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

Case Number: 083447/2024

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

5 September 2024

DATE

SIGNATURE

SA STUDENT ACCOMODATION CC

First Applicant

GEORGE ASABA

Second Applicant

AND

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

Respondent

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on Case Lines. The date and time for hand-down is deemed to be 10H00 on 6 September 2024.

JUDGMENT

MYBURGH AJ

[1] This matter came before me in the urgent court in the week of 6 August this year and I heard argument in relation to urgency and merits. As I consider the issues to be quite straightforward, I intend to deal with the matter as tersely as is reasonably possible. I will, for the same reason, also not refer to or quote from authorities save where I consider that to be strictly necessary.

[2] The first applicant is a close corporation. Its sole member is the second applicant, Mr Asaba. Mr Asaba is in the business of providing what I think can fairly be referred to as basic group accommodation; in some cases directly, and in others indirectly- i.e. via corporate vehicles, of which the first applicant is one. It seems that premises are, in some cases acquired and let out “as is” whereas, in other instances, buildings have either been constructed or extensively modified to suit their intended purpose. Mr Asaba is involved in several such properties in the central area of Tshwane. This matter concerns two of them, viz. Erf 1[...] P[...] h[...] (also referred to as “4[...] A[...] Street”) and Erf 13[...] Pretoria (also referred to as “3[...] L[...] Street”). The A[...] Steet property, which is owned by Mr Asaba personally, comprises a recently constructed multi storey building whereas the L[...] Street property, which is owned by the first applicant, has on it what appears to be a large number of small, connected single storey dwelling units. According to Mr Asaba , who deposed to both the founding and replying affidavits on behalf of both applicants, the L[...] Street property is home to approximately one hundred families and the A[...] Street property is home to even more – i.e. both properties are occupied by hundreds of people. The relevance will become apparent.

[3] A central part of the city’s case is that all of the developments have been or are in the process of being constructed illegally – i.e. that what Mr Asaba is what might be termed a “rogue developer”. According to it, the building on A[...] Street property was constructed without approved building plans, from which it follows that the building cannot be legally occupied. It says that the same is true in respect of the L[...] Street property, the zoning of which only permits the construction of a single dwelling house.

[4] Both applicants complained that the respondent, whom I will refer to simply as “the city”, had unlawfully terminated the supply of electricity to the properties in question. The main thrust of their complaint was that the city had failed to give notice of its intention to terminate or to obtain a court order. The language of spoliation was also used - for instance it was alleged that the applicants or their tenants had been in peaceful possession or occupation of electricity prior to the allegedly unlawful conduct of the city, which was alleged to have been committed on 18 July this year. The substantive relief which was sought in terms of the notice of motion was, in essence, an order compelling the city to reconnect the premises to the grid and ancillary relief.

[5] The city contended that the matter was not truly urgent (this for reasons which will become apparent). It also opposed the application on the merits. In addition, it brought a counter application for the removal of the matter to the Pretoria court in terms of section 27(1) of the Superior Courts Act¹. I will deal first with the issue of urgency, then with the removal application and thereafter with the merits.

Urgency

[6] The applicants’ case in respect of urgency took the normal form in matters of this kind viz. the disconnection of the electricity supply was causing harm to it and its tenants on a daily basis and urgent redress was therefore required. Nothing more need be said in that regard.

[7] As I have already indicated, the city’s case was that the Mr Asaba, both personally and via the corporate entities which he controls (including the first applicant) is involved in what amounts to a large-scale unlawful enterprise in terms of which he builds or converts premises of the kind described above in contravention of the applicable legislation, including the city’s zoning scheme and by-laws. It also alleged that the buildings had been connected to the grid illegally, that they had been disconnected as long ago as February this year and that that the applicants’ *modus operandi* had been to cause them to be reconnected illegally resulting in an ongoing

¹10 of 2013.

saga of illegal connections followed by disconnections - the disconnections complained of having been but the most recent in the ongoing saga.

[8] The view which I took is that a proper case had been made out for urgency; this notwithstanding the troubled history. The fact that the disruption of the electricity supply would have seriously inconvenienced the occupants of the buildings in question is something that weighed heavily with me in this regard. It is also apposite to note that the application had been brought on a truncated timetable which allowed time for the filing of opposing papers rather than on a pressingly urgent basis.

The removal application

[9] The basis of the city's counterapplication for removal was that there is currently litigation pending in the Pretoria court between it, Mr Asaba and certain corporate entities controlled by him relative to the construction and alteration of buildings as outlined above – all of which activities were alleged to have been unlawful. Indeed, the evidence was that the city was seeking a demolition order in respect of the A[...] Street apartment block, which had been constructed without approved plans and in respect of which it had already obtained a *rule nisi* calling upon Mr Asaba to show cause why it should not be demolished. It appeared from the city's answering papers that they were considering bringing a similar application in respect of the L[...] Street property.

[10] On my understanding of the authorities, that was not a sufficient basis to deprive the applicants of their right to proceed in the forum of their choice. I also do not think that it could properly be said that it would be convenient or appropriate for me to order the removal of a matter in respect of which I have already read all of the papers and heard argument. Things would have been otherwise if the fate of the current application had been dependent on the outcome of the other litigation referred to; however, that is not the position *in casu*.

[11] I accordingly intend to dismiss the counterapplication.

An act of spoliation?

[12] As I have already mentioned, the application was liberally peppered with the language of spoliation. It was also expressly asserted that the applicants had been spoliated. As I pointed out to Mr Mhlanga, who appeared for the applicants, I understand the decision in *Masinda*² to exclude that line of argument. In response Mr Mhlanga sought refuge in the decision in *Makeshift*.³ In my view that decision does not assist the applicants. As appears from the judgment in that matter, it is peculiarly fact bound in that the court found that the right to be supplied with electricity was, given the facts of that matter, an incident of the right to occupy the property. That is not the position *in casu*. On the contrary, we have here to do with the interruption or suspension of a service which was provided by the city – according to the applicants in terms of supply agreements and hence subject to the applicable terms as contained in the city’s electricity supply by-laws. In the circumstances I consider myself to be bound by the decision in *Masinda*. What occurred was not a spoliation, and the remedy of a *mandament van spolie* is not available.

Were the applicants entitled to receive notice?

[13] The applicants’ case was that they did not know why they had been disconnected. In their founding papers they expressly alleged that they had accounts with the city and that those accounts were up to date. They also said that they had been disconnected without notice and that city’s officials had declined to give any explanation for their conduct. The impression which Mr Asaba sought to create in the founding affidavit was that the city had acted capriciously and that its conduct had been part of campaign of targeting him and the entities which he controls.

[14] As I have already indicated, the city’s case was quite different . In essence it was that the connections had been illegal and that it acted within its powers in effecting the disconnections. In this regard reliance was placed on by-law 14 of the city’s electricity supply by-laws, which stipulates that the city may disconnect or suspend the supply of electricity to premises if it “*has reasonable grounds to believe that the consumer uses the electricity for a purpose or deals with the electricity in a*

² *Eskom Holdings SOC Ltd v Masinda* 2019 (5) SA 386 (SCA).

³ *Makeshift 1190 (Pty) Ltd v Cilliers* 2020 (5) SA 538 (WCC).

way that interferes in an improper or unsafe manner, or is calculated to interfere in an improper or unsafe manner, with the efficient supply of electricity to the premises and/or to any other consumer...”

[15] In argument before me counsel for the applicants sought to rely on the decision in *Joseph*,⁴ which, so it was argued, had held the by-law in question to offend against the Constitution and set it aside in part. That argument was flawed on a number of bases. In the first instance, *Joseph* dealt with a particular by-law of the city of Johannesburg, not the statute in question *in casu*. Secondly, *Joseph* dealt with disconnection on account of non-payment, not on account of illegality. Thirdly, and most importantly, the applicants’ papers did not contain an attack on the validity of the by-law under consideration and no relief was sought in that regard. That being so, the line of argument was simply not open to the applicants. It is so well settled as to be trite that the affidavits in motion proceedings constitute both the pleadings and the evidence.⁵ It is also well settled that a party who seeks to challenge the validity of a statutory provision must do so directly and seek relief in those terms – i.e. as was done in *Joseph*.

[16] The result is that the applicants’ case was flawed to the extent that it was based on a failure on the part of the city to give notice regardless of the basis of the termination. There is no requirement to give notice in the case of illegal connections. Indeed, to impose such an obligation would, to my mind, be absurd given the risks which illegal connections and the improper use of electricity pose to life, limb and property.

Were the connections legal?

[17] The crisp question is therefore whether the applicants have succeeded in establishing that the premises under consideration were legally connected to the grid at the time of the disconnections complained of – i.e. on 18 July this year.

⁴ *Joseph and Others v City of Johannesburg and others* Case CCT 43/09 [2009] ZACC 30; 2010 (3) BCLR 212 (CC) ; 2010 (4) SA 55 (CC) (9 October 2009)

⁵ *Triomf Kunsmis (Edms) Bpk v AE & CI Bpk en Andere* 1984 (2) SA 261 (W): dictum at 269G – H.

[18] Before proceeding to a consideration of the evidence it is apposite to note that the civil standard applies – i.e. the test is one of a balance of probabilities. It is also apposite to note that the relief sought by the applicants is final in nature and hence that the so called *Plascon Evans*⁶ rule applies. The effect of that rule is, in essence, that the matter falls to be determined according to the respondent's version save only to the extent that it is obviously so far-fetched, having regard to the common cause facts and inherent probabilities that it can safely be disregarded.

[19] The case made out by the applicants, both in their founding papers and in reply, was that the connections to the premises had been legal. In support of this proposition they alleged that they had accounts with the city for the supply of electricity which, so they said, were up to date at the time of the disconnections. In support of this proposition they annexed to their papers copies of municipal accounts which spanned an extended period.

[20] As I have already indicated, the main thrust of the city's case was that the connections had been illegal. The city also said that the applicants had been receiving electricity without paying for it for many months, that the supply had been disconnected on number of prior occasions and that the applicants had, in response, simply caused the premises to be reconnected illegally. As evidence of non-payment the city produced copies of payment records, which were supportive of its case. As evidence of the alleged illegality, the city annexed to its papers a number of photographs showing what it said were and which certainly appeared to be illegal connections. Photographs of the buildings constructed on the two properties were also annexed to the papers.

[21] In respect of the A[...] Street property the city's evidence was furthermore to the effect that two persons had been caught in the act of effecting or attempting to effect an illegal reconnection on 14 July and that they had been arrested and charged. Photographs and a case number were also provided. None of that evidence was disputed directly. If that evidence is accepted, as I believe it has to be,

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

then it follows axiomatically that the connection to that property which existed on 18 July could not have been a legal one.

[22] The evidence in respect of the L[...] Street property was not as detailed; however the city also asserted that the buildings on that property had been erected illegally and that the electrical connection to it had been illegal. That the buildings which have been constructed on that property do not comply with the zoning, which permits only of a single dwelling absent consent, is self-evident from the photographs - which, as I have said, show what appear to be a large number of small, connected, single storey dwellings. This in itself renders it unlikely that they were the subject of properly approved building plans or that they were in fact lawfully connected to the grid. Put otherwise, this evidence was supportive of the city's case.

[23] The applicants' evidence regarding the existence of accounts and the assertion that such accounts had been up to date when the disconnections were effected also did not stand scrutiny.

[24] The copies of the municipal accounts which were attached to the replying affidavit in respect of the L[...] Street property did not contain a line item in respect of electricity.⁷ Those accounts were accordingly supportive of the proposition that that property had never in fact been legally connected to the grid – i.e. they were supportive of the city's case and destructive to that of the applicants.

[25] As to the A[...] Street property, some of the older accounts which were annexed to the replying affidavit contained line items in respect of electricity but they either reflected no consumption at all (and hence no charge), or what appear to have been fairly nominal charges given the nature of the premises. By way of example, the account for the period ended 17 August 2022 reflected a charge of R6 858.47 and that for the period ended 18 October 2022 reflected a charge of R4 882,94. As with the L[...] Street property, the more recent accounts did not contain a line item in respect of electricity. Again, this evidence was consistent with the city's case and destructive of the case put up by the applicants in their founding papers – i.e. that

⁷ The accounts refer to the property as a sectional title development.

they have accounts with the city for the supply of electricity which were up to date at the time of the disconnection.

[26] The applicants also annexed a series of screen shots to their replying papers – this in support of the proposition that prepaid meters had been installed on the units constructed on the L[...] Street property. That evidence was contrary to the case made out in the founding affidavit and hence fell to be ignored. It was also of such little evidential value that it would not have disturbed my finding on the central issue, even if I had taken it into account. At best for the applicants (i.e. assuming that the images are taken to be screen shots evidencing payments in respect of electricity vouchers), they constitute proof of isolated small purchases of pre-paid electricity which could not, on the papers, be linked to any particular property. They certainly did not come anywhere close to showing that payments had been made of amounts which would be appropriate to the consumption of the occupants of the L[...] Street property (which, as I have said, was alleged to be home to approximately 100 families) for the period preceding 18 July.

[27] The conclusion which I have arrived at is therefore that the applicants have failed to discharge the onus of establishing that either of the buildings under consideration were legally connected to the grid at the times in question and hence that the city acted unlawfully in disconnecting them. Their application must accordingly fail.

Costs

[28] The parties were *ad idem* that costs should follow the result.

[29] As I have already indicated, I do not intend to grant the counter application and will make a separate order in that regard. I believe it appropriate to add, for the benefit of the taxing master, that very little time was spent on that issue. I would estimate at most 10 percent, if that.

Order

[30] I accordingly make the following order:

1. The application is dismissed with costs.
2. The counterapplication is dismissed with costs.
3. The costs of counsel will be taxable according to scale A

G S MYBURGH
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

For the Applicant: Adv L Mhlanga

Instructed by Precious Muleya Inc

For the Respondents: Adv S Mbeki

Instructed by Leepile Attorneys

Heard: 06 August 2024

Delivered: 6 September 2024