

REPUBLIC OF SOUTH AFRICA



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

1. REPORTABLE: **NO**/YES
2. OF INTEREST TO OTHER JUDGES: **NO**/YES
3. REVISED.

.....**14 May 2024**
SIGNATURE DATE

CASE NO: 2023/114156

DOH: 30 April

2024

In the matter between:

**CASTING, FORGING AND MACHINING
CLUSTER OF SOUTH AFRICA (NPC)**

First Applicant

SCAW SOUTH AFRICA (PTY)LTD

Second Applicant

DUNROSE TRADING 57 (PTY) LTD

Third Applicant

ABRACON PROPERTY 1 (PTY) LTD

Fourth Applicant

**INTERNATIONAL WIRE CONVERTORS
(PTY) LTD**

Fifth Applicant

And

**CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY**

First Respondent

CITY POWER SOC LTD

Second Respondent

REASONS

BAM J

A. Introduction

1. On Tuesday 30 April 2024, the applicants, represented by counsel, applied before this court for an interim interdict restraining the respondents from terminating or threatening to terminate the electricity supply in the premises occupied by the second to the fifth applicants, pending final determination of the application they had launched during November 2023.
2. The first respondent filed a notice to oppose the application and its answering papers were due on 26 April 2024. However, the first respondent did not file its papers on 26 April. Instead, on the eve of the hearing, (29 April), the first

respondent filed papers in excess of 800 pages, including a counter application to declare the applicants vexatious litigants.

3. The applicants, as a consequence of the first respondent's conduct, were denied the opportunity to engage with the first respondent's defence and reply. The court was also denied the opportunity to read the respondent's papers.
4. Given the first respondent's failure to meet the deadline of 26 April and observe the permissible limit of pages¹ that may be filed in the urgent court, in terms of this Division's Practice Directive, the applicants suggested that the court refer the matter to the Deputy Judge President's office for a preferential date, with the rider that the court grant them the interim order set out in their Notice of Motion.
5. Having carefully reflected on the circumstances of the applicants' case, I ruled that the matter proceed without reference to the respondent's papers. Accordingly, the matter proceeded solely on the applicants' papers. After hearing the applicants, I refused the interdict. The applicants have since requested reasons for the order I made². I begin by introducing the parties and follow up with a generous statement of the background facts to put matters into perspective.

¹1. The papers combined may not exceed 500 pages in the urgent court.

²2 The request for reasons reached this office on 3 May 2024.

Structure of the reasons

6. These reasons take the following structure:

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B. Parties

7. The first applicant is a non-profit company incorporated in terms of South African laws, with its principal place of business situated at 12 Spanner Road, Spartan, Kempton Park. The first applicant's primary business is to promote growth and development of the metals manufacturing industry.

8. The second applicant is SCAW South Africa, a company duly incorporated in terms of the company laws of South Africa with its registered address recorded as Gate 1, Penny Lane, Germiston. SCAW has various divisional business units, with each conducting an independent stand-alone business that is measured and accounted for separately. This application concerns the Haggie Steel Rope division of SCAW. Its premises are located at Lower Germiston Road, Cleveland, Johannesburg. Haggie specialises in manufacturing steel wire rope for the mining and electrical sectors.

9. The third applicant is Dunrose Trading 57 (Pty) Ltd, (Dunrose) which trades under the name Abracon. Dunrose is incorporated in terms of South African laws with its principal place of business at 6 Raduktor Avenue, Stormil Ext 3.
10. The fourth applicant is Abracon Property 1, a company duly incorporated in terms of South African law with its registered address recorded as 26, 17th Avenue, Corner 2nd Street, Edenvale. Abracon is in the business of letting immovable property and is the owner of the premises occupied by Dunrose.
11. The fifth applicant is International Wire Convertors (Pty) Ltd (IWC), a company duly incorporated in terms of South African law with its registered address recorded as 88, 5th Street, Booyesen's Reserve, Johannesburg. IWC is the manufacturer of low and high carbon steel wire.
12. The first respondent is the City of Johannesburg, a Category A municipality in terms of the Local Government: Municipal Structures Act³, MSA, with its principal place of business at 158 Civic Boulevard, Braamfontein. The second respondent is the City Power Soc Ltd, an entity wholly owned by the first respondent. The second respondent's registered address is 40 Heronmere Road, Reuven. The second respondent took no part in these proceedings. Thus, reference to the respondent or the City or CoJ refers to the same person.

C. Background

³ Act 117 of 1998

13. On 2 November 2023, the applicants instituted proceedings, in the ordinary course, for an interdict to restrain the respondents from disconnecting the electricity supply to the premises occupied by the second to the fifth applicants, pending finalisation of what they referred to as disputes in terms of Section 102 of the Municipal Systems Act, MSA⁴; alternatively, without giving the applicants notice and the related components of the right to procedural fairness⁵.

14. Following the issuing of the November application, there appears to have been various exchanges of correspondence between the applicants' and the respondents' attorneys. In the letters, the applicants are critical of the respondents' threats to terminate and, in some instances, actually terminating the supply of electricity to some of the applicants' properties.

15. I quote from a letter dated 15 November 2023 to illustrate the point. The letter is from Botha Inc, the applicants' attorneys. In the relevant parts, the applicants record:

"2...we informed you that your clients[,] CoJ, in the face of the interdict and with reckless disregard of the relief being sought in the interdict application, issued pre-termination notices threatening to cut the electricity supply to two of the applicants' premises in the Interdict Application, namely the Fifth Applicant (IWC) and the Third Applicant, Dunrose Trading.

3. By the way, we refer your client to the following:

⁴ Act 32 of 2000

⁵ The applicants provide the full detail of what they envisage as related components of the right to procedural fairness in their Notice of Motion filed on 2 November 2023.

3.1 Your client and City Power were both previously represented by ENS Attorneys in relation do a dispute regarding the lawfulness of the CoJ tariffs approved by NERSA. As part of this dispute, [applicants] declared a dispute in terms of section 102 of the Local Government Municipal Systems Act 32 of 2000, in relation to each of the applicable tariff years, [applicants] paid what they contend to be lawful electricity Tariff, being a lesser amount than the NERSA approved tariff invoiced to our clients by CoJ. The difference between the amounts paid by our respective clients forms the subject matter of the Section 102 Disputes. Our clients further launched a review application to review and set aside the impugned tariff which resulted in the judgment of Kubushi J which we deal with below.

3.6 ...Your client is also aware that its electricity tariffs over the immediately succeeding years (2020/21; 2021/22; and 2022/23) are similarly being disputed by, amongst others, IWC in terms of section 102, based on substantially similar grounds.

3.7 However, in view of the CoJ's historical disregard of the section 102 Dispute, the Guideline judgement and the CoJ Judgement prompted our client to launch the interdict application in an attempt to shield our clients against the ongoing unlawful conduct by the CoJ. This interdict application was served on your client on 3 November 2022...'

16. On 16 November 2023, the respondents, through their attorneys of record, Patel Inc., responded to the applicants' letter. In the relevant parts, the letter reads:

'4. Kindly note, our client confirms the accounts ...62007 and3869 have been flagged. This must be understood as a revocation of the pre-termination notice.

5. We urge your offices that, while our client may do all in its power to flag the account every 30–60 days due to the vast number of accounts they may be dealing with, same may not occur and your offices are humbly requested to send through a follow up email to request a flagging of the account while the matter is under dispute and or statement and debate. However please note that a flagging

of the account is depended on your clients continu[ing with the] agreed [upon] payment of the accounts.

6. For reasons whereby a payment under the 59% is made, our client cannot provide a blanket undertaking as requested as [this] may lead to a precedence around credit control policies.'

17. If I understand the letter from Mr Patel correctly, the CoJ, through its attorneys, says they will continue to flag the applicants' accounts. They also invite the applicants to send an email with the accounts that are to be flagged while the accounts are under dispute or where the statement is being debated but the flagging is dependent on the applicants' continued payment of what had been agreed on the accounts. However, in the event the applicants pay an amount under 59% [presumably of what is outstanding], the CoJ cannot provide the undertaking sought by the applicants not to terminate electricity supply.

The November 2022 decision

18. It is now apposite to refer to the decision in *Casting, Forging and Machining Cluster of South Africa (NPC) and Others v National Energy Regulator of SA and Others*⁶. The decision was handed down during November 2022 with the following order:

'1. The decision of the First Respondent, published on the First Respondent's website on or about 16 August 2019 (with retrospective effect to 1 July 2019), to approve an electricity tariff for the Second Respondent for the 2019/2020 tariff year ("the tariff decision"), is reviewed and set aside.

⁶ (92792/2019) [2022] ZAGPPHC 927 (25 November 2022):

2. Save to the extent set out in paragraph 3 below, the order in paragraph 1 shall not have any retrospective effect and shall not affect any amounts that became due to the Second/Third Respondents⁷ pursuant to the tariff decision.

3. In respect of the Applicants (which shall include the members of the applicants as at the date of instituting the present application), the following regime shall apply subject to paragraph 4 below:

3.1. The Applicants and the Second/Third Respondents will seek to resolve by mutual agreement their dispute regarding the applicable electricity tariffs payable for the 2019/2020 tariff year;

3.2. If agreement is not reached in terms of paragraph 3.1 within thirty (30) days of the date of this order, the tariff decision is remitted to the First Respondent [NERSA], for it to take a decision only on the applicable electricity tariffs payable by the Applicants for the 2019/2020 tariff year; and

3.3. Following the agreement in paragraph 3.1 or a valid decision as contemplated in paragraph 3.2:

3.3.1. If the Applicants owe amounts to the Second/Third Respondents arising from the agreement in paragraph 3.1 or the decision in paragraph 3.2, they shall pay these amounts forthwith; and

3.3.2. If the Second/Third Respondents owe amounts to the Applicants arising from the agreement in paragraph 3.1 or the decision in paragraph 3.2, they shall credit the Applicants with these amounts forthwith.'

19. The following is apparent from reading the order of 22 November:

- i) The court set aside NERSA's decision, approving the CoJ's electricity tariff.
- ii) The order made by the court has no retrospective effect.

⁷ The reference to the second and third respondents is a reference to the City of Johannesburg Municipality and the City Power.

- iii) The order has no effect on the electricity tariffs of the financial years after the 2019/20, financial year.
- iv) The order did not take away the power of CoJ to use its credit control measures, including termination of services to consumers, including the applicants, in line with the City's Credit Control measures.
- v) There is no mention that the applicants may pay what they believe is the correct amount for their consumption of electricity. Rather, the order encourages the applicants and the CoJ to reach an agreement about what the applicants owe to the CoJ in relation to the 2019/20 financial year, failing which, NERSA must issue the correct tariff.
- vi) Whatever is due to the applicants following either an agreement between the applicants and the CoJ or a valid decision by NERSA, in relation to the 2019/20 financial year, must be credited forthwith, in the applicants' accounts with CoJ, and all amounts due to the CoJ must likewise be paid.
- vii) There is nothing in the order that says the applicants must be paid cash, in the event there is credit due to them following the events set out in (v).
- viii) Finally, the court did not say the CoJ's conduct, in charging a tariff approved by NERSA, had acted unlawfully. It reviewed and set aside the tariff approved by NERSA and put the responsibility to issue a valid tariff at the doors of NERSA.

20. To summarise the background:

- i) The applicants, on the strength of their success in reviewing and setting aside the decision made by NERSA approving the 2019/2020 tariff of the CoJ, have chosen to pay what they believe is the correct amount for their consumption.
- ii) As a result of the City exercising its statutory power in terms of its Credit Control measures, as empowered by the MSA, the applicants

are before court seeking an order to restrain the City from exercising those statutory powers, based on what they claim is a dispute in terms of Section 102 of the MSA.

- iii) Following various exchanges between the parties, the CoJ informed the applicants that two of their accounts had been flagged. The CoJ further invited the applicants to send an email of the accounts they want flagged but made it clear that it would continue to flag the accounts provided the applicants pay the amounts agreed upon.
- iv) In the event of paying an amount less than the 59% [of what is outstanding] the City will not flag.
- v) The CoJ further made it clear that it will not provide an undertaking not to terminate electricity supply to the any of the applicants' properties as this may set a precedent.

Applicants' approach

21. I digress to make a few observations about the applicants' approach in this application. In paragraph 7 of their founding affidavit, the deponent avers:

'I respectfully request that this affidavit is to be read together with the founding affidavit in the main application, and I will focus here only on the events that have occurred after the application was launched.

I request further that this affidavit is read against the backdrop of:

- i. the findings of this honourable court of 20 October 2022 in Nelson Mandela Bay Business Chambers NPC and another v National Energy Regulator and others, where the court declared the methodology used by NERSA to determine the municipal electricity tariffs throughout South Africa was unlawful; and*
- ii. the findings of this honourable court of 25 November 2022 in Casting Forging, and Machining Cluster of SA NPC and Others v National Energy Regulator of*

SA and others [2022] JOL 57058 (GP) where the court declared the 2019/2020 electricity tariffs of the City of Johannesburg to be unlawful, and directed NERSA to determine a lawful tariff. To date NERSA has failed to determine such tariff.'

22. The applicants do not identify which aspects of the November 2023 founding affidavit must read with the present application, bearing that the applicants are before the urgent court. The applicants also do not identify the findings in the Nelson Mandela Bay and the Casting Forging (2022) judgments they consider relevant to the present application, which the court is asked to take into account.

23. In other words, this court must sift through the mentioned material and make its own decision about what to take into account for purposes of the present proceedings. This is unacceptable. It is trite that an applicant must make their case in the founding affidavit. The application stands or falls on the basis of the case set out in the founding affidavit⁸.

24. In conducting themselves in this manner, the applicants, it would appear, have failed to heed the words of the court, per Fourie J in *Casting, Forging & Machining Cluster of South Africa (NPC) and Others v National Energy Regulator of SA and Others*⁹ where they were warned against the very same conduct of making reference to an affidavit in another case that is not before court.

⁸ *Gold Fields Limited and Others v Motley Rice LLC, In re: Nkala v Harmony Gold Mining Company Limited and Others* (48226/12) [2015] ZAGPJHC 62; 2015 (4) SA 299 (GJ); [2015] 2 All SA 686 (GJ) (19 March 2015), paragraph 121

⁹ (93301/2019) [2019] ZAGPPHC 967 (24 December 2019), paragraphs 7-8

25. On 5 April 2024, the applicants filed a supplementary affidavit wherein they purportedly seek leave to file the supplementary affidavit. They do not explain why the supplementary affidavit must be accepted by the court. They make no case other than repeat much of what is set out in the founding affidavit. They further introduce letters exchanged after the founding affidavit had been filed. The applicants appear to be oblivious to the rules regarding number and sequence of affidavits in motion proceedings. In *James Brown & Hamer (Pty) Ltd (previously named Gilbert Hamer & Co Ltd) v Simmons* NO it was said that:

'It is in the interests of the administration of justice that the well-known and well-established general rules regarding the number of sets and proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied:...Where, as in the present case, an affidavit is tendered in motion proceedings both late and out of its ordinary sequence, the party tendering it is seeking, not a right, but an indulgence from the Court: he must both advance his explanation of why the affidavit is out of time and satisfy the Court that, although the affidavit is late, it should, having regard to all the circumstances of the case, nevertheless be received.'¹⁰

D. Merits

26. Against that generous background, I now deal with the merits of the applicants' case. I begin by setting out the orders sought by the applicants in the present motion:

- i) *That this application be adjudicated as a matter of urgency....*
- ii) *That, pending the final adjudication of the main application under Case Number 2023-114156, which was issued on 2 November 2023, the respondents are interdicted from disconnecting the supply of municipal services to the premises of the second to fifth applicants.*

¹⁰ 1963 4 SA 656 (A) At 660 D-H,

iii) Ordering any respondent who opposes this application to pay the costs of the application jointly and severally on a punitive scale.

27. In order to appreciate the true nature, extent and duration of the order sought by the applicants, one must refer to the Notice of Motion, filed on 2 November 2023. The relief sought there reads:

*'1. The respondents are interdicted from disconnecting the electricity supply to the premises of the second to the fifth applicants pending the finalisation of the disputes lodged by those applicants in terms of section 102 of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act) pertaining to the 2019/2020; 2020/21; 2021/22; 2022/23; and 2023/24 financial years, **regardless of when (and in which financial year) the disputes are finally resolved.***

2. In the alternative to the relief sought in paragraph 1 above, the respondents are interdicted from disconnecting the electricity supply to the premises of the second to the fifth applicants without following the procedure set out in this paragraph.

28. I do not set out the procedure envisaged by the applicants in terms of sub paragraph 2 in paragraph 25 of this judgment. The procedure contemplated is lengthy and elaborate. The applicants bring in what they loosely refer to as the related components of their rights to procedural fairness.

29. In the present proceedings, the applicants say nothing about paying for their current consumption. They say nothing about liquidating arrears until such time that NERSA has issued a valid tariff. They make no statement about having met the CoJ to resolve their differences as per the November 2022 decision. They make no statement about what they had done, even if

the CoJ failed to play their part to resolve the issues surrounding the 2019/20 billing, in furtherance of the November 2022 Court order.

E. The Law

30. The decision of *City of Tshwane Metropolitan Municipality v Vresthena (Pty) Ltd and Others*, by the Supreme Court of Appeal, SCA, is particularly important in providing guidance to this court as the two cases have common features. In that case, Vresthena, in whose favour the interdict had been granted, sought to argue before the SCA that the order was interim as it would stand until the disposal of certain aspects of Part A and Part B. The CoT, the appellant on appeal, and respondent in the court a *quo*, had been burdened with reconnecting electricity pending the hearing of the matter. The parties there were also ordered seek an expedited date of hearing from the registrar. In confirming that the interdict was final and thus appealable, the court had the following to say:

[13] The orders that were granted by the high court have a number of shortcomings...Second, the duration of the order is indefinite which means that it shall endure until such time that the legal process in Part B is completed... Fourth, the restoration of electricity without the provision for the payment of arrears creates an anomaly in that the City is forced to provide electricity to the property where payment is not being made. Lastly, the chilling effect of the order is that it compels the City to act contrary to the prevailing law and its constitutional mandate: it must continue to supply electricity to users who are in arrears and have a history of non-payment for the foreseeable future, and at the same time the City is denied the statutory power to terminate services without approaching a court to obtain leave to do so. These characteristics of the order demonstrate that its effect is final in nature. At the very least, for reasons I traverse below, this is

*one of those cases where the relief sought ought to have never been granted, and the order is appealable on this basis too.*¹¹ (own underline)

31. I have already set out in detail the order sought by the applicant in the present proceedings. The order sought by the applicants in the present case must endure until all their disputes are finally resolved, regardless of when that might be. On the strength of the court's reasoning in *Vresthena*, the order sought by the applicants in the present case is, in fact, final in its impact. And, as I shall soon show, it carries with it the sting of this court's intrusion into the executive terrain, (which the Constitutional Court in *OUTA* referred to as the separation of powers harm), which is immediate. Meanwhile, the CoJ's hands will be tied indefinitely while the applicants consume electricity without paying for it.

32. The applicants are fully aware that the issue of the tariff is not something that can be resolved by the CoJ. NERSA is the party that must issue a valid tariff or tariffs. I refer in this regard to the comments of the court in *Casting, Forging & Machining Cluster of South Africa (NPC) and Others v National Energy Regulator of SA and Others [2019]*, where the court refused the interdict sought by the applicants:

'I agree with this dictum, but wish to add a further qualification to clarify this interpretation: having regard to the provisions of Chapter 9 of the Act, section 102(2) is intended to apply to internal disputes between a municipality and a consumer relating to, inter alia, inaccuracies or mistakes with regard to the metering systems introduced by a municipality, or the consumption of services, or the calculation of the amounts due for such services, or inaccurate accounts, or tariffs incorrectly applied by a municipality, but not with regard to the external

¹¹ (1346/2022) [2024] ZASCA 51 (18 April 2024), paragraph 13

determination of a municipal tariff in terms of other legislation by an authorised third party, such as NERSA. Such a determination is not, in my view, included under the term "dispute" as referred to in section 102(2) of the Act. This is a dispute between the applicants and NERSA and not between them and the municipality with regard to any of the grounds referred to above. This determination by NERSA falls outside the ambit of the Municipal Systems Act and therefore also outside the provisions of section 102,¹²

33. In the previously mentioned case set out in paragraph 31 of this judgment, the applicants conceded that their dispute is against NERSA, yet they continue to label the dispute/s as a Section 102 dispute/s. Apart from attaching and referring to the various pre-termination notices, the applicants make no positive statements that they have paid a particular amount/s or are committing to paying certain amounts towards a specific account/s. As a consequence, vast amounts of monies are owing to the respondent. I point to two examples:

(i) In terms of the Notice of disconnection dated 10 November 2023, with reference to the fifth applicant, IWC, with account number ending with 33869, an amount of R 34 727 495. 00 is said to be outstanding. In terms of the 23 February 2024 pre-termination notice, the amount has grown to R 38 438 199. This is a staggering thirty-eight million four hundred and thirty-eight thousand, one hundred and ninety-nine rand.

(ii) In respect of the property described as 91 & 92 Stormil, Extension 3, with account number ending with 62007, an amount of R1 860 172.00 was said to be owing as at 10 November 2023 as per pre-termination notice. Other than the claim to have paid what the applicants believe is

¹² (93301/2019) [2019] ZAGPPHC 967 (24 December 2019), paragraph 18

the correct amount, there is no mention of a rand amount paid. As for the amounts owed by IWC, they appear to be growing without any payment made.

34. I pause here to note that in the applicants' balance of convenience, which I will look into later, the applicants complain that in the event the order is not granted, they will be forced to pay the CoJ about R100 million. This is not an amount that accumulates overnight. Based on the applicants' version, they are refusing to pay the CoJ for their current consumption because, so they claim, the tariffs for the financial years after 2019/2020 are unlawfully high. They ask this court to grant them an interdict to shield themselves from what they claim is the unlawful conduct of CoJ.

35. The picture I have just painted is sufficient to demonstrate the chilling effect that the court spoke about in *Vresthena*, of compelling a municipality to act against its constitutional mandate by providing electricity to a consumer who is in arrears, and, in this case, refusing to pay for their consumption.

36. The court in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* (OUTA) laid down the law in more authoritative terms:

'A court must also be alive to and carefully consider whether the temporary restraining order would unduly trespass upon the sole terrain of other branches of Government even before the final determination of the review grounds. A court must be astute not to stop dead the exercise of executive or legislative power before the exercise has been successfully and finally impugned on review. This approach accords well with the comity the courts owe to other branches of Government, provided they act lawfully....[27] In the present case, there can be no doubt that the impact of the temporary restraining order is immediate, ongoing

*and substantial. The order prohibits SANRAL from exercising statutory powers flowing from legislation whose constitutional validity is not challenged.*¹³

37. The court went further:

[45] It seems to me that it is unnecessary to fashion a new test for the grant of an interim interdict. The Setlogelo test, as adapted by case law, continues to be a handy and ready guide to the bench and practitioners alike in the grant of interdicts in busy Magistrates' Courts and High Courts. However, now the test must be applied cognisant of the normative scheme and democratic principles that underpin our Constitution. This means that when a court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution.

[46] Two ready examples come to mind. If the right asserted in a claim for an interim interdict is sourced from the Constitution it would be redundant to enquire whether that right exists. Similarly, when a court weighs up where the balance of convenience rests, it may not fail to consider the probable impact of the restraining order on the constitutional and statutory powers and duties of the state functionary or organ of state against which the interim order is sought.

*[47] The balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of Government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm. A court must keep in mind that a **temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm.** It is neither prudent nor necessary to define "clearest of cases". However one important consideration would be whether the harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights. This is not such a case.'*¹⁴ (Own emphasis)

¹³ (CCT 38/12) [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) (20 September 2012), paragraph 26

¹⁴ OUTA, note 13 supra

38. With that exposition of the law on the granting of interdicts against public functionaries seeking to exercise their statutory powers set out, it is now convenient to say something briefly about the executive and legislative powers of a municipality, including its constitutional duties.

39. In *Vresthena* the court had the following to say:

'... The duty of the municipality to provide electricity is regulated by the Constitution, statutes and By-laws. The relevant provisions of the Constitution are as follows:

'152. Objects of local government

(1) The objects of local government are—

(b) To ensure the provision of services to communities in a sustainable manner;. . .

(2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).

153. Developmental duties of municipalities

A municipality must—

(a) Structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community; and . . .

156. Powers and functions of municipalities

(1) A municipality has executive authority in respect of, and has the right to administer—

(a) The local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and ...

(2) A municipality may make and administer By-laws for the effective administration of the matters which it has the right to administer.¹⁵

40. The court further noted:

¹⁵ *Vresthena* note 11 supra, paragraph 18

'The Constitutional Court in *Mkontwana v Nelson Mandela Metropolitan Municipality* held that electricity is a component of basic services and that municipalities are constitutionally and statutorily obliged to provide their residents with electricity. However, non-payment for such services has a negative impact on the provision of such services by the municipalities. In that regard citizens have to pay for such services. As a form of credit control, any municipality has a statutory right to terminate such services on notice. Section 102 of the Systems Act gives municipalities a discretion to implement any debt collection and credit control measures provided for in the Act.¹⁶

41. There can be no doubt that a Municipality, such as the CoJ or any other municipality, has legislative and executive powers, sourced, in the first instance, from the legislation designed to give effect to the scheme set out set out in the Constitution and, ultimately, from the Constitution itself.

F. Requirements for an interdict

a) Applicants' case of a clear right

42. The applicants claim they have a clear right in terms of section 102 of the MSA, not to have their municipal services terminated pending the finalisation of the disputes declared by each of the applicants under section 102. The applicants further note that the CoJ has taken issue with the applicants' interpretation of section 102, but they submit that for purposes of this interim application, the applicants' legal interpretation must be accepted as correct.

¹⁶ Vresthena note 9 supra, paragraph 25

43. The applicants also claim to have a clear right based on the undertaking granted by both the attorneys of City Power and CoJ (ENS) on 17 and 21 January 2024, in terms of which it was said that *'as an interim solution pending our comprehensive response, should our client elect to proceed with disconnection, ample notice will be given and any applicable procedures followed.'* The CoJ, according to the applicants, has failed to give effect to the undertaking and, in fact, continues to issue pre-termination notices, and in some instances, it cuts off municipal services without giving 'ample time' and without following PAJA.

44. Third, the applicants claim to have a clear right to have the main application adjudicated, and without having that relief undermined by CoJ terminating their electricity supply, and continually disrupting the business with notices of termination.

45. None of what the applicants claim give them a clear right has any merit. In the first instance, while the applicants coyly say the CoJ has another interpretation of section 102, and that for purposes of this interim order, their interpretation must prevail, they know that this very submission did not find favour with the court in NERSA (2019) cited in paragraph 31 of this judgment. In fact, the applicants conceded in that case that their dispute was against NERSA and for those reasons, it cannot be a Section 102 dispute.

46. With regard to the second source of their clear right, the applicants were informed by Patel Inc as early as November 2023 that the City cannot give

such an undertaking less they create a precedent. Mr Patel invited the applicants to pay the agreed upon amount/s while the accounts continue to be flagged. They have chosen not to mention anything about the Patel letter in these proceedings preferring to refer to an undertaking they say the City has not delivered on. This claim too by the applicants is astonishing given that by their own admission, the City has issued the pre-termination notices. They do not state why the pre-termination notices that are issued in the ordinary course by the CoJ are not sufficient warning for them. Nor do they say they have previously made a case to the CoJ stating why the pre-termination notices are not sufficient notice in their case.

47. As a consequence of not making the agreed payments, the CoJ has soldiered on with its Credit Control Measures as they are entitled to do, provided they give notice as set out in the CoJ's by-laws.

48. As for the claimed clear right founded on the third basis, the court in *Vresthena* has made it clear that calling upon a municipality to supply electricity to a customer who has arrears amounts to ordering the municipality to act in breach of its constitutional duty.

49. I add that the applicants' reliance on the pending application issued in November 2023 requires this court to weigh the prospects of success on the interdict sought in those proceedings. On the strength of the *ratio* in *OUTA* and *Vresthena*, the prospects are poor, especially when considering that the CoJ had long invited the applicants to work with it by paying 59% of what is

outstanding in order for it to keep the accounts flagged. They do not mention that invitation in these proceedings. They also do not allege to have made a specific payment/s towards any of the accounts. The applicants have failed to demonstrate a clear right.

b) *Irreparable harm*

50. The applicants say that the significant irreparable harm that each applicant will suffer in the event the relief is not granted is set out in the main application and is not repeated here. I interpose that this application stands or falls on the basis of what is in the applicants' founding affidavit. The applicants were warned about crafting affidavits in this fashion. [See paragraph 25 of this judgment.] They have contented themselves with making occasional references to the November affidavit, which is not before this court. The conduct is simply unacceptable.

51. They add that CoJ does not seriously dispute the disruption to the applicants' business and the consequential harm that they will suffer in the event electricity is shut off. The applicants further add that the industrial processes conducted by the applicants are entirely dependent on an uninterrupted supply of electricity and their clients have no alternative remedy but to purchase their electricity from the CoJ. This, they claim is sufficient to justify final relief.

52. During argument, counsel for the applicants, perhaps motivated by this court's decision to exclude the respondent's papers, maintained that the court

does not have evidence of the harm that will be caused to the City, in the event the order is granted. The harm is caused the moment the court grants an order forcing the CoJ to supply power to a non-paying customer with arrears, according to *Vresthena*. That is exactly what the court in *OUTA* meant by the unwarranted trespass into the executive terrain by a court and preventing the exercise of statutory power where there is no basis to do so.

53. The applicants appear not to appreciate that their refusal to pay the CoJ impacts negatively on the CoJ ability to discharge its constitutional duty towards other citizens who depend on the CoJ for services. This was accepted as a matter of principle in *Mkontwana v Nelson Mandela Metropolitan Municipality*¹⁷, in *OUTA*, and in *Vresthena* as already mentioned in these reasons. Such an order may be granted only in the clearest of cases. Based on the reasoning in this judgment, this is not one of those cases.

54. Lastly, the applicants and the CoJ were encouraged in terms of the order made in the NERSA 2022, case per Kubushi J, to work with one another to resolve their differences and conclude on what is outstanding in terms of the 2019/20 financial year. There is no reason for the applicants not to pay the CoJ in respect of the succeeding financial years for their consumption. A rough scan of the letters issued by the applicants to the CoJ demonstrates no attempt to work with the CoJ. If anything, the applicants have set out to interpret the order in a way that can best be described as unusual. I conclude that the applicants have failed to demonstrate irreparable harm.

¹⁷ (CCT 57/03) [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) (6 October 2004), at paragraph 38

c) *Balance of Convenience*

55. The applicants aver that the balance of convenience favours the granting of the interim relief. If the relief were to be refused, so it is submitted, the applicants who have a valid and pending section 102 dispute with the municipality would have no choice but to pay the disputed amount to the municipality to ensure that their electricity supply is not disconnected. In that case, the applicants would be forced to pay significant arrears, totalling about R100 million, which the applicants assert is not owing to CoJ because the tariffs that the CoJ are charging are unlawfully high.

56. The applicants add that there is no undertaking from the CoJ that were the applicants to be successful with their review, the CoJ would pay them the amounts concerned. They say that permitting the CoJ to persist with the current conduct will essentially allow the CoJ to proceed as it pleases, with abundant disregard of the existing court orders.

57. The November 2022 order uses the word 'credit' as in crediting the applicants' accounts. It does not say anything about paying cash to the applicants. Secondly, the statements that the CoJ would proceed with abundant disregard of the existing court orders.

58. I shall not repeat the November 2022 order save to say that the order makes plain that the party that must issue a valid tariff is NERSA. The Nelson Mandela Bay case deals with the methodology relied on by NERSA. None of

these court orders suggest that the CoJ is or has acted unlawfully in applying what is after all, a valid tariff, until set aside. The only tariff that has been set aside thus far is the 2019/2020 tariff. There too, the court order is clear. It laid the blame at the doors of NERSA. It further ordered the CoJ and the applicants to work together to agree the amount owing to the CoJ, failing, NERSA must issue a valid tariff.

59. On the authority of *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*¹⁸, the tariffs, once passed by NERSA are valid, until set aside and the CoJ must enforce them, regardless of what the applicants assert about those tariffs.

60. The Court in *OUTA* enjoins this court to consider the separation of powers harm when weighing the balance of convenience. It further instructs that granting an interdict against the exercise of statutory powers long before the review is decided may be granted only in the clearest of cases. The court in *Vresthena* informs that ordering a municipality to provide electricity to a customer with arrears is ordering it to act in contravention of its constitutional duty. It brings about a chilling effect. In the present case, we are dealing with a customer who not only has arrears but one that refuses to pay for its consumption on the basis that the tariffs for the financial years after 2019/2020 are unlawfully high. The balance of convenience in my view favours the refusal of the order.

18 (41/3003) [2004] ZASCA 48

d) *No alternative remedy*

61. The applicants have an alternative remedy. They were invited to pay 59% of what is outstanding so the City continues to flag the accounts. They have chosen not to say anything about that invitation in these proceedings. Nor do they say they have made such payment. Instead, they claim that in the event the order is granted, they will be forced to pay about R100 million in circumstances where there is no undertaking that they will be repaid amounts due to them. The CoJ is only permitted to credit the customer's accounts not repay a customer. In any event, as I have already mentioned, the applicants have long been invited by the CoJ to work with it by paying 59% of what is outstanding. They have chosen not to heed the invitation.

G. Conclusion

62. In sum, the applicants do not meet the requirements for an interdict, whether interim or final.

63. These then were my reasons for refusing the order.

NN BAM
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA

Date of Hearing: 30 April 2024

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