

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No: **6050/2022**

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

IMPERIAL LOGISTICS SOUTH AFRICA

Applicant

and

THE CITY OF MANGAUNG METRO MUNICIPALITY

Respondent

CORAM: TSANGARAKIS, AJ

HEARD ON: 9 FEBRUARY 2023

DELIVERED ON: 20 FEBRUARY 2023

INTRODUCTION

[1] This application concerns the entitlement of the respondent to disconnect the municipal electricity services to the applicant's property as described in prayer 1 of the relief reproduced in paragraph 3 below (*"the property"*).

[2] Part A of the relief sought by the applicant served before this Court on 2 December 2022. On that date an order was granted inter alia (i) postponing the application to 9 February 2023, (ii) regulating the periods of time in terms of which the respective parties were to file further affidavits, (iii) directing the respondent to reconnect the electricity supply with immediate effect pending finalisation of Part B of the application and (iv) standing the costs over for later adjudication.

[3] In terms of Part B, it being the remaining portion of the relief that serves before me for adjudication, the applicant moves for an order in the following terms:

"1. That it be declared that the Respondent's conduct in disconnecting the municipal electrical services on 1 December 2022, to the property described as Erf [...] Bloemfontein E[...] [...]Township, Registration Division Bloemfontein Road, Free State, with municipal account number [...] is unlawful;

2. That the Respondent be interdicted and restrained from disconnecting municipal service supply to the property without first complying with:

2.1 its obligations in terms of the Municipal Systems Act, 2000, as amended;
and

2.2 its obligations in terms of the By-Law Relating to Credit Control and Debt Collection, 2013.

3. That to the extent necessary the respondent is ordered and directed to reinstate all municipal service supply to the property;

4. That the Respondent pay the costs of this application;

5. *That this Honourable Court grants such further and alternative relief as it may deem fit in the circumstances.”*

THE FACTUAL MATRIX

[4] The origin of this dispute is to an extent evident from the content of a court order granted on 28 July 2022 (“the 28 July 2022 order”). The 28 July 2022 order reads as follows:

“IT IS ORDERED BY AGREEMENT BETWEEN THE PARTIES THAT:

1. *In fulfilment of its obligations in terms of section 118 of the Local Government Municipal Systems Act, 2000, (MSA) as amended, the applicant shall pay the amount of :*

1.1 *R7,369,054.74, being the amount of R7,636,563.74 in respect of the municipal clearance figures less interest in the amount of R267,509.66;*

1.2 *together with an amount equal to 4 months’ estimated charges, which amount is to be calculated by the respondent, and provided to the applicant, through its attorneys of record, within 5 days of this order.*

2. *The respondent is ordered and directed to issue a certificate in terms of section 118(1) of the MSA within 7 (seven) days of receipt of the payment contemplated by paragraph 1 above.*

3. *The payment contemplated in paragraph 1 above is made under protest, and shall, pending the outcome of the dispute contemplated in prayers 4 to 6 below, be held by the respondent as such.*

4. *The respondent is ordered and directed to take the following steps in resolution of the dispute which forms the subject of this application:*

4.1 the respondent is ordered and directed to provide the meter reading records on combined meter numbered 1IH76298I and 1(M68353 (“the combined meter”) from January 2019 until the date of any order of this Honourable Court;

4.2 the respondent is ordered and directed to provide a written report, together with any supporting documentation such as job cards that may exist, regarding any work done, or contemplated, in respect of the combined meter between January 2020 until January 2021; and

4.3 the respondent is ordered and directed to appoint a registered third party meter checking agency to test the accuracy of the combined meter, as contemplated in section 36 of the Respondent’s By-laws relating to Water Services, 2013, and to provide a written report to the applicant thereon within 60 days of having appointed the aforementioned service provider – provided that the meter shall be removed from the property within 14 calendar days of this order and the applicant shall pay the fee as prescribed.

5. Upon receipt of the reports contemplated in paragraphs 4.2 and 4.3 above, the applicant will have 30 (thirty) calendar days within which to launch appropriate legal proceedings to impugn the report or reclaim the amounts paid to the respondent, if necessary.

6. Should the applicant fail to launch legal proceedings contemplated in paragraph 5, the amount found to be due in the resolution shall be paid over to the respondent, or held by the respondent as no longer paid over under protest, as the case may be.

7. Each party shall pay their own costs.”

[5] Briefly the facts that gave rise to the 28 July 2022 order are that the applicant, as registered owner of the property, responsible for the payment of the respondent

municipality's account(s), had entered into a deed of sale in terms of which it was obliged to give registration of transfer of the property to the purchaser it being the current tenant of the property. The process of registration of transfer was frustrated in and because of a dispute of the applicant's then indebtedness to the respondent which rendered the obtaining of a clearance certificate in terms of section 118 of the Municipal Systems Act 32 of 2000 ("the MSA") problematic. Such certificate is necessary to pass transfer of the property.

[6] The dispute in that application had as its foundation the fact that the applicant disputed the computation of the amount purportedly owed by it to the respondent at that time. This dispute was prosecuted inter alia on the basis that the respondent had relied, in the computation of applicants purported indebtedness to it, upon the readings of an incorrect meter (which were subsequently corrected) and aberrant water meter readings.

[7] The court order of 28 July 2022 clearly serves as a methodology recording the terms and conditions of the manner in which the respective parties envisaged that the dispute between them would be resolved. As stated by the respondent, by way of its answering affidavit filed in the resistance of the present application, the purpose of the order is:

" 9.2.4 to take certain steps in the resolution of the dispute, namely to:

*a. provide the meter reading records on the combined meter from **January 2019** until **28 July 2022** (paragraph 4.1 of the Court Order)"*

[8] A significant portion of the facts, as pleaded by both parties, are dedicated to the dispute between the parties relevant to their respective interpretation of the order of 28 July 2022. Counsel for both the applicant and the respondent submitted, correctly so in my view, that this Court is not called upon to pronounce the manner in which the Court order of 28 July 2022 falls to be interpreted. The particularity of these facts are accordingly by and large irrelevant to the adjudication of this application. It suffices to record that it is common cause that there exists a dispute

between the parties regarding the interpretation of that Court order. More importantly, within the context of this application, the dispute provided for in the 28 July 2022 order (being relevant the applicants purported indebtedness to the respondent) remains to date very much alive.

[9] A synopsis of the more pertinent facts evident from the pleadings of record reveals that it is the applicant's case that:

9.1 There exists an ongoing and unresolved dispute regarding the applicant's pecuniary obligations to the respondent, the extent of which is evident from the 28 July 2022 order and the events that subsequently transpired in relation thereto;

9.2 The respondent did not receive proper notice of the impending disconnection as required in terms of its By-Laws and Credit Control Policy;

9.3 The applicant has been paying the undisputed charges on its municipal account; and

9.4 There exists a process of negotiation between the parties relevant to the clearance certificates required to give effect to registration of transfer of the property pursuant to the 28 July 2022 order.

[10] A similar synopsis of the respondent's case illustrates that:

10.1 Its disconnection of the municipal electricity services to the property was lawful and that the necessary jurisdictional requirements, as required inter alia in terms of its By-Laws and Credit Control Policy predominantly relevant to its Notice of Intention to Limit or Disconnect or Discontinue the Supply of Electricity or Water (*"the pre-termination notice"*), were both in existence and complied with; and

10.2 The applicant has not made payment of its undisputed payment obligations to the respondent.

[11] That which is recorded in paragraphs 9 and 10 above constitutes a broad overview of the respective parties fundamental submissions as they developed during the argument of the application before me. Additionally relevant facts shall be dealt with under the heading “**EVALUATION**” below.

STATUTORY FRAMEWORK AND APPLICABLE PRECEDENT

[12] Section 5(1)(g) of the MSA provides that:

“Members of the local community have the right to have access to municipal services which the Municipality provides, provided the duties in subsection (2)(b) are complied with.”

[13] Section 102 the MSA provides as follows:

“(1) A municipality may-

(a) consolidate any separate accounts of persons liable for payments to the municipality;

(b) credit a payment by such a person against any account of that person; and

(c) implement any of the debt collection and credit control measures provided for in this Chapter in relation to any arrears on any of the accounts of such a person.

(2) Subsection (1) does not apply where there is a dispute between the municipality and a person referred to in that subsection concerning any specific amount claimed by the municipality from that person.”

[14] In terms of section 20(3)(a) of the respondent’s Credit Control and Debt Collection Policy (dated 30 June 2022) (“*the Credit Control Policy*”), a municipality is

authorised to discontinue the supply of electricity to an immovable property if the customer fails to pay any account.

[15] Section 20(6) of the Credit Control Policy provides:

“Prior to the limitation, disconnection or discontinuation of the supply of electricity or water as per paragraph 20(3) above, the Municipality or Municipal Entity shall:

(a) provide the customer with adequate notice, including:

- (i) the date of the proposed limitation, disconnection or discontinuation;*
- (ii) the reason for the proposed limitation, disconnection or discontinuation;*
- (iii) the place at which the customer can challenge the basis of the proposed limitation, disconnection or discontinuation;*
- (iv) the notice may be a combined notice between both the Municipality and the Municipal Entity; and*

(b) allow the customer fourteen (14) days within which to challenge or make representations.”

[16] Section 36(2) of the Credit Control Policy authorises specific methods of service of the required pre-termination notice. They are these:

“(2) If a notice is to be served on a person in terms of this policy then such service shall be effected by:

- (a) delivering the notice to him or her personally, or to his or her duly authorised agent;*
- (b) delivering the notice at his or her residence or place of employment, to a person apparently not less than 16 (sixteen) years of age, and apparently residing or employed there;*

- (c) *if he or she has nominated an address for legal purposes, delivering the notice to such an address;*
- (d) *registered or certified post, addressed to his or her last known address;*
- (e) *in the case of a body corporate, delivering it to the registered office or the business premises of such a body corporate; or*
- (f) *if service cannot be effected in terms of the afore going subsections, by affixing it to the principal door of entry to the premises or displaying it in a conspicuous place on the property to which it relates.*
- (g) *with respect to notices in respect of valuation rolls, section 49 of the Property rates act shall be followed.”*

[17] It was held in ***Ngqumba en ‘n Ander v Staatspresident en Andere; Damons NO en Andere v Staatspresident en Andere; Jooste v Staatspresident en Andere*** 1988 (4) SA 224 (A) at 226B – C that the rule in ***Plascon-Evans***¹ applies even where the onus in a matter is on the respondent. However, where an onus rests on the respondent, and the respondent fails to allege and prove a defence, judgment ought to follow.

[18] In the matter of ***Euphorbia (Pty) Ltd t/a Gallagher Estate v City of Johannesburg*** [2016] ZAGPPHC 548 the Court dealing with a municipality’s onus to prove the correctness of the municipal charges, explained the position at paragraph 17 as follows:

*“[17] In the absence of special circumstances, considerations of policy, practice and fairness require that **the City is saddled with the onus of proving the correctness of its meters, the measurements of water consumption and statements of account rendered pursuant thereto. It cannot reasonably be expected from the consumer, having raised a bona fide dispute concerning the services delivered by the City, to pierce the municipal veil in order to prove aspects that peculiarly fall within the knowledge of and are controlled by the City.** In the present matter it was*

¹ ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*** 1983 (3) SA 623 (A)

*impossible for Euphorbia to perform its own test on the contentious meter as, firstly, only Termets was legally permitted to perform the tests and, as it happened, the meter was untimely disposed of by the City. The statements and other data concerning the water usage were in the possession and under control of the City. **Euphorbia relied on justified inferences arising from a sudden spike in water consumption arising from its own comprehensive investigation, in order to verify the correctness thereof. It accordingly raised a bona fide dispute as to the City's billing in regard to the services, and the City bore the onus to prove the correctness thereof.***

[Bold font added for emphasis]

[19] In **Body Corporate Croftdene Mall v Ethekeeni Municipality** 2012 (4) SA 169 (SCA) at paragraphs 21 – 23, the SCA reflected on the meaning of the word “dispute” for purposes of section 102(2) of the MSA and remarked as follows:

“[21] Neither the Systems Act nor the policy defines the term 'dispute'. Some of the definitions ascribed to it include 'controversy, disagreement, difference of opinion', etc. This court had occasion to interpret the word in *Frank R Thorold (Pty) Ltd v Estate Late Beit* and said that a mere claim by one party, that something is or ought to have been the position, does not amount to a dispute: **there must exist two or more parties who are in controversy with each other in the sense that they are advancing irreconcilable contentions.**

[22] It is, in my view, of importance **that s 102(2) of the Systems Act requires that the dispute must relate to a 'specific amount' claimed by the municipality. Quite obviously, its objective must be to prevent a ratepayer from delaying payment of an account by raising a dispute in general terms. The ratepayer is required to furnish facts that would adequately enable the municipality to ascertain or identify the disputed item or items and the basis for the ratepayer's objection thereto. If an item is properly identified and a dispute properly raised, debt collection and credit control**

measures could not be implemented in regard to that item because of the provisions of the subsection. But the measures could be implemented in regard to the balance in arrears; and they could be implemented in respect of the entire amount if an item is not properly identified and a dispute in relation thereto is not properly raised.

[23] Whether a dispute has been properly raised must be a factual enquiry requiring determination on a case-by-case basis. It is clear from clause 22.3 of the policy referred to above that the dispute must be raised before the municipality has implemented the enforcement measures at its disposal.”

[Bold font added for emphasis]

[20] In ***Ditsobotla Local Municipality v IGA Dada Properties***,² in applying what was stated by the Constitutional Court in ***Rademan v Moqhaka Local Municipality and Others***,³ the following was stated:

“[18] The court in Rademan supra stated that “a municipality is obliged to collect all money that is due and payable to it, subject to the Systems Act and any other applicable legislation.” It was the applicant’s responsibility to ensure that it takes all reasonable steps to ensure that the revenue due to it is collected and calculated on a monthly basis. The non-payment by debtors of their accounts has a direct negative impact on the appellant’s ability to deliver services to residents. Thus the appellant was entitled to take reasonable steps to collect debts due to the appellant.”

[21] It is trite law that the onus to prove valid payments rests on the debtor.⁴

EVALUATION

² [2018] jol 40382 (NW).

³ 2013 (4) SA 225 (CC).

⁴ **Pillay v Krishna and Another** 1946 AD 946 at 955B.

[22] It is convenient, within the facts and circumstances of this matter, to first deal with the purported validity of the respondent's pre-termination notice.

[23] The respondent alleges that its pre-termination notice was delivered to the property on 26 October 2022 by Messrs Radebe and one George.

[24] On that day Messrs Radebe and George enquired from a security guard at the gate of the premises to whom they could talk in relation to the pre-termination notice. The security took Messrs Radebe and George to an unidentified female individual who in turn informed them that one Ronel was the person to talk to. The unidentified individual went outside to call Ronel, who was smoking. They waited in a reception area and after a while an individual arrived and introduced herself as Ronel. She accepted the notice, after being requested to sign both the original and a copy thereof for purposes of acknowledgement of receipt. Ronel furthermore enquired from Mr Radebe whom she must contact regarding the notice, and when informed that she may contact Ms Selepe, she being employed in the debt collection department of the respondent, she told Mr Radebe that she knows Mss Selepe as they had corresponded in the past. Ronel further informed Mr Radebe that she has to refer the notice to head office in Johannesburg, because all payments are attended to thereat.

[25] In rebuttal of the facts, as aforesaid, the applicant denies that Ronel is employed whether by the applicant or the occupant tenant of the premises. In substantiation of this allegation the applicant lists by name all of its and the tenant's employees. The name Ronel is not amongst those names listed.

[26] To my mind, the onus rests of the respondent to allege and prove satisfaction of the provisions of sections 20(6) and 36(2) of its Credit Control Policy. Absent the satisfaction of the jurisdictional requirements provided for in these sections, the respondent's pre-termination notice is invalid and unavoidably renders the termination of its electrical services to the property improper and therefore unlawful.

[27] During argument, counsel for the respondent submitted that the pre-termination notice was delivered in accordance with the provisions of section 36(2)(b) or (c).

[28] The respondent's reliance upon the provision of section 36(2)(b) is, in my view, misplaced. The applicant is a company and cannot reside or have a place of residence. The applicant has its registered address situated at 10 Skeen Boulevard, Bedford View, Johannesburg. Service upon this address would obviously have sufficed.

[29] Insofar as the respondent relies on the provisions of section 36(2)(c) there is no evidence before me that the respondent nominated the premises as "*an address for legal purposes*".

[30] Moreover, and in any event, the probabilities illustrate that the pre-termination notice only came to the attention of the applicant on 30 November 2022. This being the date upon which the respondent's representative attended upon the property with the intention of disconnecting the municipal electricity supply thereto. The facts show further that immediately pursuant to the pre-termination notice coming to the applicants attention, its attorneys of record addressed a letter to Ms Selepe. By way of that letter the applicant's attorneys of record inter alia asserted the unresolved dispute in respect of the applicant's indebtedness to the respondent and significantly also demanded that the respondent demonstrate how the amount of R7 576 720.28 (it being the amount reflected in the pre-termination notice) can be due on the applicant's municipal account in circumstances in which the account totalled R7 636 563.75 at the time of the 28 July 2022 order. No response was received in respect of the letter aforesaid; instead the respondent proceeded to disconnect the municipal electrical services to the property. On 1 December 2022 a further letter was addressed by the applicant's attorneys to Mr Chauke (of the respondents attorney of record) and Ms Selepe in terms of which the applicant re-asserted the dispute, joined issue with delivery of the pre-termination notice and demanded the re-connection of the electrical services to the premises by 18:00 on 1 December 2022. The application was issued the very next day.

[31] On the facts before me, and over and above the findings made in paragraphs 28 and 29 above, I additionally find that the further jurisdictional requirements for the delivery of a valid pre-termination notice have not been satisfied and that the respondent has failed to discharge the onus which rests upon it on this score. Who Ronel is and why she would have said that which she did to the respondent's representatives responsible for the delivery of the pre-termination notice is unclear. What is, however, clear is that Ronel is not the applicant's agent, she does not reside at the property and she is not employed either by the applicant or the applicant's tenant. The respondent bears the onus of pleading and proving the satisfaction of the jurisdictional requirements relevant to delivery of the pre-termination notice. It has failed to discharge the same.

[32] Lest my findings in respect of the invalidity of the delivery of the pre-termination notice be incorrect, which I do not suggest to be the case, I deal briefly with the aspect of whether or not the applicant has made payment of the undisputed municipal charges to the respondent.

[33] The respondent's case, simply put, is that it accepts that a substantial portion of the applicant's indebtedness to it is disputed. However, the respondent denies that the applicant has made payment of its undisputed indebtedness to it and is accordingly on this basis entitled to disconnect the municipal electrical services to the property.

[34] In support of the proposition, as aforesaid, the respondent relies on a tax invoice relevant to the applicant's account with it. The invoice is in respect of the period 18 October 2022 to 22 November 2022.

[35] The first entry reflected on such invoice reflects the amount of R7 576 720.28, this being the precise amount recorded in the respondent's pre-termination notice. How this amount is calculated is not apparent from such invoice.

[36] The remainder of the entries on the invoice reflect the municipal charges rendered by the respondent on 22 November 2022 which are in respect of interest charges levied by the respondent in respect of refuse removal, sanitation repairs, arrears sundries, rates and water and the levies in respect of sanitation, water and refuse (together with VAT thereon). The monthly interest levied on these charges amounts to approximately R53 500.00. The balance of the monthly charges reflected in the invoice, which the respondent argues to be uncontested, amounts to approximately R20 000.00. These uncontested entries were only charged long pursuant to the respondent's pre-termination notice which was, as I have explained, dated 25 October 2022. The uncontested charges for the months of August, September and October 2022 are, for example, not reflected.

[37] The respondent in further support of its proposition that the uncontested charges have not been paid additionally attaches a screenshot of its billing system. The screenshot reflects that the last payment that the applicant made to it was in the month of December 2021 in the amount of R537 918.37.

[38] The applicant explains that the amount of R537 918.37 was effected pursuant to a deposit request for clearance certificates in that amount and that the respondent has inappropriately allocated this payment to the disputed amount in contravention of section 102 of the MSA. This is in circumstances in which the charges raised to the account, in the intervening periods, do not exceed R537 918.37 given that they ostensibly amount to approximately R20 000.00 per month.

[39] Mindful of the principles set forth in judgments of *Ngqumba en 'n Ander* in paragraph 17 above and *Euphorbia (Pty) Ltd t/a Gallagher Estate* in paragraph 18 above, the respondent has unavoidably failed to discharge the onus's which it bears in alleging and proving a defence and placing evidence before the court evidencing the **"correctness of its meters, the measurements of water consumption and statements of account rendered pursuant thereto."**

[40] The respondent's reliance upon the tax invoice and screenshot, as aforesaid, can therefore not assist it in its attempted resistance of the present application. The respondent's pre-termination notice reflects the purported indebtedness of the applicant to the respondent as at 25 October 2022 in the amount of R7 576 720.28. There is no evidence before me which illustrates the manner in which said amount calculated by the respondent and its allocation of the amount of R537 918.37 is in contravention of section 102 of the MSA. On the papers before me, I accordingly find that the applicant has made payment of its undisputed charges to the respondent and discharged the onus which rests upon it in this regard.

CONCLUSION

[41] I am satisfied that the applicant has made out a case for the relief that it seeks by of Part B of the notice of motion. The relief sought in prayer 2 of the notice of motion follows by operation of law and there is no need for an order on this score. Given the subsequent reconnection of the municipal electrical services to the property, an order in accordance with prayer 2 of the notice of motion is also unnecessary.

[42] There exists no valid reason(s) why costs should not follow the result, which includes the costs of 2 December 2022.

ACCORDINGLY, I MAKE THE FOLLOWING ORDER:

1. It is declared that the respondent's conduct in disconnecting the municipal electrical services on 1 December 2022 to the property described as Erf [...] Bloemfontein E [...] [...] Township, Registration Division Bloemfontein Road, Free State, with municipal account number [...], is unlawful.
2. The respondent is to pay the costs of this application, including the costs of 2 December 2022.

S. TSANGARAKIS, AJ

On behalf of the Applicant: Adv H.J. Van der Merwe

Instructed by: Jacobs Fourie Attorneys
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On behalf of the Respondent: Adv J.J. Buys

Instructed by: Rampai Attorneys
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