

SOUTH AFRICA / JUDGMENT

# Swiftnet Soc Limited and Another v Peete and Others (UM82/2022) [2024] ZANWHC 256 (15 October 2024) [2024] ZANWHC 256

## COURT

North West High Court, Mafikeng

## BEFORE

Dibetso-Bodibe

## CASE / FILE NUMBER

UM82/2022

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## Source record

IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST PROVINCIAL DIVISION, MAHIKENG

Case

No.: UM82/2022

Reportable: NO

Circulate to Judges: NO

Circulate to Magistrates:

NO

Circulate to Regional

Magistrates: NO

In

the matter between:

SWIFTNET

SOC LIMITED

1st

Applicant

TELKOM

SA SOC LIMITED

2nd

Applicant

and

DANIEL

MATSHWENYEGO PEETE

1st

Respondent

SIBANDA

JULY

2nd  
Respondent  
TSHEOLE  
NTSHADI  
3rd  
Respondent  
BAKGATLA  
BA KGAFELA COMMUNAL  
PROPERTY  
ASSOCIATION  
4th  
Respondent  
MINISTER  
OF AGRICULTURE, LAND REFORM  
AND  
RURAL DEVELOPMENT OF SOUTH AFRICA  
5th  
Respondent  
DIRECTOR-GENERAL: AGRICULTURE,  
LAND  
REFORM, AND RURAL DEVELOPMENT  
6th  
Respondent  
PREMIER  
OF THE NORTH WEST  
PROVINCIAL  
GOVERNMENT  
7th  
Respondent  
MOKOTEDI  
SOPHY  
8th  
Respondent  
THEBYANE  
TSHEPISO  
9th  
Respondent  
In

re:

DANIEL  
MATSHWENYEGO PEETE  
1st  
Applicant  
JULY  
SIBANDA  
2nd  
Applicant  
NTSHADI  
TSHEOLE  
3rd  
Applicant  
and  
BAKGATLA  
BA KGAFELA COMMUNAL  
PROPERTY  
ASSOCIATION  
1st  
Respondent  
MINISTER  
OF AGRICULTURE, LAND REFORM  
AND  
RURAL DEVELOPMENT OF SOUTH AFRICA  
2nd  
Respondent

DIRECTOR-GENERAL:

AGRICULTURE,  
LAND  
REFORM, AND RURAL DEVELOPMENT  
3rd  
Respondent  
PREMIER  
OF THE NORTH-WEST  
PROVINCIAL  
GOVERNMENT  
4th  
Respondent  
MOKOTEDI  
SHOPHY  
5th  
Respondent  
THOBYANE  
TSHEPISO  
6th  
Respondent  
UNKNOWN  
PARTIES CONDUCTING  
CONSTRUCTION  
ACTIVITIES ON BAKGATLA  
BA  
KGAFELA COMMUNAL LAND

7th  
Respondent

## JUDGMENT

DIBETSO-BODIBE AJ

## INTRODUCTION

- [1] Careless litigation cannot be cured by an urgent application especially if the prejudice to the other Party and the administration of justice are clear. Furthermore, the rules of Court may not be utilised to play litigatory games that delay justice and cause costs and procedural misery. Litigation must be proper and timeous and may not cause trials or hearings to become chaos.

## BRIEF BACKGROUND

- [2] On 05 May 2022, the Applicants, two members of the Bakgatla Ba Kgafela Tribal Community and a representative of the house of the royal family sought and were granted an interim interdict against the Respondents, the Communal Property Association of the Bakgatla Ba Kgafela, its Chairperson and secretary and the “Unknown Parties Conducting Construction Activities on Bakgatla Ba Kgafela Communal Land.” The Unknown Parties during the hearing of the urgent application came to be known as Swiftnet and Telkom.
- [3] According to the Founding Affidavit on behalf of Telkom and Swiftnet, Telkom is a leading communications service provider in South Africa whilst Swiftnet is the subsidiary of Telkom responsible for erecting communication facilities specifically in the form of Masts at various locations. In undertaking its responsibilities Swiftnet concludes agreements with the owners of the properties in terms whereof it may erect and operate Masts on such properties.
- [4] According to the Answering Affidavit of the 1st Respondent in the urgent application, the Bakgatla Ba Kgafela Communal Property Association (the CPA), the CPA entered into an agreement with Swiftnet for the erection of the two Masts and the agreement forms part of the Answering Affidavit.
- [5] The nub of the urgent application was that the properties upon which the Masts had been erected is the Communal Land of the Bakgatla Ba Kgafela Tribal Authority (the Tribal Authority) and does not belong to the CPA.

## THE ORDER GRANTED ON 05 MAY 2022

- [6] On 05 May 2022 Snyman J granted an interim order in favour of the Applicants as follows-

[6.1] Declaring Part A of this application to be a matter of urgency and dispensing in as far as is necessary in terms of Rule 6(12) with the usual forms and service provided for in the Uniform Rules of Court.

[6.2] Pending the final adjudication of this matter in Part B of the Notice of Motion, the First (and or its members), Fifth, Sixth and Seventh Respondents are prohibited from:

- (a) Leasing out communal land that belongs to and is administered by the Bakgatla Ba Kgafela and/or (Traditional Authority),
- (b) Alienating, in any form whatsoever, the communal land that belongs to and is administered by the Bakgatla Ba Kgafela and/or (Traditional Authority),
- (c) Permitting expressly or by omissions, the construction, installation, or activation of telecommunication/electronic communication towers or associated infrastructure on communal land that belongs to and is administered by Bakgatla Ba Kgafela and/or (Traditional Authority),
- (d) Causing misrepresentations, expressly or by omission, to the Seventh Respondent or any other person that is desirous of constructing, installing, or activating telecommunication/electronic communication towers or associated infrastructure to the effect that the First (and or its members), Fifth, Sixth Respondents are lawfully entitled to deal with, lease, permit or alienate the communal land of the Bakgatla Ba Kgafela,
- (e) Proceeding with construction, installation, or activation of telecommunication/electronic communication towers or associated infrastructure on communal land that belongs to and is administered by Bakgatla Ba Kgafela and/or (Traditional Authority),
- (f) Intimidating, harassing or violating any member of Bakgatla Ba Kgafela Community in a bid to induce such members of the community to enter into unlawful agreements associated with securing, leasing, or alienating communal land that belongs to and is administered by the Bakgatla Ba Kgafela and/or (Traditional Authority),

[6.3] Pending the final adjudication of this matter in Part B of the Notice of Motion, the First, Second and Third Applicants are ordered to monitor the compliance of the orders set out in paragraph 2 of the Notice of Motion above and, where necessary, report any non-compliance to the South African Police Services (SAPS).

- (a) Should there be non-compliance, the SAPS are hereby ordered to assist the applicants with enforcing such compliance in accordance with paragraph 2 of the Notice of Motion.

[6.4] Pending the final adjudication of this matter in Part B of the Notice of Motion, the First (and or its members), Fifth, Sixth and Seventh Respondents are ordered to:

- (a) Transmit copies to all parties in this application, of any and all agreements, entered into with any party for purposes of the construction, installation, or activation of telecommunication/electronic communication towers or associated infrastructure on communal land that belongs to and is administered by the Bakgatla Ba Kgafela,

(i) In the event that such agreements were not reduced to writing, depose to affidavits in which all material terms of the agreement are disclosed in such affidavit and confirmed by the other party in a confirmatory affidavit.

(ii) Transmit copies to all parties in this application, of minutes of meetings, resolutions, disciplinary records, financial records, or any other evidential material linked to the First (and or its members), Fifth and Six Respondents connected to or incidental to the dealing leasing, alienating, permitting or allotment of communal land that belongs to and is administered by the Bakgatla Ba Kgafela and/or (Traditional Authority).

(iii) Transmit copies to all parties in this application, of any and all evidential material supposing to be in compliance with the provisions of the Electronic Communications Act, No. 36 of 2002 and the National Environment Management Act (NEMA) No. 107 of 1998 incidental to the construction, installation or activation of telecommunication/electronic communication towers or associated infrastructure on communal land that belongs to and is administered by Bakgatla Ba Kgafela,

[6.5] Parties may supplement their papers as necessary for the purposes of Part B of the application.

[6.6] Swiftnet Soc Limited and Telkom be joined to proceedings.

[6.7] Costs to be costs in the cause.

[7] Before me are two applications. The first application is a reconsideration and rescission application brought by Swiftnet and Telkom. The second application is a contempt of court against the 1st, 5th and 6th Respondents in the urgent application. The Respondents are alleged to be in contempt of the order of Snyman J.

[8] The reconsideration and rescission application preceded the Contempt of Court application as per agreement between the Parties and given the fact that the hearing of the latter application is dependent on the outcome of the former application.

#### APPLICATION FOR RECONSIDERATION AND RESCISSION

[9] The application by Swiftnet and Telkom is brought in terms of Rule 6(12)(c) and Rule 42(1)(a) of the Uniform Rules of Court.

[10] Rule 6(12)(c) provides that 'a person against whom an order was granted in such person's absence in an urgent application may by notice set the matter down for reconsideration.' This rule envisages a redetermination of a matter. This is so because the Court that entertained the ex parte application in the absence of the affected parties did not enjoy the benefit of the argument from their side.

[11] In terms of Rule 42(1)(a), the court may, in addition to any other powers it may have, mero motu or upon application of any party affected, rescind or vary 'an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.'

- [12] “The principle of audi alteram partem is sacrosanct in the South African Legal System. Although, like all other constitutional values, it is not absolute, and must be flexible enough to prevent, inadvertent harm, the only times that a court shall consider a matter behind a litigant’s back are in exceptional circumstances. The phrase “exceptional circumstances” has regrettably through overuse, and the habits of hyperbole, lost much of its impact. To do that phrase justice, it must mean very rarely, only if countervailing interest is so compelling that a compromise is sensible, and then a compromise that is parsimonious in the deviation allowed.”[1]
- [13] As is often the case with applications that are moved on ex parte and urgent basis, the granting of such relief later draws into question the duties of an applicant to make full and correct disclosure of all material facts that may influence the judge hearing the ex parte application, and whether an applicant has obliged.
- [14] The Rule “affords the aggrieved party a mechanism designed to redress imbalances in, and injustices and oppression flowing from, an order granted in his absence. The order in question may, be either interim or final in its operation. Reconsideration may involve the deletion of the order, either in whole or in part or the engraftment of additions.”[2]
- [15] “A respondent need not even deliver an answering affidavit... it would be competent for a court under this subrule to reconsider the matter on the applicant’s founding papers and after having had the benefit of hearing the respondent’s arguments, for example, to set aside the initial order and strike the matter from the roll for lack of urgency or to dismiss the application because the applicant failed to make out a proper case in its founding affidavit.”[3]
- [16] S & T seek the reconsideration and rescission of the order granted by Snyman J on the following grounds:
- [16.1] Swiftnet acted in terms of its powers as a licensee under the Electronic Communications Act 36 of 2005 (ECA) having obtained the necessary approvals from the regulatory authorities to construct, erect and commission the Masts. Therefore, to the extent that Snyman J granted the order on the basis that Swiftnet erected the Masts unlawfully and without regulatory authorization, the order was erroneously granted.
- [16.2] The Court determined the Applicants’ entitlement to the relief sought based on an incorrect understanding about who is entitled to control and manage the communal land on behalf of the Community. Had the Court properly considered the judgment to which it referred to of the Constitutional Court in Bakgatla Ba Kgafela Communal Property Association and Others, as well as the settlement agreement and the CPA’s constitution, the court would have appreciated that the CPA’s consent to erect the Masts was valid because the Community had vested the CPA with the authority to control and manage communal land on behalf of and for the benefit of the Community.

[16.3] To the extent that the prospect of completing the Masts led to a reasonable apprehension of irreparable harm (which is denied), the Applicants had already suffered the harm because the Masts were substantially complete when the order was granted. Accordingly, the order had no practical effect. Given the Applicants' failure to establish apprehended harm, the order should not have been granted.

[16.4] Swiftnet erected the Masts to inter alia improve the level of access to vital high quality electronic communications services in an underserved area, therefore, the community served by the Masts had (and continues to have) a pressing interest and need for the services provided by the Masts. The Applicants' narrow interest in wresting control of communal land, from the CPA does not outweigh the community's interest in the development that would flow from the improved access to high quality electronic communications services. Accordingly, the balance of convenience clearly favoured refusing the interdict.

[16.5] The interdict was not justified because the Applicants had an alternative and suitable remedy. The implication of the Applicants' complaint that S & T failed to comply with legislative prescripts is that the Moses Kotane Local Municipality (the Municipality) committed a reviewable irregularity when it authorised Swiftnet to erect the Masts. In these circumstances, the Applicants' remedy would be to review the Municipality's decision.

#### PRIMA FACIE RIGHT

[16.6] Swiftnet was entitled to erect the Masts and in doing so acted within its license conditions. The Municipality imposed requirements for the erection of the Masts and Swiftnet, complied with the requirements. Swiftnet applied for consent in accordance with the provisions of the by-laws and other legislative requirements. The Municipality granted consent thereafter and approved building plans. Accordingly, there is no basis for the contention that Swiftnet acted in contravention of applicable laws.

[16.7] The Applicants are clearly aligned with the Tribal Authority in the disputes that persists between the CPA and the Tribal Authority. This undermines the community's decision to adopt the constitution and thereby vest the CPA with the authority to control and manage communal land.

[16.8] For these reasons the Court should reconsider the order and find that the Applicants failed to establish a prima facie right to the order interdicting Swiftnet from conducting any further activities in relation to the Masts. On this ground alone, S & T are entitled to a rescission of paragraph 2 of the order to the extent that the order applies to them.

#### APPREHENSION OF IRREPERABLE HARM

[16.9] The Applicants sought an interdict to prevent the harm that would allegedly flow if Swiftnet completed the construction and erection of the Masts but the Masts were fully constructed when the order was granted. Accordingly, to the extent that the order was granted to prevent harm that would flow from completing the construction and erection of the Masts, the order was unjustified as the Masts were already complete when the order was granted. Thus the order violates the trite rule that the courts should not grant ineffectual orders.

[16.10] In any event if the complaint was that encasing the Masts would cause harm, the complaint was unjustified. The Masts do not pose a safety risk to anyone, crucially, they would not pose a safety risk in their energized state. The kinds of Masts erected at Manamakgotheng and Sandfontein are common features of electronic communications network. They are ubiquitous because they have been tested and are proven to be safe when erected in proximity to human beings. There is simply no basis for the allegation that energizing the Masts will cause harm. The fact that permission to erect the Masts was granted by all the relevant authorities is proof that they are safe to operate.

[16.11] The balance of convenience clearly favours rescinding the order interdicting Swiftnet from conducting further work in relation to the Masts. Swiftnet erected the Masts inter alia to improve network coverage thereby increasing access to electronic communications services in an underserviced area.

[16.12] The Court must consider the interests of two groups when assessing the balance of convenience. On the one hand, it must consider the interests of the Applicants and on the other, the interests of the community. If the order remains, the community will suffer the further prolonged deprivation of access to high quality electronic communication services. This consideration must be balanced against the Applicants' sole narrow interests which is to wrestle control of communal land away from the CPA. If these competing interests are weighed, there is no justifiable reason why the Applicants' interests should trump the community's broad interests in access to quality electronic communications services. It follows that the balance of convenience favours S & T and the community. As such the Court should reconsider the order and find that the Applicants failed to establish a reasonable apprehension of irreparable harm and/or that the balance of convenience favoured granting the interdict.

[16.13] S & T contended that paragraph 4 of the order which directed them to disclose documents listed therein was final in effect and totally unjustified on the papers. The Applicants did not describe their legally enforceable right to production of the documents nor did they explain what irreparable harm they would suffer if the order is not granted. That the Court should reconsider the order and find that S & T are entitled to a rescission of paragraph 4 of the order, to the extent that it applies to them.

[17] The contention by S & T that the Applicants' sole interest in this case is to wrestle control and the management of the communal land away from the CPA is, in my view, plausible. This can be gleaned from the following relevant portions of the Applicants' founding papers and Answering Affidavit to S & T's reconsideration and rescission application:-

[17.1] Addressing the issue of locus standi, the Applicants averred that they have a vested interest in the effective proper administration of the communal land through the customary law practices and administrative processes of the Tribal Authority.

[17.2] The 1st Applicant, a resident of Manamakgotheng village, is directly affected since the Mast was constructed upon his property site no

50102. This site has been fenced and marked off pending the Applicant's readiness to build another dwelling on the site, consequently his family has been stripped of an opportunity to expand their dwellings on the site.

[17.3] The 2nd Applicant, a resident of Sandfontein village, is the secretary of the Traditional Local Council and has received complaints about the erection of the Mast in Sandfontein.

[17.4] The interest of the 3rd Applicant in her capacity as the delegated member of the royal family is that of ensuring proper administration of communal affairs within the community.

[17.5] The urgency in relation to the 1st Applicant's case was triggered by the fact that he 'noticed tubings and electrical wiring that are yet to be connected or activated and became deeply concerned and unsettled to have such Mast infrastructure on his site close to his family. That he further have concerns about the safety in relation to the possibility of the beams and structures collapsing or becoming loose in the future.

[17.6] From there, the bulk of the content of the 1st Applicant's Founding Affidavit addresses his displeasure at the erection of the Masts by S & T based on the fact that the community have already in place the "Bakgatla Connect Master Plan, that there is an integrated infrastructure plan in place to roll out various forms of digital connectivity in the community and that various sites have already been earmarked.

AVERMENTS DEPOSED TO AS PER ADVISE FROM THE LEGAL REPRESENTATIVES OF THE 1ST APPLICANT

[17.7] The 1st Applicant averred under the sub-heading 'JURISDICTION OF THE BAKGATLA BA KGAFELA TRIBAL AUTHORITY' that –

'I am advised by my legal representatives, which advise I accept, that the portions of land on which the construction activities are being conducted fall under the administration of the Bakgatla Ba Kgafela Traditional Authority and its associated structures including the Traditional Council.'

[17.8] From this paragraph the Deponent averred to specialised knowledge or assertions regarding ownership of the communal land, produced aerial maps as proof of such ownership, dealt with the historical background on the dispute and legal battles which ensued between the Tribal Authority, the CPA and the Royal Family and came to the conclusion that the Bakgatla Ba Kgafela communal land which comprises 32 villages (of which Sanfontein and Manakgotheng forms part of) is the property owned by the Tribal Authority and not the CPA.

[17.9] Based on the said assertions, the Applicants contended that the agreement between the CPA and Swiftnet was null and void.

[17.10] The Applicants also contended that the S & T failed to comply with ECA in that they did not obtain consent of the relevant regulatory bodies and that where they did obtain such consent, the process followed was irregular.

[18] The CPA in its Answering Affidavit under the urgent application contended that the CPA is duly registered in terms of the provision of the Communal Property Association Act 28 of 1996, that its constitution has been approved by the Department of Agriculture, Land Reform and Rural Development (the Department). In terms of the constitution of the CPA, which formed part of the Applicants' Founding Affidavit, the CPA shall:-

[18.1] be a legal person constituted for an indefinite period, terminable in a manner and subject to compliance with the formalities stipulated in the constitution,

[18.2] be a body corporate with limited liability and perpetual succession, existing as a juristic person separate from its members and shall be capable of suing or being sued in its own name,

[18.3] have an Executive Committee (EXCO) elected from amongst its members and the EXCO shall consist of the Chairperson, Deputy Chairperson, Secretary, Deputy Secretary, Treasurer and five other additional members. The management and control of the affairs of the CPA shall vest in the EXCO which shall have fiduciary responsibilities in relation to the CPA and shall act in the best interest of the CPA. The EXCO shall have the power to execute contracts and the authority to bind the CPA or to create any legal relationships. All contracts and any documents required to be signed shall be signed by the Chairperson and/or the Secretary.

[19] Annexure "E" to the constitution of the CPA termed 'Bakgatla Ba Kgafela Villages and Regions' depicts six Regions made up of 32 villages. The foot note at the end of the Annexure states: '[NB] All the properties listed above shall be registered and transferred in the name of the Association as contemplated in S19.1 of our BBKCPA Constitution.'

[20] The properties as described in Annexure "E" and which must be registered and transferred in the name of the CPA includes the two villages of Manamakgotheng and Sandfontein which are the subject matter in the dispute before the Court.

[21] The CPA through its Chairperson entered into an agreement with Swiftnet in respect of occupation of the identified sites in Manamakgotheng and Sandfontein for the erection of the Masts.

## EVALUATION OF EVIDENCE

[22] The evidence of S & T is that Swiftnet obtained consent from the relevant authorities including the CPA. Before erecting the Masts, S & T through Swiftnet received confirmation from the Department of Economic Development, Environment, Conversation and Tourism that they were not required to obtain environmental authorization in terms of the National Environmental Management Act, 1998 and its regulations. They also obtained consent from

the Planning and Development Division of the Municipality for the erection of the Masts subject to certain conditions. The Civil Aviation Authority also granted their consent

for the erection of the Masts. The CPA entered into an agreement with Swiftnet, granting it the right to occupy the specified sites. S & T could not challenge the Applicants' claims because they did not receive the notice for the urgent application interdicting the erection of the Masts.

[23] I cannot find anything untowards in the processes followed by S & T which processes led to the erection of the Masts in the two villages. These processes are in accordance with the spirit and purport of Section 22(1) of the ECA which confers powers on a licensee to enter upon land and construct telecommunications networks for the benefit of the public. In terms of this section, a licensee is required to meet other requirements laid down by the "owner of the land" or a municipality in terms of the bylaws or other regulatory laws. In the circumstances, the right of the licensee is not unlimited, it must be exercised having regard to all applicable laws. In my view, S & T complied with all the processes leading up to the erection of the Masts at Manamakgotheng and Sandfontein.

[24] The 1st Applicant deposed to the Founding Affidavit in respect of all the issues involved in connection with the erection of the Masts. In application proceedings, the affidavits take the place not only of the pleadings in action proceedings, but also of the essential evidence which could be led at trial. The admissibility of the deponent's evidence depends on whether he/she has 'personal

knowledge' of the primary facts deposed to in the affidavit.

[25] "It therefore, stands to reason that a deponent to an affidavit is a witness who states under oath facts that lie within her personal knowledge. She swears or affirms to the truthfulness of such statements. She is no different from a witness who testifies orally, on oath or affirmation, regarding the events within her knowledge." [4]

[26] "a deponent's assertion that information is within his or her personal knowledge "is of little value without some indication, at least from the context, of how knowledge was acquired". An indication of how the alleged knowledge was acquired is necessary to determine the weight, if any, to be attached to the evidence set out in the affidavit. The key question is whether the deponent would, in the ordinary course of his or her duties or as a result of some other capacity described in the affidavit, have had the opportunity to acquire the information or knowledge alleged." [5]

[27] "... although it is not necessary for the deponent to state reasons in the affidavit for his assertion that the facts are within his own knowledge he should... at least give some indication of his office or capacity which would show an opportunity to have acquired personal knowledge of the facts to which he deposes... laying a foundation for personal knowledge of a fact cannot practically require a deponent to produce a paper trail of every knowledge – building action he or she has undertaken." [6]

- [28] “If the deponent to a founding affidavit lacks personal knowledge of the material facts, the integrity and veracity of the “evidence” placed before the Court is compromised. In any trial a Court should be vigilant to manage how witnesses testify, ensuring that the rules of evidence are observed scrupulously. Similar vigilance should be displayed in motion proceedings – however, courts must be mindful not to adopt an over-formalistic approach.”[7]
- [29] In the circumstances, I am not convinced that the evidence of the 1st Applicant in the founding papers in relation to the urgent application is an acquired personal knowledge. The averment under urgency that the Masts poses a hazard with electrical wires protruding can only be an assertion by a lay person in that field, (i.e the electrical field) hence S & T had to obtain a certificate of test report for electrical installations and general electrical installation certificate of compliance from the Department of Labour Occupational Health and Safety. The advice by the deponent’s legal representative that the portions of land on which the construction activities are being conducted fall under the administration of the Tribal Authority is the basis and foundation of the deponent’s affidavit. This, in my view, is not tantamount to an advice, it is in fact evidence, specialized evidence that requires proof of specialized acquired knowledge in that field.

## CONCLUSION

- [30] What is apparent and deep rooted from the context of the founding papers in the urgent application is the historical battle between the Tribal Authority, the CPA and the Royal Family which causes unnecessary factions within the community. It is also not surprising that the Tribal Authority which is alleged to be the owner of the properties in dispute is not before this Court. The Applicants have been granted an order to access the records of the CPA and S & T including disciplinary records of the members of the CPA. In my view, this amounts to excavation of information in a manner untowards. No urgency has been proven in the founding papers except for alarming urgency displayed as a result of the in fighting within the community, and this cannot be analogous to urgency in terms of Rule (6)12 of the Uniform Rules of Court.
- [31] It is unfortunate that Swiftnet and Telkom have been caught between the fires. As I have said the rules of court may not be utilised to play litigatory games that delay justice and cause costs and procedural misery. The business of the erection of Masts goes to the heart of the constitutional rights of the South African people. As clearly articulated in the ECA, the effect of access to telecommunications services networks advances a nation socio-economically and in the digital era that we find ourselves, access to these services can no longer be optional.

## ORDER

- [32] In the circumstances I make the following order:

[32.1] The order of 05 May 2022 of Snyman J which was granted ex parte against the 7th Respondent (Now Swiftnet SOC Limited and Telkom SOC Limited) is hereby reconsidered as follows:

*“The order of Snyman J granted on 05 May 2022 is hereby set aside.”*

[32.2] The application is struck from the roll for lack of urgency.

[32.3] The Applicants are ordered to pay the costs of the reconsideration including the costs of two Counsel.

O.Y DIBETSO-BODIBE

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

Delivered: This judgment is prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties or their legal representatives by email and by release to SAFLII

DATE OF HEARING: 25, 26 January 2024 DATE OF JUDGMENT: 15 October 2024 APPEARANCES FOR THE APPLICANTS: Adv D Burger SC Adv M Seape INSTRUCTED BY: Motsoeneng Bill Attorneys C/O Zisiwe Attorneys FOR THE 1ST TO 3RD RESPONDENTS: Adv I Mwanawina INSTRUCTED BY: Bamphitile & Associates C/O Sephecholo Lechuti Lesofe Attorneys FOR THE 4TH TO 9TH RESPONDENTS: Du Plessis Van Der Westhuizen Inc C/O Smit Stanton Inc

- [1] South African Airways SOC v BDFM Publishers (Pty) Ltd and Others (2015/33205) [215] ZAGPJHC 293 (17 December 2015) at para [22]
- [2] Industrial Development Corporation of South Africa Limited v Bokone Group of Companies (Pty) Ltd (2022-027186) [2023] ZAGPJHC 837 (24 July 2023) (IDC) at para [57]. Referencing from ISDM Solutions (Pty) Ltd v CSDN Solutions CC and Others [1996] 4 ALL SA 58 (W)
- [3] IDC ibid at para [58]
- [4] Masako v Masako and Another (724/2020) [2021] ZASCA 168 (03 December 2021) at para [11]
- [5] President of the Republic of South Africa and Others v M & G Media LTD (Oct 03/11) [2011] ZACC 32 (29 November 2011) (M & G Media) at para [28]
- [6] M & G Media ibid at para [29]
- [7] Minister of Water and Sanitation v Limphota Housing CC (17766/2023) [2024] ZAGPPHC (17 April 2024) at para [36]

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