

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2021/29893

- (1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED

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29 October 2021

.....  
SIGNATURE

.....  
DATE

In the matter between:

**LEOGEM INVESTMENTS (PTY) LTD**

Applicant

and

**IKAGENG MODUKA**

First Respondent

**NICOLA NGOMUNT**

Second Respondent

**COMMUNITY MEMBERS OF  
THE MIDRAND AREA ENGAGED  
IN UNLAWFUL AND DISRUPTIVE  
BEHAVIOUR AT THE PRIVATE PROPERTY  
SITUATED AT CORNER 16<sup>TH</sup> ROAD  
AND SCALE ROAD WATERFALL**

Third Respondent

Delivered: 29 October 2021 - This judgment was handed down electronically.

## **JUDGMENT**

### **Karachi AJ:**

#### **Introduction**

- [1] The applicant, the owner and developer of private property known as Innovation Works situated at 16<sup>th</sup> Road and Scale Road Waterfall (“the site”) commenced development on the site in February 2021. The development comprised offices, warehouses and storage and was on a strict deadline to be completed by the end of August 2021 as leases had been signed.
- [2] Since commencement of the project, individuals claiming to be members of the Midrand Community made demands on the applicant that they be given jobs on the site. The applicant informed the individuals that work on the site was carried out by sub-contractors and that all sub-contractors had to be registered with the Department of Labour and meet the health and safety requirements necessary for the development of the site.
- [3] In May 2021, a group of approximately 20 individuals claiming to be members of the Midrand Community appeared on site demanding that the applicant provide them with jobs and threatened workers who were on site. As a result, the site had to be shut down and the South African Police Service: Midrand (“SAPS”) were called in to maintain order.
- [4] During the afternoon of 21 June 2021, the applicant was notified by SAPS of an application in terms of section 6(3) of the Safety at Sports and Recreational Events Act 2 of 2010 (“the Sports and Recreational Events Act”) which was signed by the first respondent (“the section 6(3) events application”).
- [5] In terms of the section 6(3) events application, the name of the event was described as “Construction Site Closure” and the type and description of event was described as stopping production, closing of site, stopping entry onto the site and not allowing production until demands are met. The date of the event was scheduled to take place on 21 June 2021, the duration would be for 14 days and the expected number of attendees were 30. The event organizer was the first respondent and the second respondent was listed as the “Controlling Body”. As appears from the section 6(3) events application, the written reasons for non-compliance with section 6(1) of the Sports and Recreational Events Act (that is submission of an annual schedule of

events) was that “This event is as a result of previous engagements with the owners of which the commitments to the community have not been kept and the labour law is not adhered to. The company does not want to productively incorporate locals”.

[6] On 22 June 2021, the applicant launched an urgent ex parte application for a rule nisi calling upon the respondents to show cause why an order in the following terms should not be made final:

a) That the respondents be interdicted and restrained from engaging, or attempting to engage, in any unlawful activities aimed at disrupting the proper functioning of the private property known as Innovation Works situated at the site including but not limited to:

- (i) Interfering with, intimidating, harassing, threatening and/or assaulting the applicant and its staff, contractors, subcontractors, officials, employees, and/or agents;
- (ii) In any way obstructing and preventing ingress and egress from the precincts of the site and any building or facility forming part of the premises;
- (iii) In any way causing damage to the site and the property of the applicant and the applicant’s staff, contractors, subcontractors, officials, employees, and/or agents;
- (iv) Otherwise participating in, calling for, enticing or encouraging unlawful conduct;
- (v) Instructing or affecting or causing an employee, staff member, official of the applicant to vacate their offices and/or leave the private property known as the site of the applicant;
- (vi) That the respondents be interdicted from participating in any conduct which would result in the commencement and/or escalation of violence at any of the applicant’s private property;
- (vii) That the respondents be interdicted from erecting obstacles at the entrance and/or entrances of the applicant’s property to prevent access thereto;
- (viii) That the respondents be ordered to pay the costs of the applicant.

[7] On 23 June 2021, the rule nisi was granted per Justice Opperman. Costs were reserved for determination on the return date. In terms of the order, service on the first respondent was to be done by the Sheriff at the residential address of the first respondent and service on the second and third respondents were to be done by the

Sheriff by reading out the order by loudhailer at the entrance/s of the site. The order was further to be posted at all entrances to the property of the site.

- [8] The order was served on the second and third respondents and copies of the order was affixed at the site. In respect of the first respondent, the order could not be served at the given address for reasons that the first respondent was unknown at the given address as informed by the occupier of the property situated at the address. The applicant's attorneys of record further emailed a copy of the order to the first and second respondents email addresses that appeared on the section 6(3) events application and further had a telephonic conversation with the first respondent in terms of which the first respondent indicated that the first respondent would collect the order from the offices of the applicant's attorneys of record. The first respondent however failed to do so.
- [9] Nevertheless, on 25 August 2021, on the return date, the first respondent appeared in person and requested a postponement in order for opposing papers to be filed. Acting Justice Nochumson accordingly extended the rule nisi issued on 23 June 2021 to 25 October 2021 and reserved the costs occasioned by the postponement.
- [10] On the return date of 25 October 2021, there was no appearance on behalf of the respondents despite an undertaking once again by the first respondent to the applicant's attorneys of record that opposing papers would be filed prior to the return date.
- [11] Counsel for the applicant submitted that since the construction project which formed the subject matter of the rule nisi was now complete, the only issue left to be decided by the court was the issue of costs.
- [12] Counsel for the applicant argued that the first, second and third respondents be ordered to pay the costs of the urgent rule nisi application jointly and severally each paying the other to be absolved on an attorney and client scale and that the first respondent pay the costs of the postponement on 25 August 2021 as well as the costs of this return date on an attorney and client scale. The applicant maintains that in light of the threats made by the respondents, the persistent evasive conduct and the failure to file opposing papers, a punitive cost order is warranted.

## **Discussion**

- [13] The basic rule regarding costs in litigation is that costs are in the discretion of the court. The court's decision must be exercised judicially upon a consideration of the facts of each case.
- [14] The court's discretionary decision has to be a matter of fairness to both sides. In coming to its decision, the court needs to carefully weigh the issues in the case, the conduct of the parties and any other circumstances which may have a bearing on the issue of costs, to enable it to make a costs order that would be fair and just between the parties.
- [15] The purpose of an award of costs is to indemnify the successful party that has incurred expenses to bring or oppose an application. In my view, the applicant was justified in instituting the application against the respondents by way of an urgent ex parte application, relief in the form of a rule nisi was necessary and the applicant demonstrated that harm was imminent.
- [16] The respondents were given an opportunity to show cause. However, on both occasions, the respondents failed to do so despite an undertaking by the first respondent.
- [17] Even if regard were to be given to the section 6(3) events application, section 2 of the Sports and Recreational Events Act provides that the Act does not apply to gatherings as defined in the Regulation of Gatherings Act, 205 of 1993 ("the Regulation of Gatherings Act"). The Regulation of Gatherings Act regulates the holding of public gatherings and demonstrations. No notice was given in terms thereof.
- [18] On the facts before me, fairness justifies an award of costs in respect of the urgent rule nisi application. However, a punitive cost order as sought by the applicant is not warranted in the circumstances of this case. Regard being had to among other things the respondents attempt to at the very least obtain the involvement of SAPS, this conduct is not worthy of a court's rebuke.
- [19] Turning to the costs of the postponement on 25 August 2021 as well as the costs of this return date, the first respondent sought to file opposing papers but failed to do so on at least two occasions. The first respondent's evasive conduct and the applicant

being forced to expend unnecessary costs once again on the return date for the second time warrants a punitive cost order as sought by the applicant against the first respondent in respect of the postponement and the return date. The first respondent specifically sought to postpone the matter on the first occasion to file opposing papers however no papers were filed. Closer to the return date, the first applicant again intimated to the applicant's attorneys of record that opposing papers would be filed before the return date. Once again, no papers were filed. On 25 October 2021 and despite being aware of the return date the first respondent failed to appear. Such conduct is indicative of a complete disregard for this court and its processes.

### **Conclusion**

[20] I have considered the conduct of the parties in this litigation. I make an appropriate order of costs, taking into account all the circumstances of this case.

[21] In the result, it is ordered that:

- (a) The first, second and third respondents are ordered to pay the costs of the urgent rule nisi application jointly and severally each paying the other to be absolved;
- (b) The first respondent is ordered to pay the costs of the postponement on 25 August 2021 as well as the costs of this return date being 25 October 2021 on an attorney and client scale.

**F KARACHI**

**ACTING JUDGE OF THE HIGH COURT**

Appearances:

For the Applicant: Adv Sarah Pearl Stone  
(Instructed by Andrew Groenewald Inc.)

For the Respondents: -

Date of the hearing: 25 October 2021

Date of the judgment: 29 October 2021