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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: 2026-155230

In the matter between:

MOHAMED EIDRIS VAWDA N.O.

FIRST APPLICANT

ZAKARIYA EIDRIS VAWDA N.O.

SECOND APPLICANT

EIDRIS MOHAMED VAWDA N.O.

THIRD APPLICANT

and

ETHEKWINI MUNICIPALITY

RESPONDENT

ORDER

I make the following order:

1. The application is dismissed.
 2. The Applicants are to pay the Respondent's costs on an attorney and client scale.
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JUDGMENT

P WALLIS AJ

[1] On its face, this application is about the reconnection of electricity supply by the Respondent (the municipality) to a commercial property and the setting aside of penalty rates levied by the Respondent consequent upon a determination that unlawful development had taken place on the property. The application is about that. But it is not only about that.

[2] Mr Koroma (who appeared for the Applicants, who are themselves the trustees of the Zikr and Shukr Trust) submitted that the dispute is about the rule of law. I agree.

[3] The error of the Applicants is to assume that the rule of law runs in only one direction and that that direction confers rights, but not obligations, upon the Trust. In contrast, this case is illustrative of how the rule of law runs as a golden thread that controls the conduct of local government, restrains unlawful private development to the benefit of fellow citizens and future generations, and proves the value of the enforcement of court procedure in defence of those two prior principles.

Brief summary background

[4] It suffices to say that a multi storey building¹ has been constructed immediately behind the single storey building owned by the Trust. That construction required excavation of the hillside and appears to have taken place on municipal land. Not only is the land municipal in nature, but it is also a protected area declared as a nature reserve (known as Burman Bush). The municipality determined (the reasonableness of that determination will be considered below) that the Applicants were responsible for the construction. Based on that determination, the rates category for the Applicants' property

¹ The record does not establish the precise number of storeys; the photographic evidence suggests between five and seven.

was changed to “unauthorised/illegal dev.use”, which change of status imposes penalty rates. The Applicants admit that they did not pay those penalty rates and consequent upon that non-payment, the municipality disconnected electricity supply to the property.

[5] There is no dispute before me on the papers as regards the determination that this structure is unlawful or the contention that it encroaches onto municipal land.

[6] Against that background, the application seeks relief in the form of a rule *nisi*, broadly:

- (a) directing the reconnection of electricity, and interdicting further disconnections; and
- (b) setting aside the change of the rates category. The reconnection and interdictory relief were sought on an interim basis.

[7] Notably, the application is not framed as a review in the form contemplated in Uniform Rule 53. Consequently, no record was sought or placed before the court at the hearing of the matter.

[8] The underpinning contention of the Applicants is that the Respondent has acted without due regard to their administrative law rights (particularly rights to notice).

The rule of law

[9] As indicated, the Applicants framed their submissions within the rubric of the ‘rule of law’. The submission was narrowly focussed on the ‘rule of law’ in the form of compliance by government with administrative law obligations.

[10] In order to assess those submissions it is necessary to consider what is meant by the phrase ‘rule of law’. I do not accept that the phrase has so narrow an application as the Applicants contend. In this application the rule of

law encompasses: the obligation on local government to conduct itself in accordance with fair procedure, but also the corollary obligation to enforce the law; as well as the obligation on citizens to conduct themselves in accordance with their own legal obligations. Additionally the concept enjoins practitioners and litigants to conduct themselves honestly and candidly within the framework of the rules and processes of Court.

[11] So important is the rule of law that it finds mention in s1 of the constitution. It does so in the following terms:

“The Republic of South Africa is one, sovereign, democratic State founded on the following values:

(c) Supremacy of the constitution and the rule of law.”

[12] For the most part, the judgments that deal with the question of the rule of law are focused upon the legitimacy of the exercise of public power. This is an unsurprising focus. The Constitutional Court in *Fedsure Life Assurance and Others v Greater Johannesburg Transitional Metropolitan Council and Others*² stated: “These provisions imply that local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition – it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate when lawful. The rule of law – to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental principle of constitutional law.”

[13] More jurisprudentially complex is whether the rule of law imposes upon private citizens a duty to obey the law.³ Whatever the academic view, the Constitutional Court has since been clear that:

“It is indeed the lofty and lonely work of the judiciary, impervious to public commentary and political rhetoric, to uphold, protect and apply the constitution and the law at any and all costs. The corollary duty borne by all members of South African society – lawyers, laypeople and politicians alike – is to respect and abide by

² 1999 (1) SA 374 (CC) at [56]

³ For a full discussion consider the chapter by C Hoexter in Roederer et al, *Jurisprudence*, 2004

the law and court orders issued in terms of it, because unlike other arms of State, Courts rely solely on the trust and confidence of the people to carry out their constitutionally mandated function.”⁴

[14] This reinforces the earlier Constitutional Court judgment in *Lesapo v North West Agricultural Bank and Another*,⁵ which although dealing with an entity created by statute, considered that the rule of law precluded a creditor in the exercise of private law rights from “self help” in the form of execution in the absence of a court order. Thus understood the rule of law constrains the conduct of private citizens where that conduct is incompatible with the constitutional or legislative order.

[15] The Constitutional Court has further expounded upon the rule of law in a manner relevant to both the exercise of public power and to the obligations of private citizens. In the matter of *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*⁶ that court confirmed that:

“The rule of law requires that no power be exercised unless it is sanctioned by law and no decision or step sanctioned by law may be ignored based purely on the contrary view we hold. It is not open to any of us to pick and choose which of the otherwise effectual consequences of the exercise of constitutional or statutory power will be disregarded and which given heed to. Our foundational value of the rule of law demands of us, as a law abiding people, to obey decisions made by those clothed with the legal authority to make them or else approach courts of law to set them aside, so we may validly escape their binding force.”

[16] As set out below, the particular facts of this matter also implicate the constitutional right to environment as encapsulated in s24 of the constitution. That section in relevant part declares as follows:

⁴ *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* 2021 (5) SA 327 (CC) at [1]

⁵ 2000 (1) SA 409 (CC)

⁶ 2016(3) SA 580 (CC) at [75]

“Everyone has the right –

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –

(i) prevent pollution and ecological degradation...

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”

[17] In explaining this provision the Constitutional Court⁷ expounded as follows:

“But development cannot subsist upon a deteriorating environmental base. Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction. The environment and development are thus inextricably linked.”

[18] The South African State was also in attendance at the 27th Session of the governing council of the United Nations Environment Programme (12 March 2013) where the governing council of that body recorded in decision 27/9:⁸

“Noting that democracy, good governance and the rule of law, at the national and international levels, as well as an enabling environment, are essential for sustainable development, including sustained and inclusive economic growth, social development, environmental protection and the eradication of poverty and hunger.

...

Recognizes that the violation of environmental law has the potential to undermine sustainable development on the implementation of agreed environmental goals and objectives at all levels and that the rule of law and effective governance play an essential role in reducing such violations and invites Governments and relevant organizations to further strengthen mechanisms and explore initiatives for exchanging information and sharing experiences in order to reinforce international, regional and subregional cooperation to combat noncompliance with environmental

⁷ *Fuel Retailers Association of Southern Africa v Director General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC) at [44]

⁸ Titled Advancing Justice, Governance and Law for Environmental Sustainability

laws, including, inter alia, measures to increase the effectiveness of administrative, civil and criminal enforcement mechanisms, institutions and laws in the field of environment as well as applicable education and training.”

[19] *Kreilhuber and Kariuki*⁹ record that:

“Environmental rule of law, or rule of law in the field of the environment, describes when laws are widely understood, respected and enforced and people in the planet enjoy the benefits of environmental protection. It provides an essential platform underpinning the three pillars of sustainable development – economic, social and environmental.”

[20] In discussing the distinct characteristics of the environmental rule of law, the authors identify that:

“...because the environmental rule of law is implemented in the face of uncommon time scales – that is, time scales of many centuries and more – it implicates intergenerational equity. While sustainable development may serve short term individual or organisational interests, environmental rule of law plays an important role in protecting the individual and collective interests of citizens and future generations over the long term.”

[21] International and comparative materials increasingly describe the convergence of legality and environmental protection as the 'environmental rule of law'. South African authors use the same lens when considering the right of public participation in respect of decisions having environmental impact¹⁰. The Supreme Court of India¹¹ expressly recognised the concept of an “environmental rule of law”. Closer to home, the Kenyan High Court has considered the rule of law within the context of the impact of development on environmental and cultural rights.¹²

⁹ *Kreilhuber and Kariuki, Environmental Rule of Law in the context of Sustainable Development, the Georgetown Environmental Law Review*, Vol 32: 591

¹⁰ J Hall & PJ Lukey ‘Public participation as an essential requirement of the environmental rule of law: Reflections on South Africa’s approach in policy and practice’ (2023) 23 *African Human Rights Law Journal* 303-332 <http://dx.doi.org/10.17159/1996-2096/2023/v23n2a4>

¹¹ *Hanuman Laxman Aroskar vs Union Of India* (29 March, 2019) 2019 SC 318 – Part J

¹² *Baadi & others v Attorney General & 7 others; National Land Commission & 2 others (Interested Parties); Global Initiative for Economic, Social and Cultural Rights & another*

[22] It does not seem to me that that terminology has yet assumed an established doctrinal status in South African law, but it provides a useful descriptive framework in which to consider a dispute at the intersection between town planning, administrative, and environmental law.

[23] Some support for this idea can be found in the judgment of the Supreme Court of Appeal in *Lester v Ndlambe Municipality and Another*¹³, which dealt with a demolition order of a similarly unlawful construction under Section 21 of National Building Regulations and Building Standards Act 103 of 1977. That Court framed a demolition order within the rubric of the rule of law¹⁴. Indeed, that Court held that:

“Put differently, a failure to exercise that power [under S21] where the exigencies of a particular case require it, would amount to undermining the legality principle which, as stated, is inextricably linked to the rule of law.”¹⁵

[24] The rule of law also depends upon courts determining disputes on truthful and complete factual material presented in accordance with established procedures. Those judgments in turn depend upon a conduct of both litigants and practitioners. The Constitutional Court in *General Council of the Bar of South Africa v Jiba and Others*¹⁶ held:

“The proper administration of justice may not be achieved and justice itself may not be served unless truthful facts are placed before the Courts. Legal practitioners are a vital part of our system of justice. Their important role includes preventing false evidence from being presented at Court hearings, and by so doing they protect judicial education of disputes from contamination by fabricated facts. As a result, the law demands from every practitioner absolute personal integrity and scrupulous honesty.”

(Amicus Curiae) (Petition 22 of 2012) [2018] KEHC 5397 (KLR) (Civ) (30 April 2018) (Judgment) [243]

¹³ 2015 (6) SA 283 (SCA)

¹⁴ *Lester* [23]

¹⁵ *Lester* [26]

¹⁶ 2019 (8) BCLR 919 (CC) at [1]

[25] In my view these threads of the rule of law come together in a determination of this matter.

Factual analysis

[26] In order to place this development in context it is necessary to describe briefly both the geography and history of eThekweni (previously Durban). The property in question lies on the western side of the Umgeni Road. The Umgeni Road runs broadly north - south from the traditional CBD towards the Umgeni River. Historically it was the route to the Queens Bridge which was the first bridge over the Umgeni River.

[27] To the western side of Umgeni Road, the Berea Ridge rises steeply. Indeed, at this particular place, there is space for only one row of buildings between the road and the foot of the hill. On the eastern flank of the Umgeni Road, sits an area now developed as golf courses but historically part of the meandering estuary of the Umgeni River which area was described by Cooper and Mason¹⁷ as follows:

“...The uMngeni flowed southward between the Berea Ridge and a line of coastal dunes before discharging into Natal Bay.”

[28] This historical geographical constraint has left a series of single and double storey light-industrial and commercial buildings on the western edge of Umgeni Road. Rising above that set of buildings is approximately 50 hectares of preserved coastal forest known as the Burman Bush. That forest is all that remains of the coastal forest that historically covered the entirety of the Berea Ridge. It contains important rock formations that expose the geological history of Durban dating back to the Pleistocene era.¹⁸

¹⁷ The extract appears in a recordal of the historical description of the Umgeni River published by the Department of Water and Sanitation in its State of the Rivers Report https://www.dws.gov.za/iwqs/rhp/state_of_rivers/state_of_umngeni_02/history.html

¹⁸ On the Pleistocene rocks at Burman Bush, Berea Ridge, Durban, *JJ Frankel* published in the South African Journal of Science, December 1964

[29] The environmental importance of Burman Bush was recognised by forward thinking representatives of the eThekweni Municipality and its predecessors nearly a 100 years ago in 1932. The Borough of Durban was only granted city status 3 years later in 1935.

[30] By 1962, the entire space was classified as a public park on the Surveyor General's diagram. Still later in 2016, the municipality gave notice of an intention to declare the area a protected area as contemplated in the National Environmental Management: Protected Areas Act, 2003. The "Durban State of Biodiversity Report 2017/2018" published by the municipality reflects that such status had been granted. The Burman Bush is also fully integrated into the Durban Metropolitan Open Space System (D-MOSS) which finds recognition in the various town planning provisions as controlled development land.

[31] This extended history speaks to the intergenerational nature of environmental rights discussed by Kreilhuber et al.

[32] Having set out the geographical space in which the dispute arises, I turn now to consider the facts of this particular application.

[33] It is not in dispute that immediately behind the building on the Applicants' property that fronts onto the Umgeni Road, is now a large multi storey concrete structure. That structure is, from the photographic record, so near to the lawful building constructed on the Applicants' property, that it seems unlikely that a person could pass between them. The structure manifestly required significant excavation from the hillside within the boundaries of Burman Bush. There is no obvious entrance into the structure except through the Applicants' property. The cut material must, on these papers, have been removed through the Applicant's property. The report of the Building Inspector records a conversation with the Manager of the adjoining property who is recorded to have stated that:

“They had no dealings with the unauthorised building and that as far as they are aware, the owner of 1[...] U[...] Road [the Trust] was responsible for the development.”

[34] Against this factual background, the municipal inspectors conducted an inspection on 5 June 2025 and issued a notice to stop work to the Applicants on the following day.

[35] That notice included the following wording:

“The municipality shall, upon your failure to comply with the provisions of this notice, implement an increase in your property rates in accordance with the eThekweni Municipality rates policy 2024/2025.”

[36] The municipality sets out that a further inspection was conducted on or about 1 September 2025 and a final notice was delivered to the Applicants on 3 September 2025. A subsequent inspection on 15 January 2026 revealed that the unauthorised construction was ongoing. The rates type was re-categorised during November 2025 and a supplementary valuation roll adjustment notice was issued to the Applicants on 13 November 2025.

[37] From 16 January 2026, various challenges were then raised through correspondence and the submission of objections to the rates reclassification. I regard it as important to identify certain features of the correspondence addressed on behalf of the Applicants to the municipality prior to the institution of the application. In particular:

- (a) Throughout the correspondence the Applicants put forward bare denials of any involvement in the construction of the building. They do this in a tone of outrage.
- (b) Despite professing no knowledge of, or interest in, the building the Applicants nonetheless:
 - (i) invited engagement with the municipality to explore “lawful regularisation mechanisms” such as a lease or servitude of the property; and

- (ii) made clear that they would object to an order for demolition (ostensibly on safety grounds).

[38] Throughout this application, the Applicants persisted in contending that they had nothing whatsoever to do with the construction of the building but surprisingly (if that version were to be accepted) the Applicants made no effort to take the court into their confidence as to when the construction took place, how access was gained to the site, how the excavated soil was removed from the site, or any other relevant information that one would have expected a neighbour to know when construction was so clearly taking place immediately adjacent to the Applicants' building.

[39] It is also clear from the correspondence directed by the Applicants that even if they seek to raise a complaint about the time of delivery of notices by the municipality there can be no debate that the Applicants in fact received actual notice of the municipality's position.

[40] The effect of the reclassification of rates was to cause the monthly rates to reach a punitive level. These were admittedly unpaid by the Applicants. The monthly rates and electricity invoices issued by the municipality contain notices that if arrears are not settled, then electricity services will be terminated.

Analysis of the factual version

[41] The Applicants' case is predicated upon a contention that they are not responsible for the construction of the structure encroaching upon the Burman Bush. That version is advanced in the form of a bare denial (which bare denial is repeated in the replying affidavit). I have already indicated that if that denial were to be relied upon, one would have expected a more amplified version as to how the construction came about.

[42] In the ordinary course, the application of the rule in *Plascon-Evans*¹⁹ would be sufficient grounds to hold that the matter must be determined on the version advanced by the municipality. This is particularly so in circumstances where the Applicants have elected not to invoke the procedure as contemplated in Uniform Rule 53 and thus there is no record.

[43] However, the same outcome can be reached by a different method which in my view is more apposite in this matter. The Supreme Court of Appeal described the alternate approach in *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd and Another*:²⁰

[19] The court should be prepared to undertake an objective analysis of such disputes when required to do so. In *J W Wightman (Pty) Ltd v Headfour (Pty) Ltd* **[2008] ZASCA 6; 2008 (3) SA 371(SCA)**, it was suggested how that might be done in appropriate circumstances. The present case calls for a similar analysis.

[20] A court must always be cautious about deciding probabilities in the face of conflicts of facts in affidavits. Affidavits are settled by legal advisers with varying degrees of experience, skill and diligence and a litigant should not pay the price for an adviser's shortcomings. Judgment on the credibility of the deponent, absent direct and obvious contradictions, should be left open. Nevertheless the courts have recognised reasons to take a stronger line to avoid injustice. In *Da Matta v Otto* **1972 (3) SA 858** (A) at 689 D-E, the following was said:

'In regard to the appellant's sworn statements alleging the oral agreement, it does not follow that because these allegations were not contradicted – the witness who could have disputed them had died – they should be taken as proof of the facts involved. Wigmore on Evidence, 3rd ed., vol. VII, p.260, states that the mere assertion of any witness does not of itself need to be believed, even though he is unimpeached in any manner, because to require such belief would be to give a quantitative and impersonal measure to testimony. The learned author in this connection at p. 262 cites the following passage from a decision quoted:

¹⁹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] (3) SA 623 (A)

²⁰ 2011 (1) SA 8 (SCA)

“it is not infrequently supposed that a sworn statement is necessary proof, and that, if uncontradicted, it established the fact involved. Such is by no means the law. Testimony, regardless of the amount of it, which is contrary to all reasonable probabilities or conceded facts-testimony which no sensible man can believe-goes for nothing; while the evidence of a single witness to a fact, there being nothing to throw discredit, cannot be disregarded.”

Also in *Siffman v Kriel*, **1909 T.S. 538**, INNES, C.J., at p 543 says:

“It does not follow, because evidence is uncontradicted, that therefore it is true ... The story told by the person on whom the onus rests may be so improbable as not to discharge it.”

[44] In short, the version advanced by the Applicants is in my view so untenable that it cannot be true. It is inconceivable that a structure of that size was erected with the necessary engineering support, significant excavation and removal of materials, and the considerable amount of concrete and other building supplies that would be required, where the evidence reveals no plausible means of access other than through the Applicants' property, with the Applicants' having no involvement in that development.

[45] I therefore reject the Applicants' version as untrue.

[46] As Mr Koroma submitted, this case is about the rule of law. The advancing of a factually untrue case undermines the effective operation of judicial processes through which the rule of law is maintained.

[47] To advance such a case in order to protect an unlawful development that infringes upon a place of local environmental importance also undermines the environmental values protected by the constitutional and statutory framework described above, and further undermines the rule of law

as manifested in the obligation of citizens to comply with unchallenged statutory and regulatory obligations.

Urgency

[48] It may be surprising to turn to the question of urgency at the end of this judgment. I do so because to bring an urgent application that is not urgent ordinarily results merely in the matter being struck from the roll²¹ rather than being dismissed. In my view, this application does not warrant being kept alive for hearing on another day.

[49] The application was brought under cover of a certificate of urgency issued on 1 July 2026 for hearing on 8 July 2026. This was in circumstances where, as set out above, notices had been delivered by the municipality throughout 2025 and where the electricity supply was terminated on 21 February 2026.

[50] Plainly the matter was not urgent, or at the very least, any claim to urgency was unsustainable because of delay on the part of the Applicants.

[51] The effect of bringing the application urgently could, but for the efforts of the municipality to deliver papers on truncated time periods, have resulted in this application being heard upon a fundamentally untruthful set of facts.

Abuse of process

[52] I have reached the conclusion that when the issue of urgency is coupled with the failure to present a fair and complete factual version to the court that the application as a whole constituted an abuse.

²¹ *Commissioner for South African Revenue Service v Hawker Air Services (Pty) Ltd; Commissioner for South African Revenue Service v Hawker Aviation Services Partnership and Others* 2006 (4) SA 292 (SCA) at [9]

[53] The Constitutional Court²², later echoed in the Supreme Court of Appeal²³, has made clear that:

“An abuse of process can occur in a variety of ways. The litigation may be frivolous or vexatious. A litigant may seek to use the legal process for an ulterior purpose or by recourse to conduct that subverts fundamental values of the rule of law. The behaviour of the litigant may be so tainted with turpitude that the court will not come to such a litigant’s aid. The unclean hands doctrine references this latter type of abuse. It is the abusive conduct of the litigant that, in a proper case, may warrant the exercise of the court’s power to non-suit such a litigant. The court does so, even though the litigant claims a right that they would vindicate in the court proceedings.”²⁴

The approach of the municipality

[54] The statutory powers entrusted to municipalities exist to secure orderly development and to give practical effect to constitutional environmental obligations. These are the powers that the municipality exercised.

[55] The conduct of the municipality in this matter included repeated inspections, the delivery of the requisite building contravention notices, engagement in correspondence, and the exercise of the powers of the municipality to terminate electricity supply. None of these powers and functions were expressly directed at the preservation of an area of environmental importance – yet, as a consequence of the upholding of the rule of law, that is the effect that they had.

[56] Ms Mdlalose who appeared for the municipality together with her instructing attorneys and the municipal officials that clearly gave assistance, are commended and thanked for the clear and comprehensive affidavits put

²² *Villar Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH* 2023 (4) BCLR 461 (CC)

²³ *PFC Properties (Pty) Ltd v Commissioner for the South African Revenue Services and Others* 2024 (1) SA 400 (SCA)

²⁴ *Villar Crop* supra at [77]

before the court on urgent time periods and the cogent argument that they presented.

Costs

[57] Having determined that, in my view, the application was an abuse it follows that costs should be ordered on a punitive scale.

Order

[58] For the reasons set out above, I make the following order:

1. The application is dismissed.
2. The Applicants are to pay the Respondent's costs on an attorney and client scale.

P Wallis AJ

Appearances

Counsel for Applicants: Adv MSS Koroma
Trust Account Advocate: Suite 712, Office Towers, Overport City
430 Peter Mokaba Ridge
Ref: Adv Koroma

Counsel for Respondent: Adv SP Mdlalose
Attorneys for Respondent: Dwarika, Naidoo and Company
Umhlanga
Ref: ND/PH/E26017/ETH