IN THE HI[illegible]H AFRICA

FREE STA[illegible]MFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/ NO**
Circulate to Magistrates:	**YES/NO**

CASE No.: **5520/2021**

In the matter between:

MAFUMA CONSULTING (PTY) LTD
Applicant

and

BRANDFORT FORUM First Respondent
INA BEUKES N.O. Second Respondent
FRANS BESTER POSTHUMUS N.O. Third Respondent
JOHAN ENGELBERTUS FOURIE N.O. Fourth Respondent
MASILONYANA LOCAL MUNICIPALITY Fifth Respondent
LEJWELEPUTSWA DISTRICT MUNICIPALITY Sixth Respondent

In re:
BRANDFORT FORUM First Applicant
INA BEUKES Second Applicant
FRANS BESTER POSTHUMUS N.O. Third Applicant
JOHAN ENGELBERTUS FOURIE N.O. Fourth applicant

and

MASILONYANA LOCAL MUNICIPALITY First Respondent
LEJWELEPUTSWA DISTRICT MUNICIPALITY Second Respondent

MAFUMA CONSULTING (PTY) LTD Third Respondent

JUDGMENT BY: VAN RHYN, J

HEARD ON: 27 JULY 2023

DELIVERED ON: 13 OCTOBER 2023

---

[1] The applicant, Mafuma Consulting (PTY) Ltd, a private company with its registered address and principal place of business at Rivonia, Gauteng, applies for the stay of the operation of the review order granted by this court on 10 March 2023 pending the final determination of the rescission application brought by the applicant under the same case number.

[2] The application is opposed by the first, second, third and fourth respondents (the "opposing respondents"). The first respondent is Masilonyana Brandfort Forum, an association with perpetual succession which conducts its activities as the Masilonyana Brandfort Forum Trust with registration number IT00191/2021(T). The trustees of the Trust, as per the Letter of Authority issued by the Master of the High Court on 13 August 2021, are Ina Beukes, Johan Engelbertus Fourie and Frans Bester Posthumus. The second respondent is cited as Ina Beukes N.O, the third respondent is Frans Bester Posthumus N.O. and the fourth respondent is Johan Engelbertus Fourie N.O.

[3] The fifth respondent is Masilonyana Local Municipality (the "Municipality"), a municipality contemplated in section 2 of the Local Government: Municipal Systems Act operating under the care of the municipal manager with its offices situated at Welkom, Free State Province. The sixth respondent is Lejweleputswa District Municipality, a municipality contemplated in section 2

of the Local Government: Municipal Systems Act. The fifth and sixth respondents did not oppose this application.

[4] The applicant seeks an order in the following terms:

"1. That the execution and operation of the order of Loubser J dated 10 March 2023 is stayed pending the finalisation of the rescission application brought under the same case number 5520/2021 on 23 March 2023;

2. Any enforcement proceedings of the court order by Loubser J dated 10 March 2023 are suspended in terms of the Court's general powers to stay enforcement proceedings, alternatively in terms of rule 45A of the Uniform Rules of the Court."

[5] The background facts relevant to this application are the following: On 1 September 2021 the applicant was awarded a service level agreement (SLA) on a risk basis to carry out the installation of pre-paid electricity meters within the jurisdiction of the Municipality comprising of the following towns; Theunissen, Winburg, Verkeerdevlei and Brandfort. The applicant contends that its ability to fulfil the requirements of the tender were fully assessed as part of a transparent and fair tender process.

[6] The installation of the pre-paid meters progressed in the towns mentioned except in Brandfort where the process met with opposition by way of a petition signed by some of the residents. The opposing respondents on an urgent basis, sought an interim interdict pending the finalisation of a review and/or declaratory orders pertaining to the unlawful installation and sale of prepaid electricity meters. The urgent application was opposed by the applicant, the Municipality and the Lejweleputswa District Municipality, all three parties being represented by Kruger Venter Inc. The interim interdict was granted on 5 November 2021.

[7] The Municipality's application for leave to appeal against the interdict was dismissed as well as its petition to the Supreme Court of Appeal. The

applicant however continued to install prepaid meters in contempt of the interdict. On 11 August 2022 the court declared the applicant and Mr Manyike, who deposed to the answering affidavit on behalf of the applicant in the contempt proceedings, to be in contempt of court. The application for leave to appeal against the contempt order was dismissed by the court on 19 August 2022. Again Kruger Venter Inc. acted on behalf of the applicant and Mr Manyike.

[8] The applicant and Mr Manyike thereafter applied to the Supreme Court of Appeal for leave to appeal. The Supreme Court of Appeal dismissed the application for leave to appeal on 9 February 2023. The opposing respondents issued and served the review application within the 15-day period. The review was heard on 21 February 2023 by Loubser J and Jonase AJ. Judgment was handed down on 10 March 2023.

[9] The review court, *inter alia* ordered, that:

9.1. The Municipality and/or the Lejweleputswa District Municipality are interdicted and restrained from installing any pre-paid electricity meters in its jurisdiction and from selling electricity by means of prepaid metering before duly and lawfully adopting bylaws authorising the supply and sale of electricity by means of prepaid metering, alternatively amending or supplementing the existing bylaws to authorise the supply and sale of electricity by prepaid metering and/or;

9.2 The Municipality's council duly adopt a resolution to supply and sell electricity by means of prepaid meters;

9.3 The transparent determination of tariffs/charges for the distribution and sale of prepaid electricity must be adhered to, and/or

9.4 If an external service provider is to be appointed to render service to the Municipality to install and/or sell prepaid electricity meters, then a competitive bidding process in terms of the said Municipality's Supply

Chain Management Policy has to be followed, alternatively a lawful procurement process must be complied with;

9.5 The appointed service provider has to comply with the registration requirements for the supply and/or sale alternatively resale of electricity in terms of the Electricity Regulation Act[1] ("ERA"), alternatively due and proper compliance with the provisions of section 7 read with Schedule 2 of the ERA for exemption of the service provider for the supply, sale, resale, trading in electricity.

9.6 The Municipality is ordered to forthwith remove the prepaid meters already installed and to convert to the supply of electricity by way of conventional metering pending compliance with 9.1 to 9.5 above;

9.7 The appointment of the applicant by the Municipality to install and administer the supply, alternatively the sale, alternatively the supply and sale of prepaid electricity to consumers in Brandfort is reviewed and set aside;

9.8 It is declared that the service level agreement concluded between the Municipality and the applicant is invalid, void and unlawful and the service level agreement ("SLA") is set aside.

[10] This application is brought in terms of the provisions of Rule 45A of the Uniform Rules of Court ("Rule 45A"), alternatively the common law, for the suspension of the operation and execution of the order granted by Loubser J (Jonase AJ concurring) in the review application brought by the opposing respondents. It is contended by the applicant that the review order is the product of serious errors of fact, of law and demonstrable bias or ulterior purpose from the part of the first respondent.

[11] It is argued by the applicant that the termination of the SLA will have disproportionate and adverse effects on businesses and private individuals

[1] Act 4 of 2006.

who diligently purchase their electricity and rely on the prepaid meters for the supply of electricity. The applicant issued its rescission application to be enrolled for hearing on 13 April 2023, however due to the opposition in the rescission application, the matter has not been enrolled for hearing. In the event of the implementation of the orders granted by the review court, it would have far-reaching consequences, which would include complete discontinuation of all electricity services, not only at Brandfort but also in Winburg, Verkeerdevlei and Theunissen.

[12] On behalf of the applicant it is contended that there is no reason for the urgent implementation of the review order on the basis that the respondents, more specifically the Municipality, have not provided any indication regarding the execution thereof and what the way forward entails. Therefore, there is no reason to "punish" the applicant by implementing the orders prior to the determination of the rescission application. The relief should be granted in this instance since the possibility exists that the order on which the execution is predicated "…may be prejudicial to the applicant who has great prospects of success in the rescission application".

[13] The application is opposed by the opposing respondents on the grounds that the applicant has, firstly, failed to make out a case for the relief sought and, secondly, is not entitled to the relief sought. The applicant has delayed the finalisation of the rescission application and has no standing to request any indulgence from the court much less that any discretion be exercised in its favour.

[14] On behalf of the opposing respondents, Mr Snellenburg SC argued that the applicant did not file an answering affidavit in the interdict proceedings but filed a confirmatory affidavit deposed to Mr Manyike, who also deposed to the founding affidavit in this application. Yet, the applicant continued to install prepaid meters in contempt of the interdict granted by Opperman J on 5 November 2022. The opposing respondents were constrained to bring contempt proceedings after several attempts to get the applicant to refrain from its contemptuous conduct were unsuccessful.

[15] The applicant furthermore did not oppose the review application. The review application was heard on this court's unopposed roll subsequent to the Municipality filing a notice to abide by the courts decision. The applicant furthermore has no prospects of success in the rescission application.

[16] It is therefore contended on behalf of the opposing respondents that it is evident from the background facts relevant to this matter, that the applicant's conduct in these matters have been *mala fide*. The applicant has approached the court with "dirty hands" as it has contravened the interdict granted by this court and cannot expect to receive sympathy from the court.

[17] The review application and thus the order which the applicant seeks to suspend, also concerns the conduct of the Municipality in procuring the unlawful installation of prepaid electricity meters as well as the unlawful sale of electricity by means of prepaid electricity metering within Brandfort. The Municipality is constrained to act in accordance with the governing legislation, being the Constitution of the Republic of South Africa,[2] the Local Government: Municipal Systems Act[3] (the "Systems Act') and the ERA.

[18] It was not disputed in the review application that:

18.1 no public participation process was followed prior to commencing with the installation of prepaid electricity meters;

18.2 no bylaws were adopted by the Municipality to provide for the metering and sale of electricity by means of prepaid meters;

18.3 no resolution was taken by the municipal council to migrate from the conventional method of supplying, metering and sale of electricity to prepaid supply, metering and sale of electricity;

18.4 none of the peremptory requirements for the appointment of the applicant as service provider in accordance with the criteria and processes set out in the Systems Act were followed;

---

[2] 1996.
[3] Act 32 of 2000.

18.5 the Municipality failed to determine and/or adopt tariffs for the sale of prepaid electricity nor included the same in a duly adopted and implemented tariff policy as envisaged in the Systems Act;

18.6 the National Energy Regulator (Nersa) never approved the sale of electricity at a tariff were no facts underlying the tariff was known and not contained in a tariff policy;

18.7 the Municipality relinquished control of the payments for the prepaid electricity to the applicant contrary to the prohibition contained in the Systems Act.

[19] From the contentions made on behalf of the opposing respondents, the findings made by the review court and the fact that the Municipality abided by the review court's decision, it is evident that the applicant is not able to address the unlawful and materially flawed nature of the Municipality's conduct in the appointment of the applicant as service provider to install prepaid electricity meters.

[20] The applicant moves for the rescission of the whole order of the review court whilst it has no standing to move for the rescission of those orders directed at the Municipality and which the Municipality gave notice they would abide by. On this point alone the application for the stay of the orders granted by the review court should fail.

[21] The applicant's application for the rescission of the review court's order is based upon the provisions of Rule 42(1)(a), alternatively in terms of the common law, *inter alia,* on the basis that the applicant was not notified of the review application by Kruger Venter Inc., its former attorneys of record. However, Kruger Venter Inc. was appointed to act on behalf of Mr Manyike to deal with the contempt of court application and the appeal thereto. It is argued that the notice to abide filed by the Municipality in the review application was done without the knowledge of the applicant in this matter. The point made by the applicant is that the said attorneys merely acted on its behalf in certain of the litigation conducted between the parties and not in respect of all the applications or matters.

[22] It is the applicant's contention that it should have been present at the review proceedings and due to not obtaining any knowledge of the review proceedings, material facts were withheld from and/or deliberately misrepresented to the court by the opposing respondents. From the contents of the judgment by the review court it is however clear that Adv. Grewar, a member of the local Society of Advocates, appeared on behalf of the applicant and placed on record that the application is not opposed by the applicant. Whatever the situation, it will be dealt with at the hearing of the application for the rescission of the review court's order.

[23] From the" Record of Decision" in the review application it is evident that the tender was for transactional advisory services for the Lejweleputswa Development Agency. The tender was not for the installation of prepaid meters in the jurisdictional area of the Municipality. The applicant did not provide any evidence that it tendered for and was appointed to install prepaid electricity meters nor that the Municipality did not 'piggyback' on the existing contract in terms of the provisions of Regulation 32, but that the Municipality concluded a direct contract with the applicant. Due to the failure of the Municipality to follow due process the supply and sale of prepaid electricity constitutes unlawful conduct.

[24] A court's decision is operational and executable once it is handed down by the court. The court may, on application, suspend the operation and execution of any order for such period as it may deem fit.[4] The court has, apart from the provisions of Rule 45A, a common law inherent discretion to order a stay of execution and to suspend the operation of an order granted by it. The power to do so will be exercised sparingly and only in exceptional cases. Where an application to vary, rescind or set aside a court's decision is instituted, the application does not automatically suspend/stay the court's order.

[25] In **Gois t/a Shakespeare's Pub v Van Zyl and Others**[5] the court held that the stay of execution will be granted where the underlying causa is the subject

[4] Rule 45A of the Uniform Rules of Court.
[5] 2011 (1) SA 148 (LC).

matter of an ongoing dispute between the parties. It was further held that an application for review qualifies as an attack on the underlying causa. As a general rule the court will grant a stay of execution where real and substantial justice requires such a stay or where injustice will otherwise be done.

[26] The review court held that the Municipality failed to act in accordance with the law. The procurement process was not followed by the Municipality and from the documents supplied for purposes of the review proceedings, it is evident that the tender pursuant to which the applicant was appointed, was not for the installation of prepaid electricity meters. The SLA concluded between the Municipality and the applicant was contrary to the empowering provisions of the applicable legislation and was thus unlawful and unconstitutional.

[27] In **Lavelikhwezi Investments (Pty) Ltd and Others v Mzontsundu Trading (Pty) Ltd and Others**[6] the court held that:

> "The whole constitutional framework and the rule of law have, as their pillars, the unhindered execution of court orders and obedience to them by all citizens, especially those to whom they apply. The force of court orders lies not in their being issued but in their execution once they are issued. It is this principle that is liable to be tempered with under strictly circumscribed and exceptional circumstances and for very valid reasons. That this is so appears from the Constitution itself."

[28] The principle of legality applies to government institutions and governed alike. The law cannot and does not countenance an ongoing illegality. To grant the relief sought by the applicant would be in contravention of legislative prescripts. I am of the view that the non-observance or omission to comply with the law, be it law based on common law or statutory provision or even regulations promulgated thereunder, remains unanswered by the applicant in that these challenges have not been seriously grappled with in its founding, nor in its replying affidavit. It has merely stated that the applicant's ability to fulfil the requirements of the tender were fully assessed as part of a transparent and fair tender process. This is not what the review court found.

---

[6] (1043/2022) [2022] ZAECMHC 6 (12 April 2022) at [18].

[29] In its founding affidavit the applicant contends that it is not asserting a right in the strict sense, but a discretionary indulgence based on the apprehension of justice to all the parties who will be affected by the adverse effects that the termination of the SLA will have. The contention is therefore that the termination of the SLA by the review court during January 2023 resulted in the interruption and/or termination of the electricity supply to residents of Brandfort and the other towns within the Municipality's jurisdiction.

[30] In their answering affidavit this contention is answered by stating that the conventional electricity supply and metering will simply be followed by the Municipality and no interruption of the electricity supply will occur. In any event, the review order was handed down on 10 March 2023 and the opposing respondents would have been able to ascertain whether any such devastating results ensued by the time of deposing to the answering affidavit on the 4th of July 2023. None was mentioned. On this ground therefore the application to stay or suspend the execution and operation of the order by Loubser J should fail.

[31] The doctrine of "unclean hands" is a legal principle in common law and is relied upon when a party seeking relief from a court has acted unethically or unlawfully in relation to the matter at hand. The unclean hands doctrine is used as a defence against such a party's claims. The purpose of the unclean hands doctrine is to maintain fairness and integrity in the legal system and is based on the principle that a party should not be allowed to benefit from their own wrongdoing or unlawful behaviour.

[32] In their answering affidavit the opposing respondents referred to several instances where the applicant acted *mala fide* i.e., by refusing to give an undertaking to stop the installation of prepaid electricity meters pending finalisation of the interdict and review applications. It is averred that the applicant actually increased the installation of prepaid meters during this period. The applicant furthermore did not oppose the interdict proceedings and elected to file a confirmatory affidavit deposed to by Mr Manyike. Subsequent to the interim interdict being granted on 5 November 2021, the

applicant continued to install prepaid meters in contempt of the interdict with the result that the court declared the applicant and Mr Manyike to be in contempt of court and sentenced them.

[33] Mr Snellenburg SC argued that the applicant has absolutely no standing to request any indulgence from the court much less that any discretion be exercised in its favour as a result of its contemptuous behaviour and dirty hands with which the applicant now approaches this court for relief.[7] I agree. This is yet a further aspect which has to be taken into consideration in weighing-up all the relevant facts and factors when called up to exercise a discretion whether considerations of real and substantial justice are sufficiently engaged to warrant suspending the execution of the order of the review court.

[34] The failure of the applicant to proceed with the rescission application is a further factor to be considered. The judgment in the review application was handed down on 10 March 2023. The rescission application was issued on 23 March 2023. The answering affidavit was filed on 24 April 2023. At the hearing of this matter, on 27 July 2023, the applicant's replying affidavit had not yet been filed. Certain defects in the application was objected to by the opposing parties, which necessitated further applications by the applicants.

[35] On behalf of the opposing respondents it is contended that there is no reason to justify the delay in the finalisation of the review application. The applicant has evidently failed to file its replying affidavit within the *dies* allowed in terms of the Rules of Court. The applicant does not provide any reasonable explanation for the delay, however, relies upon the injustice and the disproportionate and adverse effects that the termination of the SLA will have in the event of this application being dismissed.

[36] The appointment of the applicant by the Municipality was unlawful. South Africa is a State founded on the supremacy of the Constitution and the rule of law. All the organs of state have the responsibility to ensure that processes

[7] At Khaile v Administration Board, Western Cape 1983 (1) SA 473 (C) at 480.

undertaken under auspices of programs set out by such organs of state, are undertaken in accordance with the law. Should circumstances, therefore, arise which excite suspicion about the legality of any process undertaken under auspices of an organ of state, the organ of state concerned has the responsibility to be responsive to such suspicious circumstances. The fact that the Municipality initially, filed a notice of its intention to oppose the review application and then, without filing an answering affidavit, thereafter abided with the court's decision, is an unequivocal indication of the Municipality conceding to the submissions and facts tendered by the applicant (being the opposing respondents) in the review application.

[37] The applicant is not entitled to seek the rescission of the whole of the order granted by the review court on the basis that the Municipality obviously conceded that it did not follow the correct procedure to implement the migration and sale of electricity by prepaid meters. The relief sought by the applicant is therefore not competent. The application by the applicant is self-serving.

[38] The Constitution and the rule of law establish a strong principle supporting the sanctity of valid and binding court orders. Furthermore, the persons in whose favour such orders have been issued have the right to enforce them.[8] I am of the view that, based on the information available before this court, the rescission application has no prospects of success.

[39] On the facts of this matter I am not persuaded that considerations of real and substantial justice are sufficiently engaged to warrant the suspension of the execution of the order granted by the review court.

[40] The applicant contends that it not only litigates for the vindication of its constitutional rights, but also those of the citizens of the towns affected by the order granted by the review court. As a result, the Biowatch principle should apply in the event of this application being dismissed. I am not convinced that the Biowatch principle applies when private parties, such as the applicant and

[8] MEC for Public Works, Eastern Cape and Another v Ikamva Architects CC 2023 (2) SA 514 (SCA) at para 33.

the opposing respondents are involved in litigation. In any event I am also not convinced that the present application relates to constitutional litigation. There are no reasons to deviate from the general rule that costs follow the result.

[41] **ORDER:**

1. The application is dismissed with costs.

_____

I VAN RHYN
JUDGE OF THE HIGH COURT,
FREE STATE DIVISION, BLOEMFONTEIN

On behalf of the Applicant:	**ADV. M MATOME**
Instructed by:	WEBBERS ATTORNEYS BLOEMFONTEIN
On behalf of the 1ST-4TH Respondents:	**ADV. N SNELLENBURG SC**
Instructed by:	SYMINGTON DE KOK ATTORNEYS BLOEMFONTEIN