REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: Yes / No
(2) OF INTEREST TO OTHER JUDGES: Yes / No

5/2/2021
DATE

SIGNATURE

Case No.: 2020/26215

In the matter between:

CITY OF EKURHULENI METROPOLITAN MUNICIPALITY — Applicant

and

BAFANA MAZIBUKO — First Respondent

THOMAS NKUNA — Second Respondent

EMILY MOHLALA — Third Respondent

JERRY BULALA — Fourth Respondent

NGUBANE EZEKIEL — Fifth Respondent

ABEL MALEDIMO — Sixth Respondent

BHEKI BHEKI — Seventh Respondent

THE UNKNOWN INDIVIDUALS UNLAWFULLY GATHERING, INTERFERING, INTERRUPTING, DISRUPTING, INTIMIDATING AND PROVOKING THE APPLICANT'S CONTRACTORS AND EMPLOYEES WORKING ON THE TSAKANE WAR ON LEAKS 3 PROJECT — Eighth Respondent

CITY OF EKURHULENI METROPOLITAN POLICE DEPARTMENT — Ninth Respondent

SOUTH AFRICAN POLICE SERVICES — Tenth Respondent

JUDGMENT

This judgment was handed down electronically by circulation to the applicant's legal representatives and to the respondents and also by publication on SAFLII and is deemed to be handed down by such circulation.

Gilbert AJ

1. The applicant is a municipality that has appointed a panel of contractors to effect certain work within the municipal area. The applicant has appointed one of those contractors to effect repair water leaks within its municipal area. The community in which the leaks are being repaired is dissatisfied with this state of affairs and with the applicant's engagement with them and, so is alleged by the applicant, has sought to disrupt and prevent the contractor from carrying out the repairs.

2. The applicant seeks interdictory relief directed at preventing the disruption of the contractor from carrying out the repairs.

3. The applicant has alleged that it has identified the first to seventh respondents as leaders within the community who have engaged in this alleged disruptive activity, and so has cited these natural persons as the primary respondents against which it seeks interdictory relief. I shall refer to the first to seventh respondents, who are individually cited natural persons, as 'the opposing respondents".

4. Also cited, as the eighth respondent, is a faceless, generic group of persons described as *"the unknown individuals unlawfully gathering, interfering, interrupting, disrupting, intimidating and provoking the applicant's contractors and employees working on the Tsakane War on Leaks 3 Project"*. No person falling within this category has opposed these proceedings.

5. The municipal and national police have been cited as the ninth and tenth respondents respectively as they are directed to give effect to the relief, including to effect arrests of persons who transgress the interdictory relief. They have not participated in the proceedings.

6. On 22 September 2020 the court granted on an urgent basis the applicant interim interdictory relief in the following terms:

> "*3. The first to eighth respondents and any other interested person/s or group/s are prohibited and interdicted from:*
>
> *3.1 trespassing, invading and or gathering at any place, area or on the immovable property/properties where the Municipality's contractors and or their employees*

are carrying out the works of War on Leaks Phase 3 Project for the purposes of: -

3.1.1 intimidating, obstructing, disrupting, interfering threatening and or provoking in any manner, form whatsoever, the Municipality's contractors, subcontractors and or its employees who are carrying on with their works in the implementation of the Tsakane War on Leaks Phase 3 Project in around Tsakane and or any area where the project is being implemented.

3.1.2 performing any act of violence or causing violence or making any threat or instigating any threat by any other means, such as throwing stones, yelling insulting any authorised person/s on the Municipality's Tsakane War on Leaks Phase 3 Project.

3.1.3 instigating any person or member of the public to perform any acts designed or designated to intimidate obstruct, disrupt or interfere with the Municipality's appointed contractors or its employees together with its subcontractors carrying out the Municipality's Tsakane War on Leaks Phase 3 Project.

3.1.4 to conduct demonstration and or gathering, if they so wish, at any place closer than 200 metres from the perimeter of any of the Municipality's Tsakane War on Leaks Phase 3 Project."

7. The court simultaneously issued a *rule nisi* calling upon the respondents and any other interested persons/s or group of people to show cause on 9 November 2020 why the interim relief should not be made final.

8. The interim order also provided for the following relief:

> "*4 The eighth and ninth respondents[1] are ordered to prevent the first to eighth respondents and/or any other person or group of people from invading, trespassing and or provoking the Municipality's contractors, sub-contractors and their employees carrying out Municipality's Tsakane War on Leaks Phase 3 Project.[2]*
>
> *6. The members of the City of Ekurhuleni Metropolitan Police Department and of the South African Police Services are authorised and directed to arrest any person/s or members of the first to eighth respondents and any person or group of people who contravene/s the order stipulated in paragraph 3 above and that such a person/s so arrested are to justify on the return date on why they should not be incarcerated for a period of not less than 30 days.*
>
> *7. The Municipality is granted leave to serve copies of the Court Order and the application as a whole on the first to eighth respondents or on any other person/s or group of people through the sheriff by:*
>
> *7.1 by affixing copy of the Court Order and the application on corner of any area where the Municipality's and/or*

[1] Presumably this is intended to refer to the ninth and tenth respondents.
[2] I have combined paragraphs 4 and 5 of the order to rectify the obvious formatting error in the order.

its contractors are carrying out the Tsakane War on Leaks Phase 3 Project.

7.2 The eighth respondents and any other person/s or group/s who accepts the service from the sheriff is to identify themselves by their full names and physical address to the Sheriff or his Deputy.

8. Any person or group of people who intend/s to oppose the order in paragraph 3 from being made final are ordered:

8.1 to deliver their notice of intention to oppose on the Municipality's attorneys of record, within 5 days of service of this Court Order and the application on them, and

8.2 deliver their answering affidavit, within 10 days of delivering their notice intention to oppose.

9. Such person/s or respondent/s who oppose/s the Municipality's application shall identify themselves by name, their physical address, gender and age when delivering their written intention to oppose to the applicant's attorneys of record.

10. All respondents who oppose the application shall forthwith be joined as respondents, be identified as such in the application and shall have the rights and obligation as respondents in as far as it is applicable to the rules of this Honourable Court.

11. In the event of any opposition the Municipality is granted leave to supplement its founding affidavit within 5 days from the date of receipt of the notice of intention to oppose."

9. The applicant seeks that the interim relief be confirmed, including the relief in paragraph 6. I raised my concerns with the formulation of the relief in paragraph 6 in particular as *inter alia* it was unclear who would make the determination that the interdictory order had been breached (there is no provision made for the court to determine whether the arrested person was in contempt and the consequences thereof), what would happen after an arrest was made (was the arrested person to remain in custody?) and how the relief would be given effect to as it was linked to a return date that would fall away if the order was confirmed. Applicant's counsel was nevertheless insistent that the relief in paragraph 6 should be granted, at least in some formulation and although it appeared that the relief contemplated incarceration as a sentence for a breach of the order without the court having first determined whether there had been contempt of the order[3] and what an appropriate sentence should be. The applicant's counsel did not seek to hand up an amended draft order addressing the concerns and motivating a particular form of final relief. The applicant contended itself with simply seeking an order that the '*rule nisi issued by Justice Strydom on 22 September 2020 is hereby confirmed*'[4] and appeared to require the court, if it was not prepared to simply confirm the *rule nisi*, to craft some or other sensible order granting relief in a final form.

[3] Bearing in mind that it would be necessary to prove that not only did the relevant person have notice of the court order and that he or she had breached the order, but also that beyond a reasonable doubt the relevant person had mala fide and wilfully breached the order: *Fakie NO v CCII Systems (Pty) Limited* 2006 (4) SA 326 (SCA) at para 42.

[4] See the draft order that had been uploaded (filed) on 19 January 2021.

10. This is but one instance of the cavalier approach that would be adopted by the applicant to its prosecution of its application.

11. The urgent relief was granted without any of the opposing respondents having filed answering affidavits. There is some confusion as to whether or not the respondents were present when the urgent order was granted, and if so which respondents were present, particularly as the hearing was conducted by the urgent court on a virtual platform and the respondents have throughout been unrepresented.

12. Be that as it may, the first respondent was able, after the grant of the urgent interim relief, to deliver an answering affidavit on 28 September 2020. The first respondent states in that affidavit that he acts on his behalf as well as on behalf of the second to seventh respondents, that is all the opposing respondents.

13. Attached to the first respondent's affidavit are confirmatory affidavits by the second to seventh respondents, to which they deposed at a police station on 23 September 2020.

14. Whatever the difficulties may have been on 22 September 2020, the opposing respondents were sufficiently aware of the proceedings to have filed answering affidavits thereof, and so have participated in these proceedings.

15. Nonetheless, it is concerning that given the far-reaching effect of the interim order, particularly should it be confirmed, and which places the

opposing respondents at risk of being arrested and incarcerated, that the applicant did not take steps to ensure that the interim order containing the rule *nisi* was properly served per sheriff on each of the first to seventh respondents.

16. The applicant in paragraph 66 of its founding affidavit had undertaken through its attorneys to create a WhatsApp group with all the respondents' numbers so as to bring the contents of the application to their attention and that therefore they would not be prejudiced. I was informed by the applicant's counsel from the bar that no such WhatsApp group was created, notwithstanding this undertaking and presumably it having been relied upon to persuade the urgent court to grant the relief that it did on 22 September 2020.

17. Paragraph 67 of the founding affidavit that served before the urgent court also states that the respondents would "*properly be served*". The applicant states in paragraph 68 of its affidavit that unfortunately the applicant had neither their email addresses nor their physical addresses.

18. But whatever the position may have been when the founding affidavit was prepared and the urgent relief granted on 22 September 2020, the answering affidavit of the first respondent as well the confirmatory affidavits of the other opposing respondents contain physical addresses and some even telephone numbers.

19. Notwithstanding the applicant having this information it did not produce any proof that the interim order had been properly served by sheriff on any

of the respondents, including the opposing respondents. Although there were indications from the bar that the applicant has so attended to do so, no returns of service had been uploaded (filed) in the court file.

20. Although the interim order expressly grants the applicant leave to service copies of the interim order and the application on the respondents in a particular manner, there is no evidence that the applicant did so.

21. The applicant contented itself with submissions that as the opposing respondents had filed answering affidavits and at least some of them had appeared in court on the various return dates that this constituted adequate knowledge on their part in order for the rule *nisi* to be confirmed, and that this excused any failure to properly effect service upon them.

22. I have already expressed my concern at this approach by the applicant, particularly given the undertakings in its founding affidavit that it would effect service.

23. The applicant also overlooks that there are other respondents, other than the opposing respondents. There is no proof that the interim order was served on the ninth and tenth respondent as the law enforcement bodies that the applicant seek enforce the order.

24. The applicant did not seek to craft an order for final relief that is limited to the first to seventh respondents. The applicant persists in seeking that the faceless group of persons described as the eighth respondent also be bound by a final order. There is no evidence that the applicant gave notice

(or even attempted to give notice) to those that may constitute this amorphous grouping. There is no evidence of publication of any sort, such as in a local circulating newspaper. If final relief is granted as sought by the applicant, the order may be used to enforce interdictory relief, on the pain of incarceration, against persons who have neither been cited nor served in any form with notice of these proceedings or the interim order.

25. The rule *nisi* not only calls upon the first to eighth respondents to show cause on the return date why a final order should not be granted, but also upon *'any other interested person/s or group of persons'* to show cause. In the absence of adequate publication of the rule *nisi*, it cannot be expected of such other interested persons or group of persons to know of the rule *nisi* and show cause on the return date why final relief should not be granted.

26. As stated, the opposing respondents, although unrepresented, were able by 28 September 2020 to file an answering affidavit. Although the opposing respondents were not legally represented, the answering affidavit does put forth their position with sufficient cogency, responding substantively to the applicant's founding affidavit and making serious allegations of and concerning the conduct of the applicant and various other persons, such as personnel of the contractor. The averments in the answering affidavit include assertions that the applicant municipality and other role-players declined to engage constructively in relation to the community's grievances, that certain of the individually cited respondents were not part of the various disruptive behaviour that the applicant

contends form the basis for the relief that it seeks, that the contractor engaged by the applicant itself engaged in intimidatory conduct directed at the community, that the contractor's site agent Mr Xolani (who furnished a confirmatory affidavit to the applicant's founding affidavit) was unresponsive and evasive, and that those undertaking the repairs are "*unknown individuals*" who are not there to provide service delivery "*but to milk the resources of the community and leave it with nothing to salvage*". The opposing respondents in their answering affidavit express concern at the manner in which the contractor was awarded the project, contending that "*there's a lot to uncover from this project*" and deny that the opposing respondents "*disrupted, harassed and invaded site*".

27. These are self-evidently serious allegations being asserted by the respondents who are leaders within their community. It would have been expected of the applicant municipality to respond to these allegations by way of a replying affidavit. But the applicant chose not to. The explanation given by the applicant's counsel is that there was no need to do so because on the common cause facts, particularly as to what was admitted by the opposing respondents in their answering affidavit, the relief was justified. I shall return to this when dealing with the merits of the application.

28. The opposing respondents complain that the applicant does not engage seriously with them. This complaint is fortified by the applicant's decision not to respond by way of a replying affidavit to the opposing respondents' averments in their answering affidavits. Whatever the tactical legal

motivation not to deliver a replying affidavit, the applicant's decision not to respond to the serious allegations made under oath by the opposing respondents does not redound to the applicant's credit and is not conducive towards a commitment to engage constructively with the opposing respondents and the community that it serves.

29. Upon the applicant electing not to file a replying affidavit, there were no further affidavits outstanding. The applicant was therefore in a position as early as the end of September 2020 to advance the prosecution of its interdictory proceedings to finality, and in particular to deliver heads of argument. Given the far-reaching interim relief that it had been granted, which included the potential incarceration of persons transgressing the order, it was incumbent upon it do so with alacrity.

30. But the applicant did not do so.

31. The return date of the rule nisi was 9 November 2020.

32. On Monday, 25 January 2021, when the matter was first called before me, I invited the applicant to deliver a supplementary affidavit why the application should not be struck from the roll, effectively discharging the rule nisi, on the basis that the matter was not ripe for hearing as there had been non-compliance with the applicable practice manual and directives. I stood down the matter until Friday, 29 January 2021 for the applicant to do so and for the opposing respondents to respond, should they choose to do so.

33. The applicant did file a supplementary affidavit, by the applicant's attorney of record. The applicant's attorney stated that the application should have been enrolled on the opposed roll for 9 November 2020, but that "*for reasons unknown to the applicant*" the registrar enrolled same on the unopposed roll. The applicant appears to fault the registrar for doing so. But the registrar was entirely correct.

34. The Practice Manual and September Consolidated Directive makes it clear that a matter cannot be enrolled on the opposed roll unless it is ripe for hearing, which requires at the very least that affidavits have been exchanged between the parties, with heads of arguments and practice notes.[5] I refer to my judgment in *Chongqing Qingxing Industry SA (Pty) Limited v Mingying Ye and four others*[6] in which I deal fully with the necessity to comply with the relevant procedures to ensure that a matter is ripe for hearing before being enrolled on the opposed roll.

35. It is therefore not surprising that the Registrar enrolled the matter on the unopposed roll rather than the opposed roll, as the matter was not ripe to be enrolled on the opposed roll. The applicant had not filed any heads of argument or a practice note[7] to enable the matter to be ripe for hearing on the opposed roll for 9 November 2020.

36. On the return day, 9 November 2020, the opposing respondents sought a postponement in order to attempt to obtain the services of an attorney.

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[5] With list of authorities and a cross-referenced chronology table: paragraphs 1 to 5, 16 and 17 of Chapter 9.8.2 of the Practice Manual. See also paragraph 94 of the September Consolidated Directive.
[6] Case number 35962/2020, handed down on 29 January 2021.
[7] The only practice note was for the unopposed hearing before the urgent court on 22 September 2020.

The court extended the rule *nisi* to 25 January 2021. Presumably, the applicant had obtained this date from the registrar.

37. Again, the applicant, now for the second time, acted contrary to the Practice Manual. The applicant had obtained an opposed date from the registrar and had attended to enrol the matter on the opposed roll for 25 January 2021 in circumstances where through its own continued default in complying with the relevant practice manual and procedures the application was not ripe for hearing.

38. It would only be on 19 January 2021 that the applicant would eventually deliver heads of argument and a practice note and then only after the omission had been pointed out in my allocated roll and in my annotations to the Caselines file on 14 January 2021. The applicant was oblivious to the procedural requirements, whether because it was unaware thereof or because it was unconcerned with any need to comply with them. This is unacceptable, especially as the applicant in its supplementary affidavit does not demonstrate any real concern at or contriteness with these failings, or even an adequate realisation as to its non-compliance.

39. The applicant in its supplementary affidavit creates the impression that it and the court indulged the respondents on 9 November 2020 by extending the rule *nisi* to 25 January 2021. But this is not entirely correct in that the applicant too was being indulged given that it had done nothing by that date to advance its own application, having sought to enrol the matter on the incorrect roll. The applicant had known since 28 September 2020 that

the application was opposed by the opposing respondents but it had done nothing to advance the hearing of the matter on an opposed basis, such as file heads of argument. The matter was not ripe for hearing as an opposed matter on 9 November 2020 and was unable to heard as an unopposed application as the opposing respondents had long since filed answering affidavits. The rule *nisi* was unlikely to be confirmed that day and the applicant needed the postponement of the matter as much as the opposing respondents did.

40. As stated, it was because of this non-compliance that I afforded the applicant an opportunity to deliver a supplementary affidavit motivating why the rule nisi should be extended again (applicant's counsel had mentioned during the course of argument on 25 January 2021 that he had obtained a date in March 2021 from the Registrar), rather than striking the matter from the roll. I pointed out that a striking may result in the discharge of the rule nisi.

41. I expressed reticence at extending the return date again, especially as certain of the opposing respondents had once again appeared in court that day and were opposing any further delay in the finalisation of the matter. The opposing respondents had appeared (or attempted to appear) on the day of the urgent application on 22 September 2020, then appeared on 9 November 2020 and again on 25 January 2021. The opposing respondents submitted that they did not have the resources to repeatedly appear at court, as they were unemployed or had to attend work.

42. In these circumstances, I stood the matter down until Friday, 29 January 2021 to afford the applicant an opportunity to file a supplementary affidavit explaining its conduct and why the application should not be struck from the roll.

43. The supplementary affidavit does little to dispel the impression that the applicant was conducting its prosecution of the interdictory proceedings at its own pace and contrary to applicable procedures.

44. The supplementary affidavit is deposed to by an attorney from the applicant's instructing firm of attorneys. It does not contain any substantive facts as to the prejudice that the applicant will suffer should the rule *nisi* be discharged, other than to make generalised statements. What would have been expected, at the very least, is evidence by a deponent with personal knowledge as to what has transpired since the interim order was granted in September 2020, including the position on the ground in relation to the Project and what engagement had taken place with the opposing respondents and the community generally to address the issues.

45. The applicant had in its founding affidavit expressly recorded that it is not opposed to meeting with the opposing respondents in a peaceful manner to address any matters of concern with them and relating to the Project. But there is no evidence in the supplementary affidavit that the applicant has made any attempts to engage with the respondents, even after the opposing respondents filed their answering affidavit and appeared in court on the previous return date.

46. The supplementary affidavit shows no appreciation of the failure by the applicant to comply with the relevant procedures. I have already dealt with the applicant's erroneous assertion that the registrar had incorrectly enrolled the matter on the unopposed roll for 9 November 2020. I have also already dealt with the applicant's attorney incorrectly seeking to characterise the further extension of the rule nisi from 9 November 2020 to 25 January 2021 as having been occasioned only by the opposing respondents wanting to obtain the services of an attorney.

47. It also appears from the supplementary affidavit that the applicant seeks to explain its conduct on the basis that as the opposing respondents did not then obtain an attorney, that this excuses the applicant from complying with the Practice Directive. As stated above, there was nothing that stopped the applicant from timeously filing its heads of argument. Whether or not an attorney came on board for the opposing respondents does not change the fact that it was for the applicant to file heads of argument and to ensure as *dominus litis* that its matter was ripe for hearing,[8] whether on 9 November 2020 or on 25 January 2021.

48. The applicant's attorney explains that she closed her offices for two month from 11 November to 11 January 2021 for *'the December holidays'*. This can hardly constitute adequate reason for not complying with the practice directives. The applicant's attorney continues that when she returned to work "*there were issues with the CaseLines as same could not give us an option to upload documentations*" and that it was only through the

[8] Paragraph 109 of the September Consolidated Directive.

assistance of my registrar that the applicant was able to do so. Again, this is no explanation at all. The heads of argument that were uploaded are dated 18 January 2021 and therefore were only prepared or at least finalised and dated that day. It is not an instance of the heads of argument having been prepared in good time but the applicant's attorneys facing technical difficulties in uploading the heads of argument and practice to the electronic case system. As described above, it appears that the applicant's legal representatives were only spurred into action as a consequence of the directives that I had issued leading up to the hearing that pointed out that there had been non-compliance with the practice directives. But for my directives, it is unclear whether the applicant intended filing any heads of argument or practice note at all and was anticipating confirmation of the rule *nisi*, without more, on the opposed roll on 25 January 2021.

49. It is also noteworthy that no evidence was placed before the court of any attempts by the applicant or its legal representatives to engage constructively with the opposing respondents, whether for purposes of resolving the matter or for advancing the litigation. It was rather through the endeavours of my registrar that communications took place with the unrepresented respondents so as to advance their participation in the hearing of the application, both on 25 and 29 January 2021.

50. The distinct impression that is created upon the papers and by the submissions of the applicant's counsel is that once the applicant had succeeded in obtaining its interim order coupled to a rule *nisi*, it was

content to then prosecute the matter to finality at its leisure and without taking the opposing respondents' opposition seriously.

51. The opposing respondents on the other hand, being unrepresented and by all accounts unable to afford legal representation appear to have done what they could to advance their position.

52. The opposing respondents have taken sufficient interest in the proceedings to appear on each day the application was in court. Their case is also put forward in their answering affidavit, although they are legally unrepresented.

53. When the matter resumed before me on 29 January 2021, I indicated to the parties that having read the papers including the supplementary affidavit filed by the applicant, that I was prepared to hear the matter provided that the parties were in a position to argue the matter. The applicant indicated that it wished to proceed with the hearing of the matter rather than seek an extension of the rule nisi. The opposing respondents also wished the matter to be brought to finality.

54. Having heard the submissions by the applicant's counsel and on behalf of the opposing respondents (the first respondent made representations on 25 and 29 January 2021 and the sixth respondent made representations on 29 January 2021, on behalf of the opposing respondents), in my view, the applicant's explanation for not ensuring that the matter was ripe for hearing is unpersuasive and, if anything, reflected an unrepentant approach on its part.

55. As already stated, the interim relief that the applicant has obtained against the opposing respondents and the amorphous group of persons in the form of the eighth respondent is far-reaching and places those persons at risk of being deprived of their liberty. Nevertheless the applicant municipality adopted a cavalier approach to bringing the matter to finality.

56. The grant of a final interdict remains of a discretionary nature and a failure to prosecute the matter to finality expeditiously is to be taken into account.[9]

57. The applicant in seeking confirmation of the rule *nisi* would have to satisfy the usual requirements for a final interdict. The opposing respondents filed a substantive answering affidavit, to which the applicant elected not to reply. As the applicant seeks final relief on motion, the usual *Plascon-Evans* test applies in relation to any factual disputes that may arise, where the opposing respondents' version is effectively to be preferred over that of the applicant[10] unless the opposing respondents' version can be rejected as far-fetched and fanciful.[11]

58. The applicant relied heavily upon paragraph 10 of the first respondent's answering affidavit:

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[9] *Sandell and others v Jacobs and another* 1970 (4) SA 630 (SWA) at 635B-D; *Chopra v Avalon Cinemas SA (Pty) Ltd and another* 1974 (1) SA 469 (D) at 472C – F; *Razi v Madaza* [2001] 1 All SA 498 (Tk) at 498.

[10] Final relief can only be granted on motion if the facts as stated by the first respondent, together with the admitted facts in the applicant's affidavits, justify the granting of the relief: *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Limited* 1984 (3) SA 623 (A) at 634 E-G, as reaffirmed in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 290 D-G. Effectively, any factual disputes ought to be resolved by accepting the respondents' version, save where such version is "*so far-fetched or clearly untenable that the court is justified in rejecting (it) merely on the papers": Botha v Law Society, Northern Provinces* 2009 (1) SA 277 (SCA) at para 4, with reference to *Plascon-Evans Paints*.

[11] Once the respondents' version is rejected as far-fetched and fanciful, there would only be one version before the court, namely that of the applicant and therefore the *Plascon-Evans* approach would not come into play as there would no longer be conflicting factual versions.

> "*Seeing that the ward councillor is not responsive on the grievances of the community, <u>the community took it upon itself to halt operations of the contractors</u> as they believed that the recruitment process was procedurally incorrect as many of these contractors are not from within and that has great economical and social effect on theirs lives.*"[12]

59. The applicant's counsel submitted that this constitutes sufficient admission of the conduct complained of by the applicant in its founding affidavit to justify the confirmation of the rule *nisi* against the respondents. But there is no reference to any of the opposing respondents or any particular person, only to "the community" generally.

60. To the extent "the community' is to be equated with the faceless group cited by the applicant as the eighth respondent, no attempt had been made to effect service of or publish the rule *nisi* on 'the community'.

61. The only evidence in the applicant's founding affidavit identifying the opposing respondents as having participated in the conduct complained of are the following paragraphs.

62. The applicant's deponent Davey Selven Frank ("Frank"), described as the Divisional Head: Specialised Legal, By-Law Drafting and SCM Support of the applicant, states in paragraph 16 that:

> "*The first to seventh respondents were identified by the applicant's contractors and its employees as people who often attend to their*

[12] The emphasis is mine.

> *work stations and intimidate, provoke and threatens and seek the employees to stop with the Tsakane War On Leaks 3 Project*".

63. The deponent, Frank, does not have personal knowledge of these allegations and does not identify the applicant's contractors and employees that it refers to in this paragraph who had identified the respondents.

64. Similarly, in relation to the bland assertion in paragraph 33 of the founding affidavit that:

> "*the appointed contractor and the appointed sub-contractors advised the Municipality that they are experiencing an ongoing interference from the first to seventh respondents.*"

65. Frank as the deponent also cannot have first-hand knowledge of his assertion in paragraph 41 of the founding affidavit that:

> "*The first to seventh respondents threatens and insult and intimate the employees of the appointed contractor and the sub-contractors and seek of them to stop the project until the entities have been appointed.*"

66. No source of knowledge at all is cited for this factual assertion.

67. The applicant filed two confirmatory affidavits to its founding affidavit. The first is by the applicant's chief engineer of projects in the water and sanitation department at the applicant municipality, Thulani Mthembu. But he is not described in the founding affidavit as having personal knowledge

of the involvement of the respondents in the conduct complained of. In fact, he is not referred to at all in the founding affidavit.

68. The second confirmatory is by Xolani Magadlela, who is described as the Site Agent for Makhodo Project Management, which is the main contractor for the Tsakane War on Leaks Project. This person is neither identified in the founding affidavit as the source of the factual assertions made by Frank nor referred to in the founding affidavit.

69. The first respondent on behalf of the opposing respondents denies under oath any intimidatory conduct. For example, the first respondent states under oath in paragraph 18 of the answering affidavit that:

> "*The applicants alleges that we disrupted, harassed and invaded site, we strongly deny these allegations levelled against us as baseless accusations aimed at silencing us from uncovering the rot with the war on leaks project.*"

70. The first respondent expressly stated under oath in paragraph 11 of his answering affidavit that:

> "*some of the respondents cited in this application where never even part of the community engagements and gatherings with the community however because of their political portfolios in the branch are cited as respondents, we as leaders of the community we tried several times to engage with the site agent Mr. Xolani to have this matter resolved as it had detrimental, economical and social effect on parties involved but Mr. Xolani did not want to engage with us*".

71. The applicant declined to respond to these averments in a replying affidavit, including the averment that at least some of the opposing respondents were not part of the community gatherings that appear to be the subject matter of the applicant's complaint. At the very least, a response was expected from the applicant on this issue. Nor does the applicant seek to obtain a version from Mr Xolani, although he is referred to by name in the answering affidavit on several occasions and is available to the applicant as he had signed a confirmatory affidavit.

72. The opposing respondents again in court, both on 25 and 29 January 2021 emphasised in their submissions that at least some of the opposing played no role in any of the events complained of by the applicant. In a letter filed on behalf of the opposing respondents in the court file on 5 November 2020 motivating for a postponement of the rule nisi as had been previously enrolled on 9 November 2020, the opposing respondents record that those who were present during the project stoppage were the first respondent, second respondent and the fifth respondent as well as various other persons who are not cited as respondents.

73. As the applicant has failed to file a replying affidavit, the court is to accept the version of the opposing respondents and find that the third, fourth and sixth respondents have not been sufficiently proven to have been part of any of the conduct complained of and therefore no relief can be granted against them.

74. In relation to the remaining individually cited respondents, there remains a factual dispute as to the extent of their participation. Although the evidence before the court demonstrates at least some involvement of the first, second, and fifth respondents in the "*project stoppage*" (which mainly emanates from the letter filed on behalf of the opposing respondents and not from any affidavit), this falls short of resolving the factual dispute in favour of the applicant of the alleged intimation, obstruction, disruption, interference and threatening, and of the performance of any act of violence and of making or instigating threats as described in the rule *nisi* that the applicant seeks to confirm.

75. As further difficulty presents itself for the applicant in seeking final relief. The applicant is required to demonstrate that there is no other satisfactory remedy available to it. Although the applicant stated in its founding affidavit that it remained open to meeting with the respondents and the community, it has adduced no evidence that it has done so. It is also clear from the opposing respondents' answering affidavit, and from their submissions in court, that they wish to meet with the applicant's representatives to resolve the issue. It also appears from the respondents' conduct throughout the proceedings by attending court on each occasion that they were readily available to engage with the applicant. Whatever the position may have been before the grant of the interim order, there has been four months for the applicant to engage constructively with the opposing respondents. It is common cause on the papers that the respondents are leaders within the community and are ready to engage with the applicant. Nothing is said in the form of a replying affidavit or even in the supplementary affidavit as to

what attempts have been made by the applicant to engage with the respondents to reach an amicable resolution.

76. The conduct of the applicant reinforces the impression that once it obtained the interim order, and so to speak was 'armed' with that interim order, it had no impetus to engage with the respondents. The opposing respondents impressed upon me in their submissions that the applicant having obtained the interim order went about "*brandishing*" the order. Although I exercise caution in accepting what is stated by the respondents which goes beyond that in the affidavits, the cavalier manner in which the applicant has gone about prosecuting its interdictory proceedings to finality does credence to the opposing respondents' concerns.

77. During the course of argument, I invited the applicant's counsel's attention to Uniform Rule 41A, which imposes an obligation upon parties to consider mediation as a dispute resolution mechanism. Rule 41A(2)(a) provides that:

> "*In every new action or application proceeding, the plaintiff or applicant shall, together with the summons or combined summons or notice of motion, serve on each defendant or respondent a notice indicating whether such plaintiff or applicant agrees to or opposes referral of the dispute to mediation*."

78. The applicant's counsel confirmed that no notice had been given but submitted that there was no need to do so, firstly because there was no dispute and secondly that it would have been a pointless endeavour to do so when the conduct that they sought to interdict was criminal. In my view,

both these submissions are misplaced. Firstly, it is clear that there is a dispute. Secondly, the applicant itself in its founding affidavit stated that it was open to meeting with the opposing respondents in a peaceful manner. Having obtained the interim order, it had every opportunity to meet with the opposing respondents who were bound by the interim interdictory relief from conducting themselves in an aggressive manner.

79. Whilst it might have been understandable why the applicant did not serve the requisite notice under rule 41A before seeking urgent relief, there is no reason why such notice could not have been given afterwards. The applicant is not an ordinary litigant. It is municipality that it is required in terms of section 152(1)(e) of the Constitution to encourage the involvement of communities and community organisations in the matters of local government.

80. In the circumstances, I am unable to find that the applicant has no satisfactory remedy available to it other than the confirmation of the rule *nisi.*

81. It will be recalled that I enquired of the applicant's counsel whether the applicant was in a position to proceed with the matter and he indicated that the applicant was and wished the matter to proceed. The applicant did not at any stage seek leave to file further affidavits in support of the relief. The applicant had already been granted leave to supplement its founding affidavit in the interim order it had obtained on 22 September 2020. It did not do so. The applicant has elected not to meet head-on the

averments made by the opposing respondents in their answering affidavit. And the supplementary affidavit filed during the course of the hearing does little to advance the applicant's position.

82. The applicant has had every opportunity to properly place its case before court why the rule *nisi* should be confirmed. This the applicant has failed to do, both procedurally and substantively.

83. In the circumstances, I decline to confirm the rule nisi and the application is to be dismissed.

84. As none of the opposing respondents were legally represented, there will be no order as to costs.

85. This judgment must not be seen as approval for any unlawful conduct directed at the applicant, its employees or its contractors and sub-contractors. To the contrary, the opposing respondents and the community must respect the rights of the applicant municipality, its employees, contractors and sub-contractors. Should they be dissatisfied with what has or is taking place in relation to the War of Leaks Project, they cannot take the law into their own hands and must exercise such legal remedies as are open to them. Intimidation, acts of or threats of violence, and other such conduct, will not be tolerated.

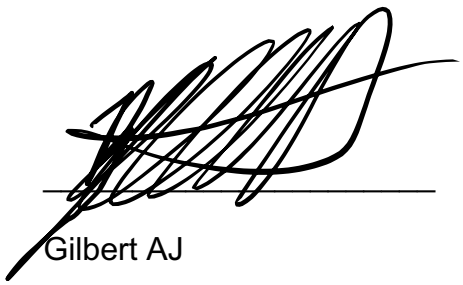
86. Should the applicant municipality be faced with unlawful activity, it remains open to it to pursue its legal remedies including to approach the court on properly motivated papers seeking such relief as may be appropriate.

87. Hopefully the applicant municipality will engage with the community and the opposing respondents to resolve the dispute between them to the benefit of the community that the applicant municipality serves.

88. The following order is made:

88.1. The application is dismissed and the rule *nisi* is discharged.

88.2. There is no order for costs.



Gilbert AJ

Date of hearing:	25 and 29 January 2021
Date of judgment:	5 February 2021
Counsel for the Applicant:	Mr E Sithole
Instructed by:	Mphela Mngadi & Associates (Kempton Park)
For the first to seventh respondents:	The first and sixth respondents in person