IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

19 November 2024

DATE SIGNATURE

CASE NUMBER: 121281/2024

In the matter between:

VAN DER LINDE, GLEN ANDREW	APPLICANT
and	
TSHWANE METROPOLITAN MUNICIPALITY	FIRST RESPONDENT
MUNICIPAL MANAGER, TSHWANE METROPOLITAN MUNICIPALITY	SECOND RESPONDENT

SUMMARY: *Notice of Motion- Urgent Application- Rule 6 (12)-The requirements for an urgent application in that the applicant should set forth explicitly the reasons why he or she avers that the matter is urgent and why it is claimed that no substantial redress would not be afforded at a hearing in due course.*

ORDER

HELD: The application is struck from the roll for lack of urgency.
HELD: The Applicant is ordered to pay posts on party and party Scale B.

JUDGMENT

MNCUBE, AJ:

INTRODUCTION:

[1] This is an opposed urgent application in which the Applicant seeks the following relief-

'1. Condoning the Applicant's non-compliance with the rules relating to service of processes and papers as well as the timeframes set out, including the 72 hours' notice referred to in section 35 of the General Law Amendment Act,1955 (Act 62 of 1955);

2. Granting the Applicant leave to proceed with this application by way of urgency in terms of Rule6 (12);

3. Issuing a rule nisi calling upon the Respondents to show cause on date to be arranged with the Registrar of this honourable Court at 10:00 or as soon thereafter as the matter may be heard why an order in the following terms should not be made final:

3.1 that the termination/disconnection/ discontinuation / blocking/ restriction of service to the electricity supply to 5 Edelweiss Close, 2 Ben du Toit Street, Bronkhorstspruit (the premises) be and is hereby declared unlawful;

3.2 that the Respondents be and are hereby directed to reconnect/ unblock/ unrestrict the electricity supply to the premises within four hours after service of the court order, by the Applicant's Attorneys, at the offices of the Second Respondent;

3.3 that the Respondents be and are hereby interdicted and restrained from charging the applicants a reconnection fee as a result of the unlawful restriction/ termination/ disconnection/ discontinuation/ blocking of service.

3.4. that the Respondents are interdicted and restrained from unlawfully terminating/ disconnecting/ blocking/ restricting the supply of electricity to the premises;

3.5 that the Respondents are directed to pay the costs of this Application on an attorney and client scale; and

3.6 that further and/or alternative relief be granted as this Court may deem meet.'

[2] The Applicant is Mr Glen Andrew van Der Linde, an adult male. The First Respondent is City of Tshwane Metropolitan Municipality, a municipality duly established in terms of the Constitution and the Local Government Municipal Structures Act 117 of 1998. The Second Respondent is the Municipal Manager of City of Tshwane Metropolitan Municipality, cited in his

capacity as an accounting officer of the First Respondent. The Applicant is represented by Mr Du Plessis. The Respondents are represented by Adv. Erasmus. The Respondents have applied for condonation for the late filing of the answering affidavit which is granted.

BACKGROUND FACTS:

[3] The salient facts are that the Applicant is a registered owner of the premises situated at 2 Ben du Toit Street in Bronkhorstspruit since 31 January 2014 which is currently leased. The Applicant did not immediately open an account with the Respondents which led to an adjustment being done on his account during December 2022. There is a contractual agreement between the Applicant and the Respondents in respect of services to the premises. The Applicant's account is in arrears to the sum of R131 038,56 (one hundred and thirty-one thousand and thirty- eight rand and fifty -six cents). On 15 October 2024, the Respondents disconnected electricity supply to the Applicant's premises which caused the Applicant to launch an urgent application on 23 October 2024.

ISSUES FOR DETERMINATION:

[4] The issues for determination are whether or not the application is urgent and whether the Applicant received the notice of termination of electricity as prescribed in the By-laws.

SUBMISSIONS:

[5] All submissions and cited case law have been considered. Counsel for the Applicant contends in the written heads of argument that the disconnection of electricity occurred without compliance with section 21 of the By-Laws. The submission is that public authorities possess only power that is lawfully authorised and if there is no authorization for the action such action would be invalid. The contention is that it is not competent for a public body such as the First Respondent to confer upon itself such powers or functions that it is not authorised to perform. Reliance is placed on the matter of **Special Investigating Unit v Nadasen 2002 (1) SA 605 (SCA)** para [5]. The submission is that to disconnect electricity is a drastic and draconian step in the process of debt collection, section 115 (1) of the Municipal Systems Act sets out the manner of service of the notice referred to in section 21 of the By-Laws. The contention is that the burden of proving compliance with section 21 of the By-laws rests on the Respondents who are the only ones to attest when and how the notice of termination was served. The argument is that the Respondents failed to comply with the By-laws.

[6] On the issue of urgency, Counsel for the Applicant contends that the following factors must be considered- (a) when the Applicant became aware of its rights to be afforded with notice and (b) if there was a delay after becoming aware of rights to be afforded notice before launching the application. Counsel cites several matters including **Noncedo Dukashe v Buffalo City Municipality (2011/2022)** and **Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others 2004 (2) SA 81 (SE).** The submission is that the Respondents were required to provide the Applicant with fourteen days' notice of its intention to disconnect services to the premises and the Applicant launched the proceedings without delay. Lastly, the contention is that the Applicant has established a clear right to be afforded fourteen days' notice before the electricity was disconnected. The disconnection of electricity is causing the Applicant irreparable harm and there is no other remedy. The submission is that the balance of convenience favours the Applicant.

[7] The contention is that the Applicant has a constitutional right to access to electricity which is being infringed by the Respondents. A concession is made that the First Respondent has a right to disconnect the supply of electricity for unpaid rates and services only as governed by section 21 of the Standard Electricity Supply By-laws. The submission is that it is fundamental to our constitutional order that the Legislature and Executive are constrained by the principle that they may exercise no power and perform no function beyond that is conferred upon them by law. The argument is that Courts have a duty to ensure that the limits to the exercise of public powers are not transgressed. The submission is that the fact that the Applicant owes the Respondents money is not the issue for determination. If the finding is that notice was given to the Applicant then the application must fail and the corollary is that if the finding is that there was no notice then the application must succeed.

[8] The Applicant makes the argument that the Respondents place reliance on the provisions of the Municipal Systems Act 2 of 2000, however the right to collect overdue amounts is governed by the Standard Electricity By-laws that require that a fourteen -day written notice be given before electricity may be disconnected.

[9] Counsel for the Respondents in the written heads of argument contends that the matter is not urgent and the Applicant has failed to make out a case for a declaratory order that the disconnection of electricity was unlawful. The submission is that the Applicant has also failed to make out a case for a final relief in ordering the Respondents to restore the services to the property. Counsel reiterates that the test to determine urgency is whether the Applicant cannot

obtain substantial redress at a hearing in due cause and refers **to East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others (11/33767) [2011] ZAGPJHC 196 (23 September 2011).**

[10] The contention is that the court's power to condone non- compliance of the Rules should be in light of sufficient and satisfactory grounds shown by an applicant. The submission is that the Applicant does not state why he would not get substantial redress in future. Instead the Applicant has failed to provide explicit why he makes such a claim and the matter should be struck from the roll. The averment that he has a right to electricity is incorrect, he has right to access to electricity. The argument is that the Applicant is trying to force access to electricity despite the fact his account is in arrears. The contention is that the Applicant failed to make out a case for the relief he seeks, in declarator order and final interdict.

THE LAW:

(a) Urgency:

[11] An urgent application must comply with the provisions of Rule 6 (12) (b) of the Uniform Rules which provides that –

'In every affidavit or petition filed in support of the application under paragraph (a) of this sub-rule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he would not be afforded substantial redress at a hearing in due course.'

[12] The jurisdictional requirements in an urgent application are - (a) an applicant must file an affidavit setting out explicitly the circumstances which render the matter urgent, and (b) sets out the reasons why he or she cannot be afforded substantial redress at a hearing in due course. An applicant must therefore establish facts to justify the application in order to be granted immediate relief and to circumvent the normal motion processes. Urgency must not be self-created.[1] In **Dynamic Sisters Trading (Pty) Ltd and Another v Nedbank Limited (081473/2023) [2023] ZAGPPHC 709** (21 August 2023) para [18] it was held '*This Court has consistently refused urgent applications in cases when the urgency relied-upon was clearly self created.'*

[1] See Schweizer-Reneke Vleis Maatskappy (Edms) Bpk v Die Minister van Landbou en Andere 1971 (1) PH F 11 (T).

[13] The Court has the power to dispense with the forms and service provided for in the Rules as envisaged in Rule 6(12) (a). The word 'may' in Rule 6 (12) (a) shows that the Court has discretion to condone or decline to condone non- compliance with the prescribed forms and service. It is recognised by our Courts that the failure to comply with Rule 6 (12) is fatal to an urgent application. It is further recognised that there are various degrees of urgency. The test for urgency is based on the reasons that an applicant claims that he or she could not obtain substantial redress at a hearing in due course.[2] Where the application lacks urgency, the court can on that basis decline to exercise its powers under Rule 6(12)(a). The procedure set out in Rule 6 (12) is not there for the taking.[3]

[14] In **East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others (11/33767)** [2011] ZAGPJHC 196 (23 September 2011) it was held-

'[6] The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.

[7] It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. . . . Whether an applicant will not be able to obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his cases in that regard.'

(b) The statutory framework of the Respondents' duties:

[15] In **Mkontwana v Nelson Mandela Metropolitan Municipality 2005 (1) SA 530 (CC)** para [1] it was held *'One of the five objects of local government in our Constitution is to ensure the provision of services to communities in a sustainable way. Municipalities supply water and electricity to consumers in their area subject to the payment of a consumption charge.'*

[16] In terms of section 73 (1) of the Local Government Municipal Systems Act 32 of 2000 the First Respondent has the duty to give effect to the provisions of the Constitution including the following general duties-

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[2] See Luna Meubel Vervaardigers (EDMS) BPK v Makin and Another (t/a Makin's Furniture Manufactures) 1977 (4) SA 135 (W) at 137F-G.

[3] See East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others (11/33767) [2011] ZAGPJHC 196 (23 September 2011) para [6].

(a) Give priority to the basic needs of the local community;
(b) Promote the development of the local community; and
(c) Ensure that all members of the local community have access to at least the minimum level of basic municipal services.

[17] Section 96 of the Local Government Municipal Systems Act 32 of 2000 imposes the responsibility on a municipality to collect all money that is due and payable to it and to implement a credit control and debt collection policy which complies with this Act.

[18] The City of Tshwane Metropolitan Municipality Standard Electricity Supply By-laws sets out relevant provisions. In terms of section 18 (1), the consumer is liable for all electricity supplied to his or her premises. In terms section 18 (3), on the consumer's failure to pay, the Municipality must notify the consumer and eventually disconnect the electricity supply to the premises of the consumer.

[19] Section 21 of the Standard Electricity Supply By-laws supra provides-

'(1) The Municipality has the right, after giving notice, to disconnect the electricity supply to any premises if-

(a) the person liable for payment for the supply or for payment for any other municipal service fails to pay any charge due to the Municipality in respect of any service which he or she may at any time have received from the Municipality in respect of the premises; or

(b) any of the provisions of these By-laws and/ or the regulations are being contravened.

(2) The Municipality has the right to disconnect the electricity supply to any premises if there has been deliberate overloading on or the illegal increase of supply or capacity of supply to the premises. The Municipality must give notice to the consumer of its intention to disconnect or, in the case of a grave risk, the Municipality may disconnect without giving notice. After a consumer's electricity supply has been disconnected for non-payment of accounts or for the improper or unsafe use of electricity or for any other related reason, the fee prescribed by the Municipality must be paid by the consumer.'

[20] In section 2.1 of the City of Tshwane Metropolitan Municipality Credit Control By-laws, the manner of service of notices is set out. Section 2.1 (f) provides-

'if service cannot be effected in terms of paragraphs (b) to (e) by affixing it to the principal door of entry to the premises, or placing it to a conspicuous place on the land to which it relates.'

[21] Section 5.2 of the Credit Control By-laws supra set out discretionary powers of the Respondents to either restrict or disconnect supply of services. In terms of section 5.2 (a) (i), the Council may, restrict or disconnect the supply of water, gas or electricity to any premises whenever a user fails to make full payment on the due date or fails to make acceptable arrangements for the repayment of any amount for services, rates or taxes.

[22] Our Courts recognise that the supply of electricity by Municipalities is an important function which affects constitutional rights, however Courts cannot be rendered a credit control agent by parties abrogating their rights or duties.[4] The right to receive electricity as a basic municipal service is qualified by the constitutional and statutory obligations of the municipality to provide public services in a financially sustainable manner.[5] A Municipality has a duty to develop a culture of payment and to disconnect the supply of electricity and water in appropriate steps for the collection of amounts due.[6] In **Eskom Holdings SOC Ltd v Vaal River Development Association (Pty)Ltd and Others 2023 (4) SA 325 (CC)** para [88] it was held that where a consumer contravened a municipal's condition of payment, it is then entitled to cut off the electricity supply.

ANALYSIS:

[23] There are two issues to be determined in this application- first, whether or not the application is urgent and secondly, whether or not notice of termination was given to the Applicant. The first hurdle that is upon the Applicant is to show that the application is indeed urgent. Once the finding of urgency is made, then the second issue can be determined. It is common cause that the Applicant's electricity has been disconnected due to the fact that his account with the Respondents is in arrears. On the issue of urgency, the Applicant is required to show why he claims that he cannot be afforded substantial redress at a hearing in due course. That is the test.

[24] The Applicant avers the following facts as constituting urgency-

'*This matter is so urgent because we need electricity in order for us to fully utilize the premises and it warrants being heard on a non-motion court date and outside normal court hours.'* In addition to this averment, the Applicant cites the fact that the property is being leased to tenants that he owes a contractual duty to ensure the continued supply of electricity to the premises.

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[4] See Hlazi v Buffalo City Metropolitan Municipality and Another 2023 (6) SA 464 (ECEL) para[67].
[5] See Hlazi v Buffalo City Metropolitan Municipality and Another 2023 (6) SA 464 (ECEL) para [37].
[6] See Mkontwana v Nelson Mandela Metropolitan Municipality supra para [47].

The Applicant further avers that he and his tenants are being punished for the alleged unlawful conduct of the Respondents.

[25] The contention that Counsel for the Applicant makes is that because this matter involves the supply of electricity it is inherently urgent and warrants it to be heard as a matter of urgency. Wilson J[7] dispelled the notion of a class of proceedings that enjoys inherent preference unless a statute specifies inherent urgency and held that urgency is determined by the circumstances. I am persuaded that urgency must be determined by the circumstance is a correct legal principle.

[26] The Applicant's averments on why he claims that the matter is urgent is with respect unconvincing for the following reasons-

(1) The Applicant's averment that he has a contractual obligation to his tenants is not a sufficient reason to render the matter urgent. The contention that the amounts that the Applicant owes is not for determination therefore immaterial is respectfully not correct. The arrears on the account is interlinked to the matter. If his account had not been overdue, then there would have been no legal basis for the Respondent to disconnect his electricity. To now cite his contractual obligations to his tenants (as one of the grounds for urgency) does not constitute urgency as envisaged by Rule 6 (12).

(2) The Applicant avers that he has a right to the supply of electricity. Accepting for a moment that he has such a right, it is conditional to the payment for the services rendered by the Respondents. On the facts, it is common cause that the Applicant's account with the Respondents is in arrears. The fact that the account has fallen into arrears provides the Respondents with the legal recourse to embark on credit control.

[27] The Applicant concedes that he has a contractual relationship with the Respondents. In an effort to show that the matter is indeed urgent, he avers that he cannot obtain subsequent redress at a hearing in due course. I am not persuaded that this is in fact correct. Firstly, there is nothing stopping the Applicant from making a payment arrangement with the Respondents as envisaged in section 5.4 of the Credit Control By-laws. In the event that the Respondents unreasonably withhold engaging with the Applicant on a payment plan, the Applicant is within his right to approach the court for relief in this regard. Put differently, the fact that there is provision in the By-laws for a consumer to make payment arrangement with the Respondents

[7] See Volvo Financial Services Southern Africa (Pty) Ltd v Adamas Tkolose Trading [2023] ZAGPJHC 846 (1 August 2023) para [6].

means that there is a constitutional duty on the Respondents to consider any payment proposals in a fair and reasonable manner to assist the consumer to settle overdue accounts. It is on this basis that I am not persuaded that the averment of lack of subsequent redress is correct. For this reason, the Applicant has failed to meet the test as contemplated by Rule 6 (12) of the Uniform Rules.

[28] There is another ground on the basis of which a finding is that this application lacks urgency alternatively that urgency is self- created. The termination was done on the 15 October 2024 and the Applicant only launched this application on 23 October 2024. This brings about the following question- why did it take the Applicant several days before making this application if his contention is that electricity is inherently urgent? I pose this question well aware that the Court in **East Rock Trading 7 (Pty) Ltd** supra para [9] held that where there is a delay in instituting the proceedings, an applicant has to explain the reasons for the delay and why despite the delay he cannot be afforded substantial redress at a hearing in due course. In my view, the Applicant is required to provide an explanation for the delay covering the full period from 15 October 2024 to 23 October 2024. To merely make a generic averment that he consulted with legal representative and engaged the Respondents before launching the application is insufficient. Instead, the delay signifies that the matter is not as urgent as the Applicant is alleging. It must be reiterated that urgency is diminished where a litigant takes longer to act.[8]

CONCLUSION:

[29] In conclusion, I am satisfied that the Applicant has failed to prove urgency as he failed the test that he cannot be afforded substantial redress at a hearing in due course. He has substantial redress in terms of section 5.4 of the Credit Control By-laws as well as any other relief available in law. For these reasons, I decline to condone the non-compliance with the Rules of Court. The application stands to be struck from the roll. It follows that there is no need to determine the second issue whether or not the Applicant received notice of termination.

COSTS:

[30] The basic principle on costs is that the Court exercises a discretion which has to be exercised judicially. I find no reasons to depart from the trite position that costs follow the result.

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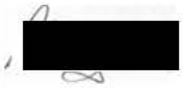
[8] See Van Der Merwe and Others v Nel NO and Others (2483/2023) [2023] ZAECMKHC 86 (11 August 2023) para 32.

Order:

[31] In the circumstances the following order is made:

(1) The application is struck from the roll for lack of urgency.

(2) The Applicant is ordered to pay costs on party and party Scale B.



MNCUBE AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

On behalf of the Applicant	: Mr N. J. Du Plessis
On behalf of the Respondents	: Adv. N. Erasmus
Date of Hearing	: 6 November 2024
Date of Judgment	: 19 November 2024