IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)
CASE NO.: 5633/2020

In the matter between :

CITY OF CAPE TOWN	Applicant
and	
SOUTH AFRICAN HUMAN RIGHTS COMMISSION	First Respondent
CHIEF EXECUTIVE OFFICER OF THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION	Second Respondent
TAURIQ JENKINS	Third Respondent
ANNIE KIRKE	Fourth Respondent
ANNELIZE VAN WYK	Fifth Respondent
LYSANDRA FLOWERS	Fifth Respondent
LORENZO DAVIDS	Sixth Respondent
CATHERINE WILLIAMS	Seventh Respondent
CATHERINE WILLIAMS	Eighth Respondent
GILLES VAN CUTSEM	Ninth Respondent
JARED SACKS	Tenth Respondent
ZELDA HOLTZMAN	Eleventh Respondent

JUDGMENT DELIVERED ON 17 MARCH 2021

DESAI, J

[1] At this stage these proceedings relate only to the issue of costs.

[2] Underpinning this application is a patently unconstitutional endeavour by a municipality to intrude upon, or hinder, the effective exercise by a so-called Chapter 9 institution of its statutory powers, *inter alia*, to monitor the observance of human rights.

[3] The Constitution of the Republic of South Africa (the Constitution) obliges a municipality to promote a safe and healthy environment for its citizens and, in so doing, protect their rights to health care services, sufficient food and water and social security.

[4] In fulfilment of this obligation, it seems, the applicant established the Strandfontein site as one of its measures to house the homeless and street-based persons in Cape Town. This was in the earlier stages of the pandemic currently still in progress. The applicant's conduct is, of course, not exempt from scrutiny and accountability.

[5] What eventually followed was the fracas involving the applicant and the South African Human Rights Commission (SAHRC). The unpleasantness was compounded by the applicant, somewhat unwisely, approaching this Court for relief which severely impinged upon the constitutional and statutory functions of the SAHRC.

[6] The rule *nisi* granted herein was extended on several occasions and when it finally came before me the matter was ripe for hearing. Suddenly, and without

prior notice to this Court or the respondents, Ms R. Williams SC, appearing for the applicant, indicated that she was withdrawing the application. I asked whether she was abandoning the application. She indicated she was withdrawing the application not abandoning it ... shades of Alice in Wonderland. In any event she refused to tender costs.

[7] Argument followed on the issue of costs only. Williams SC failed to advance any cogent response to the suggestion that the sudden withdrawal of the matter, on the morning of the hearing, should result in her client being saddled with costs.

[8] Regrettably, the applicant, a municipality, elected to litigate against a Chapter 9 institution. More appalling is the disdain with which the applicant regards the SAHRC. This is graphically illustrated in the following remark contained in applicant's founding papers :

> *"The City does not need the unwelcome and indeed unnecessary interference by the respondents."*

[9] As Mr N. Arendse SC, who appeared with Mr S. Magardie on behalf of most of the respondents, correctly pointed out the issue at the heart of this case was whether this Court should be party to the efforts by the applicant to shield its activities from scrutiny by local and internal human rights defenders and the SAHRC, the body constitutionally established to monitor human rights.

[10] With the exception of the ninth respondent, the third to eleventh respondents are, or were, individual monitors appointed by the SAHRC. It was the applicant's case that the individual monitors were unlawfully appointed. This was a spurious argument. Quite clearly, Section 11(1) of the SAHRC Act permits the Commission to appoint individual monitors as members of a committee established for the purposes of advising the Commission and making recommendations to it. Applicant did not seek to review or set aside the decision of the Commission to establish the committee and appoint its individual monitors. That decision accordingly stands unchallenged.

[11] The ninth respondent is a medical practitioner and epidemiologist employed by Médecian Sans Frontiéres (also known as MSF or Doctors Without Borders). The MSF is an international independent medical humanitarian organisation delivering effective emergency medical aid and other such activities. It also speaks out to bring attention to neglected crises and advocates for improved medical treatment.

[12] The ninth respondent was appointed as a contractor to the Commission. It appears that Section 19 of the SAHRC Act permits the Commission to enter into contracts of service with persons who have specialist technical knowledge related to the work of the Commission. The ninth respondent's appointment was accordingly most appropriate in the circumstances.

[13] During the course of these proceedings applicant's deponent sought to level wild and unsubstantiated allegations against the ninth respondent, that is Dr. Cutsem. These criticisms were most unfortunate. They sought to diminish the stature of an international human rights defender for no apparent reason. Their conduct is deprecated.

[14] As Williams SC has conceded the applicant's case, it is in the circumstances not necessary to canvass their case in any great detail.

[15] Applicant's notice of motion purports to seek an interim interdict pending a return date. It is quite apparent that the interdict sought would have a final effect if granted. If that is so, the applicant was requested to satisfy this Court that it was entitled to final interdictory relief, not interim relief.

[16] On the papers there are considerable and significant disputes of fact. Those must be resolved in accordance with the respondents' version as contemplated by the *Plascon Evans* Rule. (See: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 (A)).*

[17] If I am wrong and the relief sought by the applicant was interim and not final relief, the constitutional rights and obligations of the Commission and of the human rights defenders weigh heavily in the balance of convenience against granting the applicant an interim interdict.

[18] This, of course, is now academic in that Williams SC no longer proceeds with the application.

[19] As Arendse SC correctly pointed out the orders sought by the applicant were overbroad and they failed to demonstrate why this is one of the clear cases in which such orders should be granted.

[20] With regard to the Lockdown Regulations interdict, the evidence points to the respondents not having breached the regulations. Moreover the photographic evidence shows applicant's allegations in this regard to be unfounded.

[21] The Monitoring Interdict, as I have already indicated, intrudes upon and hinders the Commission effectively exercising its statutory or constitutional powers.

[22] The allegations of incitement to rebellion, intimidation and similar threats are vague and not borne out by the actual evidence let alone establish respondents' complicity in such conduct.

[23] Probably of greater significance in this matter is the gagging interdict sought by the applicant. It sought to gag the respondents from independently reporting on what was occurring at Strandfontein. It sought broad relief. It wanted to interdict the publication and dissemination of reports relating to

Strandfontein which were untrue or had not been presented to the City for comment before publication or dissemination.

[24] The applicant, i.e. the City, has no right, whether clear or even *prima facie* to such interdictory relief.

[25] Everyone is at liberty to publish whatever they wish as long as they do not contravene the law or infringe upon constitutional rights. There is no suggestion of any rights or law being infringed by those publications. The applicant has no right to prevent such publication and our Courts have repeatedly refused to muzzle criticism of organs of State providing public services. Nor does the applicant have any right to be heard before the publication or dissemination of reports relating to Strandfontein.

[26] An interdict against publication constitutes a *"prior restraint"* on expression and our Courts have repeatedly held that it *"should only be ordered where there is a substantial risk of grave injustice"*. Simply put, a prior restraint constitutes a drastic interference with freedom of expression.

[27] Faced with several insurmountable hurdles Williams SC, or her client, wisely, and quite properly, elected not to pursue the application, albeit on the doorsteps of the Court. Regrettably that wisdom did not extend to conceding costs.

[28] I note that Mr D. Watson appeared with Mr R. Matsala for the ninth respondent. Mr Watson indicated that he appeared *pro amico* for the respondent and was not seeking a costs order for himself.

[29] In the result :

(a) Insofar as it may be necessary the Rule granted herein is discharged and the applicant is ordered to pay the taxed or agreed costs of the respondents, such costs to include the cost of two counsel where so employed.

DESAI, J