REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 19700/18

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

17 MAY 2019
DATE

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SIGNATURE

In the matter between

AVERDA SOUTH AFRICA (PTY) LIMITED Applicant

and

THE UNLAWFUL AND UNAUTHORISED INDIVIDUALS AND PICKERS TRAVERSING PROPERTY SITUATED AT THE REMAINING EXTENT OF FARM ROBINSON 82, REGISTRATION DIVISION IR, PROVINCE OF GAUTENG AND SITUATED ON THE CORNER OF FENNELL AND ROSETTENVILLE ROAD, VILLAGE MAIN Respondent

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J U D G M E N T

MAHALELO, J:

INTRODUCTION

[1] This is an application in terms of which the applicant seeks an order to protect its immovable property from violent conduct by unknown groups of reclaimers. The application is launched in two parts namely A and B. Part A of the application served before the urgent court of this Division on 24 August 2018 and a rule *nisi* was granted in the absence of the respondents who were cited as the "*Unlawful and Unauthorised Individuals and Pickers traversing the property situated at the remaining extent of farm Robinson 82, Registration Division IR, Province of Gauteng and situated on the corner of Fennell and Rosettenville road, Village Main.*" The applicant also sought ancillary orders including that it be granted permission to serve the application and the interim order by substituted service. The *rule nisi* was extended to 15 October 2018 and again to 11 March 2019.

[2] The applicant now seeks to confirm the order.

[3] The rule *nisi* granted in essence interdicted the respondents not to approach, traverse or be present at the applicant's immovable property ("*the property*") and to desist from any conduct in so far and in respect of any of the applicant's employees, representatives, subcontractors in any way whatsoever including but not limited to threatening and intimidating by words

and/or violence to harm any person involved at the property and to vandalise any equipment or assets or works of the applicant, its employees and subcontractors.

THE PARTIES

[4] The applicant is Averda South Africa, a privately owned company which operates a waste management landfill site at the property commonly known as Genesis landfill site. The property has been a landfill site since approximately 1999. It forms part of a larger property that has been leased from Dymac Properties Management by Waste Giant General Waste. The applicant purchased Waste Giant's business operations in 2016 and is now operating the landfill at the property. Subsequently the applicant underwent a name change to Averda. The 32 respondents are the pickers who recycled the waste on the applicant's landfill site. For the sake of convenience I will refer to the applicant as such and the respondents as the 32 respondents.

[5] Circumstances under which the rule *nisi* was granted are as follows:

Applicant's operations on the site is to manage general waste. In terms of the minimum requirements of waste disposal the applicant is required to operate the site in terms of the prescribed method and regulations of the integrated environmental authorisation in terms of section 24G of the National Environmental Management Act 59 of 2008. The licence in terms of which the applicant operates follows from Waste Giant Projects which was

incorporated into Wasteman and which was purchased by the applicant. The 32 respondents worked at the site before any private companies operated there. An agreement existed between Waste Giant and Remade (a company with exclusive rights to recycle waste within the applicant), in 2011 in terms of which the respondents were allowed to work on site and to sell their recycled material to Remade exclusively. They were issued with access cards by Waste Giant and later by Remade. During 2015 under Waste Man they were taken for induction process where they were taught about health, safety and the machinery that worked on the site. They also had to undergo medical examinations which were done by Ponelopele for Wasteman.

[6] During 2016, after the applicant took over the landfill site and as a result of waste being present at the property, the applicant from time to time experienced an influx of pickers, being individuals who collected recyclable items on the site. It appears that some of the pickers did not gain access to the property through the main gate but through a portion of the fence which created a disturbance to the applicant's operations. There was an influx of pickers on the site under various factions which resulted in violent outbursts and a shooting incident occurred which resulted in the death of a picker.

[7] The police intervened and investigated and no major incidents occurred for some time. Pickers from time to time attended at the property but not to the degree where they interfered with the operations of the applicant from 06h00 to 18h00 on a work day.

[8] The applicant states that on 8 May 2018 a sudden surge and attendance of pickers was noticed. The pickers gained access into the property by pushing down a portion of the fence on the East end and posed a number of threats to the employees of the applicant. They were organised and presented with armed security and a number of them were seen carrying firearms. Several gunshots were fired by the pickers and the applicant's staff was instructed to evacuate the workstations, production and works was halted. Members of the SAPS attended at the property and managed to calm down the volatile situation.

[9] Between 9 and 14 May 2018 the pickers continued to enter the landfill site with the result that the applicant's production was affected in that its employees were returned to office at approximately 10h00 as soon as the pickers arrived on the landfill site. On 16 May 2018 another shootout occurred between the various factions of the pickers and on 20 May 2018 pickers displayed aggressive conduct towards Mr Pieterse wherein he was threatened with death if he interfered with their business. On 22 May 2018 yet another shooting incident occurred where the pickers were shot by one of the rival factions on the site. This led to the applicant launching the ex parte urgent application for an interim interdict barring access to all the pickers on the property. According to the applicant there was a real risk to the property being damaged and even loss of life.

[10] The 32 respondents in opposing confirmation of the rule *nisi* raised a number of issues on the merits and also raised a point *in limine*. For reasons

which will become apparent in due course, I will consider the point in limine first.

[11] The contention raised by the 32 respondents is that the rule *nisi* should not be confirmed on the ground that the applicant breached its duty of utmost good faith, which is an essential requirement of *ex parte* applications. It is alleged in the answering affidavit that the applicant failed to disclose material facts to the court hearing the *ex parte* application and misstated others. The material not so disclosed or misstated are alleged to include, but not limited, to the fact that the applicant explained its need to approach the court *ex parte* primarily because it did not know the identity and whereabouts of the 32 respondents. The 32 respondents contended that their presence on the property was lawful, they are known to the applicant as they engaged the applicant's representatives on many occasions even after September 2016, the date on which the applicant alleges that he terminated their access to the property. They contended that the applicant has a register of their names and addresses (formal reclaimers), that the applicant under its previous name Waste Man entered into agreements with them through Remade and that the applicant under Waste Man had almost weekly meetings with them to discuss their conduct and safety on site. The 32 respondents further allege that the applicant's head of security knows them well because they reported issues of safety to him. They furthermore state that Mr Pieterse of the applicant attended several meetings with them where it was agreed that they should access the property through a roll call at the gate with ID tags. According to

the 32 respondents, the applicant through Mr Bantsha advised them to register a company and they did so through the assistance of Waste Man.

[12] The 32 respondents submitted that it was Mr Pieterse who referred them to raise their concerns with Mr Gerber when they protested against what they believed to be the unlawful termination of their contracts and they raised the unlawfulness of the termination of their contracts with Mr Gerber long after September 2016 and that some of them were allowed back on site. The 32 respondents therefore contended that the applicant's allegation that they are not known is false.

[13] Secondly, the 32 respondents contended that the applicant approached the court *ex parte* seeking protection from the reclaimers who were violent on its site. They indicated that it is not them who were violent. They stated that they have worked in peace on the property for 16 years, they are distinct from the new influx of violent recyclers and the applicant does not deny this distinction. The 32 respondents therefore contended that the applicant has failed to put facts before court that there have been peaceful recyclers on its property for years before the onset of violence as the court faced with the *ex parte* application believed that the applicant was confronted with an influx of violent people it needed protection from. They further argued that the applicant failed to place before court the fact that the 32 respondents have been recycling on the property and making a living for almost two decades without violence on their behalf. According to them, much as they do not dispute violence on site, the applicant presented the court with half-truths

of recently arrived violent recyclers. The 32 respondents therefore contended that if the court was presented with a full picture it would have been able to apply its mind to the distinction.

[14] The 32 respondents further contended that the applicant failed to present to court that in granting the order sought, the court would deprive the 32 non-violent respondents of their only means of making a living. They submitted that this information would have been vital to the court and further that it was necessary for the applicant to disclose to the court that the 32 recyclers believed their presence in the property to be lawful and that the applicant contends that the 32 do not have a right to work on the property. The 32 respondents argued that the court was deprived of the opportunity to apply its mind to whether or not the 32 respondents had a lawful basis to be on the property. They submitted that the court was not only faced with a slither of non-disclosure but was faced with significant and considerable mischaracterisations of facts and non-disclosure of relevant ones and on that basis the rule nisi should be discharged.

[15] The applicant denied that there are any grounds on which the 32 respondents could lay credence to the suggestion that the applicant did not act in good faith when it obtained the interim order. According to the applicant, there is no further information on the facts which needed to be placed before court at the time of bringing the ex parte application. The applicant argued that it was able to show the court that an interim interdict was necessary to protect its site and employees from the violence that had erupted. The

applicant further argued that it terminated the 32 respondents' access to the property when it took over in 2016.

[16] It is trite that an *ex parte* application is a serious departure from the ordinary principles applicable to civil proceedings. An *ex parte* application, by its nature, places only one side before the court. See *Pretoria Portland Cement Co Ltd v Competition Commission* 2003 (2) SA 385 (SCA). As per normal court practice an *ex parte* procedure should be invoked only where there is good cause or reason for the procedure such as when the giving of notice would defeat the very object for which the order is sought. It is, therefore, our law that an applicant in an *ex parte* application bears the duty of utmost good faith in placing before the court all the relevant material facts that might influence a court in coming to a decision. Only facts that are material and which are within the applicant's knowledge should be disclosed. See *Powell and Others v Van der Merwe and Others* 2005 (5) SA 62 (SCA) at para 42. It is further trite in the practice of the court that *'[G]ood faith is sine qua non in ex parte* applications', to adopt the words of *H J Erasmus, et al,* Superior Court Practice *(2018), p D1–61-62.*

> *'Good faith is a sine qua non in ex parte applications. If any material facts are not disclosed, whether they be wilfully suppressed or negligently omitted, the court may on that ground alone dismiss an ex parte application. The court will also not hold itself bound by any order obtained under the consequent misapprehension of the true position. Among the factors which the court will take into account in the exercise*

of its discretion to grant or deny relief to a litigant who has been remiss in his duty to disclose, are the extent to which the rule has been breached, the reasons for the non-disclosure, the extent to which the court might have been influenced by proper disclosure, the consequences, from the point of doing justice between the parties, of denying relief to the applicant on the ex parte order, and the interest of innocent third parties such as minor children, for whom protection was sought in the ex parte application.

[17] Approving the principle, the court stated in *Knouwds NO v Josea and Another 2007 (2) NR 792 (HC)*, para 18 that:

'This application was brought ex parte, i.e without notice to the respondent(s). It is trite that a party who comes to court without notice to a person affected by the relief it seeks must act bona fide and must disclose all relevant facts to the court.

[18] The court should always bear in mind that by granting the indulgence to hear an ex parte application brought on urgent basis, the court is in effect taking away the respondent's constitutional right to fair trial (i.e the right to be heard), and, therefore, there must be in existence good grounds for the court to exercise its discretion in favour of granting the indulgence. Good grounds exist where, for example, to serve papers on the opposing party would defeat the very object of the application and an applicant does not act in utmost good faith where he or she does not disclose all material facts; material facts which

in the circumstances of the case were more likely to influence the court in refusing to consider the matter on ex parte basis and on the basis of urgency, if the material facts had been placed before it when such application was heard.

[19] In the instant case, I make the following findings that are relevant to a consideration of the aforegoing principles and considerations respecting the instituting of urgent ex parte applications. Nowhere in the founding affidavit does the applicant disclose this material fact, namely, that the 32 respondents have been recycling on the site for over 16 years without any aggression or violence on their part. Further that, in actual fact they were also concerned about the violence on site and that after termination of their access to the site they protested and continued to engage the applicant and that some of them went back to the site. The applicant failed to disclose that the 32 respondents or their representatives attended meetings with Mr Pieterse and Mr Gerber even after September 2016. In my view it cannot be said that the 32 respondents or at least their representatives were unknown to the applicant. Even more so because, the representatives of the 32 respondents exchanged emails with Mr Gerber concerning the issue of termination of their access on site. Mr Gerber was the managing director of the applicant post September 2016.

[20] On the authorities, there are material facts which applicant owed a duty of utmost good faith to disclose to the court. An applicant does not act in utmost good faith where he or she does not disclose all material facts, that is,

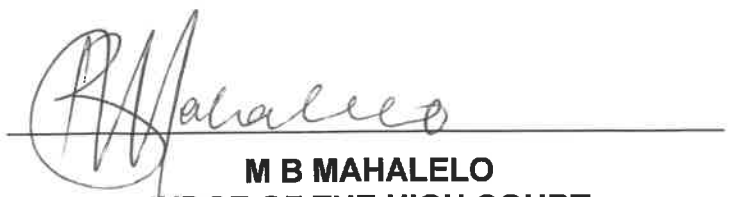
facts which in the circumstances of the case were more likely to influence the court in refusing to consider the matter on ex parte basis and on the basis of urgency. It has been said that on the return day of a rule nisi a court should decline to confirm the rule nisi where the rule nisi was granted in circumstances in which the applicant had failed to act in utmost good faith.

[21] I hold the view that the applicant, having failed to disclose the aforementioned relevant and material facts to the court, acted in material breach of his duty to act in utmost good faith in instituting the urgent ex parte application. On this ground the application stands to be dismissed.

[22] Based on these reasons, it is my view that the applicant has failed to make out a case for confirmation of the rule nisi; and the respondents have established that the rule nisi should be discharge.

[23] In the result I make the following order:

1. The rule nisi is discharged.
2. The applicant to pay the costs of the application.



M B MAHALELO
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

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