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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NUMBERS: 2023-082305 & 2023-083488

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

28.08.23

In the matter between: -

MOLEBUSH INVESTMENTS CC

Applicant

and

CITY OF JOHANNESBURG

First respondent

REASONS FOR ORDER

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be 10h00 on 11 September 2023.

F. BEZUIDENHOUT AJ:

INTRODUCTION

[1] On late-afternoon, the 8th of September 2023, I granted an urgent order in the following terms: -

[1.1] The reconsideration application is dismissed.

[1.2] It is declared that the respondents are in contempt of the court order granted on 21 August 2023 by the Honourable Judge Maier-Frawley under case number 2023/082305 insofar as they have disconnected contrary to the interdict ordered against the respondents.

[1.3] The respondents shall immediately effect a temporary reconnection of electricity supply to the property known as Erf [...], Kensington B and Erf[...], Kensington B, physically located at [...] and [...] [...]Street, Kensington ("**the applicant's property**").

[1.4] The applicant shall immediately attend at its nearest police station and take all steps necessary, including but not limited to the deposing to an affidavit, to report the theft, alternatively unauthorised or unlawful removal, of the electricity meter from its property, with the view of obtaining a CAS number.

[1.5] Upon receipt of the CAS number, it shall immediately be provided by the applicant's representatives to the legal representatives of the respondents.

[1.6] Within 24 hours of receipt of the CAS number, the respondents shall install a new prepaid meter at the applicant's property.

[1.7] Each party shall pay its own costs occasioned by both the reconsideration and contempt application.

[2] Due to the lateness of the hour when the order was granted, I indicated to the parties that I would give my reasons for my order on Monday, 11 September 2023. These are my reasons.

THE ORDER DATED 21 AUGUST 2023

[3] On 21 August 2023, the applicant urgently applied ("***the interdict application***") for the reconnection of its electricity supply on the basis that it was unlawfully disconnected by the respondents. Although the application was brought on notice, the following order was granted by default: -

- [3.1] The respondents were ordered to reconnect the electricity supply to the applicant's property pending the finalisation of the pending High Court application in this court under case number 2023-052945.
- [3.2] The respondents were interdicted and restrained from disconnecting the applicant's electricity supply to the property pending the finalisation of the pending High Court application in this court under case number 2023-052945.
- [3.3] The respondents were ordered to pay the costs of the application on an attorney and client scale.
- [4] On the 22nd of August 2023, when the respondents failed to reconnect the electricity, the applicant deposed to a founding affidavit in support of an application for contempt. Shortly thereafter and on the same day, the respondents reconnected the electricity at the applicant's property. There was hence no need to proceed with the urgent application at that stage.
- [5] On the 25th of August 2023, the respondents disconnected the electricity again. This action revived the contempt application and it was brought on the 4th of September 2023. A supplementary founding affidavit was deposed to on behalf of the applicant wherein it explained the reconnection and subsequent disconnection.
- [6] Apart from a declaratory order for contempt and the payment of a fine, the applicant sought an additional order compelling the respondents to install a new electricity meter at the applicant's property. This relief was not included in the order of the 21st of August 2023.

- [7] The respondents retaliated with a reconsideration in terms of rule 6(12)(c) of the Uniform Rules of Court on an urgent basis.
- [8] Both the reconsideration and contempt applications were opposed. Although urgency was opposed on the papers, both parties conceded urgency at the hearing - wisely so in my view.
- [9] This court was called upon to determine both applications.

THE RECONSIDERATION APPLICATION

- [10] The dominant purpose of the subrule is to afford an aggrieved party a mechanism designed to redress imbalances in and injustices and oppression flowing from an order granted as a matter of urgency in its absence.¹ The rationale is to address the actual or potential prejudice because of an absence of *audi alteram partem* when the order was made.²
- [11] It is common cause that the urgent application was not brought on an *ex parte* basis. Rule 6(12)(c) allows a party against whom an order was granted in its absence in an urgent application to set the matter down on notice for reconsideration.
- [12] A number, if not most of the authorities cited within the context of rule 6(12)(c), concerned orders that were granted on an *ex parte* basis. I was however referred to *ISDN Solutions (Pty) Ltd v CSDN Solutions CC*

¹ Erasmus: *Superior Court Practice*, RS20, 2022, D1-88; *ISDN Solutions (Pty) Ltd v CSDN Solutions CC* 1996 (4) SA 484 (W) at 486H-I.

² *Industrial Development Corporation of South Africa v Sooliman* 2013 (5) SA 603 (GSJ) at paragraph [10].

*and Others*³ where this was not the case. In discussing the ambit of the subrule, the court found that the framers of the rule have not sought to delineate the factors which might legitimately be taken into reckoning in determining whether any particular order falls to be reconsidered and that it is plain that a wide discretion is intended.⁴

- [13] Regarding procedure, the court found that although no hard and fast rule need to be laid down, it seems desirable that a party seeking to invoke the rule ought in an affidavit to detail the form of reconsideration required and the circumstances upon which it is based. As is the case in the matter argued before me, the respondents failed to explain their absence. The court concluded thus: -

*"They clearly knew that an order would be sought on that day. Given such knowledge, I have no reason to suppose that they did not acquiesce in the grant thereof pending the determination of final relief."*⁵

- [14] The interdict application was served on the respondents via electronic mail. An amended notice of motion was similarly served via electronic mail. Upon the granting of the order, the order itself was served via electronic mail. All services was effected on the same email addresses. Significantly, one of these email addresses was dedicated to Mr Selby Rasoesoe, a person in the employ of the first respondent.

- [15] On the 22nd August 2023, upon receipt of the court order, Mr Rasoesoe

³ 1996 (4) SA 484 (W).

⁴ *ISDN Solutions (Pty) Ltd v CSDN Solutions CC* 1996 (4) SA 484 (W) at 487.

⁵ *ISDN Solutions (Pty) Ltd v CSDN Solutions CC* 1996 (4) SA 484 (W) at 487E.

replied to the applicant's attorneys via email. He replied from the same email address where the application was served. Mr Rasoesoe copied in various individuals employed by the first and second respondents whose email addresses were also used when service of the application was effected.

[16] Under the subrule the court has a wide discretion and the factors which may determine whether an order falls to be reconsidered include the reasons for the absence.

[17] An explanation for the respondents' absence on the 21st of August 2023 is glaringly absent from the papers. The ineluctable conclusion is that the respondents knew about the application and that an order would be sought on the 21st of August 2023, yet, elected not to oppose the application.

[18] In their papers for reconsideration, the respondents categorically stated that they were not the ones who terminated and/or disconnected the applicant's electricity supply. It was further stated that the respondents are not aware of an individual by name of Bongani ("**Bongani**") who attended at the applicant's property and purportedly removed the electricity meter on behalf of the respondents.

[19] The respondents informed the court that when they attended the applicant's property, to investigate the disconnection, they discovered that there was no electricity meter. The second respondent concluded that the applicant may have been the victim of theft resulting in the second

respondent advising the applicant to report the incident to the South African Police Services and to submit the case number to the respondents.

[20] The applicant was advised that pending the submission of the SAPS case number and affidavit, an interim reconnection would be authorised pending the replacement of the meter and the normalisation of the electricity supply. The temporary connection was carried out on the 25th of August 2023.

[21] On the 1st of September 2023 the applicant's attorneys advised the respondents that the applicant would not attend at the South African Police Services to report the theft because, according to the applicant and the document provided by one Bongani, the meter had been removed by the respondents. Accordingly, the applicant contended that it could not legitimately report a theft and that if the respondents believed that theft had been committed, it was their duty to do so.

[22] As a result of this refusal to comply with the respondents' directive to obtain a CAS number, the respondents disconnected the temporary connection, again without proper notice and without a court order.

[23] The respondents deny that they are in contempt in that it was impossible to reconnect the electricity legally and safely without a meter, and therefore they had no choice but to disconnect the electricity supply.

[24] Other factors that the court may consider in exercising its discretion in applications for reconsideration, include the nature of the order granted, the period during which it has remained operative, whether an imbalance,

oppression or injustice has resulted and if so, the nature and extent thereof and whether alternative remedies are available.⁶

[25] In considering the issue of oppression, injustice or imbalance, the court found in *ISDN Solutions (Pty) Ltd* that the respondents were ordered to refrain from doing that which the law in any event prevents them from doing. In my view the same principle applies in the matter before me. If the respondents believed that it was impossible to comply with the order, they ought to have approached the court earlier with an application for reconsideration. They were not entitled to take the law into their own hands and disconnect the electricity while they were interdicted from doing so.

[26] In this regards the timing of the respondents' reconsideration application is telling. It was only instituted after the applicant launched the contempt application. One would have expected the respondents to have acted more vigilantly once the order came to their attention and they realised that there was a serious problem in complying with the order due to the absence of a meter.

[27] At this juncture it is important to point out that the applicant, when confronted with the respondents' version that Bongani was not in the respondents' employ, contacted this individual telephonically who confirmed that he was in fact a subcontractor of City Power, that the meter that was removed was in his possession and that he had been contacted by numerous people in relation to the matter. He further

⁶ Erasmus: *Superior Court Practice*, RS20, 2022, D1-89.

confirmed that he had a valid City Power identification card and that the executive of the second respondent would be provided with all documentation and the meters in question on Monday, the 11th of September 2023.

[28] A party who seeks to invoke the provisions of the sub-rule, ought to, when filing an affidavit, detail the form of reconsideration required and the circumstances upon which it was based. The respondents merely sought a dismissal of the interdict application. They did not seek an amendment to the order as it was entitled to do in a procedure of this nature. Moreover, the respondents failed to advance one iota of evidence in support of a bald denial that they knew nothing about Bongani.

[29] Against this backdrop and given the very nature of the cause of complaint by the applicant and the very real prejudice it would be exposed to should it not receive the protection afforded by the order of the 21st of August 2023, I found that the balance of convenience favours the retention of the order and dismissed the reconsideration application.

THE CONTEMPT APPLICATION

[30] In its founding papers in support of the application for the reconnection of its electricity, the applicant stated that on the 17th of August 2023 the respondents' officials attended at the applicant's property and terminated electricity alleging an illegal connection. The applicant did not mention the removal of the meter.

[31] As alluded, the second respondent contacted the applicant's attorneys on

the 29th of August 2023 and requested the applicant to depose to an affidavit stating that the meter had been stolen by a third party. On the 1st of September 2023 the applicant declined deposing to such an affidavit for the reason that the documents in its possession showed that it was the second respondent who disconnected the electricity and removed the meter.

[32] Although the papers are not entirely clear on this issue, it must logically follow that the meter was removed by Bongani at time when he disconnected the electricity which was on the 17th of August 2023. Why this critical information was not disclosed to the court at the time the application was brought, is not explained in the contempt proceedings.

[33] It was however common cause between the parties during the hearing of the application before me, that the electricity cannot be safely and legally reconnected unless a meter is installed. This particular fact, had it been brought to the court's attention of the 21st of August 2023, the order may very well have read differently and would have provided for the installation of a meter. This would have prevented the ensuing litigation.

[34] Despite the absence of this critical fact, I do find that the respondents are in contempt of the court order granted on the 21st of August 2023. Not only did they know about the application, but they were made aware of the order and in fact acted upon it and complied with it only to disconnect the electricity when the dispute between the parties arose regarding the issue of the alleged theft or unlawful removal of the meter. Again the respondents verily believed that the court order was impossible to comply

with in circumstances where there was no meter and where, according to the respondents, it was the applicant's duty to report the unlawful removal of the meter, one would have expected the respondents to have approached the court earlier with a reconsideration application or at the very least with an application to vary the order granted on the 21st of August 2023. No such steps were taken.

[35] Accordingly, the applicant has satisfied the requirements for contempt.⁷

[36] It was argued before me that additional relief may in certain instances be requested during contempt proceedings and under particular circumstances. In this regard I was referred *Matjhabeng* where the Constitutional Court stated as follows:⁸ -

"[54] Not every court order warrants committal for contempt of court in civil proceedings. The relief in civil contempt proceedings can take a variety of forms other than criminal sanctions, such as declaratory orders, mandamuses, and structural interdicts. All of these remedies play an important part in the enforcement of court orders in civil contempt proceedings."

[37] In my view, no purpose would be served by protracting the dispute between the applicant and the respondents over whose responsibility it is to report the alleged unlawful removal of the meter. It was incumbent upon the respondents to advance some evidence that Bongani was not a subcontractor and a fraudster as alleged. Instead, the respondents simply denied that Bongani was in their employ. It was then that the applicant

⁷ *Fakie N.O. v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA); *Pheko and Others v Ekurhuleni City* 2015 (5) SA 600 (CC).

⁸ *Matjhabeng Local Municipality v Eskom Holdings Ltd and Other* 2018 (1) SA 1 (CC).

took it upon itself to make the necessary enquiries with Bongani. On the other hand, the applicant could simply have attended at the police station and deposed to affidavit stating that it was directed by the respondent to report the matter. In doing so it would not have compromised its position regarding how it perceives the version of events and the involvement of Bongani.

- [38] It is for these reasons that I ordered the applicant to report the matter to the police and to apply a punitive measure, other than a fine, by ordering the respondents to provide and install the new meter.

COSTS

- [39] The applicant's non-disclosure of the removal of the meter weighed heavily with me when I considered the issue of costs. The fact that the applicant included an additional prayer in the contempt proceedings for an order compelling the respondents to install a new meter, demonstrates an acknowledgement on the part of the applicant that the installation of a meter is an essential requirement to the lawful reconnection of the electricity. Having said that it does not derogate from the fact that the respondents ought to have complied with the order until varied or set aside.

- [40] It is trite that the awarding of costs falls squarely within the discretion of the court. In this particular matter, I was not persuaded that costs should follow the result as is usually the case. My deviation from the norm is motivated by the issue surrounding the removal of the meter. Had the

applicant informed the court on the 21st of August 2023 that the meter had been removed, the court would in all likelihood have granted an order providing for the installation of a meter which would have avoided further litigation. Hence, the applicant is not entitled to a costs order in its favour.

[41] The respondents, if they had appeared at court on the 21st of August 2023 and had conducted timeous investigations into the applicant's accounts and the status of the meter at the property, would have provided the court with this information on the day. Instead, the respondents waited until the contempt proceedings were brought before bringing a reconsideration application and dealing with its dilemma regarding the absent meter.

[42] Both parties could have dealt with this issue very differently and it is for this reason that I have not granted any costs order.

F BEZUIDENHOUT

**ACTING JUDGE OF
THE HIGH COURT**

DATE OF HEARING: Friday, 8 September 2023

DATE OF JUDGMENT: Monday, 11 September 2023

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