

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

Case No:35672/12

15/8/2012

In the matter between:

THE FEDERATION FOR SUSTAINABLE
ENVIRONMENT

1ST APPLICANT

THE SILOBELA CONCERNED COMMUNITY

2ND APPLICANT

And

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES /NO.	
(2) OF INTEREST TO OTHER JUDGES: YES /NO.	
(3) REVISED.	
2012/08/15	
DATE	SIGNATURE

THE MINISTER OF WATER AFFAIRS

1ST RESPONDENT

THE DIRECTOR GENERAL: WATER AFFAIRS

2ND RESPONDENT

ACTING CHIEF DIRECTOR GENERAL OF WATER AFFAIRS
MPUMALANGA

3RD RESPONDENT

DIRECTOR OF WATER AFFAIRS: MPUMALANGA WATER SECTOR REGULATION AND USE	4TH RESPONDENT
MEC CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS, MPUMALANGA	5TH RESPONDENT
ACTING EXECUTIVE MAYOR: THE GERT SIBANDA DISTRICT MUNICIPALITY	6TH RESPONDENT
MUNICIPAL MANAGER: THE GERT SIBANDA DISTRICT MUNICIPALITY	7TH RESPONDENT
THE MAYOR: THE ALBERT LUTHULI LOCAL MUNICIPALITY	8TH RESPONDENT
MUNICIPAL MANAGER: THE ALBERT LUTHULI LOCAL MUNICIPALITY	9TH RESPONDENT
KOMATI CATCHMENT AGENCY	10TH RESPONDENT

JUDGMENT

MAVUNDLA, J.

- [1] The sixth to ninth respondents brought an application for leave to appeal against an interim execution order granted against them in terms of Rule 49(11). The application was opposed by the applicants. On the 7 August 2012, after hearing submissions on behalf of the respective parties, I held the view that it is not in the interest of justice that the application sought, should be granted and proceeded to dismiss the application with costs, inclusive costs of 2 (two) counsel, and indicated that reasons for this order will follow. I proceed to set out the reasons herein below.
- [2] In the main application, on 10 July 2012 this Court granted an order in terms of which the sixth and seventh respondents were ordered, *inter alia*, to provide potable water to the residents of Carolina, with

ancillary relief, and that the sixth to ninth respondents jointly and severally pay the costs.

[3] The sixth to the ninth respondents then brought an application for leave to appeal against the aforesaid judgment. It is trite that the application for leave to appeal automatically suspends the execution of the main order, unless the court orders otherwise on application; *vide South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*.¹ Indeed the applicants also brought an application in terms of Rule 49(11) for an order that the operation and execution of paragraphs 2 to 5 of the main order are not suspended.

[4] Both the application for leave to appeal and the application in terms of Rule 49 (11) were heard simultaneously and a judgment dealing with both applications was handed down on 26 July 2012. Leave to appeal was granted. In respect of Rule 49(11) application, the Court ordered, *inter alia*:

¹ 1977 (3) SA 534 (A) at 545.

"3 That in terms of Rule 49(11) the operation and execution of paragraphs 2 to 5 of the order granted on 10 July 2012 are suspended pending finalization of any appeal to the Full Bench, and or to the Supreme Court of Appeal, and or to the Constitutional Court;".

- [5] The order as it was, was superfluous, as it seemed to reaffirm the automatic incident of noting of an application for leave to appeal, namely the execution of the order of 10 July 2012, which was not the intention of the Court, but to suspended that very incident so that the main order can be executed. However, the word "not" had been erroneously omitted in this order. The Court on 3 August 2012 *mero motu* corrected this order without inviting the parties by varying it in terms of Rule 42(1)(b)² by inserting the word "not" so that the order would reflect the true intention of the Court, such that the order reads as follows:

"3 That in terms of Rule 49(11) the operation and execution of paragraphs 2 to 5 of the order granted on 10 July 2012 are **not** suspended pending finalization of any appeal to the Full Bench, and or to the Supreme Court of

² Uniform Court Rules of High Court.

Appeal, and or to the Constitutional Court;" Full reasons for this verification are contained in the Court's judgment delivered on 3 August 2012, and need no repetition, for purposes of this judgment.

- [6] The central issue, in the totality of the whole case, resulting in the litigation between the parties, culminating to the respondents seeking leave to appeal against the interim order, relates to the provision or lack of potable water, which is a Constitutionally enshrined right³, to the Silobela residents in Carolina. The case therefore relates to a fundamental right to be provided with water, and is therefore of importance and demands, in my view, that the process of finalizing the dispute should be expedited. This equally entails, in my view, that the order of the Court, where there is an error or ambiguity, should be expeditiously corrected so that there can be certainty and clarity to enable the parties to execute whatever appeal, in respect of which leave to appeal is granted⁴.

³ Section 27 (1)(b) of the Constitution of Republic of South Africa, Act No 108 of 1996.

⁴ *Vide* para [9] *infra*.

[7] The chagrin of the respondents against the judgment and order of 26 July 2012 is that just like the judgment and order of 10 July 2012, is unenforceable because the orders direct the sixth and seventh respondents to encroach in the domain of the eighth and ninth respondents, who are the local municipality seized with the function of providing water services, whereas the sixth and seventh respondents are not water service authority in terms of *Water Service Act* 108 of 1997 and are not tasked to provide the service directed to provide. The respondents have raised various other issues in assailing the flaws in the judgment and order of the 10 July 2012. Of course leave to appeal has since been granted and indeed respondents have noted an appeal against it, raising the very points they assail the judgment of 26 July 2012.

[8] The respondents, further bemoan the fact that the Court *mero motu* corrected its judgment, firstly without inviting the parties and secondly after they had already noted an appeal. They submitted that the Court, in those circumstances was not at liberty to correct the order. They further rely on this ground, *inter alia*, why leave to

appeal against the interim execution order should be granted, contending that another court would find that the Court erred in effecting the correction in the circumstances. There is, in my view, no substance in this submission for the reasons set out herein below.

- [9] The main judgment was delivered on 26 July 2012. It would seem that the application for leave to appeal as well as the notice of appeal were delivered on 1 August 2012. This Court varied its judgment on 3 August 2012. In my view, the Court has inherent power to correct an ambiguity, patent error or omission in its judgment, immediately it became aware thereof. In this regard *vide*, *Thomson v South African Broadcasting Corporation*,⁵ *Traditional and Local Government Affairs*⁶. The fact that there is an appeal noted, *in casu*, it cannot be said that the correction of a patent error or omission, was not necessary, nor that the court was not at liberty to

⁵ 2001 (3) SA 746 (SCA) at 748H-749C para [5];

⁶ 2006 (3) SA 1 (CC) at 12F-14G.

do so; *vide Mostert NO v Old Mutual Life Assurance Co (SA) Ltd*,⁷
First National Bank of SA v Van Rensburg NO and Others.⁸

[10] The order in respect of which application for leave to appeal is sought, is an interlocutory order of execution generally considered not to be appealable, because granting leave to appeal will defeat the very purpose of the order of execution; *vide Minister of Health v Treatment Action Campaign (No1)*.⁹ In motivating why, leave to appeal the Rule 49(11) order should be granted, it was submitted, on behalf of the respondents, *inter alia*, that the Court erred in placing an *onus* on the respondents by holding that the respondent who opposes the grant of such an order, must show why leave to execute should not be granted and in relying in the *Antares (Pty) Ltd v Hammond*¹⁰ decision.

⁷ 2002 (1) SA 82 (SCA) at 86D para [5].

⁸ 1994 (1) SA 677 (TPD) at 681D-G.

⁹ 2002 (5) SA 703 at 707F para [5].

¹⁰ 1977 (4) SA (WLD) 29 at 30H, Elloff J. (as he then was) said: "As far as merits of application is concerned, it is now I think well settled, in view of decision of the Full Bench of the Transvaal in the case of *Engineering Management Services (Pty) Ltd v South Cape Corporation (Pty) Ltd* 1977 (2) SA 64 (T), that *onus* is on the respondent to show reasons why leave to execute should not be granted."

[11] In the matter of *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*¹¹ Corbett JA dealing with the issue of *onus* put it as follows:

“... the word *onus* has often been used to denote, *intert alia*, two distinct concepts: (i) the duty which is cast on a particular litigant, in order to be successful, of finally satisfying the Court that he is entitled to succeed on his claim or defence, as the case may be; and (ii) the duty that cast upon a litigant to adduce evidence in order to combat a *prima facie* case made by his opponent. Only the first of these concepts represents *onus* in its true and original sense. In *Brand v Minister of Justice and Another*, 1959 (4) SA 712 (AD) at p 715, OGILVIE THOMPSON, JA., called it “the overall *onus*”. In this sense the *onus* can never shift from the party upon whom it originally rested. The second concept may be termed, in order to avoid confusion, the burden of adducing evidence in rebuttal (“weerleggingslas”). This may shift or be transferred in the course of the case, depending upon the measure of proof furnished by the one party or the other. (See also *Tregea and Another v Godart and Another*, 1930 AD 16 at p. 38; *Marine and Trade Insurance Co. Ltd. v Van der Schyff*, 1972 (1) SA 26 (AD) at pp. 37-9.) Applying these concepts to an application for leave to execute a judgment pending an appeal, the *onus* proper (or overall *onus*) rests, as I have already indicated, upon the applicant. This is so, in my view, irrespective of whether the judgment in question is one sounding in money only or is one granting other forms of relief.”

¹¹ *Supra* at 548A-D.

[12] In the light of the above authority, there is, in my view, no substance in the contention made on behalf of the respondents regarding this aspect of *onus*. The Court was quite conscious of the fact that the true *onus* rested with the applicants who sought to have the automatic incidence of noting of appeal, namely the suspension of the execution of the order, not to take place but that the order be executed by adducing evidence that on a balance of probability prove a *prima facie* case. The *onus* referred to in *Antares (Pty) Ltd v Hammond (supra)* in respect of the respondent, is not “an *onus* proper but merely a burden of adducing evidence to rebut a *prima facie* case”, and the respondent was not required to establish its case on a preponderance of probabilities¹². This as much is clear from paragraph 8 of the judgment of the 26 July 2012 and needs no repetition. In opposing the respondents' application, the applicants adduced evidence in a form of affidavit to show that even after the order of the 10 July 2012 and 26 July 2012, the cause of complaint regarding water was still persisting. The respondents failed to adduce evidence to refute the *prima facie*

¹² *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd supra* at 548 F-G.

case made by the applicants, as to why the order should not be executed.

[13] The other grounds of appeal raised by the respondents, are in my view, the very grounds upon which the appeal has been noted. Those grounds, in my view, are not relevant in deciding the present application for leave to appeal against the interim execution order, particularly because the prospect of success in the appeal are not decisive in this application for leave to appeal against an interim execution order. But besides, to decide those issues would result in a piecemeal determination of the matters that are already a subject of the appeal, which is, in my view, undesirable. I therefore decline to deal with those issues for purpose of this judgment.

[14] The essential thrust of the respondents, is that the order cannot be executed because they are district municipality and not a water service authority whereas the eighth and ninth respondents are a local municipality and water service authority against whom there is no

order. They contend that the court has not made any finding of unlawfulness against any of these parties. The sixth and seventh respondents' further submission is that there would be irreparable harm on their part because there is no mechanism enabling them to conclude the necessary contracts to enable them to comply with the Court order.

[15] The applicants essentially complain about the violation of a fundamental right of the residents of Silobela and Carolina. They have also presented evidence which shows that post the order of 26 July 2012 the cause complained of still persists. In as much as the general rule is that, the interim execution order is not appealable, the Court may in certain circumstances grant leave to appeal if it would be in the interest of justice; *vide Machele and Others v Mailula and Others*.¹³ For the applicant to succeed in the application for leave to appeal, he must demonstrate that there would be irreparable harm were the relief he

¹³ 2009 (8) CLR 766 para [18].

seeks not to be granted; *vide Minister of Health and Others v Treatment Action Campaign and Others (No 1)*¹⁴.

[16] It brooks no argument that this case is in regard with violation of Constitutionally entrenched s27 right. In the matter of *Minister of Health v Treatment Action Campaign (No 1)*¹⁵ the Constitutional Court stated that: "Section 38 of the Constitution empowers a court to grant appropriate relief when it concludes that a breach or threatened breach of a person's rights under the Bill of Rights has been established." The Constitutional Court further proceeded to point out that a Court is also empowered, in those circumstances, of an individual case to decide whether it is in the interest of justice to grant leave to appeal against an interim execution order¹⁶.

¹⁴ 2002 (5) SA 703 (CC) 707E-710D in particular paras [5] et [12].

¹⁵ *Supra* at 708D para [7]

¹⁶ *Supra* at 708G para [8].

[17] The respondents *in casu* are obliged to respond positively to ameliorating the water crisis in the affected area and to take adequate measure in that regard the Court, in its discretion may order them to do so¹⁷.

[18] It was conceded on behalf of the respondents, quite correctly so, in my view, that the solution to their difficulty in complying with the Court's order is a political one. It was quite correctly pointed out on behalf of the applicants that, the first to fourth respondents in the main application placed it on record that they are willing to advance necessary funds to the respondents to resolve the plight of the affected residents *in casu*. Any difficulty to comply with the order, if any, can therefore be resolved at political level by the respondents and this would therefore remove any harm whatsoever, if any, on the part of the respondents.

¹⁷ *Vide Minister of Health v Treatment Action Campaign (No 2) 2002 (5) SA 721 (CC)* at 736B-D.

[19] On the other hand, the water crisis has a potential of destabilizing the tranquility in the particular affected area, which would lead to untold damages. I am of the view that the Court is at liberty, to take note of the fact that many a times in the Country, when communities register their dissatisfaction over service delivery, they resort to a chaotic and uncontrolled destructive frenzy. Good governance requires that such possibilities should be averted and the Courts should not refrain in ordering those structures of governance in taking positive steps aimed at achieving this, *inter alia*, and the progressive realization of the ethos enshrined in the Constitution;¹⁸ *Vide also Linvestment CC v Hammersley and Another.*¹⁹

[20] As already indicated earlier, the applicants have placed evidence, in a form of an affidavit, demonstrating that potable water is not provided regularly, but intermittently, and the water is not as yet suitable for human consumption, post the judgments of 10 and 26 July 2012. Having regard to all these factors and the authorities referred to herein above, it is my considered view that it is not in the interest of justice

¹⁸ *Vide* s173 of the Constitution of The Republic of South Africa, Act No. 108 of 1996.

¹⁹ 2008 (3) SA 283 (SCA) at 291B-C para [25].

that the relief sought by the respondents should be granted. I therefore conclude that the application should be dismissed as already ordered.

[21] I was invited to grant a punitive cost order against the respondents, in the event the application were to be dismissed. The reason advanced in that regard was that the respondents have not at any stage complied with the Court's orders and have not acted in good faith because, notwithstanding the patent omission and the fact that the order has since been corrected, they still persist with their stance in this regard.

[22] The award of costs is a matter of the discretion of the Court. A punitive costs order, in my view, should only be meted against the Government when it is clear that the litigation is vexatious, otherwise, those tasked with the obligation to assist the government in its broad form, to seek clarity in courts, would then tread with trepidation and without vigor for fear of incurring costs against the government. This matter has, in my view, intriguing aspects of the law and therefore, I do not think that the

litigation on the part of the respondents was not *bona fide*. In the circumstances, after proper reflection, I deem it not necessary to grant a punitive costs order.

[22] These are therefore the reasons for the order which I granted dismissing the application with costs, inclusive costs of 2 (two) counsel. I therefore hand down the reasons.


N.M. MAVUNDLA
JUDGE OF THE HIGH COURT

HEARD ON THE	: 08 /AUGUST / 2012
DATE OF JUDGEMENT	: 15/ AUGUST / 2012
DATE OF VARIATION	: 03 / AUGUST / 2012
1 ST & 2 ND APPLICANTS' ATT	: LEGAL RESOURCES CENTRE
1 ST & 2 ND APPLICANTS'ADV	: ADV J.R. BRICKHILL
With ADV	: ADV G. SNYMAN (MS.)
6 TH -9 TH RESPONDET'S' ATT	: TWALA ATTORNEYS
6 TH -9 TH RESPONDET'S ADV	: ADV L.P. MKHIZE