



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

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No: **630/2023**

In the matter between:

SILVER MANOR PROP (PTY) LTD

Applicant

and

THE MATJHABENG LOCAL MUNICIPALITY

Respondent

CORAM: HEFER AJ

HEARD ON: 5 OCTOBER 2023

DELIVERED ON: 22 NOVEMBER 2023

- [1] The Applicant is the registered owner of immovable property situated in Welkom, Free State Province. This property is a warehouse used mainly for storage in respect of the Applicant's day-to-day business operations.

[2] The electricity supply to the aforesaid property is regulated through a pre-installed metering system by the Respondent, which the Respondent installed at the property.

[3] It is common cause that on the 10th of February 2023 Respondent disconnected the electrical supply to the property. After the Applicant approached the Court on an urgent basis, a *Rule Nisi* was issued in the following terms:

“4.1 That the Respondent is ordered to restore the electricity supply to the Applicant's immovable property forthwith upon service of the court order on the Respondent;

4.2 The Sheriff of the High Court is authorised to take any and all actions as are necessary to give effect to the reconnection of the electrical supply to the premises should the Respondent fail to adhere to the terms as set out in the order;

4.3 The Respondent is interdicted and restrained from disconnecting the electricity supply to the premises pending the outcome of the dispute resolution processes and/or declaratory proceedings envisaged in paragraph 4.4 below;

4.4 The Applicant is ordered to lodge a formal dispute against the electricity charges billed on his tax invoice and/or electricity fees bill in respect of such charges issued by the Respondent, in terms of Section 11 of the Respondent's officially adopted debt and credit control policy, as instituted from date of confirmation of the *Rule Nisi*;

- 4.5 *Alternatively, to 4.4 above, that the Applicant, within 30 days from date of finalization of this application, be ordered to institute declaratory proceedings against the Respondent relevant to its indebtedness to the Respondent, failing which the relief granted in paragraphs 4.1, 4.2 and 4.3 shall lapse; and*
- 4.6 *The Respondent is ordered to pay the costs of this application."*

[4] The matter now served before me to confirm the above *Rule Nisi*.

Applicant's case:

- [5] According to the Applicant, the disconnection of the electricity supply to the property concerned, was done without any prior notice by the Respondent to the Applicant.
- [6] According to the Applicant, the Respondent is bound by its adopted Debt Control Policy and By-laws. In terms of these By-laws and Policy, a mandatory pre-disconnection notice is prescribed in terms of which a period of seven days is to be given by the Respondent prior to the disconnection of the electricity supply to a consumer.
- [7] The Policy and By-laws further set out the process to be followed by the Respondent to rectify estimates contained in its records and/or invoices. It is Applicant's case that the Respondent has failed to render any tax invoices in

respect of electricity supply to the Applicant for the past twelve months and was subsequently advised by the Respondent's officials that the consumption of the property has been estimated for the past months, the Respondent had failed to physically obtain the readings from the Applicant's meter and thus estimates its consumption on a monthly basis.

- [8] It is Applicant's case that Respondent has not adhered to its own policies by acting as described above and that the disconnection based on estimates is unlawful. The Respondent further contends that the decision to disconnect the supply is one of an administrative nature. This implies that should a decision have been taken it should have been effected in a fair manner, *inter alia*, affording the Applicant the seven days' notice of such intent, supplying all the relevant information necessary to evaluate such intent and giving the Applicant an opportunity to respond to such notice. Irrespective of the aforesaid, it is Applicant's case that the Applicant in any event still made its payment of R10,000.00 per month towards the bill, irrespective of not being furnished with accurate billing figures. The Applicant then attached proof of payments by the Applicant to the Respondent for the preceding three months to its founding affidavit.

Respondent's case:

- [9] It is the Respondent's case that in terms of the Respondent's Credit Control and Debt Collection Policy, failure to receive tax invoices does not absolve a ratepayer / customer from his/her payment obligations. Further, according to the

Respondent, the policy further provides the procedure to follow when a customer doesn't receive an account. It therefore follows that the non-render of tax invoices is of no consequence.

[10] The Respondent further contends that the Respondent is allowed to estimate readings in accordance with the said policy. The Respondent in any event alleges that the Applicant had their meters read and its account reconciled on 25 January 2023 before a disconnection notice was issued. Instead of approaching the Municipality to lodge a dispute, the Applicant waited until the supply to its electricity was disconnected to approach the Court, as per the Respondent.

[11] In respect of the Applicant's payment, relied upon by the Applicant itself, the Respondent maintains that the said policy has been implemented due to the Applicant's arrears account. The Applicant's accounts in respect of electricity, water, sewage, tax and rates were consolidated and are presently still in arrears.

[12] In respect of Applicant's allegation to the effect that the disconnection of the electricity supply has been effected without prior notice to the Applicant, the Respondent denies such fact.

[13] The Respondent alleges that the 2020/2021 document upon which the Applicant relies in regards to the policy, has been amended / revised and has therefore become absolute. In terms of the latest revised policy, it is dictated that in the event of disconnected, notice must be given at least fourteen days prior to

disconnection. The Respondent admits that it is bound by its policies, but converse it is applicable to its residents including the Applicant.

Respondent's authority to act – Rule 7:

[14] Subsequent to the opposing affidavit being filed by the Respondent, Applicant filed a notice in terms of Rule 7 in terms of which the Applicant disputed the authority of the deponent to the Respondent's answering affidavit to oppose the application on behalf of the Respondent and to act on Respondent's behalf. This challenge to the authority of the deponent, needs to be dealt with first.

[15] The deponent to the Respondent's answering affidavit is Adv L Ngoqo, the Municipal Manager of the Respondent.

[16] In response to the Applicant's Rule 7 notice, the Respondent filed a document containing certain resolutions taken by the Council of the Respondent, on 31 March 2015. In this document, it appears that on the said date, it was resolved that the Municipal Manager was given the power to *"consider and take whatever action he MAY DEEM(sic) necessary in all legal actions, legal applications and arbitrations"*.

[17] After the Respondent has filed its response to the Rule 7 notice, Adv Roux, on behalf of the Applicant, filed his Supplementary Heads of Argument dealing with Respondent's reply to the Rule 7 notice. It is not necessary at this point to deal

fully with the submissions made by Mr Roux in his Heads of Argument. What is important at this stage is to mention that in his Heads of Argument the submission, amongst others, was made on behalf of Applicant on this point, that in terms of Section 59 of the Municipal Systems Act, 3 of 2000 dealing with Council's power of delegation, a delegation or instruction, *inter alia*, "*must be reviewed when a new council is elected or, if it is district council, elected and appointed*".¹

[18] The submissions on behalf of the Applicant in this regard was that the provisions of Section 59(2)(f) are peremptory. Thus, the 2015 Council Resolution delegations relied upon by Respondent, lapsed after the 2021 Municipal Elections. The delegations should have been reviewed.

[19] Subsequent to these Heads being filed, and on 11 August 2023, the Respondent filed a further response to the Applicant's Rule 7 notice. The further response consisted of the following:

(a) The Council Resolution pertaining to the appointment of Adv LR Ngoqo as the Municipal Manager;

(b) Excerpts of the system of delegation; and

¹ Section 59(2)(f), Act 3 of 2000.

(c) Extracts of the Council Resolution dated 7 August 2023, regarding the adoption of the system of delegation of power for Matjhabeng Local Municipality.

[20] Although the Court does not have the benefit of any explanatory affidavit pertaining to the supplementary documents that were filed, it is assumed that the Respondent relied on paragraph 4 of the Council Resolution stating that:

"4. All decisions taken under the previous delegation remain in force."

[21] On behalf of the Applicant, I was referred to a judgment by Molitsoane J in the matter of **Matjhabeng Local Municipality v MC Security & Investigations and Others**². In that matter the Respondent also relied on a 2015 Council Resolution, apparently the same Council Resolution which was now placed before Court. In this regard, Molitsoane J held as follows:

[8] The resolution of the Council of the delegation in terms of the Delegated Systems of Powers in this case was clearly not intended to be indefinite. Such delegation was clearly tied to the term of the Council. Section 159(1) of the Constitution provides that the term of office of the Municipal Council may not exceed five years. The resolution was clearly in line with the Constitution. The next Council, post 2021, was at liberty to resolve and delegate some of its powers in line with Section 59." (my

² (962/2023) ZAFSHC 284 (24 July 2023)

own emphasis). *"There is no evidence before me indicating that such was done.*

*[9] I am of the considered view that, in the absence of a Council Resolution, or delegated powers, it cannot be said that the Municipal Manager was properly authorised to institute this application. It is unnecessary in my view to deal with the arguments raised by Applicant with regard to the purported authorisation emanating from the Delegated Systems of power in view of the finding I made that there was non-compliance with Section 59 of the Systems Act. The delegated systems of powers relied upon by the Applicant does not assist it as its period has expired."*³

[22] *Adv Ngubeni*, appearing on behalf of the Respondent, referred me to two authorities dealing with ratification in the event of lack of *locus standi*. The first is the matter of **Robert Thornton Smith v Kwanonqubela Town Council**⁴. In this matter, Harms JA held as follows:

"It is a general essential for a validated notification that there must have been an intention on the part of the principal to confirm and adopt the authorised acts of the agent done on his behalf, and that intention must be expressed either with full knowledge of all the material circumstances, or with the object of confirming the agent's actions in all events what ever

³ par. [8] and [9]

⁴ Unreported read on 19 August 1999, delivered on 10 September 1999 (SCA)

the circumstances may be (Reid and Others v Warner 1907 TS 961 at 970 en fin – 972). Counsel for Smith submitted that there is no evidence of councillors of the transitional council acknowledge of the fact that Dobson's action has been unauthorised and, consequently, that the purported ratification was of no effect. I do not think, on the wording of the state of facts, that this argument is open to Smith. In any event, the minutes of the meeting stated that the matter was discussed in full and, further the decision to proceed with the case evinces a clear intention to ratify whatever action was taken, irrespective of the legal necessities involved."

[23] In the second matter referred to by Me Ngubeni, namely **Motlatsi Barnabas Molefi v Dihlabeng Local Municipality and 5 Others**⁵ Hancke J, dealing with *ex post facto* ratification, also referred to the matter of **Reid and Others v Warner** (supra)

[24] The further notice filed by the Respondent in terms of Rule 7 notice, dated 11 August 2023, refers to an extract from a Special Council Minutes, dated the 7th of August 2023 which shows that on the 7th of August 2023 Council resolved that:

"1. Council adopts the system of delegation for Matjhabeng Local Municipality as reviewed.

⁵ Unreported (Case no. 1885/2003) heard on 31 July 2003, delivered on 14 August 2003 (FS)

2. *Council authorises the Municipal Manager to align a system of delegation to the macro structure of the Municipality (sub-delegations to officials).*
3. *Council authorises the Municipal Manager to publish the system of delegation on the Municipality's internet.*
4. *All decisions taken under the predecessor of delegations remain in force.*
5. *Council authorises the Municipal Manager to conduct workshops for councillors and staff members on the system of delegation.*
6. *The Executive Mayor must report annually on all delegated authority."*

[25] It is important to note that this resolution was now taken not only after the present deponent to the opposing affidavit deposed to such affidavit, but also after Applicant's filing of its first Supplementary Heads in regards to the Rule 7 notice as well as the judgment of Molitsoane J (in which it had been held that the same Municipal Council's delegation of powers was not effective for the term after 2021). The finding by Moletsane J, means, effectively, that for the period 2021 up until 7 August 2023 there had not been any reviewed delegation of powers for the period onwards, i.e. from 2021 till August 2023.

[26] Unlike however in the judgment of Judge Molitsoane referred to, the Respondent has now filed a further council resolution approving or delegating powers referred to the delegation of powers, after the year 2021. It is highly unsatisfactory however, that the Respondent has failed to approve such reviewed delegation of powers for approximately two years since the last Municipal election. It was only

after it was confronted with the judgment of Molitsoane J as well as the present Rule 7 notice, that the Respondent has chosen to approve such reviewed powers as envisaged in Section 59(2)(f). This is yet another example of the manner in which many of the spheres of local government, conducts business.

[27] It must be accepted, however that for purposes of ratification, the Respondent, on the 8th of August 2023, when it resolved as discussed above, must have had knowledge of the present application and the present challenge to the deponent's, being the Municipal Manager's authority to depose to the opposing affidavit. Therefore, as expressed in the matter of **Reid and Others v Warner** (*supra*), there must have been an intention on the side of the Respondent to confirm and adopt the unauthorised actions of the Municipal Manager on its behalf with the object of confirming the agent's actions in all events.

Merits:

[28] It was the Applicant's case that the disconnection of the electrical supply to Applicant's property by the Respondent was done without any notice whatsoever. In answer to this, the Respondent denies such fact and in particular alleges that a disconnection notice was transmitted to the Applicant. The Respondent then refers to a notice attached to the opposing affidavit. The notice referred to and appended to the opposing affidavit relied upon by the Respondent is dated 26 January 2023 and is addressed to the Applicant at "9 Keerom Street, PO Box 1770 Welkom". In terms of this notice the Applicant was indeed "notified"

that the electrical supply to the property was to be disconnected on the 9th of February 2023. However, in so far as the manner in which the Applicant was notified of the intended disconnection of services, the Respondent further stated in the opposing affidavit that:

"The Respondent admits having disconnected its service to the Applicant but it was done after having served the Applicant a fourteen-day notice of such disconnection."

The Respondent then further adds:

"It is clear that a notice was duly furnished and the Applicant elected not to lodge a dispute but ran to Court for reasons known only to it."

[29] Mr Roux referred me to Section 7 of the Debt Control Policy and By-laws, in terms of which it is specified that the Respondent has to give seven days' notice, prior to the disconnection of electricity supply to an account holder if an account has not been paid on the due date by delivering, by hand, the notice at the address of the debtor's *domicilium citandi et executandi*. As indicated, Ms Ngubeni referred to a new revised policy in terms of which the seven day notice period has been amended to fourteen days.

[30] Mr Roux, argued the Respondent persists in its submission that a 14-days' notice has been given to the Applicant, prior to the disconnection of electrical supply, yet it does not bolster the alleged service.

[31] I was also referred to Section 115 of the Local Government: Municipal Systems Act 32 of 2000 which provides as follows:

"115 Service of documents and process.

(1) A notice or other document that is served on a person in terms of this act or by the Municipality in terms of any legislation is regarded as having been served –

(a) when it has been delivered to that person personally;

(b) when it has been left at that person's place of residence or business in the Republic with a person apparently over the age of 16 years;

(c) when it has been posted by registered or certified mail to that person's last known residential or business address in the Republic and an acknowledgement of the posting thereof from the postal service is obtained."

[32] I must agree with the submissions on behalf of the Applicant. In regards to the notice to the Applicant, the Respondent uses vague terms such as *"transmitted to the Applicant"*, *"having served the Applicant a four day notice"*, and *"a notice was duly furnished"*. As indicated to Ms Ngubeni during argument, one would expect some particularity of how this notice was brought to the attention of the

Applicant, which the Respondent has failed to provide. Proof of how the relevant notice was dealt with to bring it to a consumer's attention, although not by sheriff, is similar to that of serving Court processes in terms of the Uniform Rules of Court. I say this in view of the particular manner of service provided for in Section 115 of the Local Government Systems Act. A Court should at least be satisfied that, *prima facie*, the required notice had been brought to the attention of the consumer prior to the disconnection of services. Therefore, whereas, the Respondent has failed to provide any details in this regard, I am not satisfied that proper notice had been given to the Applicant.

[33] In **Joseph and Others v City of Johannesburg and Others**⁶ the Constitutional Court said the following in regards to such notice to a consumer of electrical supply rendered by a local authority:

"... It must afford the applicants sufficient time to make any necessary enquiries and investigations, to seek legal advice and to organise themselves collectively if they so wish."

[34] If the Applicant has not received such notice, it was not afforded the opportunities referred to. The Respondent had failed to give due notice of its intention to disconnect the electricity supply and therefore the Applicant was justified in bringing an urgent application for the reconnection of its electricity supply and

⁶ 2010 (4) SA 55 (CC)

the ancillary relief. I am further satisfied that the Applicant has made out a case for a final interdict.

Therefore, I make the following order:

The *Rule Nisi* dated 13 February 2023 is confirmed to read as follows:

1. The Respondent is ordered to restore the electricity supply to the Applicant's immovable property at 9 Keerom Street, Welkom (the premises) forthwith upon service of this Court Order on the Respondent;
2. The Sheriff of the High Court is authorised to take any and all actions as are necessary to give effect to the reconnection of electrical supply to the premises should the Respondent fail to adhere to the terms of paragraph 1 hereof.
3. The Respondent is interdicted and restrained from disconnecting the electricity supply to the premises pending the outcome of the dispute resolution processes and/or declaratory proceedings envisaged in paragraphs 4 and 5 hereof;
4. Applicant is ordered to lodge a formal dispute against the electricity charges billed on its tax invoice and/or electricity fees bill in respect of such charges issued to it by the Respondent, in terms of Section 11 of the Respondent's officially adopted debt and credit control policy, alternatively, to institute declaratory proceedings against the Respondent relevant to its indebtedness,

within 30 days from the date of the order herein, failing which the relief granted in paragraph 3 shall lapse;

5. The Respondent is ordered to pay the costs of the application.



J J F HEFER, AJ

Appearances on behalf of the Applicant:

Adv L A Roux

Instructed by:

Kruger Venter Incorporated
Bloemfontein

On behalf of the Respondent:

Adv K Ngubeni

Instructed by:

Tshangana & Associates Inc.
Bloemfontein