REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2021/31566

REPORTABLE: YES/NO
OF INTEREST TO OTHER JUDGES: YES/NO
REVISED. NO
DATE: 23 September 2021

In the matter between:

SIENAERT PROP CC	Applicant
and	
THE CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	First Respondent
CITY POWER (SOC) LIMITED	Second Respondent

JUDGMENT

Weiner J

Introduction

[1] The applicant sought an order as a matter of urgency for the following relief:

(a) That the first and second respondents are held in contempt of the court order granted by Kollapen J on 20 July 2021 under case number 2021/31566 (the 'Kollapen J order');

(b) That the respondents pay a fine of R100 000.00 to the applicant, or an amount to be determined by the Court (this claim was not pursued);

(c) That the respondents are to credit the electricity portion of the Rates Clearance Figures to zero, whereupon the applicant will pay the outstanding R422 635.49 as reflected in the applicant's request for Rates Clearance Figures; and

(d) Costs on the attorney and client scale.

Contempt and urgency

[2] The Kollapen J order provided that:

'1. The respondents are to respond to the applicant's queries, listed under the query numbers in paragraph 1.1 below, within 14 days from service of this order, and provide written reasons for the determination of the queries, via email to the applicant's attorneys at the email address Dino@kgt.co.za

1.1 70020071988; 8002489934 and 800300666

2. Upon compliance with paragraph 1 above, the respondents are to re-issue, within 7 days from the provision of the written reasons, revised clearance figures in terms of Section 118(1) of the Municipal Systems Act in respect of the property known as ERF[....] LONGDALE for the last 24 months.

3. The respondents are to remove, from any revised rates clearance figures, any charges relating to electricity, including forward projection charges, in respect of the Property in accordance with the reasons given in terms of paragraph 2 above.

4. No order as to costs.'

[3] The respondents contended that they have issued the required clearance certificate and that the applicant is simply refusing to pay the amounts claimed. They submitted that the applicant should have paid under protest as provided for in the Local Government: Municipal Property Rates Act 6 of 2004 which governs this situation. Section 50(6) provides: 'The lodging of an objection does not defer liability for payment of rates beyond the date determined for payment.'

[4] Similarly, s 54(4) states: 'An appeal lodged in terms of this section does not defer a person's liability for payment of rates beyond the date determined for payment.'

[5] The applicant submitted that these sections deal with rates and not electricity, and are therefore not applicable in the present matter.

[6] The respondents relied on *Casting, Forging & Machining Cluster of South Africa (NPC) v National Energy Regulator of SA*,[1] where it was held that:

'…to interfere by means of an interim interdict would amount to an intrusion into the exclusive terrain of an organ of state as another branch of government. As a matter of fact, the applicants can prevent the termination of electricity supply by paying the amount charged in terms of the tariff as determined by NERSA, "*under protest*", pending finalisation of the main application. Taking into account all these considerations, I am not convinced that the applicants have shown a *prima facie* right as contended for, or that the balance of convenience favours them. For these reasons, and also when this matter is considered from a holistic viewpoint, I am of the view that the application should be refused.'

[7] The applicant contended that the *NERSA* judgment is distinguishable. The judgment dealt with the tariff which was applicable. The respondents appear to have misconceived the applicant's argument. In the present case, it is not in dispute that the applicable tariff is the Demand Medium Voltage (DMV). The tariff was changed from Demand Low Voltage Tariff (DLV) to DMV, but the respondents have failed to implement that tariff in calculating the electricity consumption.

[8] There is clearly a valid dispute in this matter, one which is clear from the respondents' internal correspondence. As appears therefrom, the respondents' officials acknowledged that—

' – The client's account is billed on Demand Low Voltage Tariff which is incorrect.

– The account should be on Demand Medium Voltage.'

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[1] *Casting, Forging & Machining Cluster of South Africa (NPC) and Others v National Energy Regulator of SA and Others* [2019] ZAGPPHC 967; [2020] JOL 46840 (GP) para 24 (the *NERSA* judgment).

[9] The applicant has a right to have a court determine the s 118(1) dispute.[2] As stated in *Mkontwana v Nelson Mandela Metropolitan Municipality*,[3] there is a justiciable issue, which an applicant is entitled to have decided before a court.

[10] The respondents suggested that this Court should rather direct the respondents to re-issue the clearance certificate, which would be in line with what was ordered in the matter of *YST Properties CC v eThekwini Municipality*,[4] which would permit the respondents to retain their autonomy, where it was held:

'The first respondent is ordered, within 24 hours of service of this order, to furnish the applicant with the certificate in terms of s 118(1) of the [Local Government: Municipal Systems Act 32 of 2000], which certifies that all amounts that became due in connection with the remaining extent of Portion 13 of Erf 793, Dunns Grant, for municipal service fees, surcharges on fees, property, rates and other municipal taxes, levies and duties during the two years preceding the date of application for the certificate of rates have been fully paid.'

[11] The order in *YST Properties* is similar to the one that was contained in the Kollapen J order. It has not been complied with; thus the applicant now seeks the present relief.

[12] The respondents contended that a material dispute of fact exists in relation to the amount which the applicant states is due in order to obtain the clearance certificate. They submitted that such a dispute cannot be resolved on paper and it needs expert evidence. In the matter before Kollapen J, the applicant annexed an affidavit and expert report from Robert Coutts (Mr Coutts) of EnergyMax (who they

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[2] Section 118(1) of the Local Government: Municipal Systems Act 32 of 2000 (the 'MSA') provides:
'Restraint on transfer of property
(1) A registrar of deeds may not register the transfer of property except on production to that registrar of deeds of a prescribed certificate—
(a) issued by the municipality or municipalities in which that property is situated; and
(b) which certifies that all amounts that became due in connection with that property for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties during the two years preceding the date of application for the certificate have been fully paid.'

[3] *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as amici curiae* [2004] ZACC 9; 2005 (1) SA 530 (CC) para 71.

[4] *YST Properties CC v eThekwini Municipality and Others* [2009] ZAKZDHC 23; 2010 (2) SA 98 (D) at 113D-E.

described as experts in this field) which appended a schedule reflecting extensive calculations explaining that, in utilising the incorrect tariff, the electricity had been overcharged in an amount of at least R10 970 852.09 (which it contended exceeded the electricity charges in the clearance figures). The report concludes that the amount, in excess of R10 970 000, is a conservative estimate. Mr Coutts has calculated the amounts owing based upon the correct tariff being applied.

[13] The respondents have not disputed the calculation contained in the report. It now states that there is a dispute of fact on this issue and experts are needed. The respondents did not take the opportunity to deal with and challenge the report. It must therefore stand.[5] The respondents should have raised a dispute as the amounts owing, based upon the correct tariff being levied, are within their knowledge, but they failed to do so. In *Euphorbia (Pty) Ltd t/a Gallagher Estates v City of Johannesburg*,[6] in dealing with such an issue, the court held that:

'In the absence of special circumstances, considerations of policy, practice and fairness require that the City is saddled with the onus of proving the correctness of its meters, the measurements of water consumption and statements of account rendered pursuant thereto. It cannot reasonably be expected from the consumer, having raised a bona fide dispute concerning the services delivered by the City, to pierce the municipal veil in order to prove aspects that peculiarly fall within the knowledge of and are controlled by the City….'

[14] The Municipality is obliged to prove its accounts. In *Mkontwana*, the Constitutional Court held:

'It is necessary for all municipalities to ensure that they have reasonably accurate records and that they are able to provide complete, credible, comprehensible and reasonably detailed information in relation to consumption charges that are owing within a reasonable time of being requested to furnish it….'[7]

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[5] See *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; 2008 (3) SA 371 (SCA) and *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State v Zuma and others (Helen Suzman Foundation as amicus curiae)* [2021] ZACC 28; 2021 (9) BCLR 992 (CC).
[6] *Euphorbia (Pty) Ltd t/a Gallagher Estates v City of Johannesburg* [2016] ZAGPPHC 548 para 17.
[7] *Mkontwana* (note 4 above) para 64.

[15] The respondents have failed to raise a genuine dispute of fact in this regard. In *Wightman*,[8] the SCA held:

'A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed….

The second respondent's general denial leaves important matters unanswered. The failure to deal issuably with the factual averments is unjustifiable on any rational basis….'

[16] The respondents sought, in this matter, to raise a defence to the application before Kollapen J, but they did not oppose that matter; nor did they seek to set it aside; thus the order stands.[9] It cannot now be revisited. This Court cannot sit as a court of appeal over Kollapen J's order. The order was granted and served on the respondents 2021. Non-compliance does not appear to be disputed. As set out above, other defences are raised, dealing with the validity and/or correctness of the Kollapen J order – but no appeal or application to set aside the order has been instituted.

[17] Contempt has therefore been established.[10] The applicant contended that the non-compliance is ongoing, despite the present application. The respondents have not offered an undertaking to comply with the Kollapen J order. An application for contempt is urgent by its very nature, more particularly where there is a continuing infringement of the order.[11]

The *mandamus* relief and urgency

[18] The respondents submitted that the applicant approached this Court seeking contempt of court in order to make out a case for urgency, and then opportunistically sought the additional relief in regard to the issue of the clearance certificate. In

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[8] *Wightman* (note 6 above) paras 13 & 19.
[9] *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC) para 66
[10] *Zuma* (note 6 above).
[11] Ibid paras 30-31.

Matjhabeng Local Municipality v Eskom Holdings Ltd & Others,[12] it was stated that contempt proceedings may warrant relief, other than a criminal sanction, such as a *mandamus*. The Constitutional Court held that:

'Not every court order warrants committal for contempt of court in civil proceedings. The relief in civil contempt proceedings can take a variety of forms other than criminal sanctions, such as declaratory orders, mandamuses, and structural interdicts. All of these remedies play an important part in the enforcement of court orders in civil contempt proceedings. Their objective is to compel parties to comply with a court order. In some instances, the disregard of a court order may justify committal, as a sanction for past non-compliance. This is necessary because breaching a court order, wilfully and with mala fides, undermines the authority of the courts and thereby adversely affects the broader public interest….'

[19] The applicant contended that the relief that the respondents be obliged to issue a clearance certificate as contemplated in s 118(1) of the MSA on payment of only the charges levied for rates, taxes, water and ancillary charges, is an appropriate order. The applicant accepted that the municipal charges (exclusive of electricity) may have increased since the issuing of the clearance figures on 12 May 2021. They have provided for that in an amended draft order. This affords the respondents an opportunity to amend the rates clearance figures, to exclude electricity and to include any further rates, taxes, water and ancillary charges which may have arisen since the issuing of the clearance figures.

[20] The applicants contended that the relief they seek is urgent for the following reasons:

(a) The urgent court was approached in terms of the initial application on 7 July 2021. That notice of motion afforded the respondents until 13 July 2021 to serve their answering affidavit. The respondents elected not to oppose that application and the Kollapen J order was granted. The respondents now attempt to respond to the initial application in their answering affidavit in the current application.

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[12] *Matjhabeng Local Municipality v Eskom Holdings Ltd & Others* [2017] ZACC 35; 2018 (1) SA 1 (CC) para 54.

(b) The applicant contended that it has been threatened with liquidation if it is not able to effect transfer of the property for which the Rates Clearance Certificate is being sought, pursuant to a settlement agreement concluded with Sasfin Bank Ltd ('Sasfin'), which initially obliged the applicant to secure transfer of the property by 30 June 2021. In the urgent application that served before Kollapen J, a supplementary affidavit was deposed to which set out that Sasfin had granted an extension for the transfer of the property to 31 August 2021.

(c) On 26 August 2021, Sasfin addressed a further letter which records *inter alia*—

'As already pointed out, the anticipated sale of the property is linked and indeed is integral to the sale of the plant as the purchaser of both assets is effectively the same entity. Any delay in transfer risks the entire transaction.

We therefore again stress that it is imperative that the transfer of the Property not be delayed and that all efforts be made to resolve your dispute with the City of Johannesburg as a matter of extreme urgency, failing which we reserve our rights to take appropriate enforcement action against all guarantors including but not limited to calling up our surety mortgage bond.'

[21] The facts upon which the applicant relies contain the same elements and reasons for urgency as contained in the previous applications. At that time, the court found that those matters were urgent. This is a continuation of the series of events which led to the application before Kollapen J being launched as a matter of urgency.

[22] The only submission by the respondents is that the matter is not urgent, as the applicant should simply pay over R10 000 000 (under protest) as an alternative to seeking the relief claimed. The respondents have not disputed that the applicant's account has been billed 'on demand low voltage' tariff which is incorrect, as opposed to 'on demand medium voltage'.

[23] The applicant seeks punitive costs. It submitted that it is clear that the respondents have failed to abide by a court order and have failed to raise a genuine dispute on the computation relied on by the applicant. The application did not

concern the correctness of Kollapen J's order. That could not have been decided by this Court.

[24] This application concerned an order for contempt of court and a *mandamus* – based on Kollapen J's order. The respondents have not raised any legitimate defence to the charge of contempt. In my view, when an organ of state wilfully disobeys a court, a punitive costs order is warranted. As stated by Plasket AJ, as he then was, in *Victoria Park Ratepayers' Association v Greyvenouw CC*:[13]

'The applicant seeks an order that the respondents pay its costs on the scale of attorney and client. This is based on four cumulative considerations, namely: …; that the nature of the proceedings – to preserve and maintain the dignity, authority and effectiveness of the courts calls for such a costs order; that the applicant who, after all, has an order in its favour, was forced to approach the court again because of non-compliance with that order likewise militates in favour of a departure from the usual party and party costs order; and that "it is just and fair that the applicant should, as far as practically possible, not be out of pocket in an application of this nature, especially where the Municipality, which has much greater resources at its disposal, declined to come to the assistance of the residents and ratepayers falling under its jurisdiction."'

[25] The applicant has tendered to pay R1 million in respect of the amounts allegedly owing in order to obtain the clearance certificate and cover charges that may have been levied since the date of applicant's calculations.

Therefore, the following order is made:

1. The first and second respondents are held in contempt of the court order granted by His Lordship Mr Kollapen J in the above Honourable Court on 20 July 2021 under case number 2021/31566;

2. The respondents are to credit the electricity portion of the Rates Clearance Figures to zero, whereupon the applicant will pay the outstanding amount, for rates, taxes, water and ancillary charges (excluding any electricity charges) as reflected in the amended clearance figure statement to be issued on or before close of business

[13] *Victoria Park Ratepayers' Association v Greyvenouw CC and Others* [2003] ZAECHC 19 para 62.

27 September 2021 and sent to the applicant's attorneys email address at dino@kgt.co.za, failing which payment of R1 million will be deemed to satisfy the amount due owing and payable, for the purposes of issuing a clearance certificate;

3. The respondents are not to include any electricity charges in its clearance figures or insist on payment of any electricity charges, before issuing a clearance certificate as contemplated in s 118(1) of the Local Government: Municipal Systems Act 32 of 2000.

4. The respondents are to issue a rates clearance certificate to the applicant immediately upon payment of the aforementioned sum set out in 2 above (whichever is applicable);

5. This order does not determine, affect, limit or curtail the respondents' entitlement to payment for electricity charges, rates and taxes, water charges or other ancillary charges which may become due and payable, as may be determined in due course.

6. The respondents are to pay the costs of this application on an attorney and client scale.

S E WEINER
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 23 September 2021.

Date of hearing: 14 & 17 September 2021
Date of judgment: 23 September 2021

Appearances:
Counsel for the applicant: C van der Merwe

Attorney for the applicant:	KG Tserkezis Inc
Counsel for the 1st & 2nd respondents:	E Sithole
Attorney for the 1st & 2nd respondents:	Madhlopa & Thenga Incorporated