

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, JOHANNESBURG**

Case no: 25039/2021

(1)	REPORTABLE: yes
(2)	OF INTEREST TO OTHER JUDGES: yes
_____	_____
DATE	SIGNATURE

In the matter between:

PETER TANYA MILLU

Applicant

And

**CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY**

First Respondent

CITY POWER SOC LTD

Second Respondent

JUDGMENT

This judgment is delivered by upload to the digital data base of the Court and by transmission email to the parties on 19 March 2024 at 10h00.

Sutherland DJP:

- [1] The applicant is a ratepayer and owner of a house within the area of jurisdiction of the respondent, the City of Johannesburg, (the City). The application is for a temporary interdict, and subsidiary relief, pending a final reconciliation of an account for services rendered by the City to the applicant's home. The application before me is to strike out the City's defence, including its answering affidavit.
- [2] The dispute is about whether or not the accounts of the City rendered to the applicant for electricity supplied to the applicant's home are accurate. Overshadowing that core dispute is an egregious tardiness on the part of the City and its legal representatives, about which more shall be said hereafter.
- [3] The main application was launched on 21 May 2021. This hearing takes place on 4 March 2024, almost three years later.
- [4] The City, having served a notice to oppose about two months late, eventually filed an answering affidavit on the eve of an application brought to seek default judgment set down on 6 January 2022, a delay of approximately 8 months. Naturally, this nick-of-time-act precipitated a postponement. No condonation was sought, nor is it apparent any thought was given to that step.

- [5] The applicant then brought an application to strike out the answering affidavit for want of condonation, but then acquiesced in the delay and in September 2023 withdrew it for the pragmatic purpose of accelerating progress in the litigation. A replying affidavit was thereafter filed by the applicant on 15 September. This was a few days late. This lateness was thereupon pounced upon by the City who insisted a condonation application be brought, a plainly shameless demand given its own extraordinary delay in filing its answering affidavit. The applicant then incurred the costs of the condonation application to which no serious opposition could conceivably have been offered.
- [6] The case should have then moved to a hearing. The practice of this Division requires both parties to file heads of argument prior to seeking a set down date. The applicant filed heads. The respondent did not.
- [7] As a result, in accordance with the practice of the Division, the applicant sought an order in the Special Interlocutory Court to compel the delivery of heads of argument from the respondent. The relevant part of the order granted, in the presence of the respondent's legal representatives, on 2 October 2023 is thus:
- ‘(1) The respondents shall deliver their heads of argument, practice note, chronology and list of authorities within 10 days from service of this order.
- (2) Failing compliance with (1) the applicant shall be entitled to approach this honourable court to have the respondent answering affidavit and/or defence struck out.
- (3) the respondents are granted leave to deliver a supplementary affidavit within 5 days of service of his order.’
- [8] This order was thereafter served on the City on 15 November 2023. Compliance was due on 22 November 2023. There was no compliance within that period or at all up to the day of this hearing, five months later. No explanation is on record for non-compliance, still less an application for condonation.

[9] As a result of this non-compliance, in line with the relief granted on 2 October 2023, an application was launched to strike out the defence of the City. When that case came before the court, the respondent's representatives opposed the matter. Dippenaar J ordered thus:

- (1) 'The application to strike out is postponed to the SIC on the roll of 4 March 2024.
- (2) The respondents shall deliver an answering affidavit, if any, on or before 29 February 2024 the applicant shall deliver a replying affidavit on or before 29 February 2024.
- (3) Both parties shall deliver heads of argument on or before 29 February 2024.'

[10] The applicant filed heads of argument timeously. The City filed no answering affidavit. The city delivered brief heads of argument in respect of the striking out application after the prescribed deadline.

[11] On Monday 4 March 2024, the matter then came before me. After the hearing commenced, my attention was drawn to the fact that the respondent had, whilst the case was being heard, uploaded a supplementary affidavit. No application was made to me to do so, and no thought had been given to the need for leave to do so nor the need for condonation in not adhering to the order of 2 October 2023 as cited above. Moreover, no heads of argument on the main case were uploaded. From the bar, counsel for the City told me that he had settled heads of argument in the main case on Friday 1 March, ie one court day before this hearing into the striking out of the defence. Why this document was not uploaded was not explained, still less why the question of condonation was not contemplated.

The case advanced to strike out the defence

[12] The practice directives of the Gauteng Division of the High Court established a Special Interlocutory Court (SIC).¹ Its function is to provide swift relief to overcome an adversary's obstructiveness which improperly delays the orderly progress of litigation.

[13] The relevant provisions relating to the SIC, in the Directive 1 of 2021, which were applicable at the relevant time are:

'CHAPTER 8: THE TRIALS INTERLOCUTORY COURT: ROLE AND FUNCTIONS, APPLICABLE TO ALL CATEGORIES OF MATTERS²

33.[There is established a] Motion Court, the [Special] Interlocutory Court, dedicated to interlocutory matters in Civil Trials to address issues of non-compliance with this Directive, the practice manual of the Court and any Rule of Court,....

34....

35.In an application to strike out a non-compliant Defendant's defence, such application shall be set down on notice and filed before noon on a Thursday of a week, one clear week before the week in which the matter is set down.

36.....

37.....

38.Any party who, having reason to be aggrieved by the other party's neglect, dilatoriness, failure or refusal to comply with any Rule of Court, provision of the Practice Manual or provision of this Directive, must utilise the Special Interlocutory Court to compel compliance from the delinquent party.

39.Furthermore, any breach by a Legal Practitioner to promote and advance the efficacy of the Legal Process as stipulated in paragraph 60.1 of the Code of Conduct for Legal Practitioners may be referred to the Legal Practice Council for investigation into possible professional misconduct.³

39.....

40 Among the matters which this court will deal with will be:

40.1 the failure to deliver timeously any practice note or Heads of Argument that are due.

40.2 a failure to comply with Rule 36,

40.3 a failure to sign a Rule 37 minute promptly,

40.4 a failure to comply timeously with any undertaking given in a Rule 37 conference,

40.5 a failure to secure an expert timeously for an interview with a patient,

¹ Practice Directives by the Judge President have been issued from time to time since August 2019. Included in the Directive is the procedure for the Special Interlocutory Court (SIC). The versions of these directives relevant to this case are Directive 1 of 2021 and Directive 1 of 2024.

² Despite being initially referred as the 'Trials' Interlocutory court the provisions were extended to cover all types of proceedings.

³ The Code of conduct for Legal Practitioners et al, R198 of 29 March 2019, GG 42337, as amended, promulgated in terms of section 36(1) the Legal Practice Act 28 of 2014. In particular. See article 3 and 60.1 and 60.2.

- 40.6 a failure to secure a meeting of experts for the purpose of preparing joint minutes,
- 40.7 non-compliance with any provision of this directive,
- 40.8 any other act of non-compliance in respect of an obligation that rests upon a party which may imperil expeditious progress of a matter may be the subject matter of an application to compel; the list is not limited.

41 In a proper case, punitive costs (including an Order disallowing legal practitioners' from charging a fee to their clients) may be awarded where recalcitrance or obfuscation is apparent and is the cause of inappropriately delaying the progress of any matter.' (Emphasis added)

- [14] That text of the Directive was amplified with effect from 26 February in a revision, contained in Directive 1 of 2024, which reads thus:

'27.10: An application in the SIC shall not be postponed or deferred because it becomes opposed since that would have the effect of undermining the very function of the SIC. Opposed matters shall therefore be disposed of within the week in which they are set down. The opposing litigant may file such papers to succinctly set out the basis of the opposition as the presiding Judge may permit.

27.11: To prevent unnecessary delays, additional costs, and a waste of court resources caused by non-compliance with orders handed down in the SIC, a party may seek an order in the SIC that provides for the *ipso facto* striking out of the claim or defence in the event that the other party fails to comply with an order granted by the SIC within a specified time, provided that-

- 27.11.1 The order has been served on the delinquent party, and
- 27.11.2 A rule of court provides that such non-compliance entitles an aggrieved party to apply to strike out the claim or defence.'
(Emphasis added)

- [15] The applicant relies on the order of 2 October 2023, cited above, to seek the relief.

- [16] It is necessary, first, to deal with the effect of an order of court and the failure of a litigant to comply. Self-evidently, whether or not there is a contempt depends on the fact-specific circumstances. Not every non-compliance with an order constitutes a contempt of that order. In this case, however, in my view, the only reasonable inference to draw from the facts is that there has

been an egregious contempt of an order of this court. Moreover, a contempt which is calculated not only to stymie the adversary by inordinate delay, but also constitutes an abuse of the court process. Delay has characterised the City's conduct from the beginning of the litigation. In particular, the elapse of a period of over 5 months in the face of an order of court to file the heads of argument and still not file the heads is especially egregious. Moreover, there is no explanation and, in particular, no condonation application, nor, indeed, even the tender of a condonation application in regard to the non-compliance with the order of court.

[17] It is trite that since ancient times it has been recognised that courts enjoy an inherent jurisdiction to protect the integrity of the court process. The sheer arrogant indifference of the City and its dishonourable behaviour is manifest. Organs of state are expected to behave honourably. Apparently, the City expects that it can at the same time disrespect the fundamentals of the litigation system and continue with impunity to participate in that litigation system to protect its rights. Such behaviour cannot be tolerated precisely because it is calculated to abuse the process of the court.

[18] The striking out relief is resisted by the respondent, relying on three main contentions. These are dealt with in turn.

Argument No 1:

[19] It is argued that a strike out of the defence is inappropriate because the opportunity existed for the applicant to set down the matter on the opposed motion roll in the absence of the City's heads of argument. The intellectual premise for this contention is obscure. It ignores the fact of non-compliance with an order of the court. This argument of the City, as do the other contentions dealt with hereafter, wholly fails to grasp the gravity of the manifest defiance of the court order. In this case the critical issue is not a

mere failure to comply, it is the pernicious expectation of impunity with which the City has defied the order of court.

Argument No 2:

[20] Second, the contention is advanced that there is no Rule of Court which explicitly sanctions a strike-out of a defence because of the failure to file heads. For this submission, the revised text in paragraph 27.1.2 of the SIC procedure, cited above, that became effective on 26 February 2024, is invoked. The argument overlooks the fact that the caveat was absent from the Directive applicable during the material time that the application to strike out was being processed; although in these circumstances it is immaterial which version of the SIC procedure applies. Also, the respondent's contention ignores the fact of the order of court having been defied.

[21] More importantly, the argument misconstrues the import of the provisions of para 27.1 and 27.2 of the revised Directive. The text does not mean that a rule of court specifically stating that a non-compliance with a requirement to file heads of argument is a necessary precondition to a strike out of a defence. Rather, it means that circumstances exist, as contemplated by the Rules of Court, which would justify a striking out of a defence. Rule 30A (1) provides:

(1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, or with an order or direction made by a court or in a judicial case management process referred to in rule 37A, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days from the date of delivery of such notification, to apply for an order —

- (a) that such rule, notice, request, order or direction be complied with; or
- (b) that the claim or defence be struck out.
(emphasis added)

[22] The clear import of this Rule of Court is that it embraces the order of 2 October 2023, as cited above.

Argument no 3:

- [23] The third argument engages with the nature of the remedy of striking out a defence *per se*. Incontrovertibly, an order that a defence be struck out is a discretionary remedy. As such, a court must exercise a judicial discretion and may decline to exercise the power to strike out in an appropriate fact-specific case.
- [24] This led to the invocation, on behalf of the City, of the decision by Wilson J in *Capitec Bank Ltd v Mangena [2023] ZAGPKHC 225 (16 March 2023)*. The contention advanced is that this decision is authority for the proposition that a striking out of a defence cannot be granted in application proceedings unless, if, upon a scrutiny of the respondent's answering affidavit, no defence exists. This contention exaggerates and distorts what was really held in that case.
- [25] In *Capitec*, the applicant bank had taken default judgment against Ms Mangena, the respondent, a homeowner, who had defaulted on a mortgage bond, for the outstanding balance due and payable. The order did not include making the property executable. Ms Mangena then brought a rescission application founded on the allegation that she had not received the summons. Ms Mangena failed to file heads of argument in her rescission application. The Bank brought an application to strike out Ms Mangena's claim to a rescission, based on that default. All of these machinations took place in the opposed motion court. The applicant bank invoked para 9.8.2 (12) of the Practice Manual of the Johannesburg High Court. Wilson J in *Capitec* held:

[2] The basis for the application was said to be section 9.8.2 (12) of this court's practice manual. That section of the practice manual authorises an application to this court for an order compelling a party who has not timeously

filed heads of argument in an opposed motion to file their heads within a period of not less than 5 days, failing which “the defaulting party’s claim or defence [will] be struck out”. The provision appears to be inspired by similar sections of the Uniform Rules of Court which entitle a party, in appropriate circumstances, to apply for the striking out of a defence or the dismissal of a claim. For example, Rule 35 (7) of the Uniform Rules of Court provides that a party that is delinquent in making discovery of documents may have their claim or defence struck out.’

[26] The sole question that the court in *Capitec* had to decide was whether or not *the failure to file heads of argument* was an appropriate premise upon which to strike out the applicant’s case for the rescission. *There had not been a prior order* compelling Ms Mangena to file heads within a specified period and she was axiomatically not in default of compliance with such a court order, still less in contempt of an order of court. This is a material distinction from the present case.

[27] In *Capitec*, the Court’s ultimate decision was that the application of the bank to dismiss the rescission application should fail and a further order was made sending the rescission dispute to a hearing on its merits. In the course of reaching this conclusion, two principled propositions were articulated.

[28] First, it was noted that in motion proceedings the affidavits constitute both pleadings and evidence. This broad proposition is *per se* uncontroversial. However, the question of status of the ‘evidence’ in the affidavits and considerations of when regard could properly be had to the contents, at different stages of the litigation, were not addressed in the judgment; plainly, argument had not been addressed to the court on this aspect and it was therefore not considered.

[29] The second proposition is that a court that grants a discretionary remedy must do so upon a holistic appreciation of all that is before the court. On that

premise the court had regard to the defence set out in Ms Mangena's affidavit and made a qualitative assessment of the prospects of success.

[30] The critical passages in the *Capitec* judgment read thus:

'[5] The strike-out and dismissal procedures are particularly well-suited to action proceedings because no evidence of the claim has generally been led at the time they are engaged. In striking out a claim or defence, a court does no more than bring an early end to a trial action because of a party's persistent failure to observe the rules. In doing so, the court need not have regard to the merits of the action, or the strength of the claim or defence to be struck out. Indeed, the court cannot do so, because it will not have seen or heard the evidence necessary to sustain the claim or defence to be dismissed or struck out.

[6] Motion proceedings are different. Every affidavit in motion proceedings contains both a pleading and the evidence necessary to sustain it. When a court is asked to dismiss a claim or strike out a defence for failure to file heads of argument promptly, it does so once all the evidence thought necessary to sustain the claim or defence has been placed before it. It seems to me that, in these circumstances, a court is not at liberty simply to ignore the affidavits and to dismiss a claim or strike out a defence merely because one of the parties has failed to take an important procedural step. The court must go further, and satisfy itself that, on the evidence before it, the claim or defence sought to be dismissed or struck out has no intrinsic merit.'

(Emphasis added)

[31] It is argued on behalf of the applicant that although it is truism that an affidavit is composed of both pleadings and evidence, that statement requires an important qualification: the evidence in the affidavit is not yet 'received' by a court *qua* evidence until the matter is heard on the merits and therefore a court entertaining an interlocutory application does not have any 'evidence' before it but rather, what is in the affidavit is simply *potential* evidence, that at the main hearing, may or may not be relied upon. Accordingly, this thesis means that a court hearing an interlocutory application cannot legitimately have regard to the contents of the affidavit for the purpose of an assessment of the merits of a defence. It is argued that there is authority for this proposition.

[32] In *Elher (Pty) Ltd v Silver 1947 (4) SA 173 (W)*, the court was engaged with an application to strike out various parts of affidavits filed to resist an ejectment, on

the grounds that they were irrelevant and hearsay. The application to strike out the passages was refused. At p 176 -177 the court held:

'After all, what is the real nature of the objection? This is not an objection to a pleading, it is an objection to evidence which is proposed to be tendered to the Court that hears the application. How can a Court which is not hearing the application disallow evidence which it is proposed to tender later on as irrelevant to the merits of the dispute? The Court which ultimately decides the application may have quite a different view as regards the relevancy of some of the passages when all the evidence is presented to it and the matter has been fully argued.

A great waste of time, energy and expense is involved in the procedure which Mr. *Miller* has followed. First of all, there must be a full-dress argument or, at any rate, very considerable argument on the merits in order to enable the Court to decide whether the passages objected to are or are not relevant. Then a decision as regards the relevancy of various passages must be given. Then more evidence is to be filed by the petitioner, and finally the merits must be argued again before that Court which hears the application. I do not agree that Mr. *Miller's* client is entitled, at this stage, to a decision on this issue. It is evident that what the petitioner is really seeking is legal advice from the Court. The Court asked Mr. *Miller* why he himself could not advise his client to ignore those allegations which he considered were irrelevant or based on hearsay evidence, and he indicated that if his advice turned out to be erroneous his client would be at a disadvantage. The petitioner wishes to be told by this Court that he need not deal with certain facts alleged, but this Court is not trying the merits of the dispute and those facts may turn out to be important when all the evidence is before the Court and full argument has been heard, or may be so regarded by the Court that does ultimately hear the application. There is authority for this view. In the case of *Gilbert v Comic Opera Company* (16 Ch. D. 594) the identical question arose and BACON, V.C., said:

. . . Until the hearing I cannot tell whether the affidavits objected to are really in reply or not. I have nothing to guide me at this stage of the proceedings. If they are not strictly in reply the Court will not regard them at the hearing, but that is a question which cannot now be decided.'

The head-note of the case reads:

'Affidavits filed by a plaintiff in reply will not upon interlocutory motion be ordered to be taken off the file upon an allegation by the defendant that they are not confined to matters strictly in reply: though at the hearing, if it should turn out to be so, the Court will not regard them or may give leave to the defendant to answer them.'

It is true that this was a decision on procedure under rules which differ from our rules, but the ground for the refusal of the Court to entertain objections of this character before the hearing is one of general principle. Furthermore, at this stage of the proceedings the contents of those affidavits are not tendered as evidence. The evidence is merely being collected in the form of affidavits to be tendered later on to the Court that hears the application. It follows from such cases as that of *Kingswell v Argus Co., Ltd.* and *Kingswell v Robinson* (1913, W.L.D. 129) that the contents of such documents as affidavits are not before the Court as evidence until the actual hearing of the case.

The affidavits objected to are not now before me as evidence in the application; they are merely documents filed with the Registrar to be used later as evidence, when the application is heard.

Two illustrations will show some of the inconvenience involved in the procedure now attempted to be followed: Mr. *Miller* contends – *inter alia* - that certain evidence of alleged duress does not amount to duress and he asks the Court to decide that as there is no proper evidence of duress all the evidence directed to the proof of duress should be struck out. The Court which is to decide this is not hearing the application, but merely a preliminary objection to evidence, nevertheless it is asked to decide some of the issues raised in the main application. Mr. *Miller* also contends that a certain contract which is in issue between the parties is a contract in writing and that certain evidence tendered in relation to that contract is inadmissible and should be struck out because it seeks to vary the terms of the contract. Mr. *Isaacs's* reply is that the contract is ambiguous, that it is partly in writing and partly oral, and that in any case the evidence objected to does not contradict the writing but explains it. These are all issues that will have to be decided by the Court that hears the application, but Mr. *Miller* claims the right to have them decided in advance by the expedient of applying to strike out certain evidence. Such a practice would produce grave difficulties and I am unable to sanction it by ordering the deletion of any of the passages objected to, whether on the ground that they are irrelevant or that they are hearsay evidence.'

(Emphasis added)

- [33] It is further argued that this passage from *Elher* was approved in a footnote to a passage in *Helen Suzman Foundation v President RSA 2015 (2) SA 1 (CC)* at para [227] which reads:

'It is necessary to emphasise some obvious considerations at this stage. In an application to strike out evidence on affidavit, neither the eventual veracity of the evidence nor the prospects of success of the main application are at issue. This is a trite proposition. The only question in a striking-out application is whether the evidence is admissible. The truth of the evidence plays no role at this stage; it is only determined at the end of the matter if the evidence is admitted.'

(Emphasis added)

- [34] It does not seem to me that *Elher's* case or the *Suzman Foundation* case establish a basis for the main contention advanced on behalf of the applicant; ie, that the contents of the evidence in affidavits may not be examined at the interlocutory stage in an application for the striking out of the defence. The gravamen in both decisions was the removal of evidential material, not the striking out of a defence. There is authority, however, in the *Helen Suzman Foundation* case that a court should not assess the prospects of success of a defence at the interlocutory stage. In *Capitec* the court did so, presumably because this point was not ventilated in that hearing and the attention of the Judge as not drawn to it. However, on the facts it is a harmless oversight because the authorities, as I read them, require a lower bar not a higher one,

ie: is what is in the affidavit admissible? Even that requires a court to consider the contents of the affidavit.

- [35] The more significant proposition in *Capitec* is that a court enjoys wide scope for the exercise of a judicial discretion. The formulation of Wilson J in para [5] of the *Capitec* Judgment has been cited above. I would articulate what I understand his dictum to be in more universal terms: a court shall never exercise a discretion that is inconsistent with the interests of justice. The veritable plethora of authority from the Constitutional Court judgments makes that crystal clear. A holistic approach is therefore an axiomatic corollary.
- [36] It was also argued that *Gefen and Another v De Wet No 2022 (3) SA 465 (GJ)*, a decision referenced in *Capitec*, which held that, in the context of the PIE Act, a court must examine everything before ordering an eviction, is distinguishable because the wider scope of the courts' power in such a case is expressly provided for in section 4 (7) of the PIE Act. I agree that on those grounds the *Gefen* case is distinguishable. However, I do not read the *Capitec* judgment as relying on *Gefen* as authority for the general proposition of a holistic approach to exercising a discretion; rather the *Gefen* decision is alluded to as an example of the propriety of a wide scope, a factor which seems to be in keeping with constitutional norms.
- [37] Turning to the facts, the question can be asked whether the interests of justice are served by granting or refusing the striking out of the defence as a sanction for the defiance of a court order. In my view, the manifest answer is that the interests of justice are served by the granting of the relief. I deal with the relevant considerations.

37.1 The defiance of the court order is a serious affront to the process of court. This proposition requires no elaboration.

37.2 The abuse of the process of court which this defiance causes is intolerable. The SIC procedure serves to protect the process of court and litigants are on notice as to the accountability which the court shall exact for failures and defiant conduct.

37.3 The nature of the relief sought in the main application is not final, inasmuch it seeks merely to freeze the *status quo* whilst the two parties, in accordance with the credit control regulations of the City, achieve clarity on the sum properly due and payable by the applicant. Indeed, the relief is entirely procedural in character, and the consequence of granting the order sought shall not result in the City forfeiting a single cent of what applicant might owe.

37.4 The inadequacy of the respondent's engagement with the case advanced by the applicant is evident; the critical jurisprudential issue being whether the City has complied with its own regulations. The allegations of its failure are not rebutted but are evaded in the answering affidavit. Shorn of the minutiae, the answering affidavit whinges that the reconciliations are now correct and it is up to the applicant to point out an error, if one exists. No account of the progress through the debt control regulations is offered in the answering affidavit, an aspect belaboured in the applicant's case.

[38] Accordingly, it is appropriate to strike out the defence as a sanction for defiance of the court order, the interests of justice not being compromised and the process of court requiring protection from abuse.

[39] Further, it is senseless to require the applicant to go through a ritualistic application to set the matter down again to obtain the main order sought. It too shall be granted at this stage and thereby arrest the unnecessary running up of yet more costs.

The delinquency of the City in the conduct of this case

[40] The abusive manner in which the City has behaved causing undue delay, has already been traversed. Who is responsible for this sustained pattern of utter disdain for the process of Court? What are appropriate sanctions?

[41] To determine these questions, I instructed counsel for the City to file an affidavit and argument to inform me why the pattern of delay for the contempt of the court order of 2 October 2023 should not be attributed to the attorney of record and counsel briefed in the matter. Moreover, if officials of the City were responsible, rather than the legal representatives, I required that the officials be identified. In this regard, I required to be addressed on why the City should not be ordered to pay attorney and client costs and/or the attorney of record be required to pay the attorney and client costs de bonis proprius, and further why an interdict should not be issued that the legal representatives be forbidden to recover fees for the work done on this case. I also alerted counsel for the City to the recent decision in the Constitutional Court, *Ex Parte Minister of Home Affairs 2024 (2) SA 58 (CC)*. In that case, from para [90], the court deals with the abuses experienced in the process and concludes in making a punitive order similar to the order I directed counsel to address me on.

[42] I received a single response penned by the attorney of record, Mr Hugo Baloyi. The affidavit is on behalf of the firm attorneys of record and their counsel. What it contains is superficial. The contents are, in essence, no more

than a generic description of their duties to the client and a *plea ad misericordiam* that a costs penalty against them would be unduly onerous because of the relative junior standing in the legal profession.

- [43] The affidavit does not say when they were instructed by Mr Ngwana, the City's legal advisor to settle an answering affidavit or to draft heads of argument. When referring to the interaction with the officials of the City, from who instructions on the facts could be obtained, he simply says the 'client' was consulted and that otherwise their link to the city was the legal advisor Mr Ngwana.
- [44] What could these scraps mean? Was the only real contact with the City through Mr Ngwana? Mr Ngwana is the deponent to the affidavits. I was referred to other decided cases about disputes over charges and in those matters too, the deponent on behalf of the City is Mr Ngwana.
- [45] The practice of requiring a legal advisor to depose to the affidavits is both a clue to the cause of the debacle and a manifestation of the City's reckless attitude. It should be self-evident that the City's legal advisor has no personal knowledge of the accounting. He cannot ever be more than a conduit. His affidavit craftily states that he makes it based on the information provided to him, deftly evading the typical formula that the deponent has access to and control over the documents *qua* evidence. From whom the facts were truly obtained is never said, and in this wholly unsatisfactory manner, the anonymous officials who compose the accounts are shielded from accountability. If Mr Ngwana is ever be cross-examined on his affidavits it seems likely that embarrassment would soon follow. It must be stated bluntly that the affidavits in litigation should be from persons who administer the accounts. The practice of a legal advisor being a deponent to facts of which he has no personal knowledge must stop.

[46] Despite the paucity of actual information, it is nevertheless reasonably certain that this case is yet another neat example of the attorney and counsel being starved of substantive instructions from the officials who have the substantive knowledge. It also explains the bland and evasive contents of the answering affidavit: ie, an inability by Mr Ngwana to get real instructions. One may speculate that Mr Ngwana, dutifully, is driven to instruct the attorney and counsel to come up with what they can and so they busk along: *ergo*, the product is an answering affidavit brimming with rhetoric, rather than meeting the applicant's case head on.

[47] Accordingly, in my view inaction by the legal representatives does not appear to be the cause of the inordinate delay and defiance. However, the sycophantic deference to such abuses by the City by the legal representatives is intolerable. Whether or not an attorney, placed in such an invidious position, should soldier on to do what he can ethically do for a client or should, ethically, withdraw as attorney of record is an aspect of professional practice which ought to be on the minds of professional legal practitioners if they seek to preserve decent reputations. In this case, a slavish commitment to the client's interests wholly outweighed the legal practitioner's duty to the court and to the process of court. The legal practitioners are in breach of their professional duties, as expressly stipulated in the Code of conduct for Legal Practitioners, articles 60.1 and 60.1:

'[60.1] A legal practitioner shall not abuse or permit the abuse of process of court....and shall act in a manner that shall promote and advance efficiency of the legal process.

[60.2] A legal practitioner shall not deliberately protract the duration of a case before a court or tribunal.
(Emphasis added)

[48] As for the officialdom of the City, the identity of the persons who should be held accountable remains concealed. The practice of officials waging litigation with ratepayers' money can perhaps be arrested, if in future, litigants suing the City for non-performance cite the officials, who are allegedly delinquent, in

their personal capacities and, in addition, as a matter of course, cite the City Manager in his personal capacity as the official who bears ultimate responsibility. The cavalier attitude of public officials merrily fighting a case with the public's money cannot be allowed to flourish.

[49] In the affidavit of the attorney of record the only official identified is the City's legal Advisor Mr Ngwana. In a prior judgment of this Court Mr Ngwana had been warned of the risk of punitive costs being awarded for dereliction of duty.⁴ That risk has now materialised.

[50] I require, in respect of Mr Ngwana, to be told on affidavit why he should not personally pay a portion of the costs awarded to the applicant. Such representations must be uploaded by no later than 10 days after this judgment is delivered, whereupon I shall amplify and amend the order as to liability for costs, if appropriate to do so.

[51] The City must pay the applicant 's costs on the attorney and client scale. The attorney of record for the City is interdicted from recovering a fee from the City.

[52] This judgment must be brought to the attention of the Mayor, the City Manager, the head of revenue collection and the chief legal advisor.

The Order

(1) The first and second respondents' answering affidavit and defence to the main application are struck out.

⁴ *Ulcombe Ltd v City of Johannesburg Case 18969/2022 (2023 02 01)* per Strydom J.

- (2) The first respondent is ordered and directed reverse all estimated charges on the account rendered by the first respondent under account number 206812316 (“the account”), in respect of electricity and charge the applicant by means of actual readings taken from the electricity meters: 383639, 836804, 836804, (“the original meters”), and 14305995038, (“the old meter”), from January 2018 to date in respect of the consumption of electricity on the property being [...] C[...] A[...] E[...] H[...] Extension 1, (“the property”).
- (3) For the purposes of paragraph 2. above, the term reverse may include any general accepted accounting practice to be used to correct the account in a manner which will correct the account to reflect the actual electricity consumption at the property.
- (4) In consequence of the aforesaid correction as contemplated in paragraphs 2 and above, the first respondent must reverse all the interest and penalty charges rendered on the account in relation to the inaccurate estimated charges for electricity as per the applicable tariff to coincide with the actual electricity charges to be rendered. The first respondent must further reflect all the payments made by the applicant on the account.
- (5) The first respondent is directed, and has the onus, to prove its charges rendered on the account and the first and second respondents must provide the applicant with all the job cards evidencing the actual electricity meter readings taken by the first and second respondents for the original and old meters from the date that the said meters were installed on the property to the date that they were removed, and the applicable tariff charged for the consumption of electricity which tariff must be provided in writing.

- (6) The first respondent must provide the corrected account reflecting the accurate electricity charges and the documents required as contemplated in paragraphs 2 to 5 above, with 60 (sixty) days, (including weekends and public holidays), from the date of this order being served on the Respondents by delivering a copy thereof by email to kaveer@kginc.co.za or by hand at Kaveer Guinness Incorporated, Ground Floor, Zotos Place, 34 Old Kilcullen Road, Bryanston.
- (7) The first respondent is to provide the applicant with a written report explaining each and every entry on the applicant's account from January 2018 to date of this order with reference to the job cards and the applicable tariff applied.
- (8) The reports referred to in paragraph 7 above shall be delivered within 10(ten) days, (including weekends and public holidays), of delivery of the documents contemplated in paragraph 6 above.
- (9) The first (under or through it) and second respondents are interdicted and restrained from terminating the supply of basic municipal services to the property, based on disputed amounts allegedly accruing during the period up until the date of this order, and which dispute is captured in respect of query number 8004795013.
- (10) The above interdict does not affect the first and second respondents' right to terminate the municipal supply to the property, in respect of amounts accruing from municipal consumption at the property after the date of this order and falling outside the ambit of the above reference number.

- (11) The above interdict shall remain operative pending the exhaustion of the first respondent's internal dispute resolution proceedings inclusive of its/their appeal proceedings in respect of the reference number and should these disputes still persist thereafter, the interdict shall remain operative pending the finalisation of legal proceedings to be instituted within 20 (twenty) days after the exhaustion of the internal remedy procedures as aforesaid.
- (12) Should legal proceedings not instituted within the 20-day period referred to in paragraph 11 above, the interdict shall lapse.
- (13) The first and second respondents shall pay the costs of the application on an attorney and client scale, which costs shall include the costs incurred on 14 February 2024 when appearing before Dippenaar J.
- (14) The attorney of record of the Respondents is interdicted from recovering a fee for any work done in this case.
- (15) Mr Ngwana, the legal advisor must make representations within 10 days of the service of this order in which he offers reasons why he should not personally be ordered to pay 10% of the costs incurred; a failure to timeously deliver such representations shall result in a supplementary order being made to that effect.
- (16) This judgment must be brought to the attention of the Mayor, the City Manager, the Head of revenue collection in the City and to the chief legal advisor.

Roland Sutherland
Deputy Judge President,
Gauteng Division, Johannesburg.

Heard: 4 March 2024
Judgment: 18 March 2024.

Appearances:

For the Applicant:

Adv J Peter SC

Instructed by Kaveer Guinness Incorporated.

For the First and Second Respondents:

Adv E Sithole

Instructed by Madhlopa and Thenga Incorporated.