IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2013/43575

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

25 March 2015 .....

DATE SIGNATURE

In the matter between:

FRIEDSHELF 837 (PTY) LTD	Applicant
and	
THE CITY OF JOHANNESBURG	First Respondent
METROPOLITAN MUNICIPALITY	
CITY POWER JOHANNESBURG (PTYT) LTD	Second Respondent
JOHANNESBURG WATER (PTY) LTD	Third Respondent
EXECUTIVE MAYOR OF JOHANESBURG,	Fourth Respondent
MPHO PARKS TAU	
CITY MANAGER, TREVOR FOWLER	Fifth Respondent
ACTING MANAGING DIRECTOR, CITY POWER	Sixth Respondent
SICELO XULU	
ACTING MANAGING DIRECTOR, JOHANNESBURG WATER LUNGILE DLAMINI	Seventh Respondent
EXECUTIVE DIRECTOR OF REVENUE AND CUSTOMER	Eighth Respondent
RELATION, CITY OF JOHANNESBURG, LUNELWA SONQUISHE	

JUDGMENT

SPILG, J:

INTRODUCTION

1. The applicant is the registered owner of commercial property situated in Braamfontein.

2. Although it took transfer of the property on 19 November 2010 the applicant only received its first municipal invoice some nine months later, in August 2010. However electricity was only billed during the following month and included charges of R761 744.28 going back to February 2011.

3. The applicant considered the charges exorbitant since the property was hardly occupied (initially only 10% and going up to 30%) during the initial period to which the charges related.

4. A month after receipt of the September statement a number of formal queries were logged and acknowledged by the City. Over the phone the City maintained that the invoices were correct but no formal written response was forthcoming.

5. The applicant also engaged a utilities specialist to establish why the charges were so high. They provided a report in February 2012 revealing that the adjoining building was consuming electricity for which the applicant was being charged. This appeared to explain the high consumption and the City was promptly advised. It then provided a direct connection for the other building. Nonetheless consumption continued to be much higher than expected.

6. The applicant then obtained the assistance of senior officials. However no one was able to explain the high billing. It was only in August 2012 that the applicant discovered that it was being billed on a demand tariff. This meant that a minimum fee of R35 000 per month was being charged irrespective

of actual consumption. The City's responses until then continued to centre on the charges being estimations pending a physical recordal. However this was not the cause. What had not been explained, or possibly even understood, by those who responded to the applicant, was that the applicant was being charged on a minimum demand tariff of 100KVA. The effect was that even if consumption was well below 100KVA per month the applicant would still be charged a minimum of 70KVA or 80% of the average of the highest KVA demand charges in the preceding 12 months.

7. It is common cause that the applicant could have been billed for actual consumption had it so requested. The reason why it was billed on a demand tariff was because the previous registered owner had requested it and this was not altered when the property was transferred to the applicant.

8. The applicant claims that as soon as it could have reasonably become aware of the actual tariff charged and how it was applied a request was made to change to an ordinary prescribed commercial tariff for actual consumption. The request was made on 17 September 2012.

9. However the City only responded eleven months later on 13 August 2013 and agreed to amend the rate with retrospective effect to the date when the request was made; ie. 17 September 2012.

10. In January 2014 the City issued a pre-termination notice advising that services would be terminated within 14 days and on 6 February attempts were made by employees of the City to disconnect the electricity.

THE ISSUES

11. The applicant contends that it never agreed to the minimum demand tariff rates. In any event had the City billed it immediately and had the responsible officials actually informed it that a demand tariff rate was being applied, then it would have promptly changed the tariff rate to one levied on actual consumption.

12. *Adv Oppenheimer* for the applicant argued that the City has a legal duty to;

    a. ensure that accurate monthly accounts were furnished;

    b. have properly investigated and informed the applicant pursuant to its queries.

13. Furthermore the applicant contends that the enormous legal bill it was obliged to incur in requiring the City to engage it in a meaningful manner and its failure to comply with time periods provided for in the rules of court justifies a punitive order for costs on the attorney and client scale.

14. Aside from disputing the applicant's averments, the City contended that by only requesting it to write-off interest and settle the capital sum on terms the applicant had admitted liability on the minimum demand tariff rate and cannot now withdraw from that admission.

THE TARIFF RATE

15. The City cannot point to any agreement with the applicant to charge a minimum demand tariff of 100KVA. It however contends that the existing

tariff rate simply continued to apply to the property after the applicant took ownership.

16. *Adv Beharie* for the City could not produce any statute or subordinate legislation, such as a by-law, to demonstrate that a tariff somehow adheres to the property. On the contrary section 3(1) (a) of the Local Government: Municipal Systems Act (32/2000): City of Johannesburg Metropolitan Municipality: Credit Control and Debt Collection By-Laws[1] *('the By-Laws'*) expressly provides that no municipal services may be provided to any applicant unless and until an application has been made in writing on a form substantially similar to the one prescribed. The applicant referred to the City's own webpage which states that "*you can't inherit an existing water and electricity account from a previous owner or tenant of a property"*

17. It is evident that the By-law contemplates that charges are levied pursuant to agreement and that if a special rate is requested, such as a demand tariff rate, then it must be specifically applied for. It is common cause that the applicant did not apply for the special rate.

18. The City contended that the applicant must have delayed in applying for municipal services. This was in the form of a submission as it did not rely on any document or record in its possession. It also claimed that accounts had in fact been sent monthly from the time the applicant took transfer of the property. This clearly is not so since the first account which the applicant claimed to have received in August 2011 showed an opening balance of nil.

19. Perhaps the strongest argument presented by the applicant against the City's submission is that on its website the City states that a rates account

[1] Notice 1857 of 2005; Provincial Gazette no 213 of 23 May 2005

will be opened automatically as soon as transfer of the property into the new owner's name is registered at the Deeds Office.

20. It appears that the inordinately long period it took the City to explain the high charges was precisely because there was nothing in the account to reflect how the demand tariff came to be applied. Presumably an official simply took the tariff rate that had been applied to the previous owner. It would be speculative to conclude that the delay in opening the applicant's account was because the responsible official at the time did not know how to bill since it may equally have been inadequate data capturing or transferring interfaces or software programming that resulted in the delay.

21. However it is apparent that the City holds out that it automatically creates an account for a new owner immediately on transfer of the property in the Deeds Office. The City should therefore have systems in place to identify any special tariffs that applied to the previous owner and immediately engage the new owner to determine whether the special tariff is to be negotiated. On basic principles, failing agreement the prescribed standard tariff based on actual consumption must apply.

22. Since the City automatically creates accounts for new owners its failure to programme its systems to provide an alert in cases where previous owners had negotiated special tariffs must be laid at its door. It only has itself to blame having regard to the terms of the By-laws which require agreement for any rate which is not the standard applicable prescribed rate based on actual consumption. On the facts of this case no such agreement to charge a special rate irrespective of actual consumption can be inferred from the applicant's conduct. Each case however should be considered on its own merits

23. I therefore find that there was no agreement, express or implied by conduct, if regard is had to the applicant actually utilising electricity from

the time it took transfer , to pay anything other than the prescribed tariff for actual consumption. Special tariff rates must be expressly agreed upon and, without deciding, it appears arguable that the City has an obligation to inform the new owner immediately that a preferential rate was obtained by the previous owner because of the high electricity consumption and that it would be necessary to agree on such a rate if the monthly consumption will be more than 100KVA.

ADMISSION OF LIABILITY OR ACQUIESSENCE

24. A fundamental requirement for admission of liability is that it is clear, unequivocal and informed. In the present case the mere fact that the applicant was negotiating on interest when it was wrongly advised by the City's personnel about the basis on which the charges were raised hardly qualifies. This defence therefore fails. For the same reason the defence of acquiescence also fails; if the City's personnel were unable to fathom the basis of the tariff, then it is difficult to appreciate in respect of what precisely the applicant can be said to have acquiesced.

25. The City further argued that the applicant had in fact regularly consumed in excess of 100KVA and therefore accepted the minimum demand tariff. If it had not been accorded the minimum demand rate then the applicant would not have been able to utilise as much as 100KVA. However the City does not contend that the applicant was aware or must have been aware that 100KVA is only provided if a consumer is on the minimum demand tariff. It argues that 100KVA usage must be specifically requested before it is provided. However, without alleging that the applicant knew this fact the City is unable to produce the factual support for its legal contention.

THE CITY'S BREACH OF ITS OBLIGATIONS

26. There are a large number of cases where it is alleged that the City's administrative personnel shirk their responsibilities to provide a proper service but simply go ahead with the threat of terminating services.

27. Section 10 of the By-law provides that the City must endeavour to ensure '*accurate metering of consumption at fixed intervals with the minimum delay between service connection and first and subsequent rendering of accounts*[2]*'*. It also provides that the City endeavours to ensure '*accurate monthly accounts with the application of the appropriate and correct prescribed fees, rates and other related amounts due and payable*[3]*'* and '*the timely despatch of accounts*[4]*'*

28. Sections 11(5) (a) and (b) require the City to investigate a query or complaint within 14 days or as soon as possible after it has been received and inform the customer, in writing, of its decision.

29. These provisions impose a duty on the City to at least properly investigate a query and make an informed decision.

30. The delay in investigating the query and doing so in what appears to be either a haphazard or disinterested manner, is not in conformity with the acceptable standards expected under the By-Laws. A duty is owed to the consumer to undertake a conscientious investigation and not simply go through the motions and then threaten a termination of services.

[2] Section 10(a)

[3] Section 10(c)

[4] Section 10(d)

31. I am satisfied that the failure to perform their duties by completing their investigations within a reasonable time (having regard to the nature of the enquiry and the number of times the applicant was obliged to engage the City's personnel before any action was taken) and the failure to inform the applicant of the true basis of the charge resulted in the applicant not being aware that all it had to do was to request a change to the billing tariff.

32. However the view I take is that the applicant by consuming electricity implicitly accepted the prescribed tariff based on actual consumption. If it was to be charged at any special rate then that had to be in terms of an express agreement. There was none. Moreover the receipt of statements did not constitute acceptance that the special rate was to apply. On the contrary the applicant continued to query why the amount was so high having regard to the actual electricity consumption on the property.

33. On either approach the applicant cannot be charged the minimum demand tariff for the period where it has not been reversed and the ordinary prescribed tariff has been substituted. It is common cause that the period is from 19 November 2010 to 17 September 2012. I have already rejected the City's contention that the applicant must have known already by September 2011 that it was being charged a minimum demand tariff and was enjoying the added consumption benefits that were derived from it.

CITATION OF FOURTH TO EIGHTH RESPONDENTS

34. The case is made out against the operational and administrative bodies of the City responsible for electricity and the cutting off of supplies in the case of non-payment.

35. Adv Oppenheimer was asked about the necessity of joining the mayor and individuals who head certain divisions within the City. It appears that this has become a convention in anticipation of a failure to comply with any

court order that might be made pursuant to the application as it then would facilitate contempt proceedings. It also appears that an application only receives attention if the mayor or executive director is personally cited and served.

36. In my view they are not parties to the litigation and the applicant has conflated a concern for a possible non-compliance with a court order that might eventuate with the issue of who is the proper representative party to be sued.

37. The applicant could not show any legislation which requires service of such an application on the fourth to eighth respondents. That being so there has been an impermissible mis-joinder

38. Should the City fail to comply with any court order then a rule can be issued calling upon the responsible and accountable officials to show cause why they should not be held in contempt of court. But until there is a failure to respect a court order there is no *lis* between the applicant and them.

TERMS OF PAYMENT

39. It is evident that a significant sum might become due and payable. The applicants have sought an order which includes directing that the parties enter into reasonable payment terms which take into account the applicant's circumstances.

40. At this stage the court should not prescribe anything beyond a date by when the applicant is to make its representations so as to ensure that the litigation does not prejudice the applicant which otherwise might be subject to the sanctions provided for in section 13(2)(c) of the By-law.

41. Moreover sections 21 (4) to (6) of the By-law make adequate provision for the exercise by the City of the discretion it has to allow a period of payment whether under or in excess of 24 months and the factors it is obliged to consider when exercising its discretion.

42. These are administrative powers and the court cannot indirectly interfere with or further circumscribe how the discretion is to be exercised. It would amount to an impermissible interference with a discretionary power, the exercise of which is similarly regulated by the provisions of subordinate legislation contained in sections 21(4) to (6) of the By-Law.

COSTS

43. I agree that the City had not complied with its duties to properly investigate the queries and that the applicant was obliged to incur significant costs both in respect of engaging a utilities billing expert and their attorneys.

    The threat of termination of services also required the applicant to take steps to protect itself.

44. Nonetheless I am not persuaded that the applicant did not also take advantage of delays and may have lead the City to believe, unwittingly, that only interest was in issue.

45. Perhaps most importantly, the City has raised a genuine issue for consideration, which impacts on the way it deals with new owners on transfer of property into their name and cannot be critisised for seeking to argue the position they contended for. A final factor is that the joining of the fourth to eighth respondents was unnecessary.

46. Overall I believe that the usual order for costs should not be departed from, save that the actual costs of engaging MOTLA, being the utility audit service utilised as an expert is also to be borne by the City. To the extent necessary, they are declared to have provided expert testimony.

ORDER

47. I accordingly order that;

a. The first and second respondents are to reconcile the applicant's account, number 550 498 238 in respect of electricity charges and consumption by reversing the minimum demand charge tariff of 100KVA for the period commencing 19 November 2010 to 17 September 2012 inclusive and substitute such tariff with the standard prescribed tariff for actual consumption by a commercial consumer;

b. Within 14 days of the reconciliation of the applicant's aforesaid account the applicant is to make representations to the relevant respondent to allow for payment of arrears over a period either as contemplated under section 21 (4) or (5) of the Local Government: Municipal Systems Act (32/2000): City of Johannesburg Metropolitan Municipality: Credit Control and Debt Collection By-Laws (the '*By-Law*') and which will be considered by such respondent in accordance with the provisions of the applicable section as read with section 21(6) of the By-Law;

c. The relevant respondents are interdicted from terminating the applicant's services to the property in respect of the amounts that stand to be reversed;

d. The first to third respondents are to pay the applicant's party and party costs which costs are to include the actual costs of engaging MOTLA and obtaining their report , being the utility audit service engaged by the applicant, as an expert. To the extent necessary, MOTLA are qualified as an expert and are declared to have provided necessary expert evidence in the form of the report contained in the founding affidavit.

_____

SPILG, J

DATE OF HEARING:	20 May 2014
DATE OF JUDGMENT:	25March 2015
LEGAL REPRESENTATIVES:	
FOR THE APPLICANT:	Adv M Oppenheimer Schindler Attorneys
FOR THE RESPONDENTS:	Adv N Beharie Denga Inc.