

SOUTH AFRICA / JUDGMENT

Border-Kei Chamber Of Business and Another v Komani Protest Action Group ("KPA") and Others (442/2023) [2023] ZAECMKHC 62 (23 May 2023) [2023] ZAECMKHC 62

COURT

Eastern Cape High Court, Makhanda

BEFORE

T.V Norman

CASE / FILE NUMBER

442/2023

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IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION – MAKHANDA]

CASE NO.: 442/2023

In the matter between:-

BORDER-KEI CHAMBER OF BUSINESS 1ST APPLICANT

CIVIC RATEPAYERS' ASSOCIATION OF ENOCH

MGIJIMA 2ND APPLICANT

and

KOMANI PROTEST ACTION GROUP ("KPA") 1ST RESPONDENT

THULANI BUKANI

2ND RESPONDENT

SOLOMZI NKWENTSHA 3RD RESPONDENT

YOLANDA GCANGA 4TH RESPONDENT

SATCH NAIDOO 5TH RESPONDENT

AXOLILE MASIZA 6TH RESPONDENT

MNCEDISI MBENGO 7TH RESPONDENT

JEROME JASSON 8TH RESPONDENT
ALLISON DE KOCK 9TH RESPONDENT
TEMBILE MARMAN
10TH RESPONDENT
ALL PERSONS ASSOCIATING THEMSELVES
WITH THE FIRST RESPONDENT IN UNLAWFUL
ACTIVITIES IN THE ENOCH MGIJIMA LOCAL
MUNICIPALITY
11TH RESPONDENT
MINISTER OF POLICE
12TH RESPONDENT
THE COMMANDING OFFICER: PUBLIC ORDER
POLICING
13TH RESPONDENT

JUDGMENT

NORMAN J:

- [1] On 17 February 2023, the first and second applicants (“the applicants”) sought and were granted interim relief against the respondents. They were interdicted from, inter alia, interfering in any way with their businesses or employees, intimidating and/or threatening or harassing their employees or customers, causing damage or threatening to cause any damage to any property of the applicants, encouraging violence against their businesses or employees, blocking and preventing any vehicles or trucks of the applicants from traveling on any of the roads in Komani, disrupting any of their businesses or from entering their premises unlawfully. They further sought contempt of Court orders in the event that the respondents fail to comply with the interdictory relief.

Applicant’s case

- [2] The deponent to the founding affidavit is Jacques Pierre van Zyl who is the Vice- Chairman of the first applicant. He stated that on 31 January 2023 he attended a meeting with Komani Protest Action (“KPA”) and the fourth, fifth, seventh and eighth respondents to discuss the proposed protest action. He represented the first applicant at that meeting. There was a plan by KPA and those that support it to shut down Komani for a longer period. He negotiated that the shutdown should be for a shorter period due to the present economic climate. He was further assured that their members would be safe if they joined because the community

members walking around with white armbands would protect any person in need of protection.

- [3] He was also assured that there would be security personnel to attend to safeguard or control unruly groups of people. He, together with the first respondent, and those who were present discussed the dissolution of the Enoch Mgijima Council. He dealt with the protests that occurred during January 2023.
- [4] On 16 February 2023, an article appeared in the local newspaper indicating that KPA and its members intended to shut down Komani. In that article, it is recorded that letters were sent by KPA to the first applicant for it to inform the business owners who are affiliated with it that “they were not forced to close but at the same time they would be opening their businesses at their own risk.” KPA also indicated that “they would not be responsible for anything that may transpire in their shops because when one stands in the way of the community while people are protesting for their rights, he becomes the victim”.
- [5] It was also conveyed in the notice that the business sector was playing victim but “once they are ignorant of the mandate with the community all the businesses will be identified and no one will go and buy”. In an article published by the Daily Maverick dated 17 February 2023, it recorded that businesses were forced to close because hundreds of people went through the town forcing compliance with the protest. In the same article it was recorded that one Masiza had stated that ‘we will deal with those who won’t close their doors, we are planning a consumer boycott where we will not support the businesses that refuse to close their doors. We have a list of the businesses that opened.’
- [6] The deponent feared that there will be further civil unrest as a result of the proposed shut down. The present economic situation in the country and in Komani is such that the protest action was disastrous to business in Komani and would have serious negative consequences for it. He criticized the respondents in their exercise of self-help and collective punishment of business in an attempt to force the Enoch Mgijima Municipality to deliver services in circumstances where businesses were not at fault.
- [7] He submitted that the prejudice that will be caused to the applicants and the public at large is manifest and far reaching and the loss suffered will not be merely financial but may probably affect the viability of various businesses. He stated that the advertisements that the applicants rely on and the interruptions would be indefinite, because the planned protests were to continue until the situation improves or until the municipal council is dissolved. On that basis, he submitted, that the applicants, would suffer irreparable harm which would have catastrophic consequences for the applicants if the interdict is not granted. It would affect their employees, their dependants and the general public in Komani.

Respondent’s case

- [8] The respondents opposed the application in an affidavit deposed to by Satch Naidoo. In their opposition the respondents took the same legal points they took when they resisted the final interdict in *Enoch Mgijima Municipality v Komani Protest Action and Others*, Case number 444/2023. In summary those points were that there must be a balancing of rights between the protesters and those of the businesses and their commercial interests. They criticized the applicants for advancing and protecting their commercial rights at the expense of the majority of the residents of Komani.
- [9] In response to the allegations which attached the video footage and the Facebook page the deponent stated the following 'our members visited all the business premises as a precautionary measure to ask them to close shops as a risk mitigation and to prevent possible acts of vandalism.' They resisted the granting of the interdict on the basis that should a final interdict be granted the court would have elevated the rights of the few members of the community at the expense of the greater community who live below the poverty line.
- [10] The deponent admitted that a two (2) day-protest that causes business to shut down will have major financial ramifications for the businesses in Komani. He justified this by saying 'most business owners who are not members of the 1st applicant are also prejudiced.' He denied that there was civil unrest but he admitted that there were several protests. He complained about the fact that the interdict was brought ex parte. He attacked the urgency alleged by the applicants as being self- created. He contended that there was no right that was being protected by the applicants.

Applicant's reply

- [11] In reply, the applicants stated that their right to trade is being hampered by the forced shut down imposed upon them by the respondents. The applicants denied the allegations that they were simply protecting their own interests but indicated that on 14 February 2023 and without any warning KPA had delivered correspondence notifying them of the intention to commence further protest actions within two (2) days and that action continued on 16 February 2023. It was for that reason that they approached court on 17 February 2023 to protect the interests of businesses. It was on the basis that the respondents had suggested that the protest actions would continue indefinitely until the Minister of COGTA, Dr Nkosazana Dlamini-Zuma, returned to dissolve the Council.

Applicant's legal submissions

- [12] Mr Brown appeared for the applicants and Ms Mnqandi appeared for the respondents. He submitted that the interdict does not infringe on the respondents' rights to lawful and peaceful protest. All that it sought to do was to stop them from acting unlawfully by shutting down the applicants' businesses and harassing and intimidating their employees, workers, service providers and customers. In this regard he relied on *Absa Bank Limited v South African Clothing & Textile Workers Union*; and *Go Touchdown Resort Seasons CC & Another v Farm Rural Informal Dwellers Association & Another*[1] that there was no right on the part

of the opposing respondents to undertake activities which the applicants seek to interdict and thus no question of the balancing of competing rights is necessary.

- [13] He submitted that the applicants have a clear right to protect as they own the businesses. There is harm that was actually being committed or reasonably apprehended. There was absence of other satisfactory relief and the applicants have a clear and protected right to trade as envisaged in section 22 of the Constitution. This right is conceded by the respondents. It is that right that had to be protected by means of the interdictory relief. He submitted that the businesses were forced under threat to close down for the duration of the protest actions in January 2023. The fear of an indefinite protest was real whilst businesses were being forced to close during the February protests.

Respondent's legal submissions

- [29] Ms Mnqandi made the following submissions:

That the applicants failed to demonstrate that they have a right that ought to be protected. The respondents, on the other hand, have a clear right to assemble peacefully, to demonstrate unarmed, to picket and to present petitions as well as freedom of association. The applicants failed to prove that any harm suffered was caused by the respondents and have not shown that there are reasonable grounds for apprehension of harm. The applicants failed to show that there was no alternative remedy. That urgency was self-created. The community organized itself to address the challenges it had and that right must be balanced with the right to trade relied upon by the applicants. If such rights were affected they are not absolute. In balancing the conflicting rights, the court must find that it was reasonable and justifiable for the respondents to hold the protest action. The respondents denied any civil unrest or violence during the protests. They denied that businesses were forced to close.

- [31] The conduct complained of by the applicants is past conduct. An interdict is meant to prevent future conduct and not decisions already made. In this regard she relied on *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*[2] . The court must balance the rights of the protesters and businesses as they are all enshrined in the Constitution, she argued.
- [32] That the public has a right to service delivery and to hold the municipality accountable. She conceded that for two days in January 2023 and two days in February 2023, during the protests, there was business lost. She submitted that interdicting KPA to hold future marches or protests is too broad and should be refused. She submitted that the application should be dismissed with costs.

Discussion

[14] Having read the papers and having considered the submissions made by both counsel it appears to me that the respondents misconstrued the issue they were called upon to respond to. The issue is not about the respondents' right to protest, which they have addressed extensively. The applicants' source of complaint is the conduct of the respondents who, when engaging in a protest, threaten and/ or force businesses directly or indirectly to close and thus making it impossible for them to trade.

[15] Both parties are ad idem that the rights entrenched in the Constitution, namely, the right to freedom of expression (section 16); the right to peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions (section 17); and the right to choose their trade,

occupation and profession (section 22), are all equal rights.

[16] The Constitutional Court has held that the right to freedom of assembly is central to our constitutional democracy. It exists primarily to give a voice to the powerless. It is one of the principal means which ordinary people can use to meaningfully contribute to the constitutional objective of advancing human rights and freedoms.[3]

[17] In the Satawu case at paragraph 38, the Constitutional Court when dealing with the provisions of section 11 (2) of the Regulation of Gatherings Act 205 of 1993, held:

"38. The somewhat unusual defence created for an organization facing a claim for statutory liability appears to have been made deliberately

tight. Gatherings, by their very nature, do not always lend themselves to easy management. They call for extraordinary measures to curb potential harm. The approach adopted by Parliament appears to be that, except in the limited circumstances defined, organizations must live with the consequences of their actions, with the result that harm triggered by their decision to organize a gathering would be placed at their doorsteps. This appears to be the broad objective sought to be achieved by Parliament through section 11." (my emphasis).

[18] The next question would be what necessitated the requests or demands, by KPA and those acting in concert with it, that businesses should close during a protest? Those demands or requests do not form part of the steps to be taken in terms of the Gatherings Act when organizing a protest or gathering. It has not been shown on these papers that KPA and the other respondents had financial interests in those businesses to warrant the interference with their operations. I have no doubt that the businesses operating in Komani are managed by their directors or owners or employees who have the capacity to decide whether to close or not to close when there is a protest. It is not for the respondents to determine their closure during a protest. By imposing their will on the businesses, the respondents were actually interfering with those businesses' rights to trade. This issue has not been addressed by the respondents, instead they sought to attack the applicants for wanting to trade when there is a protest. They labelled them as protecting their commercial interests and not sharing the plight of the poor.

[15] This attack is unsound because not every person (rich or poor) is interested in engaging in a protest. There are hundreds of other people who were probably sitting at home and not participating in the protest. There were possibly others who were content with the manner that the services were delivered to them by the municipality. Others may have been unhappy with service delivery, but may have opted for other means of raising their dissatisfaction, for instance, sending a letter to the municipality threatening legal action. Had the respondents gone to the homes of the people I refer to in the above scenarios, to demand that they leave their homes and join the protest, their conduct would have been unlawful and unconstitutional. The same applies herein.

[16] The harm that will be suffered by businesses if they close as a result of a shutdown is admitted by the respondents. The calls to businesses to join the protest, correspondence that was exchanged and notices or interviews of some of the respondents which I have referred to, above, constituted threats to those businesses who were going to continue operating during protests. Those advertisements or interviews that threatened businesses that were going to trade when there was a protest were also admitted. For example, statements such as: 'we will deal with those who won't close their doors, we are planning a consumer boycott where we will not support the businesses

that refuse to close their doors. We have a list of the businesses that opened", were clear threats. If they were not, why would the respondents compile a list of businesses that were opened? I find that such conduct was unlawful and it had to be interdicted. It is not correct that the interdict was sought for past conduct. During January and February 2023 when there were protests businesses were forced to close. The respondents were engaged in a protesting on 16 February 2023 and had indicated that the protest was indefinite pending the dissolution of the council. The applicants' right

to trade continued to be under threat for as long as the protests were continuing. The respondents have not placed any facts that

connect the businesses or the applicants to the service delivery obligations of the municipality. In the light of the finding of

unlawful conduct on the part of the respondents it is not necessary to venture into the debate of balancing of constitutional rights. In my view, therefore, the applicants have made out a case for final relief and the application must accordingly succeed.

[17] In so far as costs are concerned, those respondents who are opposing the application should bear the costs. The heads of argument clearly indicate that they have been filed in respect of the first to the eleventh respondents. I have found in the Enoch Mgijima Municipality matter, that the respondents were entitled to receive notice albeit short notice of the application prior to the applicants moving court for interim relief. On the applicants' version, the first applicant's Vice- Chairman, who deposed to the founding affidavit, had met and engaged with some of the respondents on, inter alia, the protest as aforementioned. The fact that no notice was given to them is something that this court frowns upon. The orders

that were sought and granted in their absence affected them directly and have costs implications. They had a right to be heard prior to the granting of the interdict.

[18] In the Go Touch Down Resort Season CC case relied upon by the applicants in their submissions, the applicants therein approached their attorney of record to address a letter of demand to the respondents. In that letter of demand, all that the applicants asked for was an undertaking that the respondents would cease and desist from their unlawful actions, which were specifically mentioned in the letter. No response was received from the respondents. However, the respondents gave an undertaking not to proceed with their gatherings until such time as the application was heard[4]. Applicants are expected to take steps to notify the respondents of their intention to approach court. It is fair and just to do so.

[18] I shall accordingly issue a costs order similar to the Enoch Mgijima case No 444/ 2023 and deprive the applicants of 50% of their costs for bringing this application on an ex parte basis.

[19] In the circumstances, I make the following Order:

19.1 The Rule Nisi issued on 17 February 2023 is hereby confirmed.

19.2 The 1st to 11th respondents are hereby ordered to pay 50% of the applicants' costs of the application, jointly and severally, the one paying the other to be absolved.

T.V NORMAN

JUDGE OF THE HIGH COURT

Date of Hearing: 30

March 2023

Date of Delivery of Judgment: 23 May 2023

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- [1] 2014 JOL 31586 (KZD) at 22; Go Touchdown Resort Seasons CC & Another v Farm Rural Informal Dwellers Association & Another Case No. 60735/2021 North Gauteng High Court at para 42.
- [2] 2012(6) SA 223 (CC) at para 50.
- [3] South African Transport and Allied Workers Union and Another v Garvas and Others (CCT 112/11) [2012] ZACC 13; 2012(8) BCLR 840 (CC); 2013(1) SA 83 (CC) (13 June 2012).
- [4] GoTouch Down Resort-Season CC, supra paras 8 - 10

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