[1] On 1 July 2021 an urgent application was launched in this matter and by way of a Judge's directive was enrolled to be heard on Tuesday, 6 July 2021.

[2] It seems, however, that in fact Respondents were given until 9 July 2021 to oppose, failing which the matter would proceed on 13 July 2021.

[3] Further, Fourth, Sixth, Eighth to Twentieth Respondents opposed by giving notice of intention to do so.

[4] At the hearing before me Ms Nxazonke-Mashiya appeared for Fourth, Sixth, Eighth to Seventeenth, Nineteenth and Twentieth Respondents.

[5] The remaining Respondents gave no instruction to oppose.

[6] On 13 July 2021 the matter was heard on the unopposed roll, terms and time lines being agreed for filing of papers and an order issued accordingly, the matter postponed to the opposed roll on 29 July 2021, costs in the cause.

[7] On 27 July 2021 a rule *nisi* issued returnable on 26 August 2021 as follows, costs reserved:

> "**IT IS ORDERED THAT:**
>
> 1. The applicant's non-compliance with the normal procedures, form and time frames for instituting this application in terms of Rule 6 of the Rules of this Honourable Court be condoned and the applicant be granted leave to bring this application as a matter of urgency in terms of Rule 6(12)(a);
>
> 2. A rule nisi do issue calling upon the **First to Twentieth Respondents** to show cause, if any, why a final order in the following terms should not be made:
>
> 2.1 That the First to Twentieth respondents immediately restore peaceful and undisturbed possession and control of Erf 2368 East London, Bengal Road ('the premises') to the applicant, it employees and its agents; with such possession and control to include unfettered access to the premises.
>
> 2.2 That the first to twentieth respondents be interdicted and restrained from:
>
> 2.2.1 Interfering in any way whatsoever with the activities, and/or the administration and/or business of the applicant at the premises;
>
> 2.2.2 Intimidating and/or threatening and/or harassing and/or causing violence and/or threatening to cause violence to any worker and/or employee and/or official and/or supplier and/or agent

and/or sub-contractor and/or employee of any supplier and/or sub-contractor of the applicant;

2.2.3 Causing any damages and/or threatening to case any damage to any property of the applicant, any property or possession of any worker and/or employee and/or official and/or supplier and/or sub-contractor and/or employee of any supplier and/or sub-contractor of the applicant;

2.2.4 Encouraging violence against any employee and/or official and/or supplier and/or sub-contractor and/or employee of any supplier and/or sub-contractor of the applicant at the premises;

2.2.5 Blocking and/or preventing any vehicle and/or truck and/or plant of the applicant and/or any agent of the applicant and/or any sub-contractor of the applicant from travelling on any road in the premises or entering into the premises;

2.2.6 Being unlawfully on any of the sites on the premises which are owned and/or occupied by the applicant and/or its sub-contractors; and

2.2.7 Disruption or in any way being a disruptive presence at or near the premises of the applicant and/or site occupied by the applicant and/or any road giving access to the premises and within the premise.

3. Applicant is directed to serve this order on the rest of the respondents who are not before court today;

4. The issue of costs is referred for determination on the return date the 26th August 2021."

[8] It seems that there was service of a kind on all Respondents but in respect of Third, Seventh and Eighteenth Respondents by affixing, not personal service.

[9] Before me in fact the main issue was one of costs, Respondents denying however that the rule was justified or that it should be confirmed, but suggesting that as they had not been implicated in the matter complained of they should certainly not be mulcted in costs.

[10] At the end of the day, however, the matter having stood down, no agreement could be reached. Respondents, as represented, seeking discharge of the rule with costs. Applicant sought confirmation of the rule with costs including those reserved.

THE BACKGROUND

[11] It is common cause that Applicant is the registered owner of Erf 2368, Bengal Road, East London (Bengal Road), a registered "Township Scheme" of 150 sites. Whilst Respondents are (amongst others) purchasers of erven together with dwellings constructed thereon, Respondents having grievances relating to the erven and dwellings.

[12] Meetings have been held between some of the parties and Applicant relevant to above.

[13] The real issue in this matter is simply whether Respondents, or some of them, are preventing Applicant and contractors from having access to Bengal Road.

[14] Applicant avers that:

[14.1] On 23 February 2021 Applicant was notified by Nineteenth Respondent *"representing 18 homeowners"* (not identified in the papers) of complaints by *"the new homeowners"* regarding the *"properties"*.

[14.2] On 13 March 2021 the *"residents"* at the premises barricaded the development entrance preventing the contractor or workers from accessing same.

[14.3] A meeting was held with *"the homeowners"* to address this and the matter went on to certain negotiations during which *"the Respondents"* permitted access.

[14.4] This went on till 5 June 2021.

[14.5] This negotiation broke down and on 6 June 2021 Applicant addressed correspondence to *"the Respondent homeowners".*

[14.6] On 10 June 2021 at 07h15 Applicant's employees were *"confronted by"* the Tenth and Twelfth Respondents *"acting on behalf of the homeowners cited as the remaining Respondents"* and were told to leave Bengal Road – which the employer complied with.

[14.7] Correspondence was then sent by Applicant to First to Twelfth Respondents named *"the collective",* demanding that they desist on 11 June 2021.

[14.8] The barricade of the premises continued and urgent relief was then sought.

[14.9] Generally that the First to Twentieth Respondents have taken control of Bengal Road denying access thereto.

[15] It will be immediately apparent from the above that the identification of Respondents, save for Nineteenth Respondent initially and later Tenth and Twelfth Respondents, is tenuous and little detail is given as to their (denied) involvement or why and how *"the collective"* was made up and represented, and what each is alleged to have done.

[16] The represented Respondents' papers deposed to in the main by Nineteenth Respondent on behalf of (himself) and Fourth, Sixth, Eighth to Seventeenth, and Twentieth Respondents joined issue with the factual allegation made as follows:

[16.1] It is alleged that Respondents had difficulty with certain of the contractual terms and issues and approached Applicant with these.

[16.2] At least at this stage the Respondents referred to, represented by Nineteenth Respondent raised their concerns and grievances with Applicant through Nineteenth Respondent.

[16.3] Numerous attempts were described in an attempt to address this.

[16.4] Nineteenth Respondent absolutely denies that *"Respondents"* at any time obstructed access to Bengal Road, and alleges that Applicant was uncooperative and left Bengal Road of its own accord.

[16.5] In answering Applicant's allegations that during negotiations Respondents *"permitted the Applicant"* to return to Bengal Road, is denied – this clearly on a proper reading meant to convey that Respondents having not prevented access were not required to *"permit"* anything and that *"Applicant just returned to the premises with no explanation and proceeded with its business as usual".*

[16.6] As to what is alleged to have occurred on 10 June 2021, any confrontation or order to leave the premises is denied, Respondents alleging going to the premises to follow up on promises made by Applicant.

[17] That Respondents deny the subsequent obstructive events alleged, is said to be a *"bald denial"* by Applicant.

[18] To summarise whilst admitting that they had complaints and raised these with Applicant, the represented Respondents deny all unlawful conduct and/or obstruction of access – this being repeatedly stated.

[19] In reply Applicant, presumably perceiving the disputes raised as to the unlawful conduct alleged, resorts to the probabilities, and the issue that had Respondents not been responsible for denying access they would have had no issue with the interim relief save as to costs. This latter issue is so obviously a non-sequitur, as I pointed out in argument, as to simply be dismissed out of hand[1].

[20] The issue then comes down to an assessment of the approach to applications.

THE APPROACH TO APPLICATIONS

[21] In general terms a Court can entertain motion proceedings when there are no genuine disputes of fact.

[22] Disputes of fact which are discerned in any application are dealt with in terms of Rule 6(5)(g) which permits the hearing of oral evidence in appropriate circumstances.

[1] ***National Director of Public Prosecutions v Zuma*** 2009 (2) SA 277 (SCA) [26] and [27], Motion proceedings cannot be used to settle factual disputes not being designed to determine probabilities.

[23] It is clear from the authorities that whilst undesirable to settle disputed facts on affidavit, the first step in considering this issue is to carefully examine such alleged disputes to determine if these are real, *bona fide* and material.

[24] Whether there is a real, material, genuine dispute (of fact) is a question of fact for the Court to decide[2].

[25] There must also be an enquiry as to whether such dispute, if established, is relevant and material to the issue to be decided.

[26] A real dispute usually arises where Respondent denies material allegations by Applicant and produces positive contrary evidence. This can only arise where the party raising the dispute has seriously and unambiguously addressed the disputed fact in the answering affidavit[3]. For a genuine dispute to arise Respondent must satisfy the Court that there are reasonable grounds set out that would establish a defence in action proceedings[4]

[27] The first issue relevant to a request for a referral to oral evidence or cross-examination is a consideration of whether the application cannot be decided on affidavit (Rule 6(5)(g)).

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[2] ***Dorbyl Vehicle Trading and Finance (Pty) Ltd v Northern Cape Town and Charter Service CC*** [2001] 1 All SA 11 (NC) 123-4.
[3] ***Wightman t/a J W Construction v Headfour (Pty) Ltd and Another*** 2008 (3) SA 371 (SCA) [13].
[4] ***Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others*** 2008 (1) SA 184 (SCA) [56] and ***National Director of Public Prosecutions v Zuma (supra)***

[28] In simple terms a motion proceeding will not be referred to oral evidence, or cross-examination, unless it is clear that there is a material, real or genuine dispute of fact on the affidavits[5].

[29] It must be remembered that, in respect of final relief, even where facts are in dispute on the papers, but the Court is satisfied nevertheless that on Respondents' facts, with those of Applicant's which are admitted by Respondents (or at least not denied), that Applicant is entitled to relief, it will make such an order[6].

[30] It is Applicant, not Respondents, who runs a risk by bringing a claim on motion. That is because, as with any motion proceedings, to the extent that any facts are genuinely in dispute, they must be resolved in favour of Respondents[7], unless a referral is justified and sought.

[31] The SCA has accordingly held that:

> "It may be assumed… that an applicant who presses for a decision on the papers in the face of a factual dispute, by necessary implication consents to the matter being decided on the basis that the applicant is prepared to have the matter decided on the basis set out in *Plascon Evans*…". [8]

[5] ***Van Wyk v Botha*** [2005] 2 All SA 320 (C) at 328.
[6] ***Transman (Pty) Ltd v South African Post Office and Another*** [2013] 1 All SA 78 (SCA) at [16].
[7] ***Reddy v Siemans Telecommunications (Pty) Ltd*** 2007 (2) SA 486 (SCA).
[8] ***Ngquma v Staatspresident; Damons NO v Staatspresident; Jooste v Staatpresident*** 1988 (4) SA 224 (A0 at p 243 F-H.

[32] The Court went on to say, in ***Ngquma (supra)***, that *"although there are evidently disputes of facts there are no 'real' disputes of fact if either party can succeed on the version of the other party".*[9]

[33] The ***Plascon Evans*** rule is well known:

> "It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's … affidavits, which have been admitted by the respondent…, together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of facts, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers".[10]

THE RESULT

[34] Applications are not about probabilities they are about common cause facts and the law applicable[11].

[35] In this matter Applicant faces two issues and difficulties.

[36] Firstly the identification of those involved in respect of Respondents.

[9] Ngquma at p243 D-E.
[10] ***National Director of Public Prosecutions v Zuma (supra)*** at para [26].
[11] ***National Director of Public Prosecutions v Zuma (supra)***

[37] The founding affidavit initially only clearly identifies Nineteenth Respondent in relation to his leadership role in complaining to Applicant in February 2021, but does not identify the *"remaining homeowners"*.

[38] The Applicant's allegation as to the barricade of 17 March 2021, by *"the residents"* fails to state which of the individual Respondents were involved at all or who did what, where and when.

[39] Similarly the meetings on 22 March 2021 to 5 June 2021.

[40] As from 12 June 2021, Tenth and Twelfth Respondents are identified, but not the basis of the allegation that they were acting on behalf of the remaining Respondents, but in answer *"Respondent"*[12] admits going to the offices but says for no illegal purpose.

[41] It is far from clear on what basis Respondents (bar Tenth and Twelfth Respondents) were directly implicated herein at all.

[42] As to 22 June 2021 the reference to *"the Respondents"* by Applicant is non-specific and vague, far from sufficient to make it clear which Respondents were alleged to have acted thus.

[12] As I understand it being Tenth and Twelfth Respondents.

[43] All the above effectively identifies Tenth and Twelfth Respondents as to a particular action alleged to have been taken unlawfully.

[44] The second issue is the dispute of fact as to who acted and particularly whether, if so acting, they or any of them acted unlawfully in preventing access to Bengal Heights. This is frequently denied by Respondents represented herein as set out above.

[45] The issue then, even if identification of participating Respondents is established, which I consider not to be the case sufficiently, bar Tenth and Twelfth Respondents, comes down to whether the dispute as to what Respondents did, or did not do, can be resolved on the papers in an application context.

[46] Having set down the proper approach hereto as referred to above, I fail to see on what basis, even in a robust approach to the allegations, that I can, on these papers, resolve that issue.

[47] Whilst certainly the denials are concise – so are the allegations. Not only is the allegation that access was prevented bare of detail, there is no indication as to particularly how, or by exactly whom and in what specific manner each acted.

[48] In my view in these circumstances to deny same shortly, is in these circumstances sufficient to create an irresolvable dispute on the facts.

[49] In the result the application must fail, there being no request for a referral to evidence.

[50] Such failure must carry with it a costs order, Respondents being substantially successful.

ORDER

[51] In the result the following order issues:

1. The application is dismissed, the rule *nisi* being discharged.

2. Applicant is to pay the costs of the application in respect of those Respondents opposing same being Fourth, Sixth, and Eighth to Twentieth Respondents, including such costs as were reserved.

_____
M.J. LOWE
JUDGE OF THE HIGH COURT

Appearances:

Obo Applicant:
Adv T S Miller
Instructed by:
Gravett Schoeman Incorporated, East London

Obo Fourth, Sixth, Eighth, Ninth, Tenth, Twelfth, Thirteenth, Fourteenth, Sixteenth to Twentieth Respondents:
Adv Z Nxazonke-Mashiya
Instructed by:
MN Dwayi Attorneys, East London