IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO. 623/2022

DR BEYERS NAUDE LOCAL MUNICIPALITY	**Applicant**
and	
HERO TELECOMS (PTY) LIMITED	**First Respondent**
(registration number 2013/014376/07)	
HELMUT GREWAR NEL	**Second Respondent**
BASIE COETZEE	**Third Respondent**
LUCIAN HARRIS	**Fourth Respondent**
MR DE WET FOURIE	**Fifth Respondent**
SMIT SEWGOOLAM INCORPORATED	**Sixth Respondent**

JUDGMENT

NQUMSE AJ:

Introduction

[1] This is an application wherein an order is sought in the following terms:

1.1. That the applicant's non-compliance with the rules of this court relating to time limits, forms and service be condoned and leave be granted to

the applicant to move this application as a matter of urgency in terms of the provisions of Rule 6 (12);

1.2. That a *rule nisi* be issued calling upon the first to sixth respondents and/or any other interested party to just show cause, if any, on Thursday the 21st day of July 2022 at 09h30 or so soon thereafter as the matter may be heard why a final Order should not be granted in the following terms:

1.2.1. That the first to fifth respondents be found to be in contempt of the Order of the Honourable Justice Bloem under case number 303/2022 dated 22 February 2022;

1.2.2. That the first respondent be ordered to pay a fine in an amount to be determined by this Honourable Court;

1.2.3. That the second to fifth respondents be committed to prison for a period to be decided by this Honourable Court and that warrants for the arrest of the second to fifth respondents be issued;

1.2.4. That the warrants in paragraph 1.3 be stayed pending the return date on Thursday the 21st day of July 2022;

1.2.5. That the South African Police Service be authorised to assist with the execution of the Order of the Honourable Justice Bloem under case number 303/2022 dated 22 February 2022;

1.2.6. That the first to fifth respondents be ordered to pay costs of this application, jointly and severally, the one paying the other to be absolved, on an attorney-own client scale;

1.2.7. That the sixth respondent be ordered to pay costs of this application, *de bonis propriis*, jointly and severally, with the first to fifth respondents, the one paying the other to be absolved, on an attorney-own client scale;

1.2.8. That pending the return date of the *rule nisi* that the respondents and/or any other person under the respondents' direction be directed to comply in all respects with the Order of the Honourable Justice Bloem under case number 303/2022 dated 22 February 2022, and with immediate effect cease and desist from undertaking any trenching, excavation and/or construction works related to fibre and/or telecommunications cabling within the jurisdictional area of Graaff-Reinet;

1.2.9. That the first and/or sixth respondents be directed to provide, within 24 hours of the Order being granted, the physical residential address, current whereabouts (should they not be present at their residential address), email addresses and cellular phone numbers of the second to fifth respondents;

1.2.10. That the applicant be directed to serve a copy of the application and such Order as this Court may grant, upon the second to fifth respondents;

1.2.11. That in the event that the Sheriff is prevented and/or unable to effect personal service of this Order and/or any other legal processes in these proceedings upon the second to fifth respondents, that the Sheriff be and is hereby authorised to effect service upon the second to fifth respondents via email and/or via sms message/whatsapp to their cellular phone numbers that such service be accepted as valid service form particular, contempt of court proceedings;

1.2.12. That the sixth respondent be directed to file an affidavit, within 15 (fifteen) days subsequent to the issue of the rule nisi explaining the contents of its letter dated 25 February 2022 and to specifically address:

1.2.12.1. The advices pertaining to section 18 of the Superior Court Act 10 of 2013 (the "Act") and why its failed to refer to section 18 (2) and 18 (3) of the Act;

1.2.12.2. Why costs *de bonis propriis*, on an attorney own client scale, should not be ordered against the firm;

1.2.13. That costs of the application be reserved and determined on the return date of the *rule nisi*;

1.2.14. Further and/or alternative relief.

1.2.15. For ease of reference, any reference to the applicant shall also be reference to Beyers Naude Local Municipality as the 'Municipality' and any reference to the respondents shall also be a reference to Hero Telecoms (Pty) Limited as 'Herotel'.

[2] The factual background as well as the common cause facts, leading up to the launching of this application are briefly the following.

[3] On Tuesday, 22 February 2022, pursuant an interdictory relief that was sought by the applicants against the respondent and which was argued before Bloem J, he granted a *rule nisi* in a comprehensive judgment (the Order) and issued the following interdict "*That the first respondent and/or any other person under the first respondent's direction or authority terminate their offending conduct set out in paragraph 1 above and desist from undertaking any trenching, excavation and construction of an electronic communication network within the jurisdictional area of Graaff-Reinet*". On the same day mentioned above the order was served on the first to sixth respondents.

[4] Notwithstanding the order the first respondent continued with its operations of digging trenches, excavation work and the construction of an electronic communication network in the area of the applicant.

[5] On 25 February 2022, Herotel delivered an application for leave to appeal the whole of the judgment and order handed down by Bloem J. After delivery of its

application to appeal, Herotel continued its operations without any hindrance. On 26 February 2022 Mr Benjamin Arends, a director of infrastructure services in the employ of the applicant, accompanied by members of the South African Police Service attempted to stop Herotel by approaching its employees who were engaged in trenching activities and construction of the electronic network to stop their activities and they refused.

[6] The failure by Herotel to stop its activities caused the applicant to launch this application for contempt of court. It appears that Herotel or its employees would not be deterred even by the launching of this application because when the application was served on Mr Kobus Breedt, a manager of Herotel in Graaff-Reinet, his response was that he does not believe that this application nor the order of 22 February 2022 which was attached to the application had the effect of stopping them from proceeding with their activities, and as such they will continue until the court date.

[7] In its founding affidavit the applicant further alleged that the continued work by Herotel is posing a threat to the public as the first respondent is digging trenches on pavements and where they have previously dug up the pavements or road they have not restored it to its original condition resulting in the surface being uneven and bumpy. As a result of the unsafe conditions the applicant is at risk of civil claims launched against it.

[8] Applicant contends that the order by Bloem J is interlocutory to which section 18 (2) of the Superior Court Act 10 of 2013 (the Act) applies in a case where a party seeks to appeal an order for interim relief. In doing so a party has to act in accordance with section 18 (3) of the Act, and neither has Herotel in launching its appeal made out a case to suspend the order as envisaged in section 18 (3).

[9] In addition to the harm the applicant seeks to prevent, of digging up trenches on its streets without the wayleave permit in terms of the municipality by laws, the applicant continues to suffer prejudice. The applicant further contends that if Herotel is allowed to continue with its activities the more difficult it becomes to reverse the damage caused and as such, the aim of Herotel is to complete its work so as to be able to present the court with a *fait accompli*. It is on those bases that the applicant contends that its application is urgent.

[10] Both the affidavits of Selwin Jantjies and Benjamin Arends confirms the averments made by Martin Rankwana the deponent in the founding affidavit.

[11] In its answering affidavit Herotel contends that barring the applicant complying with the provisions of section 18 of the Act, which relief it has not sought nor addressed in its founding papers, this court is not in a position to make any pronouncements on the efficacy and/or enforcement of the order granted on 22 February 2022.

[12] The main thrust of its opposition stems from paragraph 50 of the applicant's founding affidavit which states "*so it is common knowledge that several companies in South Africa compete for installation of fibre-optic networks, as the company which lays the cables is the company which can subsequently provide and charge for the fibre-optic network service. This has created a frenzy by fibre-optic network service providers to be the first to lay down the infrastructure, the natural being to present the local authority with a* ***fait accompli****, as it were*". Herotel interprets the above statement as confirmation that a number of operators are competing against each other within the municipal area of the applicant in a race to be first to install and implement infrastructure in terms of the Electronic Communications Act, 36 of 2005 ('*the ECA*"). It further contended that any delay occasioned to any of the individual competitors in the implementation of their infrastructure within the municipal area of the municipality would inevitably prejudice the relevant competitor and put it at a disadvantage to the other operators. That delay would result in a position where the delayed competitor can no longer compete for the presentation of infrastructure to the municipality as it would have been overtaken by its rivals.

[13] In support of its contention Herotel referred to Openserve as a direct competitor who was permitted and authorised by the municipality to continue with its trenching, digging and excavation. It further referred to its answering affidavit in the main application where in paragraph 174 it made the following allegation. "*should an interim interdict be granted against Herotel, Herotel will be finally affected in its commercial business operations as a result of the interdict in that competitors such as Openserve, will gain advantage as a result of the interdict in that they will be allowed to continue with installations of their services and Herotel would be stopped from competing with Openserve. The result would be inappropriate and unlawful having regard to the fact*

that, like Openserve, Herotel is a natural licensee and should be allowed to compete on equal terms with other licensees".

[14] They further contend that it was common ground before Bloem J, that any interlocutory relief granted against Herotel would be final in substance. According to Herotel its application for leave to appeal against the Order of 22 February 2022 suspends its operation and execution in terms of the Act. In light thereof so it was contended, Herotel was procedurally entitled to continue with the installation of the services within the municipal area of the applicant until such time as the application for leave to appeal was finally determined. Therefore its conduct cannot be considered to be deliberate and as an intentional violation of the court's dignity, or authority. If the applicant is aggrieved by the conduct of Herotel it should have instituted an application in terms of section 18 (3) of the Act, instead it opted to deliver a misguided application for contempt of court.

[15] Herotel further contends that the patent failure by the applicant to institute an appropriate remedy in terms of section 18 (3), absolves Herotel's actions from being contemptuous or a deliberate *mala fide* disregard for the court's order. On the contrary, so they contend, Herotel's actions confirm its utmost respect for the judgment and orders of this court. It further disputes the truthfulness of some of the photographs that were taken by the applicant and which have been imputed on to Herotel's actions whereas they depict actions of Openserve.

[16] Herotel further holds a strong view that the advice obtained from the sixth respondent to rely on the provisions of section 18 in the pursuit for its leave to appeal is correct on both the facts and the law. It therefore applies for the dismissal of the application with costs on a punitive scale.

[17] The affidavits of Mr Van Niekerk, Coetzee Haws, and Breedt which are confirmatory affidavits to the answering affidavit of Helmut Nel had nothing further to add to Herotel's case.

[18] In reply the applicant contends that the interim order can never constitute a final relief. It further denies the allegation that there are other service providers who obtained a wayleave permit for its area. Instead all other service providers who were

competing with Herotel are abiding by its By Laws. The allegations regarding other competitors is speculative and uncorroborated. Openserve, which is a division of Telkom is not one of the competing service providers since it has an existing and historical wayleave permit to repair its network cables.

[19] The nub of the dispute between the applicant and Herotel is the proper interpretation of section 18 of the Act and its application pursuant the action by Herotel to appeal the Order of Bloem J. Flowing therefrom are the following issues for determination:

19.1. The issue of the *rule nisi* as per the notice of motion;
19.2. A declaratory which enforces certain terms of the Order;
19.3. Whether the respondent's attorney of record (sixth respondent) should be directed to file an affidavit explaining its conduct;
19.4. Whether applicant has established a *prime facie* case of contempt of court.

[20] As a point of departure I deal with the provisions of section 18 of the Superior Courts Act which reads:

Suspensions of decisions pending appeal

(1) Subject to subsections (2) and (3) and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the

court does not so order and that the other party will not suffer irreparable harm if the court so orders.

(4) ……..

(5) ……..

[21] It was submitted by Mr Potgieter for Herotel that section 18 (1) is "a catch all" provision framed in the broadest of language that suspends 'any decision' made by the court that is a subject of an application for leave to appeal or of an appeal, pending the decision of such an application for leave to appeal or appeal. Due to this reasoning, he argued that Herotel's reliance on section 18 (1) is not a misinterpretation of the section but a deliberate choice. This is more the reason, so the argument went, if regard is had to the final effect of the Order. Mr Potgieter further submitted that it is the party who alleges that the interlocutory order has no final effect who bears the onus to bring an application in terms of section 18 (3) for the suspension thereof.

[22] In further support of the proposition that the order was final in effect, he referred me to various authorities most notably the comments in ***BHT Treatment (Pty) Ltd v Leslie and Another***[1] wherein Marais J dealing with interim interlocutory proceedings relating to the enforcement of a restraint of trade, referred to the matter before him as follows "Mr Labe, on behalf of the first respondent, submitted that in circumstances it is proper for the court to approach the matter as if final relief is being sought. The application is one for an interim interdict. However, *Mr Labe, in his heads of argument, points out that, having regard to the period of the restraint, the period which has elapsed since the first respondent left the employ of the applicant and the practiced time periods involved in the court hearings, the restraint, if ordered, will have run out before the matter can come to trial. Therefore, says Mr Labe, what is being granted is in effect final relief and the test appropriate for final relief, not the test appropriate to interim relief should be applied.* Marais JA continued and stated, "*In my view, this approach is correct. The court should look at the substance rather than at the form. The substance is that an interdict is being sought which will run for the full unexpired time of the restraint. In substance therefore final relief is being sought although the form of the order is interim relief. In my view therefore the correct approach to this*

[1] 1993 (1) SA 47 (w)

matter is that set out in the Stellenbosch Farmer's Winery Ltd v Stellenvale Winery (Pty) Ltd 1957 (4) SA 234 (C) at 235." According to Mr Potgieter, Herotel's case is similar to the matter that was before Marais JA above in that the order of Bloem J has the effect of violating its competing rights with Openserve, an aspect that was overlooked and not addressed.

[23] Mr Mullins for the applicant, on the hand rejected the interpretation of section 18 of the Act by Herotel as misplaced and patently incorrect. It is, so it was argued a twisted interpretation of the law to advance Herotel's financial interests a "*win at all costs attitude*." He further submitted that the reliance on section 18 (1) by Herotel is to justify its unlawful conduct of their continued non-compliance with the Order. He further argued that the assertion that the Order is final in effect is untenable. He relied on a number of authorities amongst them is ***Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd (1948 (1) SA 839) at section 70,*** where the following is stated "*A preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to dispose of any issue or any portion of the issue in the main action or suit or unless it anticipates or prejudices some relief which would or might, be given at the hearing*". He also referred to ***Reddy v Reddy [2016] JOL 35569 (KZD) at paragraph 13, and Zweni v Minister of Law and Order 1993 (1) SA 523 at 5321 – 533A*** as authorities that support the notion that what is meant by an order which is interim and not having the effect of a final judgment, the decision must be final and not susceptible of alteration by the court of first instance.

The Order of Bloem J

[24] I turn to deal with the order and judgment of Bloem J in the context of section 18. In paragraph 30.3 the Order states as follows "*paragraph 2.4. shall operate as an interim interdict with immediate effect pending the outcome of the application"*. A plain reading of the order clearly sets out the spirit and intent of the order as that which is interim and susceptible to change on the return date.

[25] It was contended and agued by Herotel that the applicant never took issue with the fact that the order is final in effect. This assertion is not correct if regard is had to the replying affidavit wherein the entire paragraph 12 with its sub-paragraphs is dedicated to reject the contention that the order is not interlocutory but final. For sake

of completeness I shall refer specifically to the sub-paragraphs that are self-evident on this aspect.

[26] In paragraph 12.1 it is stated "*On any interpretation the order of 22 February 2022 is interlocutory and interim";*

> *Paragraph 12.2 states, "the merits of the main application have not yet been argued and determined by the court";*
> *Paragraph 12.4 states, "the interim order is not final in effect, dispositive of any of the issues in the main application or definitive of the rights of any of the parties and merely preserves the status quo";*
> *Paragraph 12.5 states, "the interim order is conditional upon confirmation on the return date and will only be finalised on the return date";*
> *Paragraph 12.7 states, "the order is an intermediate step in the course of the litigation, which provides interim protection in the applicant's rights, pending the final determination of the matter*". All the paragraphs above are a clear and emphatic statement that the applicant takes issue with the proposition that the order is final in effect.

[27] The contention of the applicant regarding the effect of the order was also followed in its heads of argument where in paragraph 68 the following is submitted "*that the order of Bloem J can only be regarded as interim and interlocutory. It cannot be final in effect and definitive, as is submitted by the respondents*". Undoubtedly the applicant rejects the notion that the order is final in effect.

[28] I find myself constrained to agree that on the objective facts before me, the only sound and proper interpretation of Bloem J's order is that it is an interim order that is susceptible to change on the return date. This brings me to the question of section 18 (1) and how the section applies to the Order.

[29] I must from the outset mention that I have difficulty to follow the submission that section 18 (1) is a "*catch all*" provision which finds application even in instances where the order is interim in nature or effect. It could never have been the intention of the legislature to render section 18 (2) superfluous without no meaning. Section 18 (2) is

a specific provision that relates to interlocutory orders which are 'not' suspended unless exceptional circumstances exist and therefore requires of an aggrieved party who intends to appeal the interlocutory order and suspend its operation to do so through the invoking of section 18 (3).

[30] I disagree that the applicant who is the successful party ought to have brought an application to suspend an order which is in its favour. On the contrary, it is Herotel as the aggrieved party and who has launched an appeal on whom the obligation lies to apply for the suspension of the operation of the Order. This was not done by Herotel.

Contempt of Court and Urgency

[31] In ***Victoria Park Ratepayers' Association v Greyvenon CC and Others***[2] Plasket AJ (as he then was) stated: "*Contempt of court has obvious implications for the effectiveness and legitimacy of the legal system and the judicial arm of government. There is thus a public interest element in each and every case in which it is alleged that a party has unlawfully and in bad faith ignored or otherwise failed to comply with a court order. This added element provides to every such case an element of urgency*". In ***Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport*** Corbet JA stated: "*The Uniform Rules of Court do not provide substantively for the granting of a rule nisi by the Court. Nevertheless, the practice, in certain circumstances, of doing so is firmly embedded in our procedural law… This is recognised by implication in the Rules (see, eg, Rule 6 (8) and Rule 6 (13)). The procedure of a rule nisi is usually restored to in matters of urgency and where the applicant seeks interim relief in order adequately to protect his immediate interests. It is a useful procedure and one to be encouraged rather than disparaged in circumstances where the applicant can show, prima facie, that his rights have been infringed and that he will suffer real loss or disadvantage if he is compelled to rely solely on the normal procedures for bringing disputes to Court by way of notice of motion or summons. The rule nisi procedure must be considered in conjunction with the provisions of Rule 6 (12) which, in the case of urgent applications, permits the Court to:*

[2] 2004 (3) ALL SA 623 (SE)paragraph 5

'dispense with the forms and service provided for in these Rules and (to) 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'.

In fact, the rule nisi procedure does make it possible for the application to come before the Court for adjudication more speedily than the usual procedures for the set down of applications or trials, and it does, in a proper case, permit of the granting of interim relief."

Flowing from the above authority it is evident that in matters of urgency such as contempt of court the utilisation of a *rule nisi* procedure is to be encouraged, since it is a first step in the committal application. To obtain a *rule nisi* the onus is lighter than when the rule is to be confirmed and a prima facie case will suffice for the issue of a *rule nisi*.[3]

[32] The requirements for contempt of court are trite and are the following:

32.1 the existence of the order;

32.2 the order must be duly served on, or brought to the notice of the alleged offender;

32.3 there must be non-compliance with the order; and

32.4 the non-compliance must be wilful and *mala fide*[4]

[33] The standard of proof which must be applied in applications for contempt of court was stated by the Constitutional Court in ***Matjabeng Local Municipality v Eskom Ltd and others***[5] as that for an order of contempt where committal is sought the standard of proof beyond reasonable doubt applies. On the other hand for civil contempt remedies that do not have the consequence of depriving an individual of their right to freedom and security of the person, the civil standard of proof on a

[3] Ex parte Alexander and Others [1959] 2 ALL SA 414 at paragraph 417, ex parte Stofer [1996] 4 ALL SA 329 (e) at 332

[4] Pheko and others v Ekurhuleni City 2015 (5) SA 600 (cc) paragraph 32

[5] 2018 (1) SA 1 (cc)

balance of probabilities applies. In ***Fakie N.O v CC11 Systems (Pty) Ltd***, the requirements for wilful and *mala fide* were stated thus: *"[9] The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed deliberately and mala fide. A deliberate disregard is not enough, since the non-complier may genuinely albeit mistakenly believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids infaction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith); [10] These requirements - that the refusal to obey should be both wilful and mala fide, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt – accord with the brander definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent"*.

[34] In *casu*, it is common cause that the order of 22 February 2022 is in extant and is ordering the respondents to terminate their offending conduct and to desist from undertaking any trenching, excavation and construction of an electronic communication network within the area of the applicant. It was ordered by the court that the order will operate as an interim interdict pending the outcome of the main application. The order was served on the first to fifth respondent.

[35] It is my view that there could not have been any other interpretation of the effect of the order or its import, neither could there have been any misunderstanding to interpret it differently from its ordinary meaning, that the order was interlocutory with an interim relief. I am not persuaded that Herotel has discharged its evidentiary burden to avoid its conduct being seen as that which is wilful and *mala fide*. On a close scrutiny I find that Herotel's conduct was wilful and *mala fide*. Its conduct is a deliberate and intentional violation of the Order of Bloem J, thereby evince non-compliance that tends to impugn the authority and dignity of this court. It is on these bases that I find it necessary to cause the sixth respondent to file an affidavit to explain its conduct relating to the advice which has been given regarding section 18 of the Act.

[36] In ***Protea Holdings Ltd v Wriwt and Another***[6] the court held that one of the objects of contempt proceedings is punishing the guilty party to compel performance of the order. The element of urgency would be satisfied if in fact it was shown that respondents were continuing to disregard the order and an applicant would be entitled, as a matter of urgency, to approach the court to get the respondents to desist. In this matter the contempt is ongoing and that has rendered the matter urgent. In this matter the actions of Herotel are ongoing which rendered the matter urgent. I therefore find that the applicant has succeeded to show the urgency with which the matter had to be brought to court and is thus entitled to the *rule nisi* it seeks.

[37] In paragraph 3 of the notice of motion the applicant further seeks a declaratory to enforce the compliance with the Order. In support of its application for the relief sought it referred to ***Municipal Manager O.R Tambo District Municipality and Another v Ndabeni***[7]. In a long line of authorities before Ndabeni I have been referred to, our courts have pronounced on the importance of the compliance and respect that ought to be given to court orders, one has to look no further than the remarks by Khampepe J in ***Secretary of the Judicial Commission of Inquiry into Allegations of State Capture Corruption and Fraud in the Public Sector including Organs of State v Zuma [2021] ZACC 18; 2021 (5) SA 327 (CC); 2021 (9) BCLR 992 (CC) (State Capture)*** where the learned judge said *"[t]he rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of State to which they apply, and no person or organ of State may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery*." It is for that sentiments expressed above and in many other authorities that I am persuaded to grant the declaratory order that is sought by the applicant and which in my view justified under the circumstances of this matter.

[38] In light of aforegoing the application succeeds and the following order will issue:

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[6] [1978] 2 ALL SA 417 (w) at 420 also ated as 1978 (3) SA 865 (w)
[7] CCT 45/21 [2022] ZACC 3 (14 February 2022 at paragraph 26

34.1. That the applicant's non-compliance with the rules of this court relating to service and time be and is hereby condoned and that the application is dealt with as a matter of urgency.

34.2. A *rule nisi* do hereby issue calling upon the first to fifth respondents and/or any other interested party to show cause of any at 09h30 on Thursday, 21 July 2022 why a final order should not be granted in the following terms:

34.2.1. That the first respondent be ordered to pay a fine in an amount to be determined by this court;

34.2.2. The second to fifth respondents be committed to prison for a period to be decided by this court and for warrants for the arrest of the second to fifth respondents be issued;

34.2.3. The warrants in paragraph 35.2.2 be stayed pending the return date at 09h30 Thursday, 21 July 2022;

34.2.4. The South African Police Service are authorised to assist with the execution of the order of 22 February 2022 under case number 303/2022;

34.2.5. The first to fifth respondents pay the costs of this application jointly and severally, the one paying the other to be absolved, on an attorney own client scale;

34.2.6. The sixth respondent to pay costs of this application *de bonis propriis*, jointly and severally the one paying the other to be absolved on an attorney own client scale;

34.2.7. That pending the return date of this *rule nisi* that the respondents and/or any other person under the respondents direction is directed to comply in all respects

with the order of Bloem J under case number 303/2022 of 22 February 2022 and with immediate effect cease and desist from undertaking any trenching, excavation and/or construction works related to the fibre and/or telecommunication cabling within the jurisdictional area of Graaff-Reinet.

34.3. The applicant is directed to serve a copy of this application and this order upon the second to fifth respondents.

34.4. In the event that the Sheriff is prevented and/or unable to effect personal service of this order and/or another legal processes in these proceedings upon the second to fifth respondents, the Sheriff is hereby authorised to effect service upon the second to fifth respondents via email and/or via sms message/whatsapp to their cellular phone numbers and that such service will be accepted as valid service.

34.5. The sixth respondent is directed to file an affidavit, within 15 (fifteen) das subsequent to the issue of the *rule nisi* explaining the contents of its letter dated 25 February 2022 and to specifically address:

34.5.1. The advice pertaining to section 18 (2) and 18 (3) of the Act;

34.5.2. Why costs *de bonis propriis* on an attorney own client scale, should not be ordered against the sixth respondent.

34.6. Costs of this application are reserved to be determined on the return date of the *rule nisi*.

_____

M.V. NQUMSE

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

Counsel for the applicant	:	Adv. Mullins (S.C.) with Adv. Morgan
Instructed by	:	Smit Sewgoolan Incorporated c/o Nolte Smit Inc. 51A Hill Street Grahamstown
Counsel for the respondents	:	Adv. Potgieter (S.C.)
Instructed by	:	Wikus Van Rensberg Attorneys c/o Neville Borman & Botha High Street Grahamstown
Date of hearing	:	08 March 2022
Date of delivery of judgment	:	22 March 2022