IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

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

Application number: 3185/2020

In the matter between:

AFRIFORUM NPC	Applicant
and	
NGWATHE LOCAL MUNICIPALITY (PARYS)	1st Respondent
FEZILE DABI DISTRICT MUNICIPALITY	2nd Respondent
MF MOKGOBU	3rd Respondent
V DE BEER	4th Respondent
ESKOM HOLDINGS SOC LTD	5th Respondent
THE MINISTER OF HUMAN SETTLEMENTS, WATER AND SANITATION	6th Respondent

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CORAM: VAN ZYL, J

HEARD ON: 13 JULY 2022; 15 JULY 2022

DELIVERED ON: 19 OCTOBER 2022

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[1] This application served before me for the first time on 13 July 2022 as an urgent application. I was performing recess duty and as such I was responsible to deal with the urgent court roll.

[2] During the said hearing the founding papers of the applicant served before me and a Notice of Intention to Oppose by the first to fourth respondents, as well as an unsigned copy of their answering affidavit, had been filed. A Notice to Abide had also been filed on behalf of the fifth respondent (Eskom"), in which notice the following was stated:

> "Be pleased to take notice that the fifth respondent hereby gives its conditional notice to abide with the court order based on papers as they stand. Should anything over and above what appears on the papers occur, then in that event the fifth respondent reserves its right to reconsider its stance."

[3] During that appearance Mr Coertze appeared on behalf of the applicant and Mr Nyangiwe appeared on behalf of the first to fourth respondents.

[4] At the commencement of that hearing Mr Coertze indicated that the applicant was ready to continue and to argue the application. Certain procedural aspects were raised by myself, as well as on behalf of the applicant on the one side and the first to fourth respondents on the other side. As a result of further discussions which developed in open court it was agreed that the hearing of the application was to be postponed to Friday, 15 July 2022, at 11h30. I consequently

issued an order pertaining to the aforesaid postponement and further ordered as follows:

"2. The first to fourth respondents shall file their signed answering papers, an unsigned copy of which has already been placed before court, on or before Thursday, 14 July 2022.

3. Leave is granted to the first to fourth respondents to file supplementary answering papers on or before Thursday, 14 July 2022 at 10h00.

4. The applicant shall file its replying affidavit on or before Thursday, 14 July 2022 at 16h00.

5. The first and fourth respondents' signed affidavits referred to in 2 and 3 above, and the applicant's replying affidavit, shall also be served upon the fifth respondent.

6. The fifth respondent shall file further papers, if any, on or before Thursday, 14 July 2022 at 16h00.

7. The costs of the day shall stand over for later adjudication."

[5] The aforesaid affidavits were duly filed, which included an "Explanatory Affidavit" filed byEskom.

[6] The matter subsequently again served before me on 15 July 2022. In addition to Mr Coertze and Mr Nyangiwe who appeared on behalf of the applicant and the first to fourth respondents, respectively, Mr Rhynhard appeared on a watching brief on behalf of Eskom.

[7] The application was fully argued before me by Mr Coertze and Mr Nyangiwe.

The relief sought in terms of the notice of motion:

[8] In terms of the notice of motion, the applicant was seeking the following relief:

"Main relief:

1. That this application be heard on an urgent basis as set out in Rule 6(12) of the Rules of Court and that the court dispenses with the forms and service provided for in these rules and dispose of this matter on an urgent basis, including service by e-mail.
2. That the first to fourth respondents are ordered to take immediate action to get the pumps for water supply and processing of sewage waste in running order by way of alternative energy sources within 24 hours of this order.
3. That the first to fourth respondents are ordered to resolve the financial dispute with the fifth respondent which is causing the delay in the repair of the electricity supply to the first respondent; alternatively, use the remedies in the Municipal Finance Managing Act (*sic*) to resolve the problems within two 2 days of this order.
4. That the first to fifth respondents must report to the Court, in detail, within 7 days of the steps taken and progress made towards resolving the financial dispute between them.
5. That, in the event that the first to fourth respondents fail to restore the water and sanitation networks of the town to a functional state within 24 hours of this order, the applicant may intervene with the supply of generators, technical experts or such other interventions which may be necessary in the circumstances, to ensure the continued supply of water and sanitation services to the residents in the town of Parys, and that the first respondent will pay the expenses incurred by applicant

in providing this service upon presentation of invoices for the expenses incurred.

6. Ordering the first to fourth respondents to pay the costs of the application (and any other party who opposes the application).
7. That the applicant be granted such further and/or alternative relief as the Court may deem appropriate.

Alternative relief:

8. Declaring that the first to third respondents are under a Constitutional and/or legal or statutory duty to ensure that:
   - 8.1 The water supply to the homes of the town is restored.
   - 8.2 The electricity supply to the town is restored.
   - 8.3 The spill of sewage in the town is contained and cleaned.
9. Declaring that the first to fourth respondents are in breach of a duty referred to in prayer 7 (*sic*).
10. Declaring that the conduct of the first to fourth respondents is unconstitutional and a breach of the following fundamental rights of the inhabitants of Parys, namely:
    - 10.1 The right to life in section 11 of the Constitution, which includes a right to biological and physical life, here threatened by the health hazards arising or likely to arise from the shortage of potable water and the discharge of raw sewage and untreated effluent into the streets and waterways of the town.
    - 10.2 The right in section 24(a) of the Constitution to an environment that is not harmful to the health or well-being of the residents of Parys (Ngwathe Municipality).
    - 10.3 The right in section 24(b) of the Constitution to have an environment protected for the benefit of present and future generations.
    - 10.4 The right in section 27(1) of the Constitution to have access to sufficient and clean water.

11. The first to fourth respondents are ordered to take all necessary steps to ensure compliance with the obligations emanating from prayers 7(*sic*) and 8 *supra.*

12. The first to fourth respondents are ordered within 2 (two) days of this order to each file at this Court under oath, and provide the applicant, the action plan and programme which they will implement, without delay, so as to ensure that the duties and obligations in prayer 7 (*sic)* above, are performed or carried out and which action plan shall address at least the following issues:

    12.1 The steps already taken to ensure that the officials and staff of the first respondent will give effect to the duties and obligations referred to in prayer 7 (*sic*) *supra.*

    12.2 What further steps will be taken in this regard.

    12.3 When each of such further steps will be taken.

13. Ordering the first to fourth respondents to pay the costs of the application (and any other party who opposes the application).

14. That the applicant be granted such further and/or alternative relief as the Court may deem appropriate.

The parties as cited in the application:

[9] In terms of the founding affidavit the applicant, Afriforum NPC, is a non-profit organisation located in Centurion, Gauteng Province.

[10] With regard to the standing of Afriforum, the applicant alleged, *inter alia,* as follows in paragraph 5 of the founding affidavit:

"5.1 The applicant is a civil rights organisation that focusses on the constitutional rights of its members. …

5.2 The applicant has numerous members in the municipal area governed by the first respondent and these members are

affected by the absence of electricity and water supply to the town.

5.3 The applicant brings the application in the interest of its members and in the public interest."

[11] The first respondent is the Local Municipality with physical address at Parys, Free State Province ("the Local Municipality").

[12] The second respondent is the District Municipality under which the Local Municipality falls with its head office located at Sasolburg, Free State Province.

[13] The third respondent is the Acting Municipal Manager of the Local Municipality.

[14] The fourth respondent is the Mayor of the Local Municipality.

[15] The applicant stated that the first to fourth respondents will collectively be referred to as "the Municipality". The applicant further stated as follows in paragraph 2.6 of the founding affidavit:

"The first to fourth respondents has a duty to supply basic services to the residents in the Ngwathe municipal area and are cited as the responsible parties in the first instance."

[16] The fifth respondent ("Eskom") is an organ of state by virtue of section 239 of the Constitution. In paragraph 2.7 of the founding affidavit the following was stated with regard to Eskom:

"Eskom as sole provider of electricity in South Africa has the duty to supply electricity to Municipalities for redistribution to their residents."

[17] In paragraph 2.8 of the founding affidavit it was indicated that the sixth respondent will be referred to as "the Minister of Water and Sanitation". The applicant further averred as follows with regard to the Minister:

"She is cited in her capacity as the national executive official responsible for ensuring compliance at a national level with legislation and regulations relating to the water quality at the Municipality. She is mandated to step in and resolve issues should the need arise. ... The sixth respondent is cited as the member of the National Executive under whose portfolio the current crisis falls."

The application papers:

[18] For reasons that will become evident later in this judgment, I deem it apposite to provide an exposition of portions of the contents of the respective affidavits which are most relevant to the adjudication of the application.

The founding affidavit:

[19] The District Co-ordinator for the North-West Branch of Afriforum deposed to the founding affidavit. The founding affidavit was deposed to on 8 July 2022.

[20] In paragraph 3 of the founding affidavit the purpose of the application was set out to be the following:

"3.2 The purpose of this application is to obtain an order for immediate intervention to prevent a health and social and socio-economic disaster in the district of the first respondent which is caused by the continuous and ongoing:

3.2.1 Lack of electricity supply to the whole town;

3.2.2 Lack of water supply to the whole town; and

3.2.3 Absence of the processing and safe flow of sewage in the town."

[21] In the founding affidavit it was further stated that since the lack of water is primarily an infringement of the basic human rights contained in Chapter 1 of the Constitution, the application was being brought in the public interest and in the interest of justice and to enforce the rights of the residents of Parys.

[22] Under the heading "**IMMEDIATE CRISIS – A TOWN IN DISTRESS**", paragraph 6 and its sub-paragraphs of the founding affidavit followed.

[23] The deponent stated, *inter alia,* as follows in paragraph 6.1 of the founding affidavit:

"The electricity supply to the town was apparently shut down due to the lack of maintenance to the electrical supply to the town, and as far as I could establish, because of non-payment of the Municipality's electricity account to Eskom. …"

[24] In paragraph 6.2 reference was made to a letter dated 1 July 2022 from Eskom to the Municipal Manager of the Local

Municipality, attached to the founding affidavit as annexure "FA2", in which Eskom stated the following:

"Eskom is aware of the fact that there is no electricity supply in Ngwathe and acknowledges that the fault is on its side. The fault is due to two hot connections, one on transformer 1 and the other on the cable. However, Eskom does not have money to cover the costs of repairs. At this point, Eskom cannot confirm restoration time as it is yet to source funds for repairs. Eskom will therefore appreciate if the Municipality could provide funds for the repairs."

[25] The following was stated in the subsequent paragraph, paragraph 6.3 of the founding affidavit, apparently with reference to the contents of the aforesaid letter:

"In an *impasse* between the Municipality, where the Municipality expect from Eskom to do maintenance and supply electricity and Eskom expecting from the Municipality to supply the necessary funding, it is the residents of Parys that pays the price and need the intervention of the Court."

[26] In paragraph 6.4 of the founding affidavit the deponent stated the following, which averments will become very relevant later in the judgment:

"I travelled to the town to deliver water to the residents, and to establish the situation on the ground. As far as I could get information in the limited time to investigate the matter, it seems as if the Municipality indeed paid R1,5 million to Eskom on Monday, 4 July 2022. Despite this payment, Eskom has not repaired the defect to the electricity. In the limited time due to the urgency of this matter, no written confirmation could be obtained."

[27] The following allegations, which will also become very relevant later in the judgment, were made in paragraph 6.5 of the founding affidavit:

"6.5 The electricity is not only a serious inconvenience, but is also causing immeasurable harm to the local economy of the town. The domino effect of the lack of electricity stretches much further than that, causing the further and even more serious problems being:

6.5.1 No water has been supplied to residents in Parys. The pumps that have to pump water into the water system of the town, cannot run without electricity and the first to fourth respondents do not supply any alternative source of energy to fulfil this life saving service and supply in this basic constitutional rights of its residents. A town without water is heading for disaster, which can result in death of residents, due to dehydration or disease.

6.5.2 The sanitation services in the town is also dependent on electricity to transfer this waste to the sewerage plant where it can safely be processed and disposed of. Without electricity supply, raw sewage is running in the streets and waterways of the town, causing a severe health risk for all residents in the town as epidemic illnesses like cholera can result from these circumstances.

6.5.3 The town borders to the Vaal River, which supplies numerous towns and farming activities downstream with water. At present, the raw sewage is flowing into the Vaal River. …

6.5.4 The businesses and shops in the town are effectively unable to conduct business, and have to rely on generators, in so far as possible, to open their shops. ...

6.5.5 Like all towns the residents of this town also have elderly people and young children. ... In order to put before this Court the harm suffered by these elderly people, an affidavit from the manager of the Sonskyn Old Age Home ... is attached hereto ...

6.5.6 I attach hereto screenshots of complaints on social media platforms of residents expressing their concerns and frustration. ... I attach hereto a screenshot from ... sent the 7th of July 2022 wherein she says that Derdelaan Street have been without water for 7 days. ... I attach a screenshot from Facebook wherein ... confirms that there are no water trucks and that she has not been unable to bath."

[28] The application was issued on 8 July 2022. Prior to the launching of the application, a letter of demand, dated 6 July 2022, was sent by the applicant's attorneys of first instance, Hurter Spies Attorneys, to Eskom and the first to fourth respondents. The letter was headed "***ELECTRICITY SUPPLY INTERRUPTIONS AND RESULTING WATER CRISIS: NGWATHE LOCAL MUNICIPALITY***". In the said letter, under the heading ***"Electricity supply interruptions"*** reference was made and enquiries were raised regarding the interruption in electricity supply. Under the heading "***Water crisis caused by electricity interruption"*** it was stated that Parys has been without water since 1 July 2022. Reference was made to applicable

legislation and regulations pertaining to basic water supply and it was demanded "*that you comply with the regulations set out above and urgently provide the basic water supply to the consumers in Ngwathe Local Municipality, and specifically the town of Parys*". The letter was concluded with the following "***Demand***":

"17. Given the gravity of the problem and the fact that the Municipality's non-compliance with its various basic obligations that (*sic*) amount to a violation of the basic human rights of the residents of Parys, we demand the following:

17.1 That Eskom **immediately** refrain from interrupting the electricity supply to the Municipality, due to them reaching the maximum demand as a result of non-payment of their account.

17.2 … as this causes a domino effect on the water supply as well as several other damages that the residents experience.

17.3 The Municipality to immediately put emergency measures in place in order to provide a sustainable interim solution to the water supply.

17.4 That in so far as the Municipality and/or Eskom is unable to adhere to the above demands due to financial constraints, National Treasury be approached to resolve the financial shortfall.

17.5 We request that a written undertaking be provided before **11h00** on **7 July 2022** of the emergency plan to address the above requests.

18. Should you fail to adhere to this urgent demand, our client will have no other choice but to exercise its rights and commence with the necessary legal action in order to obtain the necessary relief."

[29] The first to fourth respondents did not respond to the aforesaid letter of demand. Eskom did respond to the letter of demand by means of a letter attached to the founding affidavit as annexure "FA8". The said letter is not dated and there is no allegation as to when it was received by or on behalf of the applicant, but it was obviously received before the application was launched. I will deal with certain portions of the contents of this response letter later in the judgment.

[30] The deponent to the founding affidavit furthermore stated as follows under the heading "**URGENT ASSISTANCE AND INTERVENTION REQUIRED**":

"11.

Unless the Court intervenes on an urgent basis the situation is headed for a massive health, social and socio-economic disaster which will destroy the lives and livelihoods of the residents of the town of Parys. The applicant will not be able to obtain substantial redress in the ordinary course, because by the time the application is heard immeasurable and irreparable harm will already have been suffered due to the ongoing violence of the basic human rights of the residents.

12.

To cater for the basic need and for the mere survival of the residents of the town, the applicant, in addition to farmers and other organisations in the local community, are delivering water to the residents in the town. This water is only enough for the bare essentials and does not provide for any other needs like hygiene and sanitary needs of the residents. These bits and pieces are not enough to help every resident in the town and can only supply limited relief, to those in most dire need."

[31] Further allegations were made regarding the sewage problems and the consequent health risks.

[32] The deponent further stated as follows in paragraphs 16 and 17 of the founding affidavit:

"16.

The breakdown in service delivery of water and sanitation services must be resolved on an urgent basis. The breakdown in electricity supply is the cause of the first respondent's inability to supply these services. (Own emphasis)

17.

The cause of the breakdown is apparently a dispute between the first and fifth respondents. It is unconscionable (that) the fundamental human rights of the residents of the town are held hostage as a result of this dispute. The Court's urgent intervention is prayed for to ensure the safeguarding of the lives of the residents and the preservation of their fundamental rights."

[33] The rest of the founding affidavit dealt with the "**LEGAL CONTEXT FOR THIS APPLICATION**".

The first to fourth respondents' answering affidavit:

[34] The third respondent, in her capacity as the then Acting Municipal Manager of the first respondent, deposed to the answering affidavit filed on behalf of the first to fourth respondents, dated 13 July 2022.

[35] Under the heading "**LACK OF URGENCY**" the following allegations were made in the said answering affidavit:

> "7. The allegations of urgency flow from the fact (that) a transformer ceased functioning on Friday 1 July 2022. The issue with the transformer were however resolved on Monday 4 July 2022 after the first respondent effected payment. A copy of a letter from Eskom dated 4 July 2022 is attached hereto as 'MM1'.
>
> 8. The applicant contends that Eskom has not remedied the issue however that is simply not the case. In substantiation of this allegation I attach a letter from Eskom dated 9 July 2022 confirming that the transformer has been remedied 'MM2'.
>
> 9. ...
>
> 10. Not only is the application not urgent the application is also premature and badly made. The applicant is simply not aware of the true state of the facts notwithstanding its standing as a litigant litigating in the public interest.
>
> 11. The applicant actually concedes that they do not have the full facts and state as follows in paragraph 6.4 of the founding affidavit, '*in the limited time due to the urgency of this matter, no written confirmation could be obtained*'."

I will deal with certain portions of the contents of the aforesaid annexure "MM1" later in the judgment.

[36] In the answering affidavit it was stated that the main relief sought are contrary to the provisions of the Constitution and legislation and cannot be granted. According to the Municipality the procurement prescripts were simply being

ignored by the applicant. It further alleged that the application amounts to an attempt to usurp the functions of the first respondent and/or the Provincial Government and that the applicant has no authority to act in the manner described in the prayers contained in the notice of motion. It was further contended that the application is contrary to the provisions of Section 139 of the Constitution which empowers the Provincial Government to intervene when a Municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation.

[37] With regard to the alternative relief it was stated that the requested relief is not urgent and are in any event not supported by the true state of affairs.

[38] Under the heading "**BRIEF BACKGROUND**" the following allegations were made:

"31. On or about 26 May 2020 the Parys Town 132/11kv Substation MP1 Kv breaker failed and exploded. The first respondent lost supply for about two days. Since then the first respondent was supplied from Transformer 1 via a twin 640 sqmn. …

32. On 22 April 2022 an ad-hoc temperature scan was done on the Parys Town transformer 1 and it was found that the blue phase MV bushing connection was hotter than the other bushings. On 10 May 2022 an Eskom employee saw a colour change on the connection and the cable insulation was melting on the transformer MV blue phase connection. The cause was suspected to be the higher winter loads.

33. In order to prevent permanent transformer damage, the overcurrent settings were lowered to the transformer rating. The overcurrent setting applied was 1050 A (20.005 MVA).

34. It was recommended not to operate the Parys Town transformer no 1 above its rating until the hot connection on transformer 1 was fixed.

35. In order to minimize the risk, it was then decided to limit the transformer load to 20 MVA (transformer rating) until the hot connection was repaired. The overload settings was (sic) changed on 30 June 2022 to prevent overloading and the transformer tripped on 1 July 2022 at approximately 07:28 due to an overcurrent."

The issue regarding the costs of the repairs, correspondence exchanged between the first respondent and Eskom in that regard and the subsequent payment of the amount to Eskom by the first respondent, which matters were also referred to in the founding affidavit, were also dealt with in the answering affidavit. It was then stated in paragraph 39 of the answering affidavit that "the supply of electricity was restored on 4 July 2022 at about 22h00". The following allegations were furthermore made:

40. Notwithstanding that the first respondent had effected payment for the repairs to the transformer Eskom still raised issue regarding the exposure their transformer is likely to experience due to the overloading from the municipal network as the consumption /usage far exceeded the contractual supply of 21 MVA.

41. Eskom had declared a dispute in terms of Inter-Governmental Relation (IGR) processes and requested National Treasury, Provincial Treasury and the Free State CoGTA to (be) the mediator between the parties. A meeting in terms of the IGR processes was held on 6 July 2022.

42. It was resolved that Eskom would payment (*sic*) of 50% of the outstanding debt over a period of six months. The first respondent would after a grace period of six months pay the current account in full.

43. Electricity supply was restored to the first respondent on 5 July 2022 after the repairs were completed." (Own emphasis)

[39] The allegations made in the founding affidavit regarding the alleged absence of electricity and the consequences thereof pertaining to water supply and sanitation services, were denied in the answering affidavit and the deponent specifically made, *inter alia*, the following averments:

"52. It is denied that there is no water being supplied in Parys due to pumps not working. The electricity supply is in working order in Parys."

[40] It was contended in the answering affidavit that the applicant "failed to appreciate the true factual matrix notwithstanding the fact that the facts are available to the public in media statements". It was further contended that there were no facts to support the applicant`s case and its request for an interdict.

[41] The first to fourth respondents concluded that the application stood to be dismissed with costs *de bonis propriis.*

The first to fourth respondents' supplementary answering affidavit:

[42] Mr TR Malunga, employed by the first respondent as Director: Technical Services deposed to the supplementary answering affidavit filed on behalf of the first to fourth respondents. In the said affidavit he set out his academic qualifications and employment history. He further stated that he is, by virtue of his position, familiar with the facts surrounding the water issues at the first respondent.

[43] He set out the details of the historical reasons surrounding the shortage of water in the Parys area. In this regard he stated that the Parys water conveyance infrastructure dates back to the year 1912.

[44] Mr Malunga provided certain technical explanations and subsequently stated that the water issues of the first respondent were as a consequence of the first respondent's infrastructure being old and dilapidated.

[45] He, however, indicated that there is a plan to improve water quality and availability towards the Parys and Vredefort areas. This plan entails a refurbishing and upgrading of the bulk supply of water to the Parys and Vredefort areas to ensure "reliable, sufficient and safe water for the residents of the first respondent".

[46] According to Mr Malunga the projected costs of the project are estimated at R1 234 356 065, inclusive of profession and specialist fees. Due to the aforesaid costs of the proposed

upgrades, the first respondent does not have the resources to implement same. The first respondent has accordingly applied to the National Department of Public Works and Infrastructure for funding to effect the plans. A copy of the said application, dated 25 May 2022, was attached to the supplementary affidavit as annexure "NLM2".

[47] Mr Malunga consequently stated that the founding affidavit was premised on incorrect facts, since the water issues are not as a result of a lack of electricity. (Own emphasis)

The replying affidavit:

[48] In the replying affidavit the deponent pointed out that the facts which have been disclosed by the respondents, especially in their supplementary answering affidavit, had been withheld from the residents of Parys and the applicant. It was contended that those facts could have and should have been disclosed to the applicant in response to the letter of demand of 6 July 2022.

[49] With regard to the electricity issues, the deponent conceded that since she deposed to the founding affidavit, the supply of electricity "to some parts of the town has partially been restored". It was pointed out that the applicant did in any event not seek the immediate restoration of electricity services in the notice of motion. It was further conceded in paragraph 11.2 that "it appears that some steps have now been taken in an attempt to resolve the dispute between Eskom and the Municipality" and that "for the

moment the applicant does not seek relief in respect of electricity supply to residents".

[50] With regard to the water supply, the deponent stated as follows in paragraph 13 of the replying affidavit:

> 13.1 What is clear from the affidavits filed on behalf of the respondents is that they are waiting on National Government to fund the proposed project to repair and upgrade the water reticulation system of the town.
>
> 13.2 What is glaringly absent from the affidavits filed by the respondents is any alternative plans or backup measures to ensure access to water to the residents of the town, pending the proposed repairs and upgrades.
>
> 13.3 One would at least have expected the first to fourth respondents to arrange for alternative means to provide water to residents, for instance via water trucks or delivery of bottled water for drinking. This has not been done and the residents are dependent on the applicant and other charitable persons and organisations for provision of basic water."

[51] With reference to the first to fourth respondents' bare denial in their answering affidavit regarding the lack of water supply to the residents of town, the applicant obtained affidavits from members of the community and attached same to the replying affidavit, from which affidavits it appeared that some community members have been deprived of water since 1 July 2022, some of them have been receiving water some of the time, many others were still without water, whilst in some instances the water was only restored on 14 July 2022.

[52] Regarding the sanitation issues, the deponent pointed out that the Municipality did not deny that raw sewage is running down the streets of Parys, nor that it is running into the Vaal River. According to the deponent they did also not dispute the cause of the failure of the town sanitation services to be related to electricity. The deponent stated as follows in paragraph 19.3 of the replying affidavit:

"It is shocking that the current state of affairs seems to be acceptable to the respondents, and they do not even bother to disclose what the cause thereof is, or what they intend to do to resolve the issue."

[53] Under the heading "**AD ALTERNATIVE RELIEF IN LIGHT OF THE NEW INFORMATION**" the following was stated in the replying affidavit:

"20.1 It is clear that some relief is necessary to safeguard the Constitutional rights of the residents of Parys.

20.2 In so far as the relief which is sought in the notice of motion has been rendered moot or impossible in light of the information subsequently provided by the third respondent and the deponent to the respondents' supplementary affidavit, it is prayed that the Court at least grant relief for the emergency provision of water.

20.3 The emergency relief can include water trucks, bottled water, public taps etc to the extent that the court deems meet in the circumstances." (Own emphasis)

Consideration of the urgency of the application and the merits of the relief sought at the date of the adjudication of the application:

[54] From the aforesaid outline of the contents of the respective affidavits, it is evident that the disclosure and ventilation of the relevant facts and circumstances have resulted in the development of the application to the extent that the applicant is no longer seeking and/or persisting with the relief it initially sought in terms of the notice of motion. This was indicated in the replying affidavit and during the hearing of the application, Mr Coertze also confirmed same in his oral argument. In his oral argument Mr Coertze also indicated additional aspects in relation to which the applicant is no longer seeking relief and/or is not seeking it on an urgent basis and/or is now seeking relief different from what was sought in the notice of motion.

A: Electricity supply:

[55] The applicant is no longer seeking relief in respect of electricity supply to the residents of Parys. This is evident from the replying affidavit and Mr Coertze also confirmed same during his oral argument. According to the applicant this concession is based on the fact that electricity supply to the town has been restored or at least partially restored. It is furthermore based on the fact that steps have since been taken by the relevant role players to resolve the dispute between Eskom and the Municipality.

[56] In my view the aforesaid concession was correctly made.

B: Sanitation issues:

[57] Mr Coertze pointed out that the first to fourth respondents did not deny the existence of problems with the sewerage system, but other than to deny that it was related to an electricity problem, they did not disclose the cause thereof and/or what they intend to do to resolve the problems. Mr Coertze indicated that the applicant suspects that the sanitation issues are probably also as a result of infrastructure problems and the lack of maintenance thereof. He consequently submitted that should the Court be amenable to it, an order can be made in terms whereof the first to fourth respondents be compelled to report to Court on the state and functionality of the sewerage system. Once such a report has been filed, it can be dealt with at a later stage in due course and not on an urgent basis.

C: Water issues:

[58] Mr Coertze submitted that it is evident that the basic Constitutional right of the residents of Parys to access to water is being violated. He consequently contended that the matter is urgent in that urgent intervention is required to stop the violation of their right to water and to prevent a threat to life.

[59] In their answering affidavits, especially in the supplementary answering affidavit, the first to fourth respondents blamed the poor condition of the water infrastructure for the water problems and the lack of water. Mr Coertze, however,

submitted that the maintenance of the water infrastructure is ultimately the responsibility of the first to fourth respondents. Therefore, the first to fourth respondents cannot blame the lack of maintenance of the water infrastructure for the lack of water supply. It does not resolve the problem and does not exempt the first to fourth respondents from their Constitutional obligation to provide access to water to the residents of Parys.

[60] However, Mr Coertze conceded that due to the information which transpired from the answering affidavits of the first to fourth respondents, the applicant realises and concedes that even should the Court grant an order in terms of the notice of motion to compel the first to fourth respondents to restore full and complete water supply within 24 hours, the first to fourth respondents will not be able to comply with such an order. Mr Coertze confirmed that the applicant was therefore no longer persisting with the relief in that regard. Mr Coertze, however, submitted that in the meantime there are residents who have no access to water. He consequently indicated that what the applicant is requesting from Court, under the heading of "further and/or alternative relief" contained in the notice of motion, is to provide emergency relief to the effect that the first to fourth respondents be ordered to take the necessary steps to secure access to water to all residents, be that by means of water trucks, bottled water, public taps and/or any other manner in which the first to fourth respondents can provide same.

[61] Mr Nyangiwe commenced his argument with reference to paragraph 20.2 of the replying affidavit, which I repeat for the ease of reference:

> "20.2 In so far as the relief which is sought in the notice of motion has been rendered moot or impossible in light of the information subsequently provided by the third respondent and the deponent to the respondents' supplementary affidavit, it is prayed that the court at least grant relief for the emergency provision of water."

He submitted that the aforesaid constituted a complete concession that the entire application is, or has become, moot.

[62] It was pointed out by Mr Nyangiwe that the entire application was pinned on the basis that there was a complete lack of electricity supply to Parys and as a result thereof also a complete lack of water supply and no sanitation processes. That was the case which the first to fourth respondents had to meet on an urgent basis with only 48 hours' notice of the application. With regard to the letter of demand attached to the founding affidavit, Mr Nyangiwe referred to the letter from Eskom which was sent to the applicant`s attorneys of record in response to the letter of demand, which response letter is attached to the founding affidavit as annexure "FA8". In paragraph 17.1 of the letter of demand the applicant demanded that "*Eskom immediately refrain from interrupting the electricity supply to the Municipality, due to them reaching their maximum demand as a result of non-payment of their account*". Mr Nyangiwe pointed out that in response thereto, under the heading "*Ad para 17.1*", Eskom stated as follows:

*"Please note that Eskom **is not interrupting the supply** of electricity to the Municipality, but has, following the overloading which resulted in internal damage to the transformer and in compliance with its regulatory obligations, reduced the transformer`s output to the maximum allowable capacity in order to protect the transformer from further damage that could lead to a total collapse of the transformer.*

The transformer which is providing supply to the Municipality has been utilized above its capacity as communicated to the Municipality since 2018. The pending litigation at the Constitutional Court is testimony to this fact and Eskom has been at pains to explain that the transformer will collapse if it is not upgraded. Eskom has quoted the Municipality to upgrade the supply several times but to no avail.

The Municipality has now requested a quotation to increase its Notified Maximum Demand at the Parys Point of delivery and Eskom is in the process of providing the Municipality with same. Once the Municipality accepts the Budget Quote and fulfils its obligations set out in the Budget Quote, Eskom can proceed to provide the Municipality with the increase in supply."

Mr Nyangiwe consequently submitted that from the aforesaid response by Eskom it must have been clear to the applicant that the electricity supply to Parys had been restored since the deponent to the founding affidavit gathered the information she referred to in paragraph 6.4 of the founding affidavit and that there consequently indeed was electricity supply to Parys at that time. Instead, the applicant continued with the drafting and issuing of the urgent application in which the alleged reasons for urgency clearly did not exist anymore, as evident from Eskom`s response letter.

[63] I have to agree with the aforesaid contention by Mr Nyangiwe. In addition to the response letter by Eskom, which on the applicant`s own version came to its knowledge before the application was launched, there was also the Media Statement by Eskom, dated 4 July 2022, attached to the answering affidavit as annexure "MM1", from which it was also evident that the electricity supply was due to be restored "*by midnight*" on 4 July 2022. I need to mention that the deponent to the answering affidavit referred to the Media Statement as a "letter from Eskom", but as correctly pointed out by Eskom in its "Explanatory Affidavit" it was in fact a media Statement which, according to Eskom, "was posted publicly and reached a far wider audience than a letter would have". The following was, *inter alia,* stated in the said Media Statement:

"ESKOM RECEIVED NGWATHE PAYMENT, RESTORATION COMMENCES:

MONDAY, 04 JULY 2022: After waiting since Friday, 01 July 2022, for a promised payment of R1.1 million from Ngwathe Local Municipality, Eskom is pleased to confirm that the payment was finally received this morning. The payment will be allocated to repairs required to restore supply to Parys and Vredefort in the Free State after overloading on the Ngwathe electrical network tripped and damaged Eskom`s equipment on Friday, 01 July 2022.

...

Repairs to the Eskom equipment will now commence. Based on the assessments of the damage, supply to Ngwathe should be restored by midnight tonight. ...

...

Supply to Ngwathe will be restored to the capacity as per the contracted NMD. ..."

No allegation was made by the applicant in its replying affidavit that it did not have knowledge of the said Media Statement nor was any explanation provided as to why it would not have come to the applicant`s knowledge prior to the issuing of the application.

[64] Mr Coertze relied in his argument in support of the urgency of the application on judgments of the Constitutional Court in which the principle was enunciated that in instances of serious violations of rights matters should be considered to be urgent enough to warrant the attention of the Court. Mr Coertze referred, *inter alia*, to the matter of **Mtolo and Another v Lombard and Others** (CCT 269/21) [2021] ZACC 39 (CC) (8 November 2021) in which the Constitutional Court held as follows at paras [29] – [32]:

"[29] The applicants allege that they live in the open, their children sleep in the car, the children's schooling is negatively impacted by this situation, the situation has traumatised the children and the family has been reduced to being dependent on the goodwill of members of the community for such basic necessities as taking baths and washing clothes. A most demeaning situation.

[30] If true, these allegations cry out for urgent resolution. And generally a situation of this nature cannot automatically be trumped by the fact that a litigant is out by a few days in timeously arranging for the set-down of an urgent application. ... (Own emphasis)

[31] That said, there is a worrying trend where plainly urgent applications are struck from the roll for lack of urgency. A few years back an example was *Informal Traders*. A recent and most glaring example is *Moko*. In that matter an acting principal of a school denied

Mr Moko, a grade 12 student, access to an end-of-year examination for allegedly having failed to attend extra classes. The High Court struck from the roll an urgent application in which Mr Moko sought a mandamus that he be afforded an opportunity to write the missed examination in time for the result to be out with the results of other candidates. With no regard whatsoever for the impact that its decision was likely to have on Mr Moko's future, the High Court struck the matter from the roll for lack of urgency. That was plainly wrong. Unsurprisingly, we held as much.

[32] By their very nature, some cases call for the striking of a balance between compliance with practice directives on the conduct of urgent matters and the clamant need to come to the assistance of a litigant whose rights are severely being violated. *Informal Traders* and *Moko* are examples of such cases and, in my view, so is the present matter. The facts I have set out above about the instant case make this plain. To have this matter heard in due course, that is, not as one of urgency, means it will be heard not earlier than the second quarter of 2022. That cannot be. ..." (Own emphasis)

[65] Based on the aforesaid principle, the present application would obviously have been urgent and would have necessitated urgent intervention by the Court had the factual allegations relied on in the founding affidavit for purposes of urgency and in support of the relief claimed, been true and correct. Unfortunately for the applicant, they are not. As I have already indicated, the urgency of the entire application was pinned on the basis that there was a complete lack of electricity supply to Parys, with the resultant lack of water supply and no sanitation processes. Mr Coertze confirmed same in paragraph 5 of his heads of argument where he stated that the "crisis related to water and sanitation in Parys has its origin in the absence of electricity". However, it is evident from

what I have already stated and found above, that the electricity had already been restored at the time when the application was issued. The alleged reasons for urgency did consequently not exist.

[66] This, in my view, distinguishes the present application from the application in the **Mtolo**-judgment. At the time when the present application was issued, the alleged grounds for urgency did not exist anymore. The lack of urgency became even more evident after the filing of the answering affidavits.

[67] I am consequently of the view that I would be entitled to remove the matter from the roll due to a lack of urgency.

[68] However, it is evident from the nature of the substantive relief which the applicant was seeking in the notice of motion, that such relief was premised on the (incorrect) assumption that at the time when the application was issued, there was a complete absence of electricity supply to Parys due to disputes between the first to fourth respondents and Eskom, which absence of electricity was the cause of the water and sanitation problems. The alleged cause of the alleged urgency of the application is therefore, in my view, intertwined with the merits of the relief sought in the notice of motion. I consequently consider it apposite in the circumstances to also adjudicate the merits of the application, despite the lack of urgency.

[69] In the answering affidavit the first to fourth respondents explained the reasons for the power outage which occurred

on 1 July 2022 and expressly stated that the electricity supply to Parys had since been restored. On the applicant`s case as presented in the founding affidavit to the effect that the lack of electricity supply was the sole cause of the water and sanitation issues, the explanations and allegations in the answering affidavit, read on their own, actually already disposed of the merits of the application. In the supplementary answering affidavit, the true and real cause of the problems with regard to water supply was explained and the first to fourth respondents set out the steps they are taking to resolve the problems. The contents of the supplementary answering affidavit were therefore, in my view, further indicative of the complete absence of any merits in the applicant`s application. I consequently agree with the contention by Mr Nyangiwe that in light of the aforesaid facts and circumstances which the first to fourth respondents revealed in their answering affidavits, one would have expected that the applicant, at that stage, would either have withdrawn the application or have approached the first to fourth respondents with a letter indicating that since it has become evident that the relief sought by the applicant is or has become moot, it is suggested that the parties attempt, in the interest of the residents of Parys, to rather resolve the pressing and immediate plight of the residents by means of alternative ways of water supply than to continue with the urgent application. The applicant, however, failed to do so.

[70] Instead, the applicant persisted with its application and filed its replying affidavit in which it in fact conceded that the relief sought in the notice of motion has become moot. In addition

to the concession, the applicant requested that emergency relief be granted pertaining to alternative ways of supplying water to the residents. As correctly contended by Mr Nyangiwe, not only was the request for this relief for the first time forthcoming in reply, which is not permissible, but the applicant did not even attempt to provide any factual basis in support of such relief. Not a single allegation was made regarding the possible availability of water trucks, the number of trucks available, suggested central points where such trucks should be parked in order to make them accessible to residents from all parts of town, suggested ways in which and from where bottled water should be distributed, the number of bottles to be distributed on a daily basis in order to fulfil in the need, who was to be responsible for the procurements and costs of the bottled water, suggested central points where public taps should be erected and so forth. It is impossible to make any such order in the absence of proper information regarding, *inter alia,* the mentioned aspects. In fact, to make any such order in the circumstances may even result in an order which in any event would be impossible for the first to fourth respondents to comply with.

[71] An order compelling the first to fourth respondents to file a report regarding the condition of the sanitation infrastructure, as suggested and requested by Mr Coertze during argument, can obviously also not be granted on the basis of the present application papers. The relief sought in the notice of motion pertaining to the sanitation problems and the case set out in the founding affidavit in this regard was solely based on the alleged absence of electricity supply. No facts whatsoever

were alleged in support of an order as now suggested by Mr Coertze.

Conclusion:

[72] In the circumstances I am of the view that the application has no merits and consequently stands to be dismissed.

Costs:

[73] Mr Nyangiwe submitted and requested that the applicant`s attorneys of first instance be ordered to pay the costs of the application *de bonis propriis.* He contended that it was the duty of the applicant`s attorneys of first instance to have properly read and considered the contents of the letter from Eskom in response to the letter of demand. He submitted that they clearly failed to do so, because had they fulfilled that duty, they would not have advised the applicant to issue the present unfounded application.

[74] Mr Coertze submitted that there is no basis in the present matter for an order of costs *de bonis propriis.* He referred to the judgment in **Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd** 2014 (3) SA 265 (GP) at para [35] where the Court pronounced as follows on costs *de bonis propriis*:

"[35] It is true that legal representatives sometimes make errors of law, omit to comply fully with the rules of court or err in other ways related to the conduct of the proceedings. This is an everyday occurrence.

This does not, however, per se ordinarily result in the court showing its displeasure by ordering the particular legal practitioner to pay the costs from his own pocket. Such an order is reserved for conduct which substantially and materially deviates from the standard expected of the legal practitioners, such that their clients, the actual parties to the litigation, cannot be expected to bear the costs, or because the court feels compelled to mark its profound displeasure at the conduct of an attorney in any particular context. Examples are dishonesty, obstruction of the interests of justice, irresponsible and grossly negligent conduct, litigating in a reckless manner, misleading the court, gross incompetence and a lack of care..."

[75] Mr Coertze also referred to the matter of **Stainbank v SA Apartheid Museum at Freedom Park** 2011 JDR 0706 (CC) where the Constitutional Court held as follows at para [52]:

"Although the courts have the power to award costs from a legal practitioner's own pocket, costs will only be awarded on this basis where a practitioner has acted inappropriately in a reasonably egregious manner. ..."

[76] I agree with the contention by Mr Coertze that there is no evidence of any such inappropriate conduct by the applicant`s attorneys of first instance. There is no evidence that the application was issued on the basis of advice by the said attorneys. It may well be that the applicant decided to launch the application and/or persist with the application despite advice to the contrary by its attorneys of first instance. Even if it is to be accepted for argument`s sake that it was done on the advice of the said attorneys, the mere fact that the attorneys erred in advising as such, does not justify an order mulcting them in costs.

[77] Mr Coertze further submitted that should I find against the applicant, it would be inappropriate to order the applicant to pay the costs of the application. In this regard he contended that the applicant acted in the public interest in the application and that the purpose of the application was to protect and promote the Constitutional rights of the residents of Parys. He consequently relied on the well-known judgment in **Biowatch Trust v Registrar Genetic Resources and Others** 2009 (10) BCLR 1014 (CC) at paras [22-] - [23] in which the general principle relating to costs in litigation between the government and a private party seeking to assert a constitutional right was established to be that ordinarily, if the government loses, it should pay the costs of the other side, and if the government wins, each party should bear its own costs.

[78] Although the aforesaid *Biowatch*-principle is in fact well-established, the Constitutional Court, in the very same judgment, at para [24] thereof, also determined as follows:

> "At the same time, however, the general approach of this Court to costs in litigation between private parties and the State, is not unqualified. If an application is frivolous or vexatious, or in any other way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunise it against an adverse costs award."

[79] For purposes of the last-mentioned qualification to the *Biowatch*-principle, the Constitutional Court referred to the judgment in the matter of **Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape, and Others**

2005 (6) SA 123 (E) at 143 I – 144 B where the Court held as follows:

"In all the circumstances I am of the view that, objectively viewed, applicant's conduct in launching the application was, regrettably, not reasonable. I use the word regrettably advisedly, because it is quite clear that in bringing the application applicant acted out of the best of motives arising out of its very real concern for the environment. It wished, in the public interest, to prevent the installation of a waste disposal system which it considered would be gravely harmful to the environment and to human life. However, in the light of all the circumstances pertaining at the time the proceedings were instituted and of which circumstances applicant, had it exercised due care, should have been aware, its concerns had already been met and the application was therefore unnecessary. I am acutely aware of the above-mentioned authorities as to the chilling effect of adverse costs orders in matters of this nature as well as of the pertinent remarks of Davis J in the *Silvermine* case (*supra*). In my view, however, it would neither be fair nor in the interests of justice for first and second respondents to be deprived of the costs incurred by them in opposing an application which was doomed to failure from its inception." (Own emphasis)

[80] In my view the last-mentioned *dicta* and the mentioned facts and factors are *mutatis mutandis* applicable to the present application.

[81] It appears that the applicant relied on the information referred to in paragraph 6.4 of the founding affidavit which the deponent obtained and prepared the application on that basis, without having considered, or properly considered, the response letter from Eskom and the Media Statement of Eskom dated 4 July 2022. The applicant furthermore

apparently also failed to exercise reasonable care in ensuring that the alleged facts and circumstances which it intended to rely on in the founding affidavit, had not changed between 4 July 2022 and the time when the founding affidavit was deposed to. This failure of the applicant resulted in the launching of the baseless urgent application.

[82] In my view the facts and circumstances in the present matter are similar to those in the **Wildlife and Environmental Society of South Africa**-judgment, *supra,* which necessitates a finding similar to the one at 144 A – B of the aforesaid judgment:

> "In my view, however, it would neither be fair nor in the interests of justice for first and second respondents to be deprived of the costs incurred by them in opposing an application which was doomed to failure from its inception."

[83] In my view the application consequently constitutes an appropriate instance where an order of costs in accordance with the qualification to the Biowatch-principle, should be ordered.

[83] With regard to the costs of 13 July 2022 which stood over for later adjudication, there is no reason why those costs should not be included in the costs of the application.

[84] As indicated earlier, Eskom filed a Notice to Abide, but deemed it necessary to file an Explanatory Affidavit to "address those aspects of Ngwathe`s answering affidavit which merit correction" in order to "assist the Court in coming to a just decision

based on correct facts". I also indicated earlier that Mr Raynard appeared on instructions of Eskom on a watching brief. In my view it would not be fair in the circumstances to order the applicant to pay Eskom's costs. Eskom did also not request any costs order in their favour. Eskom is to bear its own costs.

Order:

[85] The following order is consequently made:

1. The application is dismissed.
2. The applicant is ordered to pay the first to fourth respondents` costs of the application, which costs are to include the reserved costs of 13 July 2022.

C. VAN ZYL, J

On behalf of the applicant: Adv. A Coertze
Instructed by:
Rossouws Attorneys
BLOEMFONTEIN

On behalf of the 1st – 4th respondents: Adv. L Nyangiwe
Instructed by:
Matlho Attorneys
BLOEMFONTEIN

On behalf of the 5th respondent:	Mr A Raynard Instructed by: Raynard & Associates Inc BLOEMFONTEIN