IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 114156/2023

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED: NO

_____ _____

Date Signature

In the matter between:

CASTING, FORGING AND MACHINING CLUSTER OF SOUTH AFRICA NPC	**FIRST APPLICANT**
SCAW SOUTH AFRICA (PTY) LTD,	**SECOND APPLICANT**
DUNROSE TRADING 57 (PTY) LTD,	**THIRD APPLICANT**
ABRACON PROPERTY 1 (PTY) LTD	**FOURTH APPLICANT**
INTERNATIONAL WIRE CONVERTORS (PTY) LTD	**FIFTH APPLICANT**

and

CITY OF JOHANNESBURG **FIRST RESPONDENT**

METROPOLITAN MUNICIPALITY
CITY POWER SOC LTD **SECOND RESPONDENT**

JUDGMENT

BAQWA J

Introduction

[1] This is an urgent interdict in which the applicants seek to prevent the respondents from disconnecting the electricity supply to the premises of the second to fifth applicants, pending the finalisation of the disputes lodged by the applicants in terms of section 102 of the Local Government: Municipal Systems Act 32 of 2000(Systems Act) pertaining to the 2019/20, 2020/21,2021,22,2022/23 and 2023/24 financial years regardless of when (and in which financial year) the disputes are to be resolved. Alternatively, the applicants seek that the respondents be interdicted from disconnecting the electricity supply to the premises of the second to the fifth applicants without first furnishing them with the written notice, written reasons and allowing them to make representations [1]

[2] The respondents oppose the main application and they have filed a counter application in terms of which they seek to declare the applicants' vexatious litigants in terms of section 2(1) (b) of the Vexatious Proceedings Act 3 of 1956, and a payment of the substantial arrears in excess of R113 million from the second to the fifth applicants on their respective municipal accounts, or alternatively that each of the second to fifth applicants enter into acknowledgement of debt with the respondents in respect of the substantial arrears on their respective municipal accounts, failing which the respondents be authorised to proceed with the credit

[1] Notice of Motion 015-016.

action in the form of a disconnection of municipal supply including electricity supply to their respective premises.

[3] The respondents wish to record that a distinction must be drawn between the main application and the counter-application because the main application is for a final interdict which is subject to the *Plascon-Evans* rule and the counter-application is NOT subject thereto because the counter-application merely seeks to enforce proper credit control action in terms of the provisions of the Constitution of the Republic of South Africa, 1996(the Constitution), the Systems Act, as well as, the Credit Control Policy.

Parties

[4] The first applicant is Casting, Forging and Machining Cluster of South Africa NPC(CFMC), a company duly incorporated in terms of the company laws of South Africa, its primary goal is to promote the growth and development of metals manufacturing industry. The second applicant is SCAW South Africa (Pty) Ltd (SCAW), a company duly incorporated in terms of company laws of South Africa, this application concerns Haggie Steel Rope, one of the SCAW divisional businesses which manufactures specialised steel wire rope for the mining and electrical sectors. The third applicant is Dunrose Trading 57 (Pty) Ltd (Dunrose), which trades under the name Abracon, a company duly incorporated in terms of company laws of South Africa, it manufactures and distributes nails and fasteners. The fourth applicant is Abracon Property 1 (Pty) Ltd (Abracon), a company duly incorporated in terms of the company laws of South Africa. It conducts its business by owning and letting properties and is the owner of the premises occupied by Dunrose. The fifth applicant is International Wire Convertors (Pty) Ltd(IWC), a company duly registered in terms of company laws of South Africa. It manufactures high and low carbon steel wire.

[5] The first respondent is the City of Johannesburg Metropolitan Municipality established in terms of section 12 of the Local Government: Municipal Structures Act 117 of 1998. The second respondent is City Power Soc Ltd, a municipal entity wholly owned by the first respondent with limited liability established as a municipal owned entity and incorporated in terms of the company laws of South Africa. The City of

Johannesburg and City Power will be referred to as the “respondents” or individually as the first and/or the second respondent where necessary. The same will apply in reference to the applicants in this judgment.

Background facts

[6] During the period of September and November 2019, the second to the fifth applicants submitted letters which, in their view triggered a formal section 102 dispute with the respondents. The letters explained the underlying issue in dispute, which is the municipal tariffs determined by the National Energy Regulator of South Africa (NERSA). It was also explained that the only way to obtain redress was to institute legal proceedings in the High Court to review NERSA’s 2019/20 tariffs. The letters further acknowledged that the respondents are entitled to be paid a lawful charge for electricity and the applicants tendered to make payment of a monthly sum and the basis on which it was calculated. Similar letters to section 102 dispute were submitted for the 2020/21, 2021/22 and 2022/23 financial years.

[7] On the 11 December 2019, the applicants’ attorney Botha sent a letter to the respondents in an effort to encourage them to adhere to their obligations under the provisions of section 102(2) of the Systems Act, pending the resolution of the matter. The letters referenced disputes in terms of section 102 which the applicants had declared, and the applicants asked the respondents to give an undertaking that it would not terminate electricity supply unless they are given at least 21 days prior written notice. There was no substantive response from the respondents to the letters. The applicants began to pay reduced amounts to the respondents calculated on the basis reflected in the dispute notices. The applicants made reference to the case in *Afriforum NPC v Eskom Holdings Soc Ltd*[2] which laid down the requirements of procedural fairness in relation to electricity disconnections.

[8] On 12 December 2019, a review application (*Casting, Forging and Machining Cluster of South Africa (NPC) and Others v National Energy Regulator of SA and*

[2] [2017] 3 All 663 (GP).

Others[3] "Kubushi judgment ") was lodged against the 2019/2020 tariffs in this court before Kubushi J, and the matter was opposed by the respondents. On 25 November 2022, these tariffs were held to be unlawful and set aside. The order was not appealed, and the dispute could not be resolved amicably within 30 days as directed by the court. In January 2023, the matter was remitted to NERSA to determine the 2019/2020 tariffs. The 2019/2020 tariffs remain unresolved.

[9] Despite the finding in the Kubushi judgment, on the 17 January 2020, the first respondent attempted to disconnect electricity supply to IWC without complying with the procedural requirements which includes providing a disconnection notice in advance to the entity or person affected. The first respondent's officials arrived at the IWC's premises to give effect to the disconnection, however this was averted by intervention of the first respondent's attorneys (Edward Nathan Sonnenbergs Inc "ENS") who spoke to the officials not to effect the disconnection. Later that day Botha sought an undertaking from the first respondent's attorneys regarding future compliance with the disconnection procedures. ENS responded and confirmed that the respondents will comply the procedural requirements and furnish ample notice to the applicants regarding any proposed future electricity disconnections.

[10] Despite the above undertaking, the officials of the first respondent arrived at the premises occupied by the third applicant on 29 January 2020 to attempt to disconnect the electricity supply in connection to what was alleged to be the third applicant's arrears. The notice given was dated the 23 January 2020, but the third applicant only became aware of the notice on the 29 January 2020 when the officials came to disconnect the electricity. ENS still intervened, and the electricity supply was not disconnected. Despite that letter and on 4 September 2020, IWC was once again threatened with disconnection and Botha had to communicate with ENS again. Further electricity supply disconnections were threatened, and similar interventions were made by the legal representatives of the parties.

[11] On 14 and 18 March 2022, ENS wrote to the section 102 applicants on behalf of the first respondent to demand an increased contribution to the electricity

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[3] [2022] ZAGPPHC 927.

accounts. In these letters, threats were made to disconnect the applicants' electricity if they failed to acquiesce to the demand. Botha responded on 24 March 2022 and referred back to the undertaking given by the first respondent and the rights held by the applicants in terms of section 102. Botha and ENS reached an agreement on the mechanism to prevent disconnection conflicts, and the applicants tendered to pay an increased amount in respect of their electricity bills pending the determination of the 2019/2020 tariffs as per Kubushi judgment. The 24 March 2022 letter from Botha to ENS recorded the applicants' understanding that demands made on the 14 and 18 March 2022 were not made pursuant to any Promotion of Administrative Justice Act 3 of 2000(PAJA) required notification process of fair procedure, and the first respondent was expressly invited to correct this understanding. No response was received from the first respondent relating to this letter and the threats of disconnection were not taken further.

[12] On 2 February 2023, Botha and ENS agreed on a protocol designed to prevent the first respondent's officials from disconnecting. In terms of the agreed protocol, the following steps were to be followed in the event that a disconnection without proper notice was threatened, viz:

12.1. The provision of a list of electricity account numbers forming the subject of pending section 102 disputes

12.2. A designated person at the subject company to hand the responsible first respondent official a bundle comprising of the relevant documents

12.3. To forward Botha a copy of the termination notices and for Botha to take up the threat with ENS which ENS would immediately contact the relevant municipality official and issue an instruction not to proceed with the termination.

12.4. Alternatively, contact ENS directly to arrange for termination instruction to be countermanded.

Issues for determination

[13] The following are issues for determination.

13.1. Whether the respondents are justified in demanding the payment of amounts owing by the applicants to the respondents?

13.2. Whether the applicants satisfied the requirements for an interdict against terminating electricity supply.

[14] Prior to discussing the real issues for determination I need to deal with the points *in limine* raised by the respondents. These are the points *in limine*:

14.1. Condonation

14.2. Non- Joinder

14.3. Whether the applicants' alleged dispute falls within the purview of section 102(2) of the Systems Act and whether this alleged dispute is *res judicata*

14.4 Whether the first respondent is entitled to terminate the electricity supply to the second to the fifth applicants' respective properties, in particular where customers refuse to pay all of the current charges on their municipal account over extended periods of time

[15] The respondents allege that there are real and *bona fide* disputes of facts contained in the parties' affidavits for the purposes of determining whether to grant a final interdict. This should not be confused with lodging a valid dispute for purposes of section 102(2) of the Systems Act. In other words, the respondents contend, a nuanced distinction needs to be appreciated when adjudicating the present proceedings. I deal with these seriatim:

condonation

[16] The respondents contend that there are real bona fide dispute of facts with regards to condonation as the applicants have taken issue with the filing of an answering affidavit in the main application which was served 52 days out of court time, yet the applicants did come clean regarding adhering to the time frames stipulated in Rule 6 of the Uniform Rules of Court .The applicants assert that since the respondents filed their answering affidavits out of time, their founding affidavit to their counter application should be dismissed. The respondents contend that their Information Communications and Technology system (ICT) has experienced technical failures and as such the deponents to the affidavit had been unable to access certain threads of evidence relevant to the present application. This was conveyed to Deputy Judge President Ledwaba when the parties had a virtual meeting on the 23 May 2024 in respect of the special allocation to this matter.

[17] The applicants had to serve their answering affidavit within 15 court days of filing their notice of intention to oppose the counter application, but they filed their answering affidavit late and failed to seek condonation for late filing, instead they based their late filing on the respondent's ICT failure. The fact that the respondents reserved a right to file their supplementary affidavit does not mean the applicants were entitled to file their answering affidavit late. Although the applicants have sought a special allocation for the hearing of this matter and the case management from the Honourable Deputy Judge President based on the respondent's ICT technical issues it does not mean the applicants are not equally wrong.

[18] It is common cause that the respondents filed the answering affidavit 52 days out of time in the main application. Equally the applicants answering affidavit to the counter application 15 days out of time. Both parties contend that due to ICT technical failures they could not file their papers on time. The fact of the matter is that the parities herein do not appear to have been prejudiced by the lateness of the said pleadings. In these circumstances the issue of condonation becomes a non-issue and should not detain this court's time any further.

Non-Joinder

[19] Relying on *Bowring NO v Vrededorp Properties CC and Another*[4] and *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs and Others,*[5]the respondents argue that the applicants have brought two applications in the past where they cited NERSA as the respondent. However, in the present application the applicants have failed to join NERSA. The respondents noted that in the urgent application seeking interim interdict regarding credit control action, the applicants joined NERSA. In the review application the applicants also joined NERSA. The respondents argued that these judgments are distinctly different although the dispute has been primarily against NERSA and not the respondents. In the present case the applicants have taken issue with the 2023/2024 electricity tariffs published by NERSA. In the Kubushi judgment the operative part of the case was in respect of the 2019/2020 tariffs not the succeeding years.

[20] The respondents charge customers within their jurisdiction and the tariffs are approved by NERSA, the customers are subject to NERSA approved tariffs. On 30 April 2024, Honourable Madam Justice Bam dismissed an interim interdict on the basis of the *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [6] *(Oudekraal Principle)*, where she found that the tariffs are valid once passed by NERSA until they are set aside, and the respondents must enforce them. On this premise the respondents contend that NERSA has a direct and substantial interest in this matter since the primary dispute is against the 2023/2024 tariffs regulated by NERSA.

[21] The respondents argue that the applicants have brought two applications in the past where they cited NERSA as the respondent. Whilst factually correct, that issue is of no relevance in the present matter which involves payment due to the respondents by the applicants for services rendered in the form of electricity. Those services do not implicate NERSA in any shape or form due to the fact that NERSA is a regulator and not a Municipality. For that reason, NERSA does not have to be joined as a party in these proceedings. Non- Joinder as a point *in linime* is legally not sustainable.

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[4] 2007(5) SA 391 (SCA).
[5] 2005 (4) SA 212 (SCA).
[6] [2004] 3 All SA 1(SCA).

Whether the applicants' alleged dispute falls within the purview of section 102(2) of the Systems Act and is this alleged dispute res judicata?

[22] The respondents contend that the second to the fifth applicants are not section 102 applicants because the dispute falls outside of the purview of section 102(2) of the Systems Act, given that section 102 of the Systems Act makes provision for accounts, and it provides as follows:

> "(1) A municipality may-
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> (a) consolidate any separate accounts of persons liable for payments to the municipality;
>
> (b) credit a payment by such a person against any account of that person;
>
> (c) implement any of the debt collection and credit control measures provided for in this chapter in relation to any arrears on any of the accounts of such a person.
>
> (2) Subsection (1) does not apply where there is a dispute between the municipality and a person referred to in that subsection concerning any specific amount claimed by the municipality from that person"

[23] The respondent further referred to *Casting, Forging & Machining Cluster of South Africa (NPC) v National Energy Regulator of* SA[7] (*CFMC v NERSA* 2020) and *Body Corporate Croftdene Mall v eThekwini Municipality*,[8] they argued that NERSA is a third party in the proceedings, and it is not a municipal entity and also noting that the dispute is not capable of being resolved in terms of the Systems Act. The respondents further aver that the letters raise the same dispute in respect of electricity tariffs as approved and published by NERSA for the 2023/2024 financial

[7] 2020 JDR 0119 (GP) (unreported).
[8] 2012 (4) SA 169 (SCA).

year as opposed to specific amount in respect of electricity charges on the municipal invoice. The applicants' own version is regarding the underlying issue for the period of September and November 2019 related to NERSA tariffs. The respondents also contend that they are not obliged to respond to all the applicants' emails and letters as their purpose was to delay the respondents from enforcing credit control.

[24] Subsequent to the Kubushi judgment, there is no lawful tariff for the first respondent for the 2019/2020 financial year in relation to the tariff chargeable to the applicants. Moreover, the tariff for each year from 2019/2020 is implicated by the Kubushi judgment, because that tariff year forms the basis of all subsequent tariff determinations, which are made on a percentage increase basis. Moreover, the methodology used by NERSA to approve the first respondent's tariffs for each of the subsequent years is the same methodology that was held to be unlawful in the Kubushi judgment. In the circumstances mistakes made by the first respondent in the calculations of the amounts due or services due to the application of incorrect/unlawful tariffs are mistakes which need to be corrected between the applicants and the first respondent in terms of section 102 of the Systems Act. The mistakes are not between the applicants and a third party.

[25] Conversely, in terms of *Body Corporate Croftdene*[9] as mentioned above by the respondents, the applicants have properly defined and raised a dispute in respect of a specific amount in their section 102 letters sent to the respondents before the implementation of debt collection measures. The applicants have offered to continue to pay the tendered amounts under the dispute. pending the outcome of the dispute which is to be determined by NERSA.

[26] Regarding the *res judicata* issue, the respondents submit that the main application constitutes a form of unmeritorious litigation because the gravamen of the applicants' dispute is with NERSA and not the respondents. Also, NERSA is not a municipal entity and any dispute against NERSA does not fall within the purview of section 102 of the Systems Act. This was already decided in *CFMC v NERSA*[10] 2020 above, the court found that the applicants' dispute against the methodology adopted

[9] See *Body Corporate Croftdene* at para 22 to 23.
[10] See *CFMC v NERSA* 2020 above.

by NERSA in determining the electricity tariffs for the 2019/2020 year does not fall within the ambit of section 102 of the Systems Act .It has already been decided and is therefore *res judicata*, yet the applicants vexatiously labour and persist with their *mala fide* contention in claiming that it does.

[27] *CFMC v NERSA* 2020[11], is of relevance at paragraph 22 thereof with reference to the *res judicata* issue. The court states as follows:

> "Who must determine what these relevant parts of the founding affidavit are for purposes of this application? Furthermore, the respondents in this application were unable to address these allegations in this application, as these allegations have not been set out in the founding affidavit in the application before me. I therefore have to conclude that no *prima facie* case has been made out with regard to the grounds of review relied upon by the applicants."[12]

[28] In the present matter specific amounts are claimed by the first respondent and the applicants have furnished facts that would adequately enable the Municipality to ascertain or identify the disputed items and the basis or the objection by the applicants thereto. Paragraph 23 further states as follows:

> "Furthermore, I am also not convinced that the balance of convenience favours the applicants. The impugned decision of NERSA has been taken in terms of existing legislation. The Constitutional Court held in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) at par [44] that where an interim interdict or temporary restraining order is sought to restrain the exercise of statutory powers, such a case is no ordinary application for an interim interdict. It was pointed out that the balance of convenience enquiry must carefully probe whether and to which extent the remaining order will probably intrude into the exclusive terrain of another branch of government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of

[11] See *CFMC v NERSA* above.
[12] Id at para 22.

powers harm (par [47]). It was further pointed out that the Court must also keep in mind that a temporary restraint against the exercise of a statutory power well ahead of the final adjudication of a claimant's case, may be granted only in the "*clearest of cases*" and after a careful consideration of the separation of powers harm (par [47])"[13]

The collateral challenge defence

[29] The respondents have literally closed their eyes to the facts submitted to them in the form of copious correspondences to the respondents. More importantly the applicants are protected in this application by the dictum in *Oudekraal*[14] which states as follows*:*

> "When construed against the background of principles underlying the rule of law a statute will generally not be interpreted to mean that a subject is compelled to perform or refrain from performing an act in the absence of a lawful basis for that compulsion. It is in those cases – where the subject is sought to be coerced by a public authority into compliance with an unlawful administrative that the subject may be entitled to ignore the unlawful act with impunity and justify his conduct by raising what has come to be known as a 'defensive' or a 'collateral' challenge to the validity of the administrative act."[15] (My emphasis)

[30] By law, the applicants as indicated by *Oudekraal* cannot be compelled to assist in the implementation of an unlawful administrative act. The respondents can therefore not rely on the *res judicata* principle.

Whether the first respondent is entitled to terminate the electricity supply to the second to the fifth applicants' respective properties, in particular where customers refuse to pay all of the current charges on their municipal account over extended periods of time?

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[13] Id at para 23.
[14] See *Oudekraal* above.
[15] Id at para 32.

[31] The respondents argue that the applicants cannot pick and choose how much they arbitrarily want to pay, in particular where they consume electricity and refuse to pay the full amount in respect of the electrical charges. If this is allowed, it would have a disastrous effect on the overall fiscus and the respondents' ability to provide municipal services to all of its customers would effectively collapse. As alluded to above, the respondents contend that they are a separate entity to NERSA, and as a result, NERSA should have been joined as it regulates the approval of tariffs. The Kubushi judgment stated that "it will not be just and equitable for the applicants' remedy to reach back to 2020/21 tariff year and result in extraordinary potential refunds that will cause calamity for the municipality." The respondents further submit that the decision in *Nelson Mandela Bay Business Chambers NPC and Another v National Energy Regulator and Others*[16] was based on the underlying methodology used by NERSA to approve tariffs, this especially explains that this is not the method that the respondents use but rather NERSA which was declared invalid but suspended for 12 months to be corrected by NERSA. These court cases were concerned with the methodology in which NERSA determines its tariffs, not to allow the applicants to pay amounts which are lesser than their charges against their municipal accounts.

[32] The respondents contend that they have constitutional and legislative mandate to discontinue services for non- payment and to collect all amounts owing to it in terms of section 152(2) of the Constitution, sections 5(2), 95(1)(a), 97, and 98 of the Systems Act, section 7,14,15 and 29 of the Credit Control Policy By law 2020. This was also affirmed in *Mkontwana v Nelson Mandela Metropolitan Municipality, Bisset & Others v Buffalo Municipality & Others; Transfer Rights Action Campaign & Others v MEC, Local Government and Housing, Gauteng & Others (Kwazulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)*[17] and *Rademan v Moqhaka Municipality and Others*[18] where the courts emphasized that the municipalities should reduce debt by legitimate means by enforcing credit control means mandated by section 97(1) of the Systems Act to collect all monies due and payable.

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[16] [2022] ZAGPPHC 778.
[17] 2005 (1) SA 530 (CC).
[18] 2012 2 SA 387 (SCA).

[33] The unique circumstances arising out of the present application and based on the Kubushi judgment are such that whilst not challenging the authority of the respondents to act in terms of 97(1) of the Systems Act, the first respondent is not entitled to terminate the electricity supply to the applicants' respective properties until the injunction in the Kubushi judgment is complied with, alternatively until the tariffs are rectified as directed in that judgment.

The law

The requirements of an interdict.

Prima facie and Clear right

[34] The requirements[19] of an interim interdict are trite, the applicants must have prima facie right to seek primary relief. The applicants contend that their first right stems from the right not to be charged electricity tariffs by the respondents which were set aside in a Kubushi judgment. When the applicants legitimately refuse to pay the tariffs which were declared unlawful, the respondents threaten to disconnect. The applicants relied on Kubushi J's order and said that it set out the regime which required the parties to resolve the dispute relating to the applicable electricity tariff payable for the 2019/2020 year by mutual agreement and failing which the tariff would have to be rectified by NERSA as directed by Kubushi J. The applicants further submit that this order renders the decision of NERSA to approve the 2019/2020 tariffs null and void.

[35] Section 15(2) of the Electricity Regulation Act 4 of 2006 states that the respondents may not charge a customer any other tariff and make use of provisions in agreements other than that determined or approved by NERSA. The applicants contend that their right extends further to all tariff determinations following the

[19] *Setlogelo v Setlogelo,* 1914 AD 221 at p. 227, *Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton and Another* 1973(3) SA 685 (A) *Knox D Arcy Ltd v Jamison and Other* 1996(4) SA 348 (A) at 361). (i)A prima facie right, even if it is subject to some doubt;(ii) A well-grounded apprehension of irreparable harm if the interim relief is not granted;(iii) The balance of convenience favours the granting of interim relief; and(iv) The applicant has no alternative remedy

2019/2020 tariff year although the review application was confined to 2019/2020. Therefore, the tariffs for each year from 2019/2020 to date are implicated by the Kubushi judgment because that tariff year forms the basis for all subsequent tariff determinations, which are made on a percentage increase basis. What also bears noting is that the methodology used by NERSA to approve the first respondent's tariffs for each of the subsequent years is the same methodology.

[36] The applicants also contend that they have a clear right under the *Oudekraal* principle not to be charged electricity tariffs which are unlawful on the reasoning of the Kubushi Judgment. The *Oudekraal*[20] case distinguished between the review relief and a collateral challenge and accordingly stated as follows:

> "It will generally avail a person to mount a collateral challenge to the validity of an administrative act where he is threatened by a public authority with coercive action precisely because the legal force of the coercive action will most often depend upon the legal validity of the administrative act in question.
>
> It is important to bear in mind (and in this regard we respectfully differ from the court *a quo*) that in those cases in which the validity of an administrative act may be challenged collaterally a court has no discretion to allow or disallow the raising of that defence: the right to challenge the validity of an administrative act collaterally arises because the validity of the administrative act constitutes the essential prerequisite for the legal force of the action that follows and *ex hypothesi* the subject may not then be precluded from challenging its validity."[21]

[37] Further, the applicants have a right under section 102 of the Systems Act not to have their municipal services and electricity supply terminated in circumstances where a dispute has been declared in relation to the amount of the electricity tariff. In terms of section 229 of the Constitution, the municipality may impose rates on property and surcharges on fees provided by or on behalf of the municipality if authorised by the enabling legislations. This power is regulated by the national

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[20] See *Oudekraal* above.
[21] Id at para 35 and 36.

legislation in the form of the Systems Act. The municipality in terms of chapter 9 may adopt credit control and debt collection for the monies due and payable. Notably the effect of the Kubushi judgement is that the amounts charged by the respondents are not due and payable. The applicants argued that in the established principle of law, subjects are not compelled to perform under an invalid administrative act relying on *Gillyfrost 54 (Pty) Ltd v Nelson Mandela Bay Metropolitan Municipality*[22] in which the *Oudekraal* principle is approved. The municipality's insistence on implementing an invalid administrative act is in itself unlawful and contrary to an established principle of law as expressed in *Esorfranki Pipelines.*[23]

[38] The applicants in the present application have declared a valid section 102 dispute regarding the excessive amount of charges claimed by the respondents against them. The disputes are clearly articulated by the applicants in the letters served on the respondents and they advance the irreconcilable contentions about the payments demanded by the respondents in terms of the Systems Act. Those letters were served on the respondents before the implementation of the debt collection measures.

[39] Lastly, the applicants' right is based on the undertaking that the respondents gave, that they will furnish ample notice and follow applicable procedures should there be a need to proceed with the disconnection. The respondents have not been complying with their own undertaking and have been arbitrarily and inadequately without notice, threatening and disconnecting the applicants' municipal services without providing a meaningful opportunity for the applicants to make representations. The first respondent as an organ of state is subject to a higher duty to respect the law and to tread carefully when dealing with subjects.

[40] The applicants have demonstrated clear and undisputed facts that established that they have prima facie right and the legal basis as such. Until NERSA determines the lawful tariff in which the applicants are to be charged, the respondents cannot disconnect electricity from the applicants. Doing so will be infringing the applicants' rights not to have their municipal services and electricity supply terminated by virtue

[22] [2015] All SA 58 (ECP).
[23] 2023 (2) SA 31 (CC).

of the 2019/2020 invalid tariffs, section 102 disputes and the undertakings of the respondents during the exchange of the letters between the parties. In *Eli & LA Sheepskin Products (Pty) Ltd v Lesedi Local Municipality and Others*[24] the court found that a dispute under section 102(2) of Systems Act had been established and interdicted the municipality from terminating the electricity.

Irreparable harm

[41] The applicants submit that the termination of municipal services and the disconnection of the supply of electricity will cause a catastrophic and irreparable harm as they rely on an uninterrupted supply of electricity for their manufacturing process. The court in *Cape Gate (Pty) Ltd and Others v Eskom Holdings SOC Ltd and Other*s held as follows[25]

> "If the interruption is proceeded with, the applicants, and potentially other consumers in similar positions, will shut down. That will render their review right moot. Yet Eskom will not be destroyed if the interruption decision is not implemented. It may have to wait before National Treasury devises a recovery plan that will ensure payment for it, but that is a far lesser fate than awaits the applicants. And the applicants have no alternative than that to seek a restraint on Eskom's right to interrupt the supply of electricity."[26]

[42] On the contrary the respondents will not suffer any harm because the applicants are paying and have tendered to pay according to a tariff which they have calculated approximates the lawful tariff. In the event where NERSA determines the tariffs as ordered by the Kubushi Judgment the respondents will recover any amounts it had previously under recovered, if any.

Alternative remedy

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[24] [2015] ZAGPPC 680.
[25] [2019] 1 All SA 141 (GJ).
[26] Id para 154.

[43] As far as the alternative remedy goes, the applicants submit that they do not have an alternative remedy as they have attempted to resolve the matter extra judicially between themselves and the respondents without success.

Counter application

[44] The respondents have filed a counter application and the relief which they seek is as follows:

44.1. That the first to the fifth applicants are hereby declared vexatious litigants in terms of section 2(1) (b) of the Vexatious Proceedings Act 3 of 1956 (the Vexatious Act).

44.2. That the second applicant is ordered to pay the respondents the amount of R69 048 491,77, in respect of the arrears on municipal account number: 2[…].

44.3. That the third applicant is ordered to pay to the respondents the amount of R5 757 588, 28, in respect of arrears on municipal account number: 2[…]

44.4. That the fourth applicant is ordered to pay to the respondents the amount of R4 029 392,84, in respect of the arrears on municipal account numbers: 5[…] and 5[…] respectively.

44.5. That the fifth applicant is ordered to pay to the respondents, the amount of R34 436 957,53, in respect of the arrears on municipal account number: 2[…]

44.4. That the first to the fifth applicants' application be dismissed with costs and own client scale including costs occasioned by the employment of counsel.

44.4. That the first to the fifth applicants pay the costs of this counter application on an attorney and own scale, including the costs occasioned by the employment of counsel.

Respondents' submission

[45] The respondents contend that the main application constitutes a form of unmeritorious litigation because the gravamen of the applicants' dispute is with NERSA and not the respondents. The present application is the sixth application which the applicants have brought against the respondents in the span of 5 years. The first application was launched in August 2019[27] on an urgent basis seeking an interim interdict against disconnection of municipal services including electricity. The second one was the review application[28] launched in 2022 and finalised in November 2023 which is still *sub judice.* The third application was launched on extremely urgent basis on the 20 March 2024, and sought an interim interdict against disconnection of municipal services including electricity to the second to the fifth applicants' properties and was subsequently removed by the applicants from the urgent court roll with no order as to costs. The fourth urgent application sought a similar relief to the third and it was launched on 22 March 2024, and it was struck from the urgent roll for lack of urgency and the costs were reserved to be determined at the semi-urgent hearing scheduled for 30 April 2024. The fifth application also sought similar relief, and it was heard on the 30 April 2024 and was accordingly refused with no order as to costs. The current application launched in the ordinary course for a final interdict to prevent the disconnection of electricity and municipal services was launched in November 2023.

[46] On this basis the respondents argue that the applicants have been unsuccessful on four separate occasions against the respondents. This must be seen in the context where the applicants' municipal accounts are presently in substantial arrears and cumulatively in the amount exceeding R113 million. The applicants should be declared vexatious litigants because they are abusing the court process by having brought a similar application in 2019 wherein they sought an

[27] See *CFMC v NERSA* 2020 above.
[28] See Kubushi Judgment above.

interim interdict against a disconnection of municipal services to their respective properties pending a review against the methodology used by NERSA in approving the 2019/2020 electricity tariffs and by claiming that they have a dispute for purposes of section 102 of the Systems Act, when in actual fact a review against the methodology used by NERSA in approving the 2019/2020 electricity tariffs falls outside of the purview of the Systems Act because NERSA is not a municipal entity. The applicants have already failed with their concocted dispute as is evidenced in the *CFMC v NERSA* 2020 case and they are attempting to bring a similar application again.

[46] Lastly, so the respondents argue, If the applicants are not declared vexatious litigants once and for all, they are highly likely to bring a similar application to the present one every year and again in the years to come. The applicants who seek to find a loophole into not paying the full amount for the electricity which they consume respectively, has brought the present application *mala fide* and this should not be condoned as it is a reprehensible behaviour by the applicants and should therefore show its censure by ordering the applicants to jointly and severally pay the costs of this application on scale C to be paid by the applicants jointly and severally the one paying the others to be absolved, including the costs occasioned by the employment of counsel.

Applicant's submissions

[47] The applicants submit that in the first interim application, the applicants were unsuccessful on the basis that the tariffs were still lawful until set aside, however in the review application the applicants ultimately succeeded, and the impugned tariffs were reviewed and set aside. Currently, the application before the court has prospectus of success. The fourth, fifth applications and current applications were triggered by the unlawful disconnection of the supply of electricity and municipal services. Those applications did not proceed due to an undertaking by the respondents to restore the services to the applicants. The second matter which was also triggered was struck off the roll by Bam J for lack of urgency as alluded to above. The said disconnections by the respondents were unlawful administrative acts because of the Kubushi judgement which is still unresolved. The applicants

could not be expected to fold their arms and not protect their rights by launching a collateral challenge against the respondents in terms of *Oudekraal.* In short, all the applications by the applicants were legitimate as to protect their interest and they cannot be lawfully referred to as vexatious litigation.

Vexatious litigation

[48] The law regarding vexatious litigation is regulated by section 2(1) (b) of the Vexatious Proceedings Act 3 of 1956 which states that:

> "If, on an application made by any person against whom legal proceedings have been instituted by any other person or who has reason to believe that the institution of legal proceedings against him is contemplated by any other person, the court is satisfied that the said person has persistently and without any reasonable ground instituted legal proceedings in any court or in any inferior court, whether against the same person or against different persons, the court may, after hearing that person or giving him an opportunity of being heard, order that no legal proceedings shall be instituted by him against any person in any court or any inferior court without the leave of the court, or any judge thereof, or that inferior court, as the case may be, and such leave shall not be granted unless the court or judge or the inferior court, as the case may be, is satisfied that the proceedings are not an abuse of the process of the court and that there is prima facie ground for the proceedings."

[49] The purpose of this legislation was elucidated in *S v Sitebe*[29] where Caney J held as follows: "The purpose of the legislation is to put a stop to the persistent and ungrounded institution of legal proceedings…"[30]

[50] Again, in *Absa Bank Ltd v Dlamini*[31] Rabie J quoting Mokgoro J in *Beinash and Another v Ernst & Young and Others* 1999 (2) SA 116 (CC) at para 122G-H held that:

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[29] 1965 (2) SA 908 (N).
[30] Id p911.
[31] 2008 (2) SA 262 (T).

"The purpose of this screening mechanism is …to protect, firstly, the interests of the victims of the vexatious litigant who have repeatedly been subjected to the costs, harassment and embarrassment of unmeritorious litigation, and, secondly, to protect the public interest that the functioning of the courts and the administration of justice proceed unimpeded by the clog of groundless proceedings. The provisions of the Act consequently complement the common law to prevent vexatious litigation and an abuse of process."[32]

[51] An order envisaged in terms of section 2(1)(b) was confirmed in *Beinash*[33] above where the court held that:

"An order restricting a litigant is only made in circumstances where the court is satisfied that the malfeasant has 'persistently and without reasonable grounds instituted legal proceedings.'"[34]

[52] The meaning of the word "*persistent*" in this context was considered by Gorven J in *MEC for Co-operative Governance and Traditional Affairs v Maphanga*[35]

"On the question whether there have been persistent proceedings, I agree with the court a quo's approach in interpreting the section, and in this particular instance, the word 'persistent'. Due account must be given to the language, context and purpose of the legislation. Although constitutionally valid, the legislation must nonetheless be accorded a narrow construction as it interferes with a protected right and restricts the right of access to courts, to avoid undue limitation of the right. The word 'persistent' has a variety of meanings which include 'continuous, constantly repeated, recurring' and 'determined, dogged, steadfast, tenacious'. The meaning envisaged in the present context must be a

[32] Id at para 23.
[33] 1999 (2) SA 116 (CC).
[34] Id para 18.
[35] 2018 (3) SA 246 (KZN).

'recurring' or 'constantly repeated or continuous' institution of legal proceedings in a court."[36]

[53] In *State Attorney v Sithebe*[37] it was held that the court will, in the exercise of its powers, consider the general character and result of the actions instituted. Even though the number of occasions may be comparatively small, there may be exceptional circumstances that justify the making of the order. Therefore, will not only consider the persistence of the application but the sufficient number of cases instituted without reasonable grounds

[54] The courts' approach to addressing vexatious litigation includes considering factors such as frequency, nature, merits and persistence. This may be found in recurring cases and a pattern of baseless or frivolous litigation and a consistent disregard of the legal process including the rights of others. In this case these applications do not meet the requirements of vexatious litigation in that those applications were launched in a bid to protect the applicants' rights. All the applications mentioned above were brought on reasonable grounds.

Costs

[55] The respondents submit that they are entitled to a higher scale of costs being scale C on the basis that the applicants are vexatious litigants, and my finding is that they are not. No cost order, therefore, arises out of the counter application.

Conclusion

[56] Having considered the facts, the law, and the circumstances under which the applications by the applicants were brought against the respondents, I come to the conclusion that the counter application by the respondents is not sustainable in law, and in my view, having regard to the facts and the circumstances of this matter, the applicants have satisfied requirements for an interdict.

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[36] Id at para 20.
[37] 1961 (2) SA 159 (N) at p163.

[55] In the result I make the following order:

Order

1. The respondents are interdicted from disconnecting the electricity supply to the premises of the second to fifth applicants pending the finalisation of the disputes lodged by those applicants in terms of section 102 of the Local Government: Municipal Systems Act 32 of 2000 pertaining to the 2019/2020, 2020/2021,2021/2022, 2022/2023 and 2023/2024 financial years regardless of when and in which financial year the disputes finally resolved.

2. In the alternative to the relief sought in paragraph 1 above, the respondents are interdicted from disconnecting the electricity supply to the premises of the second to the fifth applicants without following the procedure set out in this paragraph:

    2.1. Should the respondents intend to disconnect the electricity supply to the premises of any of the applicants, the respondents are to furnish the relevant applicant with a notice in which it is recorded that:

        2.1.1 The respondents intend to disconnect the electricity supply to the relevant applicant's premises in no less than 30 days from the date of the letter

        2.1.2. The relevant applicant is entitled to make written representations to the first respondent within 14 days of the receipt of the notice as to why the electricity should not be disconnected.

    2.2. The respondents are precluded from disconnecting the electricity supply to the premises of the relevant applicant until the later of either:

        2.2.1. The elapsing of the 30 -day period described in paragraph 2.1.1 above without the relevant applicant making written representations; or

2.2.2. The completion of the period envisaged in paragraph 2.3 below.

2.3. Should the relevant applicant take up the opportunity to make written representations, the respondents are precluded from disconnecting the electricity supply to the premises of the relevant applicant without following the process set out below:

2.3.1. The respondents are to consider the representations, the respondents decide nevertheless to disconnect the electricity supply to the premises of the relevant applicant they are to inform the relevant applicant accordingly and provide written reasons for such decision.

2.3.2. When informing the relevant applicant of the decision described in paragraph 2.3.2. the respondents are to adopt the following procedure:

2.3.3.1. The decision to disconnect the electricity supply notwithstanding the relevant applicant's written representations, including the reasons for such decision(the "decision notification") must be conveyed to the relevant applicant in writing.

2.3.3.2. The decision notification must record that, should the relevant applicant contest the right of the respondents to disconnect the electricity supply to the relevant applicant, the relevant applicant is entitled to approach a competent Court for urgent relief.

2.3.3.3. The decision notification must record that, should the relevant applicant choose to challenge the disconnection decision as envisaged by paragraph

2.3.3.2 above, the electricity supply will not be disconnected pending the finalisation of the litigation in question, subject to the conditions that:

2.3.3.3.1. The relevant applicant must inform the respondent of its decision to challenge the lawfulness of the proposed disconnection within 3 days of receipt of the decision notification.

2.3.3.3.2. The relevant applicant launches its urgent application within 7 days of informing the respondent of its intention to do so as envisaged by paragraph 2.3.3.3.1 above.

3. The counter application falls to be dismissed with costs.

4. The respondents are ordered to pay the applicants' costs on attorney own-client scale which will include the costs of employing two counsel subject to Scale C.

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SELBY BAQWA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

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	Instructed by MC Botha Inc
For the Respondents	Adv M Coovadia Instructed by Patel Inc Attorneys
Date of hearing:	25 July 2024
Date of Judgment :	October 2024