



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

Case No: 04154/2023

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: **NO**

.....
DATE

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SIGNATURE

In the matter between

31 KOCH STREET JOUBERT PARK CC

Applicant

And

**CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY**

First Respondent

CITY POWER PROPRIETARY LIMITED

Second Respondent

REASONS FOR ORDER DATED 01 DECEMBER 2023

PEARSE AJ:

THE ORDER

1. On Friday 01 December 2023, having heard counsel for the parties on Wednesday 29 November, I granted an order in the following terms:
 - 1.1. The applicant's non-compliance with the rules of this court is condoned in terms of rule 6(12)(a).
 - 1.2. It is declared that the applicant's reconnection of the electricity supply to the property situate at 31 Koch Street, Hillbrow, Johannesburg ("the property") on or about 08 November 2023 was unlawful.
 - 1.3. It is declared that the respondents' disconnection of the electricity supply to the property on or about 09 November 2023 was unlawful.
 - 1.4. The respondents are ordered, within 12 hours of their receipt of this order, to reconnect the electricity supply to the property and thereafter to adhere fully and properly to the terms of the order of this court delivered by Wright J on 29 October 2023, which is declared to remain of full force and effect.

1.5. Any residual issues arising in the application are postponed for determination on the return day of 19 February 2024.

1.6. There is no order as to costs.

2. On Tuesday 05 December 2023 the respondents delivered a request for reasons in terms of rule 49(1)(b) and (c) ¹ and an application for leave to appeal (seemingly) in terms of rule 49(1)(a) or (b) read with section 17(1)(a)(i), (b) and (c) of the Superior Courts Act 10 of 2013. These are my reasons for the order.

THE APPLICATION

3. This application, brought as one of urgency, was initiated on Wednesday 15 November 2023. It is the fourth in a series of matters brought before court in the course of a frenetic month of litigation between the parties. Besides requesting that non-compliance with the rules be condoned and seeking a punitive costs order against the respondents, the applicant sought substantive relief in the following terms:

“2. *The first and second respondents are ordered to comply forthwith and in any event by no later than midday on 24 November 2023² with paragraphs 2 and 3 of the Order issued by the Honourable Justice Wright on 29 October 2023.*

¹ The request for reasons focuses on paragraphs 3 and 4 of my order.

² At the hearing of the application counsel for the applicant submitted that this date should be amended to read 01 December 2023.

3. *A copy of this Order is to be served by the applicant's attorney on the office of the City Manager of the first respondent and the Chief Executive Officer of the second respondent, after which the applicant's attorney is to upload an affidavit of service confirming that such service of this Order was duly complied with.*

4. *In the event that the first and/or second respondents fail to comply with this Order by no later than midday of 24 November 2023, the applicant may, on the same papers, duly amended where necessary, approach this Honourable Court with an application that the first and second respondents and/or the City Manager of the first respondent and/or the Chief Executive Officer of the second respondent is/are in contempt of an Order issued by this Honourable Court and committing the City Manager of the first respondent and/or the Chief Executive Officer of the second respondent to a period of incarceration and/or imposing a fine on such persons as a consequence [of] such contempt.”*

4. The founding affidavit in the application was deposed to by Mark Faber, who describes himself as a member of the applicant. The applicant is said to be the registered owner of the property, which accommodates a block of flats. The case made out in support of the relief sought in the application is as follows:

- 4.1. On 08 September 2020, at the instance of the applicant, this court granted an order interdicting and restraining the respondents from cutting off the supply of electricity to the property pending a statement and debatement of account that was envisaged to take place within 30 days thereof. That process is however ongoing.

- 4.2. On 24 October 2023 the respondents terminated the supply of electricity to the property, which had the effect also of depriving residents of any water supply.
- 4.3. Approximately 400 people reside in the building located on the property.
- 4.4. When cold weather ensued, residents lit fires in their flats as a means of warming themselves and their families. This created dire risks for the lives and livelihoods of the building's residents.
- 4.5. The applicant was compelled to bring an urgent application before Wright J on the evening of Sunday 29 October 2023. (This may be referred to as the first matter.) A rule *nisi* was issued, returnable on 19 February 2024, ordering the respondents immediately to restore the supply of electricity to the property and requiring them to provide 14 days' written notice of any future termination thereof. (Wright J's order appears as annexure MF2 to the founding affidavit and his lordship's judgment in support thereof appears as annexure MF3 thereto.)
- 4.6. The respondents are yet to – and indeed refuse to – comply with the order of Wright J:

“despite the applicant's exhortations and the fact that the occupants of the applicant's building at the subject property are now imperilled in that they have no running water to drink or in which to bath as the

water must be pumped up to the roof of the building prior to it being distributed to the flats within the building and without electricity the water pumps do not work; cannot move around in place of residence other than in the dark or with the aid of candles and cannot flush their toilets or brush their teeth as both acts require water from the top of the building which cannot be pumped there without electricity.”

4.7. On 31 October 2023 this court (per Mdalana-Mayisela J) heard but dismissed an application by the applicant for an order that a private contractor be authorised to reconnect the electricity supply to the property. (This may be referred to as the second matter.) It was however stated by Mdalana-Mayisela J that the Wright J order remained operative and thus binding on the respondents.

4.8. By letter dated Thursday 09 November 2023, the applicant’s attorneys wrote to the respondents:

4.8.1. contending that they had “*failed / refused to reconnect the electricity supply*” and were thus in contempt of the Wright J order; and

4.8.2. cautioning that, “*if the electricity supply is not restored by close of business today, our instructions are to proceed with an urgent application to hold you in contempt of court.*”

- 4.9. On the following day (Friday 10 November 2023) the first respondent's attorneys replied to the applicant's attorneys stating that "[y]our client will only be reconnected after payment of penalty of R804 022.50 raised against 79 units at a rate of R10 177.50 per unit of your client's property and a further reconnection service fee of R77 000.00 excluding VAT for the bypass that was found on client's property on 24 October 2023".
- 4.10. The disputes raised by the first respondent are matters to be addressed on the return day of the Wright J order and not ones permitted to be relied on by either respondent in terminating the electricity supply in the face of the Wright J order.
- 4.11. The deponent to the founding affidavit approached new attorneys on Monday 13 November 2023. Preparation of papers in this application commenced that evening and was finalised on the following evening (Tuesday 14 November 2023), whereafter the application was launched without delay.
- 4.12. Deprivation of electricity and water to the residents of the property creates unacceptable risks of dire consequences and should not be permitted on the strength of a dispute regarding monies allegedly due by the applicant to the respondents.

4.13. The applicant has no remedy other than an order confirming that the respondents are in contempt of the Wright J order and placing their executives at risk of committal in the event of ongoing defiance of that order.

4.14. In the circumstances, the purpose of the application is:

“to obtain an Order from this Honourable Court compelling the first and/or second respondents forthwith to comply with paragraphs 2 and 3 of the Order handed down by the Honourable Justice Wright of this Court on 29 October 2023 (‘the Wright J Order’) under the same case number, a copy of which is annexure ‘MF2’ hereto, in which this Court ordered the first and second respondents forthwith to restore the electricity supply to the Applicant’s property situate at 31 Koch Street, Hillbrow, Johannesburg; and not to disconnect the supply of electricity to the applicant’s property unless 14 days written notice of such intention is given to the applicant.”

THE OPPOSITION

5. The founding papers were served on the respondents and their attorneys, by email (and thereafter by hand), on the afternoon of Wednesday 15 November 2023. The notice of motion stipulated that, in the event of opposition to the relief sought in the application, a notice of opposition be delivered by 13:00 on Friday 17 November 2023 and any answering affidavit be delivered by 16:30 on Monday 20 November 2023. That timing would allow for delivery of a replying affidavit and preparation on the Thursday-for Tuesday basis.

6. A notice of intention to oppose the application was delivered by the respondents on the afternoon of Friday 17 November 2023.

THE ANSWERING AFFIDAVIT

7. The respondents' answering affidavit was delivered on Monday 27 November 2023. The affidavit is deposed to by Tuwani Ngwana, who describes himself as a legal advisor in the employ of the first respondent who is authorised to represent both respondents in these proceedings. The defence presented by the respondents is to the following effect:

- 7.1. The Wright J order of 29 October 2023 was secured by the applicant in the absence of the respondents.

- 7.2. On receipt of that order in the first matter, the respondents compiled a disconnection report that revealed that, on previous occasions, the electricity supply to the property had been legally disconnected [by the respondents] but illegally reconnected by the applicant.

- 7.3. A reconsideration of the Wright J order was notified by the respondents but remains pending before court. (This may be referred to as the third matter.)

- 7.4. The application brought urgently before Mdalana-Mayisela J was dismissed with costs on 01 November 2023. It had been proposed by the respondents that the third matter be heard together with the second matter but Mdalana-Mayisela J was not amenable to doing so.
- 7.5. When representatives of the respondents conducted an inspection at the property on 08 November 2023, they found the electricity supply to the property to have been illegally reconnected by the applicant, which conduct “*rendered the Court Order of Justice Wright moot in that the reconnection has been effected, albeit, not by the Respondents but by the Applicants and/or a third party which both were unlawful.*” In the submission of the respondents, “[*t]he Applicants cannot therefore benefit from their own unlawful conduct and that the Court Order of Justice Wright is no longer effective.*”
- 7.6. In the circumstances, the respondents proceeded on 09 November 2023 to disconnect the supply of electricity to the property. (Although this is not stated in so many words, it appears to be the case of the respondents that it was this *disconnection* – rather than any *non-reconnection* in the wake of the Wright J order – that sparked the letter referred to in paragraph above.)

- 7.7. On the following day (10 November 2023) the respondents' attorneys emailed to the applicant's attorneys the letter referred to in paragraph above.
- 7.8. In the submission of the respondents, "*[t]he Court Order of Justice Wright is under reconsideration and, in light of it bearing evidence of illegality, it would not be in the interest of justice to force the Respondents to reconnect the electricity supply to the persons who are committing crime, in fact, a party which came before this Court with the unclean hands.*"
- 7.9. In any event, the relief sought by the applicant in this application is not competent for the reason that the Wright J order is the subject of reconsideration proceedings that remain pending before court.
- 7.10. This application is also not urgent or any urgency is self-created because almost a month has passed since the Wright J order of 29 October 2023.

THE REPLYING AFFIDAVIT

8. The applicant's replying affidavit was delivered on the following day (Tuesday 28 November 2023). Of relevance to these reasons are the following averments of Mr Farber:

- 8.1. The respondents were in fact represented at the hearing before Wright J, even if their counsel disclosed to that court that he had not had sufficient time to take proper instructions in relation to the matter. The relevance of this recordal, which accords with paragraph 5 of the Wright J judgment, is that the application that gave rise to his lordship's order was conducted neither on an *ex parte* basis nor in the absence of the respondents as contemplated in rule 6(12)(c).
- 8.2. It is acknowledged by the respondents that they received the Wright J order before compiling their disconnection report of 31 October 2023.
- 8.3. It is admitted by the applicant that, in response to a disconnection of the power supply to the property in the face of the orders of 08 September 2020 and 29 October 2023, the applicant reconnected the power supply to the property. According to Mr Farber, however, the applicant did not do so again in response to the respondents' second disconnection on the afternoon of 24 November 2023, which post-dated delivery of the founding papers.
- 8.4. There would be no prejudice to the respondents in complying with the orders of 08 September 2020 and 29 October 2023 pending the outcome of a fuller ventilation of the parties' disputes on the return day of 19 February 2024.

THE REASONS

9. When the matter was called at 14:00 on Wednesday 29 November 2023, I was addressed on urgency by counsel for both sides and ultimately satisfied, in the exercise of my discretion, that an adequate case is made out in the founding papers for a preferential hearing of this matter. In my view, it would be specious to conclude that the applicant, the tenants of the property (who face grim living conditions in the absence of electricity and water) and indeed the court itself could be afforded substantial redress on the return day or other ordinary-course hearing of the matter. Nor do I consider that the applicant delayed in launching this application or prejudiced the respondents by the timetable imposed in the notice of motion. The respondents' defence was presented to this court in a comprehensive answering affidavit and detailed written and oral submissions. As recorded in paragraph above, non-compliance with the rules of this court is therefore condoned in terms of rule 6(12)(a).

10. Mr Mitchell for the applicant elaborated on the allegations and submissions set out in the founding and replying affidavits but did not press the suggestion that the applicant's admitted reconnection of the electricity supply to the property on or before 08 November 2023 was defensible as a 'counter-spoliation'. I understood counsel to accept that sufficient time had elapsed since the disconnection on 24 October 2023 for any such suggestion to be unsustainable. If the respondents' submission on this score is to be accepted, moreover, the reconnection was a resort to self-help in light of the failure of the application

before Mdalana-Mayisela J. Either way, the reconnection on or before 08 November 2023 was plainly illegal, in my view, hence the order referred to in paragraph above.

11. Mr Sithole for the respondents confirmed that he had appeared before Wright J on 29 October 2023, albeit without proper instructions, hence the reconsideration proceedings that had been notified but not yet set down for hearing.
12. In his submission, the applicant had self-implemented the first component (paragraph 2) of the Wright J order – despite the refusal of the order sought in the second matter – thereby:
 - 12.1. precluding the respondents from implementing the first component (paragraph 2) of that order; and
 - 12.2. releasing the respondents from complying with the second component (paragraph 3) of the order;
13. Mr Sithole was however unable to provide authority or other basis for the submission referred to in paragraph above. Although he placed oblique reliance on the “*doctrine of unclean hands*”, he stopped short of contending that party A may elect to disregard one portion of an extant court order if it considers that party B has (unlawfully) done what party A was ordered (lawfully) to do. He was unable to offer a convincing answer to the question why party A’s resort to self-

help would entitle party B simply to disobey an order of court. Nor was it argued that the Wright J order was suspended by any notification of its reconsideration. It follows, in my view, that the disconnection on 09 November 2023 was in breach of that order, hence the order referred to in paragraph above.

14. The order referred to in paragraph above seeks merely to remedy that breach.
15. A declaration of non-compliance with an order of court is competent under prayers seeking relief in respect of alleged contempt of court. In the context of urgent proceedings and on the papers as they stand, it would be imprudent of this court to endeavour to make a further finding on the question whether such non-compliance was wilful. In the circumstances, any residual issues arising in respect of prayers 3 and 4 of the notice of motion are postponed for ventilation, to the extent that the parties may deem appropriate, on the return day of 19 February 2024.
16. As regards costs, whilst the applicant has achieved a measure of success in this application, its admitted reconnection of the electricity supply to the property on or before 08 November 2023 should not be condoned let alone encouraged. As noted in paragraph above, therefore, there is no order as to costs.

These reasons are handed down electronically by uploading them to the file of this matter on Caselines. They will also be emailed to the parties or their legal representatives. The date of delivery of these reasons is deemed to be 07 December 2023.

Counsel for Applicant:	Shaun Mitchell
Instructed By:	Dempster McKinnon Inc
Counsel for Respondents:	Emmanuel Sithole
Instructed By:	Madhlopa & Thenga Inc
Date of Hearing:	29 November 2023
Date of Order:	01 December 2023
Date of Request for Reasons:	05 December 2023
Date of Reasons:	07 December 2023