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

Case Number:028035-2025

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

SIGNATURE	DATE: 20 March 2025
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In the matter between:

LINRAW CC

Applicant

And

**CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY**

First Respondent

CITY POWER JOHANNESBURG (SOC) LTD

Second respondent

JUDGMENT

NOKO J

Introduction

[1] The applicant instituted an urgent application against the respondents for interim relief pending the adjudication of the *lis* (main application) between the parties under case 2024-079123. The applicant seeks the following orders: restoration of the supply of electricity to the applicant's property, interdict the respondent from terminating the supply of electricity to the applicant's property against a tender by the applicant to make payment of the amount of R10 000.00 for electricity charges and finally an interdict against the respondent from serving on the applicant an electricity Disconnection Card or any other notice of its intention to terminate the supply of electricity to the applicant's property. The applicant seeks an interim order pending a final determination of the main application.

[2] The respondent is opposing the application and is, *inter alia*, disputing that that the application is urgent and also raised two points *in limine* of *lis pendens* and *res judicata*.

Background

[3] The applicant obtained an interim order on 6 May 2019 under case number 0773/2019, *inter alia*, interdicting the respondents from terminating the supply of the electricity to its business premises situated at Lincoln Centre, 5[...] C[...] Drive, B[...], Johannesburg (the property). The said order was granted pursuant to an agreement entered into between the parties in a *lis* which was launched after to the termination of the electricity supply by the respondents. The agreement included an undertaking that the applicant would pay the amount of R10 000.00 per month for the consumption of the electricity. Notwithstanding that the order is still extant the respondents have intermittently terminated the supply of electricity without challenging the said order.

Submissions by the parties.

[4] The applicant submitted that since the order was issued in 2019 there were two other orders which were granted against the respondents issued in this Division.

This Court is the fourth Court to be seized with a suit in terms of which the applicant seeks orders to interdict the respondent to reconnect the supply of electricity and to be interdicted from terminating the supply of electricity to the applicant's property. To this end, so it was argued, the court is enjoined to relay its displeasure towards an egregious and intransigent conduct of the respondents.

[5] The applicant submitted further that notwithstanding the previous orders the respondent has flagrantly and contemptuously terminated the supply of the electricity. In April 2024 the respondents terminated the supply of electricity to the premises and in response the applicant instituted an application to reinstate the electricity supply under case number 2024-079123. The said application¹ is pending and is set down for hearing in September 2025 on the opposed motion roll.

[6] The applicant averred that it is in the property rental business and the property referred to herein consists of premises leased out to third parties. Some of the premises have been without tenants due to lack of electricity supply and some of the tenants who are in occupation have arranged to pay lower rentals as they are using their own generators. Other tenants have threatened not to renew the lease agreements if the supply of the electricity is not restored. The applicant has recently been approached by prospective tenants who are ready to enter into lease agreement provided there is a supply of electricity. The applicant has been informed that those offers to lease will be open until 17 March 2025. Confirmation to this effect in the form of correspondence attached to the founding papers.

[7] In view of the obligation for the applicant to mitigate the damages the applicant found it prudent to approach court on an urgent basis for the interdict to restore the supply of the electricity.

[8] The applicant contends that for the purposes of the requirements for an interim interdict it has rights alternatively *prima facie* right to pray for an interim interdict which flows from the interdict obtained in 2019. In addition, that for as long

¹ The pending application(s) include the relief for contempt of court and damages suffered (and continue to suffer) because of termination which damages are escalating on monthly basis.

as the electricity supply is terminated the applicant business interests remain prejudiced as the premises without electricity are less attractive to the prospective tenants. The balance of convenience favour the applicant who has a duty to mitigate damages and no prejudice would visit the respondent. There is also no alternative remedy, so argument continued, besides having to wait for period of seven month to get into court. The applicant is losing on conditional lease offers being made which were on condition that the supply of electricity is restored and also that other tenants have threatened not renew lease agreements when they fall due.

[9] The applicant submitted further that the answering affidavit deposed to by the legal advisor, Mr Boola of the respondent appears to be based on hearsay since the said deponent does not have personal knowledge of what is set out in the affidavit. The matter should therefore proceed on the basis that it is unopposed. There is furthermore no authority or resolution authorising Mr Boola to depose to the answering affidavit in this matter. Reference was made of the judgment in *Millu*² that the deponent under these circumstances cannot allege that he has personal knowledge of the facts relating to the dispute between the parties.

[10] On the other hand, the respondents contend the issues raised by the applicant are implicated by the point in limine of *res judicata* as the Court made final decision thereabout and the applicant having said it had obtained three orders to date. Furthermore, the respondents further raised a point *in limine* of *lis pendens* the issues raised in this *lis* are subject of the pending main application. The respondents further deny that the urgency has been demonstrated and more importantly that the applicant has failed to attach confirmatory affidavits of the alleged prospective tenants or even those who made threats not to renew the lease agreements. The application is therefore predicated on inadmissible hearsay evidence and should be struck off the roll.

[11] In addition, the respondents deny that the requirements for interim interdict have been met.

² *Millu v City of Johannesburg Metropolitan Municipality and Another* (25039/2021)[2024] ZAGPJHC 420 (29 April 2024).

[12] The respondents further contend that the termination of the supply of the electricity was as a result of the applicant's failure to pay for the electricity consumption. Further that the fact that the respondent has also failed to annex the alleged proof of monthly payments of R10 000.00 lend credence to the conclusion that there are no payments made. Importantly the respondent denies that there was any interdict that was granted in favour of the applicant as against the respondent and to this end the respondent denies that they are defying any of the order of court. The basis of this stance is set out in the main application.

[13] In reply the applicant contends that the point *in limine* of *lis pendens* is not implicated as the remedy sought in the other applications were sought against other respondents cited together with the current respondents. As such the requirement for this point in limine that the lis should be for the same relief and between the same parties is not satisfied. With regard to the second point *in limine* of *res judicata*, same should not be upheld as the relief sought is linked to the recent incidents where some tenants threatened not to renew the lease and also having been given an ultimatum to ensure that the supply of electricity is restored failing which offer to lease its premises will be withdrawn. No other court was ever seized with these latest developments and the point *in limine* has no basis in logic or law.

[14] With regard to the contention that the application is lacking in urgency the applicant states that the basis of urgency is the offers of lease agreement which were made in February 2025 together with the threat that the tenants would not renew the lease if no electricity supply is restored. Counsel for the applicant submitted that the Court should accept these assertions as true facts stated by the applicant. in addition, that absence of confirmatory affidavits do not apply a fatal blow to the application. In any event, argument continued, hearsay evidence is acceptable in an urgent court.

Urgency

[15] The *locus classicus* on urgent application is *East Rock Trading*³ where the Court held that a party must succinctly set out the basis for urgency as the process set out in rule 6(12)(a) of the Uniform Rules of Court is not just there for asking. Further that a party should set forth circumstances which renders the application urgent and most importantly the reasons why the applicant cannot be afforded substantial redress at a hearing in due course. In compliance herewith the applicant is enjoined to set out facts in the founding papers stating the basis for urgency. Such facts should also be supported by evidence being presented for Court's consideration.

[16] The regulatory framework regarding hearsay evidence and its admissibility is set out in the Laws of Evidence Amendment Act⁴ ("Law of Evidence Act"). The relevant sections are dealt with below:

[17] According to section 3(4) of the Law of Evidence Act, hearsay evidence is "evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence."

[18] Section 3(1) of the Law of Evidence Act provides that:

Subject to the provisions of any other law, Hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

- (a) Each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
- (b) The person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings;

[19] In *casu*, it is axiomatic that the probative value of the evidence regarding the offer to lease from the applicant and threats by those who will not renew the lease agreement depend on the said prospective and current tenants. The said tenants have not signed confirmatory affidavits. The respondents' counsel has categorically stated that the applicant's counsel wish to supplement its papers and add the

³ *East Rock Trading 7 Pty Ltd and Others v Eagle Valley Granite and Others* (11/33767)[2011] ZAGPJHC 196 (23 September 2011).

⁴ Laws of Evidence Amendment Act, 45 of 1988

confirmatory affidavits would be opposed. Their evidence is therefore hearsay and fall foul of the provisions of section 3 (1) of the Evidence Act and is, subject to section 3(1)(c), not admissible.

[20] Section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 provides that hearsay evidence may be admitted if the court-

“having regard to –

- (i) the nature of proceedings;
- (ii) the nature of the evidence;
- (iii) the purpose for which the evidence is tendered;
- (iv) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
- (v) any prejudice to a party which the admission of such evidence might entail; and
- (vi) any other factor which should, in the opinion of the court, be taken into account is of the opinion that such evidence should be admitted in the interests of justice.”

[21] It was stated in *Eastern Cape Development Corporation*⁵ that

“I acknowledge that hearsay evidence is more in urgent matters, but this does not mean that the requirements of the Evidence Act may be bypassed. It merely means that a court, having regard to exigencies on the urgent roll, will approach the admission of hearsay with some degree of latitude, if in appropriate circumstances, it is properly advanced and motivated. Differently put, a proper motivation must be set out in an affidavit by the party relying on the hearsay matter having regard to the requirements of Section 3(1) of the Evidence Act.”⁶

⁵ *Eastern Cape Development corporation v Occupiers of Erf 117 and Erf 110 Umtata, Windsor Hostel, 36 Sutherland Street, Mthatha and Others* (3333/2023) [2023] ZAECMKHC (30 January 2024)

⁶ Id Para 31.

[22] The Constitutional Court in *Kapa*⁷ held that the 'factors listed in section 3(1)(c) must be viewed holistically and weighed collectively in determining whether it is in the interests of justice to admit the hearsay evidence'.⁸

[23] The applicant denied this Court the opportunity to assess whether the hearsay evidence proffered can be accepted in accordance with the provisions of section 3(1)(c) as the applicant failed to set out in the founding papers why the said hearsay evidence should be accepted. Without such averments then *cadit questio*.

[24] In the premises the foregoing present an insurmountable hurdle which has besieged the applicant's case and I therefor conclude that without admissible evidence of the tenants the foundation upon which urgency is predicated and as such the application is bound to fail. The question of urgency is dispositive of this application and other issues raised by the parties would not detain this Court further.

In passing

[25] I must mention that the fact that the respondents have been ordered by this Court on several occasions not to terminate the supply of electricity but ignored the orders deserves of a harsher admonition by the Court despite their intention relayed to Court to challenge the orders.⁹ Worse being the denial before Court by the counsel for the respondents that there is no interdict issued against the respondents. It is also clear not clear why the applicant approached the court for a contempt of court on normal basis which is pending elsewhere. Ordinarily that contempt order in an urgent court would have arrested continuous disregard of the orders by the respondents. This would have avoided the applicants inviting several courts to adjudicate over the same issue whilst being aware that the respondents would not comply with the orders.

⁷ *Kapa v S* [2023] ZACC 1; 2023 (4) BCLR 370 (CC).

⁸ *Id* at para 77.

⁹ It was held in *Municipal Manager OR Tambo District Municipality and Another v Ndabeni* [2022] ZACC that a court order is binding until it is set aside by a competent court, and that this necessitates compliance, regardless of whether the party against whom the order is granted believes it to be a nullity or not. Importantly, however, the court confirmed that where an organ of state genuinely believes that an order of course is a nullity, then it is a duty in the public interest to pursue an appeal to correct illegality.

Costs

[26] The determination of legal costs are ordinarily within the discretion of the court which must be exercised judicially having regard to the relevant factors. It was held in *Affordable Medicines Trust and Others*¹⁰ that “[T]he award of costs is a matter which is within the discretion of the Court considering the issue of costs. It is a discretion that must be exercised judicially having regard to all relevant considerations.”¹¹ It is also trite that the costs follow the result and, in this instance, no persuasive argument was mounted warranting deviation from the well-trodden path.

Order

[27] In the premises I order as follows:

The application is struck off the roll with costs.

M V NOKO

Judge of the High Court
Gauteng Division, Johannesburg.

DISCLAIMER: This judgment was prepared and authored by Judge Noko 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 Case Lines. The date for hand-down is deemed to be **20 March 2025**.

Dates:

Hearing: 11 March 2025.

Judgment: 20 March 2025

¹⁰ *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC).

¹¹ *Id* para 138.

Appearances:

For the Applicant :

RG Cohen.

Instructed by Glynis Cohen Attorneys

For the Respondents:

MR Bvumbo

Instructed by Magagula Attorneys