

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 26799/2022

(1)	<u>REPORTABLE:</u>
(2)	<u>OF INTEREST TO OTHER JUDGES:</u>
(3)	<u>REVISED.</u>
.....
	DATE
SIGNATURE	

In the matter between:

MIDNIGHT FEAST PROPERTIES 11 (PTY) LTD

1ST Applicant

SA METAL GROUP (PTY) LTD

2ND Applicant

and

**CITY OF EKURHULENI LOCAL METROPOLITAN
MUNICIPALITY**

1ST Respondent

DR IMOGEN MASHAZI N.O.

2ND Respondent

SAM SIBANDE N.O.

3RD Respondent

TSHILIDZE THENGENA N.O.

4TH Respondent

MDUDUZI MNCUBE N.O.

5TH Respondent

MARRON BELL N.O.

6TH Respondent

GEOFRFREY MTHEMBU

7TH Respondent

EKURHULENI METROPOLITAN POLICE DEPT

8TH Respondent

ISAAC MPAYEYE N.O.

9TH Respondent

JUDGMENT

MAKUME J:

[1] The Applicants seek and order that this matter be heard as one of Urgency in terms of Rule 6(12) of the Uniform Rules of Court and if successful to grant the following interim order against the Respondents.

1.1 Directing the Respondents to attend to the electrical substation situated at Lower Boksburg Road near the corner of Knight Road, Germiston adjacent to Erf 1534.

1.2 Assess the illegal connection to the substation and to remove such illegal connection.

BACKGROUND

[2] The first Applicant is the owner of premises situated at number 5 Lower, Boksburg Road, Germiston. The second Applicant is a tenant of the first Applicant.

[3] There is an electricity substation located directly between two other company premises known as Proud foot Industries and GMR Scrap. It

is common cause that there are illegal electricity connections situated within the direct vicinity of 5 Lower Boksburg Road, Germiston. The second Applicant operates a large scrap metal recycling yard at the premises situated along 5 Lower Boksburg Road.

URGENCY

- [4] The Applicants maintain that the illegal connection in and around their business premises poses a danger to both life, limb and property hence this urgent application which they seek on an interim basis.
- [5] The Applicants further content that this application is launched within the ambit of their constitutional rights and are acting in the interest not only of their employees but also in the interest of the broader community directly affected by the illegal connection at the substation.
- [6] It is common cause that the illegal connections are intended to supply electricity to the nearby informal settlement in Knight Road. The Applicants allege that it was on the 17th September 2022 when they noticed that there was no power at second Applicant's weighbridge situated at 5 Lower Boksburg, Road, Germiston. Electricians were called in who discovered that the UPS and various other electrical components had been damaged. On further investigation on the 19th September 2022 they discovered that the ground around the weighbridge and also other parts of the yard was "live" meaning that the earth was conducting electricity as if it was an electrical cable. The

electricians discovered that an illegal connection had been made to the substation outside the premises which was the cause of the ground to be “live.”

[7] The Applicants say that the electricians were unable to rectify the problem as it was deemed dangerous.

[8] This Court is satisfied that this application is urgent because of the potential danger to life and property around the Applicants premises. What remains is whether the Applicants have satisfied this Court and made out a case for interim interdictory relief. The other the point in *limine* contended for by the Respondents is that the Applicant have failed to establish that they have the necessary *locus standi* to launch this application. It is alleged by the Respondents that the Applicants have failed to demonstrate that they have a direct and substantial interest in the subject matter before this Court.

[9] The Respondents say that the substation upon which the Applicants allege there is an illegal connection is not the same substation which provides and or supplies electricity to the Applicants premises. They say that in fact that substation did not cause the termination of the supply of electricity to the Applicants premises.

[10] This application is not about failure to supply electricity to the Applicants it is about the illegal connection on one of the substations in

and around the Applicants premises which illegal connection has caused the ground around the Applicants weighbridge and throughout parts of the yard to be “live” which means that the earth is conducting electricity as it was an electrical cable.

[11] It is common cause and not disputed that there has been for a long time illegal connections to the electrical substation. Photographs attached to the Respondent’s Answering Affidavit marked SDF5; SDF6 and SDF 11 all indicate loose electrical wires running exposed, in and around the premises of the Applicants as well as other neighbouring companies.

[12] Of interest is also a letter marked SDF3 which is dated the 1st October 2020 emanating from the office of the Divisional Head Revenue Services within the Ekurhuleni Municipality directed to other operatives within the Municipality. Extracts from that letter read as follows:

“The illegal connections are the major contributors when coming to power outages in and around the COE. On electrical infrastructure is slowly being damaged by these illegal connections. The COE is losing a lot of money in repairing damages caused by illegal connections. The main objective of these operations is to remove all the illegal connections on our electrical grid and provide residents with quality and reliable electricity. Communities are encouraged to report illegal connection.”

[13] Attached to that letter are statistics showing areas where illegal connections are and of importance it shows that as on the 1st July 2020 there were 500 illegal connections along the Lower Boksburg Road.

[14] In this application the Applicants have done exactly what the Municipality has asked communities to do that is to report illegal connections. This they did on the 22nd September 2022 when Mr Giovanni Tenner of SA Metal the second Applicant addressed a letter to Mr Robert Pienaar of Ekurhuleni and said the following:

“we had illegal cable connection at our Knight branch, 3 Knight Road, Germiston. Can we please have someone sort this out.”

[15] The Applicants assert their *locus standi* in this matter based on the Constitution. In the matter **Freedom Under Law v Acting Chairperson Judicial Services Commission 2011 (3) SA 549 (SCA)** it was held that in terms of Section 38 of the Constitution anyone acting in the public interest has the right to approach a competent Court alleging that a right in the Bill of Rights which includes a right in terms of Section 33 has been infringed or threatened.

[16] In paragraph 9 of the Founding Affidavit the Applicants say that the reasons for the urgency is the protection of life and death. They elaborate on this aspect in paragraph 11 wherein the deponent says “

“The Applicants launched this application within the ambit of their constitutional rights and are acting in the interest not only of their employees but also in the interest of the broader community directly affected by the illegal connection at the substation.”

[17] The Respondent have not denied nor disputed in their Answering Affidavit the Constitutional right that the Applicant says it is asserting its *locus standi*. All that the Respondents says at paragraph 46 is a denial that the substation which the Applicants contend has been tempered with is not the one that provides or supplies electricity to the Applicants. Once more the Respondents have missed the target and purpose of this urgent application.

[18] I am satisfied that the Applicants have set out in clear terms their right to approach this court for urgent relief. This brings me now to the question whether on the papers the Applicants have made out a case for interim relief.

PRIMA FACIE RIGHT

[19] The first aspect is a *prima facie* right. In the present matter the relief sought by the Applicants is founded on the fundamental rights expressed in Section 24 of the Constitution of the Republic of South Africa 1996 which provides as follows:

“Everyone has the right to an environment that is not harmful to their health or wellbeing and to have the environment protected for the

benefit of present and future generations, through legislative and other measures that: -

- 1) Prevent pollution and ecological degradation
- 2) Promote conservation and
- 3) Secure ecological sustainable development and use of natural resources whilst promoting justifiable economic and social development.”

A WELL GROUNDED APPREHENSION OF FURTHER IRREPARABLE

HARM

[20] The Applicants say that because of what they discovered on the weighbridge and that the ground in that area is “live” with electricity this is potentially dangerous and may cause irreparable harm in the form of death to employees and destruction of their own equipment.

[21] The first Respondent in paragraph 28 of its Answering Affidavit confirms the existence of a number of illegal connection of electricity within Ekurhuleni and that when they discover such illegality they disconnect same. It is clear that the only reason why they as a municipality disconnect is because that causes damage not only to municipal infrastructure but it is also harmful and has in many case caused death. In this instance the pictures attached to the first Respondent’s Answering Affidavit demonstrate wires crossing the road and on pavements.

ABSENCE OF SATISFACTORY RELIEF AND THE BALANCE OF
CONVENIENCE

[22] In paragraph 31 of the first Respondent's Answering Affidavit the first Respondent says that it is not correct that they as a municipal have failed to carry out their duties upon becoming aware of the illegal connection.

[23] This application fails on these two aspects. The first Respondent has not only attached correspondence starting as far back as July 2020 indicating efforts that they in the past have undertaken to remove illegal connections in the area.

[24] The first correspondence leading up to this application was addressed by one Jovanni Tenner from SA Metal on the 22nd September 2022 at 10h25. He addressed it to Mr Robert Pienaar of Ekurhuleni informing him of the illegal connection and asked that the issue be sorted out. A Mr Robert Young also from SA Metal also addressed an email to a number of officials at Ekurhuleni Municipality about the illegal connection. His email is also dated the 22nd September 2022 at 12h23 it is titled "High Importance."

[25] The following day being the 23rd September 2022 at 2h32 Mr Mduduzi Mncube of Ekurhuleni forwarded the two emails referred to above to Jabu Mkhize his colleague in Ekurhuleni.

- [26] Mr Mkhize then addressed an email to his colleagues indicating that they will be having a meeting on site on the 26th September 2022 with the service provider.
- [27] On the 26th September 2022 he followed up with an email to the service provider Bart Joubert calling for an update report seeing that they had a site visit.
- [28] Mr Joubert responded that he had a site visit and reported that “there is no illegal connection at SA Metal but an electrical problem. He did not elaborate as to what the electrical problem was. This is what caused the Applicants to approach this Court on an urgent basis and as I have already ruled they were entitled to do so.
- [29] However it is once the urgent application had been served that things started taking a different turn. Mr Jabu Mkhize addressed an email dated the 4th October 2022 a day after the first appearance of the parties before me. In that letter he says the following to amongst others Mr Davey Frank who is the deponent to the first Respondent’s Answering Affidavit:

“Hi colleagues

As per discussions yesterday today I was on site with representatives of our service provider Bart Joubert. There are illegal connections on site, however, these are not connected to SA Metal supply point but around SA Metal premises.

The plans to remove illegal connections in that area will be actioned asap as all stakeholders have to be involved such as SAPS local and SAPS POPS, EMPD Local and EMPD POPS.

The reason for that is normally after the operation there are after effects that will definitely be occurring and Law Enforcement has to have proper plan to deal with such events.

There are two main roads in that area which is Knight and Lower, Boksburg roads which are mainly used by big Cargo passing that area. After operations road closure and looting is the order of the day.

Hence proper plan needs to be done for the removal of illegal connections in that area.”

[30] It is accordingly not correct to say that the Respondents have taken no steps to remove the illegal connections it is just a matter of timing and proper arrangement. The Municipality says so in their email dated the 4th October 2022 that they need to involve other stakeholders especially from the security cluster.

[31] It is common cause and this Court can take judicial notice that whenever a Municipality or Eskom attend to the removal of illegal connections which are all over the Gauteng area this is followed by rioting and protests from the informal settlements. It is therefore not

surprising that the Municipality needs to beef up security and protect its own workers who will be tasked with removal of the illegal connections.

[32] I have come to the conclusion that the Applicants have failed to make out a case that there is no satisfactory relief nor that the balance of convenience favours the granting of an interim order. The Municipality has succeeded to demonstrate steps that are being taken to remove the illegal connections. The Applicants need to be commended for the steps they took to report this though it would appear that the illegal connections have been there since the last time there was a raid in 2020.

COSTS

[33] It is trite law that costs of litigation are at the discretion of the presiding officer. I am mindful of the fact that the Applicants were partly successful and also most importantly they brought this urgent application in asserting a Constitutional Right. It is also correct to conclude that had the Applicants not brought this application the municipality would not have done anything seeing that this situation has been there since 2020.

[34] Whenever a litigant approaches Court to ventilate issues of public importance such litigants are usually immunised from an adverse costs order. The Constitutional Court in **Biowatch Trust v Registrar**,

Genetic Resources and Others 2009 (6) SA 232 (CC) at page 245 paragraph 21 held as follows:

“In affordable medicines this Court held that as a general rule in Constitutional litigation an unsuccessful litigant in proceedings against the State ought not to be ordered to pay costs.”

[35] I accordingly deem it inappropriate to mulct the Applicants with any costs order. In the result I repeat hereunder the order that I gave on the 8th November 2022 which reads as follows:

ORDER

1. The forms, service and periods for filing provided for in the Uniform Rules of Court are dispensed with in terms of Rule 6(12) of the Uniform Rules of Court and this application is enrolled and heard as one of urgency.
2. The application on the merits is dismissed on the basis that the Applicants have not made out a case for interim relief.
3. This matter being one based on rights in terms of the Constitution of the Republic of South African 1996 I rule that each party pays own costs.

DATED at JOHANNESBURG this the day of NOVEMBER 2022.

**M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

APPEARANCES:

DATE OF HEARING	:	06 OCTOBER 2022
DATE OF JUDGMENT	:	28 NOVEMBER 2022
FOR APPLICANT	:	ADV P VENTER
INSTRUCTED BY	:	MESSRS
FOR INTERVENING PARTY	:	ADV E SITHOLE
INSTRUCTED BY	:	MESSRS