



**IN THE HIGH COURT OF SOUTH AFRICA, NORTHERN CAPE DIVISION,
KIMBERLEY**

Not reportable
Case No: 1572/2022

In the matter between:

CARELINE CLINIC (PTY) LTD

APPLICANT

and

AL-KANT OPBERGERS EN VERPAKKERS CC

FIRST RESPONDENT

**MVD KALAHARI CONSULTING ENGINEERS
AND TOWN PLANNERS (PTY) LTD**

SECOND RESPONDENT

SOL PLAATJE MUNICIPALITY

THIRD RESPONDENT

Heard: 12 August 2022

Delivered: 09 September 2022

JUDGMENT

Phatshoane DJP

Introduction

- [1] Careline Clinic (Pty) Ltd, the applicant, approached this Court on an urgent basis for an order that Al-Kant Opbergers en Verpakkers CC (Al-Kant), MVD Kalahari

Consulting Engineers and Town Planners (Pty) Ltd (MVD), and Sol Plaatje Municipality, the first, second and third respondent (collectively referred to as the respondents) and any person acting through them be interdicted from laying electricity cables or erecting service connection below the ground on its premises situated at R31 Provincial Road, El Toro, also known as Erf 43870, Kimberley; further interdicting the said respondents from connecting electrical cables to its ring main unit (RMU)¹ switch house or to enter and or trespass on the said property. Only Al-Kant resisted the application whereas the municipality filed a notice to abide the decision of the Court.

- [2] The relief sought, in my view, is sufficiently urgent to warrant being heard on a truncated basis. Should the application be disposed of in the ordinary course its purpose may be defeated, and the relief rendered moot. Although the order sought was initially on an interim basis, pending the determination of the application on the return day, it is now final in effect. This is so because on the date of the hearing of the application all the necessary affidavits, albeit on suitably abridged time periods, had been filed and the issues fully ventilated through argument. Certain preliminary points were also raised in the parties' respective papers which sought to attack the authority and standing of the deponents. At the hearing of the application, these were not persisted in.
- [3] I firstly consider the relief. The applicant's prayer that the respondents be interdicted from laying electricity cables or erecting service connection below the ground on its premises, so too, a prayer that they be denied access to its premises for purposes of laying electrical cables has simply no basis. It is an express condition of the applicant's Deed of Transfer: T889/2013 that it would be obliged, without compensation, to allow electricity cables and wires to be conveyed across the erf and that the municipality would have the right of access to the erf at any reasonable time for purposes of constructing any works. Condition B of the said title deed is couched in these terms:

¹ Electrical power distribution system (referred to by the applicant as an electrical substation.)

'SUBJECT to the following condition as imposed and enforceable by Sol Plaatje Municipality, namely:

1. The owner of this erf shall, without compensation, be obliged to allow electricity, telephone and television cables and/or wires and main and/or other water pipes and the sewage and drainage, including storm water of any other or even inside this township to be conveyed across the erf, if deemed necessary by the local or other statutory authority and in such manner and position as may from time to time be reasonably required. This shall include the rights of access to the erf at any reasonable time for the purpose of constructing, altering, removing or inspecting any works connected to the above.'

[4] The municipality has reserved, in its favour, a right in the nature of a personal servitude registered against the applicant's title deed, enduring for an indeterminate period, and enforceable against the applicant.² On the papers before me, there is no indication that the applicant had previously made an application for the removal of the restrictive condition nor is the right registered against the title under any attack in these proceedings.

[5] In any event, s 139(1)(c) of Municipal Ordinance 20 of 1974 (the Ordinance) provides that a council may, within or outside its municipal area, construct, erect and lay any public sewer, public drain, water main, gas main or electricity main on, across, through, over or under any street or immovable property and the ownership of any such sewer, drain or main shall vest in the municipality. An "electricity main" means conduits, cables or other things for the conduction or transmission of electricity by or on behalf of a municipality to consumers and includes all things of whatsoever nature necessary or desirable for or incidental, supplementary or ancillary to an electricity main.³ Section 176 (1)(a) of the Ordinance further provides that '(e)very council shall, through its councillors, employees, contractors and their assistants and advisers, have access to or over any property for the purposes of doing anything authorised or required to be done by the council under the ordinance *or any other law*. However, s 176(3) provides that '(a)n employee of a council authorised thereto by such council may, by notice

² *Vestin Eshowe (Pty) Ltd v Town Council of The Borough of Eshowe* 1978 (3) SA 546 (N) at 549H.

³ Section 2 of Municipal Ordinance 20 of 1974.

in writing served on the owner or occupier of any property, require such owner or occupier to provide, on the day and at the hour specified in such notice, access to such property to a person and for a purpose referred to in subsection (1).

- [6] The relief which lies at the heart of the contestations is that of prohibiting the respondents from connecting electrical cables to what the applicant alleges to be its RMU. It should be considered whether the RMU, that is situated in the applicant's premises, belongs to it or the municipality. As I see it, if it is found that the RMU belonged to the applicant, it follows that the municipality could not give consent to Al-Kant and MVD to dig the trenches, as it did, at the perimeter fence and to lay cables to the RMU of the applicant for purposes of connecting electricity, without the applicant's knowledge and its concurrence. The determination of the application is therefore to be devoted to this aspect.
- [7] The background is largely common cause. On 29 August 2012 Sol Plaatje Local Municipality (the third respondent/ municipality) approved the applicant's application to purchase and install the metered RMU on, *inter alia*, the following conditions:

'Similarly, with regarding to the purchasing of the metered ring main unit, this Sub-Directorate Electrical Service *will permit you to purchase and install* the non-extendable 11k V RMU with bulk metering unit, which is to comply with all municipal specification as stipulated by the yearly tender, which can be obtained by the distribution superintendent MR, Faud Aysen telephonically at 053.....

All technical specifications and standards [are] to be first submitted to this Sub-Directorate Electrical Services for verification and approval before the metered ring main unit is purchased by your company. However, the bulk meter would have to be installed and commissioned by technical staff from this municipality as it will be maintained and serviced by the municipality.

Furthermore, *permission will be granted for your company on behalf of your client to the purchasing and installation* of the two 11k V 70mm² x 3Core Copper P.V.C. table 19 steel wired armoured cable including the individual 50mm squared solid earth wires to be installed with these two individual 11k V cables, that would also have to be verified and approved by the Distribution Superintendent before purchasing and installing.

The concrete slabs to be installed over these to individual 11k V cables for [their] full length are also to meet all municipal standards and specifications.

The 11k V cable trench route from the MacDougall Street 66/11k V sub-station to the proposed ring main unit switch house would have to be set out and determined on site where all municipal standard and specification regarding the digging and preparation of this cable trench is to be adhered to and is to be inspected by distribution superintendent M, Faud Aysen before and after closure.

Technical staff from the Sub-Directorate Electrical Services would be responsible for termination of the 11k V cable ends within the sub-station and the joining of the installed 11k V cable ends as installed by your registered appointed electrical contractor and will also [include] the purchase and installation of the 11k V metal clad switch breaker at MacDougall Street main 66/11 k V sub-station and bulk metering point, once a scaled site location has been [finally] determined.

The client would be required to pay a registration fee amount of R 205,702.52 (VAT included) at the rate hall ground floor of the new wing at the Sol Plaatje Municipality before the permanent electrical supply point will be energized to the site including all other outstanding municipal costs.

It will also be your responsibility to make the necessary way leave application to the municipal water work and sanitation section regarding the position and location of [the] individual services including Telkom services.'(My emphasis)

- [8] On 21 July 2022, Dr Netsa Keith Kirimi, the applicant's manager and its deponent, observed that trenches leading to the perimeter fence of the applicant had been dug. On his investigative work, it became known to him that Al-Kant was developing a residential complex opposite Gariep Private Hospital and that MVD was Al-Kant's electrical consulting engineers responsible for digging the trenches. Mr Jonck of MVD informed Dr Kirimi that MVD intended to lay electrical cables in those trenches in order to connect them to the RMU erected by the applicant on its premises with the applicant's financial resources and the concurrence of the municipality. The project undertaken by MVD in this regard is intended to supply electricity to the residential development adjacent to Gariep Private Hospital. According to Dr Kirimi, it was important for the applicant to erect the RMU on its premises for the convenient supply of electricity to its facility, its optimal functioning, and its anticipated future growth with regard to its proposed

46-bed facility and staff accommodation. The applicant's neighbouring Gariep Private Hospital and Kimberley Mental Hospital have erected their RMUs.

- [9] Mr Petrus Arnoldus Els, a member of Al-Kant and its deponent, says that the RMU in issue is the property of the municipality and fell under its control. The fact that the applicant bore the costs of the installation of the RMU infrastructure did not confer upon the applicant any right to the infrastructure. He states that if the applicant's electrical requirements were to increase beyond the supply already approved by the municipality, it would have to apply for the increase from the municipality.
- [10] Mr Els further states that the RMU in issue, although it is situated inside the applicant's premises, it is adjacent to the perimeter fence to enable the municipality, its workers and contractors approved by it, to gain easy access to the RMU in order to conduct maintenance, repairs, upgrades and to connect additional electrical cables when the need arises. Mr Els further asserts that should the relief sought be granted Al-Kant stood to suffer prejudice as it had spent in excess of R30 million in respect of its project. In addition, third parties have already purchased properties in the development which will be transferred to them once all the bulk services in respect of the development had been installed and approved by the municipality.
- [11] Whether the municipality granted Al-Kant permission to connect electrical cables to the RMU situated in the applicant's premises is a bit nebulous. Dr Kirimi states that Mr Oren Groenewalt of the municipality denied that such permission had been granted at the meeting he had with him on 28 July 2022. In its answering affidavit Al-Kant attached various correspondence from the municipality in terms of which, it averred, permission had been granted. I could find no such explicit authorisation. However, in the municipality's Notice to abide the decision of this Court, Mr Groenewalt attested to an affidavit wherein he stated that the approval was granted to Al-Kant on condition that it would be responsible for the full cost of a new 95 mm² x 3 Core PILC 11kv/6 35 kV Copper (table 17) cable from the present ABB RMU situated in the applicant's premises. On further enquiries by the applicant, regarding the authority granted to Al-Kant, and by extension MVD,

the municipal manager on 03 August 2022 confirmed that Al-Kant was permitted to dig the trenches because it had applied for a way leave on 8 February 2022 in terms of s 10 Chapter 2 of the Municipal By-Law⁴ on general conditions of supply.

- [12] On 03 August 2022 the applicant's legal representative sought an undertaking from the municipality that Al-Kant would not connect electricity from its RMU but from the MacDougall Street main 66/11 k V substation. The e-mail was not responded to. The applicant submitted that it is currently servicing a loan it acquired to build the hospital and the RMU. In order to have electricity supplied to its hospital it dug trenches and laid electrical cables from MacDougall Street main 66/11 k V substation, approximately a kilometre from the applicant's premises, at a great financial expense. It can conceive of no reason why Al-Kant and MVD ought not to have done the same.
- [13] The requisites for the right to claim a final interdict are trite. The applicant must show a clear right, injury actually committed or reasonably apprehended, that is, an unlawful infringement (actual or threatened) of the applicant's clear right, and the absence of similar protection by any other ordinary remedy.⁵
- [14] It was contended for the applicant that the municipality does not have the authority to grant Al-Kant permission to connect electrical cables to its RMU switch house without the consent of the applicant and that Al-Kant did not comply with the Sol Plaatje Municipality Electricity By-Law No 10 of 2006 (the By-law). Al-Kant's stance is that following the applicant's erection of the RMU the municipality became the owner thereof and is entitled to add new electricity connections to the RMU in accordance with its overall planning of infrastructure as well as the approved applications for new electricity supply. As support for this argument, Al-Kant relies on s 23 of the Electricity Regulation Act 4 of 2006 (the ERA) read with s 46 of the By-law.

⁴ Sol Plaatje Municipality Electricity By-Law No 10 of 2006.

⁵ *Setlogelo v Setlogelo* 1914 AD 221 at 225-226.

[15] What is immediately conspicuous from the correspondence referred to earlier, in terms of which the municipality granted permission to the applicant to erect the RMU switch house on the applicant's premises, is that the municipality never mentioned that, albeit the applicant was the purchaser of the electricity infrastructure, the municipality retained ownership thereof. Neither was the applicant informed that the municipality may connect additional electrical cable to the RMU when the need arises as suggested by Al-Kant. The protection of property interests and the legitimacy of state interferences with property must be understood – and weighed against each other – with reference to constitutional principles, goals and values.⁶

[16] Section 23 of the ERA provides:

'23 Electricity infrastructure not fixtures

(1) Any *asset belonging to a licensee that is lawfully constructed, erected, used, placed, installed or affixed to any land or premises not belonging to that licensee, remains the property of that licensee notwithstanding the fact that such an asset may be of a fixed or permanent nature.*

(2) An asset belonging to a licensee in terms of subsection (1)-

(a) may not be attached or taken in execution under any process of law, or be the subject of any insolvency or liquidation proceedings, instituted against the owner of the land, the landlord or the occupier of the premises concerned;

(b) may not be subjected to a landlord's hypothec for rent; and

(c) may only be validly disposed of or otherwise dealt with in terms of a written agreement with the licensee.'

[17] Section 22 concerns powers of entry and inspection by the licensee. It states that:

'(1) Any person authorised thereto by a licensee may at all reasonable times enter any premises to which electricity is or has been supplied by such licensee, in order to inspect the lines, meters, fittings, works and apparatus belonging to such licensee, or for the purpose of ascertaining the quantity of electricity consumed, or where a supply is no longer required, or where such licensee may cut off the supply, for the purpose

⁶ Constitutional Property Law (Juta-e-Publications) AJ van der walt and GJ Pienaar, 3rd Ed-2011 ch3-p102.

of removing any lines, meters, fittings, works and apparatus belonging to such licensee.

(2) Any person wishing to enter any premises in terms of subsection (1) shall-

(a) if possible, make the necessary arrangements with the legal occupant of the premises before entering such premises and shall adhere to all reasonable security measures, if any, of the occupant or owner of the premises;

(b) exhibit his authorization at the request of any person materially affected by his activities.

(3) Damage caused by such entry, inspection or removal shall be repaired or compensated for by the licensee.'

[18] Section 23(1) of the ERA creates an exception to the principle of accession in that none of the auxiliary things that are attached to the land or premises of an owner will become their property.⁷ The difficulty with the respondent's submission is that the RMU in issue was not an asset that belonged to the municipality. I do not read s 23 to bestow ownership of the RMU (the assets) on the municipality in circumstances where the latter had not purchased the assets in issue and or the fixture concerned had not been constructed, erected or placed or affixed by it. As stated, the applicant's subjective intention was to erect the RMU on its premises for the convenient supply of electricity to its hospital, its optimal functioning and its anticipated future growth and staff accommodation. In these circumstances, common sense or the prevailing standards of the society would not dictate that ownership of the assets adhere to the municipality.

[19] Section 46 of the By-Law featured prominently in the respective parties' contention. The applicant contends that there had been no compliance with the section whereas Al-Kant countervailed that, by virtue of s 46, ownership of the RMU resided with the municipality. Section 46 of the By-Law provides in part:

'(1) The consumer shall bear the cost of the service connection, as determined by the Municipality.

(2) Notwithstanding the fact that the consumer bears the costs of the service connection, ownership of the service connection, *laid or erected by the Municipality*,

⁷ The Law of Property, Silberberg and Schoeman's, 6th Ed, para 14.5.3.7 at 397.

shall vest in the Municipality, and the Municipality shall be responsible for the maintenance of such service connection up to the point of supply. The consumer shall not be entitled to any compensation from the Municipality in respect of such service connection.

(3) The work to be carried out by the Municipality at the costs of the consumer for service connection to the consumer's premises shall be determined by the Municipality or any duly authorised officer of the Municipality.

(4) A service connection shall be laid underground, whether the supply mains are laid underground or erected overhead, unless an overhead service connection is specifically required by the Municipality.'

[20] There is no dispute that the applicant paid the costs of the service connection which is defined in the By-Law as all cables and equipment required to connect the supply mains to the electrical installation of the consumer at the point of supply, being the municipality's electrical network. On the plain reading of s 46, it does not confer ownership of the electrical installation on the municipality. The Electrical Installation Regulations promulgated in terms of the Occupational Health and Safety Act, 1993⁸ are also silent on ownership of the electrical installation. However, they provide that the supplier (which would be the municipality), defined as a person who supplies or contracts or agrees to supply electricity to that electrical installation should be notified of the commencement of the installation work which requires a new supply or an increase in electricity supply capacity.⁹

[21] In *Setlogelo v Setlogelo*¹⁰ the Appellate Division held:

'*Prima facie*, the disturbance of a man's *bona fide* possession is such an injury to him as to justify the granting of an interdict. If such a disturbance takes place in circumstances which show that the trespasser honestly believes that he has a better right to possession than the occupier, or at all events, has an equal right, the Court would be justified in withholding the interdict until the relative rights of the parties have been decided by action. But where, as in the present case, the fact of the disturbance of a *bona fide* possession is not denied, and no single fact is adduced to show that the

⁸ Issued under Notice 31975 GOVERNMENT GAZETTE, 6 MARCH 2009.

⁹ See Regulation 8 *Ibid*.

¹⁰ *Ibid* fn 4 at 225-226.

trespasser had or honestly believed that he had, an equal right as, or a better right than, the occupier, the disturbance should be treated as an act of spoliation, and the parties should be replaced in the position in which they were before the act was committed. The interdict ought, in my opinion, to have been granted in order to place the parties in that position.

[22] The applicant does not claim that it has the right to supply and distribute electricity as Al-Kant sought to suggest. Neither is the applicant operating any generation, transmission or distribution facility as envisaged in s 7(1) of the ERA. Not only is the applicant the occupier of the land upon which the RMU is situated, but on its uncontradicted version, it erected the RMU and still pays for its installation. I am therefore of the view that the applicant established a clear right and satisfied all the requirements for the final interdict. Save to state that: '(I)t is not simply for the applicant to decide and instruct that the [municipality] must instruct [Al-Kant] and [MVD] to connect to the MacDougall substation,' nothing was placed before the court, by any of the respondents, in response to the applicant's averment that the respondents were not impeded from sourcing the electricity from the MacDougall Street point of supply, where the applicant was also permitted to acquire its electricity supply.

[23] It ought to be emphasised that in terms of s 153 of the Ordinance, where any work in respect of the provision of services¹¹ necessitates interference with or alteration to any works for the distribution of water, gas or electricity (as it appears to be the case here) owned by some person other than a council, the necessary work for the protection or alteration of such works shall be carried out by such person at the cost of the council and any dispute as to the amount of such cost shall be determined by the Administrator. Section 140(1) of the Ordinance obliges the council, before commencing any work other than repairs or maintenance on or in connection with any municipal service works within its municipal area on immovable property not owned by it or under the control or management of the council, to give the owner and occupier of such a property

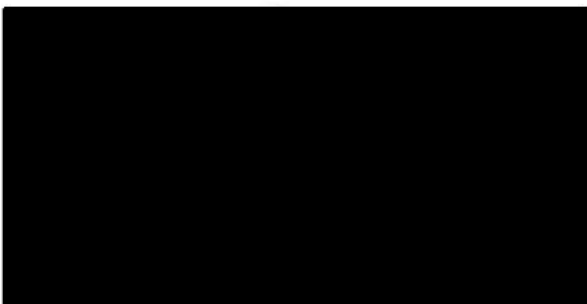
¹¹ Chapter XI, Part 1, Provision of Municipal Services (Sewerage, Drainage, Water, Gas and Electricity).

reasonable notice of the proposed work and the date on which it proposes to commence such work.

[24] The municipality's action, in granting permission to Al-Kant and MVD to acquire electricity from the applicant's RMU without affording the applicant an opportunity to be heard, in the present constitutional setting, is untenable. As already said, any relief that the respondents be restricted from laying electricity cables or erecting service connection below grounds on the applicant's premises would be inimical to the conditions registered against the title and must fail. However, any such acts done, solely for the purposes of connecting the electricity cables to the applicant's RMU cannot be defensible. In my view, the applicant has achieved substantial success, therefore there can be no reason why it should be deprived of its costs. In the result, I make the following order:

Order:

1. Al-Kant Opbergers en Verpakkers CC (Al-Kant), MVD Kalahari Consulting Engineers and Town Planners (Pty) Ltd (MVD), and Sol Plaatje Municipality, the first, second and third respondent, and any person acting through them, are interdicted from directly or indirectly connecting- electrical cables to the ring main unit of the applicant or part thereof situated on Erf 43870, R21 Provincial Road, El Toro, Kimberley.
2. The first respondent is to pay the costs of the application.



MV Phatshoane DJP

APPEARANCES:

FOR THE APPLICANT:

Adv BM Babuseng

Instructed by: Lulama Lobi inc

FOR THE FIRST RESPONDENTT: *Adv AG Van Tonder*

Instructed by: Van De Wall inc.