



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)**

Case No: EL2227/2022

In the matter between:

MAWETHU KOSANI

APPLICANT

and

**BUFFALO CITY METROPOLITAN
MUNICIPALITY**

FIRST RESPONDENT

**THE SPEAKER, BUFFALO CITY
METROPOLITAN MUNICIPALITY**

SECOND RESPONDENT

**CITY MANAGER, BUFFALO CITY
METROPOLITAN MUNICIPALITY**

THIRD RESPONDENT

**HEAD OF DEPARTMENT, PUBLIC
SAFETY AND EMERGENCY SERVICES**

FOURTH RESPONDENT

**BUFFALO CITY METROPOLITAN
MUNICIPALITY**

**PROVINCIAL COMMISSIONER, SOUTH
AFRICAN POLICE SERVICE,**

FIFTH RESPONDENT

EASTERN CAPE

LWAZI NKOSANA

SIXTH RESPONDENT

JUDGMENT

MBENENGE JP:

[1] On 15 December 2022, by virtue of a rule *nisi* returnable on 19 January 2023, the first to fourth respondents (the respondents) were called upon to show cause, if any, why they should not reinstate the security protection that had been granted to the applicant and which was subsequently withdrawn on 01 December 2022, and to do whatever is necessary within their available resources to protect and guarantee the physical safety of the applicant. The order was made to operate as interim relief pending the finalisation of Part B of the application.

[2] The launch of these proceedings was a sequel to a death threat allegedly received by the applicant after he had participated, in his capacity as Democratic Alliance councillor, in proceedings of the Buffalo City Metropolitan Municipal Council, on 24 August 2022.

[3] On the return day (19 January 2023), the applicant appeared in person and the respondents were legally represented.

[4] It is common cause that the applicant was not ready to argue the matter, but the respondents were. According to the applicant, he was desirous of having the matter postponed so as to secure legal representation and have his rights redressed. His erstwhile attorneys withdrew due to “*a misunderstanding regarding the payment of their legal fees.*” The court encouraged the parties to discuss the future conduct of the case and reach agreement in relation thereto.

[5] After the discussions had been held, the applicant acquiesced to an order discharging the rule *nisi* and postponing the matter, *sine die*, for the purposes of dealing with Part B of the application.

[6] The applicant now seeks an order reviving the rule *nisi*, alternatively varying the order by substituting same with one extending the rule *nisi* pending the outcome of Part B. In the further alternative, the applicant seeks an order reinstating the security protection previously

granted to him on terms not less favourable than those which existed prior to the impugned withdrawal.

[7] In support of the application, the applicant states:

“When we held discussions outside the courtroom with the 1st to the 4th respondents’ legal representatives, I was given no options and a postponement was categorically refused. I felt under pressure and very nervous as this was the first time I had to appear in person before a presiding officer. As a result, I acquiesced to an order that the Rule Nisi be discharged and that the matter be postponed *sine die* for the purposes of dealing with Part B of my application.”

He says, as a lay person lacking appreciation for court rules and procedures, in acceding to the impugned order, he did not envisage that the order would effectively result in him losing protection. Hence, when he left the court premises after the order had been granted, he was still in the company of his protectors.

[8] In the view of the applicant, the order is liable to be rescinded because it is the product of undue influence or pressure meted out to him by the respondents’ legal team during the negotiations preceding the grant of the order.

[9] On the other hand, the respondents, in pursuit of their opposition to the application, contend that during the negotiations the applicant was given an option to either proceed and move for a postponement application or to consent to the discharge of the rule *nisi*. There was no undue influence or pressure put on the applicant.

[10] The relevant portion of the affidavit further reads:

“26.7 During the settlement talks, the applicant requested time to speak to someone to receive advice over the phone. The applicant was asked who he was talking to, and he refused to give the name. This happened when the applicant suggested that the parties should expedite the review proceedings by writing a letter to the Judge President. The applicant was informed that the step would be premature to expedite the review when the review record was not out, and the applicant had not supplemented his founding papers. In any event, the matter before court was Part A and not Part B. It was evident that the applicant was getting legal advice over the phone.

26.8 The applicant was informed of the consequences of proceeding with a postponement in light of the fact that he brought the urgent application against the municipality and that the municipality was incurring costs for his protection.

26.9 The applicant was encouraged to ponder about his invidious position.

26.10 The applicant contacted his advisor telephonically again, the applicant returned and informed the municipality’s legal representatives that he consent to the discharge of the rule *nisi* with costs.

26.11 Thereafter a draft order was prepared and taken back to the judge in Chambers. The contents of the draft order were explained to the applicant.

26.12 Mr Bangani informed me that he is surprised and perplexed that the applicant is blaming the municipality's legal representatives for his choice."

[11] Much as a consent order following upon a settlement has the same standing and qualities as any other court order and is *res judicata* as between the parties regarding the matters covered,¹ in this matter it would be overly simplistic of me and not in the interest of justice to gloss over the paramount question – did the parties' minds meet regarding the consequence of the discharge of the rule *nisi*? This is a troubling aspect of the case, which, in my view, deserves of being enquired into even before a determination is made with regard to the relief the applicant might be entitled to.

[12] The alleged agreement to discharge the rule *nisi* underlies the order sought to be rescinded. According to the respondents, a compromise was reached; it is thus not available to this court to revisit the impugned order.

[13] The enquiry does not end there. A compromise may be set aside if it was obtained fraudulently² or on the grounds of mistake, provided that the order vitiated consent and did not merely relate to the motive of the parties or to the merits of the true dispute, which was the purpose of the parties to compromise.³ The same goes for undue pressure or influence.

[14] The dispute of fact between the parties as to how the negotiations were conducted renders it well-nigh impossible for me to decide the matter on the papers.

[15] Accordingly, the following order is made:

- 1. The application is referred for the hearing of oral evidence for a determination of -**
 - 1.1 whether the applicant was unduly influenced to consent to the order discharging the rule *nisi* granted on 15 December 2022;**
 - 1.2 what relief should be granted; and**
 - 1.3 what cost order should be made.**
- 2. The Registrar is directed to enrol this matter on an expedited basis.**
- 3. The provisions of rules 35, 36, 37 and 37A shall forthwith apply to this application.**

¹ *Moraitis Investments (Pty) Ltd v Montic Diary (Pty) Ltd and Others* [2017] 3 AllSA 485 (SCA), 2017 (5) SA 508 (SCA), para 10.

² *Rowe v Rowe* [1997] 3 AllSA 503 (A), 1997 (4) SA 160 (SCA); *Botha v Road Accident Fund* 2017 (2) SA 50 (SCA).

³ *Gollach v Comperts (1967) (Pty) Ltd v Universal Mills and Produce Co (Pty) Ltd* 1978 (1) SA 914 (A); *Wilson Bayly Holmes (Pty) Ltd v Maeyane* (1995) 2 AllSA 173 (T), 1995 (4) SA 340 (T).

4. Costs are reserved for determination by the court hearing oral evidence.

S M MBENENGE

JUDGE PRESIDENT OF THE HIGH COURT

Appearances:

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| Counsel for the applicant | : | <i>D Skoti</i> |
| Instructed by | : | Lwazi Dekeda Inc. East London |
| Counsel for the respondents | : | <i>A Mafu</i> |
| Instructed by | : | Bangani Attorneys East London |
| Heard on | : | 09 February 2023 |
| Delivered on | : | 14 March 2023 |