

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION – MTHATHA)**

Before the Honourable Justice Brooks

CASE NO: 1945/2022

CASE NO: 1629/2022

CASE NO: 2640/2022

CASE NO: 2641/2022

CASE NO: 2789/2022

In the matter between:

THOBILE MAWAYI & THREE OTHERS

First Applicant/s

PUTUMA MBALO AND THREE OTHERS

Second Applicant/s

MKHEYI GELA AND SEVEN OTHERS

Third Applicant/s

PANDEKA SIQABU AND SEVEN OTHERS

Fourth Applicant/s

SABELO FANAYO AND FOUR OTHERS

Fifth Applicant/s

And

PREMIER, EASTERN CAPE

First Respondent

MEC FOR EDUCATION, EASTERN CAPE

Second Respondent

SUPERINTENDENT GENERAL

Third Respondent

SUPPLEMENTARY HEADS OF ARGUMENT FOR COSTS

INTRODUCTION

1. The application is for costs on a punitive scale against the respondents for the bases of *inter alia*. The respondents have recklessly disregarded this Honourable Courts orders, the respondents' Case appears hopeless and the respondents do not seriously intend to proceed with the Case to finality as will be fully demonstrated here below. Central to the application before Court is the disregard of the Court process and unabated dilatory undermining section 28(2) and 237 of the Constitution of the Republic by State organs. The learners' Constitutional rights are afflicted by the respondents from time immemorial, but in 2018 the respondents assessed the schools and furnished some SGB's with contour maps, SDP; engineer plans etc decanting others with an undertaking to build them properly. Todate nothing has been done about all schools referred herein.

PROCESS OF LITIGATION

2. **AD PUTUMA MBALO CASE NO: 1629/2022**

DATES

- 2.1 18 May 2022 in Court matter postponed.
- 2.2 21 June 2022 – before **Judge Majiki** matter postponed to 12 July 2022
parties put on terms
- 2.3 12 July 2022 – before **Judge Dawood** matter postponed to 30 August
2022
- 2.4 30 August 2022 before **Justice Da AJ Silva** extended rule
- 2.5 4 October 2022 – matter before **Judge Nqumse AJ** matter postponed to
1st November 2022

- 2.6 1st November 2022 before **Judge Rusi J**, matter postponed to 29 November 2022.
- 2.7 29 November 2022 matter was removed from the roll
3. Putuma Mbalo on 4th April 2023 after removal by order of Judge Griffiths the matters were consolidated before Honourable **Justice Rusi J**.

IMPROPRIATORY

Consolidation was done by respondents deliberately under Mawayi Case 1945/2022 which was short of:

- 3.1 Applicant's replying affidavit and heads of argument because Answering Affidavit has been filed late on 28 February 2023 in non-compliance of the Court order of **Judge Nqumse AJ** dated 15 November 2022, ordering the respondents to file on or before 5 December 2022. *No explanation was proffered today for non-compliance with the Court order.*
4. After the removal by Justice Griffiths, the matter was set down for 18th May 2023 in the opposed Court. The matter was removed at the instance of the respondent on a technicality that the matters were consolidated under Mawayi.

5. **AD PANDEKA SIQABU CASE NO: 2641/2022**

The case served for the first time on 22 November 2022 before Judge Gqamane A.J. the un-commissioned answering affidavit is cut and paste like other matters hence compliance. The matter was postponed to 10 January 2023. On 10 January 2023 before **Justice Jolwana**, matter was postponed to 25 May 2023 *with the respondents* ordered to file their **Heads of Argument** and **Practice Note by 3rd March 2023**. *The respondents never did so and no explanation for that non-compliance with the Court order todate.* On 25 May 2023 the matter was referred to Case Management by **Justice Hinana A.J** improperly at the persistence of the respondents.

6. **AD MKEYI GELA CASE NO: 2640/2022.**

On 11 October 2022 the matter served before Court before **Justice Tokota ADJP**. Respondents filed on or before 8 November 2022 through cut and paste. The respondents were directed to file their Heads of Argument on 1st December 2022. *They never comply with the said Court order till today. They have not filed any explanation for such non-compliance todate.* The matter was set down in the opposed Court for the 27th July 2023.

7. The applicant's attorney set down all the 5 consolidated matters under Mkheyi Gela Case 2640/2022. The **applicants insisted that all of them be dealt to finality under Mkheyi Gela & others** because applicants have done everything

in respect of all of them in compliance with the rules and orders of this Honourable Court.

7.1 On the 27 July 2023 the applicants wanted a matter to be finalized. The respondents opposed on the basis that these matters are consolidated under Thobile Mawayi because of Hinana AJ's order dated 25 May 2023 which referred the matters to a Case Flow Management.

7.2 The stance once more adopted by the respondents was hellbent to frustrate the learners' rights in terms of section 28(2) of the Constitution.

8. **AD SABELO FANAYO & OTHERS CASE NO: 2789/2022**

On 1st November 2022 the matter served before **Madam Justice Rusi**. Matter was postponed to 29 November 2022. The respondents were directed to file their answering on or before 22 November 2022.

8.1 *They never complied with the Court order as usual. Only on 28 November 2022 out of time, they filed an Answering Affidavit without any condonation or application for such late filing to date. On 29th November 2022 the matter was removed in adhering to Judge Hinana's reference of the matters to a Case Flow Management.*

9. After that the matter in numerous occasions served in CFM with others since 13th September 2023; 9th November 2023; 17th November 2023; 7th March 2024; 14th March 2024; 20th March 2024 before **Justice Dawood ADJP**.

10. **INSPECTION IN LOCO**

On 17 November 2023 an inspection in loco by the Court, applicants' legal team and respondent's legal team and their task team was conducted of Kotyana Senior Primary School – Case No 2641/ 2022, and Gwebityala Senior Secondary School under Mkheyi Gela – Case No 2640/2022 at Elliotdale.

10.1 Due to the dilapidated and unhealthy condition of school, the Judge and the respondents' legal team felt it was not wise to further visit the other nearby schools as was prior arranged for these Elliotdale Schools.

10.2 Further the respondents' legal team *undertook to furnish the applicants' legal team with the remaining SDP plans, and Surveyor's maps, contour maps in respect of the other remaining four schools except Gwebityala S.S.S - Mkheyi Gela Case No 2640/2022 as the department had furnished the school with such plans in 2018. Albeit, having done so in 2018, todate the learners breaches complained of are unabatedly affronting the learners at the school mentioned herein.*

11. On 7th March 2024 the Court directed **the respondents to deliver the SDP plans to the applicant's legal teams on or before 14 March 2024. And, directed to arrange a conference** with their clients in order to secure a date to hold a joint conference with the applicants and their legal representatives.
12. *Todate the applicants never complied with that order. They have not filed any explanatory affidavit as to why they undermine the Court order.*
13. On 14th March 2024 the respondents' legal team never attended a Case Flow Management before **Justice Dawood ADJP**. *Again the respondents disrespected and failed to comply with the Court order.* The matter was rolled over to 20th March 2024.
14. On 20th March 2024 all the matters under Mawayi & 4 others are finally set down for hearing in the opposed motion Court on 9th May 2024; that the observation of inspection in Loco by the Case Flow Management Judge conducted on 17th November 2023 signed by both legal teams to be filed on or before 19th April 2024; and **that the respondents are still further directed to comply with the terms of paragraphs 3 and 4 of the order dated 7th March 2024 by not later than 19th April 2024; failing compliance to file and affidavit by the responsible official stated why there has been non- compliance with the Court order aforementioned.**

15. *Once more the respondents intentionally failed to comply and disregarded the aforesaid Court Order.*

16. **LIST OF COURT ORDERS DISREGARDED BY THE RESPONDENTS**

From the above, the Court will observe that since June 2022 the respondents failed to comply with the orders of the Court referred hereunder.

16.1 In Putuma Mbalo Case No: 1629/2022 the **Judge Majiki's** order *is disregarded and not complied with. A copy of the Court order is marked "A1-A2"*

16.2 In 12th July 2022 Justice Madam Dawood's order granted a rule *Nisi. It was not complied. A copy of the Court order is annexed hereto marked "B1-B2"*

16.3 On 30 August 2022 Putuma Mbalo Case No: 1629/2022 the matter served before **Madam Justice Da Silva's** order marked "**C1-C2**".

16.4 On 4th October 2022 **Justice Nqumse AJ's** order marked "**D1-D2**" *has not been complied with todate.*

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16.5 On 15th November 2022 before **Judge Nqumse AJ'S** order marked "**E1-E2**" *has todate never complied with and no explanation has been tendered by Respondents.*

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16.6 **Justice Majiki's** order of 25 October 2022 marked "**F1-F2**" *has todate never complied with and no explanation has been tendered by Respondents.*

16.7 On 10 January 2023 matter served before **Justice Jolwana** order marked "**G1-G2**" – *No Heads of Argument were filed; todate never complied with and no explanation tendered to this Court by Respondents.*

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16.8 On 11th October 2022 before **ADJP Tokota's** order marked "**H1-H2**" *has todate never complied with and no explanation has been tendered to this Court by Respondents.*

16.9 On 1st November 2022 before **Madam Justice Rusi** her order marked "**J1-J2**"; *has todate never complied with and no explanation has been tendered to this Court by Respondents.*

16.10 On 7th March 2024 before **Madam Justice Dawood ADJP**, her order is marked “**K1-K2**”; *and has todate never complied with and no explanation has been tendered by Respondents.*

16.11 On 20 March 2024 before **Madam Justice Dawood** her order is marked “**L1-L2**”; *and has todate not been complied with and no explanation is advanced by Respondents to this Court.*

APPLICABLE LEGAL PRINCIPLES REGARDING COSTS IN PUNITIVE SCALE.

17. We submit that the award of costs is a matter wholly within the discretion of the Court, which must be exercised judiciously on the grounds upon which a reasonable man could have come to the conclusion at.¹ Even though the consideration of costs does not always necessitate a full enquiry into the merits in all cases, a judgement for costs involves a decision on the merits and a claim for costs cannot be viewed in isolation.²
18. We submit that out of some options open to the Court in exercising its discretion on the matter of costs, it is prudent of the Court to lean in favour of the general rule – that the costs follow the results. As a general rule, the party who succeeds (*in Casu* the party would have been applicants in all five

¹ Herbstein and Van Winsen The Civil Practice of Supreme Court of SA 4th Edition @ 703-4

² Cats v Cats 1959 (4) SA 375 (C) at 379 H.

Cases) should be awarded costs and this rule should not be departed from except on good grounds.³

19. This matter engages this Court jurisdiction. These being disregarded and non compliance of its orders by several judges in the matters referred herein. Accordingly, this Court has power to protect its own processes in terms of section 173 of the Constitution is implicated. The section enjoins the Court the flexibility to be responsive in an emerged and transforming democracy. When the Constitutional safeguards are undermined recklessly and so blatantly or so egregiously, section 173 empowers the Court to respond swiftly and effectively in its own interests and the interests of justice.
20. This matter concerns the protection of learners' rights and the authority of the judiciary to carry out its Constitutional functions vested in it in terms of section 165 of the Constitution and the safeguarding of the rule of law, the supremacy of the Constitution, and the values that lie at the heart of our Constitutional order.
21. The thrust of section 165 of the Constitution was expounded by Nkabinde J in Peko 11, in which it was stated that:-

“[T]he rule of law, a foundational value of the Constitution, requires that the dignity and authority of the Courts be upheld. This is critical, as the capacity of the Courts to carry out their functions depends upon it. As the Constitution

³ Union Government v Gass 1959 (4) SA 401 (A) at 413 C-E; Smit v Maqabe 1985 (3) SA 974 (T) 977 D-E.

demands, orders and decisions issued by Courts bind all persons to whom and organs of the State to which they apply, and no person or organ of the 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. The effectiveness of Court orders or decisions is substantially determined by the assurance that they will be enforced. Courts have the power to ensure that their decisions or orders are complied with by all and sundry, including the organs of the State (in ad hoc Casu). In doing so, Courts are not only giving effect to the rights of the successful party but also and mainly, importantly, by acting as guardian of the Constitution, asserting their authority in the public interest”

22. We submit that the authority of the Courts and obedience of their orders – the very foundation of a Constitutional order founded on the rule of law depends on public trust and respect for the Courts. The respondents herein are disdainfully making a mockery of the value and foundation ensconced herein. Any disregard for this Court’s orders and the judicial process requires this Court’s expression of its displeasure with punitive costs on attorney and own client scale for the bases referred hereinabove.⁴

THE IMPORTANCE OF ENSURING THAT COURT ORDERS ARE OBEYED.

⁴ Victoria Park Ratepayer’s Association v Grey Venouw CC 2004 JDR (SE) at Paragraph 23

23. It cannot be gainsaid that orders of Court bind all to whom they apply. In fact, all orders of Court, whether correctly or incorrectly granted, have to be obeyed unless they are properly set aside. Section 165(5) of the Constitution itself provides that an order or decision binds all persons to whom it applies. The reason being that ensuring the effectiveness of the judiciary is an imperative. This has been confirmed in various decisions including Mjeni.⁵
24. Chief Justice Mahomed writing extra – curially in 1998, said:
“The exact boundaries of judicial power have varied from time to time and from country to country, but the principle of an independent Judiciary goes to the very heart of sustainable democracy based on the rule of law. Subvert it and you subvert the very foundations of the civilisation which protects.....what judicial independence means in principle is simply the right and the duty of judges to perform the function of judicial adjudication of their integrity and the law, without any actual or perceived, direct or indirect interference from or dependence on any person institution”.
25. The Court held that the obligation to obey Court orders has at its heart the very effectiveness and legitimacy of the judicial system.....and is the stanchion around which a State founded on the supremacy of the Constitution and the rule of law is built.⁶

⁵ Mjeni V Minister of health and Welfare, Eastern Cape 2000(4) SA 446(TK) at 452 C-E which was cited by Kirk – Cohen Jin Federation of Governing Bodies of South African Schools MEC for Education, Gauteng 2016(4) SA 546 (CC)

⁶ Department of Transport v Tasima (PTY) Limited 2007(2) SA 622(CC)

DATE ASKED FOR OFFICIAL TO FURNISH EXPLANATORY AFFIDAVIT

26. On 20th March 2024 the Court order of justice Madam Dawood ADJP directed that an official be caused to depose to explanatory affidavit. *Unfortunately, but not entirely unexpected, the respondents once again squandered an opportunity to follow and respect the country's legal process which guarantee all citizens, officials of organs of the State fairness and equality before the law.* The respondents' conduct demonstrates a reckless disregard of the Court processes and orders.
27. It is unbecoming and highly irresponsible of the respondents' officials to wilfully undermine the rule of law, and the Court order, something warranting punitive costs order. The appropriateness of punitive costs order needs no repeating that the only rationale provided to this Court for the granting of a punitive sanction is that what we pray for. However, it is trite that the Court enjoys wide powers, and that it is enjoined by the Constitution to grant appropriate remedies that are just and equitable on the facts of this Case with a punitive costs order – on an attorney and own client scale.
28. We fervently submit that the intensity and aggravation of affronting breaches on learners at various school, and repeat disregard of Court orders by the respondents justifies a punitive costs order for the Court to express its

displeasure. The Court is obliged to protect its Supremacy for citizens to respect and uphold the rule of law

29. The Court is exercising its discretion will take note that there is repetitive.

29.1 Non-compliance with numerous Court orders and directives referred hereabove;

29.2 We further argue that the respondents recklessly disregarded their obligations; as an organs of State to address the learners' breaches complained hereof. Further the respondents as organs must walk the Constitution in exemplary form.

29.3 That the respondents are deliberately pursuing a hopeless and indefensible case from the onset.

29.4 We also submit that the respondents are not seriously intending to have the matter proceeded to a finality.

30. At the heart of the disregard and disobedience to Court orders is a serious unabated breach of section 28(2) of the Constitution since 2022 todate in 2024. Further the effectiveness of section 237 is made a mockery by the organs of the State in the Eastern Cape.

31. At all material times the learners are suffering as a result of the breaches affronting them at schools at the instance of the respondents who care less about their wellbeing.
32. In conclusion we pray for the proposed order in terms of the draft order.

Dated at Mthatha this 7th May 2024

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