



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO.: 19610/2023

In the matter between:

**RESIDENTS OF PARADISE PARK
LISTED ON ANNEXURE MARKED "Z"**

Applicants

and

**MAGNA BUSINESS SERVICES (PTY) LTD
ESKOM HOLDINGS SOC LTD**
Respondent

First Respondent

Second

Coram: Bishop, AJ

Dates of Hearing: 14 and 17 November 2023

Date of Judgment: 20 November 2023

JUDGMENT

BISHOP, AJ

[1] In this urgent application, the Applicants – the residents of an estate called Paradise Park in Hermanus – complain that their electricity is being unlawfully disconnected, and that they are being denied visitors. They initially sought relief against both the First Respondent (**Magna**) and the Second Respondent (**Eskom**). Magna is the owner of Paradise Park. The operative relief was to interdict both respondents from disconnecting the Applicants' electricity, and to interdict Magna from implementing a decision to restrict visitors.

[2] The matter has a long history. This Court granted an eviction order against some of the Applicants on 10 December 2019. An appeal against that order is pending before a Full Court of this Division. Le Grange J granted another eviction order against all the residents on 20 April 2022. A late application for leave to appeal that order is currently before the Constitutional Court.

[3] Fortunately, the details of that history need not concern me. As I narrate briefly below, the parties were agreed that the matter could not proceed and should be postponed. They were largely in agreement about how to regulate their relationships until the matter could be heard. The only issues on which they could not agree, and which I was called to decide were: the extent of interim relief the Applicants should be granted to allow them visitors; who should pay Eskom's costs; and who should pay the wasted costs of the hearing on 17 November 2023.

Brief Background

[4] I only have the Applicants' version of what occurred before me. This brief summary of what brought them to court must be understood with that in mind. There were two key events.

[5] First, on 9 October 2023, Magna sent notices to the Applicants that "electricity to the dwelling which you are illegally occupying at Paradise Park will be disconnected and the pre-paid electricity meter will be removed, with effect from 1 November 2023." The next day, the Applicants' attorneys sought an undertaking by 19 October 2023 that they would not proceed with the disconnection. Magna did not provide that undertaking.

[6] The Applicants allege that some of them require electricity for health reasons. They claim that five residents (not all of whom are applicants) use oxygen machines, and some require insulin, which must be refrigerated. They also claim that loss of electricity will affect the ability of the 23 children living in Paradise Park to study for their upcoming final exams.

[7] The application was launched on 3 November 2023. I was informed from the bar that, when the matter was argued on 14 November 2023, electricity had not been disconnected.

[8] Second, on 12 October 2023, Magna sent another notice to the Applicants. It claimed that "certain of the illegal occupiers are sneaking in new illegal occupiers into Paradise Park under the guise of visitors". The notice set out new rules to regulate visits with effect from the next day. It read:

1. *No visitors will be allowed without pre-approval.*

2. *All potential visitors will have to complete the attached “Visitors Application Form” and email it to heloisec@sablecape.co.za for approval.*
 - 2.1. *The elderly illegal occupiers making use of daily support staff, will only have to apply once and if the requirements are met, will obtain a day pass for entry of the support staff to Paradise Park.*
 - 2.2. *All other applications must reach heloisec@sablecape.co.za 24 hours in advance of the proposed visit by the visitor.*
3. *No Access will be allowed without the approval.*
4. *Only Day visitors will be allowed.*

[9] The Applicants complain that they were not consulted about these rules before they were made, and that this failure violated their right to natural justice. They describe the rules as “draconian” and contend that they interfere with the ability of carers and nurses to visit elderly or sick residents. They also claim they have a right for their loved ones to sleepover. They seek an order interdicting Magna “from interfering with and/or limiting and/or hindering the access of the visitors to Paradise Park”.

The Proceedings

[10] The matter was set down for hearing before me on 14 November 2023. The application was launched on 3 November 2023. It called on the Respondents to oppose within three days, and to file answering affidavits within five days. That

meant that the answering affidavits were, in terms of the notice of motion, only due on 16 November 2023; the day after the hearing.

[11] By the morning of the hearing, I had been informed that Eskom intended opposing the application, but had not received any answering affidavits. It seems that the reason there was no notice to oppose was that the application that was served on Eskom had no case number, and so it was not able to file its notice to oppose.

[12] At the hearing, Eskom handed up its answering affidavit and a counter-application. In its answer, Eskom contends that the relief is improperly sought against it. It has not yet taken any steps to disconnect the Applicants' electricity. A decision whether to do so must still be made. Any attempts to disconnect electricity were – it alleges – taken by Magna. In the counter-application Eskom seeks an order to compel Magna to comply with the payment conditions in the electricity supply agreement between them, to pay its outstanding arrears, and to pay Eskom monthly for electricity consumption. In short, Eskom claimed it had nothing to do with any disconnection, and that the Applicants had inappropriately pulled it into a fight between them and Magna.

[13] At the hearing, the Applicants' counsel conceded that relief should not have been sought against Eskom; it should have been directed only against Magna. It agreed to withdraw its application against Eskom. Eskom in turn agreed to remove its counter-application against Magna from the urgent roll. It would prosecute it in due course.

[14] On 15 November 2023, it seemed that only two issues remained: how to regulate the further conduct of the main application against Magna, and who should pay Eskom's costs. The issue of visitors did not arise in the debate.

[15] Counsel for the Applicants and Magna agreed to try to reach an agreement on the further conduct of the matter. The basic outline I set for the parties at the hearing was as follows:

[15.1] The matter would be heard in the first week of February when a judge could be specially allocated to hear it;

[15.2] The parties would agree on the exchange of papers to ensure that the Respondent's heads of argument would be filed at least two weeks before the hearing;

[15.3] Until the hearing, Magna would not disconnect the Applicants' electricity. The Applicants would pay for all electricity they used during that period; and

[15.4] If either party defaulted on those obligations – if Magna disconnected the electricity, or if the Applicants failed to pay – the other party would be entitled to set the matter down on the urgent roll on reasonable notice.

[16] A draft order along those lines was provided to me on the morning of 15 November 2023. Its terms are incorporated in the order I make below. The order did not mention the issue of visitors. I assumed that issue did not immediately concern the Applicants. As it turns out, I was mistaken.

[17] The Applicants and Eskom could not agree on who should pay Eskom's costs. Eskom claimed it had been wrongly dragged to court, but had no choice but to defend itself. The Applicants seemed to claim that they had merely made a mistake and should not be mulcted in costs given the constitutional rights at stake.

[18] That is where the matter ended on 14 November 2023. I had prepared a judgment addressing those two issues and planned to deliver it by the end of the week.

[19] However, on 15 November 2023, the Applicants' counsel wrote an email to my registrar. It referred to the relief his clients had initially sought concerning the restrictions on visitors and claimed the parties had been unable to agree on provisions in the draft to address the issue. He asked that I hear that outstanding issue on Friday 17 November 2023, when I was again on urgent duty, and when Magna's counsel was also available.

[20] I must say at the outset that this is not the correct way to address the problem. The Applicants had every chance to argue this issue when the application was properly on the roll on 14 November 2023. Their counsel did not do so. He did not mention it at all. Plainly the Applicants realised after the hearing that they ought to have persisted with this part of their application. But it was too late. There is no procedure that allows a litigant to simply write to a judge's registrar to seek a new hearing on an issue its counsel neglected to argue.

[21] Nonetheless, because some of the residents appear to be elderly and vulnerable, and because their constitutional rights may be at stake, I agreed to hear the Applicants again on 17 November 2023. I did so on the understanding that this

was acceptable to Magna's counsel, and that my decision would be conveyed to Magna's counsel.

[22] Magna's counsel wrote to my registrar early on the morning of 17 November 2023. She indicated that the Applicants' counsel had raised the issue of the visitors only after the draft order had been agreed to and sent to my registrar. The Applicants' counsel had then requested a complete suspension of any restrictions. Magna had refused, but was willing to agree to an alternative, which the Applicants rejected. She also – quite rightly – objected to the manner in which the Applicants' counsel had sought a second bite at the proverbial cherry. She indicated that, having agreed to a timetable to file answering affidavits for a hearing in February, her client was suddenly confronted with a hearing the next day. That was obviously prejudicial and her client was unable to prepare answering affidavits in time.

[23] That was the position when I heard the parties again on 17 November 2023. I expressed my displeasure to the Applicants' counsel about the manner in which the matter had, again, been brought before the Court. But I also indicated a preliminary view that the prohibition on visitors may be overbroad.

[24] Magna's counsel agreed, and handed up a draft order that contained the proposal her client had made to the Applicants on 15 November 2023. It provided for a range of exceptions from the general 24-hour rule. It did not provide for any exceptions from the no sleepover rule. I indicated that I appreciated the concessions, but thought that the absolute prohibition on sleepovers should be slightly relaxed to accommodate both the health requirements of some residents, and the right to family life of the residents.

[25] The parties agreed to try to seek agreement on the issue. They provided two draft orders later that day setting out where they agreed, and where they continued to differ. The differences – which I address below – were minor.

Eskom's Costs

[26] Eskom costs argues that no relief should ever have been sought against it. I was informed from the bar that Eskom's attorneys had communicated this fact to the Applicant's attorneys prior to the hearing of the matter, but had received no response. The Applicants' counsel did not dispute this. He was also forced to concede that there was no basis for relief against Eskom and to withdraw that part of the application. But this occurred only at the hearing. Eskom, unaware that the Applicants would not seek relief against them, quite reasonably instructed attorneys and counsel to attend court to protect its interests.

[27] It seems to me that there are three options on costs. First, I could grant an ordinary order of costs against the Applicants. Second, I could order the Applicants' attorneys to pay the costs *de bonis propriis*. Third, I could determine that, given the constitutional rights at stake, there should be no order as to costs.

[28] Each of these options has drawbacks. I am not convinced the Applicants' are to blame for the manner in which their relief was formulated to include Eskom. Their attorneys' apparent failure to respond to Eskom's attorneys also cannot be laid at their feet. But I am not sure that it would be appropriate for me to mulct the Applicants' attorneys in costs without at least affording them an opportunity to explain themselves. If the matter was to proceed in any event, I would probably have

ordered them to do so. But there is no longer a substantive dispute between the Applicants and Eskom and such an order may just incur further costs to determine who should pay the existing costs. Finally, the Applicants do assert certain constitutional rights. Some of them assert they have health problems that require electricity to, for example, power a machine to provide oxygen or cool insulin.¹ The supply of electricity is itself constitutionally protected, at least in some circumstances.² *Biowatch*³ would ordinarily protect them from an adverse costs award, but the manner in which this litigation was conducted may well fall into one of the exceptions justifying costs even against those asserting constitutional rights. Sachs J summarized those exceptions in these terms:

*If an application is frivolous or vexatious, or in any other way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunise it against an adverse costs award. Nevertheless, for the reasons given above, courts should not lightly turn their backs on the general approach of not awarding costs against an unsuccessful litigant in proceedings against the state, where matters of genuine constitutional import arise.*⁴

[29] Ultimately, I have decided that the application against Eskom was frivolous and manifestly inappropriate. Eskom should never have been brought to court and should not be required to pay the costs. Eskom's resources are far from limitless. When it expends resources to reasonably defend inappropriate litigation, it cannot spend those resources on more worthwhile matters.

¹ Constitution s 27(1)(a).

² *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others* [2022] ZACC 44; 2023 (5) BCLR 527 (CC); 2023 (4) SA 325 (CC).

³ *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC)

⁴ *Ibid* at para 24 (footnote omitted).

[30] What I am unable to decide is whether the Applicants or their attorneys should pay Eskom's costs. I have therefore decided to afford the attorneys an opportunity to explain why they should not pay Eskom's costs *de bonis propriis*. I must make two things clear. One: I have determined that either the Applicants or their attorneys will pay Eskom's costs. That issue is not open for re-evaluation. Two: It is not necessary for Eskom to file papers to determine who should pay its costs. It may do so. But it may also decide it does not matter who pays its costs, and that it will not spend further money on the issue.

Visitors

[31] I must first re-emphasise that the manner in which the Applicants' sought to place the issue of visitors before me again was entirely inappropriate. Counsel are required to address all issues relevant to their clients when a matter is properly set down before a court. They cannot claim another hearing when they realise the following day they failed to cover a vital issue. It is an all-too-common reality of practice that counsel realises the next day what she should have said the day before. Court would be completely unmanageable if parties were entitled to informally "re-enroll" matters because of counsel's forgetfulness.

[32] The only reason I permitted it in this case was because of my concern for some of the residents, and because constitutional rights were at stake. There are two relevant constitutional rights:

[32.1] Most obviously, the right to healthcare in s 27(1)(a). Some of the residents appear to be elderly and sickly. They require care. It is vital that any

policy regulating visitors does not interfere with them receiving the care they need.

[32.2] The Constitution guarantees a right to family life as an element of the right to dignity.⁵ That includes the right to be able to visit at least your close family members.

[33] Rights do not always impose obligations on private parties to respect those rights. Whether a right imposes a concomitant obligation on a private party is regulated by ss 8(2) and 8(3) of the Constitution. In this instance, it seems to me – at least on a prima facie basis – that Magna may have obligations under both s 27(1)(a) and s 10.

[33.1] If you as a private party control access to land, you cannot ordinarily use that power to deny people access in a way that threatens residents' health. That seems uncontroversial and Magna accepted as much.

[33.2] A private party's obligations to respect the right to family life are less obvious. Landowners can legitimately limit access for a variety of reasons. The most obvious is security, but there may be others. Magna's concern was that – while it had an eviction order – allowing free access would increase the number of unlawful occupiers and make the ultimate eviction more difficult and costly. That is a legitimate concern. But the right to family life – the right to see the members of your immediate family – is constitutionally significant. It cuts to the heart of what it is to be human. I am not convinced a landowner can discount that right without weighty justification.

⁵ See *Dawood and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC).

[34] The initial restriction on visitors was extremely blunt. It only permitted day visitors. It required all visitors to obtain pre-approval 24 hours before the visit. The only exception was for support staff for elderly residents who would only need to obtain approval once. But they would still be limited to access during the day. Of course, while the restriction was strong, nothing prevented residents from leaving Paradise Park to visit friends and family outside.

[35] It seemed to me that it would be possible for Magna to achieve its goals with a more carefully tailored restriction that would allow medical visits without notice, would allow medical visits overnight when necessary, and would allow immediate family to visit overnight. Magna had already proposed a more limited order that largely addressed these concerns.

[36] In my view, the proposal made by Magna meets these requirements. It would operate as follows:

[36.1] Any person can visit on 24 hours' written request, but must leave by 20:00.

[36.2] Parents, children and siblings will be allowed to sleep over subject to:
(a) 24 hours' notice; (b) the details of the request and the duration being provided in advance; (c) the resident must be present during the sleepover; (d) the resident is responsible for all the costs; and (e) each resident is entitled to only four guests at a time for up to three days;

[36.3] Professional carers required to sleep over night will be permitted subject to prior approval;

[36.4] Visits without notice will be permitted provided that: (a) the resident is present; (b) the access control manager has been provided with a doctor's certificate indicating the resident cannot medically visit guests elsewhere; (c) the visitor can only visit that resident; and (d) they may only visit until 20:00; and

[36.5] All medical staff shall be permitted to assist any of the applicants at any time, subject only to providing identification.

[37] As Magna has already made substantial concessions, and has not had a fair opportunity to justify its restrictions, I am extremely hesitant to order it to do anything it has not agreed to. I would only do so if the constitutional violation was manifest. With that in mind, the Applicants raise the following objections to these proposals:

[37.1] All visitors should have to provide only four hours' notice, not 24 hours. I do not think this is necessary. 24 hours is, in the circumstances, a reasonable restriction.

[37.2] Visitors should be allowed to stay until midnight. Again, I do not think the Constitution requires that. Magna's fear that visitors will become occupiers is obviously enhanced the longer they are permitted to stay.

[37.3] The Applicants' object to being responsible for the costs and expenses incurred by their guests. It is not clear what costs Magna anticipates. But it is also not clear why, if there are any costs, Magna should bear them. I see no merit in this objection.

[37.4] They seek to allow direct family members to stay overnight for 12 consecutive days, instead of three. Once more, I do not think three days is an

unreasonable line. If there are special circumstances justifying a longer visit, I would expect Magna to consider them.

[37.5] They ask for special rules for bereavements and birthdays. I do not think these are necessary. Magna's proposals are adequate to provide for these situations if they applied with some common sense by both Magna and the residents.

[38] Ultimately these are interim arrangements that will be in place until the hearing of the matter in February. They need not be perfect. I will also make it clear that the order will not prevent Magna from granting wider access than the order requires.

Conclusion and Wasted Costs

[39] The manner in which this application was litigated must be deprecated. The Applicants unnecessarily called Eskom to Court at great cost to the public purse. They came to Court without affording a proper timeline to ensure the matter could proceed on 14 November 2023. And then they came back for another attempt on 17 November 2023, having rejected an offer from Magna that largely reflects the order I now make. All of this was unnecessarily disruptive to the parties and the Court. If I did not have some sympathy for the Applicants and suspect that the fault lay with their attorneys and counsel, I would not have considered the matter so generously.

[40] That leaves the costs between the Applicants and Magna occasioned by the urgent hearing. Those will stand over for later determination, save for the costs of the hearing of Friday 17 November 2023. Those costs must be borne by the Applicants

or their attorneys. The matter ought never to have been heard over two days. It seems, on the face of it, that it was the Applicants' legal representatives' negligence that required a second hearing. However, I am again hesitant to make that finding without affording them an opportunity to be heard. I therefore make a similar order to the one I have made concerning Eskom's costs. Again, I have decided that either the Applicants or their attorneys must pay those costs. The only question is which of the two must pay.

[41] Finally, I record that, at the request of the Acting Deputy Judge President, I will be keeping the file and will hear the matter on the date to which it is postponed.

[42] Accordingly, the following order is made:

1. That the application against the Second Respondent is withdrawn.
2. That the Second Respondent's counter application is removed from the urgent roll.
3. That the present Application between the Applicants and the First Respondent is postponed for an expedited hearing before Acting Justice Bishop on **5 February 2024**.
4. That the further conduct of the matter between the Applicants and the First Respondent shall be regulated as follows:
 - 4.1. That the First Respondent shall file its answering affidavit on or before **1 December 2023**;

- 4.2. The Applicant shall file their replying affidavit on or before **15 December 2023**; and
- 4.3. The parties shall file heads of argument in terms of the Practice Directives of this Court.
5. That pending the hearing of the matter, the use of electricity at Paradise Park shall be regulated as follows:
 - 5.1. The First Respondent undertakes not to disconnect the electricity supply at Paradise Park or to remove the prepaid meters;
 - 5.2. The Applicants undertake to pay for all the electricity which they consume; and
 - 5.3. Should either party fail to comply with the above undertakings, the aggrieved party may set the matter down in the fast lane on appropriate notice to the other party.
6. That pending the hearing of the matter, the visitation of residents at Paradise Park shall be regulated as follows
 - 6.1. Day visitors can enter the Park, subject to:
 - 6.1.1. Obtaining the necessary prior consent from the First Respondent's access control manager on at least 24 hours' written request.

- 6.1.2. The written request can be made either via email or via electronic text message to the cell number of the First Respondent's access control manager.
- 6.1.3. Day visitors will not be permitted to stay over at or in the resort and must vacate the park by no later than 20:00 every evening.
- 6.2. That the only exceptions to the above arrangements will be the following:
 - 6.2.1. Parents, children and siblings of an Applicant will be allowed to sleep over at (and only at) that Applicant's residence, subject to the following:
 - 6.2.1.1. The visitation shall be arranged in line with paragraphs 6.1.1 and 6.1.2 above;
 - 6.2.1.2. The personal details of each guest and the duration of their stay shall be included in the above request;
 - 6.2.1.3. The relevant Applicant must be present at the residence during the time that the sleepover visit takes place;
 - 6.2.1.4. The relevant Applicant shall be responsible for all costs and expenses incurred by his/her guest(s);
 - 6.2.1.5. The maximum number of sleepover guests may not exceed four guests at a time; and

6.2.1.6. Each sleepover guest will be limited to three consecutive days each.

6.2.2. Professional carers, night nurses and medical professionals shall be allowed to sleepover at the residence of an Applicant requiring such additional care for that purpose subject to:

6.2.2.1. Prior arrangement with the access control manager;
and

6.2.2.2. The visitor provides proof of his or her qualification.

6.2.3. Any general visitor will be allowed without prior notice and/or consent, if the Applicant they intend to visit is:

6.2.3.1. At that stage present in the Park; and

6.2.3.2. The access control manager has been provided with a medical doctor's certificate confirming the Applicant's illness is of such a nature that it will be medically unsafe for them to leave the Park and spend time with their guests elsewhere.

6.2.3.3. The visitor shall then only be permitted to visit the specific Applicant as referred to in the medical certificate.

6.2.3.4. The visitor will be a day visitor and must leave the Park by 20:00.

6.2.4. All medical and emergency staff called to assist any of the Applicants shall be entitled to enter the Resort at any stage, subject to providing the necessary identification.

6.3. This order does not prevent the First Respondent from permitting visitors access in other circumstances.

7. Save for the costs occasioned by the hearing of 17 November 2023, the costs between the Applicants and the First Respondent will stand over for later determination.

8. The Applicants and the Applicants' attorneys are required, when they file their replying affidavit, to explain whether the Applicants should pay the Second Respondent's costs, or whether those costs should be paid *de bonis propriis* by the Applicants' attorneys.

9. The Applicants and the Applicants' attorneys are required, when they file their replying affidavit, to explain whether the Applicants should pay the First Respondent's wasted costs of the hearing of 17 November 2023, or whether those costs should be paid *de bonis propriis* by the Applicants' attorneys.

M J BISHOP
Acting Judge of the High Court

Counsel for Applicants:

Adv T Mofokeng

Attorneys for Applicants:

Sharuh Attorneys

Counsel for First Respondent:

Adv L Theron

Attorneys for First Respondent:

DVN Attorneys

Counsel for Second Respondent:

Adv S Shangisa SC

Adv F Jakoet

Adv L Rakgwale

Attorneys for the Second Respondent:

Rahman Inc