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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 065167/2023

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED

DATE: 21 JULY 2023

E LABUSCHAGNE

In the matter between:

VRESTHENA(PTY)LTD

Applicant

and

**THE CITY OF TSHWANE
METROPOLITAN MUNICIPALITY**

First Respondent

**THE BODY CORPORATE OF
ZAMBEZI RETAIL PARK**

Second Respondent

ZAMBEZI RETAIL PARK INVESTMENTS (PTY) LTD

Third Respondent

**THUMOS PROPERTIES (PTY) LTD
(In liquidation)**

Fourth Respondent

ZRJ PROPERTIES (PTY) LTD

Fifth Respondent

JUDGMENT

[1] The applicant approached the court on the basis of urgency, seeking the following relief:

"2. It be declared that the applicant is entitled in terms of par 2.2 of the full court's order dated 10 November 2022 to do all things necessary to reconnect the electricity to Units 1 to 4, 7 and 8 of Zambezi Retail Park.

3. The first respondent is ordered to do all things necessary in order to give effect to par 2 of this order, which includes:

3.1 Assisting by temporarily disconnecting the electricity that feeds to the Zambezi Retail Park substation (China Mall) ("the substation"), in order for the applicant to install all the necessary parts and/or to effect all necessary repairs to the relevant substation; and

3.2 Immediately upon the applicant installing the necessary parts and/or effecting the necessary repairs to the relevant substation, reconnect the electricity supply to the substation.

4. Should the first respondent, or any other person or entity acting in unison or on instruction of the first respondent impede the applicant, or any of its appointed service providers, from implementing par 2.2 of the full court's order and/or para 2 and 3 of this order, then the applicant is authorised to approach this court again on the same papers, duly supplemented for any consequent (sic) relief

5. The first respondent is ordered to, upon the reconnection of electricity, install a meter at the substation which will be linked to the

first respondent's Rates Account Number 501[...].

6. *That the first respondent be ordered to pay the costs of this application on the scale as between attorney and client."*

[2] The first respondent (the City) opposed the relief and brought a counter application, also on an urgent basis, for the following relief:

"2. That the execution of the order granted on 10 November 2022 under case number 28250/2020 by the full court in this division is hereby stayed pending the finalisation of the application for special leave to appeal and condonation served on the applicant on 30 June 2023, and to be filed in the Supreme Court of Appeal (case number to be allocated).

3. Costs of this application to be paid by the applicant on an attorney and client scale, which scale shall include the costs of two counsel where so employed."

[3] The core issue in this matter relates to the interim implementation of the full court order. That order, granted on 10 November 2022 provides for the following interim relief:

"2. Pending the finalisation of the appeal in the Supreme Court of Appeal, with case number A1124/2022:

2.1 The first respondent is ordered to make payment in the amount of R200 000.00 for the electricity supply solely to Units 1 to 4, 7 and 8 ('the Units') upon the reconnection of electricity and installation of a meter at the Zambezi Retail Park substation (China Mall), which will be linked to the first respondent's own rates account number 501[...], by the appellant within 7 (seven)

days of this order;

2.2 The appellant undertakes to reconnect the electricity supply to the aforesaid Units as soon as reasonably possible and if not within 7 (seven) calendar days of this court order being granted. In the event that the appellant does not restore the electricity supply within the said 7 (seven) days, then in that event the appellant authorises the first respondent to reconnect the electricity supply to the aforesaid units through an electrician authorised by the appellant, which authorisation may not be unreasonably withheld. The parties in such event agree that the first respondent may then utilise the first R200 000.00 referred to in par 1.1 for the costs associated with the reconnection of the electricity to the aforesaid units.

2.3 This order only authorises the reconnection of the electricity to the units as aforesaid and none other within the sectional title scheme (the second respondent).

2.4 The first respondent is to make a further payment of R200 000.00 directly to the appellant by no later than 30 November 2022.

2.5 The determination of the actual amount owed by the first respondent, if any, for the consumption of electricity from date of registration of the respective units shall be furnished to the appellant by no later than 30 November 2022, which amount shall be debated by the parties through an agreed mediator who shall be appointed by no later than 15 December 2022.

2.6 Should the parties not be able to agree to a mediator,

then and in such event the parties will approach the chairman of the Bar Council of the Pretoria Society of Advocates, who shall appoint a suitably qualified person to attend to the aforesaid envisaged mediation, the parties agreeing that such a mediator need not be counsel or an attorney.

2.7 That payment of the month-to-month consumption of electricity shall be made upon the due date reflected on the invoice directly to the appellant, who must register with the first respondent in terms of the bylaws without derogating the powers of the appellant to terminate the supply of the electricity in the event of default of payment.

3. *All rights of the parties are reserved."*¹

[4] Since the granting of the full court order, the City has refused to reconnect the electricity.

[5] Upon learning that the applicant intends proceeding to effect the reconnection, the Council delivered a "notice of appeal pursuant to Section 18(4) of the Superior Courts Act" and argued that the operation of the order has been suspended pending the purported appeal.

[6] In November 2022, following delivery of the notice of appeal, the applicant sought urgent relief in the Gauteng Division for the setting aside of the notice of appeal. On 9 December 2022 the application was dismissed with costs. While concluding that the Council abused the legal process, and expressing a strong *prima facie* view that the alleged notice was defective and irregular, the Presiding Judge (Neukircher J) ruled that the High Court lacked jurisdiction over proceedings pending before the Supreme Court of Appeal.

¹ First Respondent in the Full Court order is a reference to the current applicant a the reference to the appellant is a reference to the City.

[7] The competence of a second automatic appeal in terms of sec 18(4) was then argued before the SCA. On 22 June 2023 the SCA delivered judgment in the matter of **City of Tshwane Metropolitan Municipality v Vrestena (Pty) Ltd and Another** (Case Number 1124/2022) [2023] ZASCA 104 (22 June 2023) and held at par [17) as follows:

"[17] The current matter exemplifies the mischief that the legislature intended to address through the introduction of s 18(4). Despite a reconnection order being issued on 16 June 2022, an order under s 18(3) in September 2022 and an order of the full court in November 2022, the Municipality has still not reconnected the electricity to Vresthena, thus thwarting the purpose of the extraordinary appeal process introduced by s 18(4)."

[8] The notice of appeal dated 22 November 2022 was found to be irregular and void (at par [27]).

[9] On 22 June 2023 the City served an application for special leave to appeal the full court's order in terms of sec 17 of the Superior Courts Act to the Supreme Court of Appeal and brought an application for condonation for the late delivery thereof.

[10] The SCA in my assessment of its judgment dealt not only with the question whether there was more than one automatic appeal in terms of sec 18. It also determined the question whether there was a further right of appeal at all on interim implementation in terms of sec 18. Matojane JA held as follows:

*"[22] We endorse Navsa JA's obiter viewpoint in **Ntlemeza v Helen Suzman Foundation**, that s 18(4) of the Act specifically allows for a single automatic right appeal indicating that multiple appeals are not permitted under the section. He expressed it as follows:*

'Understandably, because it is such a dramatic change, only one appeal to the "next highest court" is permissible. No further appeal beyond this court appears competent - for present purposes it is not necessary to decide this point'."

[11] The SCA at par [16] confirms that the regime for the implementation of interim orders pending an appeal is dealt with exhaustively in Sec 18 of the Superior Courts Act. In terms thereof there was only one automatic right of appeal to a full court against an implementation order. Thereafter there was no further appeal possible.

[12] It bears noting that the full court order of 10 November 2022 was drafted by agreement between the parties, but the City recanted and would no longer endorse it when it served before court. The SCA interpreted that order to mean that *"the full court rejected the Sec 18(4) appeal and issued an order allowing the main order to be implemented while the appeal decision was pending."* This order was uploaded onto Caselines by the City's legal team.

[13] Before me the City contends that the full court order is not competent. The City contends that the enforcement of the order would direct the City to act unlawfully. When pressed on this matter, counsel for the City contended that the unlawfulness lies therein that the interim order bypasses the account of the Body Corporate of Zambezi Retail Park in breach of the Sectional Titles Act. Further the order would force the City to act in breach of its own bylaws. The bylaws require an agreement between the service provider and the City, and no such agreement exists in the current circumstances. The order therefore forces a contractual relationship onto the party without the applicant having applied for or having entered into a contract.

[14] The aforesaid contentions are no doubt a preview of what will be argued when the appeal against the full court order is heard by the SCA. However, it

is common cause before me that the order of the full court of 10 November 2022 is enforceable. The primary reason for this contention is that the application for special leave was late and that a condonation has to be granted before it could suspend the order.

[15] It is not necessary to decide whether, or when, the full court order may be suspended by the acceptance of a valid application for leave to appeal. It suffices for present purposes that the order is enforceable.

URGENCY

[16] Both parties agree that they are at an impasse. If the applicant were to reconnect the electricity based on the order of the full court, the City would simply disconnect the electricity. That is the reason why the applicant seeks the declarator in par 2 of the notice of motion quoted above. The fact that the parties are at loggerheads is apparent from the counter application in which the City seeks the suspension of the full court order.

[17]

17.1 The property that forms the subject matter of the aforesaid impasse is situated on Erf [...], Derdepoort, R573 Moloto and R53 Zambezi - a large commercial shopping centre over the Zambezi Retail Park Sectional Title Scheme is registered. Save for a Sasol Filling Station, the entire scheme has one electricity supply point. The electricity was supplied by the City under the Scheme's electricity account, which was only open during the later stages of 2017 under account number 501[...]. The proceedings leading up to the full court judgment arose from the City disconnecting the electricity to the Scheme on 13 April 2022. An urgent application served before Ndlovokane AJ on 20 June 2022, who granted an order directing the City to restore the applicant's electricity within 14 (fourteen) days.

17.2 On 6 July 2022 the City filed an application for leave to appeal.

17.3 On 12 August 2022, after the applicant had already spent R724 000.00 to restore electricity, on the advice that the leave to appeal application did not suspend the operation of the Ndlovokane J order, the City disconnected the electricity supply of Zambezi Retail Park. This led to another urgent application which served before Van der Westhuizen J on 19 August 2022. Van der Westhuizen J found that the Ndlovokane J order was final in effect and consequently that the Council's application for leave to appeal had suspended the operation and execution of the order. The application was dismissed.

[18] The applicant then launched an application on 23 August 2022 in terms of Sec 18(3) of the Act, to execute the order of Ndlovokane J.

[19] On 28 September 2022 Ndlovokane AJ granted the City leave to appeal to the SCA after finding that exceptional circumstances were present, and that the applicant will suffer irreparable harm if the order is not placed into operation. The City exercised its right to an automatic appeal in terms of Sec 18(4), which automatically suspended the order of Ndlovokane AJ.

[20] The full court heard the appeal in terms of Sec 18(4) on 11 November 2022 and granted the order currently being sought to be implemented.

[21] The City still contends that the full court's order is not competent in law. It is however binding on the City until set aside (Sec 165(5) of the Constitution); **Department of Transport and Others v Tasima (Pty) Limited** 2017(2) SA 622 (CC) at par [183].

[22] The City is an organ of state which is under a duty to render assistance to the court by complying with the court's orders (Sec 165(4) of the Constitution).

[23] I am satisfied on the question of urgency both in respect of the application and the counter application.

[24] The applicant contends that the declaratory order that it seeks in Prayer 2 is required to lay to rest the City's contention that the full court order is not competent. That contention can be argued when the SCA hears the appeal but in the interim the Full Court order must be implemented

[25] The City contends that the declarator in Prayer 2 is unnecessary as the court order that it refers to stands on its own. The purpose of the declarator is to declare the rights of party who have an interest in a matter. The existence of a dispute between them is a fact to be considered in whether the declarator would be granted or not.²

[26] A declarator would however put an end to the City's contention that the full court order is not competent and will therefore not be implemented.

[27] An application for a declarator requires a two-stage process. The court must firstly be satisfied that the applicant has an interest in an existing, future or contingent right or obligation (which is conceded by the City in this matter) and secondly, if satisfied that such an interest exists, it must consider whether or not the order should be granted.³

[28] I am satisfied that the declaratory order serves the purpose of declaring the applicant's and the City's rights and obligations on the issue of interim implementation of the Full Court order. The declarator in Prayer 2 of the notice of motion endorses the full court order. It is not for the City to second guess what has been ordered. The interim implementation order is final and cannot be appealed further.

² Ex Parte Nell, 1963(1) SA 754(A)

³ **Cordant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd** 2005(6) SA 205 (SCA)

[29] The relief sought in Prayers 3.1 and 3.2 of the notice of motion are ancillary to the full court order and are required for it to be an effective court order. The City contends that Prayers 3.1 and 3.2 are not found in the full court order and are therefore an amendment of the full court order. I disagree, as the relief sought is aimed at giving effect to the full court order and not to amend it. The same applies for the relief in Prayer 5.

[30] The relief in Prayer 4 is unnecessary as any party has the right to approach the court at any stage, as advised.

[31] The question is whether the City has advanced reasons by means of its counter application why the order of the full court should be suspended.

COUNTER APPLICATION

[32] The applicant contends that the counter application is aimed at the wrong court order. The full court order is merely an amendment to the court of first instance's order and it is the order of the court of first instance (as amended) that should have been the target of the Rule 45A counter application. This is a somewhat technical approach. To my mind, it is apparent that the full court order is clearly identifiable and, despite it constituting an amendment of the order of the court of first instance, it is clear what the City had in mind.

[33] The proviso to Rule 45A imposes a limitation on the court's discretion. If a Sec 18 process has delivered a specific result, then Rule 45A cannot be utilised to upset that result. In this instance the Sec 18 process has played out fully and it is common cause that the full court order is enforceable at present. This is the outcome of a Sec 18(3) implementation process and an appeal in terms of Sec 18(4). That being the case, the relief that the City seeks would be contrary to Sec 18 and would therefore not be competent.

[34] Courts will generally grant a stay in terms of Rule 45A where real and substantial justice requires such a stay, or where injustice would otherwise be done (**RAF v Strydom** 2001(1) SA 292 (C)).

[35] In this instance the applicant has had electricity cuts since 12 August 2022. It has disbursed R19 million on diesel to keep generators going. These expenses were incurred in the face of at least three court orders directing the City to restore the electricity connection.

[36] The City contends that the applicant has substantial arrears for rates and taxes, and contends that there has been tampering by means of illegal electricity connections. The City's bylaws entitle it to terminate electricity supply immediately.

[37] There is clearly a protracted and unsavoury history between the parties. Nevertheless, the court orders granted need to be complied with and it is not within the City's power to disregard them on the basis of its own contentions that it would be incompetent in law. Until set aside, such orders are valid and need to be adhered to. This is more so in the case of an organ of state, in the light of its obligations under Sec 165(4) of the Constitution.

[38] Much of the debate from the City related to implementation of the order compelling the City to be involved in unlawful conduct. None of the arguments are persuasive. The court's order would clothe the conduct of the City with the legality that it requires, particularly where the relief flows from what the court has assessed as being just and equitable in the circumstances. The current application has been brought about because of the recalcitrance of the City in complying with a court order pending an appeal. The powers and obligations of municipalities are constitutional matters, and the enforcement of court orders is a constitutional issue as well. I am therefore satisfied that the matter before me attracts sufficient constitutional interests to trigger the court's powers under Sec 172(1) and (a). The declarator that is sought in

Prayer 2 is aimed at endorsing and confirming the effectiveness of the full court order. By implication the granting of the declarator would flow from what is clearly unlawful conduct on the part of the City in not complying with the full court order.

[39] I therefore regard it as being just and equitable to grant the further relief sought in the notice of motion to give effect to the court order of the full court of 11 November 2022. By contrast, the counter application would not only undermine the interests of substantial justice (**RAF v Strydom** *supra*) but is not competent in law. That is because the order sought would be inconsistent with Sec 18 of the Superior Courts Act.

[40] In the premises I am satisfied with the relief sought by the applicant. The counter application however falls to be dismissed.

[41] I was requested by both parties to order costs on a punitive scale. There is merit in mulcting the City in costs on a punitive scale. Its refusal to implement the Full Court order is in breach of its constitutional obligations in terms of section 165(4). It is also in breach of Constitutional Court authority. Self-help by an organ of state is to be severely deprecated.

[42] I consequently grant the following order:

1. The matter is found to be urgent in the context of Rule 6(12).
2. It is declared that the applicant is entitled in terms of par 2.2 of the Full Court's order dated 10 November 2022 to do all things necessary to reconnect the electricity to Units 1 to 4, 7 and 8 of Zambezi Retail Park.
3. The first respondent is ordered to all things necessary in order to give effect to par 2 of this order, which includes:

3.1 Assisting the applicant, by temporarily disconnecting the electricity that feeds to the Zambezi Retail Park substation (China Mall) ("the substation") in order for the applicant to install all the necessary parts and/or to effect all necessary repairs to the relevant substation; and

3.2 Immediately, upon the applicant installing the necessary parts and/or effecting the necessary repairs to the relevant substation, reconnect the electricity supply to the substation.

4. The first respondent is ordered, upon the reconnection of electricity, to install a meter at the substation which will be linked to the first respondent's Rates Account Number 501[...].

5. The first respondent is ordered to pay the costs of the application.

6. The counter application is dismissed with costs.

7. The costs orders above will be on the scale of attorney and client.

E. LABUSCHAGNE
ACTING JUDGE OF THE HIGH
COURT GAUTENG DIVISION, PRETORIA

APPEARANCES

Applicant's Counsel:	Adv. M Louw
Instructed by:	Wiese & Wiese Inc
First Respondent's Counsel:	Adv. M Dewrance SC

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