



Reportable:	YES / <u>NO</u>
Circulate to Judges:	YES / <u>NO</u>
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>

**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

CASE NO: 1339/2024

In the matter between:

MAQUASSI HILLS LOCAL MUNICIPALITY

Applicant

AND

HERO TELECOMS (PTY) LIMITED

Respondent

Heard: 26 MARCH 2024

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be **4 APRIL 2024**

ORDER

I make the following order:

1. The application in terms of Part A of the Notice of Motion is dismissed.

2. The applicant is ordered to pay costs which shall include costs of senior counsel.

JUDGMENT

DJAJE DJP

[1] The applicant approached this court on an urgent basis seeking an order against the respondent in part A of the notice of motion as follows:

- “1. *That the Applicant’s non-compliance with the Uniform Rules of the above Honourable Court with regards to the forms, service and the time limits be condoned and that this application be heard as one of urgency in terms of the provisions of Rule 6(12) (a).*
2. *Pending the final determination of the review application in Part B;*
 - 2.1 *The Respondent be interdicted and restrained from constructing; erecting or installing telecommunications infrastructure Wolmaransstad;*
 - 2.2 *The Respondent be ordered to remove all telecommunications infrastructure unlawfully constructed, erected or installed in Wolmaransstad;*
 - 2.3 *Directing that the costs of this application be paid by the Respondent;*
3. *Granting the Applicant leave to supplement its papers in respect of the relief sought in Part B;*
4. *Granting the Applicant further and alternative relief as this Honourable Court may deem fit.”*

- [2] In part B of the notice of motion the applicant seeks an order to review and set aside the decision to approve the Wayleave application of the respondent and that the permission granted to undertake the works by the respondent be declared unlawful and set aside.
- [3] Both the applicant and respondent have a brief history in relation to the installation of optic fibre. In **2018** the respondent had received an approval from the applicant to install optic fibre within the Maquassi Hills Local Municipality. The installation was done in Wolmaransstad and was completed in **November 2019**. In **April 2022** respondent as a wireless internet service provider applied for the installation of an electronic communication network and electronic communication facilities at certain areas of the Maquassi Hills Local Municipality. On **6 April 2022**, the respondent received a letter from the Director Technical Services of the applicant. The letter was as follows:

“ *MAQUASSI HILLS LOCAL MUNICIPALITY*
“Diamond of the Platinum Province”

Private Bag X3
19 Kruger Street
WOOLMARANSTAAD
2630

6 APRIL 2022

Hero Telecoms (Pty) Ltd
97 Ian Street
Flimieda

Klerksdorp
2570

Attention: Albert Hurter

WAYLEAVE APPROVAL INSTALLATION OF AN ELECTRONIC COMMUNICATIONS NETWORK AND ELECTRONIC COMMUNICATIONS FACILITIES- MAQUASSI HILLS ALL AREAS

The Municipal would like to acknowledge your application for Wayleave for the following areas:

1. Wolmaranstaad/ Tswelelang
2. Leeudoringstad/ Kgakala
3. Leeudoringstad town
4. Wolmaranstaad ext 10, 13, 15 & 17

Unfortunately, the municipality does not have records of it's A Built records of the Project Area in question. However, the Superintendents and Divisional Head of for Water Sanitation have a combined institutional memory of 70 years. The following personnel would assist in identifying existing citizens physically on site.

Name	Designation	Contact Number:
James Muller	Divisional Head: Water and Sewer	060 963 3079
Nico Morris	Superintendent: Sewer	073 465 5486
Johannes Phutiagae	Acting Divisional Head: Electricity	083 318 3225"

[4] Subsequent to the receipt of the letter by the respondent, the following response was addressed to the applicant:

To: Mr Nelson Mwase

Municipality: Maquassi Hills

Ref: 13/3/12/N.MWASE

RE: CONFIRMATION OF ACCEPTANCE OF THE WAYLEAVE:

Leeudoringstad, Kgakala, Tswelelang & Tswelelang Ext 10, 13, 15 & 17

HeroTel, herewith, confirms receipt of the Way Leave Approval Letter (Dated: 6 April 2022).

HeroTel, furthermore, confirms that we accept your Wayleave approval letter and ensures that we will comply with the parameters established therein.

Please note that the relevant Departments/ Directorates will be informed shortly before the construction starts.

Regards

Annette Swart

(Wayleave Administrator)

Ruan van Tonder (Network Fibre Planner)"

- [5] According to the applicant, the letter by Mr Mwase, the Director Technical Services was not an approval for Wayleave and as such no agreement was entered into with the respondent. The applicant submitted that the approval for such an application should be made by the Municipal Manager and not the Director Technical Services. For that reason, Mr Mwase had no authority to appoint the respondent. There were no steps taken by the applicant after the correspondence of **April** and **May 2022** until in **November 2022** when the applicant became aware of construction by the respondent in Leeudoringstad which falls under the municipal boundary of the applicant. On **22 November 2022** a letter was addressed to the respondent by the acting Municipal Manager requesting them to immediately halt the construction of the telecommunication infrastructure in Leeudoringstad. The reason

for such was that the respondent had not been appointed by the Municipality to do the construction on municipal land.

- [6] The Municipal Manager on **8 December 2022** addressed a second letter to the respondent authorising the respondent to proceed with the activities in Leeudoringstad only until completion. The applicant has not attached any response from the respondent in respect of that correspondence of **8 December 2022**. The applicant submits that on **23 February 2024** they discovered that the respondent had gone on and was installing telecommunication infrastructure in Wolmaransstad despite the letter of **December 2022** to only complete the work in Leeudoringstad as there was no authorisation. This resulted in a letter of demand addressed to the respondent to desist from proceeding with the construction in Wolmaransstad and remove all installations of the telecommunication networks and facilities already erected.
- [7] In response to the letter of demand the respondent addressed a letter to the applicant denying any unlawful conduct and further that it was not constructing any new network infrastructure within the municipal road reserve. The respondent explained that it was only running cables from poles situated within the road reserve to the homes of its existing clients as well as maintaining its existing network. As a result, there was no basis to demand that there should be a removal of all infrastructure installed.
- [8] The applicant has now launched this application pursuant to the response received from the respondent.

[9] The respondent raised points *in limine* in opposing this application. These are lack of jurisdiction, lack of urgency and non-joinder.

Jurisdiction

[10] This point *in limine* goes to the heart of this application as it deals with the cause of action. The respondent argued that its principal place of business is in Stellenbosch and that there is no cause of action that arose within this court's area of jurisdiction to establish jurisdiction. The respondent's argument is based on the fact that according to it, there is no construction of telecommunication infrastructure by the respondent in Wolmaransstad as alleged by the applicant. It was submitted that the **2018** Wayleave approval for infrastructure installation in Wolmaransstad is not a subject of this application and according to the respondent, that was the last installation done in Wolmaransstad. As a result, there is no activity in this court's area of jurisdiction.

[11] In contention the applicant maintained that there was construction by the respondent as noticed on **23 February 2024** in Wolmaransstad and hence this application.

[12] The applicant has attached photographs of wires on poles and a report of inspection dated **8 March 2024**. In terms of the report the scope of inspection is stated as follows: "*The inspection covered the entire town of the municipality and the surrounding areas to analyse the installations of the fibre network lines installed by Herotel and the streetlights poles of the municipality without authorisation.*" At the end of the report the results of the inspection are recorded as follows:

“7.1 We confirm that we have conducted an inspection with Mr Shakes Phutiagae and Mr Petrus Makaile, the officials of the Municipality, inter alia at the following locations in the Maquassi Hills Local Municipality, Wolmaransstad area:

- a) Piet Rietiff Street*
- b) Joubert Street*
- c) Geyer Street*
- d) Leask Street*
- e) Kruger Street*
- f) Broadband Street*

7.2 The inspection we conducted revealed that Herotel has unlawfully installed the wires for fibre network at all the street poles of the Municipality in contravention of the applicable legislations. We noticed that some of the street poles are destroyed by the abnormal trucks as a results of the overheads wires installed by Herotel. The abnormal trucks dragged the wires which resulted in damaging the street lights pole. Pictures taken evincing the skewed street poles are attached hereto. The overheads wires are installed below the prescribed height in contravention of the Electronic Communications Act and exposes the Municipality to a serious risk.”

[13] The applicant’s case is that the installations forming the subject of this application were noticed in **February 2024**. However, this report does not contain any detail of the date on which the inspection was done and whether such inspection did not include the areas under the **2018** Wayleave. It is not disputed that the respondent installed infrastructure as a result of the **2018** Wayleave in Wolmaransstad. The difficulty however is that this application lacks the specific areas where the installations were done and where the new unlawful installations are. This goes to the heart of the cause of action.

[14] Section 21 of the Superior Courts Act 10 of 2013 in dealing with jurisdiction of the High Courts states that:

“21. *Persons over whom and matters in relation to which Divisions have jurisdiction*

- (1) *A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power—*
 - (a) *to hear and determine appeals from all Magistrates’ Courts within its area of jurisdiction;*
 - (b) *to review the proceedings of all such courts;*
 - (c) *in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.*
- (2) *A Division also has jurisdiction over any person residing or being outside its area of jurisdiction who is joined as a party to any cause in relation to which such court has jurisdiction or who in terms of a third party notice becomes a party to such a cause, if the said person resides or is within the area of jurisdiction of any other Division.*
- (3) *Subject to section 28 and the powers granted under section 4 of the Admiralty Jurisdiction Regulation Act, 1983 (Act 105 of 1983), any Division may issue an order for attachment of property to confirm jurisdiction.*

[15] In order for this Court to have jurisdiction in this matter, the respondent should be in its area, or the cause of action should have arisen in this Court's jurisdiction. The respondent's place of business is not in this Court's' jurisdiction. The next question is whether there is a cause of action. According to the applicant there is activity by the respondent in Wolmaransstad which falls in this Court's jurisdiction and the respondent argued that there is none and thus arguing that there is a dispute of fact.

[16] There are two versions by the parties herein that creates a material dispute of fact. In dealing with the issue of a genuine dispute of fact the following was said in **Wightman t/a JW Construction v Headfour (Pty) Ltd and another 2008 (3) SA 371 (SCA)**:

"[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are , in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984 (3)SA 623(A) at 634E-635C.

[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the

knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say “generally” because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision.”

[17] Rule 6(5)(g) of the Uniform Rules of Court provides that:

“6 Applications

(5)...

(g) *Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.”*

[18] The applicant in approaching this Court fails to give a full disclosure of the installations which form the subject of this application in relation to those of the **2018** Wayleave. The respondent disputes any installations based on the **2022** Wayleave approval in Wolmaransstad. In view of the above authorities, there is a material dispute of fact that cannot be resolved on the papers. In my view, the applicants have failed to demonstrate that a cause

of action arose within this Court's jurisdiction and on this point alone, the application stands to be dismissed.

Urgency

[19] In terms of Rule 6(12) of the Uniform Rules of Court an applicant in an urgent application must demonstrate the circumstances that render the matter urgent and absence of substantial redress in due course. **See: East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others (11/33767) 2011 ZAGPJHC 196 (23 September 2011).**

[20] The applicant argued that the urgency of this matter was triggered on **23 February 2024** when it discovered the unlawful activities of the respondent installing telecommunications infrastructure in Wolmaransstad. Upon that discovery the applicant acted immediately by engaging the respondent and subsequently launching this application. The history between the parties is that the Wayleave approval which is a subject of these proceedings was granted in **2022**. In **May 2022** the applicant was aware that the respondent regarded such approval as valid and continued to act on it, hence the installations in Leeudoringstad. In **November 2022** the applicant realised that the respondent was acting on the approval and decided to authorise the works to continue in Leeudoringstad. However, despite having realised that the **2022** approval was not valid, the applicant did not take any steps to have such approval declared invalid and unlawful.

[21] The applicant further argued that it will not be able to obtain substantial redress in due course as the respondent will complete the installations without the required authority. The applicant's case is that the respondent is of the view that they have a Wayleave that is valid and as such will continue with the installations if the interdict is not granted. Further that the connections by the respondent are low hanging and pose a risk to motorists in the event of lightning. This argument goes to the heart of lack of specifications by the applicant as to which connections are referred to and how they pose a risk to motorists and businesses. In my view the urgency herein is self-created, and the application stands to be struck off the roll due to lack of urgency.

[22] On the merits of the matter the applicant seeks an interim interdict in respect of prayer 2. It is trite that a party seeking an interim interdict must satisfy the four requirements being *prima facie* right, irreparable harm, balance of convenience and absence of a suitable remedy. The Constitutional Court in the matter of **South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others 2014 (6) BCLR 726 (CC);2014 (4) SA 371 (CC)** at par 24 held that:

“[24] Once we grant leave to appeal out immediate concern becomes whether we should grant temporary relief. Foremost is whether the applicant has shown a prima facie right that is likely to lead to the relief sought in the main dispute. This requirement is weighed up along with irreparable and imminent harm to the right if an interdict is not granted

and whether the balance of convenience favours the granting of the interdict. Lastly, the applicant must have no other effective remedy.”

[23] The applicant argued that it has a *prima facie* right which ensures that there is no authorisation for the respondent to undertake any work in Wolmaransstad. The argument by the applicant was that it stands to suffer irreparable harm as the respondent will continue with the unlawful construction and the consequences cannot be reversed as there are safety risks. Firstly, as stated above the applicant has failed to show how the wires referred to pose any risk and if indeed those are the wires installed by the respondent in **February 2024**. Further to that, the **April 2022** approval granted to the respondent still stands until it is set aside by court. The applicant through the Municipal Manager acted on such approval when authorising the continuation of the works in Leeudoringstad. The requirement of irreparable harm has not been established.

[24] The applicant argued that the balance of convenience favours the granting of the interim interdict as the construction should only be carried out where there is the required authority. Further that it has no alternative remedy as the respondent insists that it has a Wayleave approval granted in **April 2022**. The respondent has throughout correspondence stated that there is no construction in Wolmaransstad. The applicant has taken no steps to have the Wayleave approval of **April 2022** set aside and in fact granted authorisation for completion of work in Leeudoringstad based on the very same approval. The applicant in prayer 2.2 is asking for the removal of the unlawfully constructed telecommunications infrastructure erected in Wolmaransstad. This is not an interim

relief sought by the applicant. It is a final relief and the requirements for an interim relief are not applicable. The applicant has not made out a case for an interim relief on any of the prayers sought and this application stands to be dismissed.

[25] It is trite that costs follow the result and I see no reason why the applicant should not be ordered to pay costs in this application which costs shall include costs of senior counsel.

Order

[26] In the result the following order is made:

1. The application in terms of Part A of the Notice of Motion is dismissed.
2. The applicant is ordered to pay costs which shall include costs of senior counsel.

J T DJAJE
DEPUTY JUDGE PRESIDENT
NORTH WEST HIGH COURT, MAHIKENG

APPEARANCES

DATE OF HEARING : 26 MARCH 2024

JUDGMENT RESERVED : 26 MARCH 2024

DATE OF JUDGMENT : 4 APRIL 2024

COUNSEL FOR THE PLAINTIFF : ADV H MUTENGA

COUNSEL FOR THE DEFENDANT : ADV N KONSTANTINIDES SC