

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 1360/2008

In the case between:

AGRITRANS CC

First Applicant

SWART, ANDRIES

Second Applicant

and

MAFUBE MUNICIPALITY

First Respondent

MAHLAKU, BRUTUS

Second Respondent

JUDGEMENT: MOCUMIE, J

HEARD: 12 JUNE 2008

DELIVERED: 7 AUGUST 2008

JUDGMENT

[1] The first applicant is Agritrans CC ("*Agritrans*"), a close corporation duly registered in terms of the Close Corporations Act 69 of 1984 (as amended), conducting business from the remaining extent of the farm Paisley No 73 ("*the property*"), district Frankfort, Free State Province. Agritrans is the registered owner of the property. The second applicant is Mr

Andries Swart, an adult businessman residing at the property and the sole member of the first applicant (*Henceforth jointly referred to as 'the applicant'*).

- [2] The first respondent is Mafube Municipality, a local authority established in terms of the provisions of the Local Government Municipal Structures Act, No 117 of 1998 (*"Act 117 of 1998"*) which conducts business from the Municipality Office Building, Frankfort, Free State Province. The second respondent is Mr Brutus Mahlaku, the Municipal Manager of the first respondent, who was appointed in terms of section 82(1)(a) of Act 117 of 1998. He is the head of administration and the accounting officer of the first respondent (*"the Municipality or respondent "*).

- [3] The applicant seeks relief for:

- "2. An order declaring the first respondent to be in contempt of the court obtained by the first applicant against the first respondent under case number 2365/2004 (*the Court order*);
3. An order directing the first respondent to comply with

paragraphs A1.1.1, A1.1.2 and A1.1.3 of the Court order within five days of date of this order failing which the second respondent be committed to prison for a period of ninety days for contempt of court;

4. *In the alternative to paragraphs 2 and 3 above, an order directing the first respondent to:*

4.1 *within five days of date of this order repair and make operational the two sewerage pumps situated in the sewerage pump house (the Namahadi pump house) which services the Namahadi settlement (the Namahadi sewerage works);*

4.2 *maintain and operate the pumps at the Namahadi pump house and the Namahadi sewerage works situate on the remaining extent of the farm Paisley No 73, district Frankfort (the property):*

4.3 *maintain and operate the pumps situate on the property from which sewerage effluent is pumped from the Namahadi sewerage works to the pivot irrigation system;*

4.4 *make available to the first applicant all effluent produced by the Namahadi sewerage works situate on the property;*

4.5 *make payment of Eskom account number 8145732273;*

5. *In the alternative to paragraph 4 above an interim order in the same terms as paragraph 4.1 – 4.5 above.*
6. *That the first and second respondents pay the costs of this application on the scale as between attorney and own client, jointly and severally, the one paying the other to be absolved.”*

[4] The application has a long history. The legal battle started as far back as 2004 when the applicant approached this Court seeking an order in terms similar to the present application.

Lombard J granted that order on 20 June 2004 which reads:

“A1.1 That the respondent be and is hereby ordered to:

1.1.1 within two days of the date of this order, repair and make operational the sewerage pump(s) situate in the pump house which services the Namahadi settlement, and

1.1.2 maintain and operate the sewerage works situate on the remaining extent of the farm Paisley No 73, district Frankfort, and

1.1.3 to maintain the pump situate on the property with which sewerage effluent is pumped from the

sewerage works to the pivot irrigation system, and

1.1.4 to make available to the applicant all effluent produced by the sewerage works situated on the property.

A1.2 That the respondent pay the costs of this application on the scale as between attorney and own client;

A2. Paragraph A1.1 read together with paragraphs A1.1 and A1.1.2 will operate with immediate effect;

A.3. The costs are reserved.

B. The court notes that the respondent undertakes pending the finalization of this application and without admitting that it is obliged to do so, make available to the applicant the effluent produced by the sewerage works as it has been doing for at least the last year until otherwise directed by the Department of Water & Forestry.”

[5] The second phase of the battle was in December 2005 when the applicant again approached this court under case No 5349/2005 for relief couched in similar terms as the 2004 order the basis whereof was that the same crisis that existed prior to the 2004 court order had re-surfaced. The matter was opposed. Respondent filed opposing papers on 10 February 2006. In paragraph 2.4 of the Notice of Motion, the applicant

then sought an order:

“Die doel van die aansoek is derhalwe om die eerste en tweede respondent te verplig om die rioolwerke ten volle operasioneel te maak en om die nodige stappe te neem om die omgewingsbesoedeling uit die weg te ruim.”

[6] In January 2008, the Namahadi pumps were not operational and once again caused the pump house to overflow and spilled raw sewerage directly into the Wilge River and the neighbouring Namahadi Settlement. In a letter dated 11 February 2008 appended to the papers as annexure “A3” the applicant made the respondent aware of the sewerage spillage. On 18 February 2008 the respondent’s workers managed to fix only one pump.

[7] The applicant approached this Court on 13 March 2008 on an urgent basis for the relief set out in paragraph [3] above. The application was considered not urgent and the respondent was granted leave to file opposing papers.

[8] In its opposing affidavit respondent raised two points *in limine*:

lis pendens and *res iudicata*. Mr. Reinders for the respondent argued that there are proceedings still pending between the parties under case no 5349/2005 and as such the Court cannot entertain this application as it is based on the same cause of action, between the same parties and on the same subject matter. He contended that the 2005 application was not stale or abandoned as submitted by the applicant. It is common cause that the applicant has applied for enrolment of the application and that the application has been set down for hearing for three days. Mr Reinders argued further that the respondent has and is still complying with the 2004 order and that this Court can therefore not entertain the same cause of action. See **RSA Factors Bpk v Bloemfontein Township Developers (Edms) Beperk** 1981 (2) SA 141 (O).

- [9] Whilst dealing with the merits, Mr Reinders argued that the applicant did not prove the requirements of a final interdict as required by law. In particular he submitted that the applicant did not prove *inter alia* that it had a clear right. See **Setlogelo v Setlogelo** 1914 AD 221 at 227.

[10] In its replying affidavit the applicant avers that

“(T)his relief relates to conduct of the first respondent at a different time and not to the conduct of the first respondent upon which the current relief is based. The relief under case number 5349/2005 is much more far reaching than the current relief.”

[11] The applicant had initially sought an interim interdict in this application and its Heads of Argument. However, when arguing in court, Mr Ellis argued for a final interdict. He submitted that applicant had set out and satisfied all the requirements of a final interdict in that:

(a) The applicant had shown a clear right.

According to Counsel the clear evidence is to be found in the contract in which the parties agreed that the respondent will be responsible to maintain the sewerage pumps. (Annexure “A” of the papers.);

(b) The applicant had no other remedy;

(c) The injury or damage was continuing and;

(d) It will cause irreparable harm not only to the applicant but

to the community of Namahadi estimated at approximately 35 000.

[12] The following facts are common cause or at least not challenged by the respondent:

- 12.1 That the photographs appended to the papers as Annexure A5 to A11 are a true reflection of the fact that the sewerage pumps were out of order;
- 12.2 That the photographs depict that sewerage was flowing from the pump house to the adjacent premises and into the Wilge river on various dates, including 29 February 2008, 06 March 2008, 07 March 2008, 08 March 2008, 10 March 2008 and 11 March 2008;
- 12.3 That since January 2008 until 3 February 2008 the pumps had not been fully operational;
- 12.4 That from 4 February 2008 to date of this hearing only one pump was operational.
- 12.5 That as a result of the despair state raw sewerage was still overflowing and being discharged into the Wilge River.

[13] The gravamen of the applicant's case is that the respondent is not maintaining the sewerage system as it is obliged to in terms of the contract between them, *inter alia*;

- (a) to prevent sewerage from spilling into the Wilge River which is the main feeder of the Vaal River. Section 152 of the Constitution of South Africa, Act 108 of 1996 (*"the Constitution"*) requires the State through its relevant organs to ensure the provision of basic services in the communities in a sustainable manner and to promote a safe and healthy environment to them; and
- (b) to prevent nuisance or unhygienic conditions from occurring. Section 20(1) of the Health Act, No 63 of 1977 (*"the Health Act"*).

[14] Counsel for the respondent sought to meet the applicant's case as follows:

"The system works on the basis that only one pump is operational at a time. The other pump, at all times, serves only as a back-up. Two pumps never run simultaneously and both can never be switched on at the same time. Should one pump fail, it

automatically switches to the other pump. However, in case of a power failure, both pumps would stop running which could within hours lead to an overflow. Respondent is not liable therefore.”

[15] Counsel further submitted that the respondent has never failed to comply with the 2004 order as it at all relevant times complied with the said order in that it “*maintained, and operated the sewerage system and pumps situated on the property with which sewerage effluent is pumped from the sewerage works.*”

[16] In a bold attempt to show that the respondent was not *mala fide*, the respondent stated that it even had two pumps replaced with new ones in 2006. Concerning the discharge of raw effluent in January 2008, respondent contended that it was due to a stone that got stuck in one pump which forced it to rely on only one pump for the entire period complained of. The respondent maintained that the one pump has been for repairs but the company responsible for the repairs , Q & H Water and Sewerage Services, Bethlehem, is still awaiting the replacement parts.

[17] It is trite that the onus of proving the requisites of a *lis pendens* rests on the party that alleges it. Once the requisites have been established the presumption arises that the second proceedings are *prima facie* vexatious. See **Loader v Dursot Bros (Pty) Ltd** 1948 (3) SA 136 (T) at 138.

[18] On perusal of the file in respect of Case No 5349/05 re-registered under Case No 4338/06 it is evident that the applicant has been allocated three days for the hearing of the matter for the same cause of action as the present application. This set down is not for argument on the question of costs only as applicant attempted to argue. It is correct that the 2005 and 2008 applications are substantively the same. There is no doubt that the applicant approached the court in 2005 requesting it to order the respondent to repair, make operational and maintain the sewerage works situated at farm Paisley No 73, Frankfort. The 2008 application seeks that the Court orders the respondent to comply with paragraphs A1.1.1, A1.1.2 and A1.1.3 of the court order (2004) alternatively to repair and make operational the Namahadi pump house.

[19] Applicants' argument that the applications were not the same on the basis that in 2008 the applicant is asking the Court to imprison the respondent in the event that it finds the respondent in contempt of the 2004 court order is untenable. I fail to follow this reasoning because by the very nature of contempt of court proceedings if a party is found to be in contempt the penalty would be a term of imprisonment as sanctioned by law or other sanctions. In order to avoid imprisonment or the imposed sanction, such a party will have to purge its default by complying with the court order. Thus the end result of the two applications will be the same.

[20] As I view it, the respondent's contention which I share does not concern contempt of court but the substance of the application. The substance of the application is that the respondent failed to repair, make operational and maintain the sewerage works at the farm Paisley No 73 as ordered in 2004. Clearly this is essentially the same relief which was sought in the 2005 application. I therefore find that the 2005 application is similar to

that of the 2008 application and it is still pending. However the striking and significant difference is that although the complaint is the same, it relates to different time-periods. In other words it is not one continuous complaint. A new cause of action had arisen. The point *in limine* taken in this respect must fail.

- [21] In so far as the defence of *res iudicata* is concerned the requirements are set out in **National Sorghum reweries Ltd t/ a Vivo African Breweries v International Liquor Distributors (Pty) Ltd** 2001(2) SA 232 (SCA) at 235i. The principle is founded on public policy to avoid multiplicity of actions in order to conserve time, energy and the resources of the courts and litigants. In each set of facts the paramount or overriding consideration will be fairness and equity. See **Bafokeng Tribe v Impala Platinum Ltd and Others** 1999 (3) SA 517 (B) at 557F. To uphold the defence of *res iudicata* in this matter will only lead to injustice and unfairness to the applicant and the broader community.

- [22] This is however not the end of the enquiry. Although I am not

inclined to believe that the respondent is *mala fide* in dealing with this matter, there are questions that still need to be answered: What must the applicant do every time the respondent fails to repair and properly maintain the sewerage pumps as it is obliged? Is the applicant entitled to another order in the same or similar terms as the 2004 order? What effect will that order have?

[23] My view is that despite my finding that the 2005 application is still pending and that the respondent is not *mala fide*, the applicant is entitled to approach this Court as there is a crisis at hand since January 2008 to date of this hearing which has not been remedied by the respondent. The situation which currently exists cannot be regarded as beyond the control of the respondent. During this age of high technology it should take a couple of days if not weeks to fix the problem. If the service provider is engaged is lethargic or incompetent or lacks the capacity a switch should be made.

[24] It is not refuted is that the respondent installed new pumps in

2006 which were operational for some time. However what is crisply clear is that the respondent is not maintaining the sewerage pumps as a responsible body and its functionaries ought to. This is evidenced by the fact that:

24.1 The respondent was not aware of the raw sewerage spillage in January 2008 until alerted by the applicant.

24.2 That the respondent's work-force attended to the spillage only when the respondent was sent a reminder by the applicant's attorney relating to the 2004 order.

[25] The respondent's unsubstantiated averments around the Eskom load-shedding is far-fetched and cannot be an excuse to have an unhealthy situation persist while the respondent simply shrugs its shoulders and claim to be waiting for the pump parts. The respondent has not even refuted the fact that the unhealthy and hazardous situation depicted in the photographs and deposed to by the applicant exists.

[26] There is clear evidence from Mr. EJ Van Zyl, an environmental health practioner in the Northern Free State District

Municipality, Mafube area, that he continually identified failures on the part of the respondent to properly maintain various sewerage works including the Namahadi works. His concerns were simply ignored by the respondent. In these circumstances I find that the respondent has failed to properly maintain the two sewerage pumps housed at Namahadi sewerage house. I am satisfied that the applicant has satisfied the requirements of a final interdict as set out in **Setlogelo v Setlogelo**.

- [27] In view of the conclusion reached I find it unnecessary to deal with the respondent's submission that the application raised constitutional issues and that there was no compliance with Rule 16A of the Practice Rules in that no notice was filed by the applicant to that effect. Although the case raises some constitutional issues, amongst others the right to a healthy environment and adequate and proper service delivery the matter can be disposed of without resort thereto. It would also be unfair and inequitable to deny the applicant its immediate right of access to courts as envisaged in section 34 of the Constitution.

[28] In the result the applicant had no other recourse to ensure that the respondent keeps to its constitutional mandate and responsibility than to approach the court as it did. I accordingly make the following order:

ORDER

1. The application to hold the respondents in contempt of the court order in respect of Case no 2365/2004 is dismissed;

2. The respondents are ordered:

2.1 Within twenty one (21) of date of this order to repair and make operational the two sewerage pumps situated in the Namahadi pump house which services the Namahadi settlement;

2.2 To properly maintain and operate the two pumps at the Namahadi pump house and the Namahadi sewerage works situate on the remaining extent of the farm Paisley No 73, district Frankfort by:

2.2.1 Inspecting the two sewerage pumps on a

regular but frequent basis and as stipulated in the Health Act 63 of 1977 in order to avoid an operational crisis;

2.2.2 Attending to operational crisis at the Namahadi pump house promptly and without undue delay when it arises.

- 3. To properly maintain and operate the two pumps situate on the property with which sewerage effluent is pumped from the Namahadi sewerage works to the pivot irrigation system.**
- 4. To make available to the first applicant (Agritrans CC) all effluent produced by the Namahadi sewerage works situate on the property as stipulated in the contract.**
- 5. To make timeous payment to Eskom into account number 8145732273 as set out in the contract between the parties.**
- 6. The Respondents are ordered to pay applicant's**

**costs jointly and severally, the one paying the other
to be absolved.**

B.C. MOCUMIE, J

On behalf of applicant: Adv. P Ellis
Instructed by: DA Honiball
BLOEMFONTEIN

On behalf of respondents: Adv. S Reinders
Instructed by: Honey & Partners Inc.
BLOEMFONTEIN

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