

SOUTH AFRICA / JUDGMENT

Vukile Property Fund Ltd v Gugulethu Residents and Others (19970/2024)

[2025] ZAWCHC 130 (20 March 2025)

[2025] ZAWCHC 130

COURT

Western Cape High Court, Cape Town

BEFORE

P. S. Van Zyl

CASE / FILE NUMBER

19970/2024

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IN THE HIGH COURT OF
SOUTH AFRICA
(WESTERN CAPE
DIVISION, CAPE TOWN)
Case
number: 19970/2024

In the matter between:

VUKILE
PROPERTY FUND LTD
Applicant
and
GUGULETHU
RESIDENTS
First respondent
MR
NTSHAWUZANA
Second respondent
MR
MADODA-BULLET
Third respondent
MR
NQUNQA
Fourth respondent
UNKNOWN
SUPPORTERS OF GUGULETHU RESIDENTS
Fifth respondent
SOUTH
AFRICAN POLICE SERVICE (STATION
Sixth respondent

COMMANDER, GUGULETHU)
MINISTER
OF
POLICE
Seventh respondent

JUDGMENT

DELIVERED ON 20 MARCH 2025

VAN ZYL AJ:

Introduction

1. This is the return day of a rule nisi granted on 16 September 2024, in terms of which an urgent interim interdict was granted, as follows:

"2. That a Rule Nisi is issued calling upon all interested parties to show cause, if any, on Monday, 4 November 2024^[1] why an order in the following terms should not be granted:

2.1 The First to Fifth Respondents are interdicted from engaging in any acts of intimidation, disruption and/or violence in respect of 61 Gugulethu Square, corner of NY1 and NY6, Gugulethu, Cape Town, commonly known as the Gugulethu Mall ("the Gugulethu Mall") and/or to incite others to engage in such acts.

2.2 The First to Fifth Respondents are interdicted from interrupting the Gugulethu Mall and/or preventing access to the Gugulethu Mall and/or to shut it down and/or to incite others to engage in such acts.

2.3 The First to Fifth Respondents are interdicted from intimidating, threatening, harassing and/or assaulting any person involved in and/or related to the Gugulethu Mall, and/or to incite others to engage in such acts.

2.4 The First to Fifth Respondents are to comply with the relevant statutory provisions including, but not limited to, the Regulation of Gatherings Act 205 of 1993.

2.5 The Sixth Respondents is authorised and directed to do all things necessary so as to ensure compliance with paragraphs 2.1 - 2.4 supra, including, but not limited to placing under arrest those contravening the said paragraphs.

2.6 Those opposing this application are to pay the costs occasioned by it, jointly and severally, the one paying, the others to be absolved."

2. The first to fourth respondents have since delivered answering affidavits, as well as a supplementary affidavit in which they comment on the applicant's replying affidavit.

3. The question is whether a final interdict should be granted.

The respondents' representative

4. The respondents were represented at the hearing by their ward councillor, Mr Mjuza, who is not a legal practitioner. Lay persons are not generally entitled to represent other persons in litigation. In *Manong & Associates (Pty) Ltd v Minister of Public Works and another* the Supreme Court of Appeal^[2] held as follows in relation to the High Court's inherent powers to regulate its own process:

"[14] I have expressly refrained from formulating a test for the exercise of the court's inherent power as I believe that such cases can confidently be left to the good sense of the judges concerned. Lest this be misconstrued as a tacit or general licence to unqualified agents, it needs be emphasised that in each such instance leave must be sought by way of a properly motivated, timeously lodged formal application showing good cause why, in that particular case, the rule prohibiting non-professional representation should be relaxed. Individual cases can thus be met by the exercise of the discretion in the circumstances of that case. It would thus be impermissible for a non-professional representative to take any step in the proceedings, including the signing of pleadings, notices or heads of argument ... without the requisite leave of the court concerned first having been sought and obtained.[3]"

5. No application had been made prior to the hearing to obtain permission from the Court for Mr Mjuza to appear, in accordance with the approach set out in *Manong*. I nevertheless allowed Mr Mjuza to make submissions in relation to the merits, because the matter was ripe for hearing, and there were several members of the public (comprising the first to fifth respondents and those supporting them) in at court. They had taken trouble to attend the proceedings (no doubt incurring expenses in doing so) and were expecting Mr Mjuza to present their case to the Court. It was in the interests of justice that the matter be dealt with.

Background

6. The applicant is the owner and operator of a retail centre known as the Gugulethu Mall. The Mall has been operating for several years, and serves the Gugulethu and surrounding communities.
7. During 2023 and early 2024 the applicant received demands from what appeared to be various community associations going by different names. They demanded, amongst other things, the employment of a greater proportion of local Gugulethu residents at the Mall. The applicant's representatives met with representatives of these associations, together with the Gugulethu Square ward councillor (who, as appears from the respondents' answering affidavits, was in fact Mr Mjuza) and other stakeholders on 26 February 2024 (the respondents indicate that the meeting was held on 29 February 2024, but nothing turns on this). This was thought to be a fruitful meeting at the time, and the applicant's representative left with the impression that the associations' concerns had been addressed.

The letter of 27 August 2024

8. On 27 August 2024, however, the applicant received a letter from another association going by the name of "Gugulethu Residents", that is, the first respondent. The letter was signed by the second, third and fourth respondents.
9. The letter described itself as being a "final meeting invitation", and took issue with the make-up of the staff employed at the Mall. It demanded that 80% of the employees should be made up of Gugulethu residents, and that all seasonal jobs should be reserved for Gugulethu youth only. It further demanded that "Gugulethu Business owners" should be consulted when office or store space became available, seemingly before it is rented out to non-"Gugulethu Business owners". Who the "Gugulethu Business owners" were was not explained. The letter demanded, lastly, that a portion of the Mall's proceeds should be paid "towards educational purposes in a form of scholarships, bursaries and youth programmes from the Gugulethu community".
10. In the supplementary affidavit delivered by the respondents in March 2025, they reiterate these demands.
11. The letter requested a meeting with the applicant by 16 September 2024, and concluded: "Failure to honour the invitation will result in the mall being shut down for as long as necessary. Its existence might well be ceased if it will not benefit the community at large. We will not be silenced. Enough is enough".
12. The final words of the letter raised a red flag to the applicant. It feared that the Mall and its occupants might be in danger.
13. The applicant thus made informal attempts to reach out to the first to fourth respondents to address their concerns. When this was unsuccessful, the applicant requested its managing agent to send a formal response to the letter on 9 September 2024, seeking an undertaking that the Mall would not be shut down, and that there would be no other form of interference with the Mall's business. The response was conciliatory and attempted to address all of the demands made in the respondents' letter, indicating that the problem was a complex one which could not be resolved by the Mall ownership alone. The various tenants, as well as the community at large and the social projects in which the Mall was involved, also had a role to play. The applicant

indicated in the letter that, should no undertaking be given, it would be compelled to institute an urgent application to obtain

interdictory relief.

14. No undertaking was given. The applicant also sought assistance from the South Africa Police Service, with no success. In the meantime, the applicant was in contact with the local ward councillor, who offered to mediate the situation. The applicant delayed the institution of this application with the hope that this meeting would resolve the issue. However, the meeting, which was scheduled for 11 September 2024, did not take place.

15. The applicant launched the application as a matter of urgency on 12 September 2024, given that the respondents' threatened date of 16 September 2024 was fast approaching. Despite prior service of the application on the first to fifth respondents' legal representative at the time, as well as email service on Mr Mjuza, there was no appearance for the respondents when the matter was called on 16 September 2024. The interim order was accordingly granted.

The respondents' opposition to the application

16. The first to fourth respondents' answering affidavits are similar in content. They contain, for the most part, a historical synopsis of the Gugulethu area, and repeat the respondents' concerns which underlie the threat of protest action in the August 2024 letter. Although the respondents state that they oppose the application, it is not clear from the affidavits what the basis for the opposition is. The factual averments made in the applicant's founding affidavit are not disputed.
17. The applicant delivered a brief replying affidavit in which it highlights the efforts made to avoid litigation and to find an amicable solution, even after the application was launched. It points out that the scheduled meeting of 11 September 2024 never happened, despite the applicant's commitment to attend it. Instead, a meeting was held on 7 November 2024 where the applicant's representative and several community members were present. The difficulties between the parties could not be resolved there.
18. Mr Mjuza's submissions at the hearing amounted mainly to a plea that the Mall should be compelled to act as a socially responsible citizen. It should act honestly and respectfully towards the community. Mr Mjuza explained that the community expected a contribution from the Mall to the social upliftment of the area and the education of its youth, and he repeated the demands made in the correspondence and the respondents' affidavits. He accused the applicant of telling untruths in the replying affidavit as regards the applicant's attempts to communicate with the respondents and with members of the community.

He questioned the applicant's respect for the community and its willingness to engage with the people within the area.

19. Insofar as the respondents' denials of the applicant's interactions with the community as set out in the replying affidavit

may conceivably be regarded as a factual dispute on the papers,[4] it does not take the matter anywhere. Even if the replying affidavit is disregarded in its entirety, the applicant's

factual averments as put up in the founding affidavit remain unaffected.

20. The respondents' affidavits do not deal with the implications of the final words of the August 2024 letter. Upon questioning from the court, Mr Mjuza denied that the letter constituted a threat. He contended that it was simply an attempt to seek attention. He added, however, that the community had been patient for a very long time, and that they could not be blamed for what might happen should they be forced to confront the applicant.
21. To date, no undertaking has been given to the effect that the respondent will not resort to the unlawful conduct referred to in the notice of motion. The applicant argues that the threat of violence and intimidation thus remains.

The requirements for the grant of a final interdict

22. The requirements for the grant of a final interdict are well established: a clear right, an injury (or damage) actually committed or reasonably apprehended, and the absence of a satisfactory alternative remedy.[5]

A clear right

23. It is clear from the terms of the interim order that the respondents have no right to undertake the activities which the applicants seek finally to interdict.[6]
24. Section 17 of the Constitution of the Republic of South Africa, 1996, affords everyone the right to protest, but this is not an absolute right. It is limited to lawful, unarmed, and peaceful protest: "Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions."
25. This was recognized by the Supreme Court of Appeal in *Hotz and others v University of Cape Town*: [7]

"[62] Protest action is not itself unlawful. ... the right to protest against injustice is one that is protected under our Constitution, not only specifically in s 17, by way of the right to assemble, demonstrate and present petitions, but also by other constitutionally protected rights, such as the right of freedom of opinion (s 15(1)); the right of freedom of expression (s 16(1)); the right of freedom of association (s 18); and the right to make political choices and campaign for a political cause (s 19(1)). But the mode of exercise of those rights is also the subject of constitutional regulation. Thus the right of freedom of speech does not extend to the advocacy of hatred that is based on race or ethnicity and that constitutes incitement to cause harm (s 16(2)(c)). The right of demonstration is to be exercised peacefully and unarmed (s 17). And all rights are to be exercised in a manner that respects and protects the foundational value of human dignity of other people (s 10) and the rights other people enjoy under the Constitution. In a democracy the recognition of rights vested in one person or group necessitates the recognition of the rights of other people and groups, and people must recognise this when exercising their own constitutional rights. ... 'every right must be exercised with due regard to the rights of others'. Finally the fact that South Africa is a society founded on the rule of law demands that the right is exercised in a manner that respects the law."

26. The Supreme Court of Appeal emphasized[8] that disputes are to be resolved without resorting to self-help:

"Section 34 of the Constitution guarantees access to courts, or, where appropriate, some other independent or impartial tribunal, for the resolution of all disputes capable of being resolved by the application of law. The Constitutional Court has described the right as being of cardinal importance and 'foundational to the stability of an orderly society' as it 'ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes without resorting to self-help'. It is 'a bulwark against vigilantism, and ...chaos and anarchy'. Not only is the Constitution the source of the university's right to approach the court for assistance, in doing so it is exercising a right that the Constitution guarantees. In granting an interdict the court is enforcing the principle of legality that obliges courts to give effect to legally recognised

rights. In the same way the principle of legality precludes a court from granting legal recognition and enforcement to unlawful conduct. To do so is 'the very antithesis of the rule of law'."

27. In their answering papers, the respondents do not deny that their August 2024 letter is in fact a threat (express or implied) to shut down the Mall, to intimidate patrons and tenants, and to cause damage and destruction to the Mall itself. I have referred to what Mr Mjuza submitted in respect thereof. His submissions did not did not relieve the sense of unease created by the letter.
28. In my view, that the letter contains such a threat cannot be denied.
29. The facts of *Border-Kei Chamber of Business and another v Komani Protest Action Group and others*[9] are in many respects similar to those in the present matter. That case too involved a protest group making a veiled threat that "they [the businesses] were not forced to close but at the same time they would be opening their businesses at their own risk". The respondents added 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".[10]
30. The court in *Border-Kei* recognised that this was a form of intimidation to force the businesses to close their doors in solidarity with the protestors' grievances. The court granted an interdict. In so doing, the court reaffirmed the constitutional right to protest, but held that it must be done within the confines of the law, and without infringing the rights of others: "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."[11]
31. In the present matter, the threat is even more direct than in *Border-Kei*, and the same principles apply.
32. I heard Mr Mjuza's submissions. I understand that the respondents are frustrated by what they regard as failure of the

applicant properly to interact with them and the community at large, and to act on to their demands. Mr Mjuza urged the Court to direct the applicant to engage with the respondents, accusing the applicant of hiding behind the judiciary so as to shirk its

responsibility to the community. It is, however, not for this Court to involve itself in the exact nature of the respondents' grievances, nor is it for the Court to determine whether the grievances are justified. Given the nature of the disputes,

that is not an exercise which can be undertaken on the papers, and it is in any event not the issue for decision before me. In Hotz[12] the Supreme Court of Appeal remarked in relation to a plea that the parties should be directed to engage:

“Counsel seized on this passage to argue that instead of an interdict the court should order the university and the protesters, including the appellants, to engage constructively with one another to resolve the issues that form the subject of the protests. But it is one thing for a judge to express the hope that parties may, by sensible engagement with one another, resolve their differences without any need for the court to intervene, and another thing altogether to refuse a litigant relief to which it is in law entitled, on the basis of a view that constructive engagement, third-party mediation or the application of common sense would be a preferable means of addressing the differences between the parties. Courts sometimes suggest to parties that there are ways other than litigation to resolve grievances and redress wrongs, but all they can do is encourage the parties to explore these alternatives. They cannot impose them upon the parties. In particular they cannot deny a legal remedy to a litigant entitled thereto on the basis that it should seek a remedy through some other non-legal means.”

33. This Court need – and should - only assess whether the respondents' conduct constitutes a threat of unlawful conduct, be it express or implied. Once this has been established, the requirements for the grant of a final interdict have been met.

An injury reasonably apprehended

34. Apart from the applicant's constitutional and common law right freely to trade and not be subjected to unlawful threats, the respondents are obliged to conduct themselves in accordance with the provisions of the Regulation of Gatherings Act 205 of 1993.

35. This Act defines[13] a "gathering" as:

"any assembly, concourse or procession of more than 15 persons in or on any public road as defined in the Road Traffic Act, 1989 (Act 29 of 1989), or any other public place or premises wholly or partly open to the air-

- (a) at which the principles, policy, actions or failure to act of any government, political party or political organization, whether or not that party or organization is registered in terms of any applicable law, are discussed, attacked, criticized, promoted or propagated; or

- (b) held to form pressure groups, to hand over petitions to any person, or to mobilize or demonstrate support for or opposition to the views, principles, policy, actions or omissions of any person or body of persons or institution, including any government, administration or governmental institution".
36. In terms of the Act, various procedural requirements must be met before one can have a gathering. The threatened action by the respondents has all the hallmarks of falling within the ambit of the Act, but there is no evidence to the effect that they intend complying with the provisions of the Act. This constitutes a stand-alone clear right in support of this application.
37. Even after the launch of this application, the respondents have given no indication that their planned action will take place within the bounds of the law. On the contrary, it appears from what Mr Mjuza stated at the hearing that the respondents, being at the end of their tether, will do as they see fit, and that they (in Mr Mjuza's submission) "cannot be blamed" for it.
38. This speaks to the threat being a continuous violation of the applicant's rights, and not just a once-off remark in a letter.

No other satisfactory remedy

39. The respondents have not indicated what alternative remedy, if any, is available to the applicant. The applicant was at pains to point out the efforts it had made to engage with the respondents to avoid the need to bring this application. At least some of those attempts have not been denied.
40. It was, in any event, not legally required of the applicant to have taken these steps. The fact that one of the parties, or even the Court, may think that a problem could be better resolved by extra-curial means is not a justification for refusing an

interdict.[14] Once the requirements for an interdict have been met, the court's scope for refusing relief is limited. There is no general discretion to refuse an interdict under these circumstances.[15]

41. On the facts available to me, I am of the view that the requirements for the grant of a final interdict have been met.

Costs

42. The award of costs falls within the discretion of this Court. Given the circumstances, it is fair that those respondents who opposed the application should bear the costs. The respondents were warned, prior to the institution of the application, that the applicant would have to resort to litigation should the respondents not undertake to act lawfully. On the applicant's version (at least partly undisputed), the applicant tried to resolve the dispute prior to the institution of the application. Mr Mjuza was involved in these attempts. The interdict entails nothing more than that the respondents should conduct themselves in accordance with the law.

43. In the exercise of my discretion on the available facts as a whole, I am of the view that an award of counsel's fees on Scale B is warranted in the present matter.

Order

44. In the circumstances, the rule nisi granted on 17 September 2024 is made final, and the first to fourth respondents are directed to pay the applicant's costs, including counsel's fees taxed on Scale B.

P. S. VAN ZYL

Acting judge of the High Court

Appearances:

For the applicant:

Mr J. P. Steenkamp, instructed by Ben Groot Attorneys t/a GVS Law

For the first to fifth respondents: Mr T. Mjuza (ward councillor)

[1] The rule was subsequently extended.

[2] 2010

(2) SA 167 (SCA) at paras [14]-[15]. Emphasis added.

[3] See also the discussion in *Navy Two CC v Industrial Zone Ltd* [2006] 3 All SA 263 (SCA) at paras [9]-[13].

[4] *Plascon Evans Paints (Tvl) Ltd v Van Riebeeck Paints (Pty) Ltd*

[1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E-635C.

[5] *Setlogelo v Setlogelo* 1914 AD 221 at 227.

[6] *Go Touchdown Resort Seasons CC and another v Farm Rural Informal Dwellers Association and another* [2022] ZAGPPHC 50 (20 January 2022) at para [42].

[7] 2017

(2) SA 485 (SCA) at para [62]. Emphasis added. The matter was taken on appeal to the Constitutional Court, but only in respect of costs (*Hotz and others v University of Cape Town* 2018 (1) SA 369 (CC)).

[8] *Hotz supra* at para [39]. Emphasis added.

[9] [2023] ZAECGHC 52 (23 May 2023).

[10] *Border-Kei supra* at para [4].

[11] *Border-Kei supra* at para [14].

[12] Hotz supra at para [38]. Emphasis added.

[13] In section 1. Emphasis added.

[14] Hotz supra at para [36].

[15] Hotz supra at para [29].

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