IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

CASE NO. 11309//20

In the matter between:

PLETTENBERG BAY RATEPAYERS' AND RESIDENTS' ASSOCIATION	First Applicant
PETER GAYLARD	Second Applicant

and

THE BITOU MUNICIPALITY	First Respondent
MSIMBOTI PETER LOBESE	Second Respondent
SANDISO GCABAYI	Third Respondent

REPLYING AFFIDAVIT

I, the undersigned,

PETER GAYLARD

do hereby make oath and state that:

1. Acting on behalf of the Ratepayers' Association, I deposed to the founding affidavit as its duly authorized representative. I continue to act in this capacity.

2. I have read the answering affidavit and respond to it hereunder. Much of the material it contains, so I am advised and apprehend, constitutes matters of law. I shall traverse them only insofar as this appears prudent in this affidavit.

3. I shall give the same treatment to averments of fact that are trivial and matters that are basically disputatious or argumentative. They will be more fully dealt with in heads of argument filed on behalf of the Ratepayers' Association and oral arguments, supposing it is called for.

4. I shall, in the time permitted by proceedings that are necessarily of an urgent nature, seek to deal with those new issues of fact raised by the answering affidavit. I shall generally avoid dealing with disputes of fact, such as they are, on which I can do no more than repeat what I said before. In doing this, I do not, of course, admit the averment made by the respondents.

STATUS OF THE PROCEEDINGS

5. **Ad para 1**

5.1. The deponent ('Mr Ngoqo') nominally occupies the position of Municipal Manager but not legally. His appointment to the post, which occurred in early 2019, has been set aside as unlawful by order of the Labour Court. The first respondent ('the Municipality') has elected to bring the order on appeal to the Labour Appeal Court and, as a result, the declaration of unlawfulness is suspended. The hearing of the appeal is imminent.

5.2. Mr Ngoqo is a lawyer admitted to practice as an advocate. He claims, with justification, to have special skill and knowledge in municipal law.

5.2.1. In the light of this, I struggle to understand the legal submissions he makes in answer to the case mounted by the first applicant ('the Ratepayers' Association').

5.2.2. Given his professional training, moreover, I would expect more objectivity and dispassion from him in the language he uses and the stances he takes in his answering affidavit. The aggressive stance and vituperative tone of the document do him no credit and brings the Municipality into disrepute.

5.3. Mr Ngoqo must surely recognize that this case is concerned with a simple question of law – that is, whether the Municipality is acting in breach of regulatory constraints or not. He should also recognize that the Municipality, concerned with observing the law as it ought to be, should welcome the opportunity to test the legality of its conduct in a court of law. This case provides no occasion for the arrogance and contempt that he exhibits in his affidavit. The Municipality is, by statute, obliged to foster and promote the work of community organizations such as the Ratepayers' Association, not to heap scorn on its work.

6. **Ad para 2**

6.1. Mr Ngoqo claims to have been 'duly authorized' to depose to the affidavit, but can only be so if the Council of the Municipality has delegated such authority to him. The Ratepayers' Association has every reason to doubt that this is so. In a report, annexed hereto marked '**RA1**', the Municipality's failure to put proper delegations in place was specifically noted and recorded.

6.2. So far as the Ratepayers' Association can see, the Council has yet to rectify the deficiency and, as a result, the only delegations in place are those that, pre-dating the election of the present Council, have become defunct by operation of s 59(2)(*f*) of the Municipal Systems Act 32 of 2000.

6.3. If this is correct, the authority to oppose this application vests exclusively in the Council. It has taken no such resolution and, given its political composition, it may decline to do so. In the light of these facts, the Ratepayers' Association has put the authority to oppose in issue by invoking Rule 7 of the Rules of this Court.

7. **Ad paras 3-4**

7.1. The legal and factual contentions made in Mr Ngoqo's affidavit must be read in the light of the averments in the founding affidavit and this affidavit. Save to the extent that they are consistent with such averments, they are denied.

7.2. I have no reason to doubt that Mr Ngoqo read the founding affidavit before deposing to the answering affidavit. I have every reason to dispute that the

averments, especially those of a legal nature, fall within his personal knowledge, but I make nothing of this. This case is concerned with an issue of law and does not depend on Mr Ngoqo's personal knowledge.

URGENCY

8. **Ad paras 7-8**

8.1. The Ratepayers' Association has no 'representative counsellors' of its own. Nor has it any representative Councillors, if this is what is sought to be conveyed. It is apolitical, non-partisan, and independent and jealously guards its status as such. It seeks information from Councillors whenever it can, but the level of cooperation is, to say the least, patchy.

8.2. The acquisition of the mayoral cars found no place on the Council agenda of 11 June 2020 but served as an additional item to which only the Councillors were at the time made privy. The item was, moreover, not recorded on the municipal website and was eventually published as an addendum to the approved minutes only on or after 13 July 2020.

8.3. As I have already explained, it only came to the notice of the Ratepayers' Association about a fortnight later. There is no undue delay implicit in this. The Ratepayers' Association, which comprises a handful of part-time volunteers, does its level best to keep up with developments in Council. Moreover, the opinion of Counsel has to be sought on a matter that, at the time, appeared to be complex.

8.4. Monitoring proceedings in Council is, I should add, no easy task. Officials and councillors, concerned to protect their positions, are bureaucratic and unresponsive and the website, which is in a parlous state, is very difficult to use. In the present instance, the problems were aggravated by the lockdown regulations. Generally the Ratepayers' Association seeks to have a presence at the Council meetings, but this meeting of Council was, I surmise, held electronically so no personal monitoring was possible.

8.5. The interval between the adoption of the resolution and the launching of proceedings is entirely reasonable. Certainly it is not so unreasonable that the residents and ratepayers of the municipality should be denied their day in court. The ordinary members of the community have a real and substantial interest in preventing the unlawful dissipation of their rates and taxes.

9. **Ad paras 9-12**

9.1. The issue in these proceedings is the same as the one that served before Councillors in the meeting of 11 June 2020. They were presented with an *ad hoc* item and invited to make a decision on the spot. It is, in the circumstances, perfectly legitimate to expect skilled and qualified lawyers to make their response within a few days, especially when the Municipality had been given advance notice of the issue by correspondence and through publicity. The issue is a narrow one of law.

9.2. On receiving the papers, the Municipality gave an undertaking not to proceed with the transactions until the Court had pronounced on the application. The Ratepayers' Association accepted the undertaking as sufficient and, from that moment on, there was no longer a concern that the transaction would be consummated *pendente lite*. As a result, the Municipality was at large to ask for whatever time it wished and could have done so. The suggestion that its lawyers 'suggested reasonable timelines for the proper ventilation of the issues [that] was declined' is baseless, as the affidavit of Martin Hurwitz, attorney for the Ratepayers' Association, makes clear. The affidavit is annexed as **'RA2'.**

9.3. In consequence of the protection afforded by the undertaking, time is no longer of the essence for the Ratepayers' Association. That it is a matter of concern for the Municipality is obvious, but it is the party who should now suggest how best the time limits should be structured to suit its needs. If it wants more time, it should ask for it, and the same is true if it wishes to file further papers. This matter is one of importance and should not be disposed of without a proper ventilation of the issues.

9.4. The Municipality is right in saying that, as a matter of form, the proper order is to remove the matter from the roll if the requirements of urgency are not satisfied. A better solution, however, would be to postpone it to an appropriate date and set such further times for the exchange of supplementary papers as might be warranted. Obviously the undertaking would have to remain in place *pendente lite.*

NON-JOINDER

10. **Ad paras 18-20**

10.1. The decision of the Municipality is the subject of attack for unlawfulness, not the workings of the Council. The Council purported to take a decision in its capacity as an organ of the Municipality. The decision that ensued was a decision of the Municipality in much the same way as a decision of a Board of Directors is the decision of the Company.

10.2. There is no merit in this point.

LOCUS STANDI AND LEGAL INTEREST

11. **Ad paras 23 (*sic*)-25**

11.1. I repeat that the Ratepayers' Association has no 'representative counsellors'. I refer to what I have said above.

11.2. I repeat that the resolution of the Municipality only came to the attention of the Ratepayers' Association a few days before the letter of demand was despatched.

11.3. The standing of the Ratepayers' Association to bring this application was dealt with in the founding affidavit. I have nothing of a factual nature to add to what I have already said. Whether my allegations of fact make out a good case for standing is an issue of law. My legal representatives will deal with the point in heads of argument.

12. **Ad paras 26-35**

12.1. The Ratepayers' Association contends that the resolution constitutes an unlawful contravention of the operative regulations. It pleads its case on alternative causes of action: one based on the Promotion of Administrative Justice Act 3 of 2000; the other on legality, also termed lawfulness, under the Constitution.

12.2. Whether a good cause of action has been made out is a matter of law that will be properly ventilated in the heads of argument.

THE PROPRIETY OF THE DECISION TO BUY LUXURY VEHICLES

13. **Ad paras 36-39**

13.1. That Mr Ngoqo is unable to appreciate the scandalous quality of this luxurious expenditure in current conditions of dire financial stringency is hardly surprising. His want of judgment led to his dismissal for gross misconduct committed when he was previously employed by the Municipality. So gross was the misconduct that he became, by law, disqualified from reapplying for the post, a fact that has been recognized by an order of the Labour Court.

13.2. That he should ascribe his want of judgment to the Municipality and suggests that it shares his understanding of morality and rectitude is regrettable, however. It is also erroneous. The Councillors were by no means unanimous in their response to the issue of whether the vehicles should be acquired. The Mayor and the Deputy Mayor participated in the proceedings even though, by reason of their material interest in the outcome, they should have recused themselves. That they voted in favour of the acquisitions may be unfortunate but it cannot be characterized as surprising. As a result of their vote, the resolution was carried by one vote, that is, seven to six.

13.3. If Mr Ngoqo seeks to provide an accurate reflection of these circumstances when he says 'the Municipality, as a matter of fact and law, represents the entire Bitou

community', then he is misguided. A bare majority of Councillors, operating under Whip, decided to indulge the Mayor and his Deputy by improperly adopting a resolution in breach of the law.

ALTERNATIVE RELIEF

14. **Ad paras 40-43**

14.1. I am advised and accept that it is the duty of an applicant for an interdict to show that no relief exists that would be a suitable alternative to the prohibitory relief being claimed. Whether this applies equally to claims for a final interdict based on considerations of unlawfulness is a matter of debate.

14.2. It is in this light that I opened up the issue of whether money placed in trust might not suffice. It would obviously serve no purpose were the money to be derived from the municipal coffers - it is precisely the dissipation of municipal money that the interdict seeks to prevent. The only sensible solution would be for the Mayor and his Deputy to put up the security, not just because they are the beneficiaries of the largesse but also because they are, in law, liable to repay benefits unlawfully received by them.

14.3. All this becomes academic, however, since this potential alternative solution has been rejected by the Municipality and no other solution has been suggested.

15. **Ad paras 47-52**

15.1. The Ratepayers' Association, a voluntary association, has the status of a corporate entity at common law. The proposition should be obvious and I fail to understand why the Municipality, which has the benefit of excellent legal advice, suggests otherwise.

15.2. The Council represents the community only when it acts lawfully in pursuit of the communal interest. Decisions taken out of vanity and self-interest scarcely qualify

as representative; still less can they be described as such when they are embodied in a resolution, irregularly adopted, whose very object and effect is unlawful.

16. **Ad para 58**

16.1. The mode of service was determined by the urgency of this matter. I refer to the affidavit of Martin Hurwitz, annexed.

16.2. The respondents are now represented by their attorneys of record and have appeared to traverse the merits of this case. The matter of service is no longer material.

17. **Ad para 61**

17.1. It is wrong to characterize the report to Council as an 'accurate summary of the legislative provisions empowering the council to approve the resolution.' The proper purpose of such a report is to inform Councillors of the implications of the proposal and enable them to apply their minds to every element of the matter. It should have listed the operative legislation and embodied a summary of it sufficient to enable Councillors, especially those unversed in the law, to understand the legal ramifications of the resolution they are being invited to pass.

17.2. The legal measures, which are listed under the heading 'Relevant Legislation', are described as the Municipal Finance Management Act 56 of 2003 ('MFMA') and 'Cost Containment Regulations'. No further legal assistance or advice is provided. This is woefully insufficient. At the least the report should have drawn councillors' attention to the following legislation: s 160 of the Constitution of the Republic of South Africa; ss 33 and 167(1) of the MFMA; ss 7(1), 8(5)(a) and 9(5)(a) of the Remuneration of Public Office Bearers Act 20 of 1998; and item 18(3) to the Schedule of GN 313 in *GG* 40763 of 3 April 2017.

17.3. The measures should have been placed in historical context. The report should have explained that the provision of a mayoral vehicle was previously authorized by item 9(1)*(d*) that stated: '(d) A municipal council may, in addition to the allowance referred to in paragraph (a), provide a municipal -owned vehicle to an

executive mayor or mayor, deputy executive mayor or deputy mayor, or speaker, where applicable, for official purposes'. It should then have explained that the permission was superseded by the regulation of 3 April 2017 when the current, highly restrictive, regime was introduced.

17.4. The report should have stressed that cars can no longer be acquired for general mayoral use. A Councillor can now use a municipal vehicle only in the very special circumstances stipulated in the regulation and then only with the requisite permission. Lest there be any confusion on the proper construction of the provision, the report should have pertinently referred to item 18(3) of the regulations, which states: 'In the event that a municipality bought a mayoral vehicle before the publication of this Notice (3 April 2017) the usage of such motor vehicle between the period 1 July 2016 and the date of this Notice will not be considered irregular.'

17.5. The report, in bringing the operative regime up to date, should have stated that item 9 of the schedule to GN 475 of *GG* 43246 of 24 April 2020 determines the remuneration that may be provided to councillors. The perquisite of a mayoral car is not included.

18. **Ad para 62**

18.1. It is a measure of the disdain with which the Municipality responds to the application that it suggests that 'the applicants failed to read and consider the contents of the report.' Representatives of the Ratepayers' Association most certainly did read the report. They found it woefully inadequate and misdirected.

18.2. Quite why Mr Ngoqo makes so impertinent an allegation is a mystery: I can only surmise that he, being a qualified advocate and a municipal manager of some experience (not all of it illustrious), believes that he has some superior insight into the legal implications of the report. If so, he profits from an understanding of his attributes to which the Ratepayers' Association is not privy.

19. **Ad paras 68-70**

19.1. The municipality has since 3 April 2017 been acting unlawfully. It cannot deny as much. It is common cause that the municipality has given its Mayor, and latterly the Deputy Mayor, the exclusive use of municipal vehicles. This is so despite the unlawfulness of the conduct; despite the fact that there is reportedly no council policy governing the use and control of the vehicles; and despite the express provisions of item 18(3), referred to above, which makes the continued use of such a vehicle after 3 April 2017 irregular.

19.2. It is helpful, though by no means necessary, to set the regulation within the applicable statutory context.

19.2.1. Section 219(1) of the Constitution states that: 'An Act of Parliament must establish a framework for determining … (b) the upper limit of salaries, allowances or benefits of members of ... Municipal Councils ….'

19.2.2. The Act of Parliament referred to is the Remuneration of Public Office Bearers Act 20 of 1998. The MFMA echoes the provision by stating in s 167 that Councillors' remuneration must be 'within the framework of the Public Office-Bearers Act, 1998 (Act No. 20 of 1998), setting the upper limits of the salaries, allowances and benefits for those political office-bearers and members.'

19.2.3. Remuneration encompasses benefits in kind as well as cash. So much is clear from s 167(2), which regulates breaches and encompasses 'any remuneration paid or given in cash or in kind to a person as a political office-bearer or as a member of a political structure of a municipality … including any bonus, bursary, loan, advance or other benefit. Such breaches constitute an 'irregular expenditure, and the municipality-

19.2.3.1. must, and has the right to, recover that remuneration from the political office-bearer or member; and

19.2.3.2. may not write off any expenditure incurred by the municipality in paying or giving that remuneration.'

19.2.4. The Annual Notices issued by the Minister of COGTA, such as 'Determination' 313, are the instruments setting the upper limits of the salaries, allowances and benefits for the political office-bearers and members in question. Strict limits are placed on everything and anything a councillor may receive in whatever form from a municipality; indeed, limits are even placed on what tools of trade a municipality may provide to councillors down to the finest details.

19.3. Mr Ngoqo says that the Determination sets upper limits and, of course, this is true: a Municipality can permissibly pay less to its Councillors than the amounts provided for. What it cannot do, however, is pay in excess of the limit or, more pertinently to these proceedings, provide a benefit that goes beyond what is prescribed as legitimate. The circumstances in which a motor vehicle can be provided for use by a Councillor are heavily regulated and very exceptional. Providing the mayor with a car for his day-to-day use, even supposing it is purely for official purposes, is most certainly not allowed. The era of the 'mayoral car' is over.

20. **Ad paras 70-75**

20.1. The municipal cost containment regulations were not published by the Minister of COGTA in terms of the Remuneration of Public Office Bearers Act but by the Minister of Finance in terms of s 168 of the MFMA. Their object is specifically described in subs (2) in the following terms: '(2) The object of these regulations, in line with sections 62(1)(a), 78(1)(b), 95(a) and 105(1)(b) of the Act, is to ensure that the resources of a municipality and municipal entity are used effectively, efficiently and economically by implementing cost containment measures.'

20.2. Their object is decidedly not to permit expenditure that would be impermissible under other enactments. What they say, in effect, is that if it is permissible to acquire a car for the official use of office-bearers, the cost of the vehicle must not exceed R700 000. It places a ceiling on the price of vehicles that can be acquired if their acquisition is permissible. In simple terms, the provision is not permissive but regulatory.

20.3. The provision accordingly operates in tandem with such other provisions as might exist. Where the other provisions constrain, as here they do, this adds one further constraint. The Chief Financial Officer's belief that the provision is 'lawful authority' to acquire a vehicle for the use of the Mayor and Deputy Mayor is wholly misplaced.

21. **Ad paras 76-82**

21.1. The resolution contemplates the provision of municipal cars for the regular, day-to-day use of the Mayor and Deputy Mayor. So much was contended in the founding affidavit and, far from being denied, is in fact admitted. The determination prohibits the provision of a car for so general a purpose and, *a fortiori*, must prohibit the acquisition of a car with such an object in mind.

21.2. What the resolution contemplates, in other words, is the grant of a mayoral car for day-to-day use, whether official or otherwise, the equivalent to what in the private sector is termed a 'company car'. Efforts to escape this provision by saying that the current application attacks only the acquisition, not the use, constitute logic-chopping of the worst sort. If, but for the illegal object, the car would not be acquired, its acquisition for an illegal object can, and should, be interdicted.

22. **Ad paras 81-83**

22.1. Mr Ngoqo seeks to distinguish between 'tools of trade' in the Determination and the kind of 'tool of trade' contemplated by the resolution. The suggestion, seemingly, is that the expression in the Determination is a term of art bearing a specialized, and narrower, meaning than its ordinary one. There is no warrant for such a construction. 'Tool of trade' in the Determination is a tool of trade within the ordinary acceptation of the term. The expression bears no arcane meaning but denotes precisely what it says.

22.2. The obvious object of the provision is to close a loophole by means of which an official can obtain a benefit or perquisite and yet claim that it is not remuneration since it is necessary to perform his or her duties. It succeeds in this object by creating a closed list of the tools that can legitimately be provided.

22.3. It follows that, since a motor vehicle is not among the items listed, it cannot by being designated a 'tool of trade' become a permissible acquisition.

23. **Ad paras 84-87**

23.1. Mr Ngoqo boldly states, by way of an argument in the alternative, that the requirements of the Determination have been met. He says '"exceptional circumstances" exist, "good cause" exists, and council approval by Resolution applies to this use of motor vehicles, and no service delivery or financial viability is compromised'.

23.2. This is a facile allegation. A deponent cannot make conclusory statements such as this and simply hope that they will be accepted. A proper effort has to be made to show why the Mayor and his Deputy are in so special a category. Were it otherwise, the mere say-so of an official would suffice to escape the operation of the limitations in the clause.

23.3. Unsurprisingly, no effort has been made to lay a factual foundation for these assertions. Nor can they be, for they do not exist. If they had existed, they would have been included in the report to Council motivating the acquisitions. That they were not speaks volumes to the barrenness of this allegation.

23.4. The truth of the matter is that the Municipality has only the Cost Containment Regulations to rely on and they, being constraining and not permissive, provide absolutely no succour whatever.

REMEDIES

24. **Ad paras 88-90**

These issues are matters of law and will be ventilated at the appropriate stage.

DEMAND

25. **Ad paras 90-92**

25.1. I fail to understand these averments. The point being made is that a demand was sent and a press release was published. They might, in the circumstances, have been expected to solicit a response, but none was forthcoming. Their merits as works of draughtsmanship are immaterial to these proceedings.

25.2. If the Municipality feels the need to rebut the allegations in some public forum, it is free to issue a press release of its own. In the release it will no doubt explain (1) why the Mayor and his deputy failed to recuse themselves when the resolution was tabled (2) why they should be privileged enough to obtain mayoral cars at their employer's expense when their constituents must use their own transport to travel back and forth on official business (3) why the Municipality feels the need to spend ratepayers' money on litigating a decision so obviously extravagant and self-indulgent.

26. **Ad paras 93-94**

26.1. This averment, perhaps more than any other, exhibits the dismissiveness of which I complained at the outset. It casts the Council in the role of leaders whose behests must be obeyed, not representatives who must make every effort to answer to the community.

26.2. It also reveals a degree of spite and malice that is thoroughly unconscionable. The Ratepayers' Association, a body which the Municipality is statutorily bound to foster and promote, has no political interests whatsoever. Its concern is simply to ensure that the interests of the Bitou community, irrespective of class, colour or creed, are properly served by the Councillors and officials who represent and must account to them. This arduous and often thankless work is performed by unpaid, community-minded volunteers who happen mostly to be in the twilight of their years. To demean them in this way is a dreadful abuse, not just of this process, but of power generally.

27. **Ad paras 95-100**

The averments are most argumentative, but are in any event denied.

28. **Ad paras 101-103**

28.1. My understanding is that the DA caucus in the Council opposed the adoption of this Resolution. Whether a vote was taken and, if so, how it eventuated is another matter. There seems to be confusion on the question.

28.2. I fail to understand the points made in attacking the prayers. They seem to be based on a confused reading of the Notice of Motion. The Ratepayers' Association seeks a final interdict and, pending its grant, interim interdictory relief. This, as Mr Ngoqo should know, is an unexceptionable way of proceeding.

29. **Ad paras 104-106**

29.1. The matter of relief should be argued in due course.

29.2. The same is true of costs. Here it suffices to say that costs should not ordinarily be awarded against a non-governmental organization that takes up the cudgels in the public interest. This being so, the special order for costs that is intemperately claimed by the Municipality, against its own ratepayers to boot, comes as a surprise and a great shock.

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DEPONENT

I certify that the Deponent acknowledged that he knows and understands the contents of this affidavit, that he has no objection to the making of the prescribed oath and that he considers this oath to be binding on his conscience. I also certify that this affidavit was signed in my presence at PLETTENBERG BAY on this ____ day of SEPTEMBER 2020 and that the

Regulations contained in Government Notice R1258 of 21 July 1972, as amended by Government Notice R1648 of 19 August 1977, have been complied with.

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COMMISSIONER OF OATHS