Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA

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

CASE NO: 0045661 /2023

DATE: 11 February 2024

DELETE WHICHEVER IS NOT APPLICABLE
1. Reportable: Yes / No
2. Of Interest to Other Judges: Yes / No
3. Revised
DATE: SIGNATURE:

In the matter between:

GEORGE STOTT & CO (PTY) LTD **Applicant**

and

THE CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY **Respondent**

JUDGMENT

Johann Gautschi AJ

1. The applicant, an industrial enterprise conducting business in the steel cutting and pressing industry, is an electricity supply customer of the respondent. In August 2021 the applicant received an invoice dated 21 August 2021 from the respondent. It reflected that, according to a metre reading taken on 3 August 2021, the applicant owed the Respondent an additional R4,394,497.81 in respect of its electricity consumption dating back to February 2019, a period of some 2 ½ years.

2. The additional amount of R4,394,497.81 is the difference between R7,819,711.88 representing the actual charges imposed based on actual meter readings and the estimated charges of R3,425,214.07 previously imposed which had already been paid by the applicant.

3. The legal basis for the applicant's claim is to be found in section 9 (7) of the respondent's Electricity By-laws published in Notice 160 of 1999 which provides as follows:

> *"When it appears that the customer has not been charged or incorrectly charged for electricity due to the application of an incorrect charge or on grounds other than the inaccuracy of a meter, the Council shall conduct such investigations, enquiries and test as it deems necessary and shall, if satisfied that the consumer should have been charged, or has been charged, adjust the amount accordingly: Provided that no such adjustment shall be made in respect of the period in excess of six months prior to the date on which the incorrect charge was observed or the council was notified of such incorrect charge by the consumer".*

4. The respondent raised two points in limine.

First point in limine: non-joinder

5. The first point in limine was one of non-joinder.

6. The respondent submitted that the applicant had an obligation to cite City Power as a party by reason of its role in removing the existing electricity meter at the applicant's premises and installing a new meter and its involvement in the preparation of accounts and ability to testify as to the correctness of meter readings. Reliance was placed the joinder provisions in Uniform Rule 10 (3) and a defendant's right to "*be joined on grounds of convenience, equity, saving of cost and avoiding multiple actions*".

7. The applicant, relying on paragraphs 4 and 8 in an unreported judgment in Nongena v City of Johannesburg case number 16758/2014 dated 8 May 2015, submitted that it was held that City Power is a subcontractor of the City of Johannesburg (COJ) and that no *lis* exists between the COJ's customers and City Power and that it was held that citing City Power constituted a misjoinder.

8. As I pointed out to counsel for the applicant during argument, the judgment does not go that far. Paragraph 4 merely records the submission of counsel for COJ and City Power as respondents in that case that the relationship between COJ and City Power is like that of the client and the contractor who later subcontracts to a subcontractor and that therefore there is no "*lis*" between the client and the subcontractor.

9. Paragraph 8 in turn merely rejected the argument of the applicant in that case that City Power was correctly cited in terms of section 2 of the State Liability Act 20 of 1957 in finding that City Power should not have been joined because that Act is not applicable to the local sphere of government.

10. The respondent's reliance on Uniform Rule 10 (3) and common law grounds of convenience, equity, saving of costs and avoiding multiple actions is misplaced. Respondent's submissions that City Power has a "direct and substantial interest" were made in general terms without showing why City Power has the requisite "legal interest". During argument I alerted counsel for the respondent to the judgment in Vandenhende v Minister of Agriculture, Planning and Tourism, Western Cape, and Others 2000 (4) SA 681 (C) as to what is meant by proof of a "legal interest" for purposes of determining a "direct and substantial interest":

> *"It is not every interest in a dispute which will entitle a person to join or be joined in legal proceedings for its settlement. Thus, in Sheshe v Vereeniging Municipality 1951 (3) SA 661 (A) at 667A the proposition was rejected that*

'a plaintiff who brings an action for the ejectment of his tenant must necessarily join as defendants his tenant's milkman, vintner or charwoman. We have had numbers of actions for ejectment against the lessees of hotels and blocks of offices. In no case that I can recall to mind was it even suggested that the plaintiff was bound to join the lodgers, boarders or sub-lessees of offices.'

What is required is 'a direct and substantial interest'; "n direkte en wesenlikebelang . . . by die uitslag van die geding': see Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) at 659 and Kock& Schmidt v Alma Modehuis (Edms) Bpk 1959 (3) SA 308 (A) at 318E - H. That interest must be 'a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment' of the dispute: see Henri Viljoen (Pty) Ltd v Awerbuch Brothers 1953 (2) SA 151 (O) at 167H. It is not sufficient for the interest concerned to be a merely financial or commercial one (see the Henri Viljoen case, supra at 169H, 170H). In that case Horwitz AJP conducted a thorough analysis of the authorities and illustrated the principles which apply by reference to the relationships between an owner, his tenant and a sub-tenant. At 167C - H he said:

> *'Where such a sub-tenant is sued by an owner for ejectment, the defendant relies on a right of occupation derived from the lessee whose rights, in turn, depend upon his contract with the lessor. In the proceedings by the lessor against the sub-lessee the adjudication upon the rights inter partes involves also the rights of the lessee who derives his rights directly from the lessor while the sub-lessee claims his rights mediately or indirectly also from the lessor. Where, however, the lessor sues his lessee, any rights of a sub-lessee are not in any way in issue in the proceedings; the sub-lessee has no "legal" interest in the contract between the lessor and the lessee, although he may have a very substantial financial or commercial interest therein which may be prejudicially affected by the judgment. If this distinction be correct, it immediately explains why a plaintiff need not join a sub-lessee on the one hand and why intervention was allowed, or joinder ordered, on the other hand in such cases as: Bright v Triumph Garage (Pty) Ltd 1949 (3) SA 352 (C); United Building Society v Rabinowitz and Others 1949 (4) SA 513 (C); Blake and Others v Commissioner of Mines 1903 TS 784; Aaron v Johannesburg Municipality 1904 TS 696; Home Sites (Pty) Ltd v Senekal 1948 (3) SA 514 (A); Ex parte Marshall: In Insolvent Estate Brown 1951 (2) SA 129 (N). In all these cases the parties to be joined, or given leave to intervene, had a legal interest in the subject-matter of the action and it was this interest which could be prejudicially affected by the judgment.'*

See also Wistyn Enterprises (Pty) Ltd v Levi Strauss & Co and Another 1986 (4) SA 796 (T) at 802H.

The principles adumbrated in the Henri Viljoen case supra were applied in this Court in the United Watch & Diamond Co case supra and were extended to intervention. At 415C Corbett J as he then was, pointed out that:

> *'Intervention is closely linked with the matter of joinder; in fact it is often treated as a particular facet of joinder.'*

At 416B - C the learned Judge went on to say:

> *'Moreover, when one comes to examine the decisions relating to intervention, it would seem that the test of a direct and substantial interest in the subject-matter of the action is again regarded as being the decisive criterion.'*

At 415E - H he said:

> *'It is settled law that the right of a defendant to demand the joinder of another party and the duty of the Court to order such joinder or to ensure that there is waiver of the right to be joined (and this right and this duty appear to be co-extensive) are limited to cases of joint owners, joint contractors and partners and where the other party has a direct and substantial interest in the issues involved and the order which the Court might make (see Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 627 (A); Kock& Schmidt v Alma Modehuis (Edms) Bpk 1959 (3) SA 308 (A). In Henri Viljoen (Pty) Ltd v Awerbuch Brothers 1953 (2) SA 151 (O), Horwitz AJP (with whom Van Blerk J concurred) analysed the concept of such a "direct and substantial interest" and after an exhaustive review of the authorities came to the conclusion that it connoted (see at 169) -*
>
> *". . . an interest in the right which is the subject-matter of the litigation and . . . not merely a financial interest which is only an indirect interest in such litigation".*

This view of what constitutes a direct and substantial interest has been referred to and adopted in a number of subsequent decisions, including two in this Division (see Brauer v Cape Liquor Licensing Board 1953 (3) SA 752 (C) - a Full Bench decision which is binding upon me - and Abrahamse and Others v Cape Town City Council 1953 (3) SA 855 (C)), and it is generally accepted that what is required is a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment of the Court (see Henri Viljoen's case supra at 167).'

As regards the position of tenants and sub-tenants he said at 417A - E:

> *'The interest of a sub-tenant in regard to actions for ejectment against the tenant at the suit of the landlord (owner) has been discussed in several cases and the generally accepted view is that the sub-tenant has no legal interest in the contract between the landlord and the tenant -*
>
> *". . . although he may have a very substantial financial interest therein which may be prejudicially affected by the judgment".*

(See Henri Viljoen (Pty) Ltd v Awerbuch Brothers (supra at 167). This, with respect, would seem to be the correct approach. The sub-tenants' right to, or interest in, the continued occupancy of the premises sub-leased is inherently a derivative one depending vitally upon the validity and continued existence of the right of the tenant to such occupation. The sub-tenant, in effect, hires a defeasible interest. (See Ntai and Others v Vereeniging Town Council and Another 1953 (4) SA 579 (A) at 591.) He can consequently have no direct legal interest in proceedings in which the tenant's continued right of occupation is in issue, however much the termination of that right may affect him commercially and financially.

Consequently, if the proceedings in issue in the present case were for ejectment or relief similar thereto, there can be no question that applicants, as sub-tenants, would be neither necessary parties whose joinder could be demanded nor parties entitled as of right to intervene.'"

11. In the present case no evidence was provided to show that City Power is a subcontractor of the respondent nor that there is another factual basis for contending that it has the requisite legal interest entitling it to be joined. On the contrary, the invoices and the acknowledgement of debt all reflect only the respondent as the party with whom the applicant contracted.

12. Consequently, applying the principles in the Vandenhende judgment, the first point *in limine* is without merit and falls to be rejected.

Second point in limine: factual disputes not resolvable in application proceedings

13. The respondent submitted that there are material disputes of fact which cannot be resolved in application proceedings. Its answering affidavit dated 4 April 2023 admitted that in terms of the aforementioned by-law the respondent's entitlement to back-bill a customer is limited to a period not exceeding six months prior to the respondent discovering the under charging and correcting same. However,

it challenged the applicant's calculations and stated that in terms of its own calculations the correct amount owing by the applicant for back-billed electricity for a period of 6 months prior to discovering the under charging and correcting same, is R3,157,381.94 and that its calculations appear from the spreadsheet annexure **CJ 1**. It further pointed out that the applicant's founding affidavit (which is dated 23 January 2023) contends that the respondent was only entitled to impose additional charges by way of back-billing in an amount of R1,220,481.39, thus resulting in the parties being apart from each other by difference of R1,936,900.55

14. The applicant on the other hand submitted that the respondent admitted all the facts and the law that are salient to the determination of this matter, except for the particular amount sought to be reversed from the applicant's account which amount is a matter of simple calculation.

15. Importantly, although the respondent's answering affidavit is dated 4 April 2023, it contained no reference to communications between the parties and meetings which were held between them in an attempt to identify and resolve their differences which took place during February and March 2023. Those were detailed in the applicant's replying affidavit dated 19 April 2023 and, as submitted on behalf of the applicant in oral argument, the result was that it put an end to any material dispute of fact regarding the calculations.

16. The respondent had in its answering affidavit correctly pointed out the one figure which was in dispute. That dispute was resolved by the applicant accepting the respondent's figure as being correct in accordance with the respondent's own spreadsheet annexure **CJ1**.

17. Two crucial figures which were not in dispute were the following: based on the respondent's 21 August 2021 invoices reflecting the results of the electricity consumption readings taken on 3 August 2021, **R7 819 711.88** being the total actual charges over the entire back-billing period (the "total actual charges") based on actual readings from February 2019 until the date of meter reading, 3 August 2021 as reflected on the invoice (the "entire back-billing period"). From the total actual charges had to be deducted **R3 425 214.07**, being the estimated charges previously imposed and already paid by the applicant over the entire back-billing period. Also this figure is not in dispute as it is taken from the respondent's own 21 August 2021 invoice. The difference between those is

therefore the undisputed amount of **R4 394 497.81** which is the total back-billing amount charged over the entire back-billing period.

18. The remaining crucial figure is **R2,104,071.88** which is the amount of estimated charges previously imposed by the respondent and already paid by the applicant in respect of the six-month period from 1 February 2021 until 3 August 2021. That appears from a schedule annexure **FA 7** to the applicant's founding affidavit. To avoid unnecessary prolixity the applicant did not attach the invoices referred to but in annexure **FA 7** It listed each invoice number and date and amount paid. The respondent's heads of argument submitted that the applicant's version in annexure **FA 7** should not be accepted because the invoices were not attached. There is no substance in this submission. After all, annexure **FA 7** lists the details which appear from respondent's own invoices. If the respondent believed the figures in annexure **FA 7** to be suspect or not in accordance with its own invoices, it could and should have raised this dispute in its answering affidavit. But, as was submitted for the applicant in oral argument, the respondent's answering affidavit simply avoided dealing with annexure **FA 7** at all. The respondent could also have called for production of the documents in terms of Uniform Rule 35 (12), but it did not do so. In the circumstances the respondent failed to raise any genuine dispute of fact in relation to annexure **FA 7**. Consequently the estimated amounts invoiced by the respondent and paid by the applicant in respect of the six-month period from 1 February 2021 until 3 August 2021 must be accepted as being undisputed and correct.

19. For purposes of oral argument and to illustrate more simply that there was no material dispute of fact, the applicant the day before the hearing circulated a one-page schedule headed "back billing recon". In that reconciliation it accepted the respondent's own figure of **R3,157,381.94** as it appears in the respondent's schedule annexure **CJ1** as correctly reflecting the actual charges imposed by the respondent for the six-month period "**February 2021 to July 2021**".

20. Having thus based its calculations on undisputed figures, the conclusion was a matter of arithmetic. From the actual charges of **R3,157,381.94** for the six-month period it deducted **R2,104,071.88** being the undisputed estimated charges for that six-month period already paid by the applicant, thus resulting in a difference of **R1,053,310.06** which represents the actual charges for the six-month period not paid by the applicant which the respondent was legitimately entitled to claim in respect of the six-month back billing period. **R1,053,310.06**

was then deducted from **R4 394 497.81,** being the total actual charges invoiced by the respondent in its 21 August 2021 invoice for the entire back-billing period and which had not been paid by the applicant. Consequently, the difference of **R3,341,187.75** as reflected on the applicants "back billing recon" would then represent the undisputed amount for which the applicant claimed it should be credited by the respondent.

21. However, in the course of preparing the judgment in this matter I became concerned about the following aspect which was not canvassed at the hearing. I raised this as follows in an email dated 19 January 2024 addressed to the attorneys and counsel of both parties and requested them to respond to my query by way of supplementary heads of argument.

> *"On the applicant's version, the actual charges of R3 157 381.94 imposed as reflected on annexure CJ 1 to the respondent's answering affidavit is exclusive of VAT according to paragraph 26 of the replying affidavit. If that is correct, then as a matter of logic should VAT amounting to R473,607.29 (i.e. totalling R3,630,989.23 inclusive of VAT) not be added thereto when on the applicants version the estimated charges of R2 104 071.88 previously imposed and already paid (and which presumably include VAT) is subtracted?*
>
> *If my understanding is correct then does it not follow as a matter of logic and arithmetic that the amount of the actual charges not paid by the applicant would be R1,526,917.35 and not R1,053,310.06 as calculated in paragraph 20 of the applicant's heads of argument; and that when subtracting R1,526,917.35 from R4 394 497.81 (the total extra charges not paid for the entire period) should the difference for the six-month period for which the applicant on the applicant's version claims a credit not be R2,867,580.46 instead of R3,341,187.75 as presently reflected in paragraph 22 of the applicant's heads of argument and in the "back billing recon" schedule handed up by the applicant during argument?"*

22. I directed both parties to respond by 22 January 2024. The applicant's attorney requested an extension of time until 26 January which I granted for both parties. On 26 January the applicant filed supplementary heads of argument. As those supplementary heads of argument raised new submissions, I emailed the

attorneys and counsel for both parties advising that the respondent should have a reasonable opportunity to consider and respond to the new points raised by the applicant and consequently granted respondent additional time to do so until 31 January 2024. However, although I had received an email from the respondent's counsel on 19 January acknowledging my directive and undertaking to oblige, the respondent failed to file supplementary heads of argument on 26 January or thereafter. This was despite a further reminder email on 6 February 2024 in which I pointed out that if I did not receive the requested supplementary heads of argument by 6 PM on 9 February 2024 I would assume that the respondent does not wish to make any supplementary submissions. I received "read" receipts from the respondent's attorney in response to my 31 January and 6 February emails, but received no supplementary heads of argument from the respondent. In the result I have assumed that the respondent has nothing further to add.

23. The applicant's supplementary heads of argument acknowledged that I had been correct in my query and that the applicant's recon "*was not consistent because the figure of* ***R3 157 381.94,*** *being identified in the recon as the actual charges imposed by the Respondent for the period February 2021 to July 2021 did not include VAT, when it ought to have*". However, it acknowledged a different error, namely, that the total of **R3 157 381.94** which it had taken from the respondent's annexure **CJ1**, should not have been used because that total incorrectly included charges for 7 months, i.e. it also incorrectly included a subsequent month, namely, for the period 4 August until 31 August 2021.

24. It is clear from annexure CJ1 that the applicant is correct. When correcting to consistently including VAT and by making the further correction, i.e. using the respondent's own figures on annexure **CJ1** for the six-month period from 1 February 2021 until 3 August 2021, the date of the meter reading, the corrected amount for which the applicant is entitled to a credit on the undisputed figures is **R3 459 054.38** inclusive of VAT. This was conveniently shown on the revised back billing recon attached to the supplementary heads of argument and which reads as follows:

Entire period 4 February 1 9 to 3 August 2021

Actual charges imposed (including VAT)

Less: Estimated charges previously imposed and already paid:	*R7819 711.88*
Equal: Actual charges not paid (including VAT)	*R3425 214.07*
	R4394 497.81

6 month period 1 February 2021 to 3 August 2021

Actual charges imposed as per COJ (including VAT) R3039515.31

Less: Estimated charges previously imposed and already paid *R2 104 071.88*

Equal: Actual charges not paid (including VAT) *R 935 443.43*

Actual charges not paid for the entire period (including VAT) : *R4394 497.81*

Less actual charges not paid for the6 month period (including VAT): *R 935 443.43*

Actual charges not paid for period in excess of 6 months-for which a credit must be granted (including VAT) ***R3 459 054.38***

25. In the circumstances I find that the applicant is entitled to a credit of **R3 459 054.38 inclusive of VAT** and to appropriate ancillary relief as formulated in the applicant's draft order and as set out in my order below.

ORDER:

1. The respondent's two points *in limine* are dismissed.
2. Within 14 days of this judgment being handed down, the respondent is ordered to:
   2.1. credit the Applicant's municipal account with it (account number […]) in an amount of **R3 459 054.38 inclusive of VAT** ("the charges to be credited").
   2.2. reverse all interest and disconnection/reconnection fees and legal fees and/or or miscellaneous fees where these were charged for legal work done or notices sent out) from the Applicant's account, charged to the Applicant in consequence of the imposition of the charges to be credited;
   2.3. send the Applicant an updated current invoice reflecting the reversal of the charges to be credited, any reversals as indicated in 2.2 above together with any current amount that might be due by the Applicant in consequence of the Respondent's charges.
3. The respondent is ordered to pay the costs of this application.

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Johann Gautschi AJ

11 February 2024

Date of judgment: 11 February 2024

Date of hearing: 23 October 2023

Counsel for Applicant: Adv M Oppenheimer

Attorneys for Plaintiff: Faber Goertz Ellis Austen Inc

Counsel for Respondent: Adv KM Kgomongwe

Attorneys for Respondent: Nozuko Nxusani Inc