IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)

Case No: 2831/2023
Date Heard: 23 August 2024
Date Delivered: 14 November 2024

In the matter between:

GRAHAMSTOWN BRICK (PROPRIETARY) LIMITED Trading as MAKANA BRICK	**APPLICANT**
and	
MAKANA MUNICIPALITY	**FIRST RESPONDENT**
THE MUNICIPAL MANAGER OF MAKANA MUNICIPALITY *NOMINE OFFICIO*	**SECOND RESPONDENT**
THE EXECUTIVE MAYOR OF MAKANA MUNICIPALITY *NOMINE OFFICIO*	**THIRD RESPONDENT**

JUDGMENT

MULLINS AJ:

[1] The Applicant, Grahamstown Brick (Pty) Ltd, trading as Makana Brick, launched this application on 17 August 2023. To date, despite a notice of opposition having been filed on 28 August 2023, the Respondents, the Makana Municipality, its Municipal Manager and its Executive Mayor, the latter two being cited in their official capacities, have not filed any answering affidavits.

[2] On the contrary, they have employed numerous stratagems to avoid having to deal with the matter, which approach continued before me, which I deal with below.

[3] The Applicant describes itself as the largest manufacturer of clay bricks between Cape Town and Durban, which it markets throughout the country. It employs over 2100 employees. Its principal place of business, and the location of its factory, is situated at Mayfield Cemetery Road, Beaconsfield Farm, which property it owns. The Applicant's premises are situated within the jurisdiction of the First Respondent.

[4] The application has its genesis based on the following factual matrix:

(a) In order to get to the Applicant's premises it is necessary to drive through a property known as Mayfield Farm, which property is either owned by the First Respondent or, at the very least, over which it has jurisdiction and in respect of which it exercises direct control, which it has done so since long before this dispute began;

(b) Going back many years, on a certain section of Mayfield Farm an informal settlement sprung up, through which informal settlement the Applicant's trucks, not to mention its employees, have to travel on a daily basis. This informal settlement amounted to the unlawful occupation of the land in question;

(c) The settlement posed a risk to the Applicant's operations and its employees and, in addition, there was a risk to the residents of the

informal settlement in that huge trucks continually traverse the road going to and from the Applicant's brick making factory;

(d) During 2001 negotiations ensued between the Applicant and the First Respondent which did not resolve the problem. In the result, the Applicant threatened legal action;

(e) Before that could happen the First Respondent took the necessary steps to obtain a court order, presumably an eviction, and the area was cleared of unlawful occupiers, which occurred during 2002;[1]

(f) During 2014 the Applicant noticed that the First Respondent was taking steps to develop a portion of Mayfield Farm, which borders on Mayfield Cemetery Road. This prompted a letter from the Applicant's attorney, the purpose of which was to enquire whether the land was properly zoned for urban development and whether adequate precautions would be taken to safeguard the persons who would be occupying the development;

(g) With regard to the second issue it was pointed out that, *inter alia*, 116 light vehicles and 20 heavy vehicles (trucks) utilize the road every day, going back and forth. At the very least the Applicant required that the road be tarred and a fence or barrier between the road and the development be erected;

(h) For reasons unknown the development never materialized;

(i) However, during 2018 a mass informal invasion commenced with "plots" being demarcated and structures being built. For reasons unknown the development is known as "Ghost Town". This prompted further correspondence in which a demand was made that the First Respondent address the problem;

---

[1] I assume that due to the lapse of time the court order is no longer available.

(j) There was tension between the occupants of the land due to the enormous amount of dust that the Applicant's trucks caused and a perception (apparently communicated by a municipal officer) that the Applicant was responsible for service delivery to the unlawful occupants of the land. The road has been blockaded on occasion, making it impassible;

(k) The First Respondent failed to address the problem as a result of which the Applicant launched an application under case no. 3293/2018 for an order to compel the Respondents to, *inter alia*, remove the unlawful occupiers and demolish the structures;

(l) The order was granted on 20 November 2018, the Respondents being afforded 90 days in which to comply;

(m) Pursuant to the above the First Respondent launched an application under case no. 2261/2019 in accordance with either PIE or ESTA (it is unclear from the papers which) as a result of which an order was obtained for the eviction of the unlawful occupiers and the demolition of the structures;

(n) In order to ameliorate the plight of the unlawful occupiers the Applicant proposed a compromise, namely that a 200 metre "*buffer zone*" be established on either side of Cemetery Road, together with certain other provision (which it is not necessary to specify), which buffer zone would be kept clear of structures;[2]

(o) This resulted in the conclusion of a Memorandum of Agreement ("MOA"), dated 17 August 2020, which was signed by the Applicant and the then Municipal Manager on behalf of the First Respondent. The following is what was agreed:

---

[2] This confirms the adage that no good deed ever goes unpunished.

"1. The municipality and Makana Brick have agreed to allow persons to occupy Mayfield Farm save for a buffer zone along the main road between Makhanda and Makana Brick, which is described in the diagram attached hereto and marked annexure "B".

2. Persons shall, in accordance with this agreement, and subject to amendment of the Court order by the Honourable Court, have the right to continue to occupy that portion of Mayfield Farm that is not reflected in the attached buffer zone, relevant to this agreement.

3. The buffer zone has been surveyed by Mr K van Niekerk, a professional land surveyor, and the boundary thereof has been demarcated by large rocks, painted white, and which have been placed on the boundary every 100 metres to indicate the buffer line, (as reflected in annexure "B" hereto).

4. The municipality shall approach the Honourable Court to have annexure "A" amended and to obtain the necessary interdict as described in paragraph 4 of the order, as amended by annexure "B" hereto, within 90 days of the signing of this agreement and shall do what is necessary to give notice to the occupants of Mayfield Farm and as directed by the Honourable Court.

5. The Municipality will pay the costs of the application to amend and the costs of giving notice to the occupiers of Mayfield Farm.

6. The parties shall each pay their own costs of the preparation and execution of this agreement."

(p) Despite having undertaken to obtain an amended court order reflecting the terms of the MOA the First Respondent failed to do so as a result of which the Applicant eventually attended thereto, which was done by way of a chamber book application;

(q) Unfortunately, the MOA did not solve the problem and unlawful occupations within the buffer zone continued unabated. In response to a demand that it enforce the terms of the court order, as amended by the MOA, the First Respondent decided to dig a trench to demarcate the boundary of the buffer zone. The trench was never completed and new occupations within the buffer zone continued;

(r) Eventually, on 17 August 2023 the Applicant launched this application, praying for the following relief:

> "1. Directing the First, Second and Third Respondents to remove any persons to be found on the demarcated area[3] (A hereto) on Mayfield Farm, District of Grahamstown/Makhanda, in terms of all applicable legislation within 90 (ninety) days of the granting of this order, alternatively, on a date so determined by this Honourable Court.
>
> 2. Directing the First, Second and Third Respondents to demolish any unlawful structures erected on the demarcated area on Mayfield Farm, district of Grahamstown/Makhanda, in terms of all applicable legislation, within 90 (ninety) days of the granting of this order, alternatively, on a date so determined by the Honourable Court.

---

[3] The buffer zone.

3. Directing the First, Second and Third Respondents to remove any materials not belonging to the First Respondent found at or near the demarcated area on Mayfield Farm, district of Grahamstown/Makhanda, in terms of all applicable legislation, including any building materials, subject to First Respondent, keeping in safe custody for three (3) months of such materials until released to the lawful owner thereof.

4. Directing the First, Second and Third Respondents to create an appropriate barrier to identify the demarcated area and to prevent occupation of the demarcated area within ninety (90) days of the granting of this order, alternatively, within such time deemed appropriate by the Honourable Court, to:

    4.1. prevent the unlawful occupation, or invasion, of the demarcated area on Mayfield Farm, by any person(s); and

    4.2. prevent the erection, completion and/or occupation of any structure on the demarcated area on Mayfield Farm by any person(s).

5. Directing that the First, Second and Third Respondents pay the costs of this application, jointly and severally, the one paying, the other to be absolved."

[5] The matter was eventually set down before me on 22 August 2024. Although it had filed a notice of intention to oppose the Respondents have never filed opposing papers.

[6] When the matter was called on 22 August 2024 I was advised by counsel for the Respondents that they (the Respondents) intend to bringing an application for a

postponement and time was required in which to file the necessary application. As the Applicant's counsel advised me that the application would be opposed I stood the matter down to the following day.

[7] When the matter was recalled I was presented with a founding affidavit consisting of 181 pages, an opposing affidavit consisting of 28 pages and a replying affidavit consisting of a further 84 pages, with a supplementary replying affidavit consisting of another 21 pages. In total 268 pages!

[8] The notice of motion in the application for postponement reads as follows:

> "1.1 That the application be postponed to a date to be arranged between parties after the first respondent's council meeting scheduled for 29 August 2024 wherein resolutions will be taken for the purpose of enabling the filing of the Respondent's answering affidavit and the following counter-applications:
>
> 1.1.1. a self-review of the decision of the first respondent's entering into a memorandum of agreement with the applicant;
>
> 1.1.2. a self-review of the decision of the first respondent to agree to have the memorandum of agreement dated 17 August 2020;
>
> 1.1.3. a recission of the chamber application and subsequent court order of 15 September 2015; in the alternative
>
> 1.2. The application be stayed pending the outcome of the abovementioned applications to be launched.
>
> 1.3. Costs of the application, only in the event of opposition of the relief sought by the Respondents.

1.4. Granting the Respondents and further and/or alternative relief that this Honourable Court deems fit."

[9] At the outset counsel for the Respondents advised me that she was only briefed to apply for a postponement and did not hold any instructions in respect of the merits of the application.

[10] The first submission was that the matter should stand down in order for the Applicant's attorneys to provide proof that it had a power of attorney to oppose the postponement application. To this end on the previous day (the 22nd) the Respondents had filed a notice in terms of Rule 7. Needless to say the Applicant denied that it was necessary to file a power of attorney in order to oppose an application for postponement.

[11] It is not in dispute that the Applicant's attorneys are in possession of a power of attorney to represent it in the main application. Counsel for the Respondents could not explain why it was necessary to obtain a separate power of attorney for an issue incidental thereto, such as an application for postponement, nor is there an explanation. It would result in an untenable situation if, every time an issue incidental to the conduct of an application (or action), a separate power of attorney was required. I was not referred to any law in support of the submission and had no hesitation in rejecting the Respondents' challenge to the Applicant's attorney's authority.

[12] The founding affidavit in the application for postponement was attested to by the Respondents' attorney. There were no confirmatory affidavits filed, apparently due to "…*the urgency of this application and circumstances beyond* [my] *control."* Which is odd, because in order to bring the application for postponement the attorney would have had to consult with and obtain instructions from the very people who, due to the urgency, were unable to file confirmatory affidavits.

[13] It was submitted that the application had been necessitated by the Applicant's unreasonable refusal to agree to a postponement of the matter, which request was accompanied by a tender of the wasted costs. Furthermore, due to the limited time

in which the Respondents had had in which prepare the application not all the relevant facts had been placed before the court. I pause to mention that the first time the Applicant's attorney had been advised that a postponement was required was on 16 August 2024, the reason given being that the matter was to be considered by the First Respondent's municipal council on 29 August 2024. It is thus not surprising that the Applicant refused to simply agree.

[14] The bottom line, and it pervades the entire application, is that the postponement was necessitated by the Respondents' own dilatoriness. They have had a year in which to deal with the matter properly, but its officials appear to have sat on their hands and done nothing other than hold meeting after meeting.

[15] It is relevant that the notice of set down, dated 22 April 2024, was served on the Respondents' local attorney on 10 April 2024, along with the Applicant's heads of argument. That was four months prior to the date upon which the matter was to be heard. That the Respondents' legal representatives were alive to the need to take action is evidenced by the exchange of correspondence between the First Respondent's attorney and its officials, which correspondence is attached to the founding affidavit. Thus:

(a) On 16 July 2024 the attorney sent an email to various officials and, with reference to the outcome of an inspection-in-loco, which was held on 31 October 2023 (my emphasis), stated:

> "It's imperative that same be addressed as an answering affidavit still has to be filed to protect the interests of the Municipality in the matter."

(b) On 1 August 2024 the attorney requested an urgent consultation because:

> "Counsel seeks to have the answering papers completed as soon as possible."

(c) The correspondence also reveals that various consultations did take place and on 13 August 2024 the attorney records:

> "As indicated the papers would have to be filed by Friday, 16 August 2024 before the date of hearing on 22 August 2024."

[16] I pause to emphasise that these communications are attached to the Respondent's founding affidavit in the application for postponement. On the Respondents' own version their attorney, at least, was alive to the fact that it was necessary to file opposing papers.

[17] Not surprisingly, the Applicant submitted that the application for a postponement was dishonourable and *mala fide* and was launched solely for the purposes of delay. According to the Applicant's attorney:

"The set down came after a long process of engagement emanating from August 2023."

[18] He goes on to detail the progress (or lack thereof) of the matter:

(a) In the absence of answering affidavits the matter was set down on 28 September 2023. On the day of the hearing a postponement was requested on the basis that the First Respondent had only just given its attorney instructions to brief counsel. A postponement to 3 October 2023 was requested. The Applicant refused to agree thereto;

(b) The day prior to the hearing (on 28 September 2023) the Respondents delivered a notice in terms of Rule 6(5)(d)(iii) in which various legal points were raised. In the light thereof the learned Judge postponed the matter to 31 October 2023 and ordered the Respondents to file their answering affidavits by 26 October 2023. This order was served on the Respondents' local attorney on 9 October 2023;

(c) No answering affidavits were filed by that date, but as the Respondents indicated that they intended to persist with arguing the questions of law the matter was removed from the roll, as it had to be placed on the opposed roll;

(d) On 19 February 2024 a further Rule 6(5)(d)(iii) notice was filed, which expanded on the original one to a certain extent.

[19] Of relevance is the fact that a very closely related matter, **Mayfield Clays (Pty) Ltd v Makana Local Municipality and Others**; case no. 3136/2023, has followed a very similar path. That matter was set down on 30 July 2024. On the morning of the hearing the Respondents' filed a notice in terms of Rule 6(5)(d)(iii) raising questions of law and seeking a postponement. Laing J refused the postponement, heard the matter and granted an order as prayed, which was to hold the same respondents in contempt of court for failing to comply with an order of court compelling them to take steps to have the unlawful occupiers of the land in question removed.

[20] Quite apart from the extreme lateness of the application, the grounds upon which the postponement is based are paper thin and contrived. They are:

(a) There is a municipal council meeting on 29 October 2024;[4]

(b) At the council meeting resolutions will be taken for the purpose of enabling the filing of:

(i) the Respondents' answering affidavit;

(ii) counter-applications to self-review the conclusion of the MOA and for a rescission of the order making the MOA an order of court.

---

[4] That date has come and gone.

[21] The first mention of a council meeting is in an email, dated 16 August 2024, in which a postponement is requested because: *"Our client has informed us that the application is being tabled for consideration by council on 29 August 2024 for resolutions to be adopted on the way forward."*

[22] The correspondence attached to the Respondents' affidavit (referred to above) makes no mention of the need for resolutions to be taken at a council meeting. In fact, the Respondents' attorney repeatedly mentions the urgent need for the filing of answering affidavits. A self-review is nowhere referred to, nor is an application for rescission of the court order in terms of which the MOA was made an order. They are after-thoughts.

[23] I interpose to mention that the founding affidavit in the application for postponement consists of over a hundred pages of annexures dealing with community meetings, reports, site meetings and the like. The Respondents were actively dealing with the matter, just not doing anything about it.

[24] Even if there was credence to basis for the postponement, there is no explanation why the council meeting could not have taken place ages ago.

[25] Finally, the council meeting, which was scheduled for 29 August 2024, took place before the handing down of this judgment. If anything of relevance occurred which could have assisted the Respondents one would have expected an application to lead further evidence.

[26] I have to agree with the Applicant that the application for a postponement is an abuse of the process of this court and is without merit. Instead of filing affidavits running in to hundreds of pages in support of the application for postponement the Respondents would have been better served in drafting their answering affidavits in the main application.

[27] In the circumstances I refused the application for postponement and ordered the First, Second and Third Respondents to pay the costs thereof, jointly and severally, the one paying the other to be absolved, on an attorney and client scale.

[28] Which brings me to the merits of the application. I will deal with the Rule 6(5)(d)(iii) notice first:

(a) The Applicant's lack of *locus standi* to seek the eviction of the occupiers in the demarcated area.

The Applicant does not seek to evict the unlawful occupiers. It seeks to compel the Respondents to do so;

(b) The Applicant should have joined the National Government as a party to the proceedings.

If this should have been done it was incumbent on the Respondents to make out a case on affidavit;

(c) No case has been made out against the Respondents and citing them amounts to misjoinder.

In the application for postponement the Respondents sought time in order for its council to pass resolutions to oppose the application and bring a self-review to set aside its previous actions. The logic of this "legal" challenge is therefore not understood;

(d) The application does not meet the requirements of a mandamus.

The Applicant is armed with a court order. It seeks to enforce it. There is no merit in this point;

(e) The Applicant does not meet the requirements of a case to compel the Respondent to evict the unlawful occupiers.

Apart from being in direct contradiction with paragraph (a) above, the answer is obvious: the Applicants seek to enforce a court order;

(f) No case is made out for the relief sought.

If this is indeed the case, it is a factual issue which should have been dealt with in an opposing affidavit. It is not a question of law as envisaged by the relevant rule.

[29] In **Boxer Superstores Mthatha and Another v Mbenya**[5] it was held that if a respondent relies solely on a notice in terms of the sub-rule the allegations in the founding affidavit must be accepted as established facts. See also **Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors.**[6]

[30] In the circumstances the questions of law, such as they are, are dismissed.

[31] The Applicant's case is, essentially, to compel the Respondents to comply with their legal obligations, as reinforced by the MOA, which was made an order of court. There is no opposition to the application.

[32] I am satisfied that that the Applicant has made out a case for the relief claimed and accordingly make an order substantially in accordance with the notice of motion. In the circumstances it is hereby ordered:

1. The First, Second and Third Respondents are directed to remove any persons to be found on the demarcated area (annexure "A" to the notice of motion) on Mayfield Farm, District of Grahamstown/Makhanda, in terms of all applicable legislation within 90 (ninety) days of the granting of this order.

2. The First, Second and Third Respondents are directed to demolish any unlawful structures erected on the demarcated area on Mayfield Farm, district of Grahamstown/Makhanda, in terms of all applicable legislation, within 90 (ninety) days of the granting of this order.

---

5 2007 (5) SA 450 (SCA) at 452 F – G.

6 2009 (2) SA 512 (DC) at 514J; para [9].

3. The First, Second and Third Respondents are directed to remove any materials not belonging to the First Respondent found at or near the demarcated area on Mayfield Farm, district of Grahamstown/Makhanda, in terms of all applicable legislation, including any building materials, subject to First Respondent keeping such materials in safe custody for three (3) months, or until released to the lawful owner thereof.

4. The First, Second and Third Respondents are directed to create an appropriate barrier to identify the demarcated area and to prevent occupation of the demarcated area, within ninety (90) days of the granting of this order, to:

    4.1. prevent the unlawful occupation, or invasion, of the demarcated area on Mayfield Farm, by any person(s); and

    4.2. prevent the erection, completion and/or occupation of any structure on the demarcated area on Mayfield Farm by any person(s).

5. The First, Second and Third Respondents are directed to pay the costs of this application, jointly and severally, the one paying, the others to be absolved.

_____

NJ MULLINS

ACTING JUDGE IN THE HIGH COURT

DATE:

APPEARANCES:

Applicant:	Adv. G Brown Attorneys: WEELDON RUSHMERE & COLE 119 High Street, MAKHANDA
Respondents:	Adv. A Masiza Attorneys: McWILLIAMS & ELLIOT INC. 152 Cape Road, Mill Park GQEBERHA c/o N N DULLABH & CO 5 Bertram Street MAKHANDA