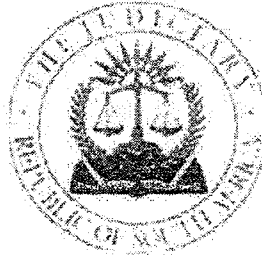


REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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

CASE NUMBER: 2016/43678

SIGNATURE

DATE

29/09/17

In the matter between:

NYELETI'S CHILDREN HOME

First Applicant

SITHOLE, NOMSA MAVIS

Second Applicant

And

REICHLIN, ARON

First Respondent

AUTUMNSKIES TRADING 745 CC

Second Respondent

EKURHULENI METROPOLITAN MUNICIPALITY

Third Respondent

JUDGMENT

WINDELL, J:

INTRODUCTION

[1] This is an application wherein the applicants seek declaratory and interdictory relief against the third respondent relating to the supply of electricity in respect of a property located at Putfontein, Benoni ("the main application").

[2] At the hearing of the main application the applicants also sought an order joining the first and second respondents to the main application ("the urgent joinder application"). The first respondent, Mr Reichlin, was present during the hearing of the main application. He is also appearing in his capacity as the member of the second respondent. Having heard oral arguments from all the parties, I granted the relief and the first and second respondents were joined in the main application.

[3] The applicants, as well as the first and second respondents were unrepresented.

THE PARTIES

[4] The first applicant, Nyeleti's Children's Home, is not cited as a party in the founding affidavit. A photocopy of a certified copy of a certificate of registration as a non-profit organization issued by the Department of Social Welfare on 21 November 2007, in favour of Nyeleti's Children's Home, with registration number 058-419-NPO, is however attached to the founding affidavit as well as a copy of a Broad Based Black Economic Empowerment Verification Certificate and correspondence from the South African Revenue Services addressed to the Directors of Nyeleti's Children's Home.

[5] The second applicant is Nomsa Mavis Sithole (Ms Sithole). She avers that she is the

chairperson of Nyelethi Children's Home. It is not stated by the deponent to the founding affidavit whether she has a mandate or not to depose to the founding affidavit on behalf of Nyelethi Children's Home.

[6] The third respondent is Ekurhuleni Metropolitan Municipality (the Municipality), a Metropolitan Municipality established in accordance with the provisions of section 12(1) read with section 14(2) of the Local Government Municipal Structures Act, 1998, as published in Notice 6788 of 2000 as amended by Notice 5215 contained in the Provincial Gazette Extra-Ordinary of No 141 of 1 October 2000 as published in the Provincial Gazette Extra-Ordinary No 170 of 19 August 2001 with head offices situated at Corner Cross and Roses Streets, Germiston, Gauteng Province.

BACKGROUND

[7] On 6 December 2016 the electricity supply to 158 Geldenhuys Street, Putfontein, Benoni (the property) was terminated by the employees of the Municipality. On 8 December 2016 the applicants approached the urgent court for an order to restore the electricity. An interim order was granted by Wright J, in terms of which the Municipality was ordered to restore the electricity to the property with immediate effect. The court postponed the application to 6 March 2017 to be heard in the opposed motion court and ordered the Municipality to file an answering affidavit by 10 January 2017, and the applicants to file a replying affidavit by 24 January 2017.

[8] Following the granting of the interim order, the Municipality duly restored the supply

of electricity to the property.

[9] The applicants subsequently failed to file a replying affidavit in the main application and did not set the matter down for hearing on 6 March 2017. Resultantly, the Municipality set the main application down for hearing during the week of 17 April 2017.

[10] On 19 April 2017, the matter was heard by Opperman J. The applicants, represented by Ms Sithole, appeared at the hearing and sought a postponement in order to obtain legal assistance. The present application was postponed to the opposed motion roll of 22 May 2017 with further orders relating to the delivery of the applicants' replying affidavit, heads of argument and practice note. The applicants, at that stage, failed to deliver either a replying affidavit or heads of argument as required by the court.

[11] The main application was subsequently allocated for hearing to Daniels AJ on 24 May 2017. On 18 May 2017, the applicants launched the urgent joinder application. Daniels AJ subsequently postponed the main application and urgent joinder application to the urgent court on 9 June 2017 together with further orders as to when the applicants were required to file their replying affidavits. On 9 June 2017, both applications were postponed to the opposed motion court roll of 14 August 2017.

THE APPLICANT'S VERSION

[12] Ms Sithole deposed to the founding affidavit on behalf of the applicants. The salient facts which appear from the affidavit can be summarised as follows.

- 12.1 The property houses a children's home, alternatively a shelter. The applicants allege that 23 children and 15 elderly persons are living in the shelter;
- 12.2 The electricity supply to the property was terminated on 5 December 2016 by the employees of Municipality without notice;
- 12.3 The reasons advanced by the said employees of the Municipality for the termination of the electricity supply was that the applicants owed money for electricity consumption;
- 12.4 Ms Sithole approached the Municipality's legal unit on an unspecified date and was advised that In order for the electricity supply to be restored, she would have to sign an acknowledgement of debt;
- 12.5 Ms Sithole was assured that reconnection of the electricity supply would be reconnected on 5 December 2016 and she therefore signed the acknowledgement of debt under duress;
- 12.6 On 6 December 2016, Ms Sithole engaged with the Municipality's employees in order to establish why the electricity supply had not been restored.

[13] On the basis of the abovementioned allegations the applicants aver that they had a legitimate expectation that the electricity supply would be restored following the

signature of the acknowledgement of debt. The culmination of these events constituted the grounds for the launching of the urgent application.

MUNICIPALITY'S VERSION

[14] The Municipality submits that the applicants failed to disclose relevant facts to the court, such as the non-payment and arrear status of the municipal account, the numerous previous warnings and terminations of the electricity supply and the ongoing dispute with the owner of the property as to their occupation. The Municipality placed the following facts before court:

14.1 During 2002, a municipal account was opened in respect of the property in the name of Ms Sithole, with account number 3303287668. Such account was a so-called "tenant's account", as Ms Sithole was a tenant of the then owner of the property.

14.2 The second respondent Autumn Skies Trading 745 CC ("Autumn Skies") purchased the property during 2014. Following the purchase of the property by Autumn Skies, a new municipal account, with account number 3306393175 was opened by and in the name of Autumn Skies in 2016. A summary of the relevant municipal account, drawn from the Municipality's electronic billing system (commonly known as a "BP108") was attached to the answering affidavit of the Municipality.

14.3 The BP108 indicates that in February 2016, Autumn Skies opened a municipal account with the Municipality after making payment of the

required deposit for the opening of such an account. During February 2016 Autumn Skies was the only municipal account relevant to the property. The municipal account was debited thereafter on a monthly basis with charges for electricity.

14.4 In 2016, Autumn Skies informed an employee of the Municipality, Wanda Mthembu, that the property was unlawfully occupied. A copy of Wanda Mthembu's confirmatory affidavit was attached to the answering affidavit as annexure "SD2". Autumn Skies requested the Municipality to terminate the supply of electricity to the property. Mr Selven Davey Frank, the Acting Divisional Head: Specialized Legal Services of the Municipality, who deposed to the answering affidavit on behalf of the Municipality, states that he was informed by Wanda Mthembu of an ongoing dispute between Autumn Skies and the occupiers of the property.

14.5 Despite the dispute between Autumn Skies and the occupiers of the property, electricity continued to be consumed at the property. During February 2016 Autumn Skies failed to make payment of the amounts due to the Municipality for electricity consumption at the property, and the municipal account fell in arrears. At the time of deposing to the affidavit, the Municipality was owed an amount of R107,347.72. The municipal account was subsequently handed over for debt collection.

14.6 As a result of the arrear status of the municipal account, the Municipality caused various notices to be delivered to the property indicating that

unless payment of the account was made, the electricity supply would be terminated. Warning notices were delivered during February, March, May and July during 2016 (Annexures "SD4" to "SD7")

14.7 The electricity supply to the property was subsequently terminated during April, May, July, August, September and November 2016. Such terminations included a "level 3 cut off" where either the electrical cable or circuit breaker was removed by the Municipality's energy department.

14.8 Notwithstanding several terminations to the supply of electricity to the property, electricity continued to be consumed at the property. The continued consumption of electricity at the property can only be related to incidents of illegal reconnections of the electricity supply.

14.9 Mr Frank confirmed that the final electricity termination (prior to the urgent application) took place on 23 November 2016 and not on 5 December 2016 as alleged by the applicants.

[15] The Municipality avers that the applicants had failed to draw a link between the children's home and the property, and no documentary proof had been furnished by the applicants to suggest that such a facility was run from the property or which person, if any, the facility houses or provides shelter to. In the absence of any proof the Municipality denies that Ms Sithole is the chairperson of Nyaletshi Children's Home. The Municipality also avers that the applicants have not furnished any relevant facts relating to the alleged operation of the children's home. The applicants failed to inform the court

of their failure to make payment for electricity and the illegal connections. The Municipality is of the view that in so far as a children's home is in fact being run from the property, it is being run in an extremely irresponsible manner.

[16] The Municipality invited the applicants to provide evidence regarding the occupation of the property by children or the elderly in their replying affidavit. The applicants only deposed to replying affidavits in the main application and in the urgent joinder application on 15 August 2017 and 9 June 2017 respectively. The replying affidavits in both applications should have been delivered by 1 June 2017. The second applicant sought condonation for the late filing of applicant's replying affidavit in the urgent joinder application on the basis of ill-health which prevented her from deposing to the affidavit timeously. A copy of a medical certificate from the Tambo Memorial Hospital is attached to the applicant's replying affidavit in support of her application. In the light of the specific circumstances of this case and the late filing of the replying affidavit is condoned. In reply to the Municipality's answering affidavit, the applicants appraised the court as follows:

- 16.1 The property is a farm and it is zoned "agricultural" by the municipality. According to the second applicant, she and most of the occupiers at the property were employed by the previous owner, Hennie Lamprecht who left South Africa for Dubai in 2003.
- 16.2 Prior to the departure of Mr Lamprecht, a full-time farming operation was conducted from the property and some sections are still used for subsistence farming to grow vegetables and the like for the orphanage and other occupants of the property who also own livestock.

- 16.3 The second applicant stated that she did not know how the first the first respondent acquired ownership of the property but that she was advised that it would seem since Mr Lamprecht left South Africa "the property, foreclosed and took judgement against him this is speculation". The second applicant averred that Mr Lamprecht and the previous owner (the identity of such previous owner is not disclosed by the deponent) consented to them staying in the property because Ms Sithole and most of the occupiers worked for him including their late grandparents.
- 16.4 The applicants contend that the first respondent took over the property as a going concern during 2013. The first respondent employed some of the labour tenants that were on the farm and left others. He also had a trucking business which delivers goods to countries outside of South Africa and the first respondent also farms.
- 16.5 The second applicant deposes to the fact that the first respondent Initially undertook to support the orphanage and even paid some money to Hammond Pole attorneys to secure a place for them in Springs. Briefly, the first respondent undertook to maintain the status quo as was done by Mr Lamprecht, that is, the first respondent would pay for the water and electricity consumption of whoever occupied the farm and continue to employ some of the farm tenants.
- 16.6 According to the second applicant, the staff and security personnel residing at Farm 158 are consuming the water and lights at the farm and the first respondent now expects the applicants to pay the bill without prior consultation with them or to furnish the applicants with reasons as to why the situation has changed.
- 16.7 The applicants stated that they have mentally challenged children, slow learners, HIV positive children and adults and some of their

medication is kept in fridges. They also have elderly people suffering from asthma and use oxygen bottles. The applicants further submitted that the children attend five different schools that cater for special needs and wake up at 05H30 every morning to bath/shower and have breakfast to take their medication which will be a difficult task without electricity.

- 16.7 The applicants stated that they had been to the city council on several occasions to endeavour to resolve the dispute amicably and they were informed to wait for the "outcome of the courts". The applicants also averred that they had pointed out discrepancies to the regarding their bills. The applicants referred the court to annexures in support of their allegations but same was not attached to the replying affidavit.

[17] The Municipality stated that it had been unable to trace the acknowledgement of debt the applicants rely on, and was not able to confirm who entered into such an agreement on behalf of the Municipality. It was therefore also unable to verify the contents thereof as the applicants provided no details in their founding affidavit. As a result, the Municipality is unable to state whether the acknowledgement of debt attached to the applicant's papers is valid. The Municipality noted that the acknowledgement of debt makes no mention of the restoration of electricity supply to the property. It moreover appears that Ms Sithole misrepresented to whoever she entered into the acknowledgement of debt with, that she was a representative of the owner of the property, Autumn Skies. The Municipality denies that any authority was granted by Autumn Skies to Ms Sithole to enter into the acknowledgement of debt, especially in light of the ongoing dispute between Autumn Skies and the applicants

regarding the lawfulness of the occupation of the property by the applicants.

Lawful terminations

[18] The Municipality submits that the supply of electricity and the lawfulness of any disconnection thereof are governed by the Municipality's By-Laws and policies and, in particular, the Municipality's Electricity By-Law and Credit Control and Debt Collection Policy. The Municipality avers that the disconnections of the electricity supply, including the disconnection of 23 November 2016 were lawful, having being carried out as a result of the non-payment of the municipal account, alternatively, an illegal reconnection of the electricity supply.

[19] By-Law 12(1) of the Municipality's Electricity By-Laws provides that the Municipality has the right *"to disconnect the supply to any premises if the person liable to pay for such supply fails to pay any charge due...after notice has been given to the occupier."*¹

[20] The Municipality contends that in terms of By-Law 12(1) it was entitled to disconnect the electricity supply to the property on the basis that the municipal account was and remained in arrears for several months, and because sufficient notice of the termination had been given to the occupiers.

[21] The continued consumption of electricity at the property, despite the above-mentioned terminations was clearly indicative of an illegal connection and is in contravention of 13(1) of the Municipality's Electricity By-laws. The Municipality's

¹ Ekurhuleni Metropolitan Municipality Electricity By-Laws, 12(1)

Electricity By-Law 12(5) provides as follows:

"when an installation has been illegally reconnected on a consumer's premises after having been previously legally disconnected by the Council... the electricity shall be physically removed from those premises..."²

Relief sought is Incompetent

[22] The Municipality contends that the relief sought by the applicants is legally incompetent and there is no factual basis for the granting of the declaratory orders sought in the notice of motion.

Prejudice

[23] The Municipality contends that the interim court order granted on 8 December 2016 required the Municipality to provide electricity to the property without being able to recover the relevant charges or to take normal credit control steps, such as terminating the supply of electricity in terms of the relevant legislation. This is highly prejudicial to the Municipality and is contrary to the Municipality's legislated right and duties. In conclusion, the Municipality requested that the application in the present matter be dismissed with costs so as to enable the Municipality to terminate the supply of electricity to the property.

URGENT JOINDER APPLICATION

[24] In Ms Sithole's affidavit in support of the joinder application she seeks a declaratory

² Ekurhuleni Metropolitan Municipality Electricity By-Laws, 12(5)

order relating to the rights of the children allegedly accommodated at the property and two mandatory interdicts, final in effect, relating to the payment of the debt for electricity charges levied by the Municipality for the supply of electricity to the property.

[25] In this affidavit Ms Sithole alleged facts not previously canvassed in the main application. The applicants allege that the Mr Reichlin and Autumn Skies are conducting a commercial business on the property and that it is all the employees of Autumn Skies that are consuming electricity. The applicants contended that the Municipality had an obligation to make Mr Reichlin and Autumn Skies pay the outstanding municipal debt in respect of electricity consumption. The applicants contended that they have a legal relationship with the municipality who is responsible for providing electricity to people within its jurisdiction like the applicants.

[26] The founding affidavit made sweeping statements, many of which were incomprehensible. The applicants referred the court to various case law as well as legislation without setting out how such case law and legislation was applicable to their own particular personal circumstances.

[27] The Municipality contends that there is no need to order the Municipality to compel Mr Reichlin and Autumn Skies to pay the outstanding debt as the Municipality has a statutory obligation to recover municipal debt and will do so in due course. It was argued that it cannot compel Mr Reichlin and Autumn Skies to pay the debt. It is also contended that the Municipality has no knowledge regarding the rate of consumption of electricity at the property by the different persons allegedly in occupation thereof, or

what activities are conducted at the property by such persons. The person usually liable for municipal fees for electricity consumption at any given property within its jurisdiction is the owner of the property. It intends holding Autumn Skies liable for the outstanding municipal debt.

[28] The Municipality stated that it does not dispute its statutory and constitutional duties to provide basic municipal services to persons living within its jurisdiction. However, it cannot simply supply electricity free of charge to every person within its jurisdiction and the applicants do not have a right to electricity free of charge. Municipal services must be provided by it in a manner that is financially sustainable. It was submitted that should the applicants wish to establish a contractual relationship with the Municipality in terms of which electricity is supplied to them, they will be able to do so in the normal course. The Municipality denied that the applicant's rights in terms of the Constitution³ or the Children's Act⁴ have been violated.

[29] Mr Reichlin made oral submissions during the hearing of the joinder and main applications. He stated that he and Ms Sithole has been involved in a dispute surrounding the property since he bought it in 2013. He admitted that he undertook to pay Ms Sithole an amount of R500 000 on condition that she vacates the property. He did not pay her the money and the relationship between them turned sour when he discovered that she had not been paying the municipal account. Mr Reichlin's late son, Richard Reichlin, subsequently paid the full outstanding amount on the municipal account in the amount of R93 385,99 during 2016 and opened a new account in the

³ Act No. 108 of 1996

⁴ Act No. 38 of 2005

name of Autumn Skies in 2016. Ms Sithole again failed to effect any payment that led to the account falling in arrears again. He is not willing to settle the outstanding account again.

[30] During the hearing of the application I was informed by Mr Felgate appearing on behalf of the Municipality, that the applicants can apply for a municipal account in their own names and if approved, the Municipality will continue providing electricity supply to the property. I was also informed that the applicants could apply to the Municipality to receive assistance in terms of their indigent support policy which provides subsidised tariffs for poor households.

[31] During the adjournment of the matter for judgment, it was suggested to Ms Sithole that she seeks legal advice in regards to the ongoing dispute between her and Mr Reichlin. She was also instructed to approach the Municipality to apply for an account, and was also informed by Mr Felgate of the relevant procedures to follow if the application is unsuccessful. To date the applicants have not reported back to the court as to the outcome of her application.

CONCLUSION

[32] It is common cause that the applicants do not have a municipal account with the Municipality for the property in question. The owner of the property, Autumn Skies, has an account with the Municipality which is currently in arrears in an amount of R107 347.72

[33] The Municipality's Electricity By-Laws provides that the Municipality has the right to disconnect the electricity supply to any premises if the person liable to pay for such supply fails to pay any charge due and after notice has been given to the occupier. It is not disputed that several notices had been given to the applicants during the course of 2016 and that the supply had been terminated on several occasions during 2016. The Municipality is also entitled to physically remove electricity from premises if it is found that an installation has been illegally reconnected on a consumer's premises after having been previously legally disconnected by the Council. I am satisfied that the Municipality was within their rights to terminate the electricity supply in the circumstances.

[34] Ms Sithole conceded that she has not made any payments to the Municipality and she did not dispute that the total amount outstanding was R107 347.72. She also conceded that she had not made any payments in terms of the acknowledgement of debt attached to her founding affidavit

[35] The applicants seek a final interdict against the Municipality to prevent it from ever disconnecting the supply of electricity from the property. Such a blanket interdict is not legally permissible. To expect the Municipality to provide electricity to the property without being able to recover the relevant charges or to take normal credit control steps, such as terminating the supply of electricity in terms of the relevant legislation is highly prejudicial and is contrary to the Municipality's legislated right and duties.

[36] However, it would be short-sighted of the court not to note the allegations made by the applicants in respect of minors and elderly people in their care. The parties were in a prime position to provide this court with additional information such as the full names, date of birth as well as all the other personal details of vulnerable members of the community who occupy the property together with an explanation as to how each and every minor child and senior citizen came to be in their care but failed to do so. Certified copies of birth certificates and Identity Documents of the occupiers of the children's home or shelter could have been attached but were not. The court is confronted with an unenviable task. Should the electricity supply be terminated at the property, there is a very good likelihood that harm may come to, possibly, the most vulnerable individuals in our community.

[37] There is a need for this court to balance the respective rights of the litigants in the context of the Constitution. In the present matter a strict and robust approach will not serve the interest of justice. In the circumstances it would be irresponsible to dismiss the application without a proper investigation into the operations of the children's home.

[38] In the result the following order is made:

38.1 The interim order granted on 8 December 2016 is extended pending the finalisation of the main application before Windell J.

38.2 The main application is postponed *sine die*.

38.3 The applicants are given 60 days to approach the Municipality and apply for a

municipal account and to report back to court in writing on affidavit.

38.4 The Municipality is ordered to provide a report dealing with the history of the account relating to the property and the applicants suitability to open an account, and report back to court in writing on affidavit within 60 days of this order.

38.4 A copy of this judgment shall forthwith be transmitted by the Chief Registrar or Acting Chief Registrar of this court to the Regional Director of the Department of Social Welfare together with a request that that the Department of Social Welfare assist this court in compiling a comprehensive report in respect of the first applicant with the following ambit:

38.4.1 Registration status;

38.4.2 Premises from which the first applicant operates as well as the first applicant's access to electricity;

38.4.3 A list of the full names of all minor children and elderly persons in the care of the first application together with an explanation as to how each individual came to be in the care of the first applicant as well as special needs that minor child or elderly person may have;

38.4.4 Any other factor that the authorised official of the Department of Social Welfare may deem relevant to bring to the attention of the court

and report back in writing on affidavit to the Chief Registrar
or Acting Chief Registrar within 60 days of receiving this order.

38.5 No order as to costs.


L WINDELL

JUDGE OF THE HIGH COURT OF THE REPUBLIC OF SOUTH AFRICA

Attorney for applicants:	Not applicable
Counsel for applicants:	Second applicant appeared in person
Attorney for first and second respondents:	Not applicable
Counsel for first and second respondents:	First respondent appeared in person
Attorney for Municipality:	K M Mmuoe Attorneys
Counsel for Municipality:	Advocate N. Felgate
Date matter heard:	17 August 2017
Judgment date:	29 September 2017