



IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MIDDELBURG (LOCAL SEAT)

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

Case No: 808/2021

In the matter between:

**AFRICAN EXPLORATION MINING
FINANCE CORPORATION (SOC) LTD**

APPLICANT

and

BEDNOCK MASINA AND 45 OTHER

RESPONDENTS

JUDGMENT

BACKGROUND:

- [1] The applicant is a state-owned company with a mandate secure South Africa's energy supply demands primarily through the mining and supply of coal to power stations to generate electricity. In particular, the applicant supplies Eskom's Kendal and Kusile power stations with coal.
- [2] In 2020, applicant employed 46 employees on fixed-term contracts which terminated on 28 February 2021. The 46 individuals are cited as the first to forty sixth respondents and are referred to for convenience as the "respondents". The South African Police Service ("the Police") was also joined as a respondent and this judgment deals with their dismal failure to comply with their Constitutional mandate.
- [3] The applicant is a state-owned company with a mandate secure South Africa's energy supply demands primarily through the mining and supply of coal to power stations to generate electricity. In particular, the applicant is responsible for supplying Eskom's Kendal and Kusile power stations with coal.
- [4] In 2020, the applicant employed 46 employees on fixed-term contracts which came to an end on 28 February 2021. The 46 individuals are cited as the first to forty sixth respondents and are referred to for convenience as the "Respondents". The

Respondents refuse to accept that the applicant's decision not to offer them new employment contracts.

- [5] On 8 March 2021 at around 17h00, the Respondents under leadership of the first respondent arrived at the applicant's Vlakfontein mine ("the mine") and blocked the entrance to the mine. This prevented the applicant's employees responsible for working the day shift from leaving the mine and the employees working the night shift from entering the mine and executing any further mining works.
- [6] On 9 March 2021 the Respondents returned to the mine, armed with sticks and rocks, and even brandishing firearms. They blocked all persons from going in or going out of the mine by damaging vehicles with sticks and throwing stones and rocks at the applicant's employees, their vehicles and equipment.
- [7] The applicant reported the matter to the South African Police Services and opened a case. The Police were called to assist with the unlawful conduct by the respondents and arrived at the mine. The Police however refused to stop the respondents from continuing with their unlawful protest action at the mine and advised applicant's manager that applicant must obtain a court order before they would be able to act against the respondents. Members of the South African Police Services advised that they are not in a position to remove the respondents from the entrance of the mine without a court order.

- [8] Shortly after the Police left, apparently not prepared to assist the with the unlawful conduct by the respondents, the respondents became violent and started throwing stones and rocks at the applicant's employees and contractors, their vehicles and equipment. They have also been threatening the applicant's employees, contractors and visitors with violence by screaming and shouting that they were going to hurt or kill them if the applicant does not re-employ them.
- [9] It is apparent that the protest action by the respondents is unlawful because it has not been approved in terms of the Regulation of Gatherings Act No. 205 of 1996. The protest action is also unlawful and criminal because it is violent. The respondents forcefully chased the applicant's employees and contractors from the mine and have caused damages to property.
- [10] The respondents undertook they will return on 10 March 2021 to burn the applicant's mine and equipment to the ground if they are not re-employed by the applicant. The applicant was left with no alternative but to turn to this Court for an interdict to prevent possible loss of life, injuries to employees, agents, and further damage to its equipment and mine. The court granted certain interdictory relief to the applicant and made an order directing the South African Police Services and the Public Order Policing Unit to take all reasonable steps to ensure that the orders issued by this court are complied with to prevent further harm.

- [11] The application should not have been necessary, as the Police should have effectively prevented the violence. The applicant, and many other employers in this division, and more specifically in the local seat, should not have to spend thousands of rands on legal costs in order to obtain court orders to “jump start” the Police. This tendency by the Police is a very disturbing characteristic in this division. Recently the Judge President of this division penned a judgment and reprimanded the Police for not complying with their constitutional obligations¹ (“*the Impangele-judgment*”).
- [12] In every urgent motion roll our courts, particularly in the Local Seat, are faced with urgent applications where the police are accused of failing to comply with their constitutional imperative. Often the explanation is that the police refuse to intervene even in clear criminal activity until a court has directed them to act. That would be wrong and will encourage lawlessness.
- [13] The Impangele Logistics judgment by Legodi JP was transmitted to the Provincial Commissioner of Police to consider whether to institute an inquiry and to consult with the applicants in those matters’ attorneys for the purpose of fully addressing the complaints raised herein and to take measures to avoid reoccurrence of similar complaints in the future, if necessary.

¹ Impangele Logistics (Pty) Ltd and Another v All Truck Drivers’ Foundation (ATDF) and Others; Mbali Coal Proprietary Limited v Ntuthuko and Others (3647/2019; 3564/2019) [2019] ZAMPMHC 11; 2020 (1) SACR 536 (ML) (25 October 2019).

[14] The judgment was handed down on 25 OCTOBER 2019. Despite the fact that the Judge President criticised and reprimanded the Police, no difference could be noted in the conduct of the Police since. It is as if the Impangele judgment was never penned or brought to the attention of the Police Commissioner at all. This Court have heard many similar applications since October 2019, and in all those applications the Police needed a Court Order to do the work they are supposed to do without this Court's admonishments.

[15] To quote the Judge President in Impangele:

"[16]This court is not hearing about this kind of responses by the SAPS for the first time. When matters deserving maintenance of public order by the police are reported to the police, immediate response is required. It would constitute a wanting conduct on the part of the police not to act on a criminal activity reported to them. Our courts often hear these kind of stories against our police officials particularly in this part of the Province where mining activities are very high. To seek an order of court before an action is taken on a criminal activity can only serve to bring the criminal justice system into a disrepute.

[17]It is not the responsibility of our courts to prevent, combat and or investigate crimes. Neither is it the function of the courts to maintain public order, secure the inhabitants and their property. That is a power and authority constitutionally bestowed on the police in term of section 205 of the Constitution.

[18]If what is said about the police is true, then one wonders whether it is training offered to our law enforcement officers, or is just dereliction of duties by police officials. These concerns are what prompted this court to say

something in the form of a judgment for the attention of the provincial Commissioner. It is up to the Provincial Commissioner to consider whether or not to launch an investigation with a few to avoid further occurrence of this conduct

[19] Lack of swift consequences for criminal actions by whoever can only encourage people to and take the law into their own hands and sometimes in full view of the police officers as it was apparently the situation in this matter."[Own emphasis]

[16] This Court must be wary not to tread on the sphere of the executive arm of the Government, but cannot sit idle and see criminal activities during protest action being perpetrated in the presence the Police who insists on a "court order" to execute their constitutional duties. The transmission of the Impangele judgment to the Provincial Commissioner of Police (Mpumalanga) seems not to have had the expected result at all as it is apparent that nothing has changed. It is this Court's view that this pressing and very concerning state of affairs in the Mpumalanga Police should be brought to the attention of the National Commissioner of Police and the Minister of Police now. In recent times it has been noted that where the Minister of Police takes charge of a situation, there seems to be a favourable outcome.

[17] The Constitution Act make it clear that, whilst empowered to investigate crime, the SAPS also bears a duty to do so. This emerges from the interpretation of s 205(3) of the Constitution. By way of contrast, s 179(2) of the Constitution affords the prosecuting authority a 'power' and thus a discretion to institute criminal proceedings. The word 'power' does not appear in s 205(3) of the Constitution in relation to investigating crime and it is therefore clear that the Police was not

given a discretion as to whether it wants to investigate crime and protect the public from threatening invasions by criminal.

[18] The Constitution: s 205(3) provides that:

"The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law."[Own emphasis]

The duty is imposed also under the South African Police Service Act the preamble affirms that it is the duty of police officers to ensure the safety and security of all people in the country. This duty is owed to the members of the public².

[19] While I am busy writing this judgment, rolling blackouts are under way since the day before. Load shedding, one of the chief destroyers of our economy is applied again. The respondents were preventing the delivery of coal to power stations and thereby unlawfully contributing to the destruction of our economy. The respondents have the right to protest, but not to act unlawfully. Simultaneously the student unrest at Wits University broke out. I was struck by the swift, and in some instances, brutal conduct of the Police to be seen by the whole world.

[20] In no time did many police officers, armed with shotguns, attend the scene at Wits. They fired rubber bullets at the protesting students whilst there was no sign of violence perpetrated by the students. Shock grenades were also utilised. The question begs why this same "efficiency" is not applied at the many mines in Mpumalanga, and why a court order remains a pre-requisite for action by the Police in

² Minister of Safety and Security v Mohofe 2007 (4) SA 215 (SCA) and K v Minister of Safety and Security 2005 (6) SA 419 (CC) (2005 (9) BCLR 835) paras [18] and [19].

our province. It is clear that the Police is betraying its constitutional obligations, and does so in a very gross manner.

[21] The Court is always hesitant to make orders against the Police in these applications, and initially refused to do so, until the failure by the Police became the norm. Since when does a inhabitant of our country need a court order to protect him/her from crimes? The situation in this Province had become unbearable and the Police needs to heed the Court's warning. It might amount to mere speculation, but somebody or some company might in the near future institute action against the Police for its failure to protect the public and its property under these circumstances, and thereby cause further wasteful expenses for the already overburdened tax-payer.

[22] The statement with reference to the court encouraging the police to do their job, is clearly a cry for help by those who feel the police are not doing their job. Hopefully, the Minister of Police and the National Commissioner will hear them. Because, it is wrong not to act on the commission of criminal activities³.

[22] **THE FOLLOWING ORDER IS THEREFORE MADE:**

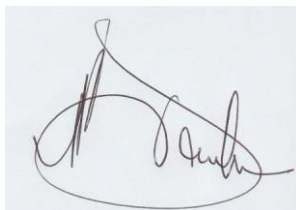
[22.1] The Registrar of this court is hereby directed to bring this judgment to the attention of the Minister of Police and the National Commissioner of Police.

[22.2] The Minister of Police and the National Commissioner of Police must consider whether to institute an inquiry and to consult with

³ Impangele Logistics, supra, para [31].

the applicant's attorneys for the purpose of fully addressing the complaints raised herein and to take measures to avoid reoccurrence of similar complaints in the future, if necessary.

SIGNED AT MIDDELBURG ON THIS THE 11th DAY OF March 2021.

A handwritten signature in black ink, appearing to read 'H Brauckmann', is written over a light blue rectangular background.

H Brauckmann

**ACTING JUDGE OF THE MPUMALANGA DIVISION,
MIDDELBURG (LOCAL SEAT)**

Attorneys for Applicant: GILDENHUYS MALAJI INC p/a AWG ATTORNEYS

Counsel for the Applicant: ADV JL UYS

