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**IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO PROVINCIAL DIVISION, POLOKWANE)**

CASE NO: 1811/2016

Not reportable

Not of interest to other judges

Revised.

In the matter between:

LIMPOPO LEGAL SOLUTIONS

FIRST APPLICANT

MASINGI MESHACK

SECOND APPLICANT

and

ESKOM HOLDINGS LIMITED

RESPONDENT

JUDGMENT

N F KGOMO J

INTRODUCTION

[1] On the 30 May 2016 the applicants herein caused motion proceedings herein to be issued in the urgent Court of this Division in the following terms:-

1.1. That this application be heard as one of urgency in terms of Rule 6 (12) of the Uniform Rules of Court, condoning non-compliance with the rules relating to service of processes and papers as well as the time frames set out, including the 72 hours provision as set out in Section 35 of the General Law Amendment Act 62 of 1955.

1.2. That a **Rule nisi** be issued calling upon the Respondent to show cause, if any, as to why a final order in the following terms should not be granted:-

1.2.1. An order directing and/or ordering and/or compelling the Respondent to forthwith and/or here and now (sic) dispatch a team of specialists or technicians to Section C along Magumuza Store road towards the Full Gospel church next to Tlhavane & Baloyi family home or house number 4[...]; to repair and/or fix and/or replace the exposed, damaged (or) low hanging power or electricity cable in order to ensure the safety of vulnerable children, motorists or affected (sic) residents of Section C, Malamulele;

1.2.2. Costs of the application to be paid by the Respondent, including any Respondent who may elect to oppose this application; and

1.2.3. Directing that prayers 1.2.1. and 1.2.2. operate as a **Rule nisi** with immediate effect and returnable on the 28 June 2016 at 10H00.

[2] The application was moved on 31 May 2016 and an interim order was later extended to 02 August 2016.

- [3] The application is opposed, with the respondent seeking an order dismissing same with costs on a scale as between attorneys and client payable by members of the 1st applicant, specifically excluding the second applicant from such a costs order.
- [4] On 28 June 2016 the **rule nisi** was extended to 02 August 2016. The application was postponed to that date. The respondent filed its answering affidavit on 29 July 2016.
- [5] On 2 August 2016 the **rule nisi** was extended to 10 October 2016.

On 10 October 2016 the application was postponed **sine die** with costs being awarded against the applicant. The **rule nisi** was extended until the day it is confirmed or discharged.

History of the matter

- [6] It is common cause between the parties that the respondent received a telephone call or complaint on 29 May 2016 notifying them of a low-hanging electricity cable. The same day, the respondent sent out a technician to the site to investigate. According to the respondent, the technician established that although the cable was hanging lower than how and where it ought to have hung normally, it was nevertheless hanging high enough not to be within reach by cars and people passing by underneath. Furthermore, it was isolated with a plastic cover.
- [7] These allegations were not gainsaid by the applicants. The location and hang height of this particular electricity cable can be clearly seen in a photo at folio 44 of the paginated record of proceedings herein marked Annexure **LL5 “4”**. One can clearly see that it is even hanging higher than the houses nearby.

- [8] On 30 May 2016 the respondent sent a team of workers to the site and the latter embarked on dealing with the cause of the complaint. The respondents employee also forwarded a whatsapp message resplendent with pictures of workers busy on the cable as proof that the cable was in the process of being repaired.
- [9] The same day, i.e 30 May 2016 the applicants served notice of motion on the respondent in the terms set out above. The respondent stated that the service was made on them around 11h30 on 30 May 2016. However, the time of appearance at court was 17h30 the same day.
- [10]. The member of first applicant to whom all the photos and intimations that the matter was being attended to is the self-same counsel representing and arguing this application on behalf of the applicants, Adv Maluleke.
- [11] From the respondent's answering affidavit it emerged that by the time Adv. Maluleke was still waiting for the papers to be issued in this court on 30 May 2016, the respondent's employee called him on his cellphone and made him aware of the fact that Eskom was addressing the complaint regarding that low-hanging electric cable and also urged him not to issue the court papers as a result.
- [12] When respondent's employee, who was incidentally the deponent of the respondent's answering affidavit, Refilwe Mhlwatika, phoned Adv. Maluleke again to verify whether he heeded her advice not to issue the papers, his phone was off. She sent him an e-mail confirming that the complaint was being attended to in the following terms:-

"Good day

This is to confirm a telephonic conversation on Monday the 30th of May at 16h40 the writer herein and Mr Maluleke-Malwashe in relation to the notice of motion that was served on Eskom at the Malamulele office.

Kindly note that I have been informed by our technicians that they are currently on site working on the electricity cable with the intention of preparing (sic) them. My instructions are that the technicians have already commenced with repairs, they are in the process of ensuring the put up underground(sic) at the site to ensure the safety of the public (sic) (my emphasis). The head of office has also confirmed that he is also on site facilitating and ensuring that the repairs will be completed today.

Please note that I attempted to call you prior to me sending the e-mail to confirm the above, but was unsuccessful in getting through to your mobile number.

I can be contacted on 0[...]

Regards

Refilwe Mhlwatika.

[13] This e-mail was received by the applicant's counsel, Adv Maluleke, at 17h03 on 30 May 2016 and is marked Annexure E.54 at paginated folio 99 herein.

[14] A whatsapp message was also sent to Adv Maluleke at 17h11 the same day confirming the successful transmission of the above message as well as the sending and receipt of photos showing work in progress at the site.

[15] The question to be answered is whether or not the applicants were justified in moving this application before the Judge President of this Court on the 31 May 2016 as well as whether the Judge President would have granted the interim order as prayed for had he been informed of all the above circumstances and facts.

[16] It was submitted on behalf of the respondent that-

16.1. the applicants misled this Court when the application was moved because they were not honest about the urgency of the matter and also did not disclose to the Honourable Court the fact that the respondent was busy repairing the electricity line in question already the day before the orders were sought in Court.

16.2. the first applicant have no *locus standi* to bring this application.

16.3. the applicant's reliance upon the Constitution and the Bill of Rights is misplaced and an abuse of court process.

16.4. the respondent had discharged its obligation of ensuring public safety before this application was moved in Court on 31 May 2016 as the electricity cable had by then been repaired by 30 May 2016.

Standard approach of determining this application

[17] In terms of the so-called Plascon –Evans test this application should be decided by relying on the respondent's version of events as well as those aspects of the applicant's version that are admitted by the respondents.¹ The rationale for this approach is found in the principle that, in motion proceedings, the court is not

equipped to determine the probabilities or improbabilities of the opposing factual propositions expressed by the parties.²

Urgency

[18] The applicants deliberately withheld vital information which would most probably have resulted in the interim order not being granted on 31 May 2016. Mr Maluleke did not inform the Honourable Court on 31 May 2016 when he moved the application that the respondent's technicians and/or employees started correcting the situation on 30 May 2016 and that by that time (of argument) the cable ought to have been repaired. After all, he also had photographs of the work-in progress. He did not disclose this information to the Honourable Judge President.

[19] The above aspect will have a big impact on the issue of costs at the end, as it also affects the aspect of urgency.

[20] Prayer 3.1. of the Notice of Motion, which is in actual fact the main and only relevant prayer-not discounting the costs order of course-seeks or sought an order directing and/or compelling the respondent to-

"....forthwith and/or here and now, dispatch a team of specialists or technicians to section C... to repair and/or fix and/or replace the exposed, damaged low-hanging power or electric cable..."

[21] That was on 30 May 2016. The respondent promptly sent out a technician, Mr Maswanganye, who established that although the cable was low-hanging, it nevertheless was no danger to cars and people or children as it was still high enough to constitute that danger.

² National Director of Public Prosecutions v Zuma (Mbeki and Another intervening) 2009(2) All SA 243 (SCA) at para[26].

[22] The above regardless, the first applicant's member and counsel at Court still went ahead on 31 May 2016 and moved the application.

[23] That in my considered view and finding is the utmost dishonesty. It deserves proper punishment by an appropriate order of costs. What the application was seeking had been complied with. So what next!. That ought to have been the end of the matter. The applicants should have withdrawn their application from the roll. Surely there would not have been the issue of costs at that stage. They chose not to but to persist with the argument hereof some 8(eight) months down the line. They chose to do so. Equally, they should live with the consequences of their actions.

[24] The application herein is for an urgent relief which the applicants applied for in the form of a mandatory interdict which was to operate as an interim interdict. However, in effect, the relief sought here is a final one.

[25] The requirements for a mandamus were stated in **Kaputuaza and Another v Executive Committee of the Administration for the Hereros and Others**³ where the court held among others that:-

*“ For such an order all the requirements of an interdict have to be established and the court will have to decide, **inter alia**, whether the applicants have established a “clear right”. (Lipschitz v Watrus NO.*⁴

[26] This means that the applicant herein must establish the requirements for a final interdict to be successful.

[27] The object of a mandamus-

³ 1984(4) SA 295(SWA)

⁴ 1980(1) SA 662 (T) at 673-C-D.

“... is to compel an administrative organ to perform some or other statutory duty. The remedy is somewhat limited because the administration cannot be compelled to do anything it is not obliged to do under the enabling statute.”⁵

[28] Section 38 of the Constitution of the Republic of South Africa (“**the Constitution**”)⁶ provides as follows:-

“38. Enforcement of rights.

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and a Court may grant appropriate relief, including a declaration of rights. The persons who may approach a Court are:-

- a. Anyone acting in their own interest,*
- b. Anyone acting on behalf of another person who cannot act in their own name,*
- c. Anyone acting as a member of, or in the interests of , a group or class of persons,*
- d. Anyone acting in the public interest, and*
- e. Association acting in the interests of its members.*

[29] It is not a requirement that a constitutional right should have been actually violated. All that needs to be shown is that a right is under threat, and that there is therefore a reasonable probability of an infringement of that right.⁷

⁵ Burns & Beukes: Administrative Law under the 1996 Constitution, 3rd Edition, Lexis Nexis, at P.525.

⁶ Act 108 of 1996.

[30] A right is said to have been infringed or threatened if the conduct is objectively, inconsistent with a right contained in the Bill of Rights.⁸

[31] There is no evidence in this application justifying the issuing and moving in Court of this application as the rationale or reason for doing so had fallen away. **Eiusdem generis** one can even say this situation is akin to what is envisaged in the legal maxim: “**Cessante rationale legis cesat et ipsa lex**”.

[32] For a mandatory interdict to be granted the applicant must prove:-

32.1. a clear right

32.2. an injury actually committed or reasonably apprehended, and

32.3. the absence of similar protection by any other ordinary remedy.

[33] To determine whether the applicant has a clear right is a matter of substantive law and whether the right is clear is a matter of evidence. The applicant has to prove on a balance of probabilities, where necessary and required, facts which in terms of substantive law establish the right relied upon.⁹

[34] The respondent has challenged the applicant's claim to a clear right to institute these proceedings. Correctly so, because when they were moved in Court, there was no longer a need to do so.

[35] In order to satisfy the second requirement for the grant of a final interdict the applicant must prove, on a balance of probabilities that an infringement of a right

⁷ Geuking v President of the Republic of South Africa 2003(3) SA 34 (CC) at para [32] to [34].

⁸ Ferreira v Levin NO and Others, Vryenhoek and Others v Powell no and others 1996(1) SA 984 (CC).

⁹ Diepsloot Residents & Landowners Association v Administrator , Tvl 1993(3) SA 49(T)

has occurred or is reasonably apprehended. It must also prove a possible or resultant prejudice or potential prejudice.¹⁰

[36] The Court may grant such a sought interdict if the applicant proves or shows failure on the part of the respondent to act, viewed objectively. It should also prove that the respondent failed to act and that its failure constituted a dereliction of a statutory duty which infringes or threatens to infringe on the rights of the applicants or the general populace.

[37] *In casu*, such a situation never arose. The respondent proceeded to address the cause of the complaint forthwith. It did so before the application was moved in court on 31 May 2016. Counsel for the applicant knew about this when he appeared before the Judge President and moved the application or caused same to be moved.

[38] As to the requirement of the above of an alternative or another adequate, ordinary, or reasonable legal remedy capable of affording similar protection, in the context of this application, the applicants should have, in addition to speaking to the Eskom Vhembe or Malamulele office, first exhausted the mechanisms for fault reporting and verification whether the complaint was being attended to before rushing to Court. Litigation in these circumstances should have been a last resort.¹¹

[39] Even when counsel for the applicant was already at Court in Polokwane on 30 May 2016, after receiving respondents' employee's assurances that the complaint was being attended to he should have asked a local from his institution to verify the information. Furthermore, after receiving the Whatsup photographs,

¹⁰ V & A Waterfront Properties (Pty) Ltd v Helicopter & Marine Services (Pty) Ltd 2006(1) SA 1 252(SCA); Capital Estate and General Agencies (Pty) Ltd v Holiday Inn 1977(2) SA 916 (A).

¹¹ Chapman's Peak Hotel (Pty) Ltd v Jab and Annalene Restaurants CC t/a O'Hagans [2001] 4 ALL SA 415(c).

from the respondents employee on 30 May 2016, the applicants should not have proceeded to move the application in Court on 31 May 2016.

[40] I agree with **Lamminga AJ** when she stated the following in the case where **Limpopo Legal Solutions, Maluleke Tintswalo Sannie, Chavane Sindile and Maponya Matodzi Sarah** are Applicants and **Vhembe District Municipality, Thulamela Municipality are respondents**, Case No. **430/2016** delivered in the High Court, Thohoyandou on 2 June 2016, where the following was stated:-

*“[27] Institutions such as the First Respondent, burdened with service delivery in pursuit of ensuring basic services in compliance with the Bill of Rights, inevitably have to put mechanisms, processes and procedures in place **inter alia** of how breakdowns in service delivery are reported and resolved within the framework of the administration of such a body. To by-pass the basic requirement of informing the authority of a breakdown in service and approaching the Court immediately creates various challenges and disregards the provisions of section 5(2) of the Local Government Municipal Systems Act 32 of 2000. It further places the Courts in a very precarious administration and would fly in the face of the principle of judicial economy. If every breakdown in service could be addressed by urgent litigation, the courts would be inundated and the effective management of the administration of the municipality would be undermined for the prejudice of the administration of justice and service delivery to the community.”*

[41] Section 5(2) of the Local Government Municipal Systems Act reads as follows:

“5.2 Members of the local community have a duty-

(a) *When exercising their rights, to observe the mechanisms, processes and procedures of the municipality.”*

[42] The above applies equally to the respondent, Eskom, as it, as a State owned entity, is in a similar position in status with a municipality or a government department.

[43] From the totality of the circumstances herein this Court is satisfied and finds that the applicant acted prematurely when, armed with information that the respondent was doing exactly what they (applicants) sought in the papers, proceeded to issue the urgent application. If the respondent had ignored the applicants' complaint, then they would have been justified to approach this court on an urgent basis. Unfortunately, the respondent did not ignore the complaint. As a consequence, the applicants' conduct to move the application on 31 May 2016 was not only irrational, ill-thought, capricious and/or superfluous, but also irresponsible and an abuse of court process. Such conduct is punishable with an appropriate order of costs. There was thus no urgency at that stage.

Proceedings against organs of State in Urgent Court

[44] The circumstances under which this application was launched and the papers served call for something to be said about the Rules relating to the issue against and service of proceedings on organs of State and State owned enterprises.

[45] **Wepener J** dealt with this aspect in **In re: Several matters on the urgent court roll of 18 September 2012**¹² where among others the following appears:¹³

“There are also matters brought against government department or department of State. Experience has taught that such respondents need time to look into allegations made in order to be able to file

¹²

¹³ At pages 574 para.[16] and [17].

*affidavits, if they wish so. When these affidavits are filed, the matters can be seen in a proper perspective. Attempts to disallow them to file affidavits are usually based on the judgment in **Arse v Minister of Home Affairs and Others 2012(4)SA 544 (SCA)** [also reported at **[2000] 3 ALL SA 261 (SCA)**, where it was said at paragraph 10 that a detained person should not be deprived of his or her right to freedom for one second longer than necessary....”*

[17] An abuse of the process has developed (in all likelihood with a hope that the respondents would not be able to file opposing affidavits in time) in order to steal a march upon such respondents. This practice must be addressed in order to stop matters being unnecessarily enrolled and to clog a busy urgent court roll. In these matters, sufficient time should be granted to the respondents to file affidavits and they can rarely do so when papers are served less than a week before the matter is to be heard. That week includes a weekend when state machinery normally comes to a standstill. Practitioners will be well advised to be more realistic and to afford the state departments a more reasonable time to file affidavits. No doubt, these are matters which require urgent attention on shorter notice...”

- [46] The applicants herein are guilty of not allowing sufficient time to the respondents to do the necessary. Service of urgent applications at 11h30 calling upon the respondents to respond and file their papers by 17h30 the same day as well as be in Court is an abuse of Court process especially when regard is had to the peculiar circumstances in this application.

Conclusion

- [47] When all is considered in this application, there was no failure on the part of the respondent to perform an act or duty imbued on it in terms of a statute or the

common law or the Constitution and Bill of Right. On the contrary, the respondents promptly did what the applicants prayed for in the notice of Motion well before the application was moved in Court. The applicants knew this fact before they embarked on the then futile exercise. This application should not have been issued in the first place.

- [48] This application stands to be dismissed with costs. The question is, what scale of costs.
- [49] The going ahead with a futile and academic exercise of issuing and moving this application stands to be punished with a punitive order of costs.
- [50] Counsel for the respondent asked for an order of costs on a scale as between attorney and client payable by the first applicant and its members jointly and severally, specifically excluding the second applicant from its ambit as the latter was ostensibly a pawn in the scheme of things.
- [51] The awarding of costs is a matter within the discretion of the trial court.¹⁴ It is a discretion the Court must exercise judiciously and reasonably.¹⁵
- [52] During the exercise of that discretion, when a costs order is assessed or determined, the Court in **Fripp v Gibbon**¹⁶ held among others that in leaving the presiding officers with the discretion-

“....the law contemplates that he should take into consideration the circumstances of each case, carefully weighing the various issues in the case, the conduct of the parties and any other circumstance which may have a bearing upon the question of costs and then

¹⁴ Fripp v Gibbon & Co 1913 AD 354; Mouton v Die Mynworkersunie 1977(1) SA 119(A) at 149 A-B; Lornadawn Investments (Pty) Ltd v Minister van Landbou 1980(2) SA 1 (A) at 14 C-D.

¹⁵ Merber v Merber 1948(1) SA 446 (A) at 453; Smit v Bruwe 1971(4) SA 164(C).

¹⁶ Supra

*make such order as to costs as would be fair and just between the parties. And if he does this, and brings an unbiased judgment to bear upon the matter and does not act capriciously or upon a wrong principle. I know of no right on the part of a court of appeal to interfere with the honest exercise of his discretion.”*¹⁷

[53] The Court may, when circumstances so dictate, even make an order of costs in favour of a successful party. Where the conduct of a plaintiff or applicant is wholly responsible for the case in question being heard in Court under circumstances as in this case where it was unnecessary, such initiates of proceedings should be ordered to pay the costs.¹⁸

[54] Where a court is satisfied, as in this application, that a party has made itself guilty of improper, dishonest or discreditable conduct, it will mark its displeasure and disapproval by granting a punitive costs order against such party.

[55] The applicant's censorable behavior or conduct was exacerbated by the applicant's member moving for the interim order on the 31 May 2016 when he well knew that the conduct or aspect complained about has been rectified. It deserves an order of costs on a scale as between attorney and client.

ORDER

[56] The following order is made:

56.1 The **rule nisi** issued on 31 May 2016 is discharged.

56.2. The application is dismissed with costs on a scale as between attorney and client.

¹⁷ See also Erasmus v Grunow en 'n ander 1980 (2) SA 793(0) at 977 A-H.

¹⁸ Bester v Van Niekerk 1960(2) SA 363 (E).

N F KGOMO J

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA
LIMPOPO PROVINCIAL DIVISION, POLOKWANE**

Appearances

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- 4. For the respondents : Adv PL Uys**
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c/o PW Becker Inc.
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- 6. Telephone Number : 015 291 1819**
- 7. Date of Argument : 13 February 2017**
- 8. Date of Judgment : 17 February 2017**