IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)

In the matters between:

CASE NO. EL 2070/2023

LIZIWE HLAZI	Applicant
And	
BUFFALO CITY METROPOLITAN MUNICIPALITY	First Respondent
THE MUNICIPAL MANAGER, BUFFALO CITY METROPOLITAN MUNICIPALITY	Second Respondent

AND

CASE NO. 2065/2023

MELVIN MARIUS DU PLESSIS	Applicant
And	
BUFFALO CITY METROPOLITAN MUNICIPALITY	First Respondent
THE MUNICIPAL MANAGER, BUFFALO CITY METROPOLITAN MUNICIPALITY	Second Respondent

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JUDGMENT

COLLETT AJ:

INTRODUCTION

[1] This judgment relates to two applications brought by way of urgency in terms of *Rule 6(12)* of the *Uniform Rules of Court* (hereinafter referred to as '*the Rules'*)

[2] The applicants in both matters seek relief upon the same factual basis relating to the alleged unlawful debt collection procedure applied to their pre-paid electricity purchases.

[3] The relief sought in each application is identical, consequently the applications were heard as one on the same day.

NATURE OF THE RELIEF

[4] In each application the applicants seek, *inter alia*, the undermentioned relief:

'4.1 that the debt collection procedure of the respondents applied towards the applicant's right to purchase electricity to the premises since 3 March 2023 to date, be declared unlawful;

4.2 that the respondents be directed to provide a detailed printout from their system of all purchases made by the applicant in respect of the premises from 1 March 2023 to the date of the finalization of this application within 14 (fourteen) days after the date of the final order being granted;

4.3 that the respondents be directed to refund and/or credit the applicant all deductions made in terms of the Debt Collection Mechanism from the 3rd of March 2023 to date of finalization of the application whereby 80% of all purchases for pre-paid electricity was allocated towards purported arrear debt of the applicant;

4.4 that the respondents be interdicted and restrained from applying their debt collection procedure in respect of the applicant's property for any amounts until such time as the respondents have complied with *Section 8(4)* of the Credit Control By-Law affording the applicant the requisite 14-day notice prior to implementing any debt collection mechanism;

4.5 that the respondent be directed to lift any partial and/or restriction to the electricity supply to the premises within 4 (four) hours after service of the court order, by the applicant's attorneys, at the office of the second respondent."

[5] This court has been inundated with a plethora of like applications with the particular facts of each case being substantially similar in all material respects. Hence the Court considers it unnecessary to document the particular facts of each case.

[6] The crux of the issue is founded in the policy adopted by the respondents which effectively applies a debt collection procedure in which 80% of the money used to purchase pre-paid electricity is offset against arrears allegedly due to the respondents and only 20% of the purchase amount is provided as electricity to the consumer. This is known as the *'80/20 policy'* and will be referred to as such hereinafter.

[7] By virtue of the overlap in the issues of both matters, it is agreed that the judgment would relate equally to both matters.

URGENCY

[8] It is trite that an applicant bringing an urgent application in terms of *Rule 6(12)* of the Rules as read with *12(d)* of the *Eastern Cape Practice Directions* (hereinafter referred to as *'the Directions'*) is required to advance grounds which he or she avers renders the application urgent and persuade the Court that the extent of the non-compliance with the Rules is justified.

[9] Implicit herein, is that the applicant is enjoined to demonstrate that reliance in the normal procedure would result in actual loss and damage. The deviation from the normal Rules embodied in the Notice of Motion must address the degree of urgency.[1]

[10] It is incumbent upon an applicant to set forth explicitly the circumstances rendering the matter urgent in an endeavour to justify the curtailment of the normal rules, procedures and time periods. The overriding consideration is to satisfy the Court that if the application is not heard as proposed, substantial redress will not be afforded in due course.

[11] An applicant may not be the author if its own urgency by delaying to the extent that the normal Rules of court are rendered inappropriate thus requiring the matter to be heard on an urgent basis.[2]

[12] Our Courts have held that the provision of electricity is probably one of the most important functions of municipal government implicating both constitutional rights and entitlement which, by their very nature, are serious considerations.[3]

[13] In considering a similar issue relating to the provision of electricity, Lowe J, found that there was sufficient urgency for the matter to be heard as such after service on the respondents with an adapted timeline.[4]

[14] In the present applications, neither applicants unduly delayed in launching their applications on the basis of urgency and have adequately documented the prejudice and harm suffered.

[15] Accordingly, the Court is satisfied that the present applications are sufficiently urgent to warrant the hearing in terms of *Rule 6(12).*

THE FACTUAL MATRIX

[1] *Nelson Mandela Metropolitan Municipality & others v Greyvenouw CC & Others* 2004(2) SA 81 (SE) at para [37], [38] & [40]

[2] *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* (11/227670[2011] ZAGPJHC 196 (23 September 2011); *Lindeque and others v Hirsch and others in re: Prepaid 24 (Pty) Limited* (2019/8846) [2019] ZAGPJHC 122 (3 May 2019[10]

[3] *Nomangezi Mzileni v Buffalo City Metropolitan Municipality* Case 2010/2022 delivered on ….

[4] *Noncedo Dukashe v Buffalo City Metropolitan Municipality and Another* Case No. 2011/2022 (18 November 2022)

[16] Both applicants aver that they have contractual relationships with the respondents and accordingly, by implication, they remain liable for municipal charges reasonably levied by the respondents. The respondents are the Buffalo City Metropolitan Municipality and its municipal manager. I should refer to the respondents as the municipality.

[17] The applicants premise their applications on the provisions of, *inter alia*, the *Municipal Systems Act No. 32 of 2000* (hereinafter referred to '*the Municipal Act'*) and the *Buffalo City Electricity Supply By-Laws (published in the Provincial Government Gazette no: 2245 of 10 December 2009)* (hereinafter referred to as 'the By-law').

[18] The applicants allege that during the '*past couple of months'* charges have been levied on their accounts for which they have not received detailed statements of account.

[19] They similarly contend that they have pre-paid electricity meters on their premises for which they are responsible for the purchase of electricity according to their needs.

[20] Both applicants alleged that when attempting to purchase electricity from agent venders of the respondents, the units received were restricted with the balance being allocated to a purported '*debt amount'* in accordance with the *80/20 policy*.

[21] They contended that they were not advised of the implementation of the policy and that the same is unlawful.

[22] They allege that the *80/20 policy* is unlawful because of *Section 162* of the *Constitution of South Africa*[5] provides that a Municipal By-law may only be enforced after it has been published in the official Gazette of the relevant province. Accordingly, the applicants allege that the *80/20 policy* is thus unenforceable. These sections apply to By-laws and not policy.

[5] Act 108 of 1996

[23] The applicants further submit that even if the *80/20 policy* is considered lawful, *Section 8(6)* the policy provides for the implementation thereof after the unsuccessful recovery following upon a disconnection and blockage from purchases of electricity.

[24] The applicants contend that they are entitled to notice of the intended debt collection and the respondents are bound to issues notice in terms of *Section 102(2)* of the *Municipal System Act* and *Section 8(4)* of the *Credit Control Policy.*

[25] The applicants' attorneys sent correspondence to the respondents affording them less than 24 hours' notice, *inter alia*, challenging the debt collection policy and requesting detailed statements of account.

[26] Conversely, the respondents contend that the credit control policy incorporating the *80/20 policy* is lawful having been approved and adopted by a Council meeting.[6]

[27] The respondents aver that consumers were informed of the implementation thereof by a public notice sent to consumers with their monthly statement, placing a notice on the municipal website and an article in the Daily Dispatch.

[28] The respondents allege that they are obliged in terms of *Section 96* of the *Municipal System Act* to collect all money due and payable to it hence the adoption of the credit control policy.

[29] The following pivotal issues requiring determination are:

29.1 whether the debt collection procedure adopted by the respondent is lawful; and

29.2 whether the applicant is entitled to be afforded 14-day notice prior to the implementation of any debt collection mechanism.

LEGISLATIVE IMPERATIVES

[6] Respondents' answering affidavit page 99

[30] *The Local Municipal Systems Act 32 of 2000* ('the Municipal Act) provides for the provision of municipal services to the local community and to ensure financially and economically viable municipalities.

[31] The Municipal Act envisaged the need for a harmonious relationship between municipal structures and local communities by the acknowledgement of the reciprocal rights and duties.

[32] The general duties of a municipality entail, *inter alia,* prioritizing the provision of the basic needs of the local community with such services being '*equitable and accessible'* and provided in a manner conducive to '*prudent, economic, efficient and effective use of available resource'*.[7]

[33] The municipality is enjoined to adopt and implement a tariff policy on the levying of fees for municipal services which must comply with the Municipal Act and other applicable legislation.[8]

[34] It is further legislated that the municipality adopt By-Laws to give effect to the implementation and enforcement of its tariff policy.[9]

[35] *Section 96* of the Municipal Act provides as follows:

> *"…A municipality –*
> *(a) must collect all money that is due and payable to it, subject to this Act and any other applicable legislation; and*
> (b) *for this purpose, must adopt, maintain and implement a credit control and debt collection policy which is consistent with its rates and tariff policies and complies with the provision of this Act."*[10] (my emphasis)

[7] Municipal Systems Act 73 (1) & (2)
[8] Municipal Systems Act Section 74 (1)
[9] Municipal Systems Act Section 75 (1)
[10] Municipal Systems Act Section 96

[36] Lastly, the Municipal Act provides for the municipality to adopt By-Laws '*to give effect to the municipality's credit and debt collection policy, its implementation and enforcement'*.[11]

[37] The right to receive electricity as a basic municipal service is further qualified by the constitutional and statutory obligations of the municipality to provide public services in a '*financially sustainable manner*.'[12]

[38] Analogous herewith is the development and enforcement of the debt-collection policies by the municipality with the importance of such procedures having been recognised as paramount by our Courts.[13]

MUNICIPAL CREDIT CONTROL

[39] As mentioned *supra* the By-law governs the electrical supply to the Buffalo City Metropolitan Municipality area.

[40] The *By-Law* makes provision for a contractual relationship between the consumer and the municipality in terms of which electricity supply is provided.[14]

[41] In terms thereof, the municipality is entitled to disconnect the supply of electricity to any premises subject to 14-days written notice where, *inter alia:*

> '*the person liable to do so fails to pay any charge due to the Municipality in connection with any supply of electricity which such person may have received from the Municipality in respect of such premises'*[15]

[11] Municipal Systems Act Section 98
[12] The Constitution of South African Act 108 of 1996; Section 152; Municipal Systems Act 73(2) (c) and section 4(2) (d)
[13] *Mkontwana v Nelson Mandela Metropolitan Municipality and Another* 2005 (1) SA 530 (cc) at para 52
[14] Electricity Supply By-Laws - Section 5
[15] Electricity Supply By-Laws - Section 21 (b) (vii)

[42] In accordance with *Section 57(5)* of the *By-Law:*

> *"…where a consumer is indebted to the Municipality for electricity consumed or to the Municipality for any other service supplied by the Municipality (including rates) or for any charges previously raised against the consumer in connection with any service rendered, the Municipality may deduct a percentage from the amount tendered to offset the amount owing to the Municipality, as set out in the section 5 agreement for the supply of electricity."*

[34] The *2022-2023 Credit Control Policy* (hereinafter referred to as the '*Credit Policy*') was adopted and approved by the Buffalo City Metropolitan Municipality Municipal Council on 31 May 2022 in accordance with the *Municipal Act*[16] as read with the *Constitution*.[17]

[44] The *Credit Policy* makes provision for the rendering of monthly accounts for municipal services, payable on the due date by the consumer.[18]

[45] Furthermore, an onus is cast upon the account holder to obtain a copy of the account should same not have been received as accounts are payable on the due date.[19]

[46] The municipal manager is enjoined in terms of the *Municipal Act* as follows:[20]

> *"The municipal manager or service provider must-*
>
> *(a) implement and enforce the municipality's credit control and debt collection policy and any by-laws enacted in terms of section 98;*
>
> *(b) in accordance with the credit control and debt collection policy and any such by-laws, establish effective administrative mechanisms, processes and procedures to collect money that is due and payable to the municipality; and*
>
> *(c) …"*

[16] Municipal Systems Act, Sections 96 and 97.
[17] The Constitution, Sections 152 and 156.
[18] Credit Control Policy, Sections 3 (1) and 3 (4).
[19] Credit Control Policy, Section 3 (6)
[20] Municipal Systems Act, Section 100.

[47] The *Credit Policy* makes provision for the termination or restriction of the provision of services when payments are in arrears[21] and for the implementation of debt collection and credit control measures in terms of the policy.[22]

[48] Provision is made for the non-implementation of the debt collection procedures if any specific amount claimed by the municipality is in dispute.[23]

[49] *Section 8* of the *Credit Policy* provides for the debt collection by the chief financial officer and for notice to the consumer as follows:[24]

> *"Amounts on accounts, which remain unpaid after the due date, will be subject to a fourteen (14) day notice period notification prior to the intended debt collection action that will be instituted."*

[50] The debt collection action to be taken makes provision for a '*disconnection of electricity supply'* and the '*blocking from the purchase of electricity'*.

[51] The *Credit Policy* in *section 8(6)* outlines the blocking narrative:

> *"(i) The Municipality will use its discretion in the block type it may apply to a consumer from the purchase of electricity on the electricity prepayment system if the account rendered by the Municipality is not paid by the due date as indicated on the monthly account.*
>
> *(ii) The block from purchase of electricity will be for the total amount outstanding on the account, including unpaid amounts handed over for collection to the panel of Collection Agents and not just for a portion of the account.*
>
> *(iii) The block from purchase of electricity for the non-payment of an account will be during the 30-day period following the due date as stipulated on the monthly account."*[25]

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[21] Municipal Systems Act, Section 97 (1)(g)
[22] Municipal Systems Act, Section 102 (1)(c)
[23] Municipal Systems Act, Section 102 (2)
[24] Credit Control Policy, Section 8(4)
[25] Credit Control Policy, Section 8 (6)(b)(i), (ii), (iii) and (vi)

THE VALIDITY OF THE CREDIT CONTROL POLICY 2022-2023

[52] It is apparent from the respondents' answering affidavit that the *Credit Policy* was duly adopted by the council[26] in compliance with the provisions of the *Municipal Act* and the *Constitution.*

[53] Accordingly, the applicants' assertion that the *Credit Policy* is unlawful must fail as their promulgation of a policy in the government gazette is not required.

[54] The respondents were entitled to invoke the terms and conditions of the *Credit Policy* in the collection of any arrears that may be due by the

[55] Despite the applicants' bare denial that notification of the implementation of the credit policy was not communicated to them, this would not, in any event vitiate its validity and/or implementation.

IMPLEMENTATION OF THE CREDIT CONTROL POLICY

[56] Our Courts are required to be mindful of encroaching upon the contractual relationship between the parties in making a finding that may effectively be inconsistent with the adopted credit policy and thus curtail the municipality's constitutional and statutory obligations to provide public services in a financially sustainable manner.[27]

[56] The municipality is obliged to give effect to its *Credit Policy* in a manner that is consistent with the terms thereof and interpreted in accordance with both the spirit of the *Municipal Act* and the guarantees of procedural fairness enshrined in our *Constitution*[28] as echoed in the *Promotion of Administrative Justice Act*[29] (hereinafter referred to as '*PAJA*').

[26] Respondents' answering affidavit
[27] Constitution Section 152; Municipal Systems Act Section 73 (2)(c)
[28] Constitution 33 (1)
[29] PAJA, Section 3 (1)

[57] The effect of applying the debt collecting mechanisms as postulated in the Credit Policy will adversely and materially affect the applicants' expectation relating to electrical supply. This decision is required to be fair with a generous interpretation being warranted.[30]

[58] The municipality's contention that written notice to the applicants is unnecessary due to the implementation of the *80/20 policy,* is not sustainable.

[59] Upon a proper reading of *Section 8*, the 14-day notice period is a precursor to the implementation of debt collection procedures. It matters not which of the procedures the municipality elects to invoke.

[60] The purpose of the 14-day notice is consistent with procedurally fair administrative action as outlined in *Section 3(2)* of *PAJA*. An interpretation seeking to differentiate between the various debt collecting procedures regarding notice is unwarranted and undermines the purpose and importance of fair administrative action.

[61] The *80/20 Policy* places a limitation on the provision of electricity supply, albeit by restricting the amount of units that will be provided to the applicant, '*materially and adversely'* affecting their rights, thus justifying the duty of procedural fairness to be exercised by the municipality.[31]

[62] In affording the applicants the 14-day notice period, the respondent is facilitating the exercise of the obligation and onus upon the applicants to seek clarity and/or lodge a dispute in terms of the *Credit Policy* as read with the *Municipal Act.* This is further consistent with the expectation of reciprocal respect and co-operation between the parties.

[63] It is common cause that the applicants did not receive the 14-day notice of the intended *80/20 Policy* which is clearly implemented as a leverage tool to encourage compliance with their contractual obligations.

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[30] *Walele v City of Cape Town & Others* [2008] ZACC 111

[31] *Leon Joseph and Others v City of Johannesburg and Others* para [26]

[64] The attempt by the municipality in seeking to limit the interpretation of notice in its *Credit Policy* is both in conflict with the right to fair administrative action and disingenuous. Compliance with fair administrative action must be strictly enforced by the Court and conduct inconsistent therewith cannot be condoned.

[65] I accordingly find that the failure to afford the applicants a 14-day written notice in terms of *Section 8(4)* of the *Credit Policy* is unlawful.

[66] Both the *Municipal Act* and the *Credit Policy* are replete with mechanisms whereby the applicants can query or dispute the charges or amounts claimed by the municipality. They have, other than a last minute, short notice letter by their attorneys, failed to invoke any of these options.

[67] The Court cannot be rendered a credit control agent by the parties abrogating their rights or duties as enunciated in the policy and legislation. The applicants have internal remedies available to address their concerns and conversely, the municipality is enjoined to give effect thereto.

[68] Whilst the Courts will not hesitate to uphold constitutional values and fairness, it is incumbent upon litigants to first exhaust the other remedies prior to instituting litigation.

[69] These applications are but two on the conveyer belt of like applications swarming the court roll in circumstance when the appropriate relief is prescribed in policy and legislation vitiating the need for this Court's intervention.

[70] Regrettably, the quality of the papers serving before this Court in these and many like matters has been sacrificed by the immeasurable quantity thereof.

[71] By way of illustration, neither of the present founding affidavits are properly commissioned and are '*cut and paste*' replicas of each other.

[72] The paucity of facts supporting each applicant's individual claim is overshadowed by the verbose citations of law and policy. The affidavits smack of a '*one size fits all*'

drafting style which leaves one pondering as to the correctness of the generic '*personal*' facts. Illustrative hereof is the contents at paragraph 56 in both founding affidavits[32] which are identical. That paragraph reads as follows:

> *'56. It is imperative that I have access to the full supply of electricity, inter alia, security and various gates operated by electricity, alarms, my fridge which is stocked with food and water used for cooking, cleaning and working.'*

[73] The affidavits are burdened with legislative and policy references, interpretation, and legal argument. In essence, and generously construed, only some 8-pages of the 32-page affidavit bear some semblance of facts deposed to by the deponent, albeit in the customized format that has become the norm in these proceedings. This is inconsistent with *Rule 6(1)*[33] which provides that an application be supported by an affidavit '*as to the facts'* as the founding affidavit contains superfluous and irrelevant information.

[74] Furthermore, the affidavit is burdened with unnecessary annexures, none of which are initialled in accordance with the Practice Directions.[34]

[75] In addition, the applicants failed to file Heads of Argument in accordance with the *Practice Directions*, as both applications exceeded 100 pages and were in effect opposed applications.[35] It deserves mention that the municipality did file Heads of argument in one of the applications.

COSTS

785] Generally, the matter of costs is that the successful party should be awarded costs unless there are good grounds, misconduct or exceptional circumstances to order otherwise.

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[32] Applicants' founding affidavit.
[33] Uniform Rules, Rule 6 (1)
[34] Practice Directions, Rule 23 (v)
[35] Practice Directions, Rule 8 (c)

[76] A successful litigant may be ordered to forfeit costs for numerous reasons, *inter alia,* allowing defect in pleadings or causing unnecessary or frivolous litigation.

[77] An affidavit containing unnecessary evidence has been held to constitute sufficient grounds to disallow costs to a successful party. Inordinate prolixity in affidavits has been met with displeasure by the courts and rightly so.[36]

[78] In *Rosani (born Nohako) and Another v Qoboka and Another,*[37] Tokota ADJP noted with concern that:

'*There appears to be a growing prevalence of failure to comply with the Rules of Court and a total disregard for the practice directives.'*

[79] Non-compliance with the *Rules* and *Practice Directions* creates a culture of not only poor quality litigation but an abuse of court process.

[80] I echo the sentiments of Tokoto ADJP that the time has come for the Court not to tolerate the non-compliance with the *Rules* and *Practice Directions.*[38]

[81] The lackadaisical approach that has crept into the presentation of the present and like matters is unfortunate. Whilst the plight in seeking to vindicate the violation of those whose rights have been unfairly affected is admirable, this cannot justify the non-compliance with the *Rules* or *Practice Directions*.

[82] The reality is that this Court is being bombarded with a host of sub-standard litigation, with scant regard being paid to either the content or the Rules and in circumstances where there is a reluctance to explore alternative remedies.

[83] Whilst the applicants have been partially successful in the relief sought, for the reasons outlined, I am not inclined to award the costs of the application to them.

RELIEF

[36] *Patmore v Patmore* 1997(4) SA 785 (W) at 787H – 788H; *Visser v Visser* 1992(4) SA 530 (SECLD) at 531
[37] (4443/2020) [2022] ZAECMHC 42 (20 October 2022), paragraph 3
[38] Rozani and Another v Qoboka and Another, paragraph 4

[84] In considering the relief that is appropriate, there appears little point in granting an interim order thus permitting a matter to remain on the court roll when the parties have fully ventilated the issues during argument.

[85] This will serve no purpose other than to proliferate an already overburdened roll with like matters and increased legal costs.

[86] Accordingly, the following order will issue in respect of each application:

1. The application is enrolled and heard as one of urgency in terms of *Rule 6(12)* of the *Uniform Rules of Court*;

2. The Respondents' failure to deliver to the applicant a 14-day written notice prior to implementing debt collection procedures is declared unlawful;

3. The first respondent is directed to deliver to the applicant a 14-day written notice of its intention to restrict the purchase of electricity supply to the applicant's premises.

4. The respondents are directed to uplift any restriction on the purchase of electrical supply to the applicant's premises within 4 hours after service of this order, by the applicant's attorney, at the office of the second respondent;

5. The respondents are interdicted and restrained from implementing a restriction on the purchase of electrical supply to the applicant's premises pending the provision and expiration of the written 14-day notice referred to in paragraph 1;

6. Each party is to pay their own costs.

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S A COLLETT

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicants	:	Mr Foord
Instructed by	:	Du Plessis Attorneys East London Ref. Mr Du Plessis
Counsel for the Respondents	:	Mr Novukela
Instructed by	:	B Bangani Attorneys, East London Ref. Mr Bangani
Date heard	:	19 July 2023
Date judgment delivered	:	25 July 2023