



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2022/531

(1)	REPORTABLE NO
(2)	OF INTEREST TO OTHER JUDGES
30/4/2022	
DATE	SIGNATURE

In the matter between:

**THE CITY OF EKURHULENI METROPOLITAN
MUNICIPALITY**

Applicant

and

THURWOOD INVESTMENTS (PTY) LTD

First Respondent

THE CITY OF EKURHULENI METRO POLICE

Second Respondent

JUDGMENT

MOORCROFT AJ:

Order

[1] In this matter I granted the following order on 19 April 2022:

- "1. The application is dismissed;*
- 2. The applicant is ordered to pay the costs of the application on the scale as between attorney and client."*

[2] The reasons for the order follow below.

Introduction

[3] The applicant is the City of Ekurhuleni Metropolitan Municipality. It seeks an order against the first respondent, a company that provided fibre network services within Ekurhuleni, and the applicant also, for reasons that are not explained, cited its own City of Ekurhuleni Metro Police as a respondent.

[4] As against the first respondent, the applicant seeks interim relief pending the outcome of two¹ applications brought by the first respondent, namely that the first respondent be ordered and directed to comply fully with a resolution adopted by the applicant on 21 October 2021 (dealt with in more detail below), and that the first respondent be directed to forthwith cease from carrying out any work whatsoever relating to the installation of poles at Kwa Thema Wards 77, 78 and 80 ("Kwa Thema").

[5] It also seeks an order that any necessary maintenance needed to be done by the first respondent on poles be preceded by a meeting duly arranged between the applicant and the first respondent's attorneys of record and the community of Kwa Thema for an appropriate agreement on the date, time and the scope of work to be

carried out by the first respondent's officials under the necessary supervision of the applicant's Metro Police officials, the second respondent. It then seeks an order that

¹ One of the two being the review application referred to below.

the cost of the application be paid by the first respondent on an attorney and client scale.

[6] As against the second respondent, the applicant seeks an order that the second respondent be directed and ordered to effect the arrest of any person or persons who fail to comply with the orders. There is no explanation as to why the applicant thought it necessary to seek an order against one of its own departments and there is no justification for such an order.

[7] The affidavits show that before the fibre project was embarked on the local community was consulted.

[8] Requiring consultation with the community before carrying out maintenance is a vague requirement and is not supported by any evidence.

The installation of an aerial fibre network

[9] The first respondent is a fibre network construction specialist contracted to prepare and install broadband infrastructure in Kwa Thema within the geographical area of the applicant. During 2021 the first respondent was granted permission by the applicant to install fibre poles in Kwa Thema. During installation of the network, community violence and unrest erupted, and a councillor was murdered and his house set alight. When the Metro Police (second respondent) sought to bring stability to the area, employees of the first respondent allegedly damaged a Metro Police vehicle. No details are provided.

[10] The relationship between the unrest and the installation of a fibre network is not apparent from the papers. No evidence is presented in support of the averments made. The first respondent also disputes the allegation that civil unrest and the murder of a City Councillor in Kwa Thema was related to the installation of fibre networks, and there seems to have been no violence since 2021. The first respondent states that the majority of aerial fibre networks within the jurisdiction of the applicant are operated by the major fibre network operators and their contracted maintenance teams routinely work on the aerial and trenched networks throughout the city.

[11] The applicant adopted a resolution that the installation of fibre through poles be halted and it apparently did so not because of unrest, but because of aesthetics. The resolution adopted by the applicant on 21 October 2021 reads as follows:

- “1. The Council must order HALTING the installation of fibre through poles as it defaces the image of the City.*
- 2. That the City must ENGAGE the private contractors to explore installation of fibre underground and stop the installation of poles.*
- 3. That the City CONSIDERS reviewing the way-leave application in which it must specify that all installations must be made underground.”*

[12] It is common cause between the parties that the Council resolution is still in force.

[13] On 21 December 2021 the first respondent brought an application for urgent relief pending a review of the Council resolution under case number 2021/59383. The urgent application was removed from the roll on the first

respondent's evidence and dismissed on the applicant's evidence,² and the review is pending.

[14] On 7 March 2022 the applicant³ wrote to the first respondent to complain about reports that the installation of fibre was continuing. An urgent application was threatened. The first respondent responded on the 9th to deny the allegations and asking for proof.

[15] Then, on the 11th the applicant demanded that all work, including maintenance work not impacted by the Council resolution quoted above, cease failing which an urgent application would be launched. The first respondent replied on the 15th, again denying that the Council Resolution applied to maintenance of existing fibre networks and confirming that it would not proceed with civil works pending the outcome of the review application.

[16] The first respondent made the statement that it was inconceivable that it was the intention of the applicant that ongoing maintenance of large scale civil infrastructure must cease. A failure to maintain the infrastructure would affect residents' access to data services and jeopardise the safety of the public in areas where infrastructure had been installed. The applicant stated further that if it was the intention to have all maintenance terminated, *"the City must have of course accept all liability relating to*

2 The correspondence seems to indicate that the urgent application was enrolled on the roll of the Urgent Court as Part A of a double- barrelled application, and then removed. Part B was and is a review application. There was also an earlier urgent application by the first respondent as applicant under case number 2021/56036, and this application was dismissed on the evidence presented by the applicant. This begs the question why an order was sought in this application pending the outcome of the application under case number 2021/56036.

3 The parties acted through their attorneys.

such unmaintained infrastructure, including but not limited to the cessation of data services to residents as well as injury or death of members of the public”.

[17] When confronted with the accusations that it was carrying on work in conflict with the Council resolution, the first respondent stated that:

“Our client denies unequivocally that it, or any of its subcontractors, has continued the installation of aerial fibre by carrying out civil works or erecting poles in the City road reserves, and puts the City to the proof thereof.

Our client has been engaged to ongoing maintenance and upkeep of existing aerial fibre networks. This includes cleaning or replacing fibre optic joints, splicing and testing network connections and replacing sections damaged fibre optic cable, amongst other things. This is to ensure that our client’s existing aerial networks are functional and that end users within the City receive the data services they have contracted to receive.

Maintenance and upkeep of existing fibre infrastructure does not contravene the City’s resolution of 21 October 2021 and does not involve any civil work.”

[18] Photographs date stamped 5 April 2022 was taken of people alleged to be employees of the first respondent installing a pole in Kwa Thema. The photographs relied upon by the applicant shows unidentified men standing around a pole on a sidewalk. The first respondent denied the photographic evidence and points out that no details are provided of when, where and of whom these photographs were taken. The first respondent also denied that any of its employees appear on the photographs. The first respondent added not it had not done any actual work, including maintenance work, since February 2022 as the sole proprietor of the business had been ill.

[19] The first respondent reiterated its denial and stated that it was willing to provide an undertaking that should the applicant identify any work being carried out in conflict with the Council resolution, the applicant should inform the first respondent of the details and the first respondent would then immediately attend at the site to ensure that all work is suspended.

[20] The applicant then proceeded to launch the application.

Urgency

[21] Rule 6 (12) (b) requires an applicant to set forth explicitly *“the circumstances which is averred render the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course.”*⁴

[22] The application was served on 6 April 2022 by email and it directed the first respondent to deliver a notice of intention to oppose by 7 April 2022 and file answering affidavits by 12 April 2022.

[23] No case is made out for the shortening of time periods in terms of Rule 6(12) and no evidence is presented to show that the applicant would not be able to obtain redress in the ordinary course. When evaluated against the backdrop of the history of the dispute since November 2021 and in the light of the paucity of evidence presented, the application is not urgent.

Conclusion

[24] The applicant has failed to make out a case that:

- 24.1 There is a relationship between unrest and the installation of aerial fibre networks;

⁴ See *Luna Meubelvervaardigers (Edms) Bpk v Makin & Another t/a Makins Furniture Manufacturers* 1977 (4) SA 135 (W) 136H – 137F; *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd* [2012] JOL 28244 (GSJ), [2011] ZAGPJHC 196 paragraphs [6] and [7]; *Export Development Canada & Another v Westdawn Investments Proprietary Limited & Others* [2018] JOL 39819 (GJ) paragraph [8]; and *In re Several Matters on the Urgent Court Roll* 2013 (1) SA 549 (GSJ) paragraphs [6] and [7].

24.2 The first respondent has continued to install an aerial fibre network;

24.3 That the first respondent's conduct causes any apprehension of harm;

24.4 That the application is urgent.

[25] The applicant nevertheless sought a punitive cost order against the first respondent. The applicant was warned on 12 April 2022 that a punitive cost order would be sought at the hearing. The application is ill-conceived and for this reason a punitive cost order against the applicant is justified.

[26] For these reasons I made the order set out in paragraph 1 above.

J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **30 April 2022**

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E SITHOLE

INSTRUCTED BY:

DU PLESSIS DE HEUS & VAN WYK

ATTORNEYS COUNSEL FOR RESPONDENT: J M HOFFMAN

INSTRUCTED BY:

SCHINDLERS ATTORNEYS

DATE OF THE HEARING:

19 April 2022

DATE OF ORDER:

19 April 2022

DATE OF JUDGMENT:

30 April 2022