

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION – MAKHANDA]**

CASE NO.: 444/2023

In the matter between: -

ENOCH MGIJIMA MUNICIPALITY

APPLICANT

and

KOMANI PROTEST ACTION (“KPA”)

1ST RESPONDENT

KOMANI PROTEST ACTION COMMITTEE

2ND RESPONDENT

MNCEDISE MBENGO

3RD RESPONDENT

(ID: 7[...])

SATCH NAIDOO

4TH RESPONDENT

YOLANDA GCANGA

5TH RESPONDENT

(3rd to 5th Respondents being the leaders spokesperson
and co-ordinators of a community/action group known
as Komani Protest Action)

**ALL INDIVIDUALS OR GROUPS OF PERSONS WHO
ASSOCIATE WITH AND/OR GATHER WITH 1ST TO 5TH
RESPONDENTS AND/OR “KOMANI PROTEST ACTION”
(HEREINAFTER CALLED KPA COMMITTEE”) FOR
PURPOSES OF STAGING AND HOLDING PROTEST ACTION
IN THE MUNICIPAL BOUNDARIES OF ENOCH MGIJIMA
MUNICIPALITY, WHETHER UNDER THE NAME OF KPA**

**OR ANY OTHER NAME IN ADVANCEMENT OF THE
OBJECTS AND/OR GOALS OF KPA AND WHETHER
REGARDING UNHAPPINESS WITH THE APPLICANT
OR ITS OFFICIALS OR FOR ANY OTHER PURPOSE
WHATSOEVER**

6TH RESPONDENT

MINISTER OF POLICE

7TH RESPONDENT

JUDGMENT

NORMAN J:

[1] The applicant is named after a Xhosa prophet and an activist, Enoch Jonas Mgijima, who was born in Ntabelanga. He led the Israeli church that embarked on a passive resistance movement. It fought against, amongst others, land dispossessions by the apartheid regime. That led to the massacre of approximately 200 of his followers by the police. That massacre is referred to in the history books as the Bulhoek Massacre.

[2] This reference to the above mentioned hero is to demonstrate the importance of ensuring that, in our life time, protests must be encouraged and not suppressed for as long as they are conducted peacefully.

[3] The applicant in these proceedings seeks confirmation of the rule. It sought and was granted interim relief on an urgent basis on 17 February 2023, by Beshe J, interdicting and restraining the 1st to 6th respondents (the respondents) during the protest actions or other gatherings from directly or indirectly committing unlawful acts and violating fundamental rights in the form of intimidation, assault or threats, littering, trashing causing pollution or harm to the environment, committing arson, barricading or blockading roads and setting fire to any items and assets of any person whomsoever in any public area in the applicant's municipal district. They were also interdicted from threatening, inciting violence, assaulting anyone or using any means whatsoever to disrupt the affairs of the Enoch Mgijima Municipality ("the municipality")

and its officials, service providers, management and/or employees in carrying out their functions and delivery of services. The interdict also applied to all the members of the Komani Protest Action (“KPA”). It is common cause that the respondents are members of the KPA or they closely associate themselves with the objectives of KPA.

[4] The applicant further sought a cost order against any of the respondents who opposed the application, individually or jointly and severally. It was further granted various orders relating to the manner of service of the orders granted.

[5] The application is opposed by the respondents.

Relevant facts

[6] Ms Nomthandazo Mazwayi, the Municipal Manager deposed to the founding affidavit. She described the applicant as a local authority and public body established in terms of the provision of section 12 of the Local Government Municipal Structures Act 117 of 1998 with full incorporation and legal personality capable of being sued in its own name.

[7] It is common cause that the municipality is empowered to govern the local government affairs within the municipal districts of, *inter alia*, Hofmeyer, Komani (Queenstown), Molteno, Sada, Sterkstroom, Tarkastad and Whittlesea. It also has executive authority in terms of section 156 (1) of the Constitution and a right to administer local government matters pertaining to, *inter alia*, housing, population development, regional planning and development, welfare services, building regulations, municipal planning, municipal health services, water and sanitation services, control of public nuisances, local amenities, public places and traffic and parking.

[8] In terms of section 156(5) of the Constitution the applicant has the right to exercise any power concerning a matter reasonably necessary for, amongst others, the effective performance of its functions.

[9] KPA is a group of persons whose names are, according to the applicant unknown to it but persons who associate with one another for a common goal, to stage protest actions aimed at disrupting the affairs of the applicant and to unsettle its leadership as a result of its members' grievances regarding service delivery issues. KPA issued notices warning the businesses of the protest action and the shutting down due to lack of municipal services or adequate service delivery. They also called upon businesses to voluntarily close down for a period of two (2) hours on 6 February 2023 between 12h00 to 13h30 pm.

Applicant's case

[10] The applicant stated that since January 2023, respondents have organized themselves as a voluntary association that staged protest actions directed at interfering with and/ or disrupting and destabilizing the affairs of the municipality so as to pursue its aims and objectives. Their aim is to force dissolution of the council and to cause the national government to intervene in the affairs of the municipality, based on the views of the KPA that the municipality fails to deliver services to its communities.

[11] These protest actions, as stated by the applicant, have been marred with violence and a range of unlawful conduct, which includes, *inter alia*, arson, assaults, threats of assault, intimidation, unlawful damage to property. The applicant contends that whilst committing these unlawful activities, the respondents violate the citizens' fundamental rights which include, *inter alia*, the rights to life, freedom of movement and dignity.

[12] The applicant relied on various media reports on SAFM radio, on WhatsApp group messages that these respondents have put out in the social media where they were announcing the two (2) days shutdown over service delivery. These statements were put up on 7 and 16 February 2023. One of the posts on social media by KPA stated, *inter alia*:

'The Komani Protest Action will proceed with the shutdown of Komani with effect from 16 -17 February 2023 until their demands are met and it is further stated that we shall put all our

conceited efforts to the dissolution of Enoch Mgijima Local Municipality. We must remain strong and firm for the betterment of our Municipality.'

[13] According to its Facebook page, KPA held itself out to be a public group which presently has 586 members. The applicant alleged that three weeks prior to the filing of the application, certain members of the KPA including, Mbengo, Naidoo and Gcanga approached one Shaun Dudley Adolph ("Adolph") who is a chief traffic officer and public safety officer of the applicant, seeking consent to hold or to stage a protest meeting on 26 January 2023. Their request was refused. It appears that these committee members informed Adolph about the objectives of KPA as aforementioned. They also mentioned to him that their grievances arise from various problems such as electricity outages, potholes and in general poor service delivery.

[14] On 5 February 2023 KPA issued a notice that a meeting would be held at the Hexagon Square, Komani with the former Minister of COGTA, Dr Nkosazana Dlamini-Zuma to whom a memorandum of grievances was going to be handed over. This group had closed all the entrances to town and had brought the business sector substantially to a standstill. Some of the members of the protest were trashing the streets of Queenstown. The applicant contends that the fundamental rights of the citizens were violated and the trashing of the streets created a health and hygienic hazard for the citizens. It further contends that the actions of the group was criminal in nature to the extent that they intentionally damage or caused damage to the property of the municipality.

[15] It appears that Adolph advised the representatives of KPA that consent would not be granted for a public protest meeting on various grounds including, short notice. Notwithstanding this refusal, various members of KPA gathered at Hexagon circle in Queenstown on 26 and 27 January 2023 after the notice contained in Annexure "FA1" had been disseminated amongst business owners. It appears that the protest of 26 and 27 January 2023 was not violent, however, there were certain screenshots attached to the papers reflecting that from the official Facebook page of the Daily Dispatch, it was reported that hundreds of frustrated Komani residents blocked the entrance to the town and were protesting at the Hexagon circle in Queenstown centre whilst the police were trying to disperse the crowds without success.

[16] The applicant complains that by its actions on those days, KPA, managed to effectively bring the commercial sector to a standstill and most businesses were closed during the day whilst the entrances to the town were blocked and closed by this group as they refused to disperse notwithstanding the presence of the police. The applicant stated that during the protest of both 26 and 27 January 2023, KPA and its members later during that day became more threatening, aggressive, intimidating especially towards the members of the police. As a result the police had to use rubber bullets and stun grenades to calm down the group and to disperse it.

Respondents' case

[17] The deponent to the answering affidavit, Satch Naidoo, described KPA as a civil organization, with no political affiliation with its objective to achieve the dissolution of the municipality. He categorizes the relief sought as an attempt to gag the respondents or residents of Komani who identify with the cause of the respondents. He contends that there have been a series of successful protest actions organized by the respondents to put pressure on the national and provincial executives to take steps to dissolve the municipality.

[18] The respondents rely on the provisions of sections 17 and 18 of the Constitution that KPA has a right to assemble peacefully, unarmed, to demonstrate, to picket and to present petitions and to assert its right to freedom of association. It states that the right to protest in this country is a fundamental right and serves as a bedrock of our democracy. He denies that KPA was involved in a violent protest. He stated that the respondents exercised their freedom to assemble in a peaceful and within the confines of the law.

[19] He relied on section 3 of the Regulation of Gatherings Act 205 of 1993 (the Gatherings Act) that KPA gave notice to the police special operating unit. The meeting they held was also attended by the crime intelligence unit on 23 January 2023. The purpose of the meeting was to advise the police about the intended gathering. He makes the point that KPA was not required to obtain consent from the authorities. He contends that the right to protest is an automatic right. He conceded that notice was

not given in writing. KPA believed that the meeting on 23 January 2023 constituted sufficient notice and thus the gathering was not illegal. It was not possible to give, according to him, seven calendar days' notice because the protest was triggered in January 2023 when the Secretary-General of the African National Congress, Mr Fikile Mbalula visited Komani for an ANC gala dinner which was, according to KPA at the expense of the residents who were adversely affected by lack of service delivery by the municipality which is in dire financial constraints.

[20] KPA had issued a cordial invitation to all members of the Komani community asking them to join the protest action. There was no intimidation, acts of violence or destruction of property of any kind. In this regard, he relied on a video clip of an interview between the Minister of COGTA and eNCA. He contends that even on 16 and 17 February 2023, the protest was peaceful and not marred with violence, intimidation or destruction of property. He criticized the fact that the application was brought *ex parte* when it affected the interests of KPA. In this regard, it contended that the application was an abuse of the process of Court. He submitted that the applicant lacked good faith and the application is contrived and ill-conceived.

Reply by the Applicant

[21] In its replying affidavit, the applicant relied heavily on the fact that the respondents in paragraph 45 of their answering affidavit admitted the fact that there was violence and a range of unlawful conduct which marred the protest and such unlawful conduct included arson, assaults, threats of assaults, intimidation and unlawful damage to property. On this basis alone, the applicant contends that this court should therefore confirm the rule.

[22] The respondents relied on an Annexure "AAOO1" which they contend is evidence to show that the gathering and protest were peaceful and conducted in a disciplined manner. However, they failed to attach such an annexure. In this regard, the applicant contends in reply that, that annexure whether it was present or not would not alter the concession made that the protest actions were marred by violence, unlawful acts and violation of fundamental rights, as admitted in paragraph 45 of the answering affidavit.

[23] The applicant also relied on the admission made by the respondents in paragraph 49 of their answering affidavit that KPA blocked the entrance road to Queenstown and arranged to bring the commercial sector to a complete standstill. In this regard, it contends, the right of freedom of movement of citizens was affected. It contends that the respondent admitted the altercations which took place between KPA and the police during which the police were obliged to use rubber bullets and stun grenades to fend off and calm down the group. In this regard the applicant submits that the respondents seek to rely on self-help or self-defense because of the alleged provocation by the mayor.

[24] They also rely on an admission also made in paragraph 51 of the answering affidavit that on 7 February 2023 they trashed the streets and also closed the entrance to the town and again brought the business sector substantially to a standstill.

[25] The applicant contends that the fact that the threats of eviction from temporal head office of the municipality and bringing the municipality to a standstill based on essential services, is conduct which objectively speaking, has not been disputed. It is that conduct that led to the application having been brought on an urgent *ex parte* basis.

[26] The municipal manager contends that when the threat was made to evict management and employees from the municipal offices it became necessary to approach the court for urgent relief because there was real apprehension that various damages and harm may accrue because of the conduct of the members of KPA.

Applicant's legal submissions

[27] Mr McLouw for the applicant submitted that on the respondents' version they do not say that they gave notice to the municipality as envisaged in section 3 of the Gatherings Act. Instead, they asked for consent which was refused due to short notice. He took the court through the admissions made in the answering affidavit as already indicated in reply. He submitted that the interdict issued by Beshe J related to unlawful actions as contained in paragraph 2.1, 2.2 and 2.3 of the order.

[28] He submitted that there is no balancing of rights in this matter because what has been brought before this Court is unlawful and unacceptable conduct on the part of the respondents. He relied on ***South African Transport and Allied Workers Union and Another v Garvas and Others***¹ that the organizers of the march may be held personally liable for the damages that the marchers do resulting in damages being suffered by the citizens or residents. He contends that in this case the respondents failed to prove that they took all reasonable steps to quell any violence as a result of the protest action.

Respondents' legal submissions

[29] Ms Mnqandi submitted that the applicant failed to demonstrate that it has a right that ought to be protected. She submitted that the respondents, on the other hand, have a clear right to assemble peacefully, to demonstrate unarmed, to picket and to present petitions as well as freedom of association. She submitted that the applicant has failed to prove that any harm suffered was caused by the respondent or has not shown that there are reasonable grounds for apprehension of harm. The applicant failed to show that there was no alternative remedy. She contends that urgency was self-created. She further contended that the community organized itself to address the challenges it had and that right must be balanced with the right and freedom of movement. If such rights were affected they are not absolute.

[30] She contended that in balancing the conflicting rights, the Court must find that it was reasonable and justifiable for the respondents to hold the protest action. She submitted that the respondents denied any interaction with the person named Adolph as alleged by the applicant. She submitted that, according to the respondents, it is the officials of the municipality who provoked the residents and that resulted in an altercation which was resolved speedily. Thereafter the crowd dispersed and it gathered again and continued with the purpose of the gathering. She submitted that any trashing of the streets is denied. This denial, according to her, is supported by the fact that the police were present and they monitored the situation.

¹ (CCT 112/11) [2012] ZACC 13; 2012 (8) BCLR 840 (CC); 2013 (1) SA 83 (CC).

[31] She further submitted that the conduct complained of by the applicant is past conduct. That an interdict is meant to prevent future conduct and not decisions already made. In this regard she relied on ***National Treasury and Others v Opposition to Urban Tolling Alliance and Others***². She submitted that it is trite that there is no hierarchy of rights and she relied on section 22 of the Constitution. The Court must look at balancing those rights, she argued. She argued that a final interdict cannot be granted when it has not been proved that the march was violent. The entire town of Komani is hanging by a thread, the municipality has an obligation to deliver services to the people, she submitted.

[32] The protest was perpetrated by the service delivery issues. Millions were spent on a gala dinner. KPA had no intentions from the very beginning of acting outside the borders of the law. That the public has a right to service delivery and to hold the municipality accountable. She conceded that for two days in January 2023 and two days in February 2023, during the protests there was business lost. She further submitted that there is perpetual suffering by the residents which is caused by a municipality that is not delivering on its mandate.

[33] She submitted that interdicting KPA of future marches or protests is too broad and should be refused.

Discussion

[34] As a starting point, it is important to mention that the applicant herein also champions the cause of the businesses operating within that municipality. Counsel had requested that the two cases be dealt with separately. This case together with the one brought by the *Border – Kei Chamber of Business v KPA & Others under case no. 442/2023* are based on similar facts.

[35] A protest action is a mechanism of exerting pressure on the authorities to deliver on their mandate to fulfill their constitutional obligations. When utilized in an

² 2012(6) SA 223 (CC) at para 50.

orderly manner it has the effect of achieving the desired results. It also has a potential of creating more harm than good. According to the respondents the intention of the protest in question was to dissolve the municipality because of its failure to deliver services to the people. A perusal of the answering affidavit shows that the service delivery issues did not trigger the protest. What triggered the protest, according to the respondents, was the visit by Mr Fikile Mbalula and the gala dinner that was held by the municipality, in circumstances where the municipality's finances were in dire straits. In any event, service delivery issues were clearly a concern as is apparent from the thousands of people that joined the protest.

[36] It is common cause that the applicant has its own council as well as executive and legislative functions.

[37] Section 157 of the Constitution provides for the composition and election of municipal councils. This means that people who serve on the council are elected. There is proportional representation based on the municipality's segment of the national common voters' roll, which provides for the election of members from lists of party candidates drawn up in a parties' order of preference or from such a system combined with a system of ward representation based on the municipality's segment of the national common voters' roll. The term of a municipal council may not be more than five (5) years.

[38] The dissolution of a municipal council is provided for in the Constitution. It is located in section 139 thereof:

"139. (1) When a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including—

(a)

(b)

(c) dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step."

[39] I deal with this aspect to highlight that a dissolution of a municipality is regulated by the Constitution and by section 34 of the Local Government: Municipal Structures Act 117 of 1998. The Municipal Structures Act provides for two (2) scenarios, namely, where a council may dissolve itself at a meeting called specifically for that purpose and where it adopts a resolution for dissolving a council with a vote of at least two-thirds majority of the councilors. The other scenario is where the MEC for Local Government dissolves the council as provided for in section 34(3) and (4) of the Structures Act. When there is a dissolution of council, an administrator must be appointed by the MEC for Local Government in the Province.

[40] Any act that would seek to dissolve the municipal council in a manner that would be contrary to that which is prescribed by the Constitution would be unlawful, invalid and unconstitutional. I mention the process of dissolution of a council to demonstrate that there are certain processes that must be followed.

[41] In the respondents' answering affidavit there is not a single document that evinces the steps they have taken to convey their intentions to have the council dissolved either to the municipality itself or to the MEC. The respondents have resorted to conduct a series of protest actions organized by them to put pressure on both the relevant provincial and national executives to dissolve the council. In their notices they make it abundantly clear that the protests will continue until the council is dissolved. The submission that the interdict sought related to past conduct is, with respect, unsound. The threat to continue with the protests until the dissolution of the council was not an empty one if one has regard to the conduct of the respondents and the series of the protests that were held and the manner they were carried out. There was a protest scheduled for 17 February 2023, the day the interdict was sought and obtained.

[42] It seems to me that the applicant's fears that the protests and the threats of KPA and its members would continue indefinitely until the demands of the KPA were met, which threats included, amongst others, to converge in the temporal head office of the municipality, evict management and employees in order to bring the municipality to a standstill, were real.

[43] In the *Satawu* case at paragraph 38, the Constitutional Court when dealing with the provisions of section 11 (2) of the Gatherings Act held:

“38. The somewhat unusual defence created for an organization facing a claim for statutory liability appears to have been made deliberately tight. Gatherings, by their very nature, do not always lend themselves to easy management. They call for extraordinary measures to curb potential harm. The approach adopted by Parliament appears to be that, except in the limited circumstances defined, organizations must live with the consequences of their actions, with the result that harm triggered by their decision to organize a gathering would be placed at their doorsteps. This appears to be the broad objective sought to be achieved by Parliament through section 11.”

[44] Professor G. Devenish in his book entitled: *A Commentary on the South African Bill of Rights, Chapter 12, Freedom of Assembly, Demonstration, Picket and Petition* page 221-222, he defines the freedom of assembly as follows:

“Freedom of assembly is concerned with the public expression of opinion by “spoken word and by demonstration”. It can be described more succinctly as a synthesis or a “mélange of speech mixed with conduct”. The latter is both a revealing and accurate definition, as it not only locates freedom of assembly “in the pantheon of freedom of expression from which it springs, but identifies its distinguishable, or one might say ‘demonstrable’ dimension as well”. An analysis of the different definitions of freedom of assembly indicates that they are essentially complementary rather than contradictory. It has been argued that freedom of assembly is merely a “specific form of freedom of speech”. In contrast, Grunis has reasoned that there is a distinction between free assembly and free speech, since freedom of assembly relates to the behaviour of a gathered group, whereas speech is concerned with the content of a verbal or written message.

The United States Supreme Court, as will be explained below, has assimilated the two divergent approaches that the Canadian scholars have demarcated. Speech, perceived in a generic sense, could, according to the Supreme Court, include more than mere intellectual content of the message, but the means of expression will also be the same or at least similar to constitutional protection given to the content. The ultimate result is that freedom of assembly is treated as a protected form of speech, although freedom of speech may have a demonstrable feature to it.

2 The need for protection of freedom of assembly.

Liberal democracy cannot operate effectively without meaningful measure of freedom of assembly, for two reasons. Modern political parties, which must of necessity appeal to the masses, must exercise collective politics to be effective. This requires political meetings, both large and small, for which freedom of assembly is indispensable. Second, the development and crystallisation of creative and innovative ideas and policies require intensive, penetrating and dialectical debate and discussion in political meetings.”

[45] In the same book he makes reference to the remarks made by Professor Dugard in his work *Human Rights and the South African Legal Order (1978)* at page 186, where he explained that the repression of public demonstration is not only undemocratic it is inherently dangerous. He stated that liberal democracy cannot operate effectively without a meaningful measure of freedom of assembly for two reasons: First, modern political parties, which must of necessity appeal to the masses, must exercise collective politics to be effective. This requires political meetings, both large and small for which freedom of assembly is indispensable. Second, the development and crystallization of creative and innovative ideas and policies require intensive, penetrating and dialytical debate and discussion in political meetings.

[46] He stated that assemblies ensure that there is meaningful and continuous communication between voters and representatives. The government is thereby informed of the unpopularity of its policies and is able to identify and address problems between elections. Freedom of assembly and demonstration is essential to a society's commitment to universal political participation in the democratic process and discourse. He states that this seminal right therefore permits persons to assemble and demonstrate their opposition or their support for any cause and to present the authorities with their demands for change. It is subject to the internal modifier that such conduct be effected peacefully and without arms. This means that violent protest is proscribed, and this impliedly permits laws regarding breaches of the peace and riot.

[47] Such conduct, as indicated above need not necessarily be directed against public authority but can be in respect of the opposition to any particular issue or cause

private or public. However, there is an obligation on the part of the authorities to ensure that such conduct is exercised within the parameters of the law.

[48] In ***Kimat Lal Kei Shaar v Commission of Police***³ where the Supreme Court of India ruled that the State can only make regulations to facilitate the right of assembly, which includes reasonable restrictions to safeguard citizens' rights, but this does not obviously mean prohibitions of all meetings and processions.

[49] The respondents complain that the application is intended to interfere with their rights of assembly contained in the Bill of Rights as follows:

16. Freedom of expression

1. Everyone has the right to freedom of expression, which includes-

- a. freedom of the press and other media;*
- b. freedom to receive or impart information or ideas;*
- c. freedom of artistic creativity; and*
- d. academic freedom and freedom of scientific research.*

2. The right in subsection (1) does not extend to-

- a. propaganda for war;*
- b. incitement of imminent violence; or*
- c. advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.*

17. Assembly, demonstration, picket and petition

Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.

18. Freedom of association

³ [1973] 1 SCR 227.

Everyone has the right to freedom of association.” (my emphasis)

[50] The Constitution itself promotes peaceful and not violent gatherings. The concession by the respondents that the protests were marred with violence is not consistent with their reliance on the above quoted provisions of the Constitution. That concession means that the interim interdict was properly sought and obtained to stop the violent acts, blockades of entrances into town and trashing of streets.

[51] The structure of the Gatherings Act is intended to encourage holding of gatherings. It does not provide that consent must be sought before a gathering is embarked upon. That would limit the right to assemble peacefully. It would thwart any efforts to convey to those in power the unhappiness or disagreements that people have towards, *inter alia*, their leaders or the government or employers.

[52] I have no doubt that were that to be so, the respondents, would have sought an order that such provisions be declared invalid and unconstitutional. What is upper most in the Gatherings Act is that a convenor must issue a written notice of its intended gathering and explain itself therein by giving details in relation to all the matters that are listed in section 3(2)(a) to (j) of the Gatherings Act.

[53] It follows that Adolph, on the applicant's version, had no basis in law or in terms of the Gatherings Act to refuse a request for a gathering. His obligation is to educate and advise those who seek to hold a gathering about the processes to be followed. In any event the respondents denied ever meeting with Adolph.

[54] The measure of control of the gathering cannot be regarded as a control that actually limits one's right to assemble and to picket or to petition. It is simply intended to ensure that in the process of one expressing its right to assemble, one does not trample upon the rights of others. The manner in which the protest will proceed through the streets must be guided so as to ensure that the protesters themselves are not in harm's way, either by way of stampedes or speeding vehicles.

[55] An open ended march or assembly cannot be regarded as a constitutional method of expressing one's unhappiness with those who are in power because what

it means is that one would hold a march protest as and when one wishes without any structure to it, no control mechanisms put in place, and most importantly no consideration for others or any of their rights that may be affected by that protest. The way I see the relief that is being sought, is simply intended to ensure that when there is such a protest action, it must be held in terms of the law (compliance with the provisions of the Gatherings Act) , it must be peaceful, non-violent and not domineering on the rights that other citizens or persons hold, which rights , they too, enjoy in terms of the Constitution.

[56] All that is prohibited in the interim interdict is unlawful conduct and no more. The respondents had, in one of their notices, made it clear that no violence would be tolerated. There is nothing in their answering affidavit which tabulates the steps that they took to ensure that the protesters acted in a peaceful manner. Unfortunately, there were violent acts as they have admitted which occurred. They have taken ownership and responsibility that they were the organizers of the protests and they have not advanced any reason why they should be distanced from the unlawful acts that occurred during the protest, that they themselves had organized.

[57] The fact that the respondents had notified the police of their intentions to hold a gathering, does demonstrate that they considered the safety of the protesters and the residents. However, that was not enough. On their version, they deny meeting Adolph and they thus accept that they failed to notify the local council or the municipal manager about the planned protest. They proffered no explanation for their failure to do so. Most importantly they failed to satisfy the requirement that they were supposed to meet in terms of section 3 of the Gatherings Act, namely, giving written notice. The complaint was about the municipality and not about the police. Notifying the police only was , perhaps on their part, to seek assistance with crowd control but that did not relieve them of their obligation to notify the local authority that its streets would be occupied, for example, from 6am to 6pm on the one day, that no vehicles would be allowed to enter or leave the town and / or that all entrances would be blocked; and that they intended to continue with the protests indefinitely until the council is dissolved.

[58] Section 4(b) of the Gatherings Act enjoins a convenor to give the notice contemplated in section 3(2) to the Chief Executive Officer or his immediate junior. It is apparent from the respondents' version that there was no compliance with the provisions of section 3(2) and those of section 4(b) of the Gatherings Act. Even where the respondents deal with the process followed by the respondents in organizing the protest action, they have not dealt, for example, with the anticipated number of participants, route of procession, names and number of the marshals who will be appointed, the manner in which the participants would be transported to the place of assembly and from the point of dispersal. The reason why the notice was given less than seven (7) days as prescribed in section 3(2).

[59] Their actions were intended to limit operations of all sectors and movement of residents, indefinitely, because their intention was to continue with the protests until the council was dissolved. Failure to comply with the provisions of the Act, in this regard, constitutes unlawful conduct. It is that conduct that the interdict sought to arrest.

[60] In ***Acting Superintendent of Education of KwaZulu Natal v Ngubo***⁴ the Court found that the right to assemble and demonstrate implicitly extended no further than what was necessary to convey the demonstrator's message. It was held that it was not possible to conceive of any situation where the right to assemble and demonstrate could be so extensive as to justify harassment, delicts or criminal conduct. As indicated above, the Courts must carefully and rationally weigh up the conflicting interest.

[61] Proceeding to deal with the conflicting interest, Ms Mnqandi urged the court to weigh up the interests of the municipality and those of the protesters who were conveying a message of their dissatisfaction about service delivery issues. In my view, because of the finding of unlawful conduct, it is not necessary to deal with conflicting interests.

⁴ 1996 (3) BCLR 369 (N) at 375 – 376.

[62] The submission that the final interdict will limit the respondents' rights enshrined in sections 17 and 18 of the Constitution, has no merit. A final interdict is sought to ensure that the respondents, when they wish to protest they do so in terms of the law. That does not amount to a blanket prohibition of protests as suggested by the respondents.

[63] I am satisfied that the matter was of sufficient urgency to warrant moving court for an interdict. There was no alternative remedy other than approaching court for relief on the part of the applicant. However, I agree with the respondents that there are no sound reasons to warrant *ex parte* proceedings when they had an interest in the matter. Had they been given notice, they contend, the application could have been avoided. The first to third respondents were known to the applicant as early as January 2023, according to the facts stated in the founding affidavit. In the founding affidavit cell phone numbers of some of the respondents are listed therein. Infact the applicant was even aware of the cell phone number of one Caren, a contact person of KPA. A whatsapp message alerting the respondent to the relief sought would have served as notice *albeit* informal. They should have been given notice of the urgent application because the orders sought affected them directly. This court intends to deprive the applicant of some of its costs for their failure to give notice of the proceedings as aforementioned.

[64] For all the reasons advanced above, the applicant has made out a case for the final interdict. It follows that it is entitled to its costs subject to those that the court will disallow for their failure to give notice to the respondents as indicated above.

[65] I accordingly make the following Order:

65.1 The Rule Nisi issued on 17 February 2023 is hereby confirmed.

65.2 The respondents are directed to pay 50% of the applicant's costs of the application, jointly and severally the one paying the other to be absolved.

T.V NORMAN

JUDGE OF THE HIGH COURT

Date of Hearing: 30 March 2023

Date of Delivery of Judgment: 23 May 2023

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