

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 15437/15

In the matter between:

CONCERNED RESIDENTS OF FLAG BOSHIELO
WEST

First Applicant

SMAKALENG JACOB BALOYI

Second Applicant

KLAAS BAPELA

Third Applicant

SELLO FREDDIE PHEFADI

Fourth Applicant

MARIA MOKOMANE

Fifth Applicant

ELSIE LETAGENG

Sixth Applicant

-And-

SEKHUKHUNE DISTRICT MUNICIPALITY

First Respondent

EPHRAIM MOGALE LOCAL MUNICIPALITY

Second Respondent

MEC, DEPARTMENT OF WATER AND SANITATION
LIMPOPO

Third Respondent

MINISTER OF WATER AND SANITATION

Fourth Respondent

MINISTER OF BASIC EDUCATION

Fifth Respondent

MINISTER OF HEALTH

Sixth Respondent

THE PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA

Seventh Respondent

FIRST RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned;

MANCHING BENEDICTA MONAMA

Do hereby make an oath and state that;

1. I am an adult female and employed as a Chief Operations Officer and current Acting Municipal Manager of the First Respondent and stationed at no 3 West Street in Groblersdal, Limpopo Province, with my address for the purposes of these proceedings C/o Messrs SC Mdhuli Attorneys C/o Lekhu Pilson Attorneys, Burlington House at number 235 Hellen Joseph Street in Pretoria.

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2. Unless I state otherwise or the context indicates differently, I confirm that the allegations contained in this affidavit fall within my personal knowledge and are to the best of my belief both true and correct. Where I rely on facts outside my personal knowledge, I rely on the records under my control and the information furnished to me by the officials within my Municipality.
3. Insofar as I make submissions on legal matters, I do so on the advice of the legal representatives of the First Respondent, which I received during the preparation of this affidavit.
4. I have been authorised to depose to this affidavit on behalf of the Sekhukhune District Municipality ("the Municipality"), which has been cited as the Municipality responsible for the development and implementation of measures to realise the right of access to basic water to the Applicants.

INTRODUCTION

5. The Applicants have brought an application in two parts. In part A, the Applicants seek an interim relief *inter alia* directing the Municipality to provide them with 25 litres of free basic water per person per day. In the alternative, the Applicants seek an interim relief, directing the Municipality to provide a minimum of 25 litres of potable water per person per day.

6. In part B, the Applicant seek an order *inter alia* declaring the Municipality's failure to provide sufficient potable water to the Applicants, unlawful and unconstitutional, in that it is inconsistent with section 3 of the Water Services Act and sections 10, 12, 24, 27 (1) read with 27 (2) and 28 as well as 29 of the Constitution.
7. The Municipality opposes prayer 1 of part A as well as the alternative thereto. The basis upon which the Municipality opposes this application is that the Applicants have failed to make out a case for an interim relief. This will be demonstrated later in this affidavit.
8. In this affidavit, I will deal with matters in the following sequence;
 - 8.1. Firstly, outline the salient background facts that underpin this application;
 - 8.2. Secondly, deal with the requirements for an interim interdict;
 - 8.3. Thirdly, deal with the individual allegations contained in the founding affidavit on behalf of the Applicants, insofar as they impact on the interim relief;
 - 8.4. Then conclude with an address on the appropriate remedy.

THE MATERIAL FACTS

9. The Flag Boshielo Purification Plant ("the Plant"), was constructed in 1998 and became operational around 2006, with a pumping capacity of 8 mega litres of water per day.
10. In terms of its design it was meant to supply water to 52 villages. However due to the fast growing population it now caters for 156 villages.
11. Due to fast growing population, the Plant was unable to meet the water demands of the villages and in an attempt to meet the demand, the Municipality constructed package purification plant, with a capacity of 4 (four) mega litres of water per day.
12. Notwithstanding the construction of an additional package plant, the plants still could not meet the demand. Therefore in order to meet the demand, the Municipality implemented a rotation plan. The rotation plan entailed that the 156 villages serviced by the purification plant would get water on a rotational basis being on certain days of the week. The Applicants are provided with water on Thursdays and Fridays.
13. Unfortunately the rotation plan was not acceptable to Applicants and this led to complaints and pickets by the residents of the villages including the Applicants.

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14. I find it prudent to highlight to the Honourable Court that, the amount of water supplied to the Applicants, although on a rotational basis is in accordance with the accepted standards.
15. I find it important at this stage to highlight to this Honourable Court that, the villages in question (Flag Boshielo West) require approximately 8.9 mega litres of water in order for the Municipality to meet their demands. This in turn leaves only 3.1 mega litres of water available to be shared by more than 125 villages.
16. I further wish to mention to this Honourable Court that, the Municipality is in the process of constructing an additional purification plant, with a capacity of 8 mega litres of water which is expected to be operational by 2017. Once this plant is operational, the Municipality will be able to meet the villages' demands
17. In light of the foregoing, I respectfully submit that currently the Municipality resources only allow for the provision of water to these villages as in accordance with the rotational plan. This is done on the basis that the Municipality accepts that it is under a constitutional obligation to realise progressive realisation of the Applicants' right to basic service, including water.
18. Against the backdrop of the salient background facts as outlined above, I now turn to deal with the requirements for interim relief.

AD REQUISITES FOR INTERIM RELIEF

19. I am advised that in an application for interim interdict, the Applicants are enjoined to *inter alia* demonstrate to the Honourable Court that;

19.1. That they have a prima facie right;

19.2. That there is a reasonable apprehension of irreparable harm, in the event the interim interdict is not granted;

19.3. That the balance of convenience favours the granting of interim relief; and

19.4. That they have no other alternative remedy.

20. In the following paragraphs, I shall deal with each of the requirements as set out above.

Ad prima facie right

21. In this application, the Applicants seek an interim relief, directing the Municipality to provide them with a minimum of 25 litres of free basic water per person per day. The Applicants allege that they have the prima facie right in that section 27 (1) read with section 27 (2) of the constitution enjoins the Municipality to provide them with basic services including free basic water. The Applicants further relies on the provisions of section 3 (1) of the Water Service Act read with regulation 3 of the Regulations regulating to compulsory national standards and measures to conserve water published in terms of section 9 of the Water Services Act which also enjoins a Municipality to provide the Applicants with a minimum of 25 litres of free basic water.
22. I submit with respect that the complaint by the Applicants has no legal basis. This is so, on that the Applicants are provided with water in line with required standards although this is due on a rotational basis.
23. I am advised that although the Water Services Act as well as the constitution guarantees the Applicants the right to free basic water such rights is not absolute and can be limited, provided the limitation falls within the ambit of the provisions of section 36 of the constitution. Section 27 (2) read with section 3 of the Water Services Act, provides that the Applicants right to free basic water is subject to the Municipalities available resources.

24. I submit that section 27 (2) as well as section 3 of the Water Service Act, are the law of general application and therefore limits Applicants right to free basic water.
25. It is further important to note that the Applicants are not seeking to challenge the constitutionality of section 27 (2) of the constitution as well as section 3 of the Water Services Act.
26. In the circumstance, I respectfully submit that the Applicants have failed to demonstrate any prima facie right which entitles them to the relief sought. Further legal submissions in this regard will be made at the hearing of this matter.

Reasonable apprehension of irreparable harm

27. As I have already mentioned earlier, that the Applicants are being provided with free basic water, although same is provided on a rotational basis.
28. I submit that the Applicants upon being provided with water, have failed to take reasonable steps to conserve the water and let the water go to waste.

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29. It is therefore incumbent upon the Applicants that when provided with water, they won't take reasonable measures to conserve same.
30. In the circumstance I respectfully submit that the Applicants' complaint has no basis and therefore there can be no harm by virtue of the Applicants, being provided with water on a rotational basis.
31. In the premises, it is further submitted that in the event the Honourable Court is inclined to find that the Applicants may suffer harm as the result of not being provided with water on daily basis as required by the constitution and the Water Servicers Act, which is denied, it cannot be said that such harm is irreparable.
32. In the circumstances. It is respectfully submitted that the Applicants have failed to demonstrate any reasonable apprehension of irreparable harm, which they may suffer as the result of interim interdict not being granted. Further legal submissions in this regard will be made at the hearing of this matter.

Balance of convenience

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33. I have already mentioned that the Applicants are being provided with water, though same is on a rotational basis. Therefore it cannot be said that the Applicant are not provided with free basic water.
34. Furthermore, I respectfully submit that the Municipality's available resources, are such that it is unable to provide the Applicants with water on daily basis.
35. I further submit that this Honourable Court must take into account the fact that one granted interim relief will be subject of a lengthy Court battle, including appeals which may be launched. In this regard the balance of convenience does not favour the grant of the interim relief since the Municipality as well as the other communities, stand to suffer more harm.
36. In the circumstance, I respectfully submit that the balance of convenience does not favour the granting of interim relief. Further legal submissions in this regard will be made at the hearing of this matter.

Absence of alternative remedy

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37. I submit that the Applicants will be afforded substantial redress in the event they succeed with part B of their application.
38. I find it prudent to mention to this Honourable Court that once granted an interim relief will be a subject to a lengthy Court battle including appeals. This will put dead the Municipality's ability to perform its constitutional obligations to other villages which are dependent on the water plant.
39. I further submit that the Applicant, although not provided with water on daily basis, the amount of water provided them in terms of the rotational plan, is in accordance with the regulations and the Water Act.
40. In the circumstance, I respectfully submit that the Applicants have failed to demonstrate that they have no alternative remedy.
41. For the reasons outlined above, I respectfully submit that the Applicants have failed to make out a case for the grant of interim relief. Further legal submissions in this regard will be made at the hearing of this matter.

Ad condonation

41. At the outset I wish to highlight to this Honourable Court that this affidavit is filed out of time. I therefore beg leave that the late filling of this affidavit be condoned.
42. I submit that the late filling of this affidavit is not due to any *mala fides* and/or blatant disregard of the Rules of this Honourable Court and/or negligent conduct of the matter by the Municipality and/or its legal representatives.
43. I further submit that the Applicants will not be prejudiced by the condonation of the late filling of this answering affidavit. This is so for the reasons set out hereunder.
44. In essence the delay in the late filing of this affidavit is predicated on the complexity of the issues raised in this matter which are linked to the main application.

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45. The application was served on the Municipality on the 5th March 2015 and upon receipt thereof the Municipality proceeded to instruct attorneys for advice and further handling.
46. In order to avoid a default order taken against the Municipality, the attorneys filed a notice of intention to oppose on behalf of the Municipality.
47. Subsequent thereto the attorneys advised the Municipality on the prosed and cons of not opposing the application.
48. The advice by the attorneys was taken to the council for deliberation and resolution.
49. The council resolved that the Municipality should oppose the application and the attorneys were accordingly instructed to oppose and brief Counsel. Counsel was then briefed on the 10th April 2015.
50. In the meantime the attorneys addressed a letter to the Applicants' legal representative seeking an indulgence to file this answering affidavit by the end of April. The request was declined by the Applicants' legal representatives. Copies of the letter addressed to the Applicants' legal representative and their response are attached hereto marked as **KKN1 & 2** respectively.

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51. In the meantime Counsel consulted with the relevant stakeholders within the Municipality who provided him with a number of documents.
52. Upon perusal of the documents Counsel requested further documents. Unfortunately the documents were not in the Municipality's possession and had to be requested from other service providers.
53. I pause to mention to this Honourable Court that the information requested dates as far back as 2006 and it therefore took longer than anticipated to obtain such information.
54. The information obtained during the second week of May 2015.
55. The documents then necessitated the consultation with various individuals from the service providers which consultation took place towards the end of May.
56. Counsel then commenced with the drafting of the answering affidavit.
57. I respectfully submit that the late filling of this affidavit is not predicated by the blatant disregards of rules of this Honourable Court and /or negligent conduct of the matter by the Municipality and/or its legal representatives, but by the need to ensure that accurate information is submitted to the Court in line with my constitutional obligation to place all relevant matters before Court to enable it to make a just determination.

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58. As I have already submitted that the Applicants will not be prejudice by the condonation of the late filing of this answering affidavit. On the other hand the Municipality will be prejudice in that not all the relevant information will be place before the Court to enable it to make a just determination.
59. In the circumstance I submit that there is good cause for the Honourable Court to grant condonation for the late filing of this answering Affidavit. Further legal submissions in this regard will be made at the hearing of this matter.

Bona fide defence

60. As it appears from the answering affidavit filed, there are reasonable prospects of success in the grounds of opposition that the Municipality has raised against the relief sought in part A of the notice of motion.
61. In order to avoid burdening this papers with repetition, I beg leave that the content of this answering affidavit be incorporated herein *mutatis mutandis*.

CONCLUSION

62. For the reasons set out above I submit with respect that the Applicants have failed to make a case for the interim relief.
63. I further submit that the Municipality has made out a case for the condonation of the late filing of this answering affidavit.
64. In the circumstances I submit that may it please this Honourable Court to;

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64.1. Condone the late filing of this answering affidavit;

64.2. Dismiss the application with costs.



 DEPONENT

SIGNED AND SWORN BEFORE ME AT GEORGETS DAL BY THE DEPONENT ON THIS THE 10th DAY JUNE 2015, AFTER HE HAS ACKNOWLEDGED THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT AND REGARDS SAME TO BE BOTH TRUE AND CORRECT AND HAS TAKEN THE PRESCRIBED OATH WHICH HE REGARDS AS BINDING ON HIS OWN CONSCIENCE AND UTTERED THE WORDS 'SO HELP ME GOD'



COMMISSIONER OF OATHS

FULL NAME :

CAPACITY :

AREA :

PHAMELA CLINTON NKONDO
 Commissioner of Oaths
 Practising Attorney
 28 Schoeman Str
 Polokwane



"KKN 1"

Suite 12 JC Limpro, 6 Hans van Rensburg Street, POLOKWANE.P.O Box 877, THORNHILL, 0882. TEL/FAX: (015) 291 5440

OUR REF: SC MDHLULI/SSDM0001

YOUR REF: Ms Z Sujee

DATE: 25 March 2015

CENTRE FOR APPLIED LEGAL STUDIES

BRAAMFONTEIN

PER FAX: (011) 717 8607

PER E-MAIL: Zeenat.Sujee@wits.ac.za

Sir/Madam

**RE: CONCERNED RESIDENTS OF FLAG BOSHIELO WEST & 5
OTHERS//SEKHUKHUNE DISTRICT MUNICIPALITY & 6 OTHERS**

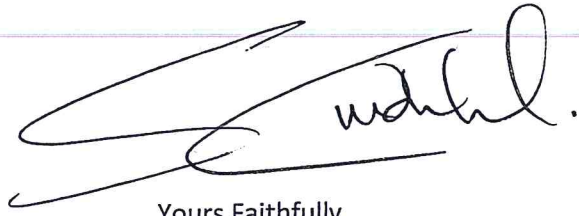
We refer to the above matter and our Notice to Oppose dated the 12th of March 2015. We confirm that we act on behalf of the Sekhukhune District Municipality, the 1st Respondent herein.

We have perused your Application and are engaging in rigorous consultation with our client and Senior Counsel to prepare our client's Opposing Affidavit. We have however noted that due to the nature of the Application and the Constitutional challenge that it poses, utmost due diligence is required in concluding our consultations.

We therefore request your indulgence and extension of time for the filling of our clients Opposing Affidavit. Senior Counsel has advised us to request an extension until the **30th of April 2015** to enable us to complete our consultations and file a proper Opposing affidavit.

We hope you will be amenable to our request and we await to hear from you.

Director: S C Mdhuli-LLB UDW (now UKZN)
In Association with Silinda Mokoena & Associates Inc



Yours Faithfully

SC MDHLULI ATTORNEYS

PER: SC MDHLULI

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TO: SC MDHLULI ATTORNEYS
Attention: SC Mdhuli
By Email: mdhluli@scmdhluliattorneys.co.za

25 March 2015

Dear Sir/Madam

CONCERNED RESIDENTS OF FLAG BOSHIELO WEST AND OTHERS //
SEKHUKHUNE DISTRICT MUNICIPALITY AND OTHERS (CASE NO. 15437/15)

1. We refer to your letter dated 25 March 2015.
2. As you are aware that the *dies* for filing an answering affidavit is fifteen days which expires on 2 April 2015. We are not able to give you an extension until 30 April but are amenable to grant you an indulgence to file the answering affidavit by no later than 17 April 2015.
3. We trust that you find the above in order.

Yours faithfully,



Zeenat Sujee

Attorney: Centre for Applied Legal Studies

Email: Zeenat.Sujee@wits.ac.za

SC Mdhluli

From: Zeenat Sujee <Zeenat.Sujee@wits.ac.za>
Sent: 25 March 2015 02:15 PM
To: mdhluli@scmdhluliattorneys.co.za
Subject: Concerned Residents of Flag Boshielo West and Others // Sekhukhune District Municipality and Others Case No. 15437/15
Attachments: Letter-25 March 2015.pdf

Dear Sir/Madam

Please find attached a letter for your attention.

Regards,
Zeenat

ZEENAT SUJEE
ATTORNEY, BASIC SERVICES PROGRAMME



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