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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 8525/2018p

In the matter between:

EQUAL EDUCATION

APPLICANT

and

MEC FOR EDUCATION: KWAZULU-NATAL — FIRST RESPONDENT

POLICE COMMISSIONER OF KWAZULU-NATAL — SECOND RESPONDENT

JUDGMENT

Delivered on.

CHILI, J

[1] The applicant approached the court for a two pronged relief, an order declaring the respondents' conduct of shutting down the protest held by the applicant and its members, to be unlawful and unconstitutional [in that it violated the applicant's and its members' constitutional rights to dignity and freedom of assembly] and an order directing the respondents to provide a sincere and unequivocal apology to the applicant and its members as well as the public generally, plus costs. In its application the applicant relied on founding and answering affidavits deposed to by Ms Ntshadi Mofokeng, the applicant's Chief Operating Officer. The respondents on the other hand

compiled and filed a joint answering affidavit deposed to by Mr Andreas Shangase, the first respondent's Acting Deputy Director in the Risk Management section.

[2] This application relates to an incident that occurred on the 11th July 2017 at the first respondent's offices situated at 247 Burger Street, Pietermaritzburg. On the day in question the applicant and its members, including learners from the Nquthu area, Northern KwaZulu-Natal, gathered and protested at the first respondent's premises. During the protest, the applicant's officials (the convener Ms Mofokeng and her Deputy) were confronted by the employees of the first respondent who expressed their objection to the presence of the protesters at the first respondent's premises. By agreement, the applicant's officials (including Ms Mofokeng) together with the respondents' officials proceeded into the first respondent's boardroom and engaged in a debate surrounding the presence of the applicant and its members at the first respondent's premises. From the papers it is clear that the parties were unable to arrive at an amicable solution. When the meeting eventually ended, Ms Mofokeng and her deputy rejoined the protesters and participated in the protest. At some point the protesting stopped and the protesters left the first respondent's premises. The question whether the applicant's members were threatened with assault in order to stop protesting or whether they stopped on their own accord is in dispute. In her founding affidavit Ms Mofokeng alleges that the protest was unlawfully dispersed by the respondents. She added that the applicant's members, many of whom were minors, were threatened with physical harm, including teargas, by the respondents.

The application

[3] There are many peripheral issues in this application but in the main, the question to be decided is whether the respondents infringed the applicant's and its members' constitutional right to protest. The two main defences raised by the respondents are muteness of the application and the presence of a disputed fact. I do not consider it necessary for the purposes of this judgment, to deal with both defences by Mr Mthembu

counsel for the respondent. It suffices to deal only with the question whether a dispute of fact exists. At the heart of this application is the question whether the protest was shut down (as alleged) by the respondents. If the answer to that question is in the negative, the applicant's application must fail. Similarly, if there is a dispute with regards to the question whether the respondents prevented the applicant and its members from continuing with the protest, again the application must fail. Rule (5)(g) of the Uniform Rules of court provides as follows:

> "Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the aforegoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear to be examined and cross examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise."

In *National Director of Public Prosecutions v Zuma*[1] Harms DP remarked as follows:

> "It is well established under the *Plascon-Evans* rule that where in motion proceedings dispute of facts arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify an order. It may be different if the respondent's version consists of a bald or uncredit-worthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers."[2]

In line with Harms DP, Heher JA in *Wightman v Headfour*[3] stated:

> "Recognizing that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact

[1] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 at 290 E-F.
[2] See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-635.
[3] *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 at 375 D-F.

or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers".

With regards to a disputed fact Heher JA proceeded to say:

> "A real, genuine and bona fide dispute of fact can only exist where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him..."[4]

The question whether the respondents prevented the applicant and its members from continuing with the protest is at the heart of this application. I am alive to the fact that the case for the applicant relates to the manner in which the respondents conducted themselves after the meeting but in my view it is important to begin with the preceding events. It is common cause or at least it is not in dispute, that when Ms Mofokeng and her deputy were locked in a meeting with the respondents' officials, the protest at the first respondent's premises which by the way included the screening of a film, continued. It is again not in dispute that the protesting and filming lasted for two hours at the very least. The protest according to Ms Mofokeng began as scheduled, at 16h00 and immediately thereafter the two sides proceeded into the boardroom where they engaged in a meeting which proceeded until 18h00 when the police officers in the employ of the second respondent changed shifts. It simply makes no sense that the respondents would have allowed the applicant and its members to continue with the protest for such a lengthy period of time if they were really intent on shutting it down as alleged by the applicant

[4] With regards to what transpired when she rejoined the protest after a meeting with the first respondent's officials, Ms Mofokeng stated:

> "Once outside, KZN DOE officials and police officers made aggressive threats to act violently. Ignoring our objections, the KZN DOE officials ordered officials from KZN SAPS to disperse EE members present at the protest. Mr Ngubane instructed officials

[4] At 357 F-H.

from KZN SAPS to ready themselves and make use of teargas to disperse the EE members with no regard to the protesters' peaceful conduct and the fact that there were numerous children present.

Due to these threats and the aggressive manner in which KZN DOE and KZN SAPS officials spoke to EE members, we were compelled for the safety of ourselves and our members, **to end the film screening prematurely**, and, by extension, the protest. EE members continued to sing songs for a short period thereafter before dispersing."[5] My emphasis.

Mr Shangase on behalf of the respondents disputed the above allegation and added that Warrant Officer Van Der Merwe in the employ of the second respondent who deposed to the confirmatory affidavit would confirm that there was no hindrance of the gathering in any manner whatsoever. In amplification Mr Shangase stated the following:

"Para 71. I mention that at no stage were the protesters:

71.1 Told to stop toyi-toying;

71.2 Chased away;

71.3 Told to stop screening the film despite the fact [sic] it had been projected onto the wall of the Department's offices;

71.4 Threatened in any manner whatsoever."

Most importantly he proceeded to state in paragraph 72:

"I have no doubt in my mind that, had the learners and the applicant's members present at the department's offices been subjected to the alleged treatment (which is vehemently disputed), the media personnel present would have had a field day."[6]

[5] See paras 64 and 65 of the applicant's founding affidavit at pages 23 and 24.
[6] See para 71 and 72 of the respondents' answering affidavit at page 375 of the indexed papers.

[5] When responding to the above, Ms Mofokeng in her reply did no more than regurgitating what is already contained in her founding affidavit. From the above it is clear that there exists a material dispute of fact between the applicant and the respondents. The fact that the applicant and its members were prevented from continuing with the protest is vehemently denied by the respondents. That in my view is not merely a bare denial. In addition Mr Shangase in his affidavit raised a very valid point, that the media personnel there present would have had a field day if the respondents conducted themselves in the manner described by the applicant. There is a ring of truth in that averment. It is worthy to be noted that it was not disputed that the media personnel were present at the scene. It is further worthy to be noted that the protest also included the screening of a film. One would therefore have expected the applicant to produce evidence of the recordal of the events either by itself or the media in support of its allegations of threats of violence. At the very least one would have expected the applicant to refer the matter for the hearing of oral evidence on the aspect of the respondents' conduct which according to the applicant amounted to breach of its constitutional right to assemble and to protest. That did not happen and this court is therefore obliged to decide the application on the version of the respondents. For the above reasons the applicant's application must fail.

Costs

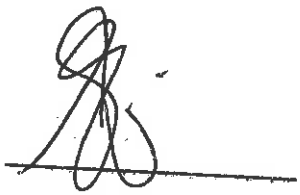
[6] The applicant should consider itself very fortunate that the respondents did not persist in their request for the award of costs in their favour. The applicant filed an affidavit that runs up to 353 pages in a simple and straight forward application for an order declaring the respondents' conduct in interfering with the applicant's protest, to be unlawful and an order directing the respondents to apologise for their conduct. The less said about unnecessary documents filed of record the better. The prolix method adopted by the applicant in the presentation of its case was absolutely unnecessary. Were it not for the respondents' spirit of generosity, I would not have hesitated to award

costs in favour of the respondents, irrespective of the fact that the applicant is a non-profit organization. I say this being fully aware of the view expressed in *Biowatch*[7].

[7] In the result the following order is made.

Order.

1. The applicant's application is dismissed.
2. Each party is to pay their own costs.



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[7] See *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 at 242 E-H. See also *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) (2005 (6) BCLR 529; [2005] ZACC 3).

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Date of hearing: 02 August 2019

Date of judgment: 23 December 2019