



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

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

12/02/2024

DATE


SIGNATURE

Case no: 2021/41510

In the application between:

DUSTY GOLD INVESTMENTS 3 (PTY) LTD

Applicant

and

**CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY**

First Respondent

CITY POWER JOHANNESBURG (PTY) LTD

Second Respondent

JOHANNESBURG WATER (PTY) LTD

Third Respondent

FLOYD BRINK

Fourth Respondent

JUDGMENT

DELIVERED: This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email and by upload to CaseLines. The date and time for hand-down is deemed to be 12h00 on 13 February 2024.

GOODMAN, AJ:

BACKGROUND

1. This interlocutory application arises out proceedings brought by the applicant in respect of the rates charged for municipal services rendered to certain specified properties situated in New Doornfontein, Johannesburg. In essence, the applicant complains that has been overcharged for municipal services, primarily electricity and sewerage.
2. In August 2021, the applicant launched the main application, in its capacity as owner of the properties in question. It sought orders, among others:
 - 2.1. crediting the applicant's municipal accounts for electricity charges, and interest charges raised, from July 2015 to the date of any order granted, and debiting its account at the correct rate, for the same period;
 - 2.2. directing that the meters at the property be re-programmed to ensure sewage billing at the correct rates, and that all charges from 1 August 2017 to the date of re-programming be reversed and re-billed;
 - 2.3. directing the respondents to provide it with a re-billed municipal statement in respect of its municipal accounts; and
 - 2.4. interdicting the respondents from disconnecting any municipal services to the properties pending final rectification of the applicant's municipal account.

3. The respondents served notice of their intention to oppose the main application in September 2021, but thereafter delayed in filing answering papers.
4. The applicant twice set the matter down on the unopposed roll – on 10 February 2022 and 15 June 2022 respectively. In each instance, the application was postponed with costs.
5. The respondents later served an answering affidavit in the main application, as well as a counter-application seeking payment of more than R5.5 million for arrears allegedly arising from the applicant's non-payment of municipal services consumed. The date of service is not clear on the papers but it could not have been before 14 June 2022 (since that is the date on which the answering affidavit was deposed to). It means that the answering affidavit must have been served only after the main application had already been enrolled on the unopposed roll of 15 June 2022. It was uploaded to Caselines in March 2023.
6. On 28 June 2022, the applicant's attorneys advised the respondents that "*following receipt of the Answering Affidavit and having consulted with our client*", they had been instructed that the applicant had transferred the property to Afhco Holdings (Pty) Ltd, and that the applicant consequently intended to amend and supplement its papers in light thereof. The applicant's attorneys called on the respondents to undertake not to terminate municipal services to the property pending the finalization of the matter.
7. An application for leave to supplement its founding papers by way of a supplementary affidavit was delivered in January 2023, which enclosed a proposed amended notice of motion. The application was opposed by the respondents. It now comes before me for determination.

CONDONATION

8. The applicant sought, at the outset, to have the respondent's answering affidavit rejected and disregarded by the Court because it was filed substantially out of time, and no application for condonation had been brought.

9. Although the answering affidavit is not accompanied by a self-standing condonation application, paragraphs 27 and 28 thereof motivate for condonation of the respondents' late filing. They explain that the respondents were initially minded not to oppose the application for leave to supplement "*as there was no chance that a Court would grant same*", but that they later decided to do so upon realising that the matter had been enrolled on the unopposed roll and that their answering affidavit in the main application had not been uploaded to Caselines, nor its existence disclosed to the Court. The affidavit asserts that it is in the interests of justice that condonation be granted both due to the alleged non-disclosure of the answering affidavit, and in light of the prejudicial nature of the relief sought in the present application.
10. These averments fall short of the requirements for condonation, which demand a fulsome explanation of the delay at issue. At best for the respondents, their affidavit provides an account for the failure timeously to file a notice of intention to oppose the application for leave to supplement. (Such notice was filed only after the interlocutory application had been enrolled on the unopposed roll). But the answering affidavit in the interlocutory application was also filed substantially out of time: 38 court days after the belated notice of intention to oppose. The respondents provide no explanation at all for this delay – let alone showing good cause for it. They appear simply to have delayed in dealing with this application, in disregard of the Rules and practice directives of this Court. This impression is reinforced by their failure to file heads of argument in respect thereof until compelled to do so.
11. However, despite these failings, and because full pleadings were ultimately exchanged and written and oral submissions made before me, I consider it appropriate to determine the application on the complete papers. I accordingly grant the respondents condonation for the late filing of the answering affidavit, but take their late filing and lack of proper explanation into account in the costs award I make below.

MERITS OF THE APPLICATION TO SUPPLEMENT

12. The applicant seeks to supplement its papers, and to amend the relief it seeks, in light of three main considerations:

12.1. First, it records that the properties that it owned (and in respect of which the main application was brought) were consolidated into a single erf on about 20 December 2021, and the property sectionalized into 572 residential units, with each unit registered in the name of Afhco Holdings (Pty) Ltd. Because it ceased being the owner of the properties (now, property), the applicant has no standing to seek relief in respect thereof beyond the date of transfer. Some of its original prayers have to be limited in time, whilst it can no longer pursue others at all.

12.2. Second, the relief sought in respect of sewerage charges is now being pursued by way of class action proceedings. The applicant consequently no longer wishes for that relief to be dealt with in the main application.

12.3. Third, according to the applicant, during August 2022, electricity supply to the property tripped due to an internal fault – but the applicant believed that it had been disconnected as a result of the disputed arrears, and consequently paid the first respondent an amount of R900 000. It seeks to have that amount credited to its account and/or repaid.

13. The respondents oppose the application to supplement because they say it is brought in bad faith and amounts to an abuse of process. That, they say, is because:

13.1. The general principle is that applications should entail the exchange of only three affidavits. Special or exceptional circumstances must prevail for additional affidavits to be permitted. None has been made out here. On the contrary, all the allegations made, and the amended relief sought, could have been dealt with in replying papers.

13.2. The founding and supplementary papers suggest that the process to transfer the property from the applicant to Afhco Holdings must have been

underway at the time that the main application was launched. Yet, no mention was made of it in the founding affidavit, nor is the date that such process was initiated disclosed in the supplementary affidavit.

- 13.3. Worse, the application for leave to supplement was filed (a) substantially after transfer had occurred, (b) after the main application had been set down twice on the unopposed roll, and (c) after the respondents' answering affidavit and counter-application had been filed. No adequate explanation had been given for this conduct, which prejudices the respondents (particularly since costs awards were taken against it in respect of the postponement of the matter).
- 13.4. The applicant and Afhco Holdings are related parties, represented by the same attorneys and counsel, and the supplementary affidavit does not adequately detail the relationship between them. The respondents are of the view that the application has been brought to avoid paying for municipal services and/or potentially to defeat their counter-application.
- 13.5. Finally, the applicant has not followed the proper procedure, laid down in Rule 28, to amend its notice of motion.
14. While applications ought usually to be adjudicated on three sets of papers, the court has a broad discretion to permit supplementary papers where it considers it appropriate. In this case, it is common cause that at least some of the facts in the supplementary affidavit – namely fact of the consolidation, sectionalization and transfer of the property, and the applicant's payment of some of the arrears to the Municipality – occurred after the main application was launched. It is appropriate that those facts be placed before the Court, so that the main application can be determined on a complete and correct conspectus of the facts. That is plainly in the litigants' interests and in the interests of this Court.¹
15. It was the applicant's choice, as *dominus litis*, whether to disclose those new facts in replying papers, or by way of an application to supplement its founding papers. It cannot be compelled by the respondent to prefer one course of action

¹ See *Khunou & Others v Fihrer & Sons* 1982 (3) SA (2W) at 355F-I. *Tantoush v Refugee Appeal Board and Others* 2008 (1) SA 232 (T) para 51

over the other. The applicant has, in my view, adopted the more cautious approach by supplementing its founding papers, rather than merely dealing with the new facts in reply. Doing so means that the respondents will have a full opportunity to answer to those allegations, and to oppose the relief as ultimately framed. Among others, they will have an opportunity to impugn the applicant's *bona fides* and/or its relationship with Afhco Holding in their supplementary answering affidavit, should they wish to do so. There is, in my view, no prejudice to the respondents entailed by applicant's approach.

16. Nor are the respondents prejudiced by the manner in which the applicant has sought to amend its notice of motion. The proposed amendments to the notice of motion arise from, and are interwoven with, the facts set out in the supplementary affidavit. They are, as a matter of practicality, appropriately sought in and together with leave to supplement. Had the applicant sought to amend its notice of motion in advance of the application for leave to admit, the respondents could have objected on the basis that no factual case had been made out for the amendments. Conversely, seeking the amendment to the notice of motion only after the application for leave to supplement had been granted would have unnecessarily delayed the main proceedings, and could have entailed unnecessary costs and court time to ventilate. The approach adopted was a sensible and practical way to proceed.
17. I am, in the circumstances, minded to grant the applicant leave to supplement its papers by way of the supplementary affidavit (together with its accompanying amended notice of motion). The respondents are entitled to file a supplemented answer in response. To avoid any confusion or dispute on this score, as well as any further delay in the prosecution of the main application (which each of the parties accused the other of), my order caters for the exchange of further process in the main application.

COSTS

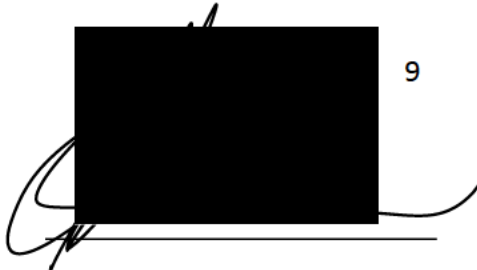
18. The parties each alleged abuses of process against the other, and sought punitive costs in the event that they succeeded. The respondents also sought

costs against the applicant if the application was granted, on the basis that it was the applicant that sought an indulgence.

19. To my mind, costs should follow the result. The applicant brought the application not for an indulgence, but to ensure that the matter was ventilated on a correct factual basis and to forego relief to which it is, on its own version, no longer entitled. It sought costs only in the event of opposition. Having elected to oppose, the respondents should bear the costs of doing so.
20. I also consider a punitive costs award to be warranted, as a mark of the court's displeasure at the respondents' late filing of their answering papers, and the wholesale lack of proper explanation for it.

ORDER

21. In the result, the following is granted:
 - 21.1. The applicant is granted leave to supplement its founding affidavit delivered under the above case number, by way of the supplementary affidavit attached to the application for leave to supplement marked as annexure "B".
 - 21.2. The first to fourth respondents are to deliver their supplementary answering affidavit(s), if any, within fifteen days from the date of the grant of this order;
 - 21.3. The applicant is to deliver its replying affidavit, if any, within ten days from the date of service of the supplementary answering affidavit(s) or, if no such affidavits are delivered, within ten days from the date on which such affidavits were due;
 - 21.4. The first to fourth respondents are ordered to pay the costs of this application on an attorney and client scale, jointly and severally, the one paying the other to be absolved.



I GOODMAN, AJ

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION JOHANNESBURG**

APPEARANCES

DATE OF HEARING : 26 January 2024

DATE OF JUDGMENT : 13 February 2024

APPELLANT'S COUNSEL Adv N Lombard

APPELLANT'S ATTORNEYS: Mervyn Smith Attorneys

RESPONDENT'S COUNSEL: Adv E Sithole

RESPONDENT'S ATTORNEYS: Madhlopa & Thenga Inc.