REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no.: HC-MD-CIV-MOT-GEN-2020/00028

In the matter between:

HENNIE MARTINUS THERON **APPLICANT**

and

THE VILLAGE COUNCIL OF STAMPRIET **FIRST RESPONDENT**

DINO KOHIMA **SECOND RESONDENT**

Neutral citation: *Theron v The Village Council of Stampriet* (HC-MD-CIV-MOT-GEN-2020/00028) [2020] NAHCMD 129 (22 April 2020)

Coram: PARKER AJ

Heard: **10 March 2020**

Delivered: **22 April 2020**

Flynote: Practice – Applications and motions – Rule *nisi* – Rule *nisi* granted in respect of spoliation order against public authority (a local authority council) – Court finding spoliation by public authority constituted unlawful and invalid administrative action since no law authorized the Council to act as such – Court confirming rule *nisi* on the ground of the unlawful and invalid administrative action.

Summary: Practice – Applications and motions – Rule *nisi* – Public authority (a local authority council) disconnected water supply to applicant's business premises for unpaid bills – Court granted rule *nisi* – On return day public authority relying on the Local Authorities Act 23 of 1992, s36 and its Credit and Debtor Control Policy – Court finding that Act 23 of 1992, s36 did not give local authority council such power when there was no draught or other emergency condition, and further, that the Council Policy is not a regulation in terms of Act 23 of 1992, s94 and therefore not law – Public authority's action therefore unlawful and invalid – Consequently, court confirming rule *nisi* with costs.

ORDER

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1. The rule *nisi* issued on 4 February 2020 is confirmed.
2. First respondent is to pay applicant's costs on the scale as between party and party, and such costs include costs of one instructing counsel and one instructed counsel.

JUDGMENT

PARKER AJ:

[1] This matter concerns the supply of water by first respondent, a local authority council, to applicant's place of business, being Erf 57, Stampriet, Hardap Region. On 4 February 2020 the court granted temporary relief in the form of a rule *nisi* ordering

respondents to reconnect and restore to the applicant peaceful and undisturbed water supply at applicant's place of business, pending the determination of the matter on the return date. On the return date of 10 March 2020, Ms H. Garbers-Kirsten represents applicant, and Ms A. Ndungula (with her Ms J. Hinda) represents respondents.

[2] I make the point that on the return day respondents bear the onus to show cause why the 4 February 2020 order ('the order') should not be made final. Thus, on the return day the only burden of the court is to either confirm or discharge the order. *(Bruyns v Louis Neethling Boerdery (Pty) LTD* (A215/2014) [2014] NAHCMD 378 (9 December 2014)). In that regard, it is important to note this. In obedience to the order, respondents, on the day following the date of the rule *nisi* order, reconnected and restored the water supply to applicant's place of business. Ms Ndungula submitted that respondents did that in order to obey the temporary order. I agree. A 'rule *nisi* … contemplates that the relief sought will only be granted at some future date after the respondent has had time to show cause (on the return day) that it should not be granted'. (See *Bruyns* para 6.)

[3] The gravamen of respondent's case in opposition to the granting of a final order finds basis in the law, according to Mr Ndungula; and is two-prong: (a) According to Ms Ndungula, s36 of the Local Authorities Act 23 of 1992 provides that a local authority council may place a limitation on the supply of water if it is of the opinion that the lives or health of its residents are threatened on account of water shortage due to draught or disruption of water supply. (b) Ms Ndungula says further that the suspension of applicant's possession and undisturbed water usage was lawful in terms of the Credit and Debtor Control Policy of Stampriet Village Council, a policy which, according to counsel, 'forms part of the municipal by-laws established in terms of the Local Authorities Act, 1999 (Act 23 of 1992) ('the Policy')'.

[4] Ms Garbers-Kirsten submitted contrariwise to subparas (a) and (b) in para 3 above in this way. Counsel's contrary argument to subpara (a) is that s36 gives no such power to first respondent to suspend water supply to applicant; and to subpara (b) is that the Policy was never made into a bye-law. The upshot, according to Ms

Garbers-Kirsten, is that in acting as it did against applicant, first respondent acted ultra vires Act 23 of 1992.

[5] As to subpara (b) of para 3; I find s36 of Act 23 of 1992 deals with, as the title of the section clearly indicates, a local authority's power to limit the supply of water or use of water during draught or other emergency condition. The facts of the instant case do not establish that the action first respondent took against applicant was in response to a draught situation or to other emergency condition, within the meaning of s36 Act 23 of 1992. And as to subpara (b) of para 3 above; the action taken by first respondent against applicant cannot be traceable to any law. In this regard the point should be signalized that policy by a public authority is not law: It is not subordinate or subsidiary legislation. There is no need to cite authority in support of such elementary and incontrovertible rule. In the instant case, the aforementioned Policy is not a regulation, within the meaning of s94 of Act 23 of 1992.

[6] The power of a public authority (administrative body or official) to act must be traceable only to an enabling Act or a subordinate (or delegated) legislation made thereunder. The Supreme Court stated in *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2010(2) NR 487 (SC) thus:

'[23] The rule of law is one of the foundational principles of our State. One of the incidents that follows logically and naturally from this principle is the doctrine of legality. In our country, under a Constitution as its 'Supreme Law', it demands that the exercise of any public power should be authorised by law – either by the Constitution itself or by any other law recognized by or made under the Constitution. 'The exercise of public power is only legitimate where lawful.'

[7] It follows inevitably that in the instant proceeding, the exercise of public power by first respondent against applicant is unlawful, and so, it is not legitimate. That administrative action is unlawful and invalid.

[8] Based on these reasons, the conclusion is inescapable that respondents have failed to show cause why the rule *nisi* granted by the 4 February 2020 order should not be confirmed and the order made final.

[9] Of the view I take of the matter on the basis of rule of law and legality, as discussed previously, I hold that *Impala Water Users Association v Lourens NO and Others* 2008 (2) SA 495 (SCA), referred to me by Ms Ndungula, on private law of contractual rights is of no assistance on the point under consideration; and so, I do not feel bound to apply *Impala Water Users Association*.

[10] As a court, we wish to enter this caveat. The decision of the court does not in any take away applicant's duty and responsibility to make full and prompt payments at all times to first respondent for utility charges. It is the decent thing to do. The decision does not also whittle away first respondent's statutory duty and power in terms of Act 23 of 1992 – which of course, must be exercised lawfully – to collect payment from its clientele to whom it supplies water and other utilities and services.

[11] It remains to consider costs. In terms of the 4 February 2020 order, costs were to stand over to be argued on the return day. On this return day, Ms Ndungula argued that the application should fail and applicant should be mulcted in costs. Indeed, respondents had prayed for such order. Applicant, on the other hand, prayed the court to grant the application and order first respondent to pay applicant's costs on a scale as between attorney and client, including costs of one instructing counsel and one instructed counsel. In her submission, Ms Garbers-Kirsten argued that upon the success of the application, first respondent should be mulcted in punitive costs because respondents disregarded applicant's entreaty that respondents should consider the law properly, and if they did they would see that their action was unlawful and if they persisted in it, they would be taking the law into their own hands.

[12] Ms Ndugula relied on *CS v CS* 2018 (4) NR 973 (HC) where the court there stated that a punitive costs order ought to be granted in 'exceptional circumstances'. Counsel relied also on *Hailulu v Anti-Corruption Commission and Others* 2011 (1) NR 363 (HC) where the court held that the court has an inherent discretion to grant attorney-and-client costs when 'special circumstances' are present arising from the reprehensible conduct of a litigant which warrants such an order'. For Ms Ndungula no special circumstances exist to grant punitive costs order. I do not see, with respect, how *CS v CS* and *Hailulu* advance respondents' case on costs.

[13] Be that as it may, in my view, the unlawful administrative action of respondents should be juxtaposed with the following unlawful and unreasonable conduct of the applicant. By so doing, the court strikes a proper balance judicially in weighing the evidence when considering whether the court should, in justice and in fairness to both parties, exercise its discretion in favour of granting punitive costs, or, indeed, any costs at all. The applicant's unlawful and unreasonable conduct is that he refused to settle his outstanding utility bills – for which he does not deny liability – with first respondent, but rather settle the bill with the Namwater Corporation, with which he has no contractual relationship for the supply of water to his business premises. Indeed, until the hearing of the rule *nisi* application, applicant had held stubbornly to this unlawful and unreasonable positon that he was entitled to settle the outstanding bills with the Namwater Corporation. In my view, applicant should not be rewarded for his unlawful and unreasonable conduct and attitude. He ought rather to be condemned for it. For these reasons, I think it will be unjust and unfair to grant a punitive costs order against respondents.

[14] Based on these reasons, I conclude that respondents have failed to persuade the court to discharge the rule *nisi*. In the result, I make the following order:

3. The rule *nisi* issued on 4 February 2020 is confirmed.
4. First respondent is to pay applicant's costs on the scale as between party and party, and such costs include costs of one instructing counsel and one instructed counsel.

C PARKER

Acting Judge

APPEARANCES

APPLICANT:	H Garbers-Kisten Instructed by Van der Merwe-Greeff Andima Inc, Windhoek.
RESPONDENTS:	A Ndungula (with her J Hinda) Government Attorney, Windhoek