



NOT REPORTABLE

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

CASE NO: 729/2022

In the matter between:

ALMARIE MALGAS

Applicant

And

BUFFALO CITY METROPOLITAN MUNICIPALITY First Respondent

THE MUNICIPAL MANAGER: BUFFALO CITY

METROPOLITAN MUNICIPALITY

Second Respondent

JUDGMENT

HARTLE J,

[1] The applicant sought a mandamus directing the respondents, who I will collectively refer to as “the municipality”, to clean and rehabilitate an area along the “Jennings Road Circuit”, Morningside, East London of waste and rubble “within a reasonable time” and to transport it “properly” to a designated landfill area/rubbish dump.

[2] The applicant also asks that the municipality be ordered to erect any such signage, barricading and/or supply a municipal “skin” bin (which I assume is a reference to a skip bin) to ensure that residents in the identified area can at least dispose of their waste into the bin.

[3] Other mandatory relief relates to providing education to members of the community regarding the harmful effects of dumping, putting measures in place to avoid a reoccurrence of illegal dumping in the area and, over the long term, for the municipality to provide a valid proper integrated waste management plan for the city.

[4] Also prayed for is an attorney and client costs order which was orally supplemented at the hearing to include the costs of an environmentalist expert.

[5] Before I deal with the brief summary below, in the applicant’s replying affidavit (delivered on 12 September 2022) it was conceded that the municipality

had taken some steps to address her complaints since the launch of the application by way of clearing the site although not to her complete satisfaction and had put up signage to warn members of the community not to dump at the impugned site. These endeavours were alluded to by the applicant as a clear indication that since the commencement of the application the municipality by its actions had evinced an awareness that they “needed to correct a wrong”. Hence the applicant sought to suggest that she was entitled in all the circumstances to her costs although she relented that a punitive costs order was no longer warranted, instead praying for costs on the party and party scale. It was also pointed out in her replying affidavit that the “expert” environmentalist’s report had gone “un-contested” which is probably why in the course of enrolling the matter for hearing a draft order was provided (served upon the municipality’s attorneys on 17 February 2023) which indicated that she was intent upon asking for the costs of the “expert environmentalist.” This request was also repeated at the hearing by counsel appearing on her behalf.

[6] The applicant is simply described in the founding affidavit as a person resident at an address in Morningside.

[7] The founding affidavit put up by her is carelessly riddled with errors of grammar and syntax and comprises of a random mishmash of allegations. It is ostensibly missing paragraphs/pages and, most significantly, is unsigned.

[8] It purports in places to support prayers for urgent relief but the notice of motion prefixed does not herald an urgent application. Instead, it follows the

template of an ordinary long form notice of motion save that it ends (no doubt courtesy of a copy and paste gremlin), with an odd injunction that:

“TAKE NOTICE FURTHER THAT if the respondents fail to deliver a notice of intention to oppose, the matter will, without further notice, be placed on the roll for hearing after expiry of the period mentioned in paragraph (a) above, on a date to be fixed by the Registrar; as Ms Almarie Malgas is of the belief that the Department of Public works and Road Works could be playing delay tactics to pro- and delay an inevitable main action.” (Sic)

[9] The cause of action made out in the unsigned affidavit is premised on the allegation that:

“The First Respondent is empowered to clean and rehabilitate its waste management and transport the rubbish to the designated/allocated rubbish dump and upon doing so create real measures to ensure this never happens again and not fruitful meetings that do not render any implementation plans as this place is soon going to be inhabitable and ensure the environment and its property valuations to decrease further due to maladministration of the Respondents.” (Sic)

[10] The applicant claimed that “in or around the first week of May 2022” she passed a dumpsite as she was driving along Jennings Road. She also noticed the absence of any municipal skip bin having been put in place for members of community of the community to dump their waste into.

[11] She added that there were numerous other “dumping spots” along the same road which are being used as illegal dumping sites. She asserted that “the property” (undescribed) was “*not being cleaned not being fenced off nor barricaded to, prevent further dumping is now a human environment health risk*”. (Sic)

[12] This prompted her immediately to approach her attorneys of record to place the municipality on terms who, on 9 May 2022, addressed a formal statutory demand to it, ostensibly on the basis provided for in terms of the provisions of section 3 of The Institution of Legal Proceedings Against Certain Organs Of State Act, No. 40 of 2002 (“ILPACOSA”) concerning an illegal dumpsite “*along the Jennings Road, Morning Side East London behind SPCA and/or Public Works and Roads & Safety near Amalinda off ramp.*”¹

[13] Despite the founding affidavit giving the impression that the applicant had casually witnessed the illegal dumping site in passing along Jennings Road and had promptly sprung into action by consulting with her attorney in this respect, the notice complained of a long term problem as follows:

“The community in Morning Side has had enough of the slow service delivery and further have most probably opted to not put up with an eyesore outside of their immediate property, and therefore wish to show their great displeasure and complaint as those are their permanent homes that they reside with their families, children and elderly people and such illegal dumping site has been like this for more than a few Months and getting worse as time goes on. Despite such health and environmental concerns you have not done anything to date thereof.” (Sic)

[14] The notice requested, rather than demanded, that the municipality “*kindly remove the illegal informal dumping site **at the end of business day** as our environmental experts have raised serious concerns*” and that it “*provide an alternative dumping site or ensure that every week the community of Morning Side are catered for with efficient service delivery.*”

¹ Google maps suggest a distance of 1,6km between these two points. The reference to the SPCA and Public Works is not explained but perhaps this might account for the mention of Public Works in the notice of motion, possibly copying and pasting from a similar but different application involving Ms. Malgas.

[15] Lastly, the notice requested (again rather than demanded) quite unintelligibly that “*your long-term solution as well as such that we engage with yourselves regarding to the issues pertaining to the illegal dumping.*” (Sic)

[16] The notice expressed the applicant’s attorney’s belief “*that a procedurally fair process could settle this matter without any necessity of approaching the court to argue settled law*” yet threatened quite paradoxically that their instructions were to bring an urgent application failing the municipality’s “*positive conduct in cleaning up our Municipality.*”

[17] The notice concluded with the hope expressed that litigation would not be necessary in the circumstances and that the municipality would “*urgently attend*” to the applicant’s rights.

[18] This notice was hand delivered to the offices of the municipal manager at 11h18 on 9 May 2022.

[19] It therefore came as a shock to the municipality when the present - on the face of it not an urgent application, ostensibly prepared and dated 10 May 2022 already, was launched the following day on 11 May 2022. Service thereof was effected on the municipality at 15h23 on that day.

[20] A professional environmental opinion (on the face of it dated 5 May 2022) accompanies the founding affidavit, but ironically does not reference the illegal dumping site in question.

[21] The municipality opposed the application on four essential grounds.

[22] Firstly, it asserted that the applicant has not established *locus standi* which is a justifiable concern as I will demonstrate below.

[23] Secondly it complained that the statutory demand sent by the applicant to clear the illegal dump site, in half a business day in effect, was unreasonable both with regard to the processes that the department of Solid Waste Management Services is required to follow when a complaint of this nature is registered and because the invocation of the provisions of the ILPACOSA naturally implicates a lead up of 30 days' notice before intended action is commenced pursuant to its relevant provisions.²

[24] Thirdly the municipality suggested that the applicant ought first to have exhausted internal remedies (if after having engaged its relevant directorate it was not satisfied of a positive outcome) which entail the invocation of an appeal process envisaged by the provisions of section 62 of the Local Government: Municipal Systems Act No. 32 of 2000.

[25] Finally, it submitted that if the applicant's matter constituted a review under the provisions of the Promotion of Administrative Justice Act, No. 3 of 2000 ("PAJA"),³ that in terms of the provisions of that Act the municipality would have been afforded 90 days "to do an act". It asserted that whichever process was of

² Section 5 (2) of the ILPACOSA. Mr. Nyangiwe, who appeared for the municipality readily agreed however that the provisions of the ILPACOSA were not strictly of application in this scenario.

³ It was not really in dispute that the applicant had couched the relief sought in the form of a mandamus.

application, whether in accordance with its internal processes or subject to the provisions of PAJA, it would have been given a decent opportunity to investigate and handle the complaint in a manner which accords with its mandate in terms of the Constitution rather than this abrupt resort to litigation by the applicant denying it the very opportunity it is entitled to, which in turn holds huge costs implication for it and the public purse. (As an aside it was not central to the matter to decide whether the provisions of PAJA apply or not but the point made is that the time frames indicated in an administrative law setting are indicative of the deference shown to state agencies to resolve issues in a structured and preordained manner before litigants should be entitled to approach a court to intervene.)

[26] On the merits the municipality denied that prior to receipt of the notice it had been apprised of any complaint in relation to the particular area or that the matter was urgent and could not therefore be resolved “*in a manner in which a solution driven process is achieved.*”

[27] As for the existence of a waste management plan it asserted that one already existed, was not primitive as was suggested by the applicant, and that it already adequately dealt with illegal dumping, which malaise it branded as a “social issue”.

[28] It thus resisted the call for it to pay the applicant’s costs.

[29] After hearing argument in this matter, I requested the parties to make further submissions to me and I also called upon the applicant to supplement the papers which were clearly deficient.

[30] Firstly, the report of the environmental assessment practitioner, ostensibly dated 5 May 2022, was included in the indexed papers and referenced as “Annexure D” but was not given any pretext in the founding affidavit, at least not in any of the pages that were before me. Another page was missing elsewhere. “Annexure F” to the applicant’s replying affidavit, which it had been portended would comprise of photographs from which this court was supposed to visualize what steps the municipality had undertaken in the interim to clean up the dumping site and erect signage, was also not included in the indexed papers.

[31] On the issue of the applicant’s purported entitlement to the costs of the expert, which had not been claimed in the notice of application, the parties were invited to consider the fact that there had also been no affidavit filed qualifying the expert or identifying the report or placing it in context. Indeed, the report itself does not reference the dumping site in contention but appears to be of general effect and was an opinion prepared for the applicant’s attorneys with regard to “*Lack of Efficient Clearing of Illegal Dumping Hotspots and Provision of Adequate Waste Management Services*” that nowhere references the Jennings Road area contended for by the applicant. Further, and more significantly, the report references a site investigation that was conducted on 27 May 2022, which date obviously post-dates the purported commissioning of the applicant’s founding affidavit, and the issue and service of the application. This was not explained, but the applicant’s attorneys fairly abandoned the prayer for these costs.

[32] The parties were also requested to make representations regarding whether the applicant’s founding affidavit, deficient for want of having been signed at all before the Commissioner of Oaths on 11 May 2022, was properly rectified by way

of the filing of the additional affidavits that were delivered, without any application for condonation at all, on 9 June 2022.

[33] Firstly, it is accepted that the applicant did not sign her affidavit as deponent but the copy in the court file (presenting as an original) evidences a set of initials on each other page thereof as well as on the annexures, one being “A.M” purporting to be the applicant’s, and the other “M.M” purporting to be those of the commissioner of oaths, Mr. Mubeen Moosa.

[34] The applicant purported to rectify this deficiency in an explanatory affidavit which provides as follows:

- “3. I confirm that I have read the founding affidavit of Almarie Malgas and confirm its correctness insofar as it relates to me. I confirm the content to be both true and correct.
4. I must apologise to the Honourable Court that I was in a hurry on the 11th of May 2022 as I was told by my attorneys of record that this matter will be done on urgent basis. I confirm that my intention was solely to depo(s)e to my founding affidavit and ensure the respondents clear up the filth and rot of the illegal dumpsite. I want to ensure that my founding affidavit should be read as evidence in this application and the court to condone my clerical error. Please find herewith attached AM1 of the page that I need to sign.”

[35] Attached to the explanatory affidavit (on the face of it by *Almaire* Malgas)⁴ is a single *pro forma* page as it were on which a deponent has signed and the date indicated at the foot of the affidavit is 8 June 2022. The full signature that appears above the line reserved for the deponent to sign mirrors the signature of “Almarie Malgas” in the explanatory affidavit. Mr. Moosa (who at this point would have had an interest in defending his role played in contributing to the defect and so

⁴ The applicant’s name is spelt differently in various places.

should have declined to administer the oath)⁵ also commissioned the latter affidavit and provided a “confirmatory affidavit” in which he explains that Ms. Malgas had on 11 May 2022 initialled every page of her founding affidavit in front of him including the attachments, but he deflected that he had made a “*clerical error of not noting that (the applicant had) left (his) offices without signing as a deponent below paragraph 36,*” which is the final concluding paragraph in the founding affidavit.⁶ He recalled that the matter was supposed to have been done on an urgent basis as the applicant was in a hurry to report back to her attorneys.

[36] The filing of these explanatory and confirmatory affidavits respectively, delivered on 9 June 2022, obviously passed by without any demur from the Municipality and indeed was not objected to during argument until I raised it with the parties after the fact. The present contention by the municipality’s legal representatives, fairly made in my view, is that the proceedings are fatally defective since there is no affidavit initiating the proceedings and that the attempts made by the applicant to fix the problem as it purported to cannot cure the defect. Moreover, there is an absence of any condonation sought from the court to have filed these “further affidavits” in any event.

[37] There is a further issue. The applicant’s attorneys were also requested to identify the signature that appears above the designation of “deponent” in the replying affidavit at page 101 of the indexed papers, which affidavit was also commissioned by the same Mr. Moosa.⁷ They acknowledge that it is Ms. Malgas’

⁵ See section 7 (1) of the Regulations Governing the Administering of an Oath or Affirmation (GNR.1258 of 21 July 1972).

⁶ The missing pages of the founding affidavit which were provided after the fact were co-incidentally not initialled which suggests that these were never served on the municipality in the first place as part of the set of founding papers.

⁷ Well at least his official stamp bearing his particulars and dated 12 September 2022 appears at the foot of the replying affidavit, but his original signature (as opposed to an image of a signature that forms part of his stamp) is

but have not dealt with my other pertinent question which is why it is so patently different from the one asserted to be hers in the “confirmatory affidavit” as also reflected on the annexure thereto marked “A.M 1.”

[38] I would have expected a further affidavit explaining all of this which is of fundamental concern to this court, absent which it must be accepted that the prior signature on the confirmatory affidavit is not that of the applicant’s and that the attempt to rectify the defect (even for the moment accepting that it was permissible for the applicant to have addressed the shortcoming of an unsigned affidavit in this manner) is under suspicion of being false.

[39] The result is that there is no founding affidavit before this court. This is indeed fatal to the application and warrants its dismissal without more.

[40] I would have been concerned in any event on the terse facts pleaded to have appreciated Ms. Malgas’ real (very fleeting) interest in the matter to establish her *locus standi*, which was mentioned rather perfunctorily.

[41] I would also have found that the application was premature and afforded the municipality insufficient time to have registered and responded to the complaint or to have dealt with it appropriately. On the basis of the *Plascon-Evans* Rule⁸ I would have accepted what the procedures are that the municipality says are in place for the waste department to deal with complaints, and that the indecent haste with which the application was launched without having afforded the municipality

absent.

⁸ *Plascon Evans Paints (Ltd) v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 263 (A) at 634e – 635c.

a fair opportunity to deal with these processes would not have been consistent with or respectful of these requirements.

[42] The applicant could not even have been bothered to allude to process or to state what the then applicable Waste By-law provided in respect of a problem of this nature or how she tried meaningfully to remedy the situation (short of giving the municipality half a business days' notice to act), assuming her to be a concerned member of the community or acting to protect her own interests which she does not really elaborate upon, before (on her supposed version) consulting with an attorney and an environmental specialist and launching full scale into litigation to seek the mandamus which she did. There is no comfort that she acted *bona fide* to preserve her constitutional rights (in fact she does not pertinently reference any right that has been infringed in her supposed founding affidavit) or that these are the kind of circumstances that would have activated the *Biowatch* principle.⁹

[43] Instead, this court is left with the distinct feeling that the application was launched opportunistically to gain an unfair opportunity of scoring a costs order. Even if the demand and service of the application was causal to the Jennings Road area being cleaned up and signage erected I would not have been inclined to award costs in her favour.

[44] In the result, I issue the following order:

⁹ *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC)

1. The application is dismissed, with costs.

B HARTLE
JUDGE OF THE HIGH COURT

DATE OF HEARING : 26 April 2023
DATE OF FURTHER SUBMISSIONS: 22 & 23 August 2023 :
DATE OF JUDGMENT : 12 September 2023

Appearances:

For the Applicant : Adv. A M Maseti instructed by S J Ngqongqo, East London (ref. Mr Ngqongqo).

For the Respondents : Adv. X Nyangiwe instructed by B Bangani Attorneys, East London (ref. Mr. Bangani)