

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: CASE NO: 34372/2020

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
30 May 2023	_____
DATE	SIGNATURE

In the matter between:

BODY CORPORATE ASSISTANCE

GAUTENG (PTY) LIMITED

FIRST APPLICANT

BODY CORPORATE ASSISTANCE

WESTERN CAPE (PTY) LIMITED

SECOND APPLICANT

THE TRUSTEES FOR THE TIME BEING

OF CENTRAL SQUARE

THIRD APPLICANT

and

PHILIP TILLMAN

FIRST RESPONDENT

RAN GOLDSTEIN

SECOND RESPONDENT

JADE KRETZMER

THIRD RESPONDENT

Neutral Citation: *Body Corporate Assistance Gauteng (PTY)LTD & 2 Others vs Philip Tillman & Others* (Case No: 34372/2020) [2023] ZAGPJHC 596(30 May 2023)

JUDGMENT

MIA J

- [1] In this matter the application initially sought an interdict against the first to third respondents. After the first to third respondents filed their answering affidavits, the applicant filed a replying affidavit and then amended its request seeking an interim interdict and a referral to oral evidence.
- [2] The first applicant according to the founding affidavit is the chairman of the Board of Trustees of Central Square Body Corporate (Body Corporate) and is also the developer of the complex which includes residential and commercial units. The first applicant was authorised by the second and third applicants to bring the application. The applicants are responsible for the daily management of the body corporate affairs which include the collection of levies for the repair, maintenance and upkeep of the property. The three respondents are owners of units in the Sectional Title Scheme of Central Square Body Corporate.
- [3] The applicant seeks an interdict against the respondents to protect the employees and personnel of the first and second applicants and the third applicant. The applicant alleges that the respondents have bombarded the applicants and are harassing them with complaints in an unacceptable manner which infringes on their dignity. They are flooded with emails that contain slurs, and the respondents demand terminations and resignations of the applicants and trustees seeking to determine what is right or wrong and lawful or not. The respondents threaten to open complaints with CSOS if the applicants do not comply with the respondents' demands and their conduct has instilled fear in the employees who threatened to resign and have had nervous breakdowns and live in fear of the respondents.
- [4] The respondents have laid complaints with CSOS and charges at the South African Police Station. The applicant referred to intimidation, long vindictive telephone calls, and abuse being levelled at personnel employed by the applicant by the respondents. In particular, the applicant refers to a manager, Ms Lourens who they wish to call as a witness being called various derogatory names. It was contended that the respondents are making the sectional title scheme ungovernable. In the founding affidavit, the applicant states that a

grievance against the managing agent should be addressed to the body corporate and then continues to state that the grievance should be received by the managing agent for onward transmission to the Trustees. Thus the same person against whom the complaint is made is meant to channel the complaint onward.

- [5] The confirmatory affidavit attached from Ms Lourens did not give details about the abuse levelled at her as it is merely a confirmatory affidavit to founding affidavit and the general the averment. This is disputed by the respondents in their answering affidavits. The applicant repeatedly refers to a massive dispute of fact, however, no emails supporting the defamatory averments were attached to the founding affidavit. The allegation was also made that there were too many calls made to the management rendering the management of the facility impossible. This too was disputed by the respondents. Counsel for the respondents submitted that upon perusing the records it appeared that the number of calls the applicant relied upon and that would be placed before the court during trial were in dispute. These records were not attached to the papers and are not before this court.
- [6] The respondents agree that there is a dispute of facts. They contend that the applicants have launched vexatious litigation in an attempt to prevent the respondents from exercising their rights and this in turn fails to address the underlying disputes that are present at Central Square. Moreover, the respondents aver that the applicants have not made out a case that warrants the granting of interim relief in the form of an interdict. It was argued that the applicants should have been aware that there were genuine and bona fide disputes of fact that would emerge when they launched this application. The respondents contend that they have been polite in their communication. In their view, the application is akin to a Strategic Law Suit against Public Participation which seeks to silence them. Therefore, the respondents apply for the dismissal of the application with costs on the attorney and client scale including the costs of two counsel
- [7] In their amended application and in view of the disputes raised in the answering affidavits, the applicants request that the disputes be referred to oral evidence.

This the applicants contend would enable the trial court to deliberate on the many disputes and allow the high level of conflict to be resolved and to restore peace and harmony to the body corporate. Counsel for the applicant submitted that a determination which applied the Plascon Evans test would not assist in the present matter in view of the massive disputes and the volumes of which it has at its disposal which it seeks to place before the court dealing with the dispute which have not been attached to the papers.

- [8] Counsel or the applicant relied on the decision in *Mamadi and Another v Premier of Limpopo Province and Others* to refer the matter to oral evidence referring to the Court's dictum at para 44 where the Court stated:

"This does not mean that an applicant in a rule 53 application is entitled, as of right, to have a matter referred to oral evidence or trial. General principles governing the referral of a matter to oral evidence or trial remain applicable. Litigants should, as a general rule, apply for a referral to oral evidence or trial, where warranted, as soon as the affidavits have been exchanged. Where timeous application is not made, courts are, in general, entitled to proceed on the basis that the applicant has accepted that factual disputes will be resolved by application of Plascon-Evans. Likewise, where an applicant relies on Plascon-Evans, but fails to convince a court that its application can prevail by application of the rule, a court might justifiably refuse a belated application for referral to oral evidence. A court should however proceed in a rule 53 application with caution."

- [9] At paragraph 44 in *Mamadi*, the Court notes:

"This does not mean that an applicant in a rule 53 application is entitled, as of right, to have a matter referred to oral evidence or trial. General principles governing the referral of a matter to oral evidence or trial remain applicable. Litigants should, as a general rule, apply for a referral to oral evidence or trial, where warranted, as soon as the affidavits have been exchanged. Where timeous application is not made, courts are, in general, entitled to proceed on the basis that the applicant has accepted that factual disputes will be resolved by application of Plascon-Evans. Likewise, where an applicant relies on Plascon-Evans, but fails to convince a court that its application can prevail by application of the rule, a court might justifiably refuse a belated application for referral to oral evidence. A court should however proceed in a rule 53

application with caution. An applicant might institute proceedings in good faith in terms of rule 53, in order to secure the advantages of the rule and on the basis that the application can properly be decided by application of Plascon-Evans, only for the respondent to later show that this is not so. In these circumstances, provided the dispute of fact which emerges is genuine and far-reaching and the probabilities are sufficiently evenly balanced, referral to oral evidence or trial, as the case may be, will generally be appropriate”

[10] The respondents’ reliance is on SLAPP and an abuse of process. In *Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others*¹ the Court noted :

“The main thrust of the respondents’ argument is that the existing doctrine of abuse of process encompasses a SLAPP suit defence and that the existing common law allows and requires courts to consider ulterior motive when assessing whether a litigant has abused court proceedings...

According to the respondents, that case holds that, generally, abuses of process occur when court processes are used for ulterior or extraneous purposes. This finding makes clear that (a) ulterior motives will be considered; and (b) ulterior motives can be determinative of abuse of process”

[11] In the present matter, counsel for the respondents submitted that the application is intended to silence the respondents and to discourage and prevent them from participating in the meetings or raising concerns generally. They submit further that they are also being limited in their freedom of association in the limitation that they not associate with other owners or discuss matters of mutual interest. Counsel submitted that the files which the applicant seeks to rely on if the matter were referred to trial related to matters between the applicant and other parties and is not relevant to the present matter with the three respondents. The papers are not before this court to make this determination.

[12] In relation to the request for a referral to oral evidence it is apparent that there are disputes of fact. I am not persuaded that the applicant had made out a case on the papers that an interim interdict be granted. The prima facie right relates

¹ *Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others* 2023(2) SA 404 (CC)

to particular person and not the juristic entities. In the *Mineral Resources* matter the court points out that:

“The purpose of the right to dignity is, by its very nature, 'humancentric'. A company was not meant to have 'intrinsic selfworth', as this court has repeatedly referred to as the essence of human dignity.”

Moreover, the applicant is already pursuing alternate remedies. The delay in pursuing the present matter was as a result of the applicant pursuing alternative litigation to prevent the purported harm it suggests is occurring and was necessary. There has been a delay of some three years since the application was launched. The explanation that the applicant was dealing with other matters does not address why this matter was not prosecuted which if moved successfully may have the effect of putting an end to the other matters.

[13] I considered the request to refer the matter in terms of Rule 6(5)(g) which provides:

“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 foregoing, 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 and 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”.

[14] I have had an opportunity to consider the submissions made and am of the view that the matter is better referred to evidence in totality rather than on the limited aspect of Ms Louren's evidence only as initially directed.

[15] The applicant however ought to have foreseen the dispute of facts from the outset and issued summons in the matter.

[16] In view of the above I make the following order,

1. The matter is referred to trial with the applicants founding affidavit standing as the summons and the respondents answering affidavits standing as the pleas.
2. The applicant is to pay the costs of the application on an attorney client scale. The first, second and third respondents are to be excluded from paying the above costs in the event that a levy is raised to pay these costs.

**SC MIA
JUDGE OF THE HIGH COURT
JOHANNESBURG**

For the Applicants:

Adv G.H Meyer
Instructed by Sean Brown Attorneys

For the Respondents:

Adv M Oppenheimer
Instructed by D'Arcy-Hermann Raney
Inc., Schindlers Attorneys and Shaie
Zindel Attorneys

Heard: 29 May 2023

Delivered: 30 May 2023