



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: 2799/2023

In the matter between:

TYSON EMMANUEL DLADLA

FIRST APPLICANT

SYNETTE UMADLADLA

SECOND APPLICANT

EMMANUEL NDUKA

THIRD APPLICANT

and

ETHEKWINI MUNICIPALITY

RESPONDENT

JUDGMENT

Nicholson AJ:

[1] The applicants, on an urgent basis, approach this court seeking *inter alia* an order for the restoration of their electricity by the eThekweni Municipality (the respondent), on the basis that the respondent's failure to give them 'individual' notice¹ of the electricity disconnection resulted in their rights to procedural fairness being infringed.

¹ Founding Affidavit, paragraph 15 at page 11 of the indexed pages.

[2] In the founding affidavit, the applicants aver that despite there being no contractual privity between the applicants and respondent; based on the reasoning in *Joseph and others v City of Johannesburg and others* (*'Joseph'*);² as tenants of the PLM Motel, situated at 542 Mahatma Gandhi Road, Durban, KwaZulu-Natal ("the property"), they have a right to procedural fairness in terms of the Constitution, and that right entitles them to individual service of the notices of termination of services, and seek an order that their rights be remedied, and their electricity restored while their rights are being remedied.

[3] The applicants seek an ancillary order for condonation for the non-adherence to the Uniform Rules of Court and that the matter be heard as urgent in terms of Uniform rule 6(12).

Factual Background

[4] The facts of this matter are not complicated and are largely common cause to the extent stated otherwise hereinbelow.

[5] The application papers were filed on or about 14 March 2023 and served on the respondent on or about 14 March 2023 at approximately 15:19. The matter was then heard in motion court on 15 March 2023 where counsel for the respondent sought to have the matter struck from the roll in light of the very short service and on the basis that a similar matter, between the parties and concerning the property, was removed from the roll less than two weeks prior.

[6] I ordered the matter be adjourned to 17 March 2023 to allow the respondent to deliver an answering affidavit.

² *Joseph and others v City of Johannesburg and others* 2010 (4) SA 55 (CC).

[7] On the day of the hearing, considering my order above, I was advised by Ms *Lennard* that she and the respondent's attorney had agreed that she would be given an answering affidavit on 16 March 2023 no later than 16:00; however, she only received the answering affidavit the morning of 17 March 2023, being the date the matter was to be heard; accordingly, she was unable to file a replying affidavit.

[8] The genesis of this matter is a notice of 'disconnection of services' (relating to the electricity) which the respondent attached to the property on 7 February 2023 ('the notice'). The notice is addressed to Ms S Moodley of 4 Sai Raj Villa, 72 Villa Avenue, Umhlatuzana, from a manager in the credit control department of respondent, advising her that the electricity to the property is scheduled to be disconnected on or about 21 February 2023 at approximately 10:00 in consequence of arrears owing to respondent, amounting to R 7 767 138.83.³

[9] Considering the notice and Ms Moodley's failure to settle the debt, the electricity services were duly disconnected on 21 February 2023.

[10] On 3 March 2023, under case no. D2206/2023⁴ in the KwaZulu-Natal High Court, Durban, Ms Moodley brought an urgent application on less than one day's notice seeking an order that the electricity be restored, pending further representations with the respondent.

[11] The above matter was heard before me where counsel for the respondent argued that the papers failed to make out a case for an interim order, because *inter alia* they failed to demonstrate a *prima facie* right to the interdict in light of the arrears, and the failure by the applicant to adhere to a previous credit agreement.

³ Founding Affidavit, Annexure 'SM1' to the founding affidavit at page 44 of the indexed papers.

⁴ Founding affidavit, paragraph 7 at page 9 of the indexed papers/pages 28A to 49 of the indexed papers.

[12] Mr *Broster*, who appeared for the respondent in that matter, sought an order that the matter be dismissed, and that the applicant pay the costs on an attorney and client scale as a result of both the very short service and the papers failing to make out a case for the relief sought.

[13] I ordered that the matter be removed from the roll and that the applicant pay the wasted costs, and granted the applicant leave to supplement its papers. It is unclear if that matter has been re-enrolled.

[14] In the present application, the applicants aver that on or about 5 March 2023, it was brought to their attention by Ms Moodley that the application under case number D2206/2023 had been adjourned and as a result, the electricity would not be restored.

[15] Mr Dladla who deposed to the founding affidavit on behalf of the applicants, states that he personally spoke to Ms Moodley about the plight of the tenants, who advised him that in terms of *Joseph*,⁵ as tenants they may approach the court because their rights to procedural fairness had been infringed. He was further advised that in consequence of the infringement of their rights, they were entitled to receive notice of the termination of the electricity.

[16] In motivation for the relief sought, the applicants stated that they were not afforded any notice of the electricity disconnection; although they subsequently established that, while a notice was stuck to an entrance lobby, it had been removed by a very irate tenant. In the circumstances, their right to procedural fairness has been infringed.⁶

[17] Further, the applicants aver that they were neither individually served with the disconnection notice, nor were they advised of the reason that the

⁵ *Supra* fn 1.

⁶ Founding Affidavit, paragraph 11 at page 10.

electricity would be disconnected, despite their paying their electricity bill to the landlord monthly, even in circumstances where other tenants struggled to pay their electricity bill, and the meter readings being exceptionally high and fluctuating monthly.

[18] In dealing with the property itself, the applicants further aver that approximately fifty-six families occupy the property, including thirty children below the ages of 9 and 16 and elderly individuals over the age of 70. The bottom of the building has a crèche that looks after children up to three years old.

[19] I pause to mention here that neither in the founding affidavit, nor in the applicants' address to me, was it ever advanced that the applicants bring this application on behalf of all the tenants of the building. In the circumstances, the amount of people living in the building, their ages, and the fact that the building also consists of a commercial business is irrelevant to this application. Further, it is unclear how the applicants would have knowledge of these averments, being mere tenants, because the founding affidavit does not explain this insight.

[20] The applicants further aver that the conditions of the property without lights are horrific because the building is very dark, and the tenants are at risk of being robbed. The electricity pump that pumps water to the various areas is unable to function which contributes to the dysfunction of the property.

[21] The applicants state that they would like to install separate prepaid meters but in light of the respondent's failure to give them 'individual' notice of the planned disconnection, they were never afforded the opportunity to make those representations to the respondent.

Disputes

[22] The disputes raised in the answering affidavit can be summarised as follows:

(a) the respondent disputes that the applicants are long-term residential tenants of the property because the property is a commercial entity that rents out rooms on an hourly basis for R90 per hour as evidenced from a sign on the building,⁷ and none of the applicants have put up any lease agreements nor documentation evidencing their occupation over a period of time or having paid for their alleged electricity;

(b) it is common cause that a notice for the disconnection of services was put up on the building, although it was subsequently removed by an irate tenant which the respondent cannot be held responsible for;⁸

(c) the building has no long-term residential tenants but only daily tenants and commercial tenants;

(d) as far as urgency is concerned, nothing in the papers justifies urgency and accordingly, this application amounts to an abuse of process.⁹

Power of Attorney

[23] At the commencement of the hearing, Mr *Veerasamy* handed to me a notice in terms of Uniform rule 7(1) that was served on the applicants' attorney of record on 16 March 2023. I understood from Mr *Veerasamy's* address to me that the reason for the notice is that they dispute that the attorney of record truly has a mandate to bring this application.

[24] It is evident from the submissions and the papers handed up to me by counsel, which I deal with hereinbelow, that indeed the Uniform rule 7(1) notice was not strictly complied with. Uniform Rule 7(1) reads:

'Subject to the provisions of sub-rules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfies the court that he is

⁷ Paragraphs 4 and 5 at page 51/annexure 'A' at page 4.

⁸ Paragraphs 24 to 29 at pages 56 to 58 of the papers/annexure 'B', pages 65 and 66.

⁹ Paragraph 11 at page 53/paragraph 44 at page 61.

authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.'

[25] The notice calls upon Rodney Reddy and Associates, the applicants' attorney of record, to furnish to the respondents, proof of authority to act on their behalf within two days, alternately to hand up such authority at court. The documents requested are the original copies of the powers of attorney and certified copies of the identity documents of the applicants.

[26] I deal with the said documents hereunder:

(a) Three documents styled 'Authority and Mandate' ('mandate'): while all three mandates were dated March 2023, and signed by the applicants and two witnesses, the day in March 2023 when they were signed is not inserted. All three mandates authorised Mr Rodney Reddy of attorneys Rodney Reddy and Associates, to act on behalf of all three applicants in this matter.

(b) Together with the first applicant's mandate, I was also handed a certified copy of a South African identity card in the name of Tyson Emmanuel Dladla, which had been certified as a true copy of the original on 2 March 2023.

(c) Together with the second applicant's mandate, I was also handed an uncertified copy of what appears to be a temporary identity document in the name Vusumuzi Synette Madladla, dated 21 February 2022 and endorsed 'valid for two months'.

(d) Together with the third applicant's mandate, I was also handed a Nigerian passport, which expired on 7 November 2015 in the name of Emmanuel Nduka.

[27] Mr *Veerasley* argues that firstly, the Uniform rule 7(1) notice was not complied with because:

(a) A power of attorney was not filed. In this regard, the document filed was not an original and secondly, the document filed is entitled 'Authority and Mandate' and is not a power of attorney as envisaged by Uniform rule 7(1).

(b) The identity document of the first applicant was certified a true copy on 2 March 2023, which is before this litigation was envisaged.

(c) In as far as the second applicant is concerned, Mr *Veerasamy* asserts that the Uniform rule 7(2) notice was not complied with because firstly, the identity document was not certified a true copy, secondly, it was dated 21 February 2022 and endorsed 'valid for two months'; and thirdly, the name thereon is 'Vusumuzi Synette Madladla', while the second applicant is cited as 'Synette Umadladla'.

(d) In as far as the third respondent is concerned, the Uniform rule 7(2) notice was not complied with because a certified copy of the passport was not filed and the passport has expired.

[28] Given all these discrepancies, Mr *Veerasamy* argues that the applicants' attorney of record has failed to demonstrate that he has the requisite authority to act for the applicants.

[29] While the issues raised by Mr *Veerasamy* are indeed suspicious and raise several questions, my view is that there has been substantial compliance with Uniform rule 7.

Issues for Determination

[30] In order to make a finding in this matter, the following issues must be determined:

- (a) do the applicants make out a case for urgency?
- (b) in as far as the merits are concerned:
 - (i) is the property a commercial or residential building, or both?
 - (ii) where the procedural rights of the applicants infringed?

Urgency

[31] With an urgent application, a litigant seeks from the presiding officer, an indulgence to be permitted not to follow the normal process because should their application run the normal course, their redress will either be

moot or insubstantial. Accordingly, the applicants approach the court with an inimitable application; wherein they must not only convince the court of the merits of the underlying application, but also of the uniqueness of their particular circumstances, before the court will be prepared to enrol and hear their application immediately.

[32] Case law is littered with matters in which the grounds for bringing an urgent application are set out. For the sake of brevity, I shall only refer to three cases, which in my view, adequately summarise the submissions and allegations that should accompany an urgent application. A convenient starting point is the authorising rule.

[33] Uniform rule 6(12) contains the regulatory framework for bringing an urgent application. The rule reads:

‘(a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as it deems fit.

(b) In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant must set forth explicitly the circumstances which is averred render the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course.

(c) A person against whom an order was granted in such person's absence in an urgent application may by notice set down the matter for reconsideration of the order.’

[34] In *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty)*,¹⁰ paras 6-9, it was held:

‘[6] the procedure set out in rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is

¹⁰ *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd* 2011 JDR 1832 (GSJ).

underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.

[7] It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able to obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his cases in that regard.

[8] In my view the delay in instituting proceedings is not, on its own a ground, for refusing to regard the matter as urgent. A court is obliged to consider the circumstances of the case and the explanation given. The important issue is whether, despite the delay, the applicant can or cannot be afforded substantial redress at a hearing in due course. A delay might be an indication that the matter is not as urgent as the applicant would want the Court to believe. On the other hand a delay may have been caused by the fact that the Applicant was attempting to settle the matter or collect more facts with regard thereto.¹¹

[9] It means that if there is some delay in instituting the proceedings an Applicant has to explain the reasons for the delay and why despite the delay he claims that he cannot be afforded substantial redress at a hearing in due course. I must also mention that the fact the Applicant wants to have the matter resolved urgently does not render the matter urgent. The correct and the crucial test is whether, if the matter were to follow its normal course as laid down by the rules, an Applicant will be afforded substantial redress. If he cannot be afforded substantial redress at a hearing in due course then the matter qualifies to be enrolled and heard as an urgent application. If however despite the anxiety of an Applicant he can be afforded a substantial redress in an application in due course the application does not qualify to be enrolled and heard as an urgent application.'

¹¹ See: *Nelson Mandela Metropolitan Municipality and others v Greyvenouw CC and others* 2004 (2) SA 81 (SE) at 94C–D; *Stock and another v Minister of Housing and others* 2007 (2) SA 9 (C) 12I–13A.

[35] In considering Rule 8 of the Labour Court rules, the Constitutional Court in *Jiba v Minister: Department of Justice and Constitutional Development and others*¹² para 18 stated,

‘Rule 8 of the rules of this court requires a party seeking urgent relief to set out the reasons for urgency, and why urgent relief is necessary. It is trite law that there are degrees of urgency, and the degree to which the ordinarily applicable rules should be relaxed is dependent on the degree of urgency. It is equally trite that an applicant is not entitled to rely on urgency that is self-created when seeking a deviation from the rules.’

[36] In *Maqubela v SA Graduates Development Association and others*¹³ para 32, the court observed:

‘Whether a matter is urgent involves two considerations. The first is whether the reasons that make the matter urgent have been set out and secondly whether the applicant seeking relief will not obtain substantial relief at a later stage. In all instances where urgency is alleged, the applicant must satisfy the court that indeed the application is urgent. Thus, it is required of the applicant adequately to set out in his or her founding affidavit the reasons for urgency, and to give cogent reasons why urgent relief is necessary. As Moshwana AJ aptly put it in *Vermaak v Taung Local Municipality*:

“The consideration of the first requirement being why is the relief necessary today and not tomorrow, requires a court to be placed in a position where the court must appreciate that if it does not issue a relief as a matter of urgency, something is likely to happen. By way of an example if the court were not to issue an injunction, some unlawful act is likely to happen at a particular stage and at a particular date.”

[37] Considering the observations in *East Rock Trading, Jiba* and *Maqubela*, it is apparent that, in order for a litigant to be successful in an urgent application, three conditions must be met:

¹² *Jiba v Minister: Department of Justice and Constitutional Development and others* (2010) 31 ILJ 112 (LC).

¹³ *Maqubela v South African Graduates Development Association and others* (2014) 35 ILJ 2479 (LC).

- (a) The application must be brought as soon as possible; accordingly, cogent reasons must be advanced to the court for any delay in bringing the application;
- (b) The applicant must provide a detailed account of why they believe that they will not receive substantial redress if the matter is heard in the ordinary course; and
- (c) The relaxation of the *dies* will depend on the degree of urgency.

[38] In considering if the applicant has made out a case for urgency, a helpful starting point is a chronology of the relevant dates, to contextualise the timeframe with the facts:

- (a) On 7 February 2023 a notice is affixed to the property advising the owners of the disconnection of the electricity on 23 February 2023.
- (b) On 23 February 2023, the electricity is disconnected.
- (c) On 3 March 2023, the owner of the property brings an urgent application for the restoration of the electricity, which is struck from the roll on the day.
- (d) On 5 March 2023,¹⁴ the applicants are advised of the outcome of the failed urgent application.
- (e) On 14 March 2023, the applicants file this application for hearing on 15 March 2023.

[39] There is no explanation in the papers for the delay between 5 March 2023 and 14 March 2023 in bringing this application. Neither is there an explanation for the application to be brought on less than one days' notice to the respondent.

Merits of Urgency

[40] In motivation for urgency, the applicants state that in light of the intolerable living conditions, tenants are throwing furniture from the tenth

¹⁴ Founding Affidavit, paragraph 7 at index page 9.

floor, and an elderly couple was held up in a flat when a bank ATM card was demanded.

[41] They contend further that the building is in a state of filth and the toilets are overflowing making the building unliveable. The court must come to the assistance of the tenants, because this application is their last resort and in the event it fails, they will be left with no choice but to leave the building, which in turn may cause the building to be unsightly on the tourist route to uShaka Marine World.¹⁵

[42] Nothing in the merits for urgency described above advances an argument that the applicants will not obtain substantial redress in the future because they have not advised the court the reason they do not leave the building given the fact that they are mere tenants.

[43] Further, these reasons *inter alia* suggest that if the application is not enrolled as urgent, it is the respondents, eThekweni Municipality, who will be prejudiced. This does not advance the applicants' argument that a delay in the litigation will cause unsubstantial redress in future.

[44] In the premises, the applicants have not made out a case for urgency, on both the merits and on account that the urgency appears to be self-created, and stands to be struck from the roll with costs. In case I am wrong on that score, I deal with the merits hereunder.

Permanent Residence *Vis A Vis* Temporary Accommodation

[45] To succeed on the merits, and considering the applicants seek an interim order, the applicants must make out a case for an interim interdict.

[46] The requirements for an interim interdict are trite and may be summarised as follows: a prima facie right even though open to some doubt;

¹⁵ Paragraphs 19 to 23 at pages 12 and 23 of the indexed papers.

a well-grounded apprehension of irreparable harm if the interim relief is not granted; that the balance of convenience favours the granting of an interim interdict; and the lack of another satisfactory or adequate remedy in the circumstances.

[47] In asserting the applicants' prima facie right that they are entitled to individual service of the disconnection notice; Ms *Lennard* on behalf of the applicants, argued that it is sufficient to assert in a founding affidavit, without providing any lease agreement, that the applicants are long-term tenants, because the respondent could have employed the provisions of Uniform rule 35 to demand the lease agreement, should it have required same. Accordingly, a bare denial that the applicants are long-term tenants is inappropriate.

[48] She states further that while the sign does state that both daily and hourly accommodation is available at a rate of R90 per hour, only part of the building is used for that purpose and not the entire building. She stated further that while the bottom is indeed a supermarket, the crèche runs from the fifth floor. The respondent was at liberty to inspect the building to confirm same and not simply dispute the allegation.

[49] It is convenient to mention at this point that the owners of the crèche and supermarket are not part of this application; accordingly, the averments relating to them are irrelevant to the application.

[50] Mr *Veerasley* submitted that in attaching the notice to the building, they had complied with the procedural requirements because; firstly, the building is a commercial building; secondly, the building, being a Motel, offers short-term accommodation of anything between hourly accommodation and daily accommodation in terms of a sign affixed to the building; and thirdly, the respondent has no obligation to first investigate the nature of the building, before issuing the notice.

[51] He stated that the respondent complied with its responsibility to advise the owners of the property of the imminent disconnection and had no such duty to provide the temporary occupants of the property with notice of the pending disconnection.

[52] Mr *Veerasamy* avers that unlike in the present matter, that involves temporary tenants (i.e daily or hourly tenants), *Joseph* is authority for where permanent tenants, in terms of their rights to procedural fairness, must be served with the disconnection notice together with the owner of the property.

[53] He argued further, that, unlike in the present case where the applicants seek an opportunity to engage the respondent about the connection of pre-paid electricity meters; the procedural rights afforded to the tenants in *Joseph* allowed them to receive the disconnection notice individually to afford them an opportunity to make representations on the payment of the arrears due to the municipality, and not simply for the reconnection of the electricity without paying the arrears either in full or with a payment plan.

[54] In examining the incongruencies between *Joseph* and the matter at hand, it appears to me that *Joseph* was decided on the premise that the applicants therein had some kind of permanence attached to the building, with either a long-term or short term lease. This is reinforced because temporary tenants would be at liberty to leave the property at a moment's notice and move to the temporary accommodation nearby. Accordingly, for *Joseph* to apply, it is axiomatic that the applicants must demonstrate that they are permanent residents.

[55] It is instructive to mention here that the very high threshold of individual service of the notice, is not in line with *Joseph*. It was common

cause in *Joseph*¹⁶ that the affixing of a notice at a prominent place is sufficient. Accordingly, Mr Veerasamy's submission on this point cannot be faulted.

[56] In examining the founding and answering affidavit regarding the status of the applicants, it appears that respondent is correct in its assertion that the status of the applicants' tenancy is not dealt with and/or pleaded at all.¹⁷ The first applicant described himself as a tenant of the property,¹⁸ while the second and third applicants describe themselves as 'residing at the property'.¹⁹ The personal circumstances of the applicants with regard to their social economic status is markedly absent from the founding affidavit.

[57] It is trite that in motion proceedings the affidavits are both the pleadings and evidence,²⁰ and the applicant must make out its case against the respondent in the founding affidavit.²¹

[58] There are no averments that the applicants either entered into a written or oral lease, nor is the duration of the lease pleaded. Considering that the applicants did not plead a lease agreement, it is not open to the respondent, as asserted by the applicants, to file a Uniform rule 35 notice requesting a lease agreement. Even if the respondents had filed the Uniform rule 35 notice, since the lease agreements are not part of the founding affidavit, the lease agreements would be inadmissible.

[59] In the premises, the applicants have failed to make out a case that they are permanent residents of the property; consequently, they have not made out a case as espoused in *Joseph* that they have a prima facie right to

¹⁶ Paragraph [60]

¹⁷ Answering Affidavit, paragraph 8, index page 52.

¹⁸ Founding Affidavit, paragraph 1.3 at index page 7.

¹⁹ Founding Affidavit, paragraphs 3 and 4 at index page 7 and 8 / Confirmatory Affidavits, pages 15 to 20

²⁰ *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA), para 28.

²¹ *Mauerberger v Mauerberger* 1948 (3) SA 731 (C)

procedural fairness. Since *Joseph* was the basis for bringing this application, the application must fail.

[60] On account that the applicants have failed to demonstrate a *prima facie* right, it is unnecessary for me to deal with the other requirements of an interim interdict. In the circumstances, the interim application stands to be struck from the roll with costs.

Order

[61] In the premises, I make the following order:

- (a) The matter is struck from the roll with the applicants directed to pay the costs.

NICHOLSON AJ

Date heard: 17 March 2023

Handed down on: 4 April 2023

For Applicants: Advocate Lennard

Instructed by: Rodney Reddy and Associates

Rodlaw House

52 Protea Place

La Mercy

For Respondent: Advocate Veerasamy

Instructed by: Linda Mazibuko and Associates

231/233 Matthews Meyiwa

Morningside