IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG



Case No.: UM117/2021

In the matter between:

SAKELIGA NPC	Applicant
and	
SEDIBENG WATER BOARD	First Respondent
MEMBER OF THE EXECUTIVE COUNCIL: NORTH WEST PROVINCE: COOPERATIVE GOVERNANCE, HUMAN SETTLEMENTS AND TRADITIONAL AFFAIRS	Second Respondent
MEMBER OF THE EXECUTIVE COUNCIL: NORTH WEST PROVINCE: FINANCE	Third Respondent
MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Fourth Respondent
MINISTER OF FINANCE	Fifth Respondent
MINISTER OF HUMAN SETTLEMENTS, WATER AND SANITATION	Sixth Respondent
NGAKA MODIRI MOLEMA DISTRICT MUNICIPALITY	Seventh Respondent
DITSOBOTLA LOCAL MUNICIPALITY	Eighth Respondent
MAHIKENG LOCAL MUNICIPALITY	Ninth Respondent
RATLOU LOCAL MUNICIPALITY	Tenth Respondent
PREMIER OF THE NORTH WEST PROVINCE	Eleventh Respondent

FILING NOTICE

Please take notice that the Applicant present the following for filing:

1. Applicant's Heads of Argument in respect of the cost aspect.

Documents Filed by:
Nicolene Neethling
Tel: (018) 381 0180/1/2
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DATED AND SIGNED AT MAHIKENG ON THIS THE 28th DAY OF JANUARY 2022.

KRIEK WASSENAAR & VENTER INC ATTORNEYS

ATTORNEYS FOR THE APPLICANT

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C/O SMIT STANTON INC

29 Warren Street

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Tel: 018 381 0180

Ref: NJ/KRI19/0003/21

AND TO: THE REGISTRAR OF THE ABOVE COURT

MMABATHO

AND TO: **AA SOLWADLE ATTORNEYS**

ATTORNEYS FOR 1ST TO 6TH RESPONDENTS

C/O TIRO ATTORNEYS

43 SHIPPARD STREET

OFFICE 6, SHASONS CENTRE

REF: MR MONNAPULA/S006

TIRO ATTORNEYS INC
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14:13 28/01/22

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH WEST DIVISION, MAHIKENG)

CASE NO. UM117/2021

In the matter between:

SAKELIGA NPC **Applicant**

And

SEDIBENG WATER BOARD **First Respondent**

MEMBER OF THE EXECUTIVE COUNCIL: NORTH WEST

PROVINCE: COOPERATIVE GOVERNANCE, HUMAN

SETTLEMENTS AND TRADITIONAL AFFAIRS **Second Respondent**

MEMBER OF THE EXECUTIVE COUNCIL: NORTH WEST

PROVINCE: FINANCE **Third Respondent**

MINISTER OF COOPERATIVE GOVERNANCE AND

TRADITIONAL AFFAIRS **Fourth Respondent**

MINISTER OF FINANCE **Fifth Respondent**

MINISTER OF HUMAN SETTLEMENTS, WATER

AND SANITATION **Sixth Respondent**

NGAKA MODIRI MOLEMA DISTRICT

MUNICIPALITY Respondent	**Seventh**
DITSOBOTLA LOCAL MUNICIPALITY Respondent	**Eighth**
MAHIKENG LOCAL MUNICIPALITY	**Ninth Respondent**
RATLOU LOCAL MUNICIPALITY Respondent	**Tenth**
PREMIER OF THE NORTH WEST PROVINCE	**Eleventh Respondent**

APPLICANTS' HEADS OF ARGUMENT

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1. INTRODUCTION

1.1. This is an application for the determination of costs in relation to the application that was originally enrolled for 31 May 2021. The application has never been opposed however the First Respondent now opposes only the aspect of costs.

1.2. The Applicant has filed a supplementary affidavit which deals specifically with the aspect of costs as the founding affidavit deals with the merits of the application. The merits have now been disposed of as the First Respondent has provided the Applicant with undertakings that constitutes the subject

matter of the application. The undertakings therefore render the application moot.

2. BACKGROUND

2.1. On the 26th of May 2021 at approximately 15:00 the Applicant became aware of a decision of the First Respondent to its employees; the decision is dated 25 May 2021 and was communicated by a notice to its employees. (annexure "X3" page 47) ("employee notice")

2.2. In the employee notice the First Respondent informed its employees as follows:

> *"Following unproductive oral and written engagements with Ngaka Modiri Molema District Municipality to service their ever-growing debt for the Operations and Maintenance services by Sedibeng Water.*
>
> ***Sedibeng water has taken a firm decision to suspend all the Operations and Maintenance services** to the municipality until the district municipality change their posture on their refusal to pay for the aforementioned services. Sedibeng Water cannot continue to offer services for free at the detriment of its financial health.*
>
> *You are therefore directed to suspend all Operations and Maintenance services at Lehurutshe, Mahikeng and Ratlou Local Municipalities as of*

the 1st June 2021. Further suspension of services for Bulk Water Supply must be effected at Ditsobotla Local Municipality's Itsoseng Plant effective from 1st July 2021.

This enforcement shall remain in place until further notice or when directed otherwise."
(own emphasis)

2.3. Thereafter the attorney for the Applicant contacted the author of the employee notice to ascertain the extent of termination of water services as contained in the employee notice.

2.4. Following the discussion, the attorneys for the Applicant directed a letter of demand to the First Respondent, demanding that the First Respondent provide the Applicant with an undertaking to withdraw the decision contained in the employee notice.

2.5. No such undertaking was forthcoming which gave rise to the issuing of this application.

2.6. On the 29th of May 2021 the First Respondent attorneys directed a letter to the Applicant's attorneys, a copy of which is annexed to the Applicant's supporting costs affidavit as annexure **"cc-1"**

2.7. In the letter the Respondents' attorneys give the undertaking that the First Respondent will *inter alia* withdraw its notice to employees to terminate the

supply of water and related services to the 7th to 8th Respondent municipalities. It is important to note that this letter constitutes confirmation of the withdrawal of the First Respondent's decision which forms the focus of the Applicant's application.

2.8. It is further stated in the letter that the employee notice is merely internal communication and that no decision was taken to terminate the Provision of Operations and Maintenance services.

2.9. The First Respondents attorneys however in the above letter proposed that the parties each pay their own costs.

2.10. Being provided with the First Respondent undertaking the Applicant proceeded to remove the application from the roll, cost to be reserved. This was done on advice of the Applicant's attorneys in order not to burden the urgent Court with a cost argument. Accordingly, costs were reserved.

2.11. Thereafter and on 31 May 2021 a second letter was directed to the First Respondent's attorneys wherein it was indicated that part B of the Applicant's application will also be removed from the roll as the First Respondent has provided undertakings to withdraw their decision to restrict water and related services. The Applicant also demanded from the First Respondent to tender the costs occasioned by bringing the main application, failing which the Applicant will apply to the above honourable Court to recover its costs. No such tender was forthcoming.

2.12. Consequently the Applicant has re-enrolled the matter to recover its costs. In opposition to the Applicant's application for costs the First Respondent filed an answering affidavit which in most part deals with the merits of the application. Seemingly the First Respondent is of the view that the Applicant would not have succeeded in its main application and therefore is not entitled to costs.

3. FIRST RESPONDENT'S CASE

3.1. It is the First Respondent case that the First Respondent is a water services institution as defined in section 1 of the Water Services Act 108 of 1999 ("WSA")

3.2. The First Respondent relies on section 31 (3) of the WSA as justification why it was entitled to suspend the provision of water services.

3.3. Section 31 (3) of the Act *supra* reads as follows:

> *"Powers of water boards*
>
> *31. …*
>
> *(3) Subject to section 4, a water board may limit or discontinue water services or other services provided to water services institutions, consumers or users."*
>
> (own emphasis)

3.4. Upon a proper reading of section 31 (3), the provision must be read together with section 4 of the Act *supra.* Section 4 reads as follows:

"4. Conditions for provision of water services

...

(3) Procedures for the limitation or discontinuation of water services must—

(a) be fair and equitable;

(b) provide for reasonable notice of intention to limit or discontinue water services and for an opportunity to make representations. unless—

(i) other consumers would be prejudiced:

(ii) there is an emergency situation; or

(iii) the consumer has interfered with a limited or discontinued service; and

(c) not result in a person being denied access to basic water services for non-payment, where that person proves, to the satisfaction of the relevant water services authority. that he or she is unable to pay for basic services,

(4) Every person who uses water services provided by a water services provider does so subject to any duplicable condition set by that water services provider.

(5) Where one water services institution provides water services to another water services institution, it may not limit or discontinue those services for reasons of non-payment, unless it has given at least 30 days' notice in writing of its intention to limit water services or 60 days' notice in writing of its intention to discontinue those water services to—

(a) the other water services institution;

(b) the relevant Province: and

(c) the Minister."

(own emphasis)

3.5. Seemingly the First Respondent infers that only subsection 5 *supra* is applicable to the First Respondent as the First Respondent is a water services institution who provides water to other water services institutions. The First Respondent is under the impression that subsection 3 is not applicable to the First Respondent.

3.6. This sentiment is however misdirected. The First Respondent at paragraph 26 of its answering affidavit states the following:

"The First Respondent provides operations and maintenance services as well as bulk water supply services. In addition, the First Respondent supplies bulk potable water to the Respondent municipalities as well as to certain consumers directly"

3.7. From a proper reading of the above paragraph one can clearly denote that subsection 3 of section 4 *supra* is unequivocally applicable to the First Respondent.

3.8. It is the Applicant's case that because the First Respondent's limitation of water affects end users and the public, that the First Respondent should have notified the public of its decision to suspend water services and thereafter allow for public participation. As is evident from annexure "X5" on page 54 of the bundle.

3.9. In response thereto the First Respondent takes the stance that the employee notice to suspend water services was only an internal communication to the First Respondent employees and does not constitute a record of a decision the First Respondent.

3.10. The First Respondent goes on to say that no decision was taken to terminate the provision of operations and maintenance services or the services for bulk water supply at the various Respondent municipalities mentioned in the notice.

3.11. The First Respondent attorneys furthermore undertake that the employee notice shall be withdrawn on Monday 31 May 2021.

3.12. Based on the First Respondents' undertaking and communications in the letter, seemingly, there existed no record of a decision to terminate water services.

3.13. Accordingly there exists nothing for the Applicant to ultimately review and set aside. This letter by the First Respondent renders the remainder of the Applicant's application academic.

3.14. Surprisingly, in the First Respondent's answering affidavit the First Respondent contradicts itself. The First Respondent now alleges that there was in fact a decision to discontinue water services and now attempt to justify such decision as being lawful.

3.15. The honorable Court should keep in mind that the Applicant removed its main application from the roll on the strength of the letter by the First Respondent

attorneys that confirms that no decision was taken to suspend or discontinue water services.

3.16. Taking the above into consideration the First Respondent is esstopped in these proceedings from relying on any decision to discontinue water services or that such decision was lawful.

4. APPLICANT'S CASE

4.1. From the onset it should be kept in mind that the only issue up for determination is the aspect of costs as the merits have been disposed of.

4.2. Dippenaar J in **Catling and Another v Constas N.O and Another (26471/2016) [2019] ZAGPJHC 350 (17 September 2019) at paragraph 37** said the following:

> *"[37] As a general principle, where a disputed application is settled on a basis which disposes of the merits except insofar as costs are concerned, the court should not have to hear evidence to decide the disputed facts in order to decide who is liable for costs but a court has, with the material at its disposal, to make a proper allocation as to costs[11].* ***Costs must be decided on broad general lines rather than on lines which necessitate a full hearing on the merits.*** *Even where the decision on costs is separate from the merits, it does not mean that the decision must of necessity be*

totally isolated from the merits. Each matter must be determined on its own facts in order to determine the extent to which such considerations apply[12]."

...

[39] In my view, consideration should be given to the conduct of the parties in relation to the litigation in order to determine an appropriate order as to costs. It is trite that a party must pay such costs as have been unnecessarily incurred through his failure to take proper steps or through his taking wholly unnecessary steps [13]. On the facts, it cannot be concluded that the review proceedings were wholly unnecessary."

(own emphasis)

4.3. Taking the above into consideration the honorable Court will denote that the Applicant has been substantially successful.

4.3.1. The Applicant would have obtained an interdict in part A and B of the application in order to maintain the *status quo* and prevent an unmitigated disaster from occurring in the areas of the Respondent municipalities.

4.3.2. It is clear that the First Respondent's conduct was made in *terrorem* in order to extract payment out of the Respondent municipalities and that the First Respondent failed to take into account the effect of its decision on the consumers of water services particularly in the human and health care sector.

4.3.3. The First Respondent provided no reason why it failed to resort to such drastic measures instead of dispute resolution measures as provided for in the Intergovernmental Relations Framework Act 13 of 2005. ("IRFA")

4.3.4. Seemingly the First Respondent is in two minds about more than one part of its case. In May of 2021 the First Respondent communicated that it had **not** taken any decision to discontinue water services. Now all of a sudden it is alleged in the First Respondent answering affidavit that it had in fact formally taken decisions to discontinue water supply services to the Respondent municipalities.

4.3.5. It is common cause that the First Respondent is an organ of State. As such the First Respondent was compelled to follow less drastic measures as set out in the IRFA before discontinuing the provision of water services.

4.3.6. Be that as it may, on the facts that were presented to the Applicant by the First Respondent, there was no such decision and so, the decision as contained in the employee notice was no more than an improper and unlawful threat to utilise the consumers of water services in the Respondent municipalities as a pawn in the battle dispute between the First Respondent and the Respondent municipalities.

4.3.7. The Applicant only had knowledge of the termination letter to the First Respondent employees, as such, the letter on its own constitutes unlawful conduct without any formal decision taken and formal procedure followed

as contained in the Water Services Act 108 of 1999 ("WSA") and Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

4.3.8. The First Respondent attorneys then confirm in correspondence (annexure cc-1) that no decision was taken and the termination notice was only circulated internally to the First Respondent employees. Nevertheless, the First Respondent undertook to withdraw the notice.

4.3.9. Being provided with such undertaking, the Applicant proceeded to remove the main application from the roll based solely on the strength of the First Respondent attorneys letter.

4.4. Furthermore, it must also be borne in mind that the Applicant acted in public interest and instituted the application with urgency based on the little information which was known at the time. None of the information which the First Respondent now alleges in its answering affidavit was public knowledge at the time.

4.5. Ultimately, were it not for the institution of the Applicants main application, the First Respondent would have proceeded to shut off the water services to the Respondent municipalities.

4.6. The consumers of such water services being schools, hospitals, residences, businesses, government services etc. would have been left without water or operational sewage systems. It follows logically that the public health and hygiene would have suffered immeasurably.

4.7. Only after the institution of this urgent application the First Respondent withdrew its termination notices and yielded to the relief sought in the Applicant's application.

4.8. In the circumstances the Applicant has been substantially successful in its application and there is no reason why the Applicant should not be entitled to costs.

4.9. Lastly, the honourable Court should keep in mind that on the **26th of May 2021** the attorneys for the Applicant directed a written letter of demand to the First Respondent's attorneys requiring, by no later than 10:00 on **27 may 2021** a written withdrawal of the First Respondents decision of **25 May 2021** failing which, the above honourable Court will be approached on a urgent basis. (annexure "X5" page 54)

4.9.1. The First Respondent then fails to provide such a written undertaking to the Applicant.

4.9.2. True to its word, the Applicant issues an urgent application in the above honourable Court on 28 May 2021.

4.9.3. Only on the **29th of May 2021 at 20:20** the attorneys for the First Respondent ultimately provided the undertaking that the Applicant requested prior to the issuing of the urgent application.

4.9.4. It is unequivocally clear that the First Respondent actions necessitated the Applicants to incur legal costs in bringing this application.

5. CONCLUSION

5.1. In the premise, the First Respondent solely necessitated the Applicant to approach the above honourable Court. Only after the application was brought, the First Respondent provided the Applicant with the all-along requested written undertaking.

5.2. In the circumstances, the Applicant is entitled to recover its costs.

SIGNED AT MAHIKENG ON THIS THE 28th DAY OF JANUARY 2022.



B RILEY

COUNSEL FOR THE APPLICANT
Advocates' Chambers
Mahikeng