OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

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

Case No: 2093/2020

In the matter between:

ELUNDINI LOCAL MUNICIPALITY **Applicant**

And

UNCEDO TAXI ASSOCIATION **First Respondent**

PERSONS AND/OR BUSINESSES CURRENTLY CARRYING ON THEIR OPERATIONS AND ILLEGALLY OCCUPYING, UNLAWFULLY SO, ON ERF 442, UGIE, IN THE DISTRICT OF THE ELUNDINI MUNICIPALITY, EASTERN CAPE **Second Respondent**

THE SHERIFF OF THE HIGH COURT, UGIE **Third Respondent**

THE STATION COMMANDER OF THE UGIE POLICE STATION **Fourth Respondent**

JUDGMENT

BESHE J:

[1] The applicant, being the Elundini Local Municipality, is seeking an eviction order against first and second respondents from Erf 442, Ugie (the property). First respondent is Uncedo Taxi Association, a voluntary association

which carries on its operations from the property concerned. The "second respondent" are persons who occupy the said property with the consent or by virtue of their membership with first respondent. I will refer to first and second respondents as the respondents being the only parties to oppose the application.

[2] The applicant asserts that it is the owner of the property having purchased it in July 2002. Until the stage when the matter was argued, I got the distinct impression that ownership of the property was not in dispute. Allegations relating thereto having been noted and not disputed by the respondents. To the extent that the following statement is made at paragraph 12 of the answering affidavit.[1]

"I find it strange that the applicant would waste the time of this honourable court by trying to prove ownership of the said property in this whole paragraph, as if same is or would be disputed."

[3] It also does not seem to be in dispute that the respondents are in possession or occupy the property. They however dispute that such possession is unlawful. The respondents assert that they are in lawful possession of the property by virtue of an agreement entered into with the applicant during 2007, as well as on the basis that there has been ongoing negotiations between the parties regarding the property. The latter assertion is confirmed by the applicant.

[4] Apart from the defence to the merits of the application, the respondents raise two points *in limine*:

First, by means of an application in terms of *Section 27 of the Superior Court's Act*[2]. In particular *Subsection 1(b)* thereof. They claim that the matter would be more conveniently or more appropriately heard or determined by the Eastern Cape Division, Mthatha. As I understand their case, this is mainly on the basis

[1] Page 64 of the papers.
[2] Act 13 of 2013.

that first respondent being a taxi association, has many individual members who reside within the Ugie-Tsolo area. They all have an interest in the fate of the main application. Due to financial constraints, they will not be able to travel to Grahamstown.

[5] The applicant in the main application points out that the matter is ripe for hearing. The parties have already incurred costs of filing in this court as well as those in respect of their legal representatives. Such costs will go to waste should the matter be transferred to Mthatha. A further prejudice to the respondents who are complaining of not being possessed of financial means.

[6] It is indeed so that a court is provided or is available in Mthatha for use by litigants in that area. That it is no doubt more convenient to those parties for their matters to be heard in that court. Both this court and the Mthatha court have jurisdiction to hear this matter. The applicant being *dominis litis* has a choice between these two courts. Granted that members of first respondent reside within the Ugie-Tsolo area, that they have an interest in the fate of this application, which no doubt is importance in them, their attendance is strictly speaking not necessary. The matter is at an advanced stage of ripeness. In my view, the balance of convenience clearly dictates that this matter should not be transferred to Mthatha. Also in view of the fact that not only will that cause the incurrence of more costs but will also delay the finalisation of the matter. Accordingly, the application for the referral of the matter to the Mthatha court is dismissed.

[7] The second point *in limine* raised by the respondents relates to their application to have the whole of the founding affidavit struck out. This application is founded on the basis that the full names of the person who commissioned it are not stated. Further, that the said person appears to be a police constable and therefore not a commissioned officer. At first, I was at a loss as to what this was about. The founding affidavit is deposed to by the Municipal Manager of the applicant **Mr Khayalethu Gashi**. The commissioner

of oaths in respect of which is a practising attorney **Mr Bodlani**. His date stamp reflects that it was commissioned on the 7 December 2020 at Mthatha. At the commencement of the proceedings, *Mr Knott* for the applicant handed up the "same" founding affidavit. This copy reflected that it was sworn to before yet another practising attorney by the name of **Aphelele Jozana** on 17 August 2021, also at Mthatha. When I required an explanation about this, a third founding affidavit surfaced. This appears to be the copy of the affidavit that the respondents were complaining about. The one that was served on them. It was apparently sworn to before a constable at Maclear on the 28 September 2020. There was no mention of the application to strike off **Mr Gashi's** affidavit by the applicant, be it in their reply or in their heads of argument.

[8] According to the explanation given by applicant's counsel, *Mr Knott*, upon the issue relating to the founding affidavit that was sworn to before a constable being raised, same was replaced by the one that was commissioned by **Mr Bodlani**. Further, that the content of the founding affidavit was the same, the only difference was that attached to the two of the founding affidavits were annexures referred to therein. He sought condonation for the replacement of the founding affidavit that was filed originally. However, no formal or substantive application was made in this regard which would have shed light as to what actually happened with the three founding affidavits.

[9] Counsel for the respondents *Mr Mgidlana* intimated that the **Bodlani** affidavit was never served on the respondents. He also pointed out that the signature on one of the three affidavits purporting to be that of **Mr Gashi** seems different from the other two signatures. He persisted with the application for the striking out of the founding affidavit, submitting that the serious flaws relating to the filing of the founding affidavit detract from the *bona fides* on the part of the applicant in the manner this litigation was conducted.

[10] I am inclined to agree with *Mr Mgidlana* in this regard for the following reasons:

The founding affidavit that was filed initially appears to have been surreptitiously removed from the court file and replaced with the one sworn to before **Mr Bodlani**. The applicant did not respond to the application to strike the founding affidavit out. There is no explanation why there was a need for yet another commissioning of the founding affidavit before attorney **Jozana**.

Mr Knott submitted that we cannot second-guess the two attorneys who commissioned the affidavits or view them with suspicion. It may be so, but the fact of the matter is that I am in the dark as to why things happened in the manner they did.

[11] Strictly speaking, *Rule 6 (15)* only provides for the striking of any matter which is scandalous, vexatious or irrelevant out from an affidavit. What the first and second respondent seek in this matter is for the founding affidavit to be regarded as *pro non scripto* – to be disregarded. This based on the confusion regarding the proper commissioning of the original founding affidavit as well as the replacement thereof on the court file without same being served on the respondents or the court's permission being sought for doing so. In the matter between ***Standard Bank of South Africa Ltd v Sewpersadh and Another***[3] a point was made that a litigant who wishes to file a further affidavit must seek leave to do so. It cannot simply slip the affidavit into the court file.

[12] An affidavit is a statement in writing sworn to before someone who has authority to administer an oath.[4] Clearly, a police constable not being a commissioned officer, does not have the authority to administer an oath.[5] The attestation also suffers from other deficiencies. Unfortunately, the confirmatory affidavit deposed to by **Mr Sisa Mveku** suffers from the same deficiencies. Besides, he only confirms the contents of the founding affidavit only in so far as it relates to him. Even though his involvement relates to what is the gist of the

[3] 2005 (4) SA 148 at 155.
[4] Erasmus Superior Court Practice 2nd Edition – Van Loggerenberg Vol. 2 D1-53 [Service 3, 2016].
[5] See Section 4 read with 7 of the Justices of the Peace and Commissioners of Oath Act 16 of 1963.

application, namely that he headed the applicant's delegation in meetings held with the respondents during 2019. I am therefore of the view that both the original founding affidavit and confirmatory affidavit deposed to by **Mr Mveku** are *pro non scripto*. The other two affidavits were only commissioned, one about two months after the launching of this application and the other almost a year after the launching of the application. One having been slipped into the court file without any explanation or application for condonation. They were also not served on the respondents. For these reasons, they should also be disregarded. The applicant did not attempt to deal with this in reply either. In my view, that being the case, there is no evidence to support the relief sought in the notice of motion. The application falls to be dismissed on this point. In my view, there is nothing to preclude the applicant from launching the application afresh, should it be advised to do so on appropriate papers.

[13] In the result, the application is dismissed with costs.

_____

N G BESHE
JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicant	:	Adv: J A Knott
Instructed by	:	GWABENI INCORPORATED
		C/o WHEELDON RUSHMERE & COLE
		119 High Street
		GRAHAMSTOWN
		Ref: Mr van der Veen/Michelle/S23400

Tel.: 046 – 6227005

For the Respondent	:	Adv: T W Mgidlana MPUMELELO NOTUNUNU & ASSOCIATES C/o YOKWANA ATTORNEYS 10 New Street GRAHAMSTOWN Ref: Mr Yokwana Tel.: 046 – 622 9928
Date Heard	:	28 August 2021
Date Reserved	:	28 August 2021
Date Delivered	:	14 September 2021