REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION

Case : 1099/2020
(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.
SIGNATURE: H.C. Jansen van Rensburg
Date : 23 June 2020

In the matter between

RAUBEX CONSTRUCTION (PTY) LTD	APPLICANT
AND	
THE HOD : MPUMALANGA PROVINCIAL GOVERNMENT : DEPARTMENT OF PUBLIC WORKS, ROADS AND TRANSPORT	1ST RESPONDENT
THE MEC : MPUMALANGA PROVINCIAL GOVERNMENT : DEPARTMENT OF PUBLIC WORKS, ROADS AND TRANSPORT	2ND RESPONDENT
ACTOPHAMBILI ROAD (PTY) LTD	3RD RESPONDENT
IMVULA ROADS (PTY) LTD	4TH RESPONDENT

JUDGMENT

JANSEN VAN RENSBURG AJ

INTRODUCTION

[1]. This is an urgent application by the applicant seeking the relief sought in part A of the Notice of Motion –

''*PART A*

1. *That the applicants non-compliance with the rules of this court in relation to service and time limits be condoned and that the application be heard as a matter of urgency in terms of the provision of rule 6(12);*

2. *Pending the determination of the relief sought in Part B the first to fourth respondents are interdicted and restrained from in anyway further acting upon the decision of the first and / or second respondents to award the public tender number P[...] : Rehabilitation of 11,8 km of road D 3930 from Arconhoek to Hluvulani in the Bohlabela Region, Mpumalanga; and*

3. *That cost of Part A is cost in the review proceedings, unless any of the respondents opposes Part A of this application. Then, and in that event, that the respondents who oppose be ordered to pay the cost jointly and severally, payment by one, the other to be absolved; and*

4. *Further and / or alternative relief''.*

[2]. Part B of the Notice of Motion read that ''*THE OUTCOME OF PART B''* will be determined on another date and time determined by the Registrar.

THE RELATIONSHIP BETWEEN THE APPLICANT AND THE FIRST AND SECOND RESPONDENTS

[3]. Since March 2019 a legal battle exists between the applicant and the 1st and 2nd respondents regarding the tender P[...] :

Rehabilitation of 11,8 km of road D 3930 from Arconhoek to Hluvulani in the Bohlabela Region, Mpumalanga. The 3rd and 4th respondents in this specific application did not enter a Notice to Oppose this specific application. For this reason the 3rd and 4th respondents' are excluded in this judgment save where I will refer to them being entities in the application.

[4]. This is the fourth application by the applicant in just over a period of one year whereby the applicant in summary requested different relief in each of the previous and the current application against the 1st and 2nd respondents. [1]

[5]. The first application was heard on 25th March 2019 by Mashile J in which the applicant *interalia* sought the following relief –

[5.1]. That the application be dealt with in terms of rule 6(12);

[5.2]. That the time cast in terms of section 5 of the *PAJA 3 of 2000* for reasons to be afforded to the applicant by the respondents in that matter be reduced;

[5.3]. That the 1st and 2nd applicants be ordered to furnish the applicant within 5 days of the reasons for the decision to disregard the applicant from the tender P[...] T[...] with documents, evaluation reports, minutes of meetings of committees and recommendations, appointment letters, contracts and relevant documentation.

[5.4]. That the 1st and 2nd respondents be ordered to pay the cost of the application.

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[1] See page 52 and 66 of the bundle.

[5.5.]. The decision by and the award of the tender by the 1st and 2nd respondents to another entity was set aside and tender was referred back to the 1st and 2nd respondents for re-adjudication. The 1st and 2nd respondents were ordered to pay the cost of the applicant.

[6]. A second application followed after the same tender was again not awarded to the applicant which was heard on 8th August 2019 by Langa AJ. This application was successful as Langa AJ found that the SBD 4 form which formed one of the matters in that application was correctly completed by the applicant. The first decision was set aside together with an order to remit the tender to the Department for fresh consideration. The contents of the arguments and judgment are included in the applicants bundle. [2]

[7]. This was not the end of the story. After the applicant was unsuccessful being awarded the tender, it again for the third time instituted legal action against the 1st and 2nd respondents whereby the same tender was again the issue in dispute. This application was heard by Roelofse AJ on 10th March 2020 and the judgment was handed down on 2nd April 2020. The 1st and 2nd respondents were ordered to re-adjudicate the tender P[...] T[...] and the 1st to 4th respondents in that application was ordered to pay the cost of the applicant.

[8]. The applicant for the 4th time was unsuccessful and it alleges that the same tender was awarded on 29th April 2020 by the 1st and 2nd respondents to the 3rd and 4th respondents in this application.

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[2] See pages 113 to 138.

[9]. The applicant alleges that the 3rd and 4th respondents lodged an application for leave to appeal two days prior to the tender being awarded and for this reason the award of the tender is origin[3] void. This argument has become moot.

[10]. The majority of the founding affidavit deals with Part B which is not before the court to adjudicate over. The main relief sought by the applicant in Part A is that of an interdict pending the outcome of Part B. I must remark that this relief in Part A of the present Notice of Motion is *''new relief sought''* by the applicant and which relief for an interim interdict was not included in the previous three applications.

THE APPLICANTS URGENT APPLICATION

[11]. The applicants' urgent relief is primarily based on an ''urgent interim interdict'' restricting the respondents to enter into or further any actions , work or construction or rehabilitation of 11,8 km of road D 3930 from Arconhoek to Hluvulani in the Bohlabela Region, Mpumalanga.

[12]. The applicant rely on the previous judgments granted in its favour, based on other facts and circumstances but forget that each application is dealt with under its own unique and specific facts and evidence. These judgments have no influence on the present urgent application before me.

[13]. The applicant requests this court to grant the relief sought in Part A of the Notice of Motion to grant an interim interdict purportedly based upon the applicants ''*prima facie right if not a clear right''*.

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[3] See founding affidavit para 18 and 19.

[13.1.]. The applicant submit that it has a duty to see to it that tender procedures are fair, transparent, competitive , equitable and cost effective. In this regard there are other legislation and entities but not limited to the Department of Finance, Treasury, the Auditor-General, SCOPA and the Public Protector to name a few who is directly involved in the monitoring of *interalia* complaints about tenders.

[13.2.]. The applicant submits that the public, the interest of successful and unsuccessful tenderers, the interest of innocent parties and organs of the State and whoever is involved as role-players in safeguarding the awarding of tenders. In essence the applicant sees itself in the role of the ‘’s*afe keeper of tenders’’*.

[13.3.] The applicant refer to a condition referred to as ‘*’unless objective criteria justify otherwise’’* by the respondents in the awarding of the tender, this read with the request by the applicant for reasons for the awarding of the tender to the 3rd and 4th respondents stands in the present application only to be answered by respondents on or before the 4th August 2020. The importance of this timeframe is that the *PAJA 3 of 2000* specifically makes provision for a period of *90 days* whereby the 1st and 2nd respondents have to provide the applicants with reasons for it in awarding the tender to the 3rd and 4th respondents.

[13.4.]. The applicant refer to the principle of ‘*legality’* and that the 1st and 2nd respondents are not to subject itself to unlawful contact. In Part A there is no factual evidence by the applicant in supported to corroborate this allegation.

[13.5.]. That this court should provide effective relief for the purported infringements of the applicants Constitutional rights. No such rights are referred to or placed before this court.

[13.6.] At the time of the hearing of this application, 40% of the construction work or rehabilitation of the road in dispute would have been completed by the 3rd and 4th respondents. [4]

[13.7.]. Should the applicants application be heard in the normal periods of the rules of the court and the set down of applications, it could take up to 6 months to be heard , whereby the 3rd and 4th respondents would have completed the work on the tender.

[13.8.] The applicant alleges that if the urgent relief as per Part A is not granted, itself as well as the public at large will suffer prejudice. No indication of the prejudice is included as to the form of such prejudice or any factor whatsoever. It seems more likely that the applicant is referring to its financial losses, if any, and which was not calculated, quantified or disclosed and which I will address later in this judgment.

[13.9.] The applicant submit that there is no other alternative as this urgent application to follow to obtain an interim interdict.

[13.10.]. The applicant forms part of Raubex Ltd, a JSE listed Company and one of the largest construction companies in South Africa. It claims to have constructed various large scale projects. [5]

[13.12.]. The applicant in its founding affidavit spent a lot of time on Constitutional rights and Part B of the application but neglect to adequately address the requirements of ‘’*urgency’’* of this application.

THE 1ST AND 2ND RESPONDENTS ANSWERING AFFIDAVIT [6]

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4 See page 44 para 84.
5 See page 39 and 40 para 72 and 73.
6 See page 160 to 178.

[14]. The 3rd and 4th respondents did not enter a Notice to Oppose the applicants application. For this reason I will refer to the 1st and 2nd respondents (hereafter the respondents) in the judgment that follow.

[15]. The respondents submit that the applicant is engaging in one application after the other based on it being unsuccessful in not being awarded the tender in dispute.

[16]. The respondents submit the following –

[16.1.]. The tar road has fallen into disrepair because there was no money to repair the road.

[16.2.]. There were various community protests, civil unrest and a demand that the road be reconstructed.

[16.3.]. That the community was outraged at the pace and speed that the repair of the road took place and that there was more pressure on the contractor to employ people of the area and SMME's.

[16.4.].That it would take up to 4 months for a contractor to be fully operational. In doing so it would open new disputes as to employment which could cause chaos and fresh disruptions in the community which would lead to public violence and a disruption of the restart process.

[16.5.]. Costs incurred by the Department would be wasted. The estimated increase in the cost is RM 30 million over and above the current estimate of RM 169 million

[16.6.] The road has 26,6, km of passes to be maintained which would add to the cost of the repaid or construction taking into account the safety of the public, commuters and vehicles.

[16.7.]. The respondents alleges that the applicant is constantly pursuing its legal battles with the respondents even in the circumstances where it was not guaranteed to be appointed as the contractor, read with the other documents and requirements, election and no guarantee of being appointed read with the processes and procedures to be followed in awarding tenders.

[17]. The respondents submit that there is no urgency in the applicants application and it should be dismissed or struck off the roll with cost.

[18]. Interestingly enough, the applicant address a letter to the respondents dated 6th May 2020 requesting reasons for the dis-qualification of the applicant as the successful bidder on the tender in dispute. [7] I cannot close my eyes for this letter as it clearly refer to section 5(1) of the *PAJA 3 of 2000* which determine the return date for the respondents to furnish reasons within 90 days of such a request which is 4th August 2020. [8] For this reason the respondents are not obliged to furnish its reasons before the 90 days period has expired.

THE REQUIREMENTS OF RULE 6(12) OF THE RULES OF THE SUPERIOR COURT : URGENCY

[19]. Specific reference is made to rule 6(12) which read as follows –

> (a) *In Urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as to it seems meet.*

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[7] See page 142.
[8] See page 144 and page 166 para 22.

(b) *In every affidavit or petition filed in support of any application under paragraph (a) of this sub-rule, the Applicant* ***shall*** *set forth explicitly the circumstances which he avers rendered the matter Urgent and the* ***reasons*** *why he claims that he could not be afforded substantial redress at a hearing in due course.*

(c) *A person against whom an order was granted in his absence in an Urgent application may by notice set down the matter for reconsideration of the order. [Inserted by GN R2845 of 1991.]*

[My underlining]

[20]. In the unreported case of *Caledon Street Restaurant CC v Monica d'Aviera* [9] which was heard at the same time with the case of *Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd and another* [10] the following was held -

'Other litigants waiting for their matters to be heard would be prejudiced if priority were afforded to these applications as they would have to wait longer. And what distinguishes these two applications from other matters? Applications for review such as these occur commonly and are not given priority. The prejudice that Applicants are complaining about is the possibility that they may suffer losses of profits - the losses, if any, sound in money. Assuming that such losses are irrecoverable, that still does not distinguish these matters from many others waiting their turn on the ordinary roll. Take for example all the cases wherein general damages are claimed in delict including actions instituted under the Compulsory Motor Vehicle Insurance Act 56 of 1972. Interest is not claimable on the amount awarded and litigants suffer

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9 [1998] JOL 1832 (SE).
10 1981 (4) SA 108 (CPD).

financially by delay in the adjudication of their matters. Moreover, the fact that a litigant with a claim sounding in money may suffer serious financial consequences by having to wait his turn for the hearing of his claim does not entitle him to preferential treatment. On the other hand, where a person's personal safety or liberty is involved or where a young child is likely to suffer physical or psychological harm, the Court will be far more amenable to dispensing with the requirements of the Rules and disposing of the matter with such expedition as the situation warrants.

The reason for this differential treatment is that the Courts are there to serve the public and this service is likely to be seriously disrupted if considerations such as those advanced by the Applicants in these two matters were allowed to dictate the priority they should receive on the roll. It is, in the nature of things, impossible for all matters to be dealt with as soon as they are ripe for hearing. Considerations of fairness require litigants to wait their turn for the hearing of their matters. To interpose at the top of the queue a matter which does not warrant such treatment automatically results in an additional delay in the hearing of others waiting their turn, which is both prejudicial and unfair to them. ***The loss that Applicants might suffer by not being afforded an immediate hearing is not the kind of loss that justifies the disruption of the roll and the resultant prejudice to other members of the litigating public.'***
[My underlining]

[21]. It would then follow that first, to the extent that these cases may be interpreted as laying down that financial exigencies cannot be invoked to lay a basis for urgency, I consider that no general rule to that effect can be laid down. Second, whatever the extent of the indulgence, the sanction of the court thereof that an application be heard as a matter of urgency (based on potential undisclosed and not

being quantified or for that ever matter or for whatever reason or aim of such financial gain being claimed as financial losses) would not in general, accord that the matter receive any precedence over other matters and result in the disposal of the latter being prejudiced by being delayed.

ASSESSMENT OF THE APPLICATION AND ITS CONTENTS

[22]. The applicant spent nearly all of its time, effort and focus on Part B of the Notice of Motion which is not to be adjudicated by this court. The lengthy repeat of contents of letters copied in the application seems to be the crisp of the application except that the applicant should concentrate on the reasons for the urgency of its present application which is the issue before this court.

[23]. It is firstly important for the applicant to show <u>good reasons</u> for the urgency and why the relief sought could not wait to be heard by a court under normal time frames and set down. The allegation of not been afforded relief in due course is not enough; there must be something else to warrant urgency.

[24]. The requirements for an interim interdict have been well established in our law. These requirements as set out in *Setlogelo v Setlogelo 1914 AD 221 at 227***.** They are the following:

[24.1.]. A *prima facie* right;

[24.2.]. Apprehension of *irreparable harm*;

[24.3.]. The *balance of convenience* in favour of granting interim relief; and

[24.4.] The absence of any other adequate ordinary remedy.

[25]. In *National Treasury & others v Opposition to Urban Tolling Alliance 2012 (11) BCLR 1148 (CC) at 1150* the court held that the *Setlogelo test*, as adapted by case law, must henceforth be applied cognisant of the normative scheme and democratic principles that underpin the Constitution.

THE APPLICANTS PURPORTED *PRIMA FACIE RIGHT*

[26]. By claiming a *prima facie* right a claimant must establish that the *''prima facie right''* is not merely a right to approach a court. It is a right to which, if not properly protected by an interdict, such as in this application, harm would follow. The applicant only refer to a *prima facie right* in a very ***''broad sense''*** but does not elaborate specifically or explained the existence of the right to be dealt with under urgency. It refer to its purported Constitutional rights and just mention in the passing by the purported right of the public.

[27]. From the reading of the application it seems as if the applicant want to be granted the interim relief for an interim interdict pending the outcome of Part B of the Notice of Motion.

[28]. The applicant neglect to take into consideration that the community of the area where this disputed tender for the rebuild of the road between Arconhoek and Hluvukani exists, also has a *prima facie right* to a safe road to travel on. In this regard the community has the Constitutional right to life, the right to access to shops, medical facilities, schools, water and other Constitutional rights which could be attributed to a safe road for transport.

[29]. Read herewith the civil unrest and the actions by the population of the area and the progress of the repair or rebuild of the specific road which is aspects that this court has to take into consideration in the evaluation of the evidence of the litigants before it.

[30]. I am of the view that when the monetary value of the tender which seems to be the only '*prima facie right'* of the applicant, is weighed up against the '*prima facie'* right of the community , the latter outweigh the purported '*prima facie' right* of the applicant by far.

[31] The applicant refers to Covid-19 and its effect on the construction industry. However the 3rd and 4th respondents could have proceeded with the construction and repair of the road since 1st June 2020. This application by the applicant did not halt such construction and repair by the 3rd and 4th respondents. The appeal by the 3rd and 4th respondents is academic for this purpose.

[32]. Should the court grant the relief sought by the applicant in Part A of the Notice of Motion, it would mean that the applicant could ''*stale mate''* the disputed application in Part B for as long as it could and thereby such action could have a detrimental impact on the community which is relying on the speedy repair and construction of the disputed road in this application. It would set a dangerous example if this court would grant the interim interdict in favour of the applicant against the relief claimed in Part B of the Notice of Motion which stands to be dealt sometime in future.

APPLICANTS PURPORTED APPREHENSION OF IRREPARABLE HARM

[33]. The applicant does not address the effect of irreparable harm anywhere in its founding or replying affidavit. The applicant addresses its purported Constitutional rights without qualifications thereof as the only reason for the urgency of this application with very little motivation and reasons, therefore.

[34]. It rather seems that the applicant will go at any lengths to secure a tender in the circumstances referred to in the two judgments attached to its founding affidavit and by which this court will not be influenced in

any manner, whatsoever. As indicated each application should be treated on its own evidence and circumstances. The only averment by the applicant is that should this application not be heard on an urgent basis; it might take up to 6 months to have the application heard. [11] This is in itself not a reason for urgency.

[35]. This is the 4th application by the applicant in just over one year on the same disputed tender. There is a fifth application to follow sometime in future should this court grant the interim relief to the applicant. From reading the papers it is clear that the real dispute is over a tender with a financial implication, either to the applicant or another successful tenderer. Financial implications for any party do not qualify as urgency. It financial implications would be classified as a factor for urgency, it would open the door to misuse of the processes of and rules of the court. [12]

[36]. In summary the applicant did not proof or provide any evidence that it should suffer irreparable harm if Part A of the Notice of Motion is not granted.

APPLICANTS ALLEGATION REGARDING THE ''*BALANCE OF CONVENIENCE*''

[37]. The court must assess the probable impact on the applicant, the respondents and society in granting the interim interdict to the applicant. The possible harm caused to the applicant vis-à-vis the respondents, including the 3rd and 4th respondents read with the position and the *prima facie right* of the community must in this regard be evaluated and analysed.

[38]. The main question is whether in *casu* the applicant will be harmed by not granting the interim relief, whilst waiting for the

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[11] See page 44 para 84.

[12] *Trustees BKA, Besigheidstrust v ENCO Produkte en Dienste* 1990 (2) SA 102 (TPD) at 108 D – E.

determination of the validity of its challenge of the tender for the fourth time?

[39]. Against the purported harm of the applicant (which has not been explained), a court must evaluate and analyse the prejudice to be suffered by the respondents (including the 3rd and 4th respondents) as well as the community at large. I have elaborated on the rights of the community above in this judgment.

[40]. It is clear from the founding affidavit that the applicant is a huge Construction company with many resources, being listed on the JSE. I therefore, find that the '*balance of convenience'* favours the respondents, jointly and / or severally.

THE ABSENCE OF ANY OTHER ORDINARY OR ADEQUATE REMEDY

[41]. I have referred to the prolonged litigation by the applicant against the 1st and 2nd respondents since March 2019. This is the 4th application which is brought before this court and seemingly there is a fifth application (Part B of this application if part A is granted) waiting in the wings whereby the applicant constantly ''*moves the goalposts''* so to speak, each time seeking alternative relief. If it does not succeed with the one form of relief the next application is issued with alternative relief.

[42]. This specific application deals with two parts :

[42.1.]. Part A of the application to be adjudicated now is an application for an interim interdict restricting the respondents from engaging in the completion of the road in dispute; and

[42.2.]. Part B of the applicants' application deals with the outcome of the second part which again refer to the dispute in the granting of the tender to the 3rd and 4th respondents in due course.

[43]. The applicant is seeking an interim interdict to basically stop all construction work to be done by the 3rd and 4th respondents on a road between Arconhoek and Hluvukani which is the ‘’*lifeline’’* so to speak of the communities in that area. I have dealt with the results of the stopping of any construction work by the 3rd and 4th respondents above in this judgment as well as the rights of the applicant and the community of that specific area of Mpumalanga.

CONCLUSION

[44]. The applicant cannot request this court to grant an interim interdict in Part A of the Notice of Motion and then rely on Part B of the Notice of Motion to be heard sometime in future; especially not under the present Covid-19 situation. It would mean that the repair and the construction of this specific road are postponed for an indefinite period whilst the Constitutional rights and protection of the community which is relying on this specific road is disregarded.

[45]. I cannot find any reason why the applicants application is urgent, especially read with rule 6(12)(b) of the Rules of the Superior Court. Other as to refer to some allegations regarding that the respondents are bias against the applicant, that the applicant has a Constitutional right to be awarded the tender, allegations of irrationality, that the applicant outscored the 3rd and 4th respondents to name a few is not enough to qualify as *urgent.*

[46]. The only allegation by the applicant is that the awarding of the tender to the 3rd and 4th respondents are unlawful which is not corroborated in any way. No reasons or factual evidence is included in the urgent application.

[47]. I refer to the allegations by the applicant which is dealt with in Part B of the Notice of Motion and which is not before me. My duty is to evaluate the effect and impact of the awarded tender read against the applicants application in Part A of the Notice of Motion to stop the

respondents , including the 3rd and 4th respondents, from engaging in the construction or repair of the road referred to in the tender which forms the crisp of this dispute.

[48]. I cannot see the reasoning behind the applicants application in Part A for an interim interdict pending the outcome of Part B of the Notice of Motion some time in future; maybe 6 months from now. Further the applicant's application for reasons in terms of section 5(1) of the *PAJA 3 of 2000* to the respondents for the awarding of the tender to the 3rd and 4th respondents was only made on 6th May 2020 with a ''*mature date''* for the respondents to reply only being set at 6th August 2020. In the light hereof I am of the view that this application is premature.

[49]. I am not persuaded that the applicant would not be able to have its application dealt with in the normal course and proceedings of a court of law.

[50]. Base on the above I am not persuaded that the applicants application qualify as on to be entertained under ''*urgency*".

[51]. In the circumstances I can find no reason for the applicants application to be treated an one based ''urgency''*.* In my view, the applicant should have awaited for receipt of the reasons to be provided by the respondents on or before 6th August 2020 and then have decided what options was available to it to evaluate and pursue its intended legal action against the respondents, if any.

COST

[52]. It is trite that cost should follow the successful party in litigation.

[53].I am of the view that the reasons submitted by the applicant for ''*urgency"* are so flimsy and unsatisfactory, that this application should never have been brought in this format before a court of

law. There is not one allegation which place the applicant in a position of irreparable harm or that the issues at stake could not be dealt with in the normal flow of motion court regarding the proper ventilation of the applicants application which was opposed by the respondents.

[54]. The present application does not make out a proper case of *urgency*. I am of the view that this application is one of the examples where an applicant would go to the extreme to misuse the processes of court merely based on continuous litigation based on financial gain in being awarded the tender in dispute and in the absence of awaiting the reasons to be provided by the respondents on or before 6th August 2020.

[55]. The applicants application does not contain any other factor to warrant its urgency nor does its purported uncorroborated allegations support the applicant in its urgent application. As mentioned, the applicant spent about 90% of its time and effort on Part 2 of the Notice of Motion whereas the time spent on Part A, which is before the court, is a few pages dealing with unrelated aspects except referring to unqualified Constitutional rights of the applicant, which I have dealt with above.

ORDER

[56]. The following order is made –

1. The applicants' *urgent application* is struck off the roll with cost on an party-and-party scale.

2. The cost of suite of the respondents to be paid by the applicant which cost will include cost of 2 counsel.

H.C. JANSEN VAN RENSBURG
ACTING JUDGE HIGH COURT OF SOUTH AFRICA
MBOMBELA DIVISION

Date of hearing : 23th June 2020

Judgment : 23h June 2020

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