

REPUBLIC OF SOUTH AFRICA



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

Case Number: 2022/322

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

In the matter between:

AFHCO CALGO M3 CONSORTIUM (PTY) LTD

Applicant

and

**CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY**

First Respondent

JOHANNESBURG WATER

Second Respondent

FLOYD BRINK

Third Respondent

Summary: Opposed application to rectify and recalculate a municipal account - Restatement of trite principles pertaining to applications – Restatement of factors to be considered in an application for leave to file a further affidavit – Unfounded opposition to main application – Respondents and its representatives should not have permitted the matter to proceed to court – Disregard of prior judicial dicta and warnings – Restating and quoting of various judgments of this court warning the first respondent, its deponent and its legal representatives of consequences of misconduct in proceedings – Litigation is not a game, nor a zero-sum context.

Costs: Relevant considerations that warrant punitive costs orders, including attorney client costs orders against litigants.

JUDGMENT

AMM, AJ

Introduction

1. The applicant is the registered owner of a residentially zoned immovable property situated in Jabulani Soweto. The property was registered in the applicant's name during 2017. There are 288 residential units erected on the property.
2. During January 2022, the applicant instituted long-form application proceedings against the respondents.
3. The applicant seeks, in broad terms, relief aimed at the rectification and recalculation of the applicant's water and sewerage consumption charges under account number 552005181 (meter reference 1047408). An attorney own client costs order is also sought against the first and second respondents. The respondents oppose the application.
4. The reason for the application is the claimed unilateral change to the tariff at which the applicant is billed for its water and sewerage consumption at the property. This unilateral tariff change is reflected for the first time in the applicant's May 2018 account statement. In its supplementary founding affidavit, the applicant asserts that up and until May 2018 it was billed on a residential tariff. Thereafter, and for reasons unexplained, it was billed on a commercial tariff. The applicant asserts that it should, as it had previously been, be billed for its water and sewerage consumption on a residential tariff.
5. There is also the first respondent's last-minute interlocutory application. The first respondent seeks leave to file a further affidavit. Within the context of the first respondent's interlocutory application and this judgment, I refer to the applicant's

application as the “main application” and the first respondent’s application as “the interlocutory application”.

6. Before dealing with the interlocutory application, I first set out certain trite principles pertaining to motion proceedings. I then traverse the relevant context and chronology of material events that informs both the main application and the interlocutory application.

A restatement of certain trite principles pertaining to applications

Introduction

7. Within the context of these proceedings (i.e., both the main and interlocutory applications), certain basic, fundamental and essentially imbricated principles pertaining to application proceedings need restating.
8. These principles traverse that ordinarily required of affidavits in motion / application proceedings, and the number or set of affidavits ordinarily allowed in motion / application proceedings.

That required of affidavits in motion application proceedings

9. The following imbricated principles pertaining to that required of affidavits are particularly pertinent:
 - 9.1. the affidavits filed in application proceedings assume the function of both the pleadings and the evidence in action proceedings;¹
 - 9.2. the deponent to an affidavit must have the requisite personal knowledge of the facts deposed in the affidavit (such that an affidavit, strictly speaking, must contain only matters of fact within the personal knowledge of the

¹ *Swissborough Diamond Mines v Government of the RSA* 1999 (2) SA 279 (W) at 323 H–I *Hart v Pinetown Drive-in Cinema (Pty) Ltd* 1972 (1) SA 464 (D) 469, *Hano Trading v J R 209 Investments (Pty) Ltd* 2013 (1) SA 161 (SCA) – these principles applicable to founding affidavit apply mutatis mutandis to both answering and replying affidavits. In respect of an answering affidavit see *Gold Fields Ltd and Others v Motley Rice LLC* 2015 (4) SA 299 (GJ) at 325 / para 122 et seq and *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) quoted therein

deponent - where this is not the case, a confirmatory affidavit by the relevant individual holding such personal knowledge is to be provided);²

9.3. the rules of evidence must be adhered to and complied with, namely deponents can only depose to admissible evidence;³ and

9.4. a deponent's assertion that information is within his or her personal knowledge "is of little value without some indication, at least from the context, of how that knowledge was acquired".⁴

10. Apropos that required of an answering affidavit specifically, it is trite that an answering affidavit:

"... cannot confine itself to bare or ambiguous denials but must make a real attempt to grapple with all of the relevant factual allegations made by the opposing party".⁵

11. Regard must also be had to the following warning sounded by Heher JA in *Wightman t/a JW construction v Headfour (Pty) Ltd and Another*⁶:

"There is this a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."

Ordinarily only three sets of affidavits are allowed in motion proceedings

12. The bedfellow of these general principles is the longstanding rule in motion proceedings that only three sets of affidavits are allowed, and that no further affidavits may be filed without the leave of the court.

² Van Blerk, *Precedents for Applications in Civil Proceedings*, Juta, 2018, page 15, para 3.24

³ See *Pountas' Trustee v Lahanas* 1924 WLD 67 70; *Dennis v Garment Workers' Union Cape Peninsula* 1955 (3) SA 232 (C), and *Dennis v Garment Workers' Union, Cape Peninsula* 1955 (3) SA 232 (C)

⁴ *President of The Republic of South Africa and Others v M & G Media Ltd* 2012 (2) SA 50 (CC) and see *President of the Republic of South Africa and Others v M & G Media Ltd* 2011 (2) SA 1 (SCA) at par [38]

⁵ As stated and summarised in Van Blerk *supra* page 15, para 3.31

⁶ [2008] (3) SA 371 para 13

13. As the Supreme Court of Appeal explained in *Hano Trading*⁷, uniform rule 6 “sets out the sequence and timing for the filing of the affidavits by the respective parties” and that “[u]nlike actions, in application proceedings the affidavits take the place not only of the pleadings, but also of the essential evidence which would be led at a trial. It is accepted that the affidavits are limited to three sets”.
14. Similarly, in *Zarug v Parvathie N.O.*⁸, the court held:
- “Normally in motion proceedings the rule is that three sets of affidavits are allowed and that no further affidavits may be filed without the leave of the Court. Such leave is in the discretion of the Court and that discretion must be exercised judicially upon a consideration of the facts of each case ...”.
15. The rationale for permitting the filing of only three sets of affidavits in a specific sequence is sound. If it were otherwise, as the court in *Wingaardt and Others v Grobler and Another*⁹ explained, parties would be free to continually present new or fresh evidence to the court as and when it pleases them and when it becomes available.

The relevant context and chronology of material events

The launching of the main application and the founding affidavit

16. As foreshadowed above, the applicant launched the main application during January 2022.
17. In its founding affidavit, the applicant alleges, in essence, that the immovable property in issue (i) is zoned residential 3, (ii) has been developed, built and used for residential purposes only, (iii) comprises a residential housing estate of some

⁷ *Hano Trading supra* para 10

⁸ *Zarug v Parvathie N.O.* 1962 (3) SA 872 (D) at page 873. In a similar vein to *Hano Trading* and *Zarug* see *BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd & Others* 2017 (4) SA 592 (GJ) at para [17], *James Brown & Hamer (Pty) Ltd (Previously Named Gilbert Hamer & Co Ltd) v Simmons N.O.* 1963 (4) SA 656 (A), page 660D-E, *Sealed Africa (Pty) Ltd v Kelly and Another* 2006 (3) SA 65 (W) at page 67B-E

⁹ *Wingaardt and Others v Grobler and Another* 2010 (6) SA 148 (ECG) at paras [13] to [14]

288 residential dwelling units, and (iv) is categorised by the first respondent as “residential” for rates and taxes purposes.

18. Accordingly, the applicant contends that it is to be charged for the water and sewerage services and consumption at the applicable residential multi-dwelling unit tariff. Instead, the applicant claims that it has been billed “at the incorrect commercial tariffs instead of the correctly applicable residential tariffs”.
19. The applicant further states in its founding affidavit that despite endeavouring to engage with the first and second respondent, the applicant is still billed at the commercial tariffs, as opposed to the relevant residential tariffs. In the interim, the applicant contends that it has paid, and will continue to pay, for all consumption charges at the applicable residential tariff.

The respondents’ (first) answering affidavit

20. The respondents filed their answering affidavit during March 2022. The deponent to the respondents’ answering affidavit is Tuwani Ngwana. He is employed by the first respondent as “Legal Assistant: Revenue and Debt Collection”.
21. In overview, the respondents, per their answering affidavit, do not deny or place the following seriously or issuably¹⁰ in dispute: (i) that stated above regarding the residential zoning, rating and use et cetera of the applicant’s property, and (ii) that the applicant has paid that due in terms of the relevant residential tariff.

The thrust of the respondents’ opposition in their (first) answering affidavit

22. The thrust of the respondents’ opposition to the main application, as set out in their answering affidavit, is to be found in a series of staccato and needlessly repetitive statements, of the following type:

¹⁰ When referring to seriously or “issuably”, I do so within the context of that stated in paragraphs 9 and 10 above

- 22.1. the applicant “must submit the Application for Tariff Changes, for the respondents to consider changing its tariff from commercial to residential rates” (see paragraphs 9, 10 and 11 of the answering affidavit);
 - 22.2. “the applicant [has] failed to make the necessary applications for the change of tariff for water and sewerage services” (paragraph 14);
 - 22.3. “the second respondent has no record of the applicant making an application for water and sanitation to be charged on [sic] residential meter and sewerage tariffs” (paragraph 16);
 - 22.4. “the applicant is obliged to make an application for the conversion of its municipal services billing tariff, to be converted from commercial to residential tariff” (paragraph 27);
 - 22.5. “[t]he applicant is required to make the necessary application with the second respondent to be charged on the correct tariff” (paragraphs 30 and 32);
 - 22.6. “[t]he applicant is required to make the necessary application with the second respondent, for it to consider changing the levying [sic] the water and sewerage rate from commercial to residential rate” (paragraph 34);
 - 22.7. [t]he applicant must “[s]ubmit an application for change of tariffs from commercial to residential rates” (paragraph 46.2); and
 - 22.8. “[d]espite being advised to do so, [the applicant has] failed to submit an application for Application for Tariff Changes” (paragraph 66.1).
23. The high-water mark of the respondents’ opposition to the main application can be found in paragraphs 27 and 66.4 of their answering affidavit; namely that the applicant’s only relief is to apply for the conversion of its municipal service tariff billing from commercial to residential. Paragraphs 27 and 66.4 respectively read:

“27 the respondent [sic] cannot revise and correct the billing tariff of the applicant for water and sewerage services, such conduct will be ultra vires and unlawful.”

“66.4 The respondent’s, cannot *mero mutu* [sic] change the tariff levied against it for water and sewerage services, without an application for Application for Tariff Changes, being submitted and appropriately approved by the respondents.”

24. Mr Ngwana, on behalf of the respondents, repeats these sentiments in paragraphs 67 and 68 of the respondents’ answering affidavit by asserting:

“67. The applicant is legally obliged to submit an application for Application for Tariff Changes, in order for its property ... to be considered for a change of tariff from commercial to residential rate.

68. The applicant cannot use the above Honourable Court to impose a decision, which the applicant has not made an application thereto [sic], for the consideration of the respondents. Such decision would be ultra vires, irrational and unlawful.”

25. The applicant filed its replying affidavit During April 2022.

The “May 2018” amendments to the main application

26. During June 2022, the applicant simultaneously filed a uniform rule 28 notice to amend its notice of motion and applied for leave to file a supplementary affidavit.

27. The import of the applicant’s amendment to its notice of motion and the need for its supplementary affidavit pertained to the aforesaid May 2018 date. The applicant had initially sought, when bringing the main application, a March 2017 commencement date for the rectification and recalculation of its water and sewerage consumption charges. The amendment and supplementary affidavit sought to reduce this commencement date to May 2018.

28. The May 2018 commencement date is pursued within the following factual context: The applicant asserts that the first respondent had initially correctly billed the applicant for its water and sewerage consumption on the relevant residential tariff with effect from the date of the transfer of the property to the first respondent (March 2017), but with effect from the applicant's May 2018 statement of account, the previously applied residential tariff "was unilaterally, arbitrarily and without cause, changed to the Commercial tariff, by the First Respondent".
29. Despite the respondents' opposition, and pursuant to uniform rule 30 and 30A notices and applications, the applicant, per orders of Benson AJ. (dated 23 August 2023), obtained the necessary leave to pursue the May 2018 date within the aforesaid factual context.

The respondents' supplementary affidavit

30. On 24 November 2023, the respondents filed what they label as an "answering affidavit to the applicant's supplementary affidavit". Again. Mr Ngwana is the respondents' deponent. His position with the first respondent remains unchanged. For reasons unexplained, the affidavit was deposed to only on 30 November 2023. Nevertheless, despite taking some three months to file their supplementary answering affidavit, there is little that is new, or noteworthy, in this (second) answering affidavit.
31. Importantly, but ultimately fatally for the respondents, the respondents' second answering affidavit does (i) not deny that the applicant was charged until May 2018 on the relevant residential tariff, (ii) nor deal with the subsequent May 2018 tariff change to a commercial tariff, (iii) nor provide a reason or explanation for the tariff change.
32. Instead, the supplementary answering affidavit essentially repeats and restates the themes of the respondents' original answering affidavit. In summary, the import of the supplementary answering affidavit is set out in paragraphs 9 to 12, which read:

- “9. ..., the respondents advised the applicant to submit an application for tariff change
10. As at the date of this affidavit, the applicant has failed and/or refused to submit an application for tariff change. This only proves that this application is mala fide and without merit. ...
11. The respondents are duty bound to follow the relevant laws and policies in relation to changing of tariff. They cannot unilaterally change tariffs without following due process. Such conduct will be ultra vires and illegal.
12. Furthermore, the respondents cannot revise the account whereas [sic] there is no application in its records as the account is revised [sic] from date of the application.”

Events subsequent to the respondents’ supplementary affidavit

33. The applicant subsequently filed a supplementary replying affidavit to the respondents’ supplementary answering affidavit. It did so on 12 December 2023.
34. After initially making application for a set down date during March 2024 (per the relevant practice directives), the applicant, on 3 September 2024, set the main application down for hearing on the opposed motion roll for the week commencing Monday, 7 October 2024.
35. More than a month later, at 10:49 am on Friday, 4 October 2024, the first respondent served its interlocutory application; to which I now turn.¹¹

The first respondent’s interlocutory application

Introduction

36. As already mentioned, the first respondent seeks leave in its interlocutory application to file a further affidavit in the main application. The first respondent’s

¹¹ In terms of my allocation directives, distributed on 25 September 2024, the main application was allocated for hearing at 10:00 am on Monday, 7 October 2024

interlocutory application is dated Friday, 4 October 2024. It is brought under the rubric of uniform rule 6(5)(e). It is supported by a single affidavit, also dated 4 October 2024, which affidavit purports, at the same time, to also be the further affidavit that the first respondent seeks leave to file.

37. The applicant opposed the first respondent's interlocutory application. It wisely did not seek for an opportunity to file an answering affidavit in opposition to the interlocutory application. Instead, the applicant pursued its opposition on the basis that the first respondent failed to make out a proper case for the granting of the discretionary relief sought. The interlocutory application was thus argued based on that asserted in the first respondent's further affidavit alone.
38. However, Ms Lombard, who appeared for the applicant, placed on record that if the interlocutory application succeeded and the first respondent was permitted to file its further affidavit, the applicant would require an opportunity to file an affidavit in response to the first respondent's further affidavit. Mr Sithole, who appeared for the first respondent, conceded that the applicant would be entitled to such an opportunity. He was however equivocal when asked whether the first respondent should be permitted to file a further affidavit in response to the applicant's aforesaid affidavit.
39. The argument in the interlocutory application consumed the entire morning of the court hearing on Monday, 7 October 2024.¹² Given other opposed motion commitments, and the availability and convenience of counsel, the matter was adjourned at 2 pm on Monday, 7 October 2024 to 2 pm, Thursday, 10 October 2024.
40. After hearing further submissions from 2 pm to 2:30 pm on 10 October 2024, I dismissed the first respondent's interlocutory application. In doing so, I ordered that the first respondent was liable for the costs of its application on an attorney client basis. I advised the parties that my reasons for the dismissal and costs

¹² For purposes of the Taxing Master, the argument was from 10 am to 1 pm save for the 11:15 am to 11:30 am tea break

orders would be included in my judgment in the main application. My reasons follow below.

The case for the requested leave (such as it is)

41. As already indicated, the first respondent's further affidavit serves two purposes. Its first purpose is an endeavour to explain the reasons for its late filing. Its second purpose is to set out the "evidence" that the first respondent seeks to introduce into the main application via the filing of its further affidavit.
42. The first respondent's case, in respect of the further affidavit's first purpose, is set out in the laconic and perfunctory terms in paragraph 34 of its founding affidavit. The paragraph reads:

"34. The evidence attached to this affidavit are [sic] evidence which only came to the attention of the Municipality's representatives recently and with the new Counsel being on brief, it became important that same is to be brought before court and the Applicant is aware of this evidence as it receives a monthly tax invoices and the evidence brought herein is nothing new to the Applicant, as it is the one who made the application as indicated above."
43. As to the further affidavit's second purpose, the "evidence" that the first respondent seeks to introduce falls into two broad classes. They are (i) "evidence" pertaining to the applicant's (alleged) indebtedness to the respondent - this evidence, in turn, is comprised of a bundle of invoices, and a document that purports to be a payment schedule; and (ii) "evidence" pertaining to the applicant allegedly having applied for a "change of tariff to business" and comprises an email and assumedly an accompanying application form and also assumedly the invoices.
44. More specifically, the email in issue is an email by "Luelle Padayachee", sent at 14:13 pm on Wednesday, 2 October 2024. Ms Padayachee is presumably an employee of the first respondent. The Padayachee email reads:

“Dear All,

As discussed,

1. Customer applied for a new water meter 150 mm connection, notification number 700300026127 in 2017 for a business supply
 2. Coj [sic] was initially billing customer for water and sewer availability charges, along with rates for vacant charges.
 3. Until such time that the developers started developing the property in 2018 where the business water meter was installed and started billing for water [a]nd sewer business consumption from 2018 to current.”
45. Also included in the second class of “evidence” is a document that purports to be a “SAP” electronic / data printout representing an apparent application by the applicant to the first respondent for a “new water connection 150 MM pipe”. The application is seemingly dated 11 April 2017.
46. Mr Sithole, appearing for the respondents, argued that the first class of documents’ materiality and relevance pertained to the interdictory relief sought by the applicant. The applicant, so Mr Sithole argued, was not entitled to broad ranging or blanket interdictory relief in circumstances where the applicant owed an amount in respect of its water and sewerage consumption charges. As to the second class of “evidence” and accompanying “documents”, Mr Sithole argued that these were material and relevant to the question of when and why there was the change in the tariff charged to the applicant.

The relevant legal principles in an application for leave to file a further affidavit

47. In amplification of the legal principles traversed above, there are several established legal principles dealing with an application to file a further affidavit.
48. First, uniform rule 6 sets out the number of, and order in which, affidavits are to be filed. Uniform rule 6(d)(e) initially regulates that relevant to a replying affidavit but includes the following important rider: “The court may in its discretion permit the filing of further affidavits.” The general rule is thus that only three sets of

affidavits are permitted, save with the leave of the court exercising its discretion. It is obvious that this discretion must be exercised judiciously.¹³

49. What considerations then ought to be brought to bear when a court engages its uniform rule 6(d)(e) discretion? Existing and recognised considerations provide valuable input and direction. Given inter-alia section 173 of the Constitution;¹⁴ these considerations cannot constitute a *numerus clausus* of considerations. They, in any event, never have.
50. In their commentary on uniform rule 6(d)(e), the authors of Erasmus¹⁵ collect and restate the following considerations (described as “factors”) relevant to the exercise of the court’s discretion: (i) the reason the evidence was not produced timeously; (ii) the degree of materiality of the evidence; (iii) the possibility that it may have been shaped to “relieve the pinch of the shoe”; (iv) the balance of prejudice to the applicant if the application is refused and the prejudice to the respondent if it is granted; (v) the stage which the particular litigation has reached which includes considering the need for finality, and the undesirability of a reconsideration of the whole case; (vi) the convenience of the court (to which Opperman J adds the consideration of whether the court has been afforded sufficient time to consider the further affidavit¹⁶); (vii) the “healing balm” of an appropriate order as to costs; (viii) the general need for finality in judicial proceedings; and (ix) the appropriateness, or otherwise, in all the circumstances, of visiting the fault of the attorney upon the head of his client. I do not understand these considerations to enjoy any primacy or preference except to state that considerations of justice and fairness are of vital importance¹⁷.
51. The authors of Erasmus¹⁸ also add:

¹³ M&G Media Ltd *infra* para 27

¹⁴ A High Court has the inherent power to protect and regulate its own process and to develop the common law, taking into account the interests of justice

¹⁵ Van Loggerenberg, *Superior Court Practice*, Juta, Third Edition

¹⁶ *White Rock Property Trading (Pty) Limited v Khaka and Another* (19602/16) [2017] ZAGPJHC 175 (7 June 2017) para 11

¹⁷ *M&G Media Ltd v President of the Republic of South Africa and Others* 2013 (3) SA 591 (GNP) para 27

¹⁸ *Supra*

“It is essentially a question of fairness to both sides as to whether or not further sets of affidavits should be permitted. *There should in each case be a proper and satisfactory explanation, which negatives mala fides or culpable remissness*, as to why the facts or information had not been put before the court at an earlier stage, and the court must be satisfied that no prejudice is caused by the filing of the additional affidavits which cannot be remedied by an appropriate order as to costs.”

52. All things considered, and questions of prejudice and costs momentarily set aside¹⁹, a court in the exercise of its discretion ought generally to be inclined to permit the case to be adjudicated on the full facts, and in so doing permit the further affidavit to be filed; provided, however, that the filing of the further affidavit is *bona fide*, there is a reasonably, sufficient and satisfactory explanation which negatives *mala fides* or culpable remissness in the failure to tender the evidence earlier in the proceedings; the matter sought to be introduced via the further affidavit is material, relevant, and admissible²⁰ and the administration²¹ and interests²² of justice are not prejudiced thereby.
53. The Constitutional Court has put the relevant threshold at “exceptional circumstances”²³ having to exist which renders the evidence sought to be introduced as material and relevant to a just and equitable determination of the dispute between the parties. I am however reluctant to apply the “exceptional circumstances” test in the present instance because the first respondent gets nowhere near it.

Analysing the “explanation” and considering the merits of the interlocutory application

¹⁹ Obviously, if the prejudice suffered by the counter-party because of the admission of the further affidavit cannot be remedied, at least, by an appropriate costs order, a court ought to be disinclined to permit the further affidavit to be filed.

²⁰ *Supra* 34

²¹ *Rex v Carr* 1949 (2) SA 693 (A) as quoted in *M&G Media Ltd supra* para 34

²² *Ibid*

²³ *M&G Media Ltd supra*

54. I have nevertheless considered the “explanation” provided in paragraph 34 of the further affidavit. I have also considered Mr Sithole’s accompanying submissions.
55. I accept for present purposes, as tendered by Mr Sithole from the bar and not contained in the further affidavit, that Mr Sithole’s attorney and he were only instructed in the matter on 2 October 2024. But this advice is unhelpful for the first respondent. It demonstrates a general insouciance, if not recklessness, on the part of the first respondent in protecting its own interests in this matter.
56. This insouciance, if not recklessness, is amplified because there is no explanation for the late instruction. I pause to mention that Mr Ngwana’s silence on this score is deafening within the context of Sutherland DJP’s March 2024 judgment in *Millu v City of Johannesburg Metropolitan Municipality and Another*²⁴ (“*Millu No. 1*”). I also mention Mr Sithole appeared for the first respondent in that matter, instructed by the same firm of attorneys who are presently also the attorneys of record for the respondents in the matter before me.
57. The further affidavit is contaminated by a general insouciance, if not recklessness, on the part of the first respondent in protecting its own interests in this matter.
- 57.1. For example, the aforementioned late change in the first respondent’s external legal team is unexplained. The further affidavit additionally fails to (i) identify who specifically are “the Municipality’s representatives”; (ii) when the “evidence” first came to the attention of the “the Municipality’s representatives” and particularly the deponent; (iii) the relevance of “new Counsel on brief”, and (v) when “new Counsel” was placed on brief.
- 57.2. To the above list of concerns regarding, and omissions in, the further affidavit, I add the first respondent’s failure to explain (i) Ms Padayachee’s prior absence, and lack of participation in this application (if this is the case), (ii) Ms Padayachee’s belated recent involvement (if this is the

²⁴ 2024 JDR 1329 (GJ)(18 March 2024) – see inter-alia paragraphs 43, 44 and 45

case); (iii); the nature of Ms Padayachee's belated involvement and (iv) the source or origin of Ms Padayachee's knowledge.

- 57.3. The second class of evidence is not new evidence. It relates to an application made in 2017. The respondents have already filed two answering affidavits in the main application. They did so in March 2022 and November 2023 respectively. The explanation tendered, such as it is in the further affidavit, does not meaningfully, if at all, address and grapple with the omission of the second class of evidence from the two prior answering affidavits.
58. Simply put, the further affidavit is bereft of the necessary particularity allowing me to be satisfied that there is a reasonably sufficient explanation or reason for the "evidence" contained therein not being produced timeously. The first respondent fails to provide a proper and satisfactory explanation sufficient to negative its *mala fides* or culpable remissness. I am equally unable to conclude that the filing of the further affidavit is *bona fide* within the context of it being the (third) affidavit tendered on the part of the first respondent in the main application.
59. Ultimately, Mr Sithole faintly conceded that the first respondent's explanation (such as it is) for its late further affidavit is unsatisfactory. I agree, but in a louder voice.
60. Even if my aforesaid findings and views, in the exercise of my discretion, are misplaced, I am not satisfied that the "evidence" sought to be introduced is admissible, let alone material and relevant to a just and equitable determination of the dispute between the parties.
61. My dissatisfaction is informed by the following: (i) Mr Ngwana, on the face of things, lacks the required personal knowledge to depose to the further affidavit, (ii) the further affidavit is not accompanied by a confirmatory affidavit of Ms Padayachee; (iii) the further affidavit seeks to introduce, for the first time, what appears to be a new defence to the main application not previously raised; and

(iv) even if it were to be introduced, the new defence does not actually constitute a defence to the main application.

62. As already indicated in paragraph 9 above, absent an appropriate confirmatory affidavit, the contents of an affidavit must fall within the personal knowledge of the deponent, and affidavits are required to contain admissible evidence. The further affidavit fails to meet either of these requirements.
63. Mr Ngwana is the first respondent's deponent to the further affidavit; albeit he now describes himself as being employed as a "Legal Adviser" by the first respondent. Mr Ngwana states the following in paragraph 2 of the further affidavit:

"Subject to the contents directly attributed to an individual within the employ of the respondent the contents of this affidavit fall within my personal knowledge, save where the contrary appears from the context hereof and are [sic] to the best of my belief both true and correct."

64. Ignoring its paucity of necessary grammar, paragraph 2 is entirely unsatisfactory. Mr Ngwana and the drafters of the further affidavit have contemptuously ignored Sutherland DJP's dicta and instruction in paragraph 45 of *Millu No. 1*.²⁵ Equally damning is paragraph 2's generic and empty verbiage of the type specifically frowned upon by the Supreme Court of Appeal.²⁶
65. The first respondent's difficulties do not end here. The further affidavit is not accompanied by a confirmatory affidavit of Ms Padayachee. The further affidavit also does not endeavour to engage with the requirements of The Law of Evidence

²⁵ Paragraph 45 reads:

"[45] The practice of requiring a legal advisor to depose to the affidavits is both a clue to the cause of the debacle and a manifestation of the City's reckless attitude. It should be self-evident that the City's legal advisor has no personal knowledge of the accounting. He cannot ever be more than a conduit. His affidavit craftily states that he makes it based on the information provided to him, deftly evading the typical formula that the deponent has access to and control over the documents *qua* evidence. From whom the facts were truly obtained is never said, and in this wholly unsatisfactory manner, the anonymous officials who compose the accounts are shielded from accountability. If Mr Ngwana is ever be cross-examined on his affidavits it seems likely that embarrassment would soon follow. It must be stated bluntly that the affidavits in litigation should be from persons who administer the accounts. The practice of a legal advisor being a deponent to facts of which he has no personal knowledge must stop."

²⁶ *President of the Republic of South Africa and Others v M & G Media Ltd supra*

Amendment Act, No. 45 of 1988, pertaining to the admission of hearsay evidence. As such, everything attributed to Ms Padayachee in the further affidavit is hearsay and inadmissible; especially the Padayachee email and what appears to be its annexures.

66. Leaving aside the invoices attached to the further affidavit, both the SAP application form (assumedly an annexure to the Padayachee email), and the “payment schedule” (annexure COJ10) attached to the further affidavit, appear to be documents or evidence that originate or exist in an electronic format (electronic or data messages). As such, the Electronic Communications and Transactions Act, No. 25 of 2002 (ECTA) applies. The first respondent however fails to attempt to render these admissible under section 15(4) of ECTA.
67. The judgment of Opperman J. (sitting in the Free State High Court, Bloemfontein) in *Sheffryk v MEC for Police, Roads and Transport: Free State Province*²⁷ opens with the following salutary and apt statements:

“Two wrongs do not make a right.’ A document is a document and hearsay evidence is hearsay evidence; opinion evidence is opinion evidence. The Law of Evidence on the admissibility of the evidence prevails. It is said that a document only proves what is written in it, but not the truth of what is written. Before the contents of a document may be presented as the truth, the admissibility requirement must be fulfilled. The contents must not be irrelevant, the document must not contain an inadmissible confession, etc. Because a document usually reflects somebody’s knowledge and thoughts, particular care must be taken to ensure that it does not infringe the hearsay rule and perhaps the opinion rule.”

68. With the above in mind, it would be both a fruitless and improper exercise of my discretion to permit the filing of the further affidavit where its content and annexures are inadmissible.

²⁷ 2022 JDR 1629 (FB) para 1

69. That said, even if any of the further affidavit's content and annexures could or should be regarded or treated as admissible, both classes of evidence in issue are immaterial and irrelevant generally, and more so immaterial and irrelevant to a just and equitable determination of the dispute between the parties. This is because:
- 69.1. The SAP application is merely an application form; evidencing, at best for the first respondent, only the following (i) the fact of an application, and (ii) an accompanying payment of an application fee; nothing more. The first respondent and the further affidavit do not assert that the application was successful and, if so, when it was approved by the first and/or second respondents, and subsequently implemented.
 - 69.2. The SAP application form appears to pertain to an application for a "new water connection"; yet it is incorrectly suggested in paragraph 18 of the further affidavit that the application is an application for a tariff change.
 - 69.3. The SAP application form further appears to pertain to a new connection for a "bus" rate (presumably a reference to "business"), yet the applicant was initially billed at the relevant residential rate meaning that the (common cause) facts belie and contradict the contents of the application form.
 - 69.4. The further affidavit fails to explain any connection between the application and the common cause May 2018 change in tariff. This is pertinent because the SAP application form is dated 11 April 2017, while the common cause change in tariff from residential to commercial took place in May 2018; some 13 months later.
70. Turning to the invoices attached to the further affidavit, their purported relevance is claimed to rest on evidencing the extent of the applicant's indebtedness to the first respondent. The applicant's position, as stated in its founding affidavit, is that it has paid the amounts owed in accordance with the residential tariff. The respondents do not issuably deny this. Inasmuch as the applicant has been billed

at the higher commercial tariff, there would therefore understandably, on the respondents' version, be an amount owed. But this is not the issue. The first respondent fails to indicate via the further affidavit and the invoices, what amount, if any, the applicant is in arrears vis-à-vis a residential tariff. As such, the invoices attached to the further affidavit are unhelpful, irrelevant and immaterial.

71. Turning to the question of prejudice, there is no reason why there should be any (further) delays in this matter. I had already read the papers and affidavits filed of record in the main application prior to the commencement of argument. I had prepared for the argument. Permitting the filing of the further affidavit will result in an unavoidable postponement of the main application, burdening the administration and interest of justice. The main application will be required to be re-enrolled and argued at a later date, needlessly delaying the enrolment of another matter on that opposed motion roll, and requiring another judge to (re)read the papers and affidavits the main application. There is also no reason for the applicant being frustrated in having its day in court. It is entitled to its main application being heard. The matter has already been needlessly delayed by the respondents within the context of their ill-advised rule 30 / 30A applications. Moreover, it is not in the interests of the public purse for this application to remain unresolved given that the respondents' litigation is funded by the public purse.
72. In addition to the above, the interlocutory application is, I believe, not pursued in good faith. It is pursued by the first respondent in order to "relieve the pinch of the shoe" by endeavouring to introduce a new defence and evidence into the main application at the proverbial last minute. The "defence" foreshadowed in the further affidavit pertains, then incorrectly, to assumedly evidencing an application for a change in tariff. The attached SAP application form however is an application for a new line, not a change in tariff. This evidence (i) on the face of it was always available to the respondents; and (ii) should have been introduced some 2½ years ago. Given the circumstances, the further affidavit is a death's hour endeavour to breathe life into the respondents' moribund opposition to the main application.

73. In concluding the discussion and analysis on this topic, the following dicta of Cloete JA in *Rhooode v De Kock and Another*²⁸ is appropriate:

“[19] In view of the conclusion to which I have come in the previous section of this judgment, no point would be served in granting the relief sought by the appellant. He would not be entitled to make allegations in a further set of affidavits that should have been in his answering affidavit, in the absence of any explanation as to why they were not there in the first place (*Kasiyamhuru v Minister of Home Affairs and Others* 1999 (1) SA 643 (W) at 649F – 650E) - and there was none; accordingly, the shortcomings in his case, which I have held to be fatal, could not be remedied.”

74. In summary, the content and annexures sought to be introduced via the further affidavit are inadmissible, immaterial, irrelevant and, moreover, the administration and interests of justice would be prejudiced by the further affidavit's admission. The interlocutory application is moreover not *bona fide*.
75. In the circumstances, after having due regard to the various circumstances (factors) set out in above (appropriately weighed, measured and counter-balanced), I decline to exercise my discretion to grant the first respondent the belated indulgence sought. Otherwise stated, the first respondent's interlocutory application is dismissed.

The costs consequences of the interlocutory application

76. On the question of costs, not only is there no reason why costs should not follow the result²⁹, but I also believe that, in the exercise of my discretion and mindful that a punitive costs order is not awarded easily or readily, a punitive costs order is justified and warranted.

²⁸ *Rhooode v De Kock and Another* 2013 (3) SA 123 (SCA)

²⁹ *Vassen v Cape Town Council* 1918 CPD 360 and *Ferreira v Levin NO and Others*; *Vryenhoek and Others v Powell NO and Others* 1996 (2) SA 621 (CC) para 3

77. The interlocutory application (i) constitutes an abuse of court process³⁰, and (ii) the first respondent, in bringing and in pursuing its interlocutory application in the circumstances that it did, has misconducted itself in the conduct of the matter.³¹ The interlocutory application was pursued on vacuous and ill-considered grounds. It ignored trite and established principles of the law of evidence. No worthy cause or worthy motive informed the bringing of the interlocutory application. It has moreover frustrated and delayed argument and the final determination of the main application, and the orderly progression of the opposed motion court roll that served before me that week.
78. Most importantly, however, the first respondent inexplicably ignored the warnings furnished by Sutherland DJP and Benson AJ. In the latter respect, the following findings of Benson AJ.³², in disposing of the respondents' uniform rule 30 and 30A application and granting attorney client costs orders, requires restating:

“The fact that the respondents are seasoned litigants, and that they utilise public funds to finance such litigation, also warrants censure. The obstructive attitude which they have displayed in relation to the applicant's approach to the intended (and now perfected) amendment, is unfathomable, yet warrants an adverse costs order as against them.”

79. There is also the after-the-fact endeavour by the first respondent to file what it labels as a “confirmatory affidavit” by Ms Padayachee. This affidavit is dated 7 October 2024. Duly considered, (i) the Padayachee affidavit is not merely a confirmatory affidavit; (ii) it fails to identify to which of Mr Ngwana's three affidavits it pertains; and (iii) it purports, without explanation and unsatisfactorily, to remedy the patent evidential shortcomings in the interlocutory application. Leave was not

³⁰ *Tjiroze v Appeal Board of the Financial Services Board* 2021 (1) BCLR 59 (CC) and *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at para 8

³¹ *Nel v Waterberg Landbouwers Ko-operatiewe Vereniging*; *Van Dyk v Conradie* 1963 (2) SA 413 (C); *De Goede v Venter* 1959 (3) SA 959 (O); and *Ward v Sulzer* 1973 (3) SA 701 (A)

³² *AFHCO Calgro M3 Consortium (Pty) Ltd v City of Johannesburg Metropolitan Municipality and others* 2023 JDR 3337 (GJ) para 37

sought to file the Padayachee affidavit. It was not accompanied by an application for its submission. I thus regard the Padayachee affidavit as *pro-non scripto*.³³

80. If any regard, however, is to be had to the Padayachee affidavit, stripped to its essence and true purpose, it serves as the first respondent's proverbial white flag within the context of the inadmissibility of the evidence sought to be introduced via the further affidavit.
81. Additionally, when asked on what basis the first respondent believed it was simply entitled to file the Padayachee affidavit, Mr Sithole unsustainably argued that this was because (i) Mr Sithole previously indicated that the first respondent intended filing the affidavit, and (ii) the need for the affidavit arose because of points which I had *mero motu* raised.
82. Each of these arguments lack obvious merit. Simply stating that you are going to do so something does not entitle you to simply do it, especially if such requires the leave of the court. Additionally, I was also not providing the first respondent with legal advice on how to present, evidence and substantiate its case in the interlocutory application. I was engaging with counsel on concerns I had with the first respondent's case. Mr Sithole additionally falsely argued that I had somehow previously indicated that I would permit the filing of the confirmatory affidavit by indicating that if the interlocutory application were to succeed, the applicant would be permitted to file a further affidavit.
83. The endeavour to justify the filing of the Padayachee affidavit on the strength of these fallacious arguments, in the absence of an application for leave to file the affidavit, is *mala fide* and constitutes misconduct in the proceedings. The grant of a punitive costs order is therefore necessary and warranted.

The merits of the main application

84. I now turn to determine the merits of the main application. As set out above, the respondents repeatedly contended that the applicant has not made application

³³ *Meropa Communications (Pty) Ltd & Another v Verb Media (Pty) Limited* (29646/2016) [2017] ZAGPJHC 464 (11/8/2017) at para [13] - [15]

for a change in tariff from commercial to residential, and the respondents cannot *mero motu* change the applicable tariff.

85. A consideration of the admissible affidavits filed in the application, and the relevant invoices, demonstrates that the applicant was billed at the relevant residential tariff up until the receipt of its May 2018 statement; evidencing a change in tariff from residential to commercial.
86. The respondents do not explain the reasons for the change in the tariff. They should have done so, particularly within the context of their repeated assertions that (i) a tariff change can only take place within the context of an appropriate application being made for a tariff change, and (ii) the applicant, despite the express invitation to do so, not making an application for a tariff change.
87. As set out above, the respondents' position in opposing this application is, as ultimately stated in the supplementary answering affidavit, the following: "The respondents are duty bound to follow the relevant laws and policies in relation to changing of tariff. They cannot unilaterally change tariffs without following due process. Such conduct will be ultra vires and illegal". But this is exactly the point. This is exactly what the first and second respondents have in fact done. It is common cause (or not seriously or genuinely disputed by the respondents) that there was a tariff change in the applicant's May 2018 account statement. The respondents do not, assert, let alone present any admissible evidence, that the applicant applied for a change in tariff from the (common cause) historically applied residential rate to a commercial or business rate. This change thus took place unilaterally and without an application being made for the change. The tariff change is thus "ultra vires and illegal".
88. Mr Sithole's endeavours to argue - presumably in support of justifying the tariff change - that resolutions of the first respondent pertaining to the applicable tariffs cannot be simply ignored and, as such, a change in tariff requires the making of an application. He endeavours to buttress this argument by stating that there must be an initial application "for a line" to the applicant's property, and that this initial application must be considered within the context of the invoices rendered

relating to “consumption”. A consideration of the first respondent’s resolutions is irrelevant within the confines and ambit of the main application. The further arguments are also unsustainable because they are unsupported by any admissible evidence and, in any event, they are self-defeating.

89. The respondents all also take issue, in their supplementary answering affidavit, with the applicant’s failure to disclose the application it made for a residential tariff when it applied for a water and sewerage account. I believe that the respondents do so improperly and opportunistically for at least two reasons. First, their position is irreconcilable within the context of that which the respondents do not place in dispute in the main application (see paragraphs 21 and 31 above), and second, the respondents could quite easily have put up the application themselves at the proper time (i.e., when filing their answering affidavit and supplementary answering affidavit) but they failed to do so.
90. Mr Sithole endeavoured to argue, as I understood him, that I could not grant the relief sought by the applicant in the absence of the applicant making the relevant application for a change in tariff. For me to do so, so the argument went, would be unlawful. This argument misses the point on the true issues requiring determination in the main application, namely; (i) who or what caused the May 2018 change in tariff from residential to commercial, and (ii) the consequences thereof.
91. Moreover, the first and second respondents have immutable statutory and legal responsibilities, with the accompanying accountabilities. On this score, Van Der Merwe AJA in *City of Johannesburg Metropolitan Municipality and Others v Hlophe and Others*³⁴, as quoted in *Barstow and others v City of Johannesburg Metropolitan Council*³⁵, held (footnotes omitted):

“In my view, however, the decisive consideration is the principle of public accountability. It is a founding value of the Constitution and central to our constitutional culture. In terms of s 152(1)(a) of the

³⁴ [2015] 2 All SA 251 (SCA) para 25
³⁵ 2023 JDR 2506 (GJ) para 14

Constitution the objects of local government include to provide accountable government for local communities. Section 6(1) of the Systems Act provides that the municipality's administration is governed by the democratic values and principles embodied in s 195(1) of the Constitution. Section 195(1)(f) of the Constitution specifically states that public administration must be accountable. In terms of s 6(2)(b) of the Systems Act the administration of a municipality must facilitate a culture of public service and accountability amongst staff. Constitutional accountability may be appropriately secured through the variety of orders that the courts are capable of making, including a mandamus."

92. As evidence of the above, there are various judgments of this court pertaining, directly and indirectly, to the reversing, revising and rectifying of the first and/or second respondents billing practices.³⁶ So too, granting interdictory relief of the type sought by the applicant.³⁷
93. Mr Sithole also argued that I could not grant the interdictory order sought by the applicant within its broad and general terms because the applicant may be in default of its payment obligations in respect of debts falling beyond those which form the subject matter of the present dispute. I immediately assuaged Mr Sithole's concerns by stating that if I was inclined to grant any interdictory order, I would ensure that it is carefully crafted to ensure that the interdictory order does not trespass upon the first and second respondents' ability to collect other debts that may be owed by the applicant. In any event, if regard is had to paragraph 1.5 of its notice of motion, the applicant does not seek broad and unencumbered relief of the type relief feared by Mr Sithole.
94. As already indicated, the issues to be determined in the main application are and were relatively simple and straightforward. These were however needlessly complicated and delayed by the litigation attitude adopted by the respondents to

³⁶ See *inter alia* Millu No.1 *supra*, and *K2012190864 (Pty) Limited v City of Johannesburg Metropolitan Municipality* 2023 JDR 3948 (GJ), *Whyte v City of Johannesburg* 2023 JDR 0648 (GJ), *Douglas and another v City of Johannesburg Metropolitan Municipality* 2023 JDR 4243 (GJ), *Barstow supra*

³⁷ See *inter alia* Millu No.1 *supra* and *Ackerman v City of Johannesburg and others* 2024 JDR 1449 (GJ) and *Barstow supra*

the main application generally, and the first respondent particularly within the context of its interlocutory application.

95. There is no admissible evidence before me that the May 2018 tariff change is as a consequence of the applicant, or anything it did. By all accounts, the tariff change could only have taken place at the instance of the first and/or second respondents and under their watch. In the circumstances, I cannot but find that the May 2018 tariff change from the relevant residential tariff to a commercial (business) tariff took place unilaterally, arbitrarily and without appropriate legal course, and must be reversed and rectified.
96. In closing this topic, I am satisfied that the applicant meets the requirements for the granting of the mandatory and interdictory relief sought. These requirements are trite and do not need restating. The applicant has made its case for the relief that it seeks, and it must therefore succeed in the main application.

The costs consequences of the main application

97. Similarly to the dismissal of the first respondent's interlocutory application, there is no reason for the costs of the main application not to follow the result.
98. The applicant asks however that the first and second respondents, jointly and severally, and in solidum, the one paying the other to be absolved, pay the costs of the main application on the punitive attorney and *own* client scale.
99. When considering whether costs should be awarded on a punitive scale, I remain sensitive to the consideration that a punitive costs order is not awarded easily or readily. That said, based on the authorities already mentioned, if a party has acted in an improper manner, a court may, in the exercise of its discretion pertaining to costs, show its displeasure with such conduct by awarding a punitive costs order. That said, an attorney and own client costs order is rare.

100. Ledwaba AJ in *HR Consulting (Pty) Ltd v Gomes and Others*³⁸ provides the following helpful excurses on attorney and own client costs orders:

“14. The scale of attorney and client is extra ordinary and penal in nature. It should be awarded where there is blameworthy conduct worthy of censure on the part of the guilty party such as fraudulent, dishonest, vexation conduct that amount to an abuse of court processes.³⁹ The costs on attorney and client scale may also be awarded to ensure more effectively than it can do by means of a judgement for party and party costs that the successful party will not be out of pocket in respect of the expense caused by the litigation. They may also be used by the courts to mark its disapproval of the conduct which should be frowned upon and where such cost order is justified having regard to the particular circumstances of the matter.⁴⁰ They may not only be meant to punish a losing party, but may be justified where, in the view of the court, there are circumstances which gave rise to the litigation, or arising out of the conduct of a losing party, which would render it just, equitable and necessary to ensure that a successful party is not out of pocket.⁴¹”

101. Eksteen JA explained in *Sentrachem Ltd v Prinsloo*⁴² that the granting of an order on the attorney and own client scale must be seen as an attempt by the court to go a step further than the ordinary order of costs on the scale as between attorney and client, to ensure that the successful party is indemnified of all reasonable costs of litigation.⁴³ Taxation will therefore occur on a more liberal scale. Such a

³⁸ 2024 JDR 2547 (LP) See also Cloete J, in *Fidelity Bank Ltd vs Three Woman (Pty) Ltd* [1996] 4 All SA 368 (W)

³⁹ *Plastic Converters of SA on Behalf of Members v National Union of Metal Workers of SA*, (2016) 37 ILJ 2815 (LAC); *Public Protector v SA Reserve Bank* 2019 (6) SA 253(CC) para 8

⁴⁰ Erasmus *Superior Court Practice: Service* 27, 2007- page B1-428A

⁴¹ *The Law Society of the Cape of Good Hope v Sizwe* 2012 JDR 1012 (ECG) para 4; and also *Nel v Waterberg Landbouers Ko-operatiewe* 1946 AD 597 at 607; and *Fidelity Bank Ltd supra* 1997 (2) SA 1 (A) at 22B-D

⁴² Also see *Delfante and Another v Delta Electrical Industries Ltd and Another* 1992 (2) SA 221 (C) at 233B; *In re Alluvial Creek Ltd* 1929 CPD 532 at 535

costs order, however, does not sanction the recovery of excessive and unreasonable costs.⁴⁴

102. Given the respondents' conduct, and on a conspectus of the main application as a whole, it is just, equitable, and necessary to ensure that the applicant is not out of pocket. There have been repeated unsuccessful endeavours and efforts on the part of the applicant to engage with the first and second respondents. The ultimate lamentable product of these unsuccessful endeavours and efforts is the need for the applicant's bringing of this application; unduly, if not unnecessarily, burdening both the applicant and the public purse. The first and second respondents could have avoided the need for the bringing of this application, had they simply applied their minds and meaningfully and timeously engaged with the applicant.

103. Mr Ngwana and the first respondent's legal advisers have eschewed Strydom J.'s January 2023 express "stern warning" in *Ulcombe v City of Johannesburg*⁴⁵ namely that:

"... unfounded opposition to applications where the aim of the applicant is to sort out long-standing disputes pertaining to municipal accounts, is frowned upon by this Court.

The impression of this court gained is that the legal adviser of the City, Mr Thuwani Ngwana, did not properly apply his mind and made no attempt to resolve the issue. The attorney for the respondent should not have allowed the matter to have found its way onto the opposed roll of this Court."

104. I must also restate the following findings of Sutherland DJP in *Millu v City of Johannesburg Metropolitan Municipality and Another*⁴⁶ (which apply equally in the present instance):

⁴⁴ *Cambridge Plan AG v Cambridge Diet (Pty) Ltd and Others* 1990 (2) SA 574 (T) op 589D-G; *Malcolm Lyons & Munro v Abro and Another* 1991 (3) SA 464 (W) op 469D-E

⁴⁵ 18969/2022 (2023 02 01)

⁴⁶ 2024 JDR 1329 (GJ) (18 March 2024) (marked reportable)

“[2] ... [there] is an egregious tardiness on the part of the City and its legal representatives...”

and

“[17] It is trite that since ancient times it has been recognised that courts enjoy an inherent jurisdiction to protect the integrity of the court process. The sheer arrogant indifference of the City and its dishonourable behaviour is manifest. Organs of state are expected to behave honourably. Apparently, the City expects that it can at the same time disrespect the fundamentals of the litigation system and continue with impunity to participate in that litigation system to protect its rights. Such behaviour cannot be tolerated precisely because it is calculated to abuse the process of the court.”

and

“[48] ... The practice of officials waging litigation with ratepayers’ money can perhaps be arrested, if in future, litigants suing the City for non-performance cite the officials, who are allegedly delinquent, in their personal capacities and, in addition, as a matter of course, cite the City Manager in his personal capacity as the official who bears ultimate responsibility. The cavalier attitude of public officials merrily fighting a case with the public’s money cannot be allowed to flourish.”

105. Regard must also to be had to the statements of Sutherland J. (as he then was) in *Zipp v Zipp*⁴⁷:

“Too often, legal practitioners display sycophantic acquiescence in their client’s desires. This is wrong. Diligent and professional advice includes frankly telling a would-be litigant what the realities of the law are. Indulging in litigation which serves only to wear down the opposition or protract the case is a violation of the duty of both attorneys and counsel

⁴⁷ Unreported judgment in *GH Zipp v LA Zipp*, in the High Court of South Africa: Gauteng Local Division, Johannesburg, Case number 2016/23915, judgment on 16 February 2017.

to the process of the court. Litigation is not a free for all. Our adversarial system of litigation does not license practitioners, whether attorneys or counsel, to ignore their duties to the court which requires them to act so as to promote the efficacy and efficiency of the process of the court. When practitioners, in their zeal for loyalty to their clients, abandon this duty they behave unprofessionally. (See: D.Ipp, 'Counsel's duties to the Court' (1998) 114 LQR 63)."

106. As I have already indicated, the issues for determination in the main application are and were relatively simple and straightforward. The applicant merely asks, via the main application, that it be billed on the relevant historical pre-May 2018 residential rate. This is particularly so because the May 2018 tariff change flies in the face, as already mentioned, of the respondents' stance that a change in tariff requires an application, and the first and second respondents "cannot unilaterally change tariffs without following due process" because such "conduct will be *ultra vires* and illegal". The respondents' inability to explain this change, despite their statutory and public service obligations and accountabilities, carries with it the indubitable inference that the change took place without due process, and was *ultra vires* and illegal. The respondents and their legal representatives should not have allowed the main application to have found its way onto the opposed roll of this Court. An adverse costs consequence must follow in these circumstances alone.
107. As already mentioned, the same legal representatives (counsel and firm of attorneys) who acted for the City in *Millu No.1* appeared before me. While I accept that the respondents' attorneys and counsel were only recently instructed in the main application, it is disconcerting that they and Mr Ngwana nevertheless appear to have paid scant, if any, regard to the aforesaid dicta of inter alia Sutherland DJP in *Millu No.1*, Benson AJ. or Strydom J.
108. I additionally agree with the applicant's assertion that the first and second respondents have mulcted the applicant in unnecessary and wasteful expenditure. All the applicant requires is that (i) it be billed at the correct rate; and (ii) its municipal account is rectified. That said, the first and second respondent's

conduct throughout their dealings with the applicant's legitimate queries and endeavours is unacceptable, high-handed and dismissive. The applicant further suggests that only an order that the first and second respondents pay the costs of the main application on the attorney and own client scale will ensure that this does not happen again.

109. That said, in all of the circumstances and having regard to the first and second respondents' conduct, as traversed above in this judgment generally, and in the exercise of my discretion, a punitive attorney own client costs order is both justified and warranted.
110. I have declined to impose a costs order or fee sanction against the respondents' legal representatives solely because of their late introduction and instruction in the main application. I doubt, however, that another court will be as forgiving in the future.
111. In closing this topic, the first and second respondents, its relevant decision-making representatives, its office bearers, and its legal representatives (internal and external) are reminded that litigation is not a game⁴⁸, nor a "zero-sum context"⁴⁹. They have fiduciary duties, especially when holding the public pursue, to litigate responsibly. They should collectively and individually keep the aforesaid in mind, and, at the same time, pay heed to at least the quoted dicta and decisions of this court. If they fail to do so, punitive personal (*de bonis propriis*)⁵⁰ costs orders, and fee forfeiture / disallowance orders, will ineluctably follow against those deserving individuals, including internal and external legal representatives.

⁴⁸ See, *inter alia*, the SCA decisions in *Cadac (Pty) Ltd v Weber-Stephen Products Company and Others* 2011 (3) SA 570 (SCA) para 10; *Madibeng Local Municipality v Public Investment Corporation Ltd* 2018 (6) SA 55 (SCA) para 30 and also *Tumileng Trading CC v National Security and Fire (Pty) Ltd*; *E and D Security Systems CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) para 14, *MGB v DEB* 2013 (6) SA 86 (KZD) para 39, *Niewoudt v Joubert* 1988 (3) SA 84 (SE) at 91B/C.

⁴⁹ Cf *The Commissioner: Companies & Intellectual Property Commission v Independent Music Performance Rights Assoc* 2020 JDR 2598 (GP) para [1]. See also *Cadac (Pty) Ltd v Weber-Stephen Products Company and Others* 2011 (3) SA 570 (SCA) para 10. And see: *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) para 14, *Niewoudt v Joubert* 1988 (3) SA 84 (SE) at 91B-C

⁵⁰ Latin for "straight from the pocket"

Orders

112. In the above circumstances the following orders are made:

1. The first respondent's interlocutory application (dated 4 October 2024) seeking leave to deliver the supplementary affidavit of Tuwani Ngwana is dismissed and the first respondent is ordered to pay the costs of this interlocutory application on the attorney client scale.
2. Within 60 days of the grant of this order:
 - 2.1 The first and second respondents are ordered and directed to reverse all amounts and charges levied on or at a commercial and business tariff / rate pertaining to water and sewerage consumption on residential water meter no. 1047408 ("the meter") pertaining to account number 552005181 ("the account") for Portion 4 of Erf (Stand) 2332, Jabulani Township ("the property").
 - 2.2 Further to paragraph 2.1 above, the first and second respondents are ordered and directed to reverse all VAT, interest, penalty and ancillary charges levied or rendered on the account in relation to the amounts and charges to be reversed per paragraph 2.1 above.
 - 2.3 The first and second respondents are further ordered and directed, in respect of the period subsequent to 1 May 2018, to charge and bill the applicant per the account for water and sewerage consumption at the correct and applicable residential water and sewerage tariff x 288 units residential units erected on the property as per the meter.
 - 2.4 The first and second respondents must further reflect all the payments made by the applicant on the account for the period 1 May 2018 to the date on which paragraphs 2.1 and 2.2 above are implemented.
 - 2.5 The first and second respondents are also directed and ordered to furnish the applicant with accurate and rectified municipal account statements demonstrating and confirming compliance with paragraphs 2.1 to 2.4 above.

3. For the purposes of paragraphs 2.1 to 2.4 above, the term(s) “reverse”, “charge”, “bill” and “reflect” may include any generally accepted accounting practice to be used to correct the account in a manner which will ensure compliance with paragraphs 2.1 above to 2.5 above.
4. The first and second respondents (including any entity and/or person acting under or through it / them) is interdicted and restrained from terminating the supply of water and sewerage services to the property pending the rectification and recalculation of the applicant’s municipal account as per paragraphs 2.1 to 2.5 above.
5. The interdict in paragraph 4 above does not affect the first and/or second respondents’ right to lawfully terminate the supply of water and sewerage services to the property in respect of amounts accruing, owed and outstanding in respect thereof *subject* to such amounts not being amounts accruing, owed and outstanding within the context of paragraphs 2.1 and 2.2 above.
6. The first and second respondents are ordered to pay the costs of the (main) application under the above case number, jointly and severally, in solidum, the one paying the other to be absolved, on the attorney and own client scale.



G AMM

**ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be on **18 October 2024**.

For the applicant:

Adv. N Lombard
Instructed by Mervyn Smith Attorneys

For the first respondent:

Adv. E Sithole
Instructed by Madhlopa & Thenga Inc.

Hearing Date:

10 October 2024

Judgment Date:

18 October 2024