

SOUTH AFRICA / JUDGMENT

Capital Propfund (Pty) Ltd v Mabena and Others (913/2023) [2023] ZAMPMHC 14 (24 April 2023) [2023] ZAMPMHC 14

COURT

Middelburg High Court, Mpumalanga

BEFORE

MBG Langa

CASE / FILE NUMBER

913/2023

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IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION (MIDDELBURG LOCAL SEAT)

CASE NO:913/2023

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE: 24/04/2023

In the matter between:

CAPITAL PROPFUND (PTY) LTD APPLICANT

AND

MUMSY MABENA FIRST

RESPONDENT

NKOSI MABENA BALWAPHI V SECOND

RESPONDENT

HLANGANANI BOMAMA 22 NPC THIRD

RESPONDENT

KWA-NDEBELE ORGANISATION FOURTH

RESPONDENT

POFU TRADITIONAL COUNCIL FIFTH

RESPONDENT

THE UNLAWFUL PROTESTERS AT PORTION SIXTH RESPONDENT

1 OF THE FARM ENKELDOORN 215 –JR

THE STATION COMMANDER SEVENTH

RESPONDENT

KWAMHLANGA POLICE STATION

THE MINISTER OF POLICE C/O STATE ATTORNEY EIGHTH RESPONDENT

REASONS

FOR ORDER

LANGA J:

Introduction

[1] This application came before court on an urgent basis in terms of Rule 6 (12) of the Uniform Rules of Court. Capital Propfund (Pty) Ltd, (“the applicant”) sought an interdict to stop the first to sixth respondents (“the respondents”) from interfering with its business, to wit, the KwaMhlanga Crossroads

Shopping Plaza, situated at KwaMhlanga on the Enkeldoorn Farm 215–JR (“the Plaza”), in the province of Mpumalanga. Only the first, second, third and fifth respondents filed notices to oppose the application.

The order

[2] After having heard Counsels for the parties and having read the papers filed of record, on 14 April 2023 I made the following order:

1. It is determined that the matter is urgent in accordance with Rule 6(12) of the Uniform Rules of Court;
2. An order is hereby granted interdicting and restraining the first to sixth respondents from:
 - 2.1 Interfering or preventing or hampering the applicant, its tenants, its employees, its subcontractors or assigns from conducting business operations at KwaMhlanga Crossroads Shopping Plaza (“the Plaza”) situated at KwaMhlanga, Enkeldoorn Farm, Mpumalanga Province;
 - 2.2 Accessing or trespassing on the Plaza;

- 2.3 Assaulting or threatening to assault or intimidating the applicant or its tenants or its employees or its subcontractors or assigns in any manner whatsoever;
- 2.4 Destroying or damaging the property or goods of the applicant, its employees, its tenants or its subcontractors or assigns; and
- 2.5 Inciting or encouraging or instigating any other person or persons to commit the acts set out in sub-paragraphs 2.1 to 2.4 above;
3. The first to sixth respondents are further interdicted and restrained from convening, attending, organizing any gathering(s) and/or demonstration(s) and/or procession(s) in contravention of the provisions of the Regulation of Gatherings Act 205 of 1993 at the Plaza;
4. The seventh and eighth respondents are hereby directed to:
- 4.1 Give effect to the order, within the course and scope of their constitutional mandate, by maintaining public order and preventing, combating and investigating any crimes committed by the first to sixth respondents;
- 4.2 Disperse any persons or group of persons who act in any unlawful manner and/or contrary to this order and/or who are acting in any manner as to contravene or reduce the effectiveness of this order;
- 4.3 Pursuant to any complaint of breach of this order or disruption or unlawful protests being held at the Plaza being laid with them, to open a docket and investigate such conduct expeditiously, and proceed to effect such arrests as are necessary to enforce the order and their constitutional mandate;
- 4.4 Utilize the services of the Public Order Policing Unit of the SAPS to maintain law and order in the event of riots or unlawful protests within the course and scope of their constitutional mandate;
5. The first, second, third and fifth respondents are ordered to pay the costs of this application on attorney and client scale, jointly and severally, the one paying the others to be absolved.
6. The reasons for the order to follow in due course.

[3] The following therefore constitute the reasons for the above order.

Concise

facts

- [4] It is necessary to first give a brief background and facts of the matter which are not complicated and most of which are in fact common cause. This litigation arises out of a dispute between the respondents and Shoprite retail store ("Shoprite")

situated on the KwaMhlanga Crossroads Shopping Plaza and which is one of the applicant's tenants. This dispute between the

respondents and Shoprite stems from the dismissal of an employee, one Kholofelo Nkabinde, (“Ms Nkabinde”) by Shoprite,

apparently for her unauthorised absence from work during the period 28 November 2022 to 16 January 2023. The respondents are disgruntled

by the said dismissal of Ms Nkabinde who allegedly had been attending to traditional rituals during her absence from work. It needs to be mentioned that there was no relationship between Ms Nkabinde and the applicant as she was not an employee of the applicant but that of Shoprite retail store.

- [5] It is common cause that due to their disgruntlement, on 14 February 2023, the respondents and other members of the community went to the Plaza demanding that the applicant and Shoprite re-instate Ms Nkabinde. After the applicant indicated that it was not the employer and therefore not involved in this labour dispute, some demonstrations were held at the Plaza and a memorandum of demands was eventually handed over to Shoprite on 24 February 2023. On 08 March 2023 the applicant received a letter dated 7 March 2023 from the fifth respondent in which it was informed that picketing will take place at the Plaza from 10 March 2023 until Shoprite addresses the demands contained in the memorandum of demands referred to above. In the said letter the applicant was also informed that the community had taken a resolution to lock the gates of the Plaza, ostensibly in order to prevent inter alia looting and damage to property which may be perpetrated by other persons who may join the demonstrations. In its response the applicant informed the fifth respondent that the locking of the gates would amount to an unlawful conduct on their part and demanded an undertaking from the third respondent not to proceed with the threatened action by no later than 9 March 2023. As no undertaking was made the applicant and Shoprite apparently beefed up security at the Plaza at a cost.
- [6] Indeed as pronounced in the said letter addressed to the applicant, on 10 March 2023, a group of people, who included the first to sixth respondents, picketed at the Plaza and also locked the gates and essentially shut down the Plaza. Although the police were present at the Plaza on 10 March 2023 when the picketing took place, they however, did not prohibit the people from entering the Plaza and demonstrating. The applicant therefore contended that the police are not doing enough as they have not taken steps to maintain public order and to investigate the incidents at the Plaza.
- [7] The applicant alleged that due to the actions of the respondents it incurred additional costs amounting to R280 000-00 in respect of security upgrade. It further alleged that shutdown is effectively infringing on the rights of its tenants including Shoprite and that the joint turnover loss by the tenants was running at approximately R1 448 685-00 per day and is likely to escalate with each passing day.

- [8] The applicant contended that the interdict should be granted as it and the tenants are unable to freely continue trading at the Plaza without fear of intimidation, assault and unlawful interference. It contended further that in addition to the harm already caused by the picketing and the shutdown, there will be no substantial redress in due course for the millions of rands in losses suffered by the applicant and the tenants and which they continue to suffer as a result of the continued demonstrations and picketing at the Plaza.
- [9] The answering affidavit was deposed to by the first respondent Mamsy Mabhena on behalf of the first, second, third and fifth respondents who are the only respondents opposing the application. The second, third and fifth respondents also filed confirmatory affidavits in support of the answering affidavit. In her affidavit the first respondent confirms that the litigation resulted from the dismissal of Ms Nkabinde by Shoprite as already stated above. She further alleged that the decision to demonstrate against Shoprite and the Plaza was taken by the fourth and fifth respondents. She, however, also confirmed that she and the other respondents availed themselves at the Plaza and participated in the demonstrations even though she says it was for the purposes of ensuring that no criminality happens and no damage is caused to the Plaza. Ms Mabhena further confirmed that the respondents together with other members of the community were part of the negotiations around the dismissal and demanded reinstatement of Ms Nkabinde.
- [10] Although Ms Mabhena claims to have been acting in the interest of the Plaza, she however, confirmed that the decision to picket at Shoprite as well as the decision to close the gates were taken by them. She, however, contended that their actions were misunderstood as they wanted to protect that Plaza by closing the gates just as they had protected it and other infrastructure during the previous riots in which most businesses were destroyed in some provinces in 2022. Although she conceded that they decided to lock the gates, Ms Mabhena however also denied in the same affidavit that they decided to lock the gates. She instead stated that it was the community which took the decision even though she states in her affidavit that “we proposed that the gates should be locked by either the police or the security guards”.
- [11] Ms Mabhena further conceded that the dispute was between “us” the respondents and Shoprite and did not involve the applicant. She also suggested that the respondents wanted to settle the matter with the applicant and confirmed that although an agreement was reached it could not be finalized before the application was brought to court. She stated that this was because their attorney did not receive the settlement proposal on time as his offices were closed over the weekend of 18 and 19 March 2023 and also because the office staff did not report for work because of the so-called National shutdown on 20 March 2023. Startlingly, despite stating that the applicant’s attorneys were responsible for the failure to reach a settlement, the respondents have stated in the same affidavit that they rejected the settlement proposal made by the applicant. Despite admitting that they rejected the settlement proposal and despite alleging that the applicant was responsible for the failure to settle the matter, the respondents stated in their answering affidavit that they are not

prepared to state the reasons for rejecting the proposal. They stated further that when the applicant proceeded with the application they decided to oppose it.

Discussion

- [12] It is common cause that the applicant negotiated a settlement of the matter with the respondent but the respondents rejected the settlement proposals as they conceded. The respondents confirmed that they had indeed reached some agreement but that when the document was presented to them for signature they rejected it. What is strange is that the respondents do not even want to disclose their reasons for rejecting the settlement proposal when same was reduced to writing. This casts doubt on the respondent's bona fides in the attempt to settle the matter.
- [13] It is further common cause from the papers filed that the Plaza was indeed interfered with by the respondents who not only proposed to have the gates locked but had them locked. The respondents conceded that they also ensured that there was no access to the Plaza at least on 10 March 2023 and the complex was shut down. Furthermore, the respondents conceded that even after the gates were unlocked, the picketing continued and that at least Shoprite's business activities were affected by the demonstrations at the entrance to Shoprite.
- [14] From the evidence once can safely conclude that there were disturbances and skirmishes at the Plaza even after the gates were unlocked. The evidence clearly shows that the respondents were involved in activities which were unlawful despite their claim that they were protecting the Plaza. If there was any cause to protect the Plaza this time around, this was precipitated by the respondents and other persons. The blockading of the Plaza on the 10 and 17 March 2023 and the subsequent picketing amounted to unlawful conduct on the part of the respondents and other persons involved. The rights of the applicant and Shoprite were clearly infringed by the conduct of the respondents and others. Based on these infringements the applicant, who was not even a party to the dispute, would have been entitled to protection in the form of an interdict.
- [15] The respondent's counsel argued that the application for interdictory relief should be dismissed as the matter has been resolved. He argued that the applicant cannot demonstrate reasonable apprehension of harm as Shoprite has in principle agreed to re-employ Ms Nkabinde and that this therefore extinguishes the dispute and its consequences. He argued that this matter is therefore moot as the horse has already bolted as he put it.
- [16] The problem with this approach is that while there is no evidence to that effect, there is also uncontroverted evidence that the matter is still pending in the CCMA. As correctly argued by the applicant's counsel, the fact that the dispute is still pending in the CCMA essentially means that it has not been resolved contrary to the respondent's contention. The dispute is therefore still alive as the matter is still pending in the CCMA and the employee Ms Nkabinde is still not back at work. From the facts before court likelihood of the dispute continuing cannot be ruled out. Consequently, the contention that the dispute has been

resolved cannot hold and has to be jettisoned.

[17] Based on the above factual position and conclusion it is clear that a reasonable apprehension of harm has been established and is extant. I am therefore satisfied in the circumstances that the applicant has not only established that it has a clear right which has been and is still being infringed, it has also established that there is a reasonable apprehension that the harm will continue into the future.

[18] However, and most importantly, the applicant has placed uncontroverted evidence that it has already incurred losses amounting

to millions. From this fact one can safely conclude that the applicant has demonstrated that there will be no substantial redress

in due course as the respondents are unlikely to redress the losses.

[19] Regarding the costs the established principle is that the costs follow the result. In this case there is no reason to deviate from this principle. However, as regards to the order for costs on a higher scale it must be pointed out that the application could have been averted had the respondents acted bona fide in dealing with this matter. The evidence shows that although the applicant was, despite the costs incurred by the business, still prepared to settle the matter, the respondents simply finally rejected the offer without any good reasons as they even chose not to advance any. It was clear that the applicant did not have a case against the respondents, and they should therefore have aborted at the earliest possible opportunity. They however failed to do so and continued to oppose a matter that they knew had to be settled. The respondents caused the applicant to incur avoidable legal costs attendant to the litigation. An innocent party cannot be put out of pocket because of the ill-advised litigation by the other party. Under these circumstances the court must show its displeasure by imposing costs on a higher scale as it did. Consequently, the court deemed it fit that costs be on attorney and client scale as reflected in the order.

Conclusion

[19] I am accordingly satisfied that the applicant has made out a case for the granting of interdictory relief contained in the order dated 14 April 2023 as reflected in paragraph 2 above.

MBG LANGA

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: Advocate TS Ngwenya, Mbombela.

Instructed by: Nkosinathi

Ntaka Attorneys, Johannesburg.

For the Respondents: Advocate H Mpe, Polokwane.

Instructed by: JS

Masombuka Attorneys, Empumalanga.

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be the 24 April 2023 at 10h00.

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