



**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

**Case No.: 14370 / 2022**

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

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DATE	MEERSINGH A.J.

In the matter between:

**JCO CONSTRUCTION (PTY) LTD**

Applicant

And

**CITY POWER (PTY) LTD**

First Respondent

**THE CHIEF EXECUTIVE OFFICER  
OF CITY POWER (PTY) LTD**

Second Respondent

**THE CITY OF JOHANNESBURG METROPOLITAN  
MUNICIPALITY**

Third Respondent

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**JUDGMENT**

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**MEERSINGH A.J. :**

1. This was an application purportedly for mandamus relief which was previously enrolled and heard on an urgent basis. The matter was then dismissed for lack of urgency and brought before this court in its ordinary course.
2. The applicant is a property development company. It is the owner of Wilgeheuwel Extension 26 Township and Wilgeheuwel Extension 67 Township the latter of which is the subject matter of this application.
3. The first respondent is City Power PTY LTD, a Municipal Owned Entity of the third respondent, The second respondent is the CEO of City Power PTY LTD. The third respondent is the City of Johannesburg Metropolitan Municipality ("the COJ").
4. This application commenced for mandamus relief with the intention of seeking an order as follows:-

An order declaring that the Township Electrical Reticulation Standard for Underground Systems Policy ("the policy ") dated June 2008 has not been properly publicly participated and/or adopted as is required by the Constitution and the Local Government: Municipal Systems Act; and consequently, the said "Policy" does not bind the first respondent in the execution of its powers and is merely a reference document that may guide and inform the first respondent but bears no greater legal status than any other document or suite of documents to which the first respondent may have regard when exercising its various statutory powers, including the power (i.e. discretion) to issue positive comments pursuant to the applicant's rezoning application;

An order compelling the first respondent to issue its positive comments relating

to the applicant's rezoning application in respect of Erf 1639 Wilgeheuwel Extension 67 Township lodged on 17 January 2022 and amended on 1 March 2022 ("the rezoning application") within 7 calendar days of the date of this Order failing which the applicant may, on the same papers duly amended and/or supplemented where necessary, apply to this Honourable Court for an order that the Chief Executive Officer of the first respondent is in contempt of an Order issued by this Honourable Court and committing the Chief Executive Officer to a period of incarceration and/or imposing a fine on such persons for their contempt, Together with ancillary relief.

5. The matter was heard on the 1<sup>st</sup> November 2022. It became evident from the submissions made by the applicant that strong reliance was placed on the settlement agreement dated 5 December 2017 entered into by the Applicant and The First and Second Respondent and forming part of the papers before it. The Applicant in its opening argument advised the court that prayer 2 of the notice of motion was in fact seeking specific performance to compel City Power to comply with its obligations which it assumed in the Settlement Agreement. The issue before this court relates to the settlement agreement and the respondents contention that it will not issue positive comments unless the Applicant complies with "the policy". The Applicants contention being that the agreement of settlement was concluded at a time when "the policy" had already been in existence. The policy did not inform the terms of the settlement agreement. The court then accorded both parties an opportunity to

supplement their papers to deal specifically with the settlement agreement, in particular, why an order for specific performance should or should not be granted. The leave granted to supplement the papers would assist this court in a proper understanding of the import of “ the policy “ in relation to the settlement agreement and the evaluation of the intention of the application. This leave to supplement papers was accorded because this court may where it deems fit amend the relief sought in order to grant suitable and competent relief based on the circumstances of the case before it.

6. Both parties filed supplementary affidavits. The matter was once again heard on the 29<sup>th</sup> November 2022. The relief sought was subsequently amended to seek an order in the following terms :-

The first respondent is ordered , within 3 days of the service of this order on the second respondent , to comply with the provisions of the settlement Agreement concluded between the Applicant and the First Respondent on 5 December 2017 ( ;The Settlement Agreement”) a copy of which in annexure “a” to this order , which was concluded by the First Respondent despite the existence of City Power’s Township Electrical Reticulation Standard for Underground Systems Policy (““ the policy “”) , and more specifically with clause 2.1.4. of the settlement agreement which requires the First Respondent to provide 500kVA of electrical capacity to Wilgeheuwel Extension 67 Township for 280 units being ( or to be) constructed therein in terms of the Site Development Plan (“the SDP”) which informed the settlement agreement signed by the First Respondent, the electrical capacity of which equates to an ADMD of 1.785kVA per unit for the dwelling units in

Wilgeheuwel Extension 67 Township which replaced the erstwhile Extension 51 Wilgeheuwel which had lapsed, Together with ancillary relief.

7. The grounds of the Applicants case remains the same save that the Applicant abandoned its mandamus relief relating to “ the policy “ and persists with its desire to hold City Power to its obligations in terms of the settlement agreement.
8. The history of the matter and the common cause facts as incorporated in the joint practice notes are as follows :-

On 1 September 2016 City Power confirmed its agreement regarding the "transfer of capacity" (630 kV A for Wilgeheuwel Extension 26 Township and 630 kV A for Wilgeheuwel Extension 67 Township. City Power agreed to allocate 1 260 kVA electrical capacity to the then "proposed" Wilgeheuwel Extension 26 Township and Wilgeheuwel Extension 67 Township .
9. City Power reneged on its agreement and the applicant was compelled to launch an urgent application in this Court to compel it to issue its clearance certificate relating to Wilgeheuwel Extension 26 Township.
10. City Power indicated that it wished to settle the said litigation and negotiations ensued between the applicant and City Power during 2016 and 2017.
11. By letter to the applicant on 20 November 2016, City Power recorded that the supply of power to Wilgeheuwel Extension 26 Township is subject to the simultaneous application and physical downgrade of the services connection

supplying the Erven within (inter alia) Honeydew Manor Extension 33 from 250 to 100 kVa".

12. On 4 December 2017, as part of the settlement negotiations, City Power studied the totality of the development as depicted in the SDP, reassessed how much electrical capacity to allocate to the applicant's townships based on the number of dwelling units shown on the SOP for both townships, reduced the total capacity for the applicant's townships from 1 260 kVA to 1 130 kVA (i.e. now Wilgeheuwel Extension 26 Township received 630 kVA but Wilgeheuwel Extension 67 Township would only receive a reduced electrical capacity of 500 kVA for the 280 dwelling units to be erected therein. City Power and the applicant signed a settlement agreement on 4 December 2017 which settled the litigation between the parties and created legal rights and obligations relating to the applicant's development.
  
13. The development in Wilgeheuwel Extension 26 Township, indicated on the SOP as comprising 340 dwelling units, came about via two rezoning applications, the first of which was approved on 3 August 2018 (for 260 dwelling units) and the second (for the remaining 80 dwelling units) was approved on 30 October 2019. City Power accordingly approved electrical capacity at 1.8 kV A per unit for the development of 340 dwelling units in Wilgeheuwel Extension 26 Township ( $630 \text{ kVA} / 340 = 1,8 \text{ kVA}$ ).
  
14. On 27 September 2019 the COJ approved Wilgeheuwel Extension 67 Township (which replaced the lapsed Extension 51). The portion of land zoned "Residential 3" therein was assigned a density which permitted 197

dwelling units to be erected thereon. This represented Phase 1 of the development on Wilgeheuwel Extension 67 Township as shown on the SDP in 2017. City Power did not object to this application.

15. In January 2022 the applicant submitted its rezoning application for the final phase of the development in Wilgeheuwel Extension 67 Township, i.e. for the last 83 units out of the 280 shown on the SDP to be constructed in Wilgeheuwel Extension 67 Township.

16. The first respondent refuses to furnish the COJ's planning department with its positive comments relating to the applicant's rezoning in respect of Wilgeheuwel Extension 67 Township which is the final 83 dwelling units to be erected and which will bring the total development thereon to 280 dwelling units as shown on the SDP to which it agreed in 2017 and in respect of which it reduced the electrical capacity from 630 kVa to 500 kVa in 2017.

17. City Power insists that the applicant must now provide 5kVa per dwelling unit for the 280 dwelling units in X67 which is the amount stated in its policy.

18. The applicant's case is that the applicant concluded a Settlement agreement on the 5<sup>th</sup> December 2017 with the first respondent which agreement was drawn by City Power PTY LTD as a result of litigation entered into between the parties in respect of Wilgeheuwel Extension 26 Township, the township immediately "next door" on which 340 units have been developed and which, by agreement with City Power, has an electrical capacity of 1,8 kVA ADMD per unit. In terms of the said agreement which included Wilgeheuwel

Extension 67 Township the total electrical capacity which City Power agreed would be allocated to both Wilgeheuwel Extension 26 Township and Wilgeheuwel Extension 67 Township was 1 130 kVA which would be further divided into 630 kVA (for 340 units) in Wilgeheuwel Extension 26 Township and 500 kVA for Wilgeheuwel Extension 67 Township .

19. The clause which included the latter township in the said agreement is clause 2.1.4. which reads as follows

*“ The above is required to make 630 kVa electricity capacity available for Wilgeheuwel 26 Township as well as 500kVa to future Wilgeheuwel 67 Extension Township “*

20. This provision in the agreement was agreed to by City Power despite the existence since 2008 of City Power’s Township Electrical Reticulation Standard for the Underground Systems Policy (“ the policy “) . The COJ approved the rezoning application in respect of Wilgeheuwel Extension 26 Township. The applicant contends that the settlement agreement as prepared by City Power and presented to the applicant to sign included the subject matter before this court which is Wilgeheuwel Extension 67 Township.

21. Wilgeheuwel Extension 67 Township, an approved township was purchased by the Applicant only after it had ensured that, by agreement with City Power, 500 kVA electrical capacity would be provided to the township through a process of approved reallocation of spare electrical capacity not required by other townships in the area. This reallocation is incorporated in the settlement agreement.



22. City Power agreed to provide 500kVa supply of Electricity capacity to Wilgeheuwel Extension 67 Township for 280 units being (or to be) constructed therein in terms of the site development plan. This provision in the settlement agreement then equated to an electrical capacity of an after diversity maximum demand (ADMD) of 1.785 KVA per unit which was the equivalent of what was approved by City Power in respect of Wilgeheuwel Extension 26 Township.

23. It is impossible to separate Wilgeheuwel Extension 26 Township (for which City Power has already approved electrical capacity at 1,8kVA ADMD per unit) from Wilgeheuwel Extension 67 Township. They are developed similarly (save for the addition of inclusionary housing in Wilgeheuwel Extension 67 Township), the energy-saving mechanisms employed therein are the same and the developer is the same.

24. The applicant has employed energy-saving mechanisms within the total development of Wilgeheuwel Extension 67 Township which are the same as in Wilgeheuwel Extension 26 Township. The applicant's engineer's actual calculation of **1,7 kVA ADMD per unit** was requested by City Power and was accepted as per the settlement agreement.

25. The applicant already had approval from the COJ and City Power for the erection of 197 units within the development on the property. Therefore, only an additional 83 units were required to be considered by City Power. The

stated purpose of the amended rezoning application was to reduce the market units to 187 units and to add 93 "*inclusionary units*" thereto.

26. City Power refuses to issue positive comments in respect of the inclusionary units unless the applicant provides no less than 5kVa ADMD per unit as per "the policy".

27. This policy has neither been publicly participated nor adopted by the Council of the COJ. Furthermore, in terms of its own language, its manifest purpose is *to guide both private developers and the first respondent regarding City Power policies and standard methods of work undertaken and to declare the level of service to which the designs are accepted.*

28. City Power now requires the applicant to build additional capacity for the proposed remaining 83 Units of the 280 units in respect Wilgeheuwel Extension 67 Township to comply with "the policy" despite the applicant having installed external engineering services in excess of R13 million over both Wilgeheuwel Extension 26 Township and Wilgeheuwel Extension 67 Township as per the settlement agreement. This requirement by City Power is extortionist conduct because such increased capacity will benefit City Power in "spare electricity" which City Power will use at the expense of the applicant in other developments.

29. City Power has departed from "the policy" in respect of Wilgeheuwel Extension 26 Township, based on its acceptance of the applicant's engineer's

actual ADMD calculations. City Power is not bound by “the policy “and may (and in fact does) depart therefrom where good cause exists.

30. The applicant is aware of the constant tripping experienced by residents in the development in particular the retirement village know as Bushy Park Retirement Village. According to the applicants engineer this is not as a result of reduced capacity. This is a “phenomenon” and is due to power outages from Eskom.

31. The applicant’s rezoning application is supported by all other internal departments of the COJ and has attracted no external objections. Without City Power’s positive comments, the COJ cannot finalise the applicant’s rezoning application.

32. In short, the applicant seeks, by way of this application, an approval from City Power of 1,785 kVA ADMD per unit in respect of Wilgeheuwel Extension 67 township as was the case in respect of Wilgeheuwel Extension 26 thereby enforcing City Powers obligations which it voluntarily undertook relating to the electrical capacity which it agreed to in the settlement agreement in 2017 despite the existence of “the policy”.

33. The respondent’s case is as follows:

The respondent admits that it concluded a settlement agreement with City Power in which agreed to supply 500 kVa to Wilgeheuwel Extension 67 Township as per clause 2.1.4. thereof. City Power does not intends to remove

the allocated capacity of 500kVa. All that is required is adequate allocation as guided by the policy.

34. City Power has complied with its obligations in terms of the settlement agreement over Wilgeheuwel Extension 26 Township and has encountered adverse consequences for itself and consumers. City Power has also equally complied in respect of Wilgeheuwel Extension 67 Township specifically the 197 units of 500kVa Electricity as per the settlement agreement. The allocation of capacity per unit will be at approximately 2,5 kVA. An additional 83 units as proposed by the applicant will bring the ADMD to 1.785kva which is not in compliance with the policy.

35. The settlement agreement does not set out the actual ADMD per unit of the proposed development. The allocation of 500kVa of the entire development of Wilgeheuwel Extension 67 Township as proposed by the Applicant being 280 units is no longer sufficient in light of the risks associated with reduced capacity.

36. City Power advised the Applicant that it will not accept allocation of capacity below the standard set in its policy, rejecting the proposed allocation of 1.785 kVA which is what the ADMD would equate if it were to support to the rezoning application in respect of the remaining 83 units. The 1.8 kVa ADMD per unit as supported previously in respect of Wilgeheuwel Extension 26 is below capacity and is causing issues with inadequate electrical supply to the residents.

37. City Power is reposed with authority to supply adequate bulk electricity reticulation in the entire Johannesburg metropolitan area. It is responsible for ensuring safe and consistent supply of electricity to consumers in its area of operation.

38. During or about 01 June 2008 City Power passed a policy called The Township Reticulation Standards for Underground System Policy ("the policy") as a means to guide developers on how to conduct their township Electrical Reticulation designs and installations in developments in City Power's area of operation.

39. "The policy "was developed in terms of the National Standards that are applicable.

"The policy is a necessary tool that helps City Power to ensure sustainable supply of electricity throughout its area of operation. Clause 1 of the aforesaid policy reads as follows:-

*"This document covers the standards and specifications for township electrical reticulation. It also covers the supply, delivery, and testing of all material and equipment including the installation; commissioning hand-over to and acceptance by City Power of the required network."*

40. Clause 8 : 6.2.3.8. thereof, reads as follows

*"The preferred sizes for residential developments are 315/500kVA units and 630/1 000kVA for Industrial/Commercial use."* This clause deals with the

infrastructure requirements for the supply of electricity in a residential development.

41. This policy was developed and published to :

1. To regulate the supply of electricity by City Power
2. Serve as guiding principles for the determination of when and how to supply electricity.
3. Operate within the national regulatory frameworks.

42. The Applicant proposed measures to resolve the issue by way of redistribution of capacity. These proposed measures will not resolve the issues. The inadequate capacity allocation results in constant tripping of circuit breakers and poses a threat to human life. The effect of outages as a result of inadequate power capacity allocations was brought to the attention of City Power by the residents of the other developments in the area. In particular by the chairperson of Bushy Park Retirement village one Ms J Gontier who advised by way of an email that neither the committee nor the residents were made aware that the supply of electricity was downgraded. The retirement village has 90 year old people who are constantly dependent on their oxygen machines and emergency medical equipment. The outages caused by Eskom together with the constant tripping of the sub-station causes extreme hardship for the residents and could pose a threat to human life.

43. City Power has previously allowed below standard capacity in respect other developments which developments include Wilgeheuwel Extension 26

Township. City Power's approval of low capacity for Wilgeheuwel Extension 26 Township was on the recommendations and calculations of the Applicant's Engineer. The implementation of solar generated energy and other alternative sources by the applicant persuaded City Power to support the application. The capacity for the Retirement Village was reduced to cater for the Applicant's development. As a result thereof it has become City Power's duty to upgrade capacity.

44. This is not so in the proposed Wilgeheuwel Extension 67 Township development. City Power deals with each development on its merits. Those that are compliant or show the allocation of alternative capacity from sources such as solar and gas do get the green light even where the ADMD allocation per unit is lower than what is stipulated in "the policy". The applicant has this option available to it to increase capacity to meet the minimum standards of allowable allocations which is 3,5kVa. City Power is dealing with different situations over different times and with hindsight. The agreement of settlement was entered into in 2017. Power outages have increased in the country.

45. According to the respondent's engineer, one Mr De Beer, these problems are a direct result of inadequate capacity allocation. In Mr De Beers view the so called 'Large Inrush Currents' happen because of low capacity allocation which in turn results in constant tripping. The 'phenomenon' as submitted by the applicants engineer as being the cause of constant tripping is not experienced in developments where sufficient capacity is in place.

46. City Power has realised the folly of its ways given the situation at the retirement village and other developments where it had allowed below standard capacity. City Power refuses to support the application because there will be serious overloading of the system that will cause persistent tripping of circuit breakers and pose a risk to human life and which will place an undue burden on its future operations

47. On evaluation of the facts before this court it is evident that the Applicant was guided in its development as a business venture by the agreement entered into by the parties. The Applicants proposal to deal with the issue of tripping by way of redistribution does not assist the applicant in the allocation of electricity over the remaining units in complying with "the policy". This will cause serious overloading of the system. The applicants were aware of the existence of "the policy" from the inception of its company. Its contention that City Power is not bound by "the policy" because of its previous ill-advised conduct cannot be sustained. The policy is in place for a specific purpose which is prescriptive as to what is expected of both the Applicant and City Power. City Power acted irresponsibly in the drafting and acceptance of the said agreement as did the applicant in its quest to obtain maximum value out of its development.

48. The policy was already in existence as at 2017 which was when the agreement was entered into. City Power ought to have been mindful of the purpose of the policy and the duties imposed on it by the said policy. City Power cannot escape its obvious culpability in allowing below standard



allocation of electricity. This court is mindful of the correspondence from Ms Gontier the chairperson of the retirement village.

49. City Power has now come to its senses. Its present stance is circumspect and prudent ,the policy serves an important purpose. This purpose has clearly been disregarded by City Power in the past and it is this conduct that has encouraged developers such as the applicant to maximise on their developments.

50. The Applicant on its papers as supplemented and by why of its oral submissions seeks an order of specific performance. It is trite that the requirements applicable for such an order are as follows:-

- a. The presence of a contract;
- b. The specific term or provision that it alleges the Respondents to be breaching; and
- c. Demand the specific execution or performance of such term or provision in the contract.

51. There is no dispute between the parties that:-

- a. An agreement was entered which into by the parties and it is the said agreement which the Applicant relies on.
- b. The specific term or provision which the Applicant refers to is clause 2.1.4 of the said agreement which makes provision for 500kVa electrical capacity over Wilgeheuwel Extension 67 Township.

52. Both City Power and the Applicant have seriously undervalued the requirement for power allocation as compared to the applicable standards.

Both parties disregarded "the policy". This agreement was entered into in good faith as at 2017. The circumstances prevalent at such time were different.

53. This court in balancing the facts before it which include the views of the applicants engineer, the views of the respondents engineer and the issues actually experienced by the residents where the capacity is reduced to almost one third of the recommended allocation as per "the policy", is inclined to accept that the reduced capacity contributes substantially to the constant tripping which in turn could pose a threat to human life.

54. The only dispute before this court relates to whether the respondent may be ordered to comply with the settlement agreement for the provision of 500kVa over the entire development as proposed by the applicant which includes the additional 83 units.

55. The Settlement Agreement is clearly inimical to the present interests of the community.

Wessels on the Law of Contract in South Africa : 2nd Edition, Vol 1, para 480 states that "(a)n act which is contrary to the interests of the community is said to be an act contrary to public policy". Wessels goes on to state that such acts may also be regarded as contrary to the common law, and in some cases contrary to the moral sense of the community.

The learned author "Aquilus" in one of a series of articles on "Immorality and Illegality in Contract" in 1941, 1942 and 1943 SALJ defines a contract against public policy as "one stipulating performance which is not per se illegal or

immoral but which the Courts, on grounds of expedience, will not enforce, because performance will detrimentally affect the interest of the community" **(1941 SALJ 346)**.

*In Sasfin (Pty) Ltd v Beukes*<sup>1</sup>, the Appellate Division had recognised the principle of public policy as a benchmark for judging fairness and reasonableness. Smalberger JA held that "[n]o court should ... shrink from the duty of declaring a contract contrary to public policy when the occasion so demands".

In *Barkhuizen v Napier*<sup>2</sup> the Constitutional Court reiterated the choice of public policy over good faith. In this seminal judgment the court endorsed the concept of public policy as the benchmark for fairness and reasonableness. Ngcobo J held that the law currently stands good faith is not a self-standing rule, but an underlying value that is given expression through existing rules of law". In regard to the question what the approach is concerning constitutional challenges to contractual terms, he pointed out that ordinarily constitutional challenges to contractual terms will give rise to the question of whether *the disputed provision is contrary to public policy*" (my emphasis).

In *Beadica 231 CC and Others*<sup>3</sup> v Trustees for the time being of the Oregon Trust and Others the constitutional court held that public policy is grounds upon which a court may refuse to enforce contractual terms.

56. Consequently, the highest court in South Africa has identified public policy as the touchstone for the enforceability of contracts.

57. An order requiring the respondents to perform in terms of the said provisions of the settlement agreement will offend public policy and fly in the face of section 11 of the Constitution of South Africa which is the right to life. Every person is entitled to the safety and preservation of life.

58. On the balance of the facts of this application, considerations of the law and public policy it would be unconscionable for this court to grant the relief as sought by the applicant. This application accordingly falls to be dismissed.

59. This court is of the view that the appropriate costs order in light of the facts of the case is for each party to pay its own costs.

60. Accordingly this Application is dismissed with each party to pay its own costs.

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**MEERSINGH A.J.**

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**DATE HEARD:** 29 NOVEMBER 2022

**DATE DELIVERED:** 28 FEBRUARY 2023

**APPEARANCES**

**FOR THE APPELLANTS:**

**COUNSEL: ADV S.D. MITCHELL**

**ATTORNEYS: ROBERT VICTOR AND PARTNERS INC**

**FOR THE RESPONDENT:**

**COUNSEL: ADV GODFREY MOKONTO**

**ATTORNEYS: PADI INC ATTORNEYS**

1. Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A) (ZACA 94)
2. Barkhuizen v Napier [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC)
3. Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others (CCT109/19) [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) (17 June 2020)