



**IN THE HIGH COURT OF SOUTH AFRICA  
[EASTERN CAPE CIRCUIT DIVISION, EAST LONDON]**

**CASE NO.: EL 869/2023**

In the matter between: -

**BULELWA NTANTISO**

**APPLICANT**

and

**BUFFALO CITY METROPOLITAN MUNICIPALITY**

**1<sup>ST</sup> RESPONDENT**

**THE MUNICIPAL MANAGER, BUFFALO CITY  
METROPOLITAN MUNICIPALITY**

**2<sup>ND</sup> RESPONDENT**

and

**CASE NO. EL 895/2023**

**MASIBULELE MAQHASHU**

**APPLICANT**

and

**BUFFALO CITY METROPOLITAN MUNICIPALITY**

**1<sup>ST</sup> RESPONDENT**

**THE MUNICIPAL MANAGER, BUFFALO CITY  
METROPOLITAN MUNICIPALITY**

**2<sup>ND</sup> RESPONDENT**

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**JUDGMENT**

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**NORMAN J:**

- [1] There are two applications to be decided herein. The parties agreed that because the facts are similar, the relief sought is the same and the points of law raised are the same, only one judgment should be delivered in respect of both matters. The first matter relates to Ms Bulelwa Ntantiso and the second matter involves Mr Masibulele Maqhashu.
- [2] The first respondent is the Buffalo City Metropolitan Municipality (the municipality). It is common cause that the municipality is established in terms of the Constitution, the Local Government Municipal Structures Act 117 of 1998 ('the Structures Act'), the Local Government Municipal Systems Act 32 of 2000 ('the Systems Act'). It has promulgated the Buffalo City Electricity Supply Bylaws (the bylaws) published in the provincial government gazette No. 2245 of 10 December 2009.
- [3] The second respondent is the city manager whose powers and functions are set out in both the Structures and Systems Acts. He is the accounting officer of the municipality and is the functionary who has the power to direct compliance with any of the orders that the court may grant.
- [4] The applicants brought these applications on an urgent basis, each seeking a rule *nisi* returnable on 4 July 2023 at 09h30 for an order in the following terms:
- “3.1. *That the debt collection procedure of the respondents applied towards the applicant's right to purchase electricity to the premises since 3 March 2023 to date be and is hereby declared unlawful.*
- 3.2 *That the respondents are directed to note that the applicant is a tenant to the property.*
- 3.3 *That the respondents are directed to give recognition to the constitutional rights of the applicant as tenant; and*
- 3.4 *Flag this account/meter as one in respect of which the applicant is not responsible for the payment of any areas;*

- 3.5 *That the respondents be and are hereby directed to refund and/or credit the applicant all deductions made from the 3<sup>rd</sup> of March 2023 to date of finalization of the application;*
- 3.6 *That the respondents be and is hereby interdicted and restrained from applying their debt collection against the applicant in respect of any amounts as the applicant has no contractual responsibility towards the first respondent;*
- 3.7 *That the respondents are directed to pay the costs of this application.”*

[5] Both applications are opposed by the respondents. I shall state the relevant facts in each case and thereafter deal with the cases as one.

*Relevant facts in the Ntantiso matter*

[6] Ms Bulelwa Ntantiso alleged:

6.1. That she is a tenant. She occupies property number 6203, NU3 Mdantsane, East London. She has no contractual relationship with the respondents because although she occupies the property, the utility account is still registered in the name of the deceased. The owner of the property was Ms Agnes Nontsumentse Ntantiso who passed away on 17 November 2016 (the deceased). For reasons unknown to her, the deceased's estate has not been finalized and it is for that reason that the applicant has instructed her attorneys to finalize the estate. Her income is extremely limited and she depends on family and friends.

6.2 She sought condonation for her failure to comply with the rules of court in relation to the service and time frames including 72 hours' notice referred to in section 35 of the General Law Amendment Act, 62 of 1995. She alleged that the system of partial blocking, restricting services is controlled by the debt management department of the second respondent.

6.3. She had a verbal agreement with her family that she would occupy and rent the property from the estate until such time as the estate was wound up. She contends that it is the estate of the deceased that is responsible for payment of the amounts that are being owed to the respondents. She is responsible for payments of her monthly rental to the estate, the upkeep of the premises in terms of the verbal lease agreement and for buying and loading electricity on the pre-paid meter.

*The issue*

6.4. Since 3 March 2023, whenever she purchased prepaid electricity from the respondents' agency, she received restricted units on each occasion with the balance being allocated to what was termed as 'debt amount'. In this regard, she attached slips evincing these deductions. She was advised that the respondents apply a debt collection procedure where 80% of the money spent on prepaid electricity is deducted and 20% thereof becomes the value of the electricity that is provided to the consumer.

6.5. She submitted that the credit control policy has not been approved by the council and therefore the actions of the municipality, of enforcing it are unlawful. She contends that the municipality does have a credit control bylaw which was approved by council and promulgated, which makes no mention of debt collection procedures. She stated that in terms of the bylaw the municipality simply blocks the consumer's electricity and flow of water. She contends that the deduction and the implementation of the debt process is unlawful and she is being seriously prejudiced thereby.

6.6. She contends that before such a deduction is made she is entitled to a notice as a consumer informing her of the intended debt collection procedure and the intention to limit the value of the purchased electricity. She views the restriction on the supply as a constructive discontinuance of the supply of electricity to the property. She contends that because the mechanism of debt collection is a debt collection procedure, the respondents are bound to issue a notice in terms of section 102(2) of the System Act. No such notice had been issued to her. She is not responsible for the payment of arrear charges and there is no basis upon which there should be deductions from the prepaid electricity for any arrear amounts which are not owed by her.

6.7. She conceded that the first respondent is entitled to discontinue services to households in terms of section 21 of the bylaws without notice in the instances mentioned therein. I do not deem it necessary to list those, as the applicant has done because they are not relevant to the issues at hand. She further relied on the Credit Control Bylaw, with specific reference to clause 8(6)(a)(i), thereof, where the municipality is empowered to disconnect electricity supply to a property of the account holder if that account is not paid by the due date as indicated on the account and in terms of the fourteen-day pre-termination notice referred to in section 8(4) thereof.

6.8 She submitted that there are no exceptional circumstances which warrant the deduction of monies from her by the municipality without notice. She needed the full supply of electricity that she purchased because her gates,

alarms, refrigerator which is stocked with food, are all operated by electricity.

[7] On the issue of urgency she contends that should she not get an interdict against the respondents or get the portion of the refund, she would be without electricity and her family would be deprived of all benefits that go with having electricity to the premises. Her attorneys caused a letter on 28 April 2023 to be sent to the city manager advising him of the unlawful partial blocking of service and calling upon the municipality to refund her for all the amounts unlawfully deducted from her. Her attorneys further called for an undertaking from the municipality, *inter alia*, that it must confirm in writing that partial restriction on the electricity purchase will be lifted or suspended; that the respondents will not restrict or limit the electricity supply in future; that the respondents will not charge any fees and the respondents would tender the wasted costs incurred for appointing the attorneys.

[8] She attached a receipt from “ Chippys” which reflects :

“Credit token  
7Kwh@ 2,5099 R/ Kwh:  
Amount : R17.39  
Tax : R2.61  
Total : R20.00  
Partial Block  
Amount Incl : R80 .00  
Grand Total : R 100.00  
Total Units. : 7.00 kwh  
....”

[9] She submitted that the balance of convenience favours her because the actions of the municipality are unlawful. The system that the municipality uses does allow for flagging of accounts and indicate that she is a tenant and not an account holder, in which event, no partial blocking or restriction would be applied.

[10] She would suffer irreparable harm if she gives the municipality 72 hours' notice. She has a clear right in terms of the bylaws to be afforded fourteen days written notification before the municipality unlawfully implements debt collection procedures, alternatively, she has a right in terms of a fair procedure. Her right to occupy and utilize premises has been prejudicially limited. She contends that she has no other adequate remedy.

*Relevant facts in the Maqhashu matter*

[11] Mr Maqhashu alleged that:

11.1. He resides at house number: 27057, NU7 Mdantsane, East London. He has no contractual relationship with the respondents. The owner of the property where he resides was one Ms Nopilisi Maqhashu who passed away on 20 October 2020. He has limited income and he relies on the assistance of family and friends. In terms of a verbal agreement with his family, it was agreed that he would occupy and rent the premises from the estate until such time as the estate has been properly wound up. His attorneys of record have been instructed to attend to the finalization of the estate.

- 11.2 The estate of the deceased is responsible for the amounts being owed to the respondents. His attorneys will also attempt to obtain clarity regarding any amounts that are purportedly being owed to the respondents. He is responsible for monthly rentals to the estate, upkeep of the premises in terms of the verbal lease agreement and for buying electricity from the respondents or its agents.
- 11.3. His complaint is exactly the same as that of Ms Ntantiso, that since 3 March 2023 he attempted to purchase electricity from the agents of the respondents only to be subjected to the 80/20 policy where 80% was deducted towards a debt amount. He only received 20% of the value of electricity.
- 11.4. The facts and legal contentions raised by Mr Maqhashu are exactly the same as those raised by Ms Ntantiso. He alleged that he has no alternative remedy but to come to this court. He complained that he was not given the notice for the 80/20 policy or written notice that the deduction would be implemented from the purchase of electricity. He is of the view that respondents should use the flagging system and in that way there would be no partial blocking or restriction to the electricity purchases. He attached a printout reflecting the following:

*“Successful*

*You’ve bought R70.00 electricity (24.3 kwh) for Masbu Maqhashu. R280.00 outstanding debt was deducted.*

*Purchase Token: number omitted.”*

*Done”*

- 11.5 It is not apparent from the founding affidavit who actually purchased the electricity and whether it was purchased from the respondent or an



agent such as the bank. This applicant sought relief as contained in the notice of motion.

*Respondent's case*

[12] As aforementioned both the first and second respondents opposed the applications. Similarly, the response to these identical applications is the same and I shall deal therewith in respect of both. The municipal manager, Mr Mxolisi Yawa deposed to the answering affidavits.

12.1. He stated that the municipality does not have a contractual relationship with the applicants. He is not aware of the oral leases between the applicants and the property owners. He contends that the matters are not urgent and the applicants failed to make out a case for the interim relief sought.

12.2 He submitted that the applicants have failed to prove that they will not be afforded substantial redress in due course. On 1 March 2023 the municipality formerly implemented the 80/20 policy. Prior to implementation, a notice was circulated to all consumers. The applicants knew that there was a partial block in respect of their electricity supply on 3 March 2023. He contends that the debt collection procedure is rational because the applicants are allowed to use a portion of their money to purchase electricity even though the owners have not satisfied the debt owed to the municipality. The applicants are entitled to recover their money from the deceased estates.

12.3 He further contends that the applicants do not dispute that the accounts of the owners are in arrears. They do not contend that the

owners have a defence to the monies owed to the municipality. Because there is money owed to the municipality, the municipality has a right to recover it. The municipality disputed that by recovering the debt it was acting unlawfully.

12.4 The partial block is provided for in clause 8(6)(b)(vi) of the Credit Control Policy. He contends that the municipality's chief financial officer approved the partial blocking and the implementation of the 80/20 policy with the previous municipal manager. The municipality's council approved and adopted the credit control policy in accordance with the Constitution and the Systems Act. He stated that the council approved the policy on 31 May 2022. In this regard he attached copies of the council minute evincing such resolutions. The Credit Control Policy was created in accordance with sections 96 and 97 of the Systems Act read with sections 152 and 156 of the Constitution.

[13] Mr Yawa stated that the municipality is enjoined to collect all monies due to it from its consumers in terms of section 96 of the Systems Act. In this regard, he submitted that the actions of the municipality are lawful.

[14] He stated that the municipality informed its customers about the 80/20 policy in the following manner: By sending a public notice to consumers together with the monthly statement in September 2022. It published the notice on its website. It placed an article in the Daily Dispatch informing its consumers about the 80/20 policy. The local newspapers published the implementation of the policy. It also by placed notices at or near public places. He attached the notice which reads:

"22 February 2023

Dear Valued Customer

RE: PUBLIC NOTICE TO ALL BCMM CUSTOMERS

The above subject refers.

The Buffalo City Metropolitan Municipality adopted a Credit Control Policy in terms of section 96 (b) of the Local Government : Municipal Systems Act, No. 32 of 2000. In terms of the policy the Municipality is permitted to implement a partial restriction of the purchase of electricity where 80 % of the amount tendered will be allocated to the arrear account of the customer. This does not apply if the account is paid in full on or before the due date as stipulated on the monthly municipal statement, and also does not apply to registered indigent customers.

The Municipality hereby wishes to inform all its customers that as from the 1<sup>st</sup> March 2023 the partial restriction on the purchase of electricity will be implemented to all the accounts that are in arrears over 30 days.

Below is the extract of the Credit Control Policy:

(a) The municipality will allow a partial block purchase of electricity of 80/20 based on economic conditions prevailing at the time for the following reasons ( a& b, below) . The approval for the implementation of the partial block can be done by the Chief Financial Officer ( CFO ) in consultation with the Accounting Officer:-

- (i) When a Customer moved into a property and failed to apply for services from the Municipality and failed to pay the required security deposit.
- (ii) When the disconnection of electricity , blocked from the purchase of electricity and the restriction of water flow to the property did not have the desired effect to persuade the Customer to pay the arrear debt.

To avoid any restriction on the purchase of electricity, customers who are in arrears are urged to settle the outstanding amount.

Yours faithfully

M. YAWA

CITY MANAGER"

[15] Just above the date there are telephone numbers and persons who may be contacted. Those details are furnished in English, IsiXhosa and Afrikaans. The notice was published in the English language only.

[16] He stated that the municipality did not disconnect the applicants electricity supply instead it implemented a partial block. This partial block enables a consumer to purchase electricity from the municipality or its agents. The municipality contends that a notice required in section 21 of the electricity bylaw is not required since there is no disconnection of electricity supply.

- [17] He stated that there is no dispute between the municipality and its customers and any reliance on the provisions of section 102(2) of the Systems Act is misplaced. The municipality further stated that it has a constitutional obligation to collect monies due to it from its customers. Granting of an interim interdict would interfere with that constitutional mandate and the separation of powers harm principle.
- [18] He submitted that the applicants do have an alternative remedy which is an action for unjustified enrichment against the owners of the properties. He stated that the applicants failed to explain why they have not pursued that remedy which remains available to them. The municipality prayed for the dismissal of the applications with costs as the applicants have failed to make a case for the relief sought.
- [19] In reply, the applicants contend that the admission by the municipality that it does not have a contract with them, makes the deduction from their purchase unlawful. They relied in this regard on an order which was made by Hartle J to the effect that the rights of a tenant must be recognized. They further contend that the bylaw has not been repealed. The Credit Control policy, they contend, has not been properly adopted by council and has not been published in the government gazette. On this basis, they submitted that the respondents have not complied with the provisions of the Systems Act because a proper notice has not been afforded to occupiers and the account holders. Their rights as tenants should be recognized and their accounts should be flagged as such.

*Applicant's legal submissions*

[20] Mr Du Plessis appeared for the applicants and Mr Mafu appeared for the respondents. The applicants in their heads of argument simply repeated the facts stated in the founding affidavit and the conclusion of law made therein. Of importance is the summary that the applicants made towards the end of the heads of argument where they stated that: the applicants are tenants to the properties, the applicants have no legal relationship with the respondents, the applicants are not indebted to the respondents, the credit control policy is unenforceable and not applicable as it has not been adopted nor promulgated or published. The respondents failed to provide notice of the debt collection procedure and a notice in terms of section 21 of the Electricity Supply Bylaw. He further submitted that the municipality is not an organ of state and therefore the provisions of section 35 of the General Law Amendment Act 62 of 1955 do not apply herein. He submitted that if this court finds that those provisions apply there are exceptional circumstances warranting non-compliance with section 35 of Act 62 of 1955.

[21] In view of those submissions, Mr Du Plessis submitted that a final order should be granted as prayed for in the notice of motion. There were no legal authorities relied upon by the applicants for the relief sought.

#### *Respondents legal submissions*

[22] Mr Mafu, relied on ***Mkhontwana v Nelson Mandela Metropolitan Municipality***<sup>1</sup> for the submission that:

*“There can be no doubt that municipalities bear an important constitutional obligation and a statutory responsibility to take appropriate steps to ensure the efficient recovery of debt”.*

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<sup>1</sup> (CCT57/03) [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) at para 124.

- [23] Mr Mafu submitted that the issue central to these proceedings are the applicants' rights to receive basic municipal services such as electricity versus the municipality's obligation to fulfill its statutory obligations such as providing basic services to all of its customers and inhabitants. He submitted that granting of an interdict will temporarily restrain the first respondent from fulfilling its constitutional and statutory responsibility to collect rates and taxes from its customers through the 80/20 policy.
- [24] He submitted that on 31 May 2022 the council took a resolution and adopted a revised credit policy and that council resolution is binding until it is set aside by a court of law. In this regard he relied on ***Manana v King Sabata Dalindyebo Municipality***<sup>2</sup>.
- [25] He submitted that a council acts through its resolutions. Once a resolution is adopted its officials are bound to execute it, irrespective of their views. He submitted that the decision of the municipality to implement the 80/20 policy has not been taken on review and for that reason it remains binding. He submitted that the decision to restrict the applicant's electricity supply was in accordance with the 80/20 policy and sections 96 and 97 of the Systems Act.
- [26] Relying on *Mkontwana, supra*, he submitted that municipalities are obliged to provide water and electricity to the residents in their areas as a matter of public duty<sup>3</sup>.
- [27] He submitted that the applicants have failed to make out a case for the relief sought. He asked for the dismissal of both applications with costs.

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<sup>2</sup> [2011] 3 BLLR 215 (SCA); 2011 32 ILJ 581 (SCA); 2011 (3) ALLSA 140 SCA; [2010] ZASCA 144; 345/09 at para 22.

<sup>3</sup> See *Mkontwana* at para 38.

*Discussion*

*Urgency*

[28] Rule 6(12) of the Uniform Rules of Court requires an applicant who moves court on an urgent basis to state facts which render the matter so urgent that he or she will not be able to obtain redress in due course. That means that the applicant must explain all the steps he or she took from the time he or she apprehended harm or the alleged infringement of right until he brought the matter to court. The slip evincing the purchases is dated 17 March 2023, in the case of Mr Maqhashu and in Ms Ntantiso's case the purchase was on 15 March 2023. In both cases the applications were brought on 11 May 2023. A period of at least 40 court days had lapsed between the date of purchase of electricity and the date they brought the applications. There is no explanation for that period at all.

[29] In the founding affidavits both applicants contended that they will bring the applications on 6 June 2023 at 9h30 where they will seek a *rule nisi* returnable on 4 July 2023. The period between 11 May 2023 when the applications were delivered and 6 June 2023 is (17) seventeen court days. In terms of Rule 6 the respondents are entitled to (5) five days after service of the application to file their notice to oppose. After filing the notice to oppose the rule affords respondents (15) fifteen days for delivery of their answering affidavits.

[30] In respect of both matters, the respondents were served with the applications on 11 May 2023 . They were directed to deliver their notice to oppose by 09h30 on 1 June 2023. They were also directed to deliver their answering affidavits on the same day, 1 June 2023. The applicants afforded themselves four (4) days within which to reply, by no later than 05 June 2023.

[31] There are no reasons advanced why the days that the respondents were entitled to ,as provided in rule 6<sup>4</sup> were not afforded to them instead a bald statement was made by the applicants that they would suffer irreparable harm if they afforded them even 72 hours. They also demand refunds on an urgent basis. In the case of Ms Ntantiso , the refund is R80.00 . In the case of Mr Maqhashu it is R280, according to the annexures they attached. Both these applicants have not alleged that they are indigent. There are no reasons given to show why these small amounts must be demanded on an urgent basis from the High Court.

[32] The matter was set down for hearing on 15 June 2023 on the opposed roll. There are no facts whatsoever, advanced by both applicants, why the relief they sought could not be moved on the normal schedule provided in Rule 6 of the Uniform Rules of Court in respect of applications.

*Is there a case made out for interdicting implementation of the credit control policy?*

[33] The Constitution of the Republic of South Africa provides:

*“Objects of local government*

*152. (1) The objects of local government are—*

*(b) to ensure the provision of services to communities in a sustainable manner.”*

*“Developmental duties of municipalities*

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<sup>4</sup> Rule 6 (5)(b)(iii) and (d)(ii) of the Uniform Rules of Court



153. A municipality must—

- (a) *structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community.*

*“Basic values and principles governing public administration*

195. (1) *Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:*

- (a) *A high standard of professional ethics must be promoted and maintained.*
- (b) *Efficient, economic and effective use of resources must be promoted.*
- (c) *Public administration must be development-oriented.*
- (d) *Services must be provided impartially, fairly, equitably and without bias.*
- (e) *People’s needs must be responded to, and the public must be encouraged to participate in policy-making.*
- (f) *Public administration must be accountable.*
- (g) *Transparency must be fostered by providing the public with timely, accessible and accurate information.*
- (h) *Good human-resource management and career-development practices, to maximise human potential, must be cultivated.*
- (i) *Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.”*

[34] Section 239 of the Constitution defines “organ of state’ as:

- (a) *any department of state or administration in the national, provincial or local sphere of government; or*
- (b) *any other functionary or institution-*
  - (i) *exercising a power or performing a function in terms of the Constitution or a provincial constitution; or*
  - (ii) *exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer,”*

[35] In Chapter 2 of the Systems Act a municipality is defined as:

## *“CHAPTER 2*

### *LEGAL NATURE AND RIGHTS AND DUTIES OF MUNICIPALITIES*

#### **2. Legal nature**

*A municipality—*

- (a) *is an organ of state within the local sphere of government exercising legislative and executive authority within an area determined in terms of the Local Government: Municipal Demarcation Act, 1998;*
- (b) *consists of—*

- and
- (i) *the political structures and administration of the municipality;*
  - (ii) *the community of the municipality;*
  - (c) *functions in its area in accordance with the political, statutory and other relationships between its political structures, political office bearers and administration and its community; and*
  - (d) *has a separate legal personality which excludes liability on the part of its community for the actions of the municipality.”*

[36] Chapter 8 provides for municipal services:

*“CHAPTER 8*

*MUNICIPAL SERVICES*

**General duty**

73. (1) *A municipality must give effect to the provisions of the Constitution and—*
- (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.*
- (2) *Municipal services must-*
- (a) *be equitable and accessible:*
  - (b) *be provided in a manner that is conducive to-*
    - (i) *the prudent, economic, efficient and effective use of available resources; and*
    - (ii) *the improvement of standards of quality over time;*
  - (c) *be financially sustainable;*
  - (d) *be environmentally sustainable; and*
  - (e) *be regularly reviewed with a view to upgrading, extension and improvement.”*

[37] Section 96 of the Systems Act provides:

*‘Debt collection responsibility of municipalities*

96. *A municipality –*
- (a) *must collect all money that is due and payable to it, subject to this Act and any other applicable legislation; and*
  - (b) *for this purpose, must adopt, maintain and implement a credit control and debt collection policy which is consistent with its rates and tariff policies and complies with the provisions of this Act.”*

[38] The above-mentioned legal instruments bestow upon the municipality the power to regulate and manage its own affairs. In ***Kungwini Local Municipality v Silver Lakes Homeowner Association and Another***<sup>5</sup>, the Supreme Court of Appeal held that the adoption of rates policy and levying, recovering and increasing of property rates is a legislative rather than an administrative act. The effect being that a municipality's action in this regard can only be challenged on the principle of legality, an incidence of the rule of law<sup>6</sup>. These principles apply equally herein.

[39] This means that where a policy has been adopted and approved by the municipal council, the municipality is obliged to ensure that it is implemented. The validity of the credit control policy is not under attack in these proceedings. The issue relates to implementation of that policy. The applicants contend that the only thing that was approved by the council is the credit control bylaw and not the credit control policy. The respondents attached proof of the resolution by the municipal council approving the credit control policy. It follows that on this issue and especially on the insistence of the applicants that a final order must be given, this court must find in favour of the municipality on the Plascon Evans rule<sup>7</sup>.

[40] In ***United Democratic Movement & Another v Lebashe Investment Group (Pty) Ltd & Others***<sup>8</sup> Madondo AJ, in a unanimous decision stated the following at paragraphs 47 and 48 entitled justification for the granting of interim interdictory relief:

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<sup>5</sup> *Kungwini Local Municipality v Silver Lakes Home Owners Association* [ 2008] ZASCA 83; [2008] 4 All SA 314 (SCA); 2008 (6) SA 187 (SCA) para 18.

<sup>6</sup> *City of Johannesburg Metropolitan Municipality v Zibi and Another* (234/2020) [2021] ZASCA 97 (09 July 2021) para 19.

<sup>7</sup> *Plascon – Evans Paints Ltd v Van Riebeeck Paints Ltd* 1984 (3) SA 623 (A).

<sup>8</sup> [2022] ZACC 34.

[47] *An interdict is an order made by a court prohibiting or compelling the doing of a particular act for the purpose of protecting a legally enforceable right, which is threatened by continuing or anticipated harm. As indicated above, an interdict may be temporary or final. Temporary interdicts are referred to as interim or interlocutory interdicts or interdicts pendente lite. An interim interdict pending an action is an extraordinary remedy within the discretion of the court. For an order to be said to be interim, it must be susceptible to alteration and capable of being reconsidered at the pending trial on the same facts by the court of first instance. . . . The requisites for the right to claim an interim interdict are: (a) a prima facie right even if it is open to some doubt; (b) injury actually committed or reasonably apprehended; (c) the balance of convenience; and (d) the absence of similar protection by any other remedy.*

[48] *In granting an interdict, the court must exercise its discretion judicially upon a consideration of all the facts and circumstances. An interdict is “not a remedy for the past invasion of rights: it is concerned with the present and future”. The past invasion should be addressed by an action for damages. An interdict is appropriate only when future injury is feared.” (footnotes omitted).*

*Have the applicants established prima facie rights?*

[41] Both applicants contend that they are tenants and therefore they have a right to be notified about the implementation of the 80/20 policy and also they demand that the accounts should be flagged indicating that they are in fact tenants and therefore not liable for payment of arrears.

[42] There are two fundamental difficulties with this argument. First, other than the applicants' 'say so' there is no document that shows or proves that the owners of the properties in question are deceased. Nothing proves that the applicants are in fact tenants. They have not even stated how much rental they pay or even attach proof of rental payments. On their version, they have instructed their lawyers to deal with the respective estates in respect of the properties that they each occupy and to finalize those deceased estates.

[43] One wonders what business would tenants have in the winding up of the deceased estate, where the relationship between them and the deceased owners has not been revealed. What is also apparent in both cases is that both these applicants are related to the deceased persons. They share the

same surnames with the deceased persons although they do not indicate the type of relationship they had with them. They do associate themselves with the families of the deceased persons. They allege that the families have in each case decided that they should look after the properties. In the letter addressed to the municipality by the applicants attorneys of record, it is stated in relevant parts:

*"1. We refer to the abovementioned matter and confirm that we act on behalf of Bulelwa Ntantiso, who is the occupant of the property mentioned above. Our client has been living in the house previously being owned by her family. We are in the process of advising our client as to how to transfer the property and finalise any outstanding issues in regards to the deceased estate..."*

This paragraph is an extract from a letter written on behalf of Ms Ntantiso. Strangely, the exact same contents are contained in the first paragraph of a letter sent to the municipality on behalf of Mr Maqhashu. These paragraphs do not state that the applicants are tenants as they have alleged before this court.

[44] On this basis alone the standing of the applicants as tenants is not only questionable but it is not properly defined to enable this court to decide whether they do have a right or not to the relief that they are seeking.

[45] The second difficulty is that although they contend that they are not liable for payment of arrears because they do not own these properties, they demand that they should be notified about the implementation of the 80/20 policy. What they are asking for is that in respect of each and every household the municipality bears an obligation of establishing whether a person who purchases electricity is a tenant or an owner of the property. To expect a municipality to do so would be onerous. It would also be an impossible task

because it would require physical determination of each and every occupant's status in each and every household.

[46] Both applicants have not put up any documents that indicate that the properties in question are indeed owned by the deceased persons as they allege. Third, they do not allege that when they took up occupation of the properties based on the oral leases, they notified the municipality of the death of the owners of the properties and of their occupation. Even after they noticed the deduction in March 2023 they did not bother to visit the municipal offices so that they can be registered and recognized as tenants, as they allege. Instead, they rushed to court to seek an interdict.

[47] Clause 11 (4) and (5) of the Credit Control Policy provides:

*"1. Application for the provisions of municipal services*

(1) ...

(2) ....

(3)...

(4) *The Municipality will not entertain an application for the provision of municipal services from a tenant of a property, or any other person who is not the owner of the property.*

(5) *The only exception to point (4) above is that individuals and businesses with lease agreements who lease properties from the Municipality will be allowed to open an account in the name of the lessee of the property. Registered indigent tenants will be allowed in terms of the Deceased Estate and Absconded Owner Schemes to open accounts in their name in order to benefit from the rebates offered by the Municipality. A tenant account may be opened in the name of the Government department/s who lease properties to their tenants."*

[48] There is no evidence that these properties and their existence were reported to the Master of the High Court. In this regard the Administration of Estates Act 66 of 1965 makes clear provision for temporal custody of property in deceased estates in section 11 as follows:

*"11 Temporary custody of property in deceased estates*

(1) *Any person who at or immediately after the death of any person has the possession or custody of any property, book or document, which belonged to or was in the possession or custody of such deceased person at the time of his death-*

- (a) shall, immediately after the death, report the particulars of such property, book or document to the Master and may open any such document which is closed for the purpose of ascertaining whether it is or purports to be a will;
- (b) . . . .”

[49] The applicants have not approached the municipality to enquire about options available to them as “lessees”. There is accordingly an alternative remedy available to them, namely, to approach the municipality, for it to assess their situation and categorize them according to its processes. The attorneys’ letters are couched as a request for information as various information and documents are required. The fact that the applicants demand that they should be paid, that is an indication that what is available to them is an action for damages but not an interdict.

[50] Of concern to this court is that in both these cases the facts are the same. The allegations made are the same. The only thing that is different are the house numbers and meter numbers. This court gets an impression that the allegations in one matter are copied into another. This is not what is expected of practitioners handling litigation on behalf of their clients. There is dearth of necessary information to justify the relief sought.

[51] In **OUTA** the Constitutional Court stated:

*“It seems to me that that it is unnecessary to fashion a new test for the grant of an interim interdict. The Setlogelo test, as adapted by case law, continues to be a handy and ready guide to the bench and practitioners alike in the grant of interdicts in bust Magistrates’ Courts and High Courts. However, now the test must be applied cognisant of the normative scheme and democratic principles that underpin our Constitution. This means that when a court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution<sup>9</sup>.*

[52] In **Economic Freedom Fighters v Gordhan & Others** at paragraph 37 the Constitutional Court stated:

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<sup>9</sup> National Treasury v Opposition to Urban Tolling Reliance [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 BCLR 1148 CC (OUTA) at para 45.

<sup>[37]</sup> *This court in OUTA established that when granting an interim interdict against a State entity – and: in effect, restraining the use of public power – courts should adroitly “consider the probable impact of the restraining order on the constitutional and statutory powers and duties of the State functionary and/or organ of State against which the interim order is sought<sup>10</sup>”.*

[53] At paragraph 48 of the Economic Freedom Fighters case the Constitutional Court stated the following:

<sup>[48]</sup> *We were cautioned by this Court in OUTA that, where Legislative or Executive power will be transgressed and thwarted by an interim interdict, an interim interdict should only be granted in the clearest of cases and after careful consideration of the possible harm to the separation of powers principle. Essentially, a court must carefully scrutinise whether granting an interdict will disrupt Executive or Legislative functions, thus implicating the separation and distribution of power as envisaged by law. In that instance, an interim interdict would only be granted in exceptional cases in which a strong case for that relief has been made out.”<sup>11</sup> (footnotes omitted).*

[54] For all the reasons advanced above, the applicants have failed to establish a right to bring these proceedings. In conclusion, both applications have been ill conceived. Both applicants have failed to meet the requirements for an interdict either interim or final. On the facts before this court, both applicants failed to prove that the implementation of the policy is unlawful.

#### Costs

[55] This is a matter where there had been no basis at all established for these applications to be enrolled outside the time schedules provided for in Rule 6. This court had to deal with matter on an urgent basis without the applicants making the effort to show that the matters are indeed qualified to jump the queue and be heard urgently. Secondly the applicants failed dismally to show that by applying the 80/20 policy the municipality acted unlawfully. It is for that reason therefore that there is no basis upon which this court would depart from the normal rule that the successful party should be awarded its costs.

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<sup>10</sup> OUTA para 46; Economic Freedom Fighters v Gordhan & Others; Public Protector & Another v Gordan & Others [2020] ZACC 10.

<sup>11</sup> OUTA para 44.



[56] In the circumstances, both applicants in both matters have failed to make out a case for the relief sought and the applications must accordingly fail.

[57] I accordingly make the following order:

1. In the matter of BULELWA NTANTISO v BUFFALO CITY METROPOLITAN MUNICIPALITY & ANOTHER: CASE NO. 869/2023 the application is dismissed with costs.
2. In the case of MASIBULELE MAQHASHU v BUFFALO CITY METROPOLITAN MUNICIPALITY & ANOTHER: CASE NO.895/2023 the application is dismissed with costs.

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T.V NORMAN  
JUDGE OF THE HIGH COURT

**Matter heard on** : 14 June 2023  
**Judgment delivered on** : 1 August 2023

#### **APPEARANCES**

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