

SOUTH AFRICA / JUDGMENT

Limpopo Legal Solutions and Others v Vhembe District Municipality and Others (430/2016) [2016] ZALMPTHC 20 (2 June 2016) [2016] ZALMPTHC 20

COURT

Limpopo High Court, Thohoyandou

BEFORE

Lamminga

CASE / FILE NUMBER

430/2016

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

LIMPOPO

LOCAL DIVISION, THOHOYANDOU

Case

No.:430/2016

Reportable:

Yes

Of

interest to other judges: Yes

Revised.

2

June 2016

In

the matter between

LIMPOPO

LEGAL

SOLUTIONS 1st

Applicant

MALULEKE

TINTSWALO

SANNIE 2nd

Applicant

CHAVANE

SINDILE 3rd

Applicant

MAPONYA

MATODZI
SARAH 4th
Applicant
and
VHEMBE
DISTRICT
MUNICIPALITY 1st
Respondent
MINISTER
OF ENVIRONMENTAL
AFFAIRS 2nd
Respondent
THULAMELA
MUNICIPALITY 3rd
Respondent

JUDGMENT

LAMMINGA AJ

[1] The Applicants brought an application on an urgent basis, for a rule nisi against the First, Second and Third Respondent for an order in the following terms:

1.1 Directing and/or compelling the First and/or Second and/or Third Respondent or anyone acting on their behalf to forthwith or here and now dispatch a team of contractors specializing in water and sewerage reticulation to provide an immediate remedy for the burst sewerage pipeline(s) in Section B, Malamulele in order to preserve the environment;

1.2 Directing and/or compelling the First and/or Second and/or Third Respondent to forthwith or here and now, attend to the drainage of the ground pools caused by the leakage from the sewer pipeline(s) to give effect to the provisions of Section 24 of the Constitution Act 108 of 1996;

1.3 Directing and/or compelling the First and/or Second and/or Third Respondent to forthwith or here and now, provide a permanent solution to avoid reoccurrence of the current situation or future sewer pipeline(s) burst or leakage in order to protect the environment and natural resources and to do reasonably so, within their available means and resources;

1.4 Directing and/or compelling the First and/or Second and/or Third Respondent to forthwith or here and now, constantly maintain the sewer system in order to ensure a non-harmful environment for the benefit of present and future generations of women, children, disabled or vulnerable groups within the members of the community of Malamulele, Section B, through reasonable legislative and other measures that prevents pollution and ecological degradation;

1.5 Alternatively, directing the First and/or Second and/or Third Respondent to give effect to section 2(2) of the National Environmental Management Act 107 of 1998, pending referral to internal remedies if any, in line with the provisions of the National Environmental Management Act 107 of 1998.

The Applicants also pray for costs of the application, if opposed.

[2] The First and Third Respondents filed Notices to Oppose and the Applicants indicated they would not seek orders against Second and Third Respondents. Applicants conceded that there had been misjoinder in respect of Second Respondent and elected not to pursue and order against Third Respondent due to First Respondent being responsible for water and sanitation in the affected area.

[3] First Respondent filed an answering affidavit and Applicants filed their replying affidavit.

[4] The Applicants raised the following points in limine in their answering affidavit to the First Respondent's reply:

4.1 Unlawful sub delegation, in that the chief deponent of the First Respondent's Answering Affidavit did not submit proof that he was delegated, directed and authorized to represent the First Respondent in these proceedings;

4.2 That the chief deponent of the First Respondent's Answering Affidavit should have sought a resolution from the municipal council to authorize him to act on the First Respondent's behalf;

4.3 Non-compliance with section 55(1)(P) of the Municipal Systems Act 32 of 2000, in that the Municipal Manager of the municipality is subject to the policy directions of the municipal Council;

4.4 Non-compliance with section 151(2) of the Constitution Act 108 of 1996, in that the executive authority of the municipality vests in the municipal council and the Municipal Manager is to execute his duties subject to the directions of the municipal council.

4.5 That the First Respondent's chief deponent lacks the authority to act, as there is no resolution attached to the affidavit, authorizing him to represent the First Respondent herein;

4.6 Non-compliance with the provisions of section 59 of the Municipal Systems Act 32 of 2000 in respect of a written delegation, authorized by the municipal council.

[5] In essence the above points in limine all refer to the deponent of the First Respondent's Answering Affidavit lacking authority to act on behalf of the First Respondent in opposing this application.

[6] In *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at par [19] Steicher JA held as follows:

"[...] In my view, it is irrelevant whether [the deponent] had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised. In the present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent. [...] . In any event, Rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant. The appellants did not avail themselves of the procedure so provided. (See *Eskom v Soweto City Council* 1992 (2) SA 703 (W) at 705C - J.)

This dictum was followed in *ANC Umvoti Council Caucus And Others v Umvoti Municipality* 2010 (3) SA 31 (KZP), a case incidentally, referred to by the Applicants in support of their points in limine regarding lack of authority, and *Firststrand Bank Ltd v Fillis and Another* 2010

(6) SA 565 (ECP) at par. 13.

[7] From the above it is clear that the deponent of an affidavit need not prove authority and consequently the Applicants' points in limine were all dismissed.

[8] First Respondent raised two points in limine against the application:

8.1 First Respondent was not aware of the problem with the pipeline, prior to the application being served on them. Therefore the application is premature, remedies were not exhausted and disregards the principle of the separation of powers. It was further submitted that the problem could have been attended to within 48 hours had the First Respondent been alerted to it;

8.2 The requirements for an interdict has not been satisfied in that there were and still are alternative remedies available to the Applicants, such as reporting the leak to their ward councillor and/or the First Respondent.

[9] In order to properly determine the points in limine the court inevitably also had to consider the merits in that the question whether or not the Applicants had any other satisfactory remedy available could only be determined by also evaluating the merits. During the submissions it was argued that the Applicants had no way to be certain that the problem would be attended to by the First Respondent with the required urgency. First Respondent submitted that the problem is already being attended to and that a report is pending regarding the exact situation. This matter emanates from an area plagued by violent service delivery protests in the recent past. The court is mindful of the fact that the application was brought on an urgent basis, that the discomfort and risks to the residents' health due to the oozing of sewerage near a residential area, the lack of detail as to exactly where the spillage was and what could be done about it and whether there would be challenges in addressing it as urgent. The court subsequently requested that the report, which was in the process of being compiled at the time the matter was being argued, be made available to the court to provide the court with more detailed information regarding the extent of the damage to the sewer line which the Applicants encountered on the 17th of May 2016, the steps required to

fix the damage and the time frame within which it could be repaired. The report was submitted and in respect of the three aspects the court needed clarity on, the parties were in agreement that the problem was indeed a blockage, which could be unblocked fairly quickly. In fact, indications were given that it could be cleared within the next day and would be monitored to ensure it does not pose a risk to the environment or the health of the residents. The blockage was indeed resolved by the time the matter was before this court for submission on the report and judgment.

This ensured that the First Respondent was able to locate the problem, the details of which were not contained in the founding affidavit, and attend to it.

[10] I proceed now to deal with the relief sought by the Applicants and the points in limine raised by the First Respondent:

In the Founding Affidavit the Applicants state that this is an application for a mandamus against the First Respondent to repair the burst sewer lines which are causing harm to the health and well-being of the residents at Malamulele Section 8. The Applicants further state that the factual basis for the application is that on the 17th of May 2016 the Second, Third and Fourth Applicants approached the offices of the third Respondent to lodge an urgent complaint regarding a leaking or burst sewer pipe flowing behind their yards. They were told by an unknown representative of the Third Respondent that a team would be dispatched to investigate within 24 hours. On the 1ath May 2016 the Second, Third and Fourth Applicants again visited to offices of the Third Respondent after realizing the leak was not repaired. During this visit they were informed that the contractor had vacated his site and that nothing could be done. This led the three Applicants to approach the First Applicant for assistance which resulted in the application before this court.

[11] In response to the points in limine the Applicants stated in their Replying Affidavit that the Second, Third and Fourth Applicants reported the leak to the Third Respondent, which is their local municipality, whom they deemed to be the institution responsible for water and sewerage in their area. They were not aware that there had been a separation of services in 2007 in terms of which the First Respondent assumed responsibility for the water and sewerage systems. They further contend that the First Respondent failed in its duty to properly inform the public of the separation of services and therefore the fact that the First Respondent was not informed of the leak should not be a bar to the relief now sought.

[12] Nature of the relief sought:

12.1. The urgent relief which the Applicants applied for was for a rule nisi in the form of a mandatory interdict coupled with a provision that the rule should operate as an interim order. Both counsel for Applicants and the First Respondent presumed the nature of the relief sought to be an interim interdict. However on proper analysis of the orders prayed for in prayers 3.1, 3.2, 3.3 and 3.4 it is clear that the relief sought is final in substance, though interim in form. It follows therefore that these prayers are for a final interdict.

12.2. The alternative prayer in 3.5 is interim both in substance and form, but constitutes a mandamus, just as the prayers in 3.1 to 3.4 do.

[13] The requirements for a mandamus was stated in *Kaputuaza and Another v Executive Committee of the Administration for the Hereros and Others* 1984 (4) SA 295 (SWA) :

"For such an order all the requirements of an interdict have to be established and the Court will have to decide, inter alia, whether the applicants have established a "clear right" (*Lipschitz v Wattrus* NO 1980 (1) SA 662 (T) at 673C - D).

Therefore it follows that the requirements for a final interdict has to be complied with in order to be successful.

[14] The object of a mandamus "is to compel an administrative organ to perform some or other statutory duty. The remedy is somewhat limited because the administration cannot be compelled to do anything it is not obliged to do under the enabling statute" (See "Administrative Law under the 1996 Constitution, 3rd Edition, Burns & Beukes, Lexis Nexis on p525.)

[15] Applicants rely on various statutory provisions as a basis for the mandamus:

15.1. Section 24 of the Constitution Act 108 of 1996, read with sections 2(2) and 32 of the National Environmental Management Act 107 of 1998, which provides for the right to a non-harmful, healthy environment environmental management and legal standing to enforce environmental laws;

15.2. Section 38 of the Constitution Act 108 of 1996, which is dealt with in more detail below;

15.3. Sections 152 and 153 of the Constitution Act 108 of 1996 read with section 4(2)(f) and 73 of the Local Government Municipal Systems Act 32 of 2000, which in essence provide for the objects of local government, the developmental duties of municipalities and the duties of a municipal council;

15.4. Section 7(2) of the Constitution, which provides that the state must respect, protect, promote and fulfil the rights in the Bill of Rights;

15.5. Section 172(1)(b) of the Constitution, which in essence provides for the powers of the High Court in constitutional matters;

15.6. Section 10 of the Constitution, which provides for the right to dignity;

15.7. Section 14 of the Constitution, which provides for the right to privacy;

15.8. Section 11(1) of the National Environmental Management Act 107 of 1998 providing for environmental managements plans; and

15.9. Section 30(1)(a) and (2) of the National Environmental Management Act 107 of 1998, which provides for the control of environmental emergencies.

[16] The Applicants submit that the failure of the First Respondent to comply with the various statutory obligations lies in that:

16.1. Municipalities, such as First Respondent, should be held accountable for their failure to provide services to the people;

16.2. The First Respondent has a duty and obligation to ensure that basic essential services are not continuously disrupted or lacking;

16.3. The First Respondent failed to –

16.3.1. reasonably engage the local community in matters relating to the provision of a safe environment for their children;

16.3.2. access available funds from the Emergency Housing Programme to provide temporary housing and access to services for households

affected by emergencies;

16.3.3. invoke the Local Government Equitable share to fund operations and maintenance of water and sanitation infrastructure; and

16.3.4. implement Free Basic Sanitation Policy and the provisions of the Division of Revenue Act 6 of 2011 to ensure access to basic sanitation services for the indigent people residing within its area of jurisdiction.

For purposes of this judgment I do not deem it necessary to deal with each of these points individually. It is common cause that the First Respondent, as a district municipality, has obligations in respect of the provision of basic sanitation services, to ensure that its operations are conducted within the parameters of the Constitution and all other applicable legislation.

[17] It is, however, necessary to pause and consider the provisions of section 38 of the Constitution, as it appears to be the basis, not only for the First Applicant's standing, but also for the Applicants' application for a mandamus in very wide and general terms. The section provides as follows:

"38 Enforcement of rights

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and a court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and

(e) an association acting in the interests of its members."

[18] It is important to note that it is not a requirement that a constitutional right should have been violated as a fact. All the

applicant has to show is that a right is under threat, and that there is therefore a reasonable probability of an infringement of that right. (See *Geuking v President of the Republic of South Africa* 2003 (3) SA 34 (CC) at paras [32]-[34].)

[19] The majority judgment of the Constitutional Court in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) serves as authority for the view that it is a sufficient basis for a conclusion that a right has been infringed or threatened if the conduct is objectively, inconsistent with a right contained in the Bill of Rights. In this case there is no evidence of such conduct which is to be objectively evaluated. There is no evidence before this court of any failure on the part of the First

Respondent, as alleged. All the allegations, save the evidence in respect of the specific leak, are in broad, general terms without any evidence of specific instances or circumstances complained of or how the First Respondent failed in executing its duties in terms of statute. The Applicants do not provide any evidence of the continuous disruption or lack of services due to the failure of the First Respondent to act or the failure of the First Respondent to secure funding it is entitled to in order to provide in basic services. There is only a general allegation in paragraph 18 of the Founding Affidavit that there are other residents with similar plights to that of the Second, Third and Fourth Applicants who are frustrated in how to pursue this incident (the leaking sewer pipe) and therefore the application is brought under Section 38.

[20] A mandamus is one of the possible forms of relief the Court may grant if the requirements have been met and if it would provide the appropriate protection.

[21] The essence of the application, as previously stated is for a mandatory interdict and thus has to satisfy the requirements for a final interdict, which are:

21.1. a clear right;

21.2. an injury actually committed or reasonably apprehended; and

21.3. the absence of similar protection by any other ordinary remedy.

[22] To determine whether the applicant has a clear right is a matter of substantive law and whether the right is clear is a matter of evidence. The applicant has to prove on a balance of probabilities, facts which, in terms of substantive law, establish the right relied upon. (See *Diepsloot Residents & Landowners Association v Administrator, Tvl* 1993 (3) SA 49 (T)). The First Respondent did not take issue with the compliance with this requirement, and it is accepted that the Applicants had satisfied this requirement in that they established the right to basic sanitation services, dignity and a healthy environment.

[23] In order to satisfy the second requirement the Applicants have to prove, on a balance of probabilities that an infringement of the right, which has been established, has occurred or is reasonably apprehended, as well as the resultant prejudice or potential

prejudice. (See V&A Waterfront Properties (Pty) Ltd v Helicopter & Marine Services (Pty) Ltd 2006 (1) SA 252 (SCA); Volkskas Bpk v Barclays Bank (DC&O) 1952 (3) SA 343 (A) at 351; Capital Estate and General Agencies (Pty) Ltd v Holiday Inn Inc 1977 (2) SA 916 (A)). As stated above, it would be sufficient to show that the failure on the part of the First Respondent to act, viewed objectively, is inconsistent with the Bill of Rights, or that such failure to act constitutes a dereliction of a statutory duty which infringes or threatens to infringe on the right of the Applicants. First Respondent was not aware that there was any need for conduct on their part, as they were not aware of the fault. Surely, before the failure can be objectively deemed inconsistent with the Bill of Rights or a dereliction of a statutory duty, it must be shown that the public official or government body was aware of the circumstances necessitating action.

[24] The third requirement is the absence of another adequate, ordinary, reasonable, legal remedy capable of affording similar protection.

(Erasmus v Afrikander Proprietary Mines Ltd 1976 (1) SA 950 0/V} at 965H; and see Chapman's Peak Hotel (Pty) Ltd v Jab and Annalene Restaurants CC t/a O'Hagans [2001] 4 All SA 415 (C)). It was submitted on behalf of the First Respondent that the mechanisms for reporting faults or disruptions of services should first be utilized and that litigation should be a last resort. The Applicants contended that they had no other option but to approach the court, as they were not able to achieve any progress in addressing the leaking pipe by reporting it to the only institution they deemed to be responsible to maintain the sewerage system, being the Third Respondent.

[25] It is common cause that Applicants did not report the disruption or leakage which is the subject of this application to the First Respondent and it is common cause that had the First Respondent been aware of the need to act to resolve the problem, they would have done so. A simple telephone call would have resolved the matter.

[26] Section 5(2)(a), read with section 1 of the Local Government Municipal Systems Act 32 of 2000, which applies to the Applicants in this application, provides as follows:

"5(2) Members of the local community have the duty-

(a) when exercising their rights, to observe the mechanisms, processes and procedures of the municipality;

[27] Institutions such as the First Respondent, burdened with service delivery in pursuit of ensuring basic services in compliance with the Bill of Rights, inevitably have to put mechanisms, processes and procedures in place inter alia of how breakdowns in service delivery are reported and resolved within the framework of the administration of such a body. To bypass the basic requirement of informing the authority of a breakdown in service and approaching the court immediately creates various challenges and disregards the provisions of section 5(2) of the Local Government Municipal Systems Act 32 of 2000. It

further places the courts in a very precarious position in respect of overreaching into the administration and would fly in the face of the principal of judicial economy. If every breakdown in service could be addressed by urgent litigation, the courts would be inundated and the effective management and administration of the municipality would be undermined to the prejudice of the administration of justice and service delivery to the community.

[28] To aver that the Applicants did not know better does not convince. The First Applicant as an organization with the object, inter alia, of promoting human rights, ensuring that state entities and institutions are held accountable for the use of public funds and to ensure that state resources are utilized efficiently for the benefit of the people, should have done their due diligence before simply approaching the court. The Applicants knew to cite the First Respondent in their application, but did not advance any reasons why the First Respondent was not informed of the situation in the first place and why they did not comply with the provisions of section 5(2) of the Local Government Municipal Systems Act 32 of 2000.

[29] Regarding the conduct of the representatives of the Third Respondent it is necessary to state that this litigation would have been avoided had there been proper dissemination of information to the Second, Third and Fourth Applicants. There is a duty on the Third Respondents to ensure it adheres to the principles of co-operative governance, which is a constitutional imperative.

29.1. Section 41 of the Constitution provides as follows:

"Principles of co-operative government and intergovernmental relations

41. (1) All spheres of government and all organs of state within each sphere must

(h) co-operate with one another in mutual trust and good faith by-

i fostering friendly relations;

ii assisting and supporting one another;

iii informing one another of, and consulting one another on, matters of common interest;

iv co-ordinating their actions and legislation with one another;

v adhering to agreed procedures; and

vi avoiding legal proceedings against one another."

29.2. Section 3 of the Local Government Municipal Systems Act 32 of 2000 provides that:

"3 Co-operative government

(1) Municipalities must exercise their executive and legislative authority within the constitutional system of co-operative government

envisaged in section 41 of the Constitution.

- (2) The national and provincial spheres of government must, within the constitutional system of co-operative government envisaged in section 41 of the Constitution, exercise their executive and legislative authority in a manner that does not compromise or impede a municipality's ability or right to exercise its executive and legislative authority.
- (3) For the purpose of effective co-operative government, organised local government must seek to-
 - (a) develop common approaches for local government as a distinct sphere of government;
 - (b) enhance co-operation, mutual assistance and sharing of resources among municipalities;
 - (c) find solutions for problems relating to local government generally;

And

- (d) facilitate compliance with the principles of co-operative government and intergovernmental relations."

Thus the Third Respondent should have in the least communicated the complaint to the First Respondent and should have referred the

Applicants to the First Respondent.

[30] In conclusion -

There was no failure on the part of the First Respondent to perform an act in terms of statute, which failure should now be addressed by the intervention of the court, the application is premature. Furthermore, it cannot be held that there was no other adequate remedy available. Therefore, the Applicants did not succeed in satisfying an essential requirement for a final or even an interlocutory interdict against First Respondent in not exhausting alternative remedies.

[31] I now turn to the issue of cost. Both counsel for the Applicants and Counsel for the First Respondent argued for cost on a punitive scale. There is no obvious reason to deviate from the general principle that the successful party should also receive cost. The only issue to be determined is whether the cost should be on a punitive scale. There is no good reason shown for the First Applicant's failure to ensure the matter was ripe for litigation. One would assume that they have the resources and knowledge to advise the community members they strive to assist and could have ensured that the correct institution is informed along the correct route, of the leak or blockage. The Applicants further failed to place any evidence before the court of the dereliction of any statutory duty by the First Respondent to provide and maintain sanitation services to the community at Section B, Malamulele. For the court to grant the relief in the general terms prayed for, there should in the least have been evidence of the degree and nature of the failure of the First Respondent, such as information as to how many people or households are not being provided sanitation services and in what way the First Respondent did not act appropriately to address the issue.

[32] The Applicants had failed to make out a case for the relief claimed and this application should not have been brought in the first place, therefore a cost order on an attorney and client scale is appropriate (See *Richter v Waterfall Equestrian Estate WUQF (Pty) Ltd and Others*, (2015] 1 All SA 695 (GJ); [2015] JOL 32774 (GJ).

[33] Therefore following order is made:

33.1. That the First Respondent's points in limine is upheld;

33.2. That the Applicants' application is dismissed; and

33.3. The First, Second, Third and Fourth Applicant, jointly and severally, are ordered to pay the cost of this application on a scale as between attorney and client.

A LAMMINGA

ACTING JUDGE OF THE HIGH COURT

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Prepared on 11 October 2026 · Esheria