IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

REPORTABLE: NO/YES	
OF INTEREST TO OTHER JUDGES: NO/YES	
REVISED.	
SIGNATURE	DATE
N V KHUMALO J	14/11/2024

Case no: **4506/22**

In the matter between:

CD SANYANGA **Applicant**

and

CITY OF JOHANNESBURG **1ST Respondent**

XANADO TRADE OR INVEST 164 (PTY) LTD **2ND Respondent**

This Judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 14 November 2024.

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JUDGMENT

N V KHUMALO J

[1] The Applicants in this matter seek an order confirming a r*ule nisi* they obtained as per order of Mbongwe J on 28 January 2022 on an urgent basis, calling upon the 1st Respondent, the City of Johannesburg ("the City") to come and show cause why the following interdictory order against it should not be confirmed:

[1.1] The Respondent is interdicted and restrained from disconnecting the electric supply under the account of Linde Lane, pending the finalisation of the unresolved disputes raised in terms of the process prescribed in Act 32 of 2000;

[1.2] The Respondent be held in contempt of court in that it wilfully refused to comply with the orders of this honourable court, that of Mbongwe J and Makhoba J ordering it to restore the electricity, on two separate occasions.

[2] The Applicants are occupants of a block of apartments called Linden Lane, a residential development that comprises of approximately 160 Units. Linden Lane is owned by Xanado Trade or Invest 164 (Pty) Ltd who lets the apartments to the Applicants and not participating in this litigation although joined as the 2nd Respondent in compliance with Mbongwe J's order. The reference to Respondent, is therefore only in relation to the City of Johannesburg, a metropolitan municipality established in terms of section 12(1) of the Local Government Municipal Structures Act, 1998 ('the Act') and responsible for supplying municipal services to the local communities in Johannesburg.

[3] On 25 January 2022, the Respondent disconnected the electricity and water supply to Linden Lane. As a result, the Applicants approached the Court on an urgent basis seeking an order directing the Respondent to restore the electricity with immediate effect. They allege it was without any warning to any of the occupants of Linden Lane and in the midst of ongoing disputes between the Applicants or the owner of the block of apartments and the Respondent, relating to the Respondent's incorrect billing for municipal services.

[3] The disputes which remain unresolved are lodged with the Respondent under reference numbers 8004777600, 8004925566 and 80049884599 in terms of the Respondent's or Municipality by- laws of engagement on incorrect billing for the municipality services, which includes water and electricity.[1] The latest dispute as alleged by the Applicants involve the Respondent's incorrect billing of an amount of R596 484.30 for refuse removals at Linden Lane, when the Respondent has never

[1] City of Johannesburg Metropolitan Municipality: Credit Control and Debt Collection By-laws

supplied any bins or removed any refuse from Linden Lane which uses its own private contractor to remove the refuse.

[4] The Respondent proceeded to terminate the supply of electricity and water to Linden lane to try and enforce payments on the incorrect bills even though it does not dispute the fact that there are disputes which remain unresolved, further that it does not supply the Applicants with refuse services. The Applicants then urgently obtained the interim interdictory orders on 28 January and 8 February 2022, with the Respondent ordered to reinstate the services pending final adjudication on the interdict sought to prevent any disconnection of services until finalisation of the disputes raised. The Applicants say it was to no avail as the Respondent persisted with the termination, hence they are also seeking a contempt of court order.

[5] An issue to be determined is hence whether the Applicants have made a case for the granting of the final interdict, and if the Respondent was guilty of contempt of court.

[6] The Applicants opposed the Respondent's Answering Affidavit being considered by the court, on the basis that notwithstanding the Respondent entering its notice to oppose on 4 February 2022, its answering Affidavit was filed only on 22 March 2022 outside the prescribed *dies induciae* without an application for condonation. Instead a new set of attorneys filed another notice of intention to defend on 22 March 2022. The Applicants argued that the Answering Affidavit was accordingly not properly before court and the matter as a result unopposed. Conversely the Respondent opposed the late filing of the Applicant's Replying affidavit which was filed together with an application for condonation. The matter was resolved with the late filing of both sets of Affidavits being condoned.

[7] The Respondent in opposing the Application raised two points *in limine. On the first point in limine,* the Respondent disputes the Applicants' *locus standi* to bring the Application on the basis that there is no contract or legal agreement between the Respondent and the Applicants as Linden Lane occupants, to be supplied with any utilities. Secondly, it points out that a pre-termination notice was served on 23 December 2021 at 14h23, for the termination that took place on 25 January 2022. It

argues that there was no justification to have brought the matter especially on an urgent basis as some issues had by then become moot. Further that it nevertheless complied with the court orders and restored the electricity. Accordingly, the Applicants have also failed to fulfil the requirements of an interim interdict.

Locus Standi

[8] It is common cause between the parties that the City is indeed not contracted to the Applicants for the supply of utilities to their units, but with the owner of the building, Invest 164 (Pty) (Ltd) ('Invest'). As a result at the hearing before Mbongwe J, the Applicants were also ordered to join Invest in the proceedings as the owner, which they subsequently did. The Respondent nevertheless persisted in its opposition of the Applicants' *locus standi*.

[9] In response the Applicant argued with reference to the decision in *Joseph and Others v City of Johannesburg and Others*[2], when the Constitutional Court held that, "in such circumstances where the City has contracted with the owner and not the residents, the residents were still entitled to be treated in a procedurally fair manner when a decision has been made to disconnect the electricity supply to their building". Skweyiya J made a significant remark in *Joseph*, that … "such a matter concerns the relationship between the public service provider and the consumers with whom it has no contractual relationship and that principles of administrative justice and not the law of contract govern the issues that arise.[3]

[10] The obligation of the Municipality as the admnistrative or public service provider was under the circumstances explained in *Joseph* as follows:

> *"When City Power supplied electricity to Ennerdale Mansions, it did so in fulfilment of the constitutional and statutory duties of local government to provide basic municipal services to all persons living in its jurisdiction. When the Applicants received electricity, they did so by virtue of their corresponding*

[2] [2009] ZACC 30; 2010 (3) BCLR 212 (CC); 2010 (4) SA 55 (CC)

[3] At para 16

public law right to receive this basic municipal service. In depriving them of a service which they were already receiving as a matter of right, City Power was obliged to afford them procedural fairness before taking a decision which would materially and adversely affect that right.[4]

[11] Yacoob J In *Mkontwana*,[5] held that "municipalities are *obliged* to provide water and *electricity* to the residents in their area *as a matter of public duty*." The basic municipal services are therefore received by the tenants as a matter of right, a public law right that is protected by the Constitution[6]. In that case, s 151(3) of the Constitution indicates the parameters within which the municipalities are to operate and reads:

'[a] municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.'

. . .'

[12] In s 33 the Constitution provides that:

'(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

[13] The Constitution further provides in s 34 that:

'[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

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[4] At para 47

[5] *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality and Amici Curiae)* [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC).

[6] The Constitution of the Republic of South Africa, 1996 ("the Constitution")

[14] In order to give effect to the provisions in the Constitution, the Local Government: Municipal Systems Act 32 of 2000 ("the Systems Act") was enacted. The Act describes and assigns the purpose, functions and powers of a municipality.

[15] In addition, Skweyiya J in *Joseph* further explaining the relationship between the municipalities and the consumers tenants stated that[7]:

> *"I am of the view that this case is similarly about the special cluster of relationships that exist between the municipality and citizens which is fundamentality cemented by the public responsibilities that a municipality bears in terms of the Constitution and legislation in respect of the persons living in its jurisdiction. At this level the admnistrative law principles operate to govern these relationships beyond the law of contract."*

[16] Section 3 (1) of the Promotion of Admnistrative Justice Act ("PAJA") provides then that *"administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair,"* indicating a broad application of the procedural fairness provisions under PAJA. The tenants are consequently entitled to procedural fairness under s 3 (1) and (2)[8] before the Respondent can take the decision to terminate the supply of services as the tenants' public law right to be supplied with water and electricity would under the circumstances be directly and adversely affected by the decision.

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[7] *Joseph* supra at para 25

[8] Section 3 (1) and (2) of PAJA provides:
"(1) Administrative action which materially and adversely affects the rights or legitimate expectations of
any person must be procedurally fair.
(2) (a) A fair administrative procedure depends on the circumstances of each case.
(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)—
(i) adequate notice of the nature and purpose of the proposed administrative action;
(ii) a reasonable opportunity to make representations;
(iii) a clear statement of the administrative action;
(iv) adequate notice of any right of review or internal appeal, where applicable; and
(v) adequate notice of the right to request reasons in terms of section 5.

[17] The Applicants are on that basis entitled to challenge the process. It is therefore clear that the Applicants have *locus standi.* Skweyiya J further opined as follows in *Joseph* that[9]:

> *"The general rationale for, and legitimacy of, disconnecting a user's electricity supply as a debt collection mechanism aimed at recovering a debt from someone entirely separate has however not been challenged in this case. Accordingly, the issue this litigation presents is not whether the effect and the reach of the debt collection policy informing the Credit Control By-laws is justifiable but more narrowly, whether users of municipal services are entitled to procedural fairness when decisions that adversely affect the municipal services that they are receiving are taken. It remains open to the Applicants to challenge the debt collection policy that underpinning the Credit Control By-laws,…"*

Pre-termination Notice

[18] The *locus standi* established, the further issue to be decided is whether indeed the Respondent failed to follow a duly fair procedure by failing to serve a pre-termination notice justifying the Applicant's urgent approach to the court, if it did, was the Applicant nevertheless still justified to approach the court for an interdict.

[19] On underlining the importance of procedural fairness, reference is made in *Joseph* to the description of procedural fairness by Hoexter[10]:

> *"Procedural fairness . . . is concerned with giving people an opportunity to participate in the decisions that will affect them, and – crucially – a chance of influencing the outcome of those decisions. Such participation is a safeguard that not only signals respect for the dignity and worth of the participants, but is also likely to improve the quality and rationality of administrative decision-making and to enhance its legitimacy."*

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[9] At para 55

[10] *Administrative Law in South Africa* (Juta, Cape Town 2007) at 326-7;

[20] The conclusion is therefore reached in *Joseph* that allude to the fact the procedural fairness requires the provision of pre-termination notice to the residents, rather than merely the building owner as the tenants would be materially and adversely affected by the disruption of services. The notice as per provisions of s 3 (2) of PAJA would have to contain all relevant information, including the date, time, nature and purpose of the proposed disconnection. They are further entitled to be afforded sufficient time to make any necessary enquiries and investigations, to seek legal advice, make representations before termination of services is considered, if need be and to organise themselves collectively if they so wished.[11] 14 days' pre-termination notice was regarded to be fair and consistent with the provisions of the Credit Control and Debt Collection By Laws.

[21] However the courts are warned not to impose undue burden on the human resources and admnistrative capacity in trying to enforce procedural fairness. Efficiency and capacity considerations being emphasised as an important aspect of any contextual determination of the content of procedural fairness. This passage In *Premier Mpumalanga & Another v Executive Committee, Association of State Aided Schools Eastern Transvaal*[12] was recited in Joseph to clarify the expected compliance:

> *"In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognised in our common law and that of other countries) As a young democracy facing immense challenges of transformation we cannot deny the importance of the need to ensure the ability of the executive to act efficiently and promptly"*

[22] This is a clear warning not to subject the City to cumbersome procedural requirements but at the same time not to allow the public right of users of municipal services to be compromised without notice and or a fair process. The fact that the Applicants would be substantially and adversely affected justify the invocation for notice directed also at them. However as pointed out, a reasonable and a fairly

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[11] At para 61

[12] [1988] ZACC 20; 1999 (2) BCLR 151 CC at par 41

achievable process should be applied. Logic would therefore dictate that notice need not be addressed to each individual occupier of the 162 Units but can be addressed to the owner and broadly to “the Occupier/s” of the property, served on them as a group by a display of the notice at a prominent place accessed by or accessible to all.[13]

[23] The Applicants in their Founding Affidavit state that the Respondent disconnected the electricity without any prior notice or resolving the formal disputes, therefore without following the correct procedure, took the law into its own hands. According to the Applicants they only received the notice of termination attaching the applicable invoice on the date that the termination took place on 21 January 2022. They therefore were not given an opportunity to engage the Respondent or challenge the termination. The notice was affixed at the main gate of the property. They further allege that the payments on their electricity bill were up to date. Each unit consists of an I-S Metering remote electricity meters which run on a pay as you go basis. So each unit’s use gets prepaid where after it gets paid to the Respondent. The Respondent nevertheless bills Linden Lane as one dwelling instead of each of the 162 different units.

[24] In response the Respondent disputes that a termination notice was only served on 21 January 2022, the date of the disconnection, but allege that a pre -termination notice in the name of the property owner was served on 23 December 2021 at 14:23 by affixing at the main gate of the main property where all the residents access the property. The Applicants as of 14 December 2021 owed an amount of R2 297 270.00 (Two Million Two Hundrend and Ninety-Seven Thousand, Two Hundrend and Seventy Rands). In terms of the notice the amount was to be paid in 14 (fourteen) days from the date of service of the notice, failing which the services were to be terminated without any further notification. The disconnection followed non-compliance with the notice.

[25] The Respondent accordingly argued that there was proper notification prior the termination of services. Further that it could not have issued the notice to every

[13] The parties in Joseph found that to be adequate notice and less onerous, see on para 60 line.

individual unit or in the names of each of the tenants of the 162 Units. It had followed what is dictated by the applicable debt collection policy where an account is in arrears. The Act requires that the local authority collect charges for such services[14]. It also referred to s 97 (1) (g) of the Act that decrees that provision be made for termination of municipality services or restrictions of the services when payments of ratepayers are in arrears. It argued that on that basis the Applicants were not entitled to the interim order that was granted, which should be discharged.

[26] In reply, the Applicants criticised the manner of notice or service of the pre termination notice which eventually did not come to their attention. They point out that the gate to which the pre- termination notice is affixed that is depicted in the exhibit photo attached to the Respondent's Answering Affidavit is the visitors gate. The pre-termination notice was therefore not affixed at a prominent place which is the main gate as it was with the termination notice, to ensure that it comes to the attention of the owner and all the tenants. The visitors' gate is used by neither the tenants or the owners. They accused the Respondent of being mala fide in placing the pre-termination notice there and of never having intended to inform the tenants of the looming termination.

[27] In its heads of argument the Respondent acknowledged the procedural fairness requirement enunciated in Joseph in respect of the pre-termination notice, and allege to have followed due process as the pre termination notice was in the same way as the termination notice, issued in the name of the Owner and allegedly displayed at a conspicuous place, an entrance to the premises. It argued that it is ridiculous of the Applicants to have expected that the notice should have been in the name of and served on each individual occupants in the premises.

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[14] s 102 (1) (c) of the Act reads:

> (1) A Municipality may–
>
> (a) . . .
>
> (b) . . .
>
> (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'.

Analysis

[28] It is therefore a fact that the Respondent as per procedural fairness requirement served a pre- termination notice albeit it was addressed only to the owner and placed not at the main gate or entrance used by the tenants but at the visitor's gate, which is evidently not the conspicuous or prominent place for tenants. The Applicants allege not to have seen the pre-termination notice, a fact that could not be rebutted by the Respondent as the likelihood of the notice coming to the attention of the tenants and or the owner at the visitor's gate was minimal. On a balance of probabilities neither the tenants nor the owner might have seen the notice. Contrariwise, the termination notice placed at the main gate on the date of the disconnection did come to the Applicants' attention which prompted their urgent application to obtain the interdict. The Respondent was aware of the main gate where the termination notice was eventually put. The affixing of the pre-termination notice at a different entrance which clearly in the picture is shown to be for visitors was indeed suspect. The failure to place the pre-termination notice at the conspicuous or prominent place that is addressed also to the tenants or occupiers was contrary to the procedural fairness requirement therefore falling short of a fair admnistrative procedure.

Unresolved Disputes

[29] Furthermore, it is apparent that at the time there were disputes in respect of the utility charges or invoices issued by the Respondent under reference numbers 8004777600, 8004925566 and 80049884599 that were pending resolution. The onus in regard thereto accordingly rested and remained with the Respondent, who did not respond to the fact that it has failed to attend to these disputes. It being clear that the resolution of the disputes was not the Respondent's a priority, it proceeded to serve a pre termination notice that was not displayed at a prominent place therefore failing to bring the attention of the tenants or occupiers to the imminent adverse action it intended taking in the midst of the unresolved disputes. The Respondent resorted to an arm twisting exercise to enforce payment on the disputed invoices.

[30] It is important to bear in mind that although s 102 (1) (c), allows a municipality to implement any of the debt collection and credit control measures provided for in the Act. In terms of s 102 (2) however, the subsection does not apply where there is a dispute between the parties concerning any specific amount claimed by the municipality. The Applicants had no other remedy to satisfactorily safeguard their public law right, which was clearly being violated, therefore the balance of convenience favoured the granting of the interdict. They justifiably harboured reasonable harm of the Respondent persisting with the disconnection whilst not attending to the disputes and continuing to incorrectly bill Linden lane.

[31] It was therefore not unreasonable for the Applicants to have approached the court on Respondent's failure to follow due process, disconnecting the electricity without having afforded the Applicants the 14 days' notice period to challenge the invoice issued or charges levied and the intended disconnection, whilst also the other disputes are still pending. Correspondingly it was not unreasonable for the court, when considering the matter, without any evidence to the contrary, to have had regard to the failure by the Respondent to adhere to the procedural fairness requirements, to attend to the pending disputes and the persisted incorrect billing when it ultimately granted the interdict, as a reasonable apprehension of irreparable harm existed. The requirements for an interdict thus fulfilled.

[32] The interdict can only be discharged if it is proven that there was no good cause for the court to have granted it or be confirmed if the Applicant had proven that a good cause exists for its granting. The Applicants are materially and adversely affected by the discontinuance of municipal services, whilst the disputes lodged remain unresolved. It is also apparent that the complains raised therein have merit as the latest invoice of 14 December 2021 that led to the termination reflects indeed as pointed out by the Applicants, an obvious erroneous charge of an exorbitant amount of R596 484,30 for refuse removal for that month even though the Respondent does not render such services to Linden Lane. The Respondent continued with the incorrect billing, showing no intention or commitment towards resolving the disputes. The interdict pending the final resolution of the disputes was therefore justified, to prevent any prejudice that may be suffered by the Applicants without services, whilst compelling the Respondent to prioritise the resolution of the pending disputes.

[33] In relation to the Respondent's absence on the date of the hearing, the Respondent argued that due to the Applicants' oversight they could not oppose the matter, and for that reason, the interim order was not supposed to have been granted. it is apparent that a Notice was sent to the Respondent with a date 28 December 2022 as the date of hearing of the urgent matter. An email was subsequently sent on 27 and 28 January 2022 at 7:37 alerting the Respondent to the error made on the date of hearing and to the fact that the matter was actually being heard before Mbongwe J later on that date. The matter proceeded, unopposed and an interim order granted, with a further order added to join Invent, the owner of Linden Lane.

[34] Since the Respondent did get notice albeit very short, attendance at court was mandatory. The Respondent could have then raised the fact of the short or delayed notification and the resultant difficulty it had in complying, for the court to consider the appropriate order at the time. But Instead the Application proceeded unchallenged.

[35] On the Applicants' version, taken together with the facts admitted by the Respondent, the Applicant had made out a case for the confirmation of the interdictory relief as requested. They had proved that that they had a clear right for the relief sought or that there was an act of interference from the Respondent.

Contempt of court

[36] The issue of contempt for failure to comply with the two court orders is also to be determined. Following the order of 28 January 2022, the Applicants approached the court again on 8 February 2022 on an urgent Application, although the return date was on 23 March 2022, alleging that notwithstanding the Respondent being served with the court order on 28 January 2022, directing it to restore the electricity in 24 hours, the Respondent failed to do so. The Applicants consequently sought an order for contempt of court which was postponed to be heard on the return date and an order

directing the Respondent to restore the electricity in 2 hours, failing which CPS Electrical was authorised to attend to the reconnection.

[37] The Applicants indicated that on Respondent's failure to comply with the 28 January order, their attorney, Mr Van der Walt contacted the Respondent' office on 31 January 2022 and was referred to Mr Hugo Baloyi, the Respondent's attorney. Mr Van der Walt contacted and requested Mr Baloyi to inform the Respondent to immediately rectify their conduct and comply with the order. On 1 February 2022 Mr Baloyi sent a screen shot of the conversation held internally at the Respondent, confirming that the electricity was to be immediately restored. On the same date Van der Walt sent a photo of the breaker accusing the Respondent's workers of not only failing to comply with the order but also of wilfully breaking the connection. The Applicants then enrolled the matter for hearing again on 3 February which was removed and re enrolled on 8 February 2022. The Respondent's attorney agreed to a Draft order to be made an order of court, ordering the Respondent to restore electricity in 2 hours failing which CPS Electrical was to reconnect the electricity, and to the postponement of the relief on the contempt of court order of 28 January with costs reserved,

[38] The Respondent contends that the services were restored soon after the 28 January 2022 court order was served on it. According to it on 2 February 2022 the Applicants' Attorney Robert Van der Walt confirmed with Mr Hugo Baloyi, the Respondent's Attorney that the services were restored. The conversation was followed by an e-mail confirming that the Respondent had agreed that the electricity be restored. The Respondent denies that there was a further termination of services or a meter removed and a disconnection card issued. According to it the account was flagged until 31 July 2022 when no activities were to or could have taken place. Proof of such annexed to the affidavit.

[39] With regard to the reconnection of electricity, both parties referred to a conversation between their respective legal representatives post the date of service of the 28 January 2022 order. They further relate the same facts with regard to the communication sent by Mr Baloyi to Mr Van der Walt, post their 2 February 2022 conversation. It was not an assertion that the electricity was reconnected, which would have been expected if indeed it was so, but a confirmation that the Respondent had

agreed to the reconnection. The internal communication indicated that the Respondent's employees have been instructed to reconnect the electricity, hence to abide with the court order, showing a wiliness to abide by the court order.

[40] On 3 February 2022, the Applicants were again in the urgent court with another Application properly served on the Respondent to compel a reconnection and seeking an order for contempt. The Application was then removed and re enrolled on 8 February 2022. The Respondent acquiesced to the prayer sought by the Applicants for it to be directed to restore the electricity in 2 hours and to a remedy mooted by the Applicants in the event the Respondent persists on its failure to comply with the reconnection order, that a private company CPS attend to the reconnection. The 2nd order was then by agreement between the parties made an order of court. These facts are not disputable. This was an odd manner of responding to the Application, if indeed by then the Respondent had complied as it alleges. It would have been expected not to agree to the relief sought by the Applicant but rather oppose the Application on the basis of its compliance or attended court to set the record straight about its compliance. The Respondent's acquiescing to the order implied an acknowledgement of its failure to comply. The Respondent's assertions that a reconnection was done on service of the 28 January order or by the time the 2nd order was obtained is therefore far-fetched.

[41] The Respondent was therefore aware of the order being granted and its immediate effect soon thereafter as it was also served on it. Conversely the Respondent seems to have done nothing until a 2 - hour period sanctioned by the court had expired, even though this was a second order and notwithstanding being obtained by agreement between the parties. The electricity was ultimately restored by CPS as per agreed order. So notwithstanding being given a chance to remedy its non-compliance, the Respondent still failed to abide by the court order.

[42] The existence of the Draft Orders being common cause, the Applicant had proven the Respondent's awareness and non- compliance or failure to comply with both orders. However, for Respondent's non- compliance to be found to have been contemptuous, it must be proven to have been deliberate and *mala fide.* In this

instance the Respondent does not carry an evidential burden to prove otherwise but to create reasonable doubt.[15] In *Fakie*[16] dealing with the onus, it was stated that:

> *"By developing the common law in conformity with the Constitution, the reverse onus the accused bore in prosecutions such as Beyers must now be reduced to an evidential burden (as Mbenenge AJ rightly envisaged in the second Uncedo decision). Once the prosecution has established (i) the existence of the order, (ii) its service on the accused, and (iii) non-compliance, if the accused fails to furnish evidence raising a reasonable doubt whether non-compliance was wilful and mala fide,* the offence will be established beyond *reasonable doubt: the accused is entitled to remain silent, but does not exercise the choice without consequence.*[34]
>
> *"It should be noted that developing the common law thus does not require the prosecution to lead evidence as to the accused's state of mind or motive: once the three requisites mentioned have been proved, in the absence of evidence raising a reasonable doubt as to whether the accused acted wilfully and mala fide, all the requisites of the offence will have been established. What is changed is that the accused no longer bears a legal burden to disprove wilfulness and mala fides on balance of probabilities, but to avoid conviction need only lead evidence that establishes a reasonable doubt."*[17]

[43] Furthermore Fakie summed up the civil procedure contempt as follows:

> 1. *The respondent in such proceedings is not an 'accused person', but is entitled to analogous protections as are appropriate to motion proceedings.*
>
> 2. *In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt.*

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[15] *Jayiya v Member of the Executive Council for Welfare, Eastern Cape* **2004 (2) SA 602** (SCA) paras 18 and 19.

[16] *Fakie v CCII Systems (Pty) Ltd* [2006] SCA 54 (RSA)

[17] At par 22 and 23

3. *But once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.*

4. *A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.*

[44] Although the order of 28 January 2022 was not complied with, there is communication that indicates that the Respondent had issued instructions to its employees for the electricity to be reconnected. Also giving assurance to the Respondent's attorney and confirming the fulfilment of the mandate. There is evidence of the Respondent's officials issuing the necessary instructions to ensure that there is compliance albeit not completed or followed up. All that indicate that the non-compliance was not deliberate or *mala fide*. The Respondent had for all intents and purposes authorised and instructed compliance with the order. It may be criticised for failure to follow up after being informed that there was still non- compliance but they cannot be accused to have been wilful and mala fide. As a result, although there was non–compliance with the 28 January 2022 court order, for all intents and purposes the Respondent's explanation indicate lack of wiliness and *mala fides*.

[45] In relation to the order that was sought for a third party to reconnect the electricity on failure by the Respondent to do so. The Respondent argued that any tempering with the meter was supposed to be reported as no third party is allowed to interfere with the connections and only the Respondent can attend to the reconnection. The latter argument does not hold and not genuine as the Respondent did not dispute the Applicants' allegation that Van der Walt sent a photo of the breaker accusing the Respondent's workers to have wilfully broken the meter other than failing to comply with the order. The Respondent was therefore made aware that the meter was broken. It nevertheless failed to fix the meter and to restore the services even after having acquiesced to the prayer sought by the Applicants to comply within 2 hours. The

questioning of CPS reconnecting the electricity is mala fide. Furthermore, the Respondent has failed to indicate when were they on site to restore the services or to indicate who was given instruction to reconnect the electricity subsequent to the 2nd order or refer to a job card confirming the restoration services. In the absence of evidence that creates or raises reasonable doubt that the Respondent's non-compliance was deliberate and mala fide, contempt is established, The Respondent was therefore wilful and mala fide in not complying with the 2nd order.

Under the circumstances the following order is made:

1. The interdictory order granted on 28 January 2022 is confirmed and made final.

2. That the Respondent is restrained from disconnecting utilities pending the finalisation of the unresolved disputes under references number 8004777600, 8004925566 and 80049884599 raised in terms of the process prescribed in Act 32 of 2000.

3. The Respondent is held in contempt of court in that it deliberately and wilfully failed to comply with the order of Makhoba J of 8 February 2022, ordering it to restore the electricity within 2 hours of the order being granted.

4. The Respondent is to pay the costs that is on the Rule 67 B scale

5. The issue of a sanction to be imposed on the Respondent which was not argued by the parties is adjourned sine die.

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N V KHUMALO J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

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