

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT – PRETORIA)

Case no. 24144/10

DATE: 23/09/2010

In the matter between:

KUNGWINI MANOR HOME OWNERS

ASSOCIATION (PTY) LTD

Applicant

and

KUNGWINI ESTATE (PTY) LTD

Respondent

JUDGMENT

Judgment reserved on; 16/09/2010

LEGODI J,

INTRODUCTION

[1] Before me, is an application for a striking out launched by the respondent and a preliminary issue raised by the applicant seeking to commit the respondent to his earlier undertaking not to cut the supply of water and electricity to the applicant and its members.

[2] The two issues above were raised in an application which was launched by the applicant in terms of which the applicant seeks an interdict to restrain the respondent from disconnecting or disrupting in anyway, the water and electricity supply to Kungwini Manor Estate of the applicant pending certain steps to be taken against the respondent. Full extent of the relief sought by the applicant is dealt with hereunder.

BACKGROUND

[3] The applicant had initially instituted more or less the same application seeking to interdict the respondent from disconnecting or disrupting in any way, the water and electricity supply to Kungwini Manor Estate. The said application which was launched on an urgent basis, was set down for hearing on 11 March 2010.

[4] On the 11 May 2010 an order was made as follows:

- “1. The application is postponed sine die;*
- 2. The respondent shall file its Opposing Affidavit (with or without a counter application) on or before 1 June 2010;*
- 3. The applicant shall file its Replying Affidavit within the time period prescribed by Rule 6(5) of the Uniform Rules;*
- 4. The cost occasioned by the postponement is reserved”.*

[5] The application that was set down on the urgent motion roll for the 11 May 2010, was prompted by a threat to terminate the supply of electricity and water to the estate by 15 May 2010.

[6] According to the applicant, it did not proceed to enrol the application in terms of Rule 6(5)(b) when the respondent failed to file an opposing or answering affidavit in time after the order of the 11 May 2010. The applicant is said to have had an undertaking from the respondent not to take any action pending the outcome of the application. According to the applicant, there was no longer a need to finalise the application on an urgent basis.

- [7] The relevant portion of the undertaking contained in the letter of the 7 May 2010 from the respondent's attorneys reads as follows:

"...Be that as it may, my client, whether or not any termination would be lawful or unlawful, has no intention of terminating the water and electricity supply to Kungwini Manor Estate, and without waiving any of its rights or making any admission of any nature whatsoever, undertakes) not to do so pending the finalisation of the pending proceedings".

- [8] On the 7 July 2010, the respondent without having delivered its answering affidavit in accordance with the order of the 11 May 2010, addressed a letter to the applicant, in which the applicant was informed that the respondent's obligation to supply water has ceased in terms of clause 9. In this letter, the applicant was given 90 days to make alternative arrangements as thereafter water would be terminated without further notice.
- [9] When everything failed to persuade the respondent to withdraw the threat made in the letter of the 7 July 2010, on the 23 July 2010, the respondent served the answering affidavit and had it filed on the 27 July 2010.
- [10] On the 28 July 2010, the applicant served its first notice of amendment of the notice of motion, together with a supplementary affidavit deposed to

on the 27 July 2010. A further amended notice of motion dated the 2 September 2010 was delivered. On the 2 September 2010, a replying affidavit was served on the respondent. The respondent then delivered an application to strike out some paragraphs in the applicant's replying affidavit. The striking out was sought on the basis that, the averments therein should have formed part of the applicant's founding affidavit and annexures. Alternatively, that the averments constitute inadmissible new matters to the prejudice of the respondent.

[11] The applicant then enrolled the matter on an urgent motion roll for the 14 September 2010.

[12] When the matter was initially argued before me, I thought one could deal with the preliminary issue raised on behalf of the applicant, striking out application, together with the matter on merits during the same urgent motion roll. However, during the course of the submissions on the 11 September 2010, counsel for the respondent made it clear that in the event the respondent does not succeed with the striking out application, the respondent will not be ready to proceed with the matter on merits. This was despite the suggestion by the court that a provisional fourth affidavit could be filed. Clear from this, that the respondent would wish to seek leave to file further affidavit in the event of an unsuccessful striking out application. It was at this stage that I told the parties that the matter

would therefore, be argued on the striking out application only. By this time, the applicant's counsel had already argued his preliminary issue.

[13] The matter then proceeded further on the striking out application on 15 September 2010. The submissions continued again on the 16 September 2010. Just before the end of the submissions on the striking out, I indicated that the court was inclined to dismiss the preliminary issue. Counsel for the respondent was encouraged not to waste any more time on the preliminary issue.

[14] At the end of the submission on the striking out, I dismissed the application for striking out. I then indicated that reasons would be delivered on Monday the 20 September 2010. At the time I thought that such reasons would be ready and could be read into record.

[15] It was further ordered that the costs of the striking out are reserved until the 20 September 2010. The respondent was also interdicted from disconnecting or disrupting in any way, the water and electricity supply to Kungwini Manor Estate pending the finalisation of the main action and or pending further order to be given by this court on the 20 September 2010.

[16] I may mention that immediately after the order was made, counsel for the respondent stood up and indicated that there was no "main application"

[17] I now turn to deal with the reasons for the judgment and further order which this court intends to make. I wish to start first with the issues raised and if need be, the applicable principles thereto.

ISSUES RAISED

[18] I find the following to be two important issues in this matter:

18.1 Whether the respondent had made a case for striking out some portions in the applicant's replying affidavit? And if so,

18.2 Whether the respondent should be allowed to file a fourth affidavit?

[19] The following two other issues are in my view, peripherals. Peripherals in the sense that they are dependent on the two issues raised in paragraphs 18.1 and 18.2 above;

19.1 Whether in the absence of an undertaking not to disconnect the supply of water and electricity and the court refusing the striking out, but allowing the respondent to file further affidavit, the respondent is at liberty to continue with its threat?

19.2 Who must be ordered to pay the wasted costs occasioned by the striking out application and the postponement of the main application?

APPLICABLE PRINCIPLES AND CASE LAWS TO THE ISSUES

[20] The court may on application, order a matter which is objectionable to be struck from affidavits, provided that the court is satisfied that the party seeking to have the matter struck out would be prejudiced if it were not struck out. **(See National Director of Public Prosecutions 2009 (2) SA 277 (SCA) at 208 B)**

[21] The procedure of striking out is not intended to be utilised, to make technical objections which are of no value to anyone and merely increase costs, and when so utilised, will be refused and costs will be awarded against the applicant. **(See Msunduzi Municipality v Natal Joint Municipality Pension/Provident Fund 2007 (1) SA 142 (N) at 150A-C).**

[22] All material points which an applicant wishes to allege, must be in the founding affidavit filed in support of his application. He cannot supplement his case by adducing facts in his replying affidavit which should have been

in the original affidavit. If he does so, such facts will as a general rule struck out.

[23] However, the applicant may bring in fresh matters in a replying affidavit, if this is by way of replying to a defence raised by the respondent, and is not a matter which should have been in the original affidavit to show the applicant's cause of action. (**See Jones and Buckle, The Civil Practice of the Magistrate's Courts in South Africa 9th Edition, Volume II, Erasmus van Loggerenbert, at 55-11).**

[24] There are normally three sets of affidavits in motion proceedings. (**See Standard Bank of SA Ltd V Sewpersach 005 (4) SA 148 (C) at 153G-H).** A fourth affidavit will be received only in exceptional cases. (**See Kasiyamburu v Minister of Home Affairs 1999 (1) SA 643 (W) at 649 H-650C):**

[25] The following principles could serve as guidelines to the manner in which the court should exercise its discretion on whether or not to allow a fourth affidavit.

25.1 The court will exercise its discretion against the backdrop of the fundamental consideration that a matter should be adjudicated upon all the facts relevant to the issues in dispute. (**See Dickson v South African General Electric**

Co. (PTY) Ltd 1973 (2) SA 620 (A) at 365H, South Peninsula Municipality v Evans 2001 (1) SA 271 (C) at 283 A-H).

25.2 While the general rules regarding the number of self and proper sequence of affidavits should ordinary be observed, some flexibility must necessarily also be permitted. **(See James Brown and Harmer (PTY) Ltd V Simmons No 1963 (4) SA 656 at 283A-H).**

25.3 It is essentially a question of fairness to both sides as to whether or not further sets of affidavits should be allowed. There should in each case be *mala fides* or culpable remissness as to the cause of the facts of information not having been put before the court at an earlier stage. The court must be satisfied that no prejudice is caused by filing of the additional affidavits which cannot be remedied by an appropriate order as to costs. If the court is satisfied on these points, it will generally incline towards allowing the affidavits to be filed. **(See Miline NO v Fabric House (PTY) Ltd 1957 93) SA 63 (N) at 65A, Watloo Meat and Chickens SA (PTY) Ltd (4) SA 461 at 472 H-J).**

25.4 In case of a complex case, and if it could not have been expected of a party to have had all of the facts at his disposal when the proceedings were launched, the objection to bar such a party from bringing in a new cause of action could be dismissed. For example, in the matter of the **Registrar of Insurance v Johannesburg Insurance Co. Ltd 1962 (4) 566 (WLD)**, a point was raised that, the applicant must have made out a complete case in its founding papers and not in his reply. In that case, counsel for the applicant wanted to refer to a report drawn by a firm of accountants concerning the affairs of the respondent company. Counsel for the respondent objected thereto on the basis of its inadmissibility, suggesting that it will introduce a new cause of action. That is, the original cause of action was for judicial management, but as a result, the applicant subsequently altered its papers to an application for liquidation. This was allowed.

25.5 In the matter of **Chakot Investments V Town Council, Borough of Stanger 1976 (2) SA d & CLD at 704 E-G**, a point having been made on behalf of the respondent, that the applicant must stand or fall by his application in the founding affidavit, and the fact alleged therein, the court

eventually stated that, in proceedings by way of application, the party seeking relief ought in his founding affidavit, should disclose such facts as would, if true, justify the relief sought and when would at the same time, sufficiently inform the other party of the case he was required to meet. If the founding affidavit is allowed to be supplemented by adding further facts in a replying affidavit, the consequence would often, but not necessarily always, be that a fourth and possibly also a fifth set of affidavit would be required. A situation the development of which the court would not lightly be disposed to facilitate or encourage.

25.6 It is one thing to say that, an applicant might or ought, by careful consideration of a piece of information conveyed by the respondent before commencement of proceedings, to have made certain deductions there, from which would or might have led him to investigate and discover further facts relative to his claims. However, an entirely different thing to say that the applicant knew all the relevant facts when he commenced the proceedings, but on some unexplained reasons, omitted to state or rely upon them in his founding affidavit. It is when that may properly be said of an affidavit, that the rule against the introduction of the new facts or

grounds in replying affidavit will otherwise than in very exceptional cases be stringently applied against him. (**See Shakot Investments supra at 706 to 707A**).

25.7 Since rules of procedure are made to facilitate litigation, they are always subject to the overriding discretion by the court, it may in an appropriate case allow an applicant to introduce a new matter in his replying affidavit. (**See Shepherd v Mitchell Lotts Seafreights (SA) PTY Ltd 1984 (3) 202 at 205G**)

25.8 Clause 7 of the Electricity Notarial Servitude number K0606323 provides that all accounts for the supply for services referred to in 5 above, shall be settled monthly by the Second Party in arrear and within seven days of the statement being rendered. All payments shall be made to the address to be determined by the First Party from time to time.

25.9 Clause 8 thereof, provides that, in the event of the second party in breach of the provisions of clause 7, the First Party shall be entitled summarily to discontinue all or any of the services referred to in 5 above, until such time as the

Second Party has effected payment. The First Party shall not be required to put the Second Party on terms or to render or to deliver any notice to the Second party.

- 25.10 Clause 9 thereof, provides that both parties shall be entitled to cancel the rendering of services by the First Party as envisaged in clause 5 by giving the other party six months written notice of its intention to cancel the service of supplying electricity. Clause 8 of the Water Notarial deed of Servitude number K0606322, contains the same provision as in clause 9 under electricity notarial servitude, except that reference to clause 5 under clause 9 of electricity notarial servitude, is reference to clause 2 under water notarial servitude.

DISCUSSIONS, SUBMISSION AND FINDINGS

- [26] I find it necessary to deal with the issues chronologically as identified in paragraphs 18.1 to 18.2 and 19.1 to 19.2.

WHETHER THE RESPONDENT HAD MADE OUT A CASE FOR STRIKING OUT?

[27] For the sake of clarity and completeness, it necessary to set out or quote the paragraphs in the replying affidavit which the respondent seeks to have them expunged from the replying affidavit.

“4.2 The respondent obtained the approval of the Kungwini Municipality (at that stage known as the Bronkhospruit Transitional Council) for the development of the estates during July 1999. Until very recently the Applicant has been unable to obtain a copy of the Conditions of Township Establishment imposed on the Respondent. This is one of the documents that the Respondent has kept from the Applicant. Searches at the municipality showed that their file is completely empty. Applicant has eventually, very recently, found a copy of the Conditions in the office of the Registrar of Deeds. A copy thereof is annexed hereto as annexure “D27”

4.3 The relevance of the conditions imposed on the Respondent is that the Respondent was not obliged to supply the Applicant with water and electricity for a limited period but it was in fact a condition of the township establishment that the Respondent had to supply the essential services on a continued basis. Paragraph 2.4 of the conditions expressly states as follows:

Die dorpseieraar moet alle interne dienste in die dorp installer en voorsien, onderworpe aan die goedkeuring van die plaaslike bestuur”.

4.4 *It makes sense that Kungwini Municipality required the Respondent to provide the essential service as the developments are situated far from any town and as explained in the Founding Affidavit, there is no water reticulation and power supply, other than those arranged by the Respondent, available to any of the estates,*

4.5 *The Respondent relies on the terms of the notarial servitudes as the basis upon which it claims to be entitled to cancel the services that it renders to the Applicant. The Respondent also, with respect, attempts to create the impression that the notarial servitudes was registered after the Applicant and the Respondent concluded arm's length agreements. This is not so. At the stage when the Applicant and the Respondent concluded the agreements for the registration of the notarial servitudes, both these parties were represented by Mr Walters. The agreement was therefore nothing other than Mr Walters contracting with Mr. Walters. The notarial servitudes to the extend that they create a right in favour of the Respondent to cancel the supply of services, is a one sided agreement concluded for the sole benefit of the Respondent.*

6.1 *The Applicant's Notice of Motion, and the relief claimed therein, was prepared at a stage when the Respondent failed to disclose certain very material documents and information to the Applicant. In the interim, the Applicant has itself uncovered some of these documents (i.e. the Conditions of Township Establishments) and the Respondent has discovered its alleged*

written Management Agreement. The respondent has however still failed to disclose the financial records relevant to the Applicant. The applicant still intends proceeding with an application in terms of Act 2 of 2000 for the discovery of these documents.

6.2 A further important issue has however now come to the foreground. It is clear that the notarial servitudes concluded between the parties (at a stage where Mr Walters represented both the Applicant and the Respondent) were not bona fide and arm's length transaction and that the notarial servitudes are in conflict with the Conditions of Township Establishment imposed on the Respondent. Applicant intends applying to set aside certain of the terms contained in the registered notarial servitudes to the extent they are in conflict with the Conditions of Township Establishment. More specifically applicant intends applying to set aside the part of the notarial servitudes authorising the Respondent to discontinue the supply of any essential services with 6 (six) months notice. Applicant has no difficulty with the suspension of services if it fails to pay for the services rendered to it.

6.3 The clause permitting the Respondent to simply suspend the services on 6(six) months notice without any reason is draconic and has the potential to cause immense harm to the Applicant. It is also in conflict with the Conditions of Township Establishment.

7.2 Applicant's answer to the servitudes is simply to reiterate that they were not concluded as arm's length transactions and that they are for the sole benefit of the Respondent. The Respondent concluded these agreements at a stage when its members, Mr Walters, had a duty to consider the best interest of the Applicant but failed to do so. The notarial servitudes are also in conflict with the Conditions of Township Establishment imposed on the Respondent

8. I take note of the fact that Eskom started to work on a main supply line to the Applicant. It is important to mention that it is, in terms of the Conditions of Township Establishment, the duty of the Respondent to supply these essential services to the Applicant. The wording of the notarial servitudes (as prepared for the sole benefit of the Respondent) attempts to shift this responsibility to the Applicant,

12.2 The fact of the matter is that the Respondent has clearly concluded an agreement for its sole benefit and is now attempting to rely on that benefit to the detriment of the Applicant. It is the Respondent who is misguided in thinking that the notarial servitudes are equitable documents that can be enforced.

14. I admit that the Respondent informed Applicant's members that the electricity transformers that supply electricity to Kungwini Manor Estate had been damaged and that a temporary connection to the

Kungwini Ranch Estate had been made. I fail to understand how this is the Applicant's problem. It is the duty of the Respondent to provide the essential services to the estate. If the transformer installed by the Respondent was faulty or damaged it is the duty of the Respondent to repair or replace it.

16.1 I admit that Eskom had a supply line available to the Applicant. Eskom prepared a quote to connect the power to the estate. The quote amounted to R98 321.42 (ninety eight thousand, three hundred and twenty one rand, fourty two cents). A true copy of the quote is annexed hereto as annexure "D 28". Although Applicant was able to pay for the connection, it was and remains of the view that the expenses is the responsibility of the Respondent. Respondent has failed to make use of the opportunity to connect the estate to the Eskom power supply.

22.2 On the one hand the Respondent states that it has no further documents. On the other hand the respondent states that it is entitled to exercise a debtor's lien over documents that is still retains. I humbly submit that only one of these versions can be accurate. The applicant is of the humble opinion that the Respondent still has substantial documents relevant to the period when it managed Kungwini Manor Estate. These documents have to be discovered. "

- 27.1 In paragraph 6.1 the portion which is sought to be struck out is the one starting with "*I fail to understand*".
- 27.2 In paragraph 14 as quoted above, the striking out is in respect of the sentence starting with "*I fail to understand*". Paragraph 8 is for the whole paragraph except for the first sentence thereof. Paragraph 6.2 is for the whole paragraph, except for the last sentence thereof. The respondent also seeks to expunge annexure D27 to the replying affidavit. Annexure D 27 is a copy of the conditions of Township Establishment imposed on the respondent as referred to in paragraph 4.2 of the replying affidavit and quoted in paragraph 27 above.
- 27.3 For the paragraphs sought to be expunged to be seen in proper perspective, I find it of a great importance to set out both the terms of the original notice of motion and the amended notice of motion that accompanied the replying affidavit.
- 27.4 The terms of the original notice of motion are as follows:
- “2. *That the Respondent be interdicted from disconnecting or disrupting, in any way, the water and electricity supply to Kungwini Manor Estate;*

3. *That prayer 2 shall operate as interim relief pending the outcome of application to be instituted by the Respondent in terms of the Promotion of Access to Information Act, 2 of 2000 and thereafter an action or application for the debating of accounts or the declaration of rights;*
4. *In the alternative to prayers 2 and 3 above, that the Respondent be interdicted from disconnecting or disrupting, in any way, the water and electricity supply to Kungwini Manor Estate pending;*
 - 4.1 *an application by the Applicant for the supply of electricity by Eskom or Kungwini Municipality;*
 - 4.2 *an investigation about the availability of alternative water supply sources in the vicinity of Kungwini Manor Estate by any Municipality;*
5. *That the interdict in 4, shall operate pending the outcome of any applications for the supply of water and electricity as envisaged in 4 above;”*

27.5 The aforesaid terms of notice of motion are sought to be amended as follows in the amended notice of motion:

“2. That the Respondent be interdicted from disconnecting or disrupting in any way, the water and electricity supply to Kungwini Manor Estate;

3. That prayer 2, shall operate as interim pending the outcome of:

3.1 application to be instituted by the Applicant within 30 (thirty) days from date of this order, in terms of the Promotion of Access to Information Act, 2 of 2000 for the discovery of any and all documents related to the Respondent’s management of Kungwini Manor Estate prior to 1 October 2008;

3.2 an action or application to be instituted by the Applicant within 30 (thirty) days from date of this order for the setting aside / cancellation of clause 8 that appears in Notarial Servitude number K06 063322 and clause 9 that appear in Notarial Servitude number K06 06324 alternatively an order declaring that the above clauses in eth above notarial deeds of servitude are unenforceable.

4. *Should Applicant fail to institute any of actions / applications referred in paragraphs 3.1 and or 3.2 within 30(thirty) days from date of this order the interim order shall immediately and automatically lapse;*

5. *That the Respondent be ordered to pay the cost of this application;*

6. *Further and /or alternative relief.”*

27.6 The grounds of attack against the replying affidavit are twofold.

Firstly, that the paragraphs sought to be struck out, should have formed part of the applicant's founding affidavit and secondly, that they are inadmissible inasmuch as they seek to introduce new cause of action in the replying affidavit.

27.7 These two grounds were amplified during the discussion to mean that the applicant had abandoned his initial cause of action in the founding affidavit and substituted it with a new cause of action in the replying affidavit. This is not permitted, so it was contended on behalf of the respondent.

27.8 In making the submission, counsel for the respondent heavily relied on the full bench decision in the case of **Johannesburg City Council v Bruma Thirty Two (PTY) Ltd 1984 (4) SA 87 TPD.** I

find it necessary to deal with this case in some detail inasmuch as the respondent in these proceedings sought to rely on it.

27.9 On or about 28 February 1982, Johannesburg City Council refused to approve building plans submitted to it by Bruma Thirty-Two (PTY) Ltd (the applicant in the court a quo). City council was the respondent. Despite refusal to approve the plans, the applicant proceeded to build town houses and completed them. On the 9 November 1982 be reviewed and set aside, the council took a decision to have the buildings, aforesaid demolished. The applicant instituted motion proceedings seeking to have the decision that was taken on the 28 February 1982. It also sought to interdict the Council from demolishing the buildings pending finalisation of the review proceedings to set aside the refusal to approve the building plans.

27.10 During the hearing of the proceedings, the applicant sought to challenge the decision to demolish the buildings. In doing so, it abandoned its initial claim to challenge the refusal to approve the plans. It alleged that the Council in taking the decision to demolish the buildings did not give it a hearing. The latter cause of action was challenged as being impermissible inasmuch as it introduced not only fresh facts, but also knew cause of action.

27.11 The court a quo dismissed the challenge by the Council. On appeal, the court a quo was found to have misdirected itself in two respects;

27.11.1 that it failed to appreciate that this was not a case of new matter, appearing in the replying affidavit. It amounted to an abandonment of the existing claim together with its cause of action and the substitution of a fresh and completely different claim based on different cause of action (my own emphasis).

27.11.2 That the court a quo failed to appreciate that over this new cause of action, is the basis of a new claim, the original motion without suitable amendment was inadequate to sustain a claim for a temporary interdict, as the original temporary interdict was claimed on the basis of a completely different alleged right. The prayer for alternative relief then became a rather cloak which could not provide any refuge for the applicant.

27.12 For the reasons that follow, seeking to rely on the decision in the Johannesburg City Council, fails to distinguish facts of that case

with the facts of the case before me. Secondly, the claim is not only misplaced but is also without any basis:

27.12.1 It cannot be correct that the applicant's new cause of action is "*a complete different right*". To put it differently, it cannot be correct that the new matter introduced by the applicant in its replying affidavit amounted to an "abandonment of the existing claim together with its cause of action and completely different claim based on a different cause of action to which the applicant is not entitled to rely on.

27.12.1.1 In the initial notice of motion quoted in paragraph 27.4 above, the applicant proposes to assert its right in terms of the Promotion of Access to Information Act 2 of 2000. Similarly, in terms of the amended notice of motion quoted in paragraph 27.5 of this judgment, the applicant seeks to assert the same right. Access to information is sought to enable the applicant to decide whether to institute an action or application against a defendant or respondent and if so, in what form. In the initial application, access to information, was

to sought in order to decide whether to debate the respondent's accounts or whether to ask for declaration of rights. In the amended notice of motion, possible challenge to the accounts is not mentioned, but what is intended to be done with the information required is couched in a wide term.

27.12.1.2 In the amended notice of motion, there is no longer a desire on the part of the applicant to ask for information in order to decide whether to launch an application or action for the debating of accounts. This should be seen in the light of the respondent's own abandonment. Before the 21 September 2009, and after that period till up to the 10 April 2010, the respondent had been demanding from the applicant, certain amounts of money alleged to be due to it. On the other hand, the applicant had been demanding proof of documents, invoices or statements to support such demand. But, the respondent failed to furnish same. However, in its answering affidavit, the respondent abandoned a claim against the applicant based on the latter's indebtedness to the

respondent. Instead, the respondent in its answering affidavit wishes to rely on certain conditions of the water and electricity registered deed of servitude and in particular, clause 8 of the Water Servitude and clause 9 of the Electricity Servitude. The relevant provisions are referred to in paragraph 25.10 of this judgment. It is clear that the abandonment of reliance on the indebtedness to it, rendered the claim to seek the accounts academic.

27.13 The desire to have certain declaratory orders be made as set out in paragraph 3 of the original notice of motion, is not completely abandoned in the amended notice of motion, to which the respondent raised no objection. I am referring to the amendment itself. In paragraph 3.2 of the amended notice of motion, the applicant proposes to ask the court to make certain declaratory orders. That is, an order that, Clause 9 of the electricity servitude and Clause 8 of the Water Servitude as registered with the Deeds Office be declared unenforceable. This in my view, should be seen in context of the original notice of motion which can be read in part as follows:

“That prayer 2, shall operate as interim relief pending the outcome of the application to be instituted by the applicant in terms of the Promotion of Access to Information Act 2 of 2000 and thereafter ... or application for the declaration of rights”

27.14 The essence of striking out application is to do away with the entire paragraph 3.2 of the amended notice of motion. The paragraph is been attacked on two grounds. Firstly, that it serves to introduce new grounds of cause of action. Secondly, it is suggested that it should have been stated in the founding affidavit. I have already indicated that I am not satisfied that paragraph 3.2 did introduce “a *complete new cause of action*”.

27.15 The alleged introduction of new cause of action must also be seen in context. Put it differently this way, the respondent is the one who had introduced or prompted it. It abandoned reliance on the indebtedness to it as a defence. It seeks to stand or fall by Clause 9 of the Electricity Servitude and Clause 8 of the Water Servitude. That is, it is entitled to terminate the supply of water and electricity on a six months notice.

27.15.1 One may ask. Is an applicant barred from dealing in its replying affidavit with a defence that is raised in an answering affidavit? In paragraph 23 of this judgment, I referred to a principle that the applicant may bring in a fresh matter in a replying affidavit if this is by way of reply to a defence raised by the respondent. I see no reason as to why this principle, should not be applicable in the present case. In my view, this should be the case irrespective whether or not such new facts should have been anticipated when the founding papers were drawn.

[28] I turn to deal with the issue whether or not paragraph 3.2 of the amended notice of motion and the averments to support same, should have been stated or made in the original notice of motion and founding affidavit. The test in my view, should be subjective and not objective as it was at one stage intimated by counsel on behalf of the respondent during the discussion. It did not know about the information as stated in paragraph 4.2 of the replying affidavit quoted earlier in paragraph 27 of this judgment.

[29] Attempt to suggest that the applicant should only blame itself in not discovering this information timeously, should be seen in context. Whilst the respondent on this contention, wishes to rely on the notice of

termination of services dated the 21 September 2009, it should also blame itself. In the notice, it states as follows:

“In terms of the above notarial Deeds of Servitude, you are hereby notified in terms of Clause 8 that Kungwini Estate (PTY) Ltd, will cancel the rendering of services as envisaged by Clause 2 of the servitude deeds, 6 months from the date of this notice being 10 April 2010”.

- [30] Then, there was a suggestion that paragraph 9 of the electricity notarial servitude should have been read in the notice. Of course, this only serves to indicate the possible confusion. The notice quoted above, makes no reference to the termination by notice of electricity services. Neither is reference made to a clause in the electricity notarial servitude entitling the respondent to terminate electricity servitude on six months notice. The suggestion that reference to electricity servitude should have been inferred from mentioning of the electricity notarial servitude number in my view, should also be seen in context. Throughout, the respondent had been persistent that the applicant owed it money. It intimated its entitlement to terminate the supply of water and electricity based on breach to pay the respondent. Even in the notice of the 10 April 2010, emphasis appears to have been on the applicant’s indebtedness to the respondent. It was the contention on behalf of the applicant that, it could

have been blindfolded by all of these. I am inclined to go along with this submission.

[31] I do not think that failure to have raised the unenforceability of the provisions of clause 9 of the electricity notarial servitude and clause 8 of the water notarial servitude in the original notice of motion and in the founding affidavit can stand in the way of the applicant to raise it in replying affidavit, particularly having regard to the cumulative effect of the facts of the present case as already outlined in this judgment.

[32] Of course, there is another aspect which in my view, should have brought an early end to the striking out application. Inasmuch as the respondent sought to rely on the Johannesburg City Council's case, notice of amendment having been delivered should have served as a deterrent to the respondent to persist with the striking out application. It did not. I deal with the effect of this when dealing with the issue of costs. It suffices to say, the amendment should be accepted.

[33] There was a stage when counsel for the respondent sought to argue that, in a situation where a cause of action is introduced for the first time in a replying affidavit, the court does not have a discretion and no consideration of prejudice. Obviously, this was an over statement and it

was abandoned the following day when the matter proceeded to be argued.

- [34] I then understood counsel for the respondent to be saying exceptional circumstances ought to be established and that the applicant had failed to establish such circumstances. I do not agree. This should then bring me to deal with the next issue raised in paragraph 18.2 of this judgment.

WHETHER THE RESPONDENT SHOULD BE ALLOWED TO FILE FOURTH AFFIDAVIT?

- [35] The issue of leave to file a fourth affidavit was first intimated by the court when counsel for the respondent was asked if he would be in a position to argue the matter on merits if the application for striking out is refused. What the court had in mind was to allow the respondent to provisionally file a fourth affidavit, so that the matter could be proceeded with on merits in case the striking out is refused.

- [36] It was at this stage when counsel for the respondent indicated that he would need weeks to deal with the fourth affidavit. This prompted the court to direct that the matter be argued only on the striking out. Submissions were presented on the 15 and 16 September 2010.

[37] At the risk of repeating myself, the court will exercise the discretion whether or not to allow a fourth affidavit against the backdrop of the fundamental consideration that a matter should be adjudicated upon all the facts relevant to the issues in dispute. Secondly, and again, it is essentially a question of fairness to both sides as to whether or not further sets of affidavits should be allowed provided an explanation which negates *mala fides* or culpable remissness as to the cause of the facts or information not having been put before the court at an earlier stage. The court must also be satisfied that no prejudice is caused by filing of the additional affidavits.

[38] It did not look like the respondent was desirous of following the route of the fourth affidavit. If it did, it would have initiated such as an alternative without the court having had to prompt it. Remember, the procedure of striking out is not intended to be utilised to make technical objections which are of no value to anyone and merely, increase costs and when so utilised it would be refused. Whether or not the respondent utilised such technical objections is not for me to decide, inasmuch as I am not dealing with the merits of the application. The ultimate fourth affidavit which I intend to allow, would be a determining factor on the issue.

[39] Prejudice in allowing the striking out or refusing it and allowing the fourth affidavit is a dominant consideration. For example, the respondent's counsel conceded that the effect of allowing the striking out would mean to send the

applicant to the drawing board. That is, to withdraw the application and then institute the proceedings afresh in order to place in the founding affidavit facts supporting paragraph 3.2 of the amended notice of motion. In the meantime, the respondent continues with its threat to disconnect the supply of electricity and water to the inhabitants of Kungwini Manor Estate. If this was to happen, undoubtedly, irreparable harm would be caused.

[40] The prejudice to the applicant and its members should be seen against balance of the prejudice that could be caused to the respondent. Firstly, the prejudice to the applicant and its members is not a speculation. It is a reality. Without water and electricity could be catastrophic. On the other hand, prejudice to the respondent is much more of commercial in nature. That is, the respondent may continue not to be paid by the applicant. The applicant never refused to pay the respondent. The respondent is said not to have cooperated in furnishing the requested information. The respondent is worried that it might suffer damages. For example, damage could be caused to other people's property. The applicant may not be in a position to meet all of its financial obligations. The respondent is been placed or would be placed under financial burden by the applicant. All of these are either not proved or are speculative.

[41] In my view, allowing the respondent to file fourth affidavit would be less evil. It is not like the respondent is been caught by surprise by the introduction of paragraph 3.2 of the amended notice of motion and by the discovery as set out in

paragraph 4.2 of the relying affidavit. Annexure D 27 to the replying affidavit is a product of the respondent and the Municipality, when the Township for Kugwini

Manor Estate was established. Therefore, the respondent should be in a position to raise whatever defence if any, it wishes to raise regarding annexure D27 in the fourth affidavit. I therefore find that it would only be fair and would also serve to expedite finalisation of the dispute between the parties to allow the fourth affidavit as against the striking out. I now turn to deal with the issue raised in paragraph 19.1 of this judgment.

WHETHER IN THE ABSENCE OF AN UNDERTAKING NOT TO DISCONNECT THE SUPPLY OF WATER AND ELECTRICITY AND THE COURT REFUSING THE STRIKING OUT, BUT ALLOWING THE RESPONDENT TO FILE FURTHER AFFIDAVIT, THE RESPONDENT IS AT LIBERTY TO CONTINUE WITH ITS THREAT?

[42] This brings me to another issue which was raised by the applicant, as a preliminary issue. That is, the applicant is bound by the undertaking not to disconnect the supply of water and electricity pending finalisation of the present application on merits. This undertaking was made in the letter of the 7 May 2010 and it is quoted in paragraph 7 of this judgment.

[43] As I understood counsel for the applicant, the contention was to the effect that the respondent waived his right, if any, to disconnect the supply of electricity

and water before finalisation of the present application on merits. For the following reasons, I had difficulties with this contention.

43.1 Waiver relied upon, is not unqualified. The question is, whether such “waiver” as stated in the letter of the 7 May 2010 could disentitle the respondent to assert his right, if any to disconnect the supply of water and electricity. Whilst I indicated my difficulty when counsel for the applicant argued the point, it was before counsel for the respondent indicated that a postponement of the application would be required in the event the striking out application is refused. Secondly, I did not ask the respondent counsel to address me on the issue. It would only be fair to defer the issue for practical purposes. On the second thought, the issue might have other ramifications on the notice of termination the respondent seeks to rely upon. For example, did the notice of the 21 September 2009 remain valid despite the undertaking and the six months period in terms of the notice having expired? I therefore, refrain from making a determination on the preliminary issue raised by the applicant.

[44] Coming back to the issue under discussion, despite the indication to ask for more time to file further affidavit, in the event of striking out application being refused, the respondent did not seem prepared to resuscitate the undertaking. I have already indicated that the disconnection of supply of water and electricity would result in irreparable harm. I should not be understood as making a final pronouncement on the merits of the application. It is for this reason that I made

an order interdicting the respondent. I come again to this order later in this judgment. This should then bring me to deal with the last issue raised in paragraph 19.2 of the judgment.

WHO MUST BE ORDERED TO PAY THE WASTED COSTS OCCASIONED BY THE STRIKING OUT APPLICATION AND POSTPONEMENT OF THE MATTER?

[45] On the 14 September 2010 when the matter was called, it was stood down until the 15 September 2010 for 14h00. On the 15 September 2010, the striking out application was argued. Further submissions on the striking out were continued on the 16 September 2010. Having granted the order, the matter was stood down until Monday 20 September 2010 to give reasons. Costs were reserved.

[46] The applicant should be seen as a successful party in the application for striking out. It should therefore be entitled to costs. Secondly, as already stated in this judgment, I do not think persistent with the application for striking out was justified. There were just no merits. Lastly, the court having intimated its willingness to afford the respondent the opportunity to file fourth affidavit, persistence with the striking out was unreasonable. All of these should entitle the applicant to be granted costs.

ORDER OF THE 16 SEPTEMBER 2010

[47] The order that I made on the 16 September 2010 reads as follows:

- “1. *An application for striking out as in terms of the notice of striking out is dismissed, reasons in this regard will be delivered on Monday 20 September 2010,*
2. *The decision on costs is stood down until 20 September 2010,*
3. *The respondent is hereby interdicted from disconnecting or disrupting in any way, the water or electricity supply to Kungwini Manor Estate, pending finalisation of the dispute between the parties in the main application and pending any decision or further decision that may be made by this court on 20 September 2010 regarding further pending issues between the two parties.*
4. *The main application is postponed sine die”.*

[48] Immediately upon making the above mentioned order, counsel for the respondent stood up to say “*There is no main application*”. I must assume that it skipped counsel’s mind that it was specifically indicated on the afternoon of the 15 September 2010 that parties must argue the matter only on the striking out application. This was after he had declined the offer to file a provisional fourth affidavit and after he had indicated that he would need some weeks to consider and file such an affidavit.

[49] Before me, there was an application for striking out. This did not deal with the merits of the application. It was a side issue. To have stood in the manner counsel for the respondent did and claimed that there was no main application was unwarranted. Clearly, there were two applications before me, the striking out application and an application in terms of the amended notice of motion by the applicant. The latter was certainly the main application.

[50] Paragraph 3 of the order quoted above is very clear. The respondent was interdicted “*pending ... and any decision or further decision that may be made by this court on the 20 September 2010 regarding further pending issues between the two parties*”.

[51] The application for the striking out having been argued in a busy urgent motion court, there was just no sufficient time to deal with every submission made and the issues raised thereby. I however, regarded the decision on the striking out application and on the interdict being important to be made there and then.

[52] I have already pronounced myself on the fourth affidavit in this part of the judgment. The order which I intend to add hereunder should be covered by part of the order quoted in paragraph 50 above.

CONCLUSION

[53] I therefore conclude by repeating the order of the 16 September 2010 and by adding to the order as follows:

53.1 An application for striking out is dismissed.

53.2 The respondent is hereby interdicted from disrupting or disconnecting in any way, the water and electricity to Kungwinin Manor Estate pending:

53.3 Delivery of the fourth affidavit by the respondent, such affidavit to be delivered within 14 days from date of this order, and

53.3.1 pending the finalization of the dispute between the parties in the main application,

53.4 The main application is postponed sine die,

53.5 The costs of the 14 September 2010 are to be costs in the cause of the main application, and costs of the 11 May 2010 remain reserved.

53.6 The respondent to pay the costs of the striking ou application for the 15 and 16 September 2010.

LEGODI

JUDGE OF THE HIGH COURT

STUART VAN DER MERWE INC.

Applicant's attorneys

Solicitor's Chambers

825 Acardia Street

Acardia,

PRETORIA

TEL: 012 343 1900

LOUIS WEINSTEIN

Respondent's attorneys

TEL: 011 705 1920

c/o SAVAGE JOOSTE & ADAMS INC.

141 Boshof Street,

Cnr Melk Street,

New Muckleneuk, PRETORIA

TEL: 012 452 8200