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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: 2022/23303

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES

24 July 2024

DATE

SIGNATURE

In the matter between:

RAND LEASES PROPERTY (PTY) LTD

Applicant

and

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY

Respondent

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 24 July 2024

JUDGMENT

Mudau, J

Introduction

[1] The applicant, Rand Leases Property (Pty) Ltd (“Rand Leases”) launched the main application against the respondent, the City of Johannesburg Metropolitan Municipality (“the City”) and seeks in the amended Notice of Motion declaratory relief in the following terms:

1.1 An order directing the respondent to credit the applicant's account with the capital amount of R37 123 495.00.

1.2 An order directing the respondent credit the applicant's account with the sum of R8 123 873.85 plus any further interest debited against the applicant's account by the respondent between the period of 1 March 2023 and the date on which the aforesaid credits are passed in favour of the applicant by the respondent as well as costs.

The Main Application and the Interlocutory Application have been enrolled simultaneously after a direction by the Deputy Judge President.

Background facts

[2] Rand Leases is an owner of various pieces of immovable property situated on the West and East Rand. Rand Leases has a dispute with the City concerning its industrial electricity account on the West Rand, which exists in the records of the City as account number 221323017. The dispute has been on-going since 2012. Many of the properties owned by the applicant were previously utilised for mining purposes. Mining on the relevant properties has ceased.

[3] The Rand Leases rents out numerous of the properties, or portions thereof, to various industrial, commercial entities and in some cases, residential tenants. The tenants occupying property owned by Rand Leases are dependent upon the supply of electricity from Rand Leases and, Rand Leases is, in turn, dependent upon the supply of electricity from the City. Rand Leases is undeniably a large industrial consumer of electricity.

[4] In or about 2006, at the instance of the City, the electricity supply to Rand Leases properties relevant to this matter, was converted from a supply of bulk electricity for mining purposes, to a supply for commercial purposes. Immediately

after the conversion of the electricity supply from mining to commercial, Rand Leases was unable to obtain electricity accounts from the City. Consequently, the City instituted action against Rand Leases in this Court under case no. 38750/2012, claiming an amount that it contended was owing by Rand Leases of R37 123 495.00 (“the 2012 summons”); an order declaring Erf 3[...] V[...] to be executable; plus, interest at 15.5%. The amount claimed in the 2012 summons was allegedly for the period from February 2006 to September 2012.

[5] Rand Leases filed a notice in terms of Rule 23, which disputed the legal basis of the claim on the basis that it was based on the Local Government: Municipal Rates Act No 6 of 2004, which it alleged is inapplicable because electricity is not a “rate” as defined in the Act. The City, however, did not react to the Rule 23 notice. From November 2012 to March 2023, according to Rand Leases, the City debited interest against its electricity account in the sum of R8 123 873.85. Meantime, the parties agreed that the filing of further pleadings would be suspended whilst Rand Leases conducted investigations into its account with the City.

[6] In due course, some ten years later, on 21 November 2022, the City withdrew the 2012 summons. In the period 2012 to 2016, the original City meter was found to be faulty after Rand Leases enlisted the services of an independent electricity consultant to investigate and advise upon the account of Rand Leases with the City. It was established to be over-reading by approximately 61% on 4 June 2013 but by 25% on the City’s version. However, there were deviations of a negative, under reading error of 14% in the measurement of Kwh. The original meter was, according to Rand Leases, as per agreement supposed to be removed jointly and taken to a laboratory for further analysis and testing. Rand Leases alleges that the City unilaterally removed the original meter. This resulted in Rand Leases’ attorneys addressing a letter dated 12 September 2013 to the respondent recording out that the City had unilaterally replaced the meter that was proven to be faulty.

[7] Surreptitiously, contrary to an arrangement according to Rand Leases, on or about 2 September 2013, the City installed a new meter (“the second meter”). The second meter was also found to be faulty. It was over-reading by some 35%. This resulted in further correspondence being addressed.

[8] In 2013, the City threatened to terminate the electricity supply, despite the dispute and despite the process of engagement. An interim interdict was obtained by Rand Leases against the City on 4 September 2013 under case number 32447/2013 in this Court (per Foulkes-Jones AJ). In response to the interim interdict the City, bizarrely, filed an application for leave to appeal, but took no effort to have the application for leave to appeal prosecuted.

[9] Following the granting of the interim interdict, over a period until approximately April 2016, efforts were made to reach a resolution with the City. These efforts were, however, unsuccessful. The facts as they unfolded were recorded in various correspondences that were addressed to the City's attorneys by Rand Leases' attorneys. I refer to Annexures "X1" to "X6" thereto per paragraph 62 of the founding affidavit.

[10] Ultimately, after a long process of interaction between the parties, and after the settings on the second meter were corrected by the City, consensus was reached in or about April 2016 that the second meter was producing the correct readings. Until that point, and whilst the dispute prevailed, Rand Leases was, on its version, making provisional monthly payments of 60% of the monthly charges which were levied by the City regarding the disputed account from the faulty meters.

[11] Rand Leases, of its own volition, calculated an amount, of R5 784 898.38 against the production by the City of a zero-balance account, which it contended could possibly relate to arrears that may, at that point in time, have been due to the City. This it tendered to pay to the City in correspondence dated 7 April 2016 for which it claims no privilege to settle any possible outstanding historical arrears. In the same letter ("X6"), Rand Leases did not accept any liability for historical debt preceding March 2013. However, the City refused to accept the tender in a letter dated 5 September 2016 and countered it with an amount of R24 406 858.84 instead after pointing out the flaws in the calculations by Rand Leases as a basis for the tender.

[12] According to Rand Leases, it thereafter paid the full charge that had been levied by the City in respect of electricity consumption relating to the Rand Leases account as generated by the corrected meter, on a monthly basis up to the present time subject only to the reservation that interest has not been paid because the interest amounts relate to the bigger alleged indebtedness, which remains disputed.

[13] Rand Leases alleges that any amounts that may be alleged by the City to be owing from the time of issue of the 2012 summons to the point in 2016 when the monthly accounts were paid in full, after the settings on the second meter had been corrected, have also prescribed. The City continued to render accounts, which according to Rand Leases were inexplicable very high amounts, i.e. in the sum of R 43 157 164.23 at the launch of this application. Efforts to engage with senior officials of the City with a view to reaching an overall settlement did not yield the desired results. The deponent to the founding affidavit referred to a spreadsheet, "annexure AA" that was prepared setting out the particularity and total of all amounts paid to the City since April 2016. However, AA is inscrutable and so is "annexure BB", a spread sheet, which purports to be proof that since December 2012, Rand Leases have paid the City the sum of R79 352 965.21 up to the end of May 2022. The City denied this and put Rand Leases to the proof thereof.

[14] In opposing this application and *in limine*, the respondent contends that the meters which form the basis of this application belong to and are maintained and owned by City Power Johannesburg (SOC) Ltd, a legal person, which can be sued and sue in its own name and not the City of Johannesburg Metropolitan Municipality. Alternatively, it is alleged Rand Leases has failed and/or neglected to join City Power Johannesburg (SOC) Ltd to these proceedings. The City contends that City Power Johannesburg (SOC) Ltd has a direct and substantial interests in the subject matter of this application as the subject matter of these proceedings involves the supply, distribution and billing of electricity, which falls within the exclusive purview of City Power Johannesburg (SOC) Ltd.

[15] Regarding the merits, the City contends that Rand Leases has failed or neglected to attach to its founding affidavit results of a test conducted by the head of the City council's electricity undertaking or an official duly authorised by the council

of the meter alleged to be over reading by 60%, which is denied. According to the City, Rand Leases has been making sporadic payments of its account since 2012, which have the effect of interrupting the running of prescription contrary to submissions by the applicant.

[16] As for the alleged overreading, the City contends that it was, as indicated, 25% in relation to the second meter for the period June 2013 to April 2015, and for this period Rand Leases was billed R14 143 481.96 (excl VAT) for electricity usage. In overall summary, the City contends that that Rand Leases' payments are allocated to the oldest debt and that each payment comprises an acknowledgement of the overall indebtedness to the City.

[17] As Rand Leases points out in reply in response to the preliminary points, the accounts that it has attached to the founding affidavit, which appear from Annexure "A" to Annexure "B16", it is apparent that there is no suggestion or reference whatsoever to the existence of City Power Johannesburg (SOC) Limited as the contracting party. Significantly, the action instituted against Rand Leases in 2012, was in the name of the City of Johannesburg Metropolitan Municipality and not City Power. All correspondence relied upon exchanged with the attorneys for the City referred to the City of Johannesburg as their client, and not City Power. It follows that the point *in limine* is without any valid foundation and falls to be dismissed. The point *in limine* is dismissed for lack of merit.

[18] As for the obligations of the City in respect of services rendered to its customers within the context of a disputed water bill, the full court of this division (per Van Oosten J) in *Euphorbia (Pty) Ltd t/a Gallagher Estates v City of Johannesburg* stated:

"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 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".¹

[19] Rand Leases introduced a supplementary affidavit that deals with the 2012 summons withdrawn on 21 November 2022 by the City. It set out in the supplementary affidavit what it contends to be the effect of the withdrawal of the 2012 summons on the relief sought by the applicant. It contends that as an immediate consequence of the withdrawal of the 2012 summons, it immediately became entitled to a credit on its account of the capital amount claimed in the 2012 summons, being the sum of R37 123 495.00 indicated above, plus interest thereon the amount claimed is not owing by Rand Leases to the City. Rand Leases requires that all interest charged from the 2012 summons to the current time must be credited because, working backwards in time, any interest on the monthly accounts from April 2016 to date, all the monthly accounts have been paid.

[20] Rand Leases also contends that any interest relating to the amount claimed in the 2012 summons of R37 123 495.00 must be credited for the same reason that the capital amount must be credited, because of the withdrawal. Rand Leases contends that, any claim the City may have between the period of the 2012 summons to April 2016, has prescribed. Rand Leases served and filed a Notice of Intention to Amend its Notice of Motion due to the City's withdrawal of its 2012 summons on 7 June 2023, which amendment was effected on 22 June 2023 without opposition.

The interlocutory application

¹ [2016] ZAGPPHC 548 at para 17.

[21] The applicant seeks the following relief in relation to the interlocutory application: (a) declaring the respondent to be in contempt of the Order of this Court granted on 4 October 2023; (b) imposing a suitable punishment on the respondent; (c) striking out the respondent's defence in the action in terms of Rule 35(7) of the Rules of Court by reason of the Respondent's failure to comply with the agreed Court Order as well as costs.

[22] The background to this is that on 7 June 2023, Rand Leases served and filed its Heads of Argument, List of Authorities, Practice Note and Chronology in respect of the main application. The City was obliged to deliver its Heads of Argument and Practice Note in respect of the main application on 22 June 2023, which it failed to do.

[23] Consequently, Rand Leases, on 8 August 2023, served on the City's attorneys, by way of email, an application to compel the respondent's Heads of Argument and Practice Note. The unopposed date for the interlocutory application was 4 October 2023. On 4 October 2023, Rand Leases agreed to an order, which Strijdom AJ granted. The order by Strydom AJ granted the respondent leave to deliver a supplementary affidavit within 5 days of service of the Court Order on the City's representatives in respect of which Rand Leases is entitled to deliver a supplementary replying affidavit. The City was also ordered to deliver its Heads of Argument within 10 days consistent with the practice in this division before the matter could be set down for hearing. Rand Leases' attorneys served the signed agreed court order on the City on 10 October 2023.

[24] The City failed to comply with the Strijdom AJ order, therefore, on 24 October 2023 Rand Leases' attorneys served on the City's attorneys its application to strike out the City's defence in line with the relief granted on 4 October 2023 as a result of non-compliance. Eventually, the City only served and filed its answering affidavit to the application to strike out on 22 November 2023. Consequently, on 23 November 2023, the matter was removed from the unopposed roll by Fisher J with the City ordered to pay the costs. On 29 November 2023, Rand Leases served and filed its replying affidavit to the application to strike out.

[25] It was only on 2 May 2024, which is more than 6 months later and on the eve of the hearing of these applications that the City served on its opponent the heads of argument as well as the chronology. There is no explanation on the papers for non-compliance, still less an application for condonation. This is more than 6 months later after the prescribed deadline. This not only egregious but constitutes abuse of court process.

[26] As Sutherland DJP had occasion to point out in similar circumstances in *Millu v City of Johannesburg Metropolitan Municipality and Another*, the defiance of the court order is a serious affront to the process of court and is intolerable.² This approach is uncontentious. The distinguishing factor with *Millu* to the facts herein, being that the application there was for a temporary interdict, and subsidiary relief, pending a final reconciliation of an account for services rendered by the City to the applicant's home.

[27] Counsel for the City, Mr Sithole, submitted that Rand Leases' main application pending cannot be heard pending the hearing of the applicant's interlocutory application to have the allegations made in the supplementary affidavit, which the City has not opposed. Rather strangely, he further submitted that Rand Leases cannot seek to strike the Municipality's defence to the main application in circumstances where the Municipality sought to supplement its answering affidavit. He added from the bar in his oral submissions for another indulgence to do so albeit without an adequate explanation by the City why a supplementary answering affidavit could not be served and filed pursuant to the Strydom AJ order.

[28] The unmeritorious application was not only opposed by Rand Leases' counsel, but dismissed for the simple reason that the City had ample time to serve and file the required affidavit but chose or neglected to do so. In fact, Mr Sithole contended that the Municipality elected not to deliver its supplementary affidavit as this would be condoning the applicant's supplementary affidavit, which the City considered as the *pro non scripto*.

² [2024] JOL 63711 (GJ) at para 37.

[29] However, it is trite that the striking of a defence is a drastic remedy with a far-reaching impact on the right enshrined in section 34 of our Constitution providing that everyone has the right to have a dispute be resolved by the application of law decided by a court or tribunal in a fair public hearing.³ The power to grant such a remedy is accordingly discretionary and is a discretion that must be exercised judicially. In this instance, the relief was not seriously pursued. Accordingly, the relief sought to strike the City's defence is, under the circumstances, no longer appropriate given the fact that the long-awaited heads of argument by the City have since been delivered, albeit late. I return to this issue below regarding costs.

[30] As for the merits in the main application, it is trite that "motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts".⁴ "Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities".⁵

[31] It is further trite as a general principle that, if the material facts are in dispute and there is no request for the hearing of oral evidence, a final order will only be granted on the notice of motion if the facts as stated by the respondent together with the facts alleged by the applicant that are admitted by the respondent, justify such an order.⁶ In this instance I have already observed that Annexures AA and BB relied upon by Rand Leases are illegible. The alleged facts in that regard are obscure.

[32] The City in paragraph 159 of its answering affidavit, in its *ad seriatim* response, admitted to the contents of paragraph 62 of Rand Leases' founding affidavit, which is an admission of the correctness of the content of those letters regarding their dispute. Rand Leases contend that it is disingenuous for the City to contend that the payments made by it amount to an admission of the historical indebtedness and therefore has the effect of interrupting prescription. In terms of section 14(1) of the Prescription Act 68 of 1969, "the running of prescription shall be

³ See *MEC for The Department of Public Works and Others v Ikamva Architects and Others* 2022 (6) SA 275 (ECB).

⁴ *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 at para 26.

⁵ *Cooper and Another NNO v Curro Heights Properties (Pty) Ltd* [2023] ZASCA 66; 2023 (5) SA 402 (SCA) at para 13.

⁶ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H.

interrupted by an express or tacit acknowledgement of liability by the debtor". Rand Leases contend that, if an acknowledgment of liability is made after the prescription period has elapsed, in any event the acknowledgment has no effect and cannot interrupt the running of prescription.

[33] In addition, Rand Leases contends that the City could only rely on an acknowledgment of an existing liability not to a liability which existed in the past, which was in any event materially disputed. I am of the view that reference to the *Miracle Mile Investment* case⁷ is unhelpful as the facts are distinguishable. In that case, the acknowledgment was made to another creditor, First National Bank in sequestration proceedings brought by such other creditor, which acknowledgement did not interrupt prescription. I am of the view therefore that the main application is incapable of resolution on the papers. As for the interlocutory application, I have already expressed the view that the defiance of the court order is a serious affront to the process of court and is intolerable. The order regarding costs below is intended to express this Court's disavowal of such practices. Consequently, the main application is referred to trial.

Order

- [1] The notice of motion shall stand as a simple summons;
- [2] The answering affidavit as a notice of intention to defend;
- [3] A declaration shall be delivered within twenty (20) days and;
- [4] The Uniform Rules dealing with further pleadings, discovery, and the conduct of trials shall thereafter apply;
- [5] The costs of the application abide the result of the action; and
- [6] The City of Johannesburg is ordered to pay Rand Leases' costs in respect of the interlocutory application on an attorney and client scale (scale C).

TP MUDAU
JUDGE OF THE HIGH COURT

⁷ See *Miracle Mile Investments 67 (Pty) Ltd and Another v Standard Bank of SA Ltd* 2016 (2) SA 153 (GJ) at para 34.

GAUTENG DIVISION, JOHANNESBURG

Date of Hearing: 07 May 2024

Date of Judgment: 24 July 2024

APPEARANCES

Counsel for the Applicant: Mr. K Huyssteen
Instructed by: Fluxmans Incorporated

Counsel for the Respondent: Adv. E Sithole
Instructed by: Mojela Hlazo Practice