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

Case No: 5270/2013

In the matter between:

RAINBOW BEACH TRADING 180 (PTY) LTD	Applicant
and	
MALUTI-A-PHOFUNG MUNICIPALITY	First respondent
RURAL MAINTENANCE FREE STATE (PTY) LTD	Second Respondent
FREE STATE DEVELOPMENT CORPORATION	Third Respondent

CORAM:	LEKALE, J
HEARD ON:	24 DECEMBER 2013
JUDGMENT BY:	LEKALE, J
DELIVERED ON:	6 FEBRUARY 2014

REASONS

INTRODUCTION AND BACKGROUND

[1] On the 24th December 2013 I granted an urgent motion for interim interdict restraining the first and second respondents from disconnecting electricity supply to the shopping complex leased by the applicant from the third respondent and undertook to furnish reasons on request by any of the parties. The second respondent has since directed such a request and these are, therefore, my reasons for the order in question.

[2] The applicant has been leasing a shopping complex known as Setsing Shopping Centre (the Shopping Centre) which accommodates formal and informal traders since 2007. The first respondent is a local municipality established in terms of Local Government: Municipal Structures Act 117 of 1998 and which, *inter alia*, supplies electricity to consumers such as the applicant as part of its service delivery mandate.

[3] The second respondent is contracted by the first respondent to fulfil its electricity supply mandate in terms of an electricity management agreement concluded on the 2nd April 2013. The third respondent, on its part, is the applicant's landlord and no relief is sought in these proceedings against it.

[4] Prior to the second respondent taking over the management of electricity supply on behalf of the first respondent the latter was billing the applicant and individual traders occupying the Shopping Centre separately with each consumer being directly responsible to the first respondent for the electricity consumed

by it. Since the end of September 2013 the applicant has been receiving invoices from the second respondent for total electricity consumption at the Shopping Centre. For this purpose the second respondent has proceeded to replace the individual electrical meters that the first respondent had installed in each shop at the centre with bulk electricity meters with the result that the applicant is rendered liable for the consumption of the entire Shopping Complex. On the 2nd September 2013 the second respondent circulated a notice among consumers, including the applicant, informing them of the "normalization" process of electricity network which, *inter alia*, requires each consumer to sign an electricity supply agreement.

[5] The applicant consistently refused to pay for the entire Shopping Centre and to sign the electricity supply agreement. On the 17th December 2013 the second respondent's attorneys directed a letter to the applicant's attorneys in terms of which they placed the applicant on terms with regard to the signing of the electricity supply agreement and payment of arrear amount of more than R1.4 million and threatened to disconnect electricity supply at the Shopping Centre in the event of the applicant failing to comply within 10 (ten) days of the date of the letter in question.

[6] The applicant, thereafter, launched the instant application on the 20th December 2013 on, effectively, the grounds that the

first and second respondents threaten to interfere with its *prima facie* right to electricity supply without just cause in an endeavour to force it to succumb to unilateral change to the conditions of such a supply. Only the second respondent opposed the motion and on, *inter alia*, the grounds that the same lacked urgency.

ISSUES IN DISPUTE

[7] The second respondent contended that the applicant failed to comply with the provisions or rule 6(12) of the Uniform Rules of Court (the rules) in that it had not set out any reasons rendering the matter urgent and that any urgency that might have existed was self-created insofar as the applicant became aware of the relevant state of affairs as early as September 2013.

[8] It was, further, contended for the second respondent that the applicant failed to make out a case for an interim interdict and simply set out allegations in its launching papers in the hope that the court would come to its assistance.

[9] In conclusion the second respondent maintained that the applicant was effectively beseeching the court to countenance unlawful conduct in that continued supply of electricity to the applicant without a signed electricity supply agreement was unlawful insofar as it was not in compliance with applicable regulations.

CONTENTIONS FOR THE PARTIES

[10] Mr Bothma, who appeared for the second respondent, submitted that the applicant failed to establish a *prima facie* right and, further, that the balance of convenience did not favour the granting of the order sought. In his view the court could not sanction illegal action by granting the relief prayed for. In his opinion the application deserved to be dismissed with costs because it also lacked urgency.

[11] Mr Tsangarakis submitted that, although the applicant did not dedicate a paragraph or so exclusively to the question of urgency, it was apparent from the founding affidavit that the matter was urgent in that the relevant electricity supply was at risk of being disconnected on the 27th December 2013 in terms of a letter from the second respondent's attorneys dated the 17th December 2013. There was no delay involved in bringing the present proceedings in his view. Although the applicant did not specifically aver in the launching papers that it had a contractual right to the supply in question, that much was clear from paragraph 7 of the founding affidavit which is to the effect that in the past the applicant used to be invoiced separately for electricity consumption in the common areas of the Shopping Centre. According to Mr Tsangarakis it was clear that the applicant did not have an alternative remedy because negotiations had failed. The balance of convenience was clearly in favour of the granting of interlocutory interdict

because the applicant stood to suffer irreparable harm if electricity supply was interrupted, according to Mr Tsangarakis.

APPLICABLE LEGAL PRINCIPLES

[12] It is correct, as effectively submitted for the second respondent, that Rule 6(12) of the rules provides a vehicle for an urgent applicant to jump the queue by forging its own rules with regard to form and service subject to the court's control in order for the court to entertain its matter out of turn. For such an applicant to avail itself of such a vehicle it needs to set out grounds which, in its view, render the matter urgent. Urgency constitutes a boarding pass for such an applicant and, in its absence, the matter is not properly on the court roll and falls to be struck off.

See: **Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd; Commissioner, South African Revenue Service v Hawker Aviation Partnership and Others** 2006 (4) SA 292 (SCA).

[13] The parties were effectively and correctly in agreement that to sustain a claim for interim interdict the applicant must establish: 1. a *prima facie* right to the relief sought, even if it is open to some doubt; 2. a well-grounded apprehension of irreparable harm if the interim interdict is not granted and the ultimate relief is ultimately granted; 3. that the balance of convenience favours

the granting of such relief and lastly that it has no other satisfactory remedy.

See: **Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others** 1995 (2) SA 813 (W).

[14] As Mr Bothma correctly pointed out, courts do not grant relief in circumstances where to do so would amount to condonation of criminal behaviour.

See: **United Technical Equipment Co (Pty) Ltd v Johannesburg City Council** 1987 (4) SA 343 (T).

[15] Mr Tsangarakis correctly reminded the court that until and unless an unlawful administrative act has been set aside by a court of competent jurisdiction after due process of the law, same exists in fact and has legal consequences that cannot be ignored.

See: **Oudekraal Estates (Pty) Ltd v City of Cape Town and Others** 2004 (6) SA 222 (SCA) at par [26].

[16] As Mr Bothma correctly pointed out, the applicable Electricity Supply Regulations published on the 22nd June 1990 prohibits the supply of electricity to an electrical installation unless and until the owner/consumer of the premises or his authorised

representative has completed a consumer agreement on a form prescribed by the council of a local municipality. The regulations further proscribe the use of an electricity supply unless such an agreement has been concluded with the council.

See: **Regulation 3 of Electricity Supply Regulations**.

APPLICATION OF LEGAL PRINCIPLES AND FINDINGS

[17] It is true that the question as to whether or not a matter is urgent must be decided *in limine* so as to establish if such a matter deserves to enjoy the attention of the court out of turn. It is, further, correct that it would have been convenient, for the court, if the applicant had set out and collected together under one or more paragraphs all the circumstances which, in its view, rendered the matter urgent for the court to appreciate the same easily. The question, however, is whether or not urgency is apparent *ex facie* the launching papers as filed by the applicant. I was satisfied, from a reading of the founding papers as a whole, that the motion did deserve to be treated as a matter of urgency regard being had to the fact that the danger of electricity supply disconnection was real and imminent. I was, further, persuaded that there was no delay, on the part of the applicant, involved in launching the application insofar as the threat was only communicated to it by way of a letter dated

the 17th December 2013. I, thus, entertained the motion in question.

[18] I was, furthermore, persuaded by the material before me that the applicant managed to establish a *prima facie* right to electricity supply regard being had to the fact that it had been receiving the same on the basis of a standing arrangement, express or tacit, with the first respondent which entailed the billing of individual traders separately inclusive of the applicant. It may be correct that such an arrangement flies in the face of applicable regulations and is, as such, unlawful in that it is not in a prescribed form and the applicant is, *ipso facto*, not supposed to use the relevant supply. The arrangement is, however, in existence insofar as it has not been terminated and has legal consequences in the form of the supply currently being enjoyed by the applicant and its sub-lessees. It was common cause between the parties that until the first collective bill was submitted to the applicant, its account with the first respondent was in credit. The instant matter was, in my view, distinguishable from the facts in **United Technical Equipment Co (Pty) Ltd v Johannesburg City Council**, *supra*, in that in the latter matter the appellant sought to have an order interdicting an unlawful activity suspended and was, thus, effectively praying for condonation and authorisation of a crime. In the present matter the relevant electricity supply has not been declared unlawful by a competent court and the *causa* underlying the same has not been set aside. The applicant,

further, did not move the court for leave to use the supply involved. The principle applicable *in casu* was, in my judgment, the one applied and elucidated in **Oudekraal Estates (Pty) Ltd v City of Cape Town and Others** (*supra)* as contended for the applicant.

ORDER

[19] In the result the following order ensued:

19.1 That the applicant's non-compliance with the rules relating to form and service be and is hereby condoned and the matter is heard as one of urgency;

19.2 That the first and second respondents be and are hereby interdicted and restrained from terminating the electricity supply to the Setsing Shopping Centre, Phuthaditjhaba pending:

19.2.1 Resolution of the respective rights and obligations of the parties by agreement, such agreement to be concluded by 28 February 2014; alternatively

19.2.2 In the event of no such agreement being reached, the final determination of the parties' rights and obligations by the court in terms of further legal proceedings in which the applicant shall seek a declaration of rights or appropriate relief, such proceedings to be instituted by the applicant within 7 (seven) days after the 28th February 2014.

19.3 That the applicant's costs of this application shall be paid by the second respondent on the scale as between party and party.

L. J. LEKALE, J

On behalf of applicant:	Adv S Tsangarakis Instructed by: Honey & Partners BLOEMFONTEIN
On behalf of second respondent:	Adv HC Bothma Instructed by: Symington & De Kok Attorneys BLOEMFONTEIN

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