



NOT REPORTABLE

CASE NO: SA 27/2020

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

**COUNCIL FOR THE MUNICIPALITY
OF WINDHOEK**

First Appellant

**THE CHIEF EXECUTIVE OFFICER FOR THE
MUNICIPALITY OF WINDHOEK**

Second Appellant

and

**PARATUS TELECOMMUNICATIONS (PTY) LTD
COMMUNICATIONS REGULATORY AUTHORITY
OF NAMIBIA**

First Respondent

Second Respondent

Coram: SMUTS JA, FRANK AJA and UEITELE AJA

Heard: 22 June 2022

Delivered: 13 July 2022

Summary: This appeal concerns the Council for the Municipality of Windhoek's (the municipality) resort to self-help used coercive power in the form of its police force to prevent the work and to confiscate the equipment of the first respondent (Paratus),

and its contractors, from installing fibre optic cables to connect its customers to the internet as is its right. Paratus is a holder of a licence provided for in terms of the Communications Act 8 of 2009 (the Act), (ie Part 5 of the Act). Paratus commenced installing fibre optic cables in Windhoek in 2013 as per its carrier licence. The municipality initially demanded a form of wayleave approval process for installing the cabling. The municipality later made more demands not referred to in the Act which had a disruptive impact upon Paratus' operations (ie installing extra sub ducts for the municipality's use, increasing the size of the duct and later requiring Paratus to follow a 'due permitting process of Council' to install its ducting). The dispute between the parties was referred to the Communication Authority of Namibia (CRAN), initially by Paratus where it complained about the municipality's conduct as being anti-competitive and contrary to the Act and by the municipality where it launched a request to CRAN for adjudication of a complaint against Paratus under s 69 of the Act. The municipality sought an order compelling Paratus to properly consult the day before installations on municipal land to enable the latter to assess public safety and compliance with by-laws but the complaint further sought that work by Paratus be stopped pending the outcome of the dispute (this complaint did not rely upon a wayleave or due permitting process).

On 13 February 2020 while Paratus and its contractor were trenching at a site, the municipality's City Police ordered them to stop their work and confiscated their equipment and a motor vehicle of the contractor.

On 26 February 2020, Paratus brought an urgent application for an interim interdict as well as further declaratory orders. In their founding papers, Paratus claimed that the municipality adopted a strategic plan to utilise existing fibre optic cabling in the city with a view to commercialising that network by entering into a partnership with a selected private company which would receive 80 per cent of the revenue from the development of this fibre optic network. Paratus further referred to the municipality's intention to benefit from its infrastructure without compensation and thereafter to operate in competition to it. It further asserted that the municipality's conduct tainted the exercise of its powers and deprived it of impartiality as a local authority in its dealings with Paratus. None of the factual issues in support of these concerns was properly placed in issue by the municipality in its answering affidavit. The municipality however raised a point that the High Court lacked jurisdiction to hear and determine

the dispute because it had requested adjudication of its complaint against Paratus before CRAN under s 69 of the Act. The municipality argued that CRAN alone had jurisdiction to adjudicate upon rights under Part 5 of the Act. The court *a quo* found in favour of Paratus by granting a final interdict against the municipality to stop it from unlawfully interfering with Paratus' rights to install its cabling. The municipality is appealing against that order.

Two issues are up for determination on appeal. Firstly, whether the court *a quo* had jurisdiction to grant the interdict and secondly, whether the requisites for a final interdict were met?

Held that, taking the law into one's own hands is fundamentally inconsistent with the rule of law. This principle is raised in this case where the resort to self-help is aggravated by the fact that a local authority used its coercive power in the form of its own police force in doing so. Conduct of that nature not only offends this fundamental principle but in this instance also amounts to an abuse of power.

Held that, the starting point in interpreting s 69 of the Act is that the High Court has jurisdiction in all matters which come before it as well as inherent jurisdiction unless the High Court has been specifically deprived of jurisdiction. There is furthermore a presumption under the common law against construing a statute to oust the jurisdiction of the High Court.

Held that, s 69 is a manifestation of the tendency to establish specialist courts under statutes to deal with specific disputes under the statutes in question. The sole jurisdiction of CRAN under s 69 is thus limited to disputes regarding the exercise of the rights of carriers under Part 5 of the Act. The High Court correctly found that the adjudication before CRAN related to the manner in which those rights are exercised.

Held that, the dispute in these proceedings is not one regarding the exercise of rights conferred under Part 5 of the Act, but rather the existence of those rights which the municipality denied and, acting upon that stance, unlawfully prevented Paratus from exercising those rights, compounded by a resort to self-help. The issue raised in these proceedings falls outside disputes contemplated by s 69.

Held that, whilst s 69 confers sole jurisdiction upon CRAN to adjudicate upon disputes regarding the manner in which rights under Part 5 are exercised (ie 'disputes regarding the exercise of the rights conferred upon a carrier'), this would not preclude the High Court from exercising its jurisdiction to grant an interdict in urgent proceedings where there is an unlawful interference with those rights as has been set out in these proceedings.

Held that, the requisites for a final interdict are well established. An applicant must establish a clear right, an injury actually committed or reasonably apprehended and thirdly the absence of similar protection by any other ordinary remedy.

Held that, the defences the municipality sought to raise - that Paratus had not acted reasonably and had caused damages - do not amount to defences to these interdict proceedings. The Act requires that a licensee must provide reasonable notice to the municipality in order to exercise its rights under s 62. It is not incumbent upon Paratus to establish that it has acted reasonably in doing so, except for such notice, in asserting its rights.

Held that, the municipality has thus failed to place any matter before this court which amounts to a defence to the clear right asserted by Paratus based upon its statutory rights as a carrier conferred upon it under Part 5 of the Communications Act 8 of 2009.

The appeal is dismissed with costs.

APPEAL JUDGMENT

SMUTS JA (FRANK AJA and UEITELE AJA concurring):

Introduction

[1] The Republic of Namibia is a state founded upon the principles of democracy, the rule of law and justice for all.¹ Inimical to the rule of law is a resort to self-help. This fundamental principle, deeply rooted in our common law, is now emphatically

¹ Article 1(1) of the Namibian Constitution.

underpinned by Art 1 of the Namibian Constitution. Taking the law into one's own hands is fundamentally inconsistent with the rule of law. This principle is raised in this case where the resort to self-help is aggravated by the fact that a local authority used its coercive power in the form of its own police force in doing so. Conduct of that nature not only offends this fundamental principle but in this instance amounts to an abuse of power.

[2] Also to be considered in this appeal are the provisions of the Communications Act 8 of 2009 (the Act).

[3] The first respondent (Paratus) in this appeal is a carrier as contemplated in Part 5 of the Act. It has a Class Comprehensive Telecommunications Service Licence (ECS and ECNS). It is in the business of providing internet connectivity in Namibia by installing fibre optic cabling to connect their customers to the internet. The fibre optic cable is installed in trenches approximately 50cm deep along the sides of roads. Paratus would also rarely but occasionally need to cut roads to install its cable.

[4] Paratus became involved in a dispute with the Council of the Municipality of Windhoek, the first appellant (the municipality), a duly constituted local authority, concerning the installation of its cabling.

[5] This culminated in Paratus obtaining a final interdict against the municipality to stop it from unlawfully interfering with its rights to install its cabling. Although the municipality's chief executive officer was cited as a respondent in the interdict and is the second appellant, for the purpose of this judgment the appellants are referred to as the municipality.

[6] The municipality appeals against that interdict. Essentially two issues emerge for determination. The first concerns whether the High Court had jurisdiction to grant the interdict. The second concerns whether the requisites for a final interdict were met. Before these questions are addressed, the statutory context and factual background leading to the interdict are first referred to.

Background facts

[7] By virtue of Paratus' licence, it enjoys certain rights under the Act, given the compelling importance of internet services to development and to society and the latter's dependence upon connectivity to them.

[8] Section 60 of the Act affords licenced carriers the right to enter upon any land, street, footpath or land reserved for public purposes to construct and maintain their facilities upon, under, over, along or across any land, street, path, land and footpath.

[9] Section 62 entitles a carrier, after reasonable notice to a local authority, to break or open up a street to construct and maintain telecommunications infrastructure under that street with the proviso that the local authority is entitled to supervise that work and the carrier is required to pay all reasonable expenses incurred by the local authority in that regard.

[10] Section 59(5) provides that the rights afforded to carriers under the Act are to be exercised in a manner that 'the burden on the land owner is as small as possible'.² In respect of land owned by a public body or the State which arises in this matter, the

² Section 59(5)(a).

rights are not to be exercised in a manner 'prejudicial to any public purpose or legal duty' of that public body.³

[11] Paratus commenced installing fibre optic cables in Windhoek in 2013. The municipality at first demanded a form of wayleave approval process for installing the cabling. But it later made more demands not referred to in the Act which had a disruptive impact upon Paratus' operations. These demands included installing extra sub ducts for the municipality's use, increasing the size of the duct and later requiring Paratus to follow a 'due permitting process of Council' to install its ducting.

[12] In its founding affidavit, Paratus attributed the increasing demands of the municipality to the latter's adoption of a strategic plan to utilise existing fibre optic cabling in the city with a view to it (the municipality) commercialising that network by entering into a partnership with a selected private company which would receive 80 per cent of the revenue from the development of this fibre optic network. Paratus referred to the municipality's intention to benefit from its (Paratus') infrastructure without compensation and thereafter to operate in competition to it. This, Paratus asserted, tainted the exercise of its powers by the municipality and deprived it of impartiality as a local authority in its dealings with Paratus. The factual basis for this concern was not placed in issue by the municipality in its rambling answering affidavit.

[13] Following the adoption of its strategic plan of competing with Paratus, the municipality on 31 May 2018 informed Paratus that it would not authorise any further access to install fibre optic cabling on its public spaces and streets as this would jeopardise its own strategic intentions. It further advised that no new applications for

³ Section 59(5)(b).

wayleaves would be approved and Paratus would only be entitled to complete previously approved wayleaves.

[14] Paratus urgently complained to the Communications Regulatory Authority of Namibia (CRAN) concerning the conduct of the municipality as being anti-competitive and contrary to the Act. A meeting was convened by CRAN within days of this complaint. At that meeting, a municipal official stated that the municipality intended to build an independent fibre optic backbone for the city and appoint a privately owned partner to benefit from it. Despite this, the official agreed that Paratus could continue to trench where it had existing wayleave approvals and that additional approvals would be considered on a case by case basis.

[15] The position of the municipality shifted in ensuing correspondence until informing Paratus on 12 July 2018 that existing wayleaves could continue subject to specified further conditions but that all new wayleave applications would be halted for 'strategic reasons'.

[16] The municipality proceeded to place further conditions on existing wayleave approvals subsequently. When this was raised by Paratus with a municipal official by name of Mr Kandjiriomuini, he insisted upon the further conditions, adding 'we will do it that way and if we have to destroy your business, then that is just how it will be – it's your choice'. This statement was significantly not placed in issue in the answering affidavits.

[17] Paratus continued with its trenching activities although a notification of 27 February 2019 of trenching work under s 62 was met with a municipal response that it

should not proceed. On 21 May 2019, the City Police of the municipality inexplicably interrupted trenching activities following a 'complaint' made by Mr Kandjiriomuini contending that the trenching was in conflict with the Local Authorities Act 23 of 1992.

[18] Paratus then approached their legal practitioners who sought an undertaking from the municipality by 31 May 2019 to desist from frustrating Paratus in their rights and duties and from threatening their employees with arrest.

[19] An undertaking was provided on 31 May 2019 that threats of arrest were withdrawn and the wayleave process was abandoned and the due permitting process was not referred to.

[20] Paratus thereafter carried on as previously and provided notifications contemplated by the Act without demur.

[21] On 2 August 2019, the municipality however launched a request to CRAN for adjudication of a complaint against Paratus under s 69 of the Act. In those proceedings the municipality did not rely upon a wayleave or due permitting process but sought an order compelling Paratus to properly consult the day before installations on municipal land to enable the latter to assess public safety and compliance with by-laws but the complaint further sought that work by Paratus be stopped pending the outcome of the dispute.

[22] Paratus took preliminary points against the request for adjudication before an external chairperson on 14 February 2020.

[23] Shortly before that, the municipality addressed Paratus on 12 February 2020 complaining that Paratus was engaging in 'unauthorised/illegal' trenching because it was done without following a 'due permitting' process and required that Paratus cease those activities with immediate effect.

[24] On the following day (13 February 2020), whilst one of Paratus' contractors was busy at a trenching site, the municipal police arrived, armed with the letter of 12 February 2020, and instructed Paratus and its contractor to stop their work and proceeded to confiscate the equipment of Paratus and its contractor, including the contractor's motor vehicle. This was without any order of court or due legal authority. Paratus then instructed its lawyers to prepare its application for an interdict.

[25] On the day of this illegal spoliation (13 February 2020), Paratus' lawyers demanded the return of all equipment and the vehicle and an undertaking that the municipality desist from obstructing Paratus in exercising its rights under the Act.

[26] The vehicle was eventually returned on 18 February 2020 but no undertaking was given.

The application before the High Court

[27] Paratus then brought an urgent application on 26 February 2020, set down for 12 March 2020. An interim interdict was sought as well as further declaratory orders in due course.

[28] In its founding papers, Paratus averred that the conduct of the municipality was actuated by an entirely improper purpose because the municipality viewed Paratus as a competitor and sought to achieve an improper advantage by interfering with its rights and obligations to install fibre optic cable. This far reaching allegation was tellingly not placed in issue by the municipality.

[29] In a discursive and unduly argumentative answering affidavit, the municipality did not dispute Paratus' reasonable apprehension of further disruptive conduct on its part, the improper purpose behind its conduct and, the threat against Paratus' business made by its official. It was also not denied that Paratus was severely prejudiced by the interference in its activities by the municipality. Nor were the events of the unlawful spoliation which occurred on 13 February 2020 put in issue, except to say the conduct was 'warranted' without providing any basis whatsoever for this extraordinary assertion. It was also said that the implements were returned after the interdict application was served. No explanation was provided for this egregiously unlawful conduct when returning the implements.

[30] The point was however taken that the High Court lacked jurisdiction to hear and determine the dispute because the municipality had requested adjudication of its complaint against Paratus before CRAN under s 69 of the Act. It was said that CRAN alone had jurisdiction to adjudicate upon rights under Part 5 of the Act.

[31] As to the merits of the claim of unlawful interference with Paratus' rights under Part 5 of the Act, it was denied by the municipality that Paratus had an unqualified right to enter municipal property and lay cables without following the procedures set

out in the Act. The municipality asserted that Paratus had not complied with the Act although without specifying in which respects. The municipality also referred to damages, also largely unspecified, it had sustained as a consequence of Paratus' installations.

[32] During the hearing of the application before the court below, Paratus sought a final interdict, given that much of the factual basis for the interdict had not been disputed by the municipality with Paratus' counsel contending that it had established the requisites for a final interdict.

Approach of the High Court

[33] The court found that the issue to be determined concerned whether Paratus was obliged to follow a due permitting process and thus needed the consent of the municipality and if so, whether the latter could simply take the law into its own hands when consent was not granted.

[34] The court found that Part 5 of the Act does not require Paratus to obtain the municipality's consent to carry out its works in accordance with its licence. All that is required is to give the necessary notice, and if grievances are raised they would then be adjudicated upon by CRAN under s 69 of the Act.

[35] The High Court further held that where disputes as to the manner in which rights (of licencees) under Part 5 are exercised, that would be solely for CRAN to adjudicate upon and not for the High Court. The court further found that the municipality had no right to interfere with Paratus exercising its rights and that the requisites for a final interdict were established. The court proceeded to grant a final

interdict, interdicting the municipality from unlawfully interfering with or obstructing Paratus in the exercise of its rights, powers, duties and functions under the Act including installing fibre optic cables and also in separate orders specifying sites where Paratus was carrying out such work. The costs of one instructing and two instructed legal practitioners accompanied the interdicts.

Submissions on appeal

[36] Counsel for the municipality correctly accepted that s 60 of the Act vests a carrier with the right to enter upon the streets, footpaths and land reserved for public purposes for the purpose of installing its fibre optic cables and connecting to customers' premises and did not require consent from the municipality to do so. Counsel however contended that this right is to be exercised in such a manner that the burden of the landowner is as small as possible under s 59(5)(a) of the Act. It was further argued that Paratus had not complied with s 59(5)(a) by showing that it had exercised its right in such a manner so as to least burden municipal property. Counsel referred to the extensive claim attached to the answering affidavit representing damage to municipal property in support of this contention and submitted that Paratus had not established a clear right to form the basis for a final interdict.

[37] Counsel for the municipality further contended that the High Court did not have jurisdiction to grant the interdicts because s 69 of the Act vests CRAN with the sole jurisdiction to deal with disputes regarding the exercise of the rights conferred in Part 5 of the Act. He further argued that the jurisdiction of the High Court was not ousted by s 69 because s 69(4) provided that any party aggrieved by a decision of CRAN had the right to appeal to the High Court.

[38] Counsel for Paratus argued that the interdicts sought and granted were directed at self-help where the municipality had taken the law into its own hands in interfering with Paratus' rights. The interdict thus concerned the interference with rights whose existence the municipality had placed in issue and argued that it was not a dispute regarding their exercise as contemplated by s 69. Counsel contended that s 69 is to be read with the regulations promulgated under the Act which set out the procedure to be followed in pursuing a complaint or request for adjudication to CRAN under s 69. Counsel pointed out that the regulations do not make provision for the granting of interdicts or urgent relief. It was further submitted that the presumption against ousting of the jurisdiction of the High Court would preclude s 69 ousting that jurisdiction and that it was only the High Court which could grant effective relief to Paratus in the face of a spoliation and unlawful interference with its rights.

[39] On the merits, counsel for Paratus argued that the requisites for a final interdict were established. Counsel referred to Paratus' rights under Part 5 of the Act and contended that those had been egregiously interfered with by the municipality, including being spoliated on 13 February 2020. No explanation was forthcoming for this unlawful conduct. An undertaking was sought and not provided. If the municipality had concerns about the manner in which Paratus exercised its rights under Part 5, it was open to it to seek legal remedies and that its resort to self-help should not be countenanced. Counsel for the respondent sought the dismissal of the appeal with costs.

Jurisdiction

[40] Section 69 of the Act provides:

'Authority to adjudicate in disputes between owners of property and carriers

- (1) Unless the provisions of this Chapter expressly provide otherwise, any party to a dispute regarding the exercise of the rights conferred upon a carrier in this Part, may only be adjudicated upon by the Authority.
- (2) Any party of a dispute referred to in subsection (1) may refer the dispute in the prescribed manner to the Authority.
- (3) The Authority must make regulations prescribing the procedure to be followed when a dispute is adjudicated upon in terms of this section.
- (4) Any party aggrieved by a decision of the Authority under this section may appeal to the High Court within the prescribed period and subject to the prescribed procedural requirements.'

[41] The starting point in the interpretation of s 69 is that the High Court has jurisdiction in all matters which come before it as well as inherent jurisdiction unless the High Court has been specifically deprived of jurisdiction.⁴ There is furthermore a presumption under the common law against construing a statute to oust the jurisdiction of the High Court.⁵

[42] Section 69 is contained in Part 5 of the Act and the rights referred to include the rights of carriers under s 59(1), s 60 and s 62. The legislature in s 69 clearly intends that 'disputes regarding the exercise of those rights' are only to be adjudicated upon by CRAN. That would exclude the High Court from adjudicating upon disputes regarding the exercise of the rights in question. This is reinforced by s 69(4) which

⁴ Pistorius *Pollak on Jurisdiction* 2 ed (1993) at 29; *National Union of Namibian Workers v Naholo* 2006 (2) NR 659 (HC) paras 39-41.

⁵ 2 *Lawsa* 2 ed para 541.

affords the parties to those disputes before CRAN the right of appeal to the High Court.

[43] Section 69 is a further manifestation of the tendency to establish specialist courts under statutes to deal with specific disputes under the statutes in question. Examples of these include the dispute mechanics including courts and tribunals set up under the Labour Act 11 of 2007 and the Electoral Act 5 of 2014.

[44] The crucial component in s 69 in this context is the nature of the disputes to be adjudicated upon by CRAN under s 69. These are stated as being 'disputes regarding the exercise of the rights conferred upon a carrier' under Part 5.

[45] Section 69(3) provides that CRAN is to make regulations concerning the procedure to be followed in adjudicating upon those disputes adjudicated under s 69.

[46] The regulations prescribe the procedure to be followed in pursuing such disputes. They contemplate the delivery of complaints and requests for adjudication in writing with CRAN. A complaint or such a request is thereafter delivered by CRAN upon a respondent which has seven days to deliver a response. After the exchange of written process in this way, CRAN has a number of options open to it. These include dismissing the dispute, initiating an investigation, appointing a mediator, calling for written submissions or conducting an oral hearing, granting the relief sought or making any other order as may be appropriate. If written submissions or an oral hearing are decided upon, certain further procedures are provided for. CRAN is required to render a determination within 60 days of the conclusion of a hearing.

[47] The regulations do not provide for urgent proceedings and for abridging time limits in the regulations. Nor are interdicts specifically referred to.

[48] The sole jurisdiction of CRAN under s 69 is thus limited to disputes regarding the exercise of the rights of carriers under Part 5. As was found by the High Court, this adjudication would relate to the manner in which those rights are exercised. Section 69 contemplates the exercise of those rights and that the disputes contemplated by s 69 are those arising regarding that exercise and not relating to their existence.

[49] What gave rise to these proceedings is the municipality's denial (until the proceedings in this court) of the existence of Paratus' rights and taking the law into its own hands to prevent Paratus from exercising those rights. The dispute in these proceedings is not one regarding the exercise of rights conferred under Part 5 but rather the existence of those rights which the municipality denied and, acting upon that stance, unlawfully prevented Paratus from exercising those rights at all, compounded by a resort to self-help. The issue raised in these proceedings falls outside disputes contemplated by s 69.

[50] I agree with counsel for the respondent that the regulations do not provide an effective remedy to Paratus by not having urgent procedures for the granting of interdicts.

[51] For all these reasons, whilst s 69 confers sole jurisdiction upon CRAN to adjudicate upon disputes regarding the manner in which rights under Part 5 are exercised, this would not preclude the High Court from exercising its jurisdiction to

grant an interdict in urgent proceedings where there is an unlawful interference with those rights as has been set out in these proceedings.

The interdict

[52] The requisites for a final interdict are well established. An applicant must establish a clear right, an injury actually committed or reasonably apprehended and thirdly the absence of similar protection by any other ordinary remedy.⁶

[53] Although Paratus applied for an interim interdict, after the municipality filed its answering affidavit and did not properly dispute the existence of the clear right asserted and other elements for a final interdict, counsel for Paratus understandably moved for a final interdict. It is also clear that if an applicant can establish a clear right, it would then be entitled to a final interdict (instead of an interim interdict) provided that the other requisites for a final interdict are likewise established.⁷

[54] Paratus asserted its rights as a carrier under Part 5 of the Act, and in particular under ss 60 and 62. Those rights are to be exercised as set out in s 59(5) and, given the public purpose of the land in question, it would further seem that s 59(5)(b) would apply to the exercise of those rights.⁸ The access to the public purpose municipal (and other privately owned) land is intended for an important objective – to facilitate an unhindered roll out of an essential communication service in the public interest.⁹ Consent by the municipality is not required for their exercise, as was correctly acknowledged by its counsel in this court. It was thus not open to it to ‘put on hold’ or

⁶ 2 *Lawsa* 2 ed para 414-415.

⁷ 2 *Lawsa* 2 ed para 404.

⁸ *Municipal Council of Windhoek v Telecom Namibia Ltd* 2015 (3) NR 629 (SC) paras 30-31.

⁹ *Tshwane City v Link Africa & others* 2015 (6) SA 440 (CC) para 125, per Cameron & Froneman JJ for the majority.

'halt' Paratus' operations in exercising its rights under Part 5 as the municipality sought to do. Less so to resort to self-help to prevent their exercise.

[55] The municipality sought to raise a defence that Paratus had not acted reasonably and had caused damage, although these points were significantly not raised in the extensive dealings with Paratus before these proceedings. These do not however amount to defences to these interdict proceedings. The Act merely requires that Paratus must provide reasonable notice to the municipality in order to exercise its rights under s 62. It is not incumbent upon Paratus to establish that it has acted reasonably in doing so, except for such notice, in asserting its rights. On the contrary, the onus would be on the municipality to show that it had suffered such damage and their extent.¹⁰ It is also not open to the municipality to seek to impose conditions outside the purview of the Act, as had also occurred at different junctures.

[56] The municipality has failed to place any matter before court which amounts to a defence to the clear right asserted by Paratus based upon its statutory rights as a carrier conferred upon it under Part 5 of the Act.

[57] The claim to past damage caused to pavements and streets is not a defence to the clear right asserted in these proceedings and did not justify the municipality in taking the law into its own hands. A claim relating to such damage may form the subject matter in other proceedings but cannot justify the brazenly unlawful interference with Paratus' rights.

¹⁰ *Breede River (Robertson) Irrigation Board v Brink* 1936 AD 359 at 366. *Bloemfontein Town Council v Richter* 1938 AD 195 at 232.

[58] The requirement of an injury is also established, as well as an apprehension of unlawful conduct recurring. The events of 13 February 2020 could not have established this requirement more graphically. Without any legal basis in the form of a court order, the municipality sent its City Police to disrupt and prevent Paratus and its contractor from exercising rights under the Act. It did so with brutal force by dispossessing Paratus and its contractor of their vehicle and equipment and evicting them from their site. No justification for this manifestly unlawful act is even tendered in the answering affidavit. Although the vehicle was returned some five days after spoliation, the equipment was only returned after the application proceedings were served.

[59] Not only has there been an appalling lack of any explanation for this conduct, but an undertaking, which was sought, was also not forthcoming.

[60] Moreover, the expressed reasonable apprehension of further unlawful conduct is not denied. This in the context of prior unlawful interference by the City Police on behalf of the municipality, its unprincipled vacillating conduct and a threat directed at Paratus' business which was not denied in the answering affidavit. A further compounding factor is that this unlawful conduct would appear to be actuated by an improper motive, also not denied.

[61] Plainly the second and third requisites for a final interdict were amply established as well. The High Court was correct in granting a final interdict in the terms it did. I would have thought that a punitive cost order was more than justified against the municipality, given the entirely reprehensible resort to self-help. But there is no cross-appeal on that aspect and the costs order granted will stand.

[62] The conduct of the municipality as set out in these proceedings is deplorable and warrants the severe censure of this court.

[63] In the result, the appeal fails and the following order is made:

The appeal is dismissed with costs, including the costs of one instructing and two instructed legal practitioners.

SMUTS JA

FRANK AJA

UEITELE AJA

APPEARANCES

APPELLANTS:

T Phatela (with him E Shifotoka)

Instructed by Gaes Uanivi Inc.

RESPONDENTS:

R Töttemeyer (with him D Obbes)

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