

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 0004168/2024

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
9/10/2024 DATE  SIGNATURE	

In the matter between:

**CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY**

1st Applicant

**THE MUNICIPAL MANAGER CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY**

2nd Applicant

JOHANNESBURG WATER (SOC) LTD

3rd Applicant

CITY POWER (SOC) LTD

4th Applicant

And

IDOLA (PTY) LTD

1st Respondent

TWIN CITY

2nd Respondent

JUDGMENT

MAKUME, J:

INTRODUCTION

- [1] There are two applications before me the first is an application for leave to appeal a judgment I handed down on the 14 February 2024 in which I granted the following order against the applicants:
- 1.1 That the matter was urgent.
 - 1.2 That the first, second and fourth respondent and or any person, representative, employee, official of the first, second and fourth respondents including but not limited to any other person or representative not necessarily in the employ of the first, second and fourth respondents but acting pursuant to and in terms of any instructions issued by and on behalf of the first, second and fourth respondents are interdicted and retained from terminating and or restricting the applicants Municipal services without having been authorised thereto by order of Court first.
 - 1.3 The first respondent is ordered to pay the taxed costs of this application on a party and party scale including costs of Counsel.
- [2] The second application is one in terms of Section 18(3) of the Superior Courts Act¹ (the Act) in which the respondents (Idola and Twin City) seek leave to execute the orders granted by me in the urgent court on the 7th 8th and 14th February 2024 notwithstanding the appeal application.
- [3] This Section 18(3) Notice of Motion which was supported by a lengthy affidavit was served on the 12th of August 2024. The City only filed a Notice of Intention to Oppose on the 28th of August 2024 and had not by the 17th of September 2024 filed their Answering Affidavit. I then ordered the City to file Answering Affidavit by the 20th of September 2024 and for both applications to be heard on the 26 September 2024. The City to pay costs on a punitive scale.

¹ 10 of 2013.

BACKGROUND

- [4] The dispute between the parties in this matter concerns the correctness of the City's statement of account in respect of Municipal services. That dispute led to several events in which the City disconnected electricity supply to the residential block owned by Idola and Twin City.
- [5] Idola and Twin City obtained three Court orders in this Court first by Madam Justice Siwendu then Madam Justice Crutchfield and lastly by Judge Wright. In all three orders the City was interdicted from disconnecting electricity supply to Idola without a Court order. It is significant to note that all three Court orders still stand and have not been challenged on appeal.
- [6] In the application before me on the 8th February 2024 the respondents had also sought an order that the first, second and fourth respondents be held to be in contempt of the orders of Siwendu J, Crutchfield J, Wright J including my judgment of the 7th February 2024. I did not make a ruling in respect of the contempt as I required proof that the order had been served on the City Manager before making such a ruling.

THE APPLICANTS' GROUND OF APPEAL

- [7] The grounds of appeal are spread between the notice of appeal as well as in the heads of argument and can be summarised as being the following:
- 7.1 That the order granted is clearly wrong as it fails to take into consideration and appreciate the statutory obligation assigned to the Municipality to collect levies and for services
- 7.2 That this Court erred in granting the order of the 7th February 2024 in the absence of the Municipality thus flouting the *audi alteram partem* rule.

- 7.3 The court erred in dismissing the Municipality's reconsideration application on the 7th February 2024.
- 7.4 This court erred in granting a final interdict against the implementation of the Municipal by-laws.
- 7.5 That this Court failed to observe the principle of *stare decisis* as set out in the Constitutional Court judgment of *Rademan v Moqhaka Local Municipality*² in which the Constitutional Court refused the contention that the Municipality needed a Court order prior to it implementing its by-laws.
- 7.6 That there are important issues of law and compelling reasons why leave to appeal should be granted.

THE TEST FOR LEAVE TO APPEAL

- [8] Section 17 (1) (a) of the Superior Courts Act number provides that leave to appeal may only be granted where the judge or judges concerned are of the opinion that:

(a) (i) the appeal would have a reasonable prospect of success.

(ii) there is some other compelling reasons why the appeal should be heard including conflicting judgments on the matter under consideration.

- [9] The Supreme Court of Appeal in *MEC for Health Eastern Cape vs Mkhitha*³ held that:

"Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospects of success. Section 17 (1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave

² [2013] ZACC 11; 2013 (4) SA 225 CC.

³ [2016] ZASCA 176; 2016 JDR 2214 (SCA).

to appeal may only be given where the judge concerned is of the opinion that the appeal *would* have a reasonable prospect of success; or there is some other compelling reason why it should be heard.

An Applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.”

FAILURE TO OBSERVE THE AUDI ALTERAM PARTEN RULE

- [10] This argument only holds water and is applicable to the first order which this Court granted at 16h00 on the 7th of February 2024. However, in my judgment I justified ruling against the applicant in their absence as I was satisfied that firstly, it was in the best interest of justice for the innocent tenants, secondly, I was satisfied that the Municipality attorneys had received the notice of motion and elected not to appear in court. In any case a few hours after the order the Municipality brought a reconsideration application which I heard on the same day in the evening and dismissed same. That alone fortifies the earlier decision taken in the absence of the municipality.

FAILURE TO OBSERVE THE PRINCIPLE OF STARE DECISIS AS SET OUT IN THE CONSTITUTIONAL DECISION IN RADEMAN VS MOQHAKA MUNICIPALITY

- [11] Reliance on the decision of Rademan is misplaced. Firstly, there has been three decisions in which the City was interdicted from disconnecting electricity and all those three decisions have not been challenged hence the application for contempt. Secondly, in Rademan the appellant had decided on her own to split the Municipalities consolidated account and only paid the electricity portion thereof leaving out the other levies on the basis that the Municipality was rendering poor service. Both the High Court as well as the Supreme Court of appeals relying on Section 18(3) of the by-laws concluded that Mrs Rademan could not on her own decide what amount to pay once the account was

consolidated it was one account and it had to be paid in full within the stipulated period.

- [12] The facts in Rademan are distinguishable from the facts in this matter. In this matter payment is being made. The dispute is about the calculation hence the order by Van Niekerk AJ in February 2024. The respondent Idola is not refusing to pay nor is it withholding any amount.
- [13] The interdict granted against the City will operate for as long as the underlying dispute remains unresolved. In granting the interdict this Court and the ones before did not seek to establish a new principle that the City or any other local authority must first obtain a Court order before enforcing the by-law.
- [14] I am not persuaded that the applicant has succeeded to establish any prospects of success in the appeal in the result the application for leave to appeal must fail.

RELIEF IN TERMS OF SECTION 18(1) AND (3) OF THE SUPERIOR COURTS ACT, 10 OF 2013 (THE ACT)

- [15] Idola are the applicants, and they seek the following relief:

- 15.1 That exceptional circumstances as contemplated in Section 18(1) of the Act exist.
- 15.2 That the applicants will suffer irreparable harm if the order herein is not granted.
- 15.3 That the first and second respondents will not suffer any irreparable harm if the order sought herein is granted.
- 15.4 That the applicants are granted leave and are authorized in terms of section 18 (1) read with section 18 (3) of the Act to execute orders granted by Makume J dated the 7th February 2024, 8th February 2024

and 14th February 2024 pending finalisation of any appeals lodged by and on behalf of the 1st and or second respondents.

15.5 Cost on an attorney and client scale.

- [16] It is common cause that the parties have been involved in litigation stemming from disputes over the applicants Municipal account since the year 2020. Despite previous court orders interdicting the Respondents from disconnecting electricity supply the respondents have repeatedly terminated such supply in flagrant disregard of the Court orders. This is the reason for a pending application to hold the City Manager in contempt of court orders.
- [17] Idola maintains that exceptional circumstances exist as contemplated in Section 18(1) and 18(3) of the Superior Courts Act. It contends that it will suffer irreparable harm should the operation and execution of the orders granted on the 7, 8 and 14 February 2020 remain suspended.
- [18] The respondents in opposing this application place heavy reliance on the issue of the *audi alteram partem* rule secondly, they refer *ad nuseam* to the decisions of Siwendu J; Crutchfield J and Wright J which decisions have no bearing on whether to grant the Section 18(1) relief or not. Lastly the respondents maintain that the order granted by Van Niekerk AJ on the 14th February 2024 serves to ensure that the respondents will not disconnect the electricity supply to Idola whilst that order is still in operation. If that is what the Respondents says the question remains why after that order, they filed the application for leave to appeal on the 11 March 2024 and why are they persisting with it instead of withdrawing the application so as to afford the Van Niekerk order to be finalised.
- [19] In *Tyte Security Services CC vs Western Cape Provincial Government and others*⁴ the SCA revisited the existing authorities with regard to such applications and stated as follows in paragraph 9 and 10:

⁴ [2024] ZASCA 887; 2024 JDR 2306 (SCA).

[9] This court has examined the requirements for the implementation of an execution order pending an appeal in *University of the Free State vs Afriforum* (*Afriforum*) [[2016] ZASCA 165; [2017] All SA 79 (SCA); 2018 (3) SA 428 (SCA)] (*Afriforum*); *Ntlemenza vs Helen Suzman Foundation* [[2017] ZASCA 93; [2017] 3 All SA 589 (SCA); 2017 (5) SA 402 (SCA)]; *Premier of Gauteng vs Democratic Alliance*; *Knoop v Gupta* [[2020] ZASCA 149; [2021] 1 All SA 17 (SCA); 2021 (3) SA 135 (SCA)] (*Knoop*) and most recently, in *Zuma v Downer and Another* [[2023] ZASCA 132; [2023] 4 All SA 644 (SCA); 2024 (2) SA 356 (SCA); 2024 (1) SACR 589 (SCA)]. Relying, in part, on the statements made in those judgments, in particular *Afriforum* and *Knoop*, Counsel for Tyte, argued that it was for an applicant for an execution order (in the position of Royal) to establish three separate, distinct and self-standing requirements, namely: first, exceptional circumstances (the first); second, that it will suffer irreparable harm if the order is not made (the second); and, third, the party against whom the order is made (in this case Tyte) will not suffer irreparable harm if the order is made (the third).

[10] Whilst there are indeed statements in those judgments that would appear to support counsel's fundamental hypothesis, they seem to have been made in passing. They thus called for close examination of this matter. An important point of departure, so it seems to me, is that consideration of each of the so-called three requirements is not a hermetically sealed inquiry and can hardly be approached in a compartmentalised fashion."

[20] The respondents repeated contention that it is entitled to disconnect electricity supply notwithstanding the interdict is proof of the existence of exceptional circumstances. In the matter of *MV Ais Mamas Seatrans Maritime vs Owners, MV Ais Mamas, and Another*⁵ Thring J said that:

"What is ordinarily contemplated by the words 'exceptional circumstances' is something out of the ordinary and of an unusual nature; something which is accepted in the sense that the general rule does not apply to it; something uncommon, rare or different."

⁵ 2002 (6) SA 150 (C) at 156 H-J.

- [21] It is indeed rare and out of the ordinary for a statutory body like the city to continuously defy court orders. This is exceptional and unheard of. The respondents also rely heavily on an agreed order of the Honourable Van Niekerk AJ which they have not adhered to instead of addressing their dispute as set out in the order the respondents decided to file an application for leave to appeal. These on its own amounts to exceptional circumstances.
- [22] It is not possible to lay down precise rules as to what constitutes exceptional circumstances. Each case has to be decided on its own facts. In *JAI Hind EMCC t/a Emmerentia Convenience Centre vs Engen Petroleum Ltd South Africa*⁶ Sutherland DJP emphasised that the question whether exceptional circumstances exist does not depend upon the exercise of judicial discretion but their existence or otherwise is a matter of fact which the court must decide.
- [23] In *University of the Free State v Afriforum and Another*⁷ the Court held that the prospects of success on appeal is a relevant factor in determining whether there are exceptional circumstances justifying an order under Section 18(3). In *Minister of Social Development Western Cape and Others vs Justice Alliance of South Africa*⁸, Binns-Ward J concluded that the judgment creditors prospects of success on appeal were so poor that they ought to have precluded a finding of sufficient degree of exceptionality to justify an order in terms of section 18 of the Act. Lastly in *Zero Azania (Pty) Ltd vs Caterpillar Financial Services SA (Pty) Ltd and a similar appeal*⁹ the Full Court held that the poor prospects of success on appeal constitutes in themselves the kind of exceptional circumstances that might justify interim execution
- [24] It is common cause that there have been three orders which the City has chosen to either ignore or stubbornly chose not to comply with worse still the agreed arrangement reached and made an order by Van Niekerk on the 14th of February 2024 remains on paper and nothing has been done about it.

⁶ 2023 (2) SA 252 (GJ).

⁷ 2018 (3) SA 428 (SCA)

⁸ 2016 JDR 0606 (WCC).

⁹ 2024 (2) SA 574 (GJ).

- [25] The applicant has succeeded in demonstrating that the city will not suffer any irreparable harm if the orders are executed. In any event the respondents prospects of success are so poor hence I have already ruled and dismissed the application for leave to appeal.
- [26] In paragraph 38 off their heads the respondents said that the Municipality seeks leave to appeal against the conflicting orders made by this Court in light of the Supreme Court of Appeals judgment and the Constitutional Court. That statement is left naked as it is without reference to any judgment which is alleged to be conflicting.
- [27] There is sufficient evidence that the repeated disconnection of electricity and services supplied to the applicant's premises is causing the applicant irreparable harm in that tenants' riot and cause damage others terminate their leases. On the other hand, the Municipality if it is convinced that money is owed to it can and should simply commence debt recovery legal proceedings rather than resort to disruption of the lives of the tenants.
- [28] I'm satisfied that the applicants have met all the requirements of section 18 (1) and section 18(3) of the Superior Courts Act.

Order

1. The application for leave to appeal is dismissed.
2. The applicant is ordered to pay the first respondent's taxed party and party costs.
3. The applicants are hereby authorised in terms of section 18(1) read with section 18(3) to execute the orders granted on the 7, 8 and 14th February 2024.



M A MAKUME

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

Dated at Johannesburg on this 09th day of October 2024

DATE OF HEARING : 26 SEPTMBER 2024
DATE OF JUDGMENT : 09 OCTOBER 2024

Appearances:

FOR APPLICANT : ADV AUCAMP
INSTRUCTED BY : JACQUES CLASSEN INCORPORATED

FOR RESPONDENT : ADV E SITHOLE
INSTRUCTED BY : MADHLOPA & THENGA INCORPORATED