REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Reportable: Yes
Of interest to other judges: Yes

25 August 2023 Vally J

Case No.: 2023-069078

In the matter between:

39 VAN DER MERWE STREET HILLBROW CC	Applicant
and	
CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	First Respondent
CITY POWER SOC LTD	Second Respondent

JUDGMENT

Introduction

[1] The applicant seeks the urgent intervention of this court to resolve a dispute it has with the respondents. To this end it has asked that the requirements set out in rule 6 of the Uniform Rules of Court pertaining to time periods for the enrolment of a matter be relaxed. Its case is that on 6 July 2023 the respondents disconnected the electricity supply to an immovable property - situated at 39 Van Der Merwe Street, Hillbrow (the property) - it owns. It purchases municipal services, including electricity, from the respondents. The disconnection occurred because the respondents

allegedly discovered that there is an illegal electricity connection at the property. The applicant denies that there is such a connection. It says that it has been billed each month for the electricity consumed at the property, and it has paid the bill on or before payment is due. Accordingly, its account is not in arrears and therefore the respondents are obligated to reconnect the supply. Given that the respondents are insistent that there is an illegal connection to the cables supplying electricity to the property, the applicant asks that this court order that the electricity be temporarily reconnected until the outcome of a trial action it intends to initiate is known. This trial action will attend to the dispute as to whether there is an illegal connection from the property to the municipal grid.

Background

[2] The property consists of a residential block of flats. There are approximately 208 tenants. The number of occupants in each flat is not revealed. All of them consume electricity for their daily needs and have no alternative supply of electricity.

[3] There is a prolonged dispute between the applicant and the respondent over the payment of electricity consumed at the property and the supply thereof. The dispute goes as far back as 2012. The applicant has succeeded in securing four orders from this court. These were in February 2012, December 2017, January 2020 and March 2023. The February 2012 order prevented the respondent from disconnecting the municipal services, including water and electricity pending (i) the holding of a meeting to attend to the statement and debatement of the applicant's statement of account, and (ii) the provision of written answers to all the applicant's queries of the statement of account. The December 2017 order is not available. The

January 2020 order provided that the applicant will, as of 1 February 2020, pay all current invoices as issued by the first respondent, which shall reflect the actual usage of electricity or, on reasonable estimates of actual usage. And, pending the finalisation of the matter, which was postponed *sine die*, the first respondent shall not disconnect the supply of electricity to the property.

[4] On 26 January 2023 the respondents disconnected the electricity supply to the property. The applicant applied to this court on an urgent basis seeking wide ranging relief, including a reconnection to the electricity supply. The matter was called on 8 February 2023, when the court, per Dodson AJ, declared the disconnection to be unlawful and ordered the respondents to reconnect the supply. The court reserved judgment on the other relief sought by the applicant. While awaiting judgment the respondents asked the court to admit a supplementary affidavit containing evidence that they had discovered an illegal connection at the property after the order of February 2023 was issued. The court refused to admit the evidence as it had already pronounced on the issue of the disconnection of 26 January 2023. The court issued its judgment on the remaining relief sought by the applicant on 24 March 2023.

[5] After the judgment was handed down the applicant and the first respondent engaged in the statement and debatement of the account. The first respondent has billed the applicant for R2 561 916.65 for services. In an attempt to resolve the disagreement regarding the invoices, the two parties met on 10 and 24 May 2013. They were unable to resolve their differences. As a result, the most recent invoice issued to the applicant reflects that the respondent claims that the applicant is

indebted to it in the sum of R2 913 208.38. The applicant contends that the quantum claimed is incorrect. The dispute concerning the claims is the one that was addressed in the 2012 order. The material paragraphs of that order read:

> '2. The Applicant shall submit within 10 days from the date of this Order, to the Respondents current attorney of record, a list containing the Applicant's queries on the account/(s) held with the Respondent [sic] which queries shall be addressed by the parties during a meeting pertaining to the statement and debatement of the aforementioned account/(s).
>
> 3. The above-mentioned meeting pertaining to the statement and debatement will take place as soon as is reasonably possible.
>
> 4. The Respondent [sic] shall not disconnect the Applicant's municipal services, including water and electricity:
>
> 4.1 pending the convening of the above-mentioned meeting pertaining to the statement and debatement; and
>
> 4.2 until such time as the Respondent has reverted in writing to the Applicants' attorney of record, whereby the Respondent addresses all the issues raised in the abovementioned list.
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> 5. The Applicant reserves its rights to launch an action to be instituted by the Applicant for the statement and debatement of its account with the Respondent [sic] with regards to the premises situated at 39 Van der Merwe Street, Johannesburg, in the event that the Applicant's queries are not satisfactorily remedied.'[1]

[6] The papers are silent on whether paragraphs 4.1 and 4.2 of the order have been complied with. They do reveal though that the statement and debatement remains unresolved and that it was central to the 2020 application (whether it was central to the 2017 application or not is not revealed in the papers), which followed upon a disconnection of the electricity supply to the property by the respondents.[2] It is clear that the respondents have not satisfactorily addressed the queries of the applicant. The applicant in terms of paragraph 5 was entitled to bring an action

[1] The order is copied from the judgment issued on 24 March 2023 where it is quoted. The judgment was annexed to the papers in this matter. See: *39 Van der Merwe Street v City of Johannesburg Metropolitan Municipality and 2 Others* (Case No 23/7784) at [2].
[2] Id at [34] and [36].

proceeding ‘for the statement and debatement of its account.’ It, however, has not done so. Yet, eleven years later it still claims that it is entitled to the benefit of the order on the ground that the statement and debatement remains unresolved, and that the interdict is an interim one pending a resolution thereof. The failure to launch the action – which only the applicant could do - has certainly been advantageous to the applicant. The arrears that were owing, which resulted in the disconnection in 2012, have not been paid. It has been carried over as recorded in [5] above.

[7] The judgment issued on 24 March 2023 records that the parties agreed to have a statement and debatement of the applicant’s account within thirty days of receipt of the judgment and order, and that during that period the respondents would refrain from disconnecting the electricity supply to the property. The order issued reflected this agreement.

[8] On 24 May 2023 the parties met with the intention of continuing with the statement and debatement exercise. Nothing came of the meeting. They were unable to come to terms on the statement and debatement. At the same time, the respondents drew attention to and insisted that an illegal connection was installed at the property resulting in the applicant bypassing the meter system and avoiding paying for the full consumption. In other words, the applicant was accused of ‘stealing’ electricity from the respondents. The applicant vehemently denied that it was responsible for any unlawful conduct. More particularly, it denied that there is (not was) an illegal connection from the municipal grid to the property.

[9] On 6 July 2023 the respondents disconnected the supply of electricity to the property. On the same day the applicant's erstwhile attorneys wrote to the respondents' attorneys denying that there was any illegal connection to the electricity supply, confirmed that the statement and debatement was continuing and demanded that the electricity supply be restored forthwith. The demand was rejected and the reason furnished was articulated thus:

> 'The City's position is that they don't reconnect in situation where there is illegal connection.' (Quote is verbatim)

[10] The sole member of the applicant, Mr Mark Morris Farber, contacted the first respondent's call centre to secure a reconnection without having to seek the assistance of this court. He was informed that he should pay R100 000.00 and sign an acknowledgement of debt before the reconnection would take place. This was unacceptable to the applicant as the issue of the outstanding debt was the subject of the statement and debatement exercise which was, and is still, ongoing albeit since February 2012.

[11] On 11 July 2023 the applicant engaged the services of two different electricians to examine the electrical connection at the property and to report back to it. Both reported that they had physically attended at the property and had examined the connections there. Neither of them found that there was an illegal connection to the supply from the grid. They both deposed to an affidavit in support of the application. One of their affidavits is styled, 'Expert Affidavit: Electrician.' I will deal with their evidence later.

The applicant's case

[12] The applicant's case is that its account with the respondents has, post the issuance of the interdict in 2012, always been up to date: it has paid for all invoices it has received from the respondents. The dispute regarding previous outstanding amounts is being attended to by way of a statement and debatement – as per the 2012 court order – and is therefore not relevant to the present disconnection dispute. The applicant denies that there is any unlawful connection to the electricity supply to the property. In support of its case against the claim that it consumes electricity without paying, it relies on the evidence of the two electricians.

The respondent's case

[13] The respondent raises two points, (i) the applicant has failed to show that it has a genuine dispute in terms of s 102 of the Local Government: Municipal Systems Act 32 of 2000 (Systems Act) with the respondents and, (ii) the disconnection followed upon a discovery of an illegal connection from the grid to the property, as a result of which the applicant has been consuming electricity without paying for it. In support of its claim it annexed a self-generated document that outlines the payment history of the applicant.

[14] The applicant says that the reference to s 102 of the Systems Act by the respondents is misguided, as this dispute is concerned solely with the conflicting claims regarding the discovery of an illegal connection from the property to the electricity supply. According to it, the only dispute that this court should address is the one concerning the alleged unlawful connection to the municipal grid discovered

by the respondents. As this is the only contested issue, it is the only one this judgment addresses.

The dispute on the issue of an unlawful connection

[15] The applicant submits that its evidence, particularly the evidence of two independent electricians, demonstrates that there is no unlawful connection. One of the two electrician's testimony, it is claimed, qualifies to be regarded as expert testimony. For convenience, I will refer to the electrician who refrains from making this bold claim as the first electrician.

[16] The first electrician's evidence is that he is a 'professional electrician' who visited the property on 11 July 2023. He tells the court nothing of his qualifications, experience or present work responsibilities. There he 'examined the electrical connections to and from the municipal circuit breaker, the electricity meter and the distribution board.' Thus, 'it is [his] opinion that the electricity supply to the [property] is correctly connected, there is no illegal connection at the [property] [and] the installation of the electricity meter and the distribution board's connection to the municipal breaker via it, appears to have been performed by employees of [the second respondent].'

[17] The evidence is hopelessly inadequate in assisting with the resolution of the disputed issue. It says nothing of the respondents' claim that they discovered an illegal connection when the officials visited the property, which was well before he did. He cannot say anything about the connection other than 'it appears to have been performed by employees of the second respondent'. He places nothing before the

court to support this averment, and thus it is nothing but a bare speculative assertion on his part.

[18] The second electrician's testimony is slightly more detailed. More importantly, the applicant claims that his testimony should be elevated to the status of 'expert'. It needs to be said that his evidence fails to satisfy the stringent requirements set out in our law of evidence for testimony to qualify as 'expert testimony'.[3]

[19] His testimony is that:

[19.1] he is 'a professional electrician registered with the Department of Labour';

[19.2] his 'career as an electrician began in 2020, wherein [sic] [he] duly obtained a national diploma in engineering';

[19.3] he is 'employed by RAM Electrical Services (Pty) Ltd' which is registered with the Construction Industry Development Board and 'with the Electrical Contractors' Association of South Africa'; and,

[19.4] during his practice as a professional electrician, he has garnered experience in respect of the electrical installations at all types of immovable properties. This includes the assessment of electrical installations between municipal supplies and electrical meters;

[3] See: *Twine v Naidoo* [2018] 1 All SA 297 (GJ) at [18].

[19.5] he undertook a physical inspection of the property as this is the method utilised to assess ’the legality of an electrical connection to the municipal grid’;

[19.6] he examined ‘the electrical connections to and from the municipal circuit breaker, the electricity meter and the distribution board’ in order to assess whether ‘any tampering has been affected to any of these components, or whether any of them have been connected in a manner that is suspicious’;

[19.7] tampering would take place when ‘the electricity meter has been bypassed’ – the distribution board is connected directly to the municipal circuit – and when ‘live wiring, extending elsewhere into the property, has been connected to the municipal circuit breaker’ without being connected to the electricity meter; and finally,

[19.8] that on the basis of his examination it is his opinion that,

1. The electricity supply to the property has been correctly connected to the meter;

2. There is no illegal connection at the property; and,

3. The installation of the electricity meter to the distribution board ‘appears to have been performed by employees of the second respondent’.

[20] The first two of his ‘opinions’ are one and the same. The third ‘opinion’ is identical to that of the first electrician. Nevertheless, just as with the first electrician he fails to provide any details as to why he believes that the installation of the electricity meter to the distribution board was conducted by ‘employees of the’ second respondent. The belief is not supported by any factual evidence from himself or anyone else. It is nothing but an assertion that is bare. Hence, it is worthless. The other ‘opinion’ – presented as two different opinions in his affidavit – that there was no illegal connection at the time he conducted his ‘investigation’ does not advance the case of the applicant. The ‘opinion’ says nothing of the respondents’ claim of having discovered an illegal connection at the property. The respondents, it must be recalled, conducted their inspection long before this affiant, and the first electrician, conducted their ‘investigations’. There is no way either of them can and, rightfully neither of them do claim, that the contention of the respondents, which is also presented as sworn testimony, is wrong or false. In short, neither of them are able to gainsay the testimony of the respondent. Two findings are therefore ineluctable: (i) there is nothing different in the testimony of the ‘expert’ from that of the first witness who rightfully abstains from claiming to be an expert and (ii) their evidence does not destroy the evidence of the respondents that they found an illegal connection at the property.

[21] The problem the applicant encounters is that, having been unable to dispute the averment that the respondents found an unlawful connection from the property to the municipal grid when they visited the property, the version of the respondents has to be accepted.[4] Furthermore, an insurmountable problem confronting the applicant is that there is evidence presented by itself and by the respondents which clearly allows for an inference to be drawn in favour of the respondents' claim that an illegal connection from the property to the municipal grid was discovered at the property. The evidence concerns the payments made by the applicant over the last few years for the consumption of electricity by the occupants of the property.

[22] According to the applicant it has made the following payments since November 2020:

Month	**Amount**
November 2020	R39 509.00
December 2020	R0.00
January 2021	R2 165.06
February 2021	R0.00
March 2021	R0.00
April 2021	R1 948.59
May 2021	R3 631.44
June 2021	R48 708.27
July 2021	R0.00
August 2021	R0.00
September 2021	R0.00

[4] *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) at [12] - [13].

October 2021	R0.00
November 2021	R0.00
December 2021	R0.00
January 2022	R0.00
February 2022	R0.00
March 2022	R0.00
April 2022	R0.00
May 2022	R0.00
June 2022	R0.00
July 2022	R0.00
August 2022	R0.00
September 2022	R0.00
October 2022	R0.00
November 2022	R0.00
December 2022	R0.00
January 2023	R48 708.27
February 2023	R0.00
March 2023	R0.00
April 2023	R2 000.00
May 2023	R2 316.03
June 2023	R2 812.01
July 2023	R0.00
Total	**R103 090. 37**

[23] The respondents' records of payments received from the applicant for some months is slightly different from that of the applicant as reflected in the table above. According to their records the applicant made the following payments:

Month	Amount
November 2020	R39 509.00
January 2021	R2 165.06
April 2021	R3 631.44
January 2023	R48 708.27
April 2023	R2 000.00
July 2023	R5 128.04
Total	**R101 141.81**

[24] The difference between the two records is not large. According to the applicant it paid R103 090.37 for 33 months for the consumption of electricity for a building hosting 208 tenants. That calculates as R3 123.95 per month. According to the respondents it paid R101 141.81 for the same period, which calculates as R3 064.90 per month. Whatever the amount - the difference is not significant - the important fact that it reveals is that the payment is extremely low taking into account the number of people consuming the electricity. Even if we assume that the 208 tenants constitute the total number of people living in the building – a completely unrealistic assumption given that it is a large building consisting of many flats and the tenancy relates to the flat not to the persons occupying the flat – it would mean that the average monthly electricity consumption of each person costs a paltry R14.74 according to the respondents' records, and R15.01 according to the applicant's records. On either version the amount of electricity consumed by the occupants of

the building is wholly unrealistic. This evidence demonstrates that the respondents' claim that an illegal connection was discovered at the property is certainly not far-fetched or unrealistic. The only inference that can be drawn from these figures is that the meter has been, to borrow from the words of one of the affiants who filed an affidavit in support of the applicant's case, 'tampered with'. The effect is that electricity is being consumed at the property without it being paid for by the applicant who, in terms of the contract between it and the second respondent, is required to pay for all the electricity consumed at the property. What is worse, the amount of electricity consumed as a result of the illegal connection will never be known as the electricity (commodity) is a consumable, and in this case it had already been consumed at the time of the discovery. Hence, the true loss suffered by the respondents will remain a mystery.

[25] It is clear then that this applicant - through its sole member Mr Farber - has not approached this court with clean hands.

The Systems Act

[26] One of the objects of the Systems Act is to 'ensure universal access to essential services that are affordable to all'. Section 73(1)(c) of the same Act provides that a municipality – the first respondent herein – 'ensure that all members of the local community have access to at least the minimum level of basic municipal services'. Section 95(e) thereto provides that the first respondent must 'ensure that persons liable for payments, receive regular and accurate accounts.' In terms of s 96(a) the first respondent 'must collect all money that is due and payable to it'. The first respondent is unable in this case to comply with its obligations in terms of ss

95(e) and 96(a) because of the illegal connection that existed at the property. The account that has been rendered to the applicant does not accurately reflect the actual quantity of electricity consumed by the tenants of the applicant, and as a result the first respondent has not been able to 'collect all the money that is due and payable' by the applicant. This is no fault of either respondent. It certainly is the fault of the applicant, who is in control of the property and is liable for ensuring that the connection from the municipal grid to the property has not been tampered with.

Interim interdicts

[27] Interim interdicts are capable of being, have been, and continue to be, abused by a party that succeeds in securing or resisting one. The applications wherein they are sought are often split into two, a Part A and a Part B, with the former being a call for an interim interdict while the latter constitutes a claim for final relief. The relief sought in Part A would be crafted along the lines of: 'Pending finalisation of Part B of the application the respondent is interdicted from …' They are also brought without a Part B. This would be in a circumstance where the final relief is sought in an action proceeding. In such a case the relief would be crafted along the lines of: 'Pending the finalisation of an action (or to be brought) by the applicant …'. In either case, once the interim relief is granted or refused the successful applicant has little interest in having either Part B or the action finalised. Having secured victory, albeit only on an interim basis, the successful party can easily frustrate the finalisation of the matter by taking advantage of the rules set out in the Uniform Rules of Court. The experience thus far demonstrates that courts have to be more vigilant when dealing with applications for interim interdicts, especially when granting them. In other words, even when an applicant has met the requirements set out in *Setlogelo*[5], courts

[5] *Setlogelo v Setlogelo* 1914 AD 221.

should carefully craft the interim interdict to prevent the possibility of the successful party abusing the process of court. One way a court can prevent such abuse is to postpone the hearing of Part B to a specific date, and to set strict time limits for the parties to adhere to in order to make Part B hearing ready. Action proceedings are much more complicated. The court would have to fashion a remedy that is case-specific.

[28] In the matter at hand, there is no Part B. The applicant has brought a single application asking for an interim interdict preventing the respondents from disconnecting the electricity supply to the property, 'pending the final determination of an action for declaratory relief to be instituted' by the applicant. And in any event the Part B is contingent upon the applicant launching an action proceeding. No such proceeding is in the pipeline. There is therefore no need to postpone Part B of the matter, which would be the usual order to make when finalising Part A.

Conclusion

[29] Having discovered the illegal connection, the respondents are not, in my view, obliged to supply the applicant with any more electricity. Articulated differently, the applicant has no right, real or *prima facie*, to having electricity sold to it by the respondents. To the extent that the applicant or its tenants had a right in terms of s73(1)(c) of the Systems Act to have access to the electricity supply provided by the first respondents, such right has been forfeited by their unlawful conduct.

[30] Accordingly, the applicant's call for interim relief must be refused. The applicant is entitled to launch its intended action proceedings. In the meantime,

should it seek to purchase electricity from the respondents, it should conclude a mutually acceptable agreement with them. Whether they come to an agreement or not is not a matter that can be dealt with in this judgment or order. This court should not compel the respondents to sell electricity to someone who has effectively stolen it from them in the past. The court should not encourage a breakdown in the rule of law which it, in my view, would be doing if it were to overlook the conduct of the applicant and compel the respondents to provide electricity to it.

Order

[31] The following order is made:

The application is dismissed with costs.

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Vally J

Dates of hearing:	26 July 2023
Date of Judgment:	Ex tempore but signed on 25 Aug 2023

Representation

For the applicant:	R Bosman
Instructed by:	Fairbridges Wertheim Becker Attorneys
For the first respondent:	E Sithole
Instructed by:	Nozuko Nxasani Inc