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**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

Case no: 7843/20

REPORTABLE: No

OF INTEREST TO OTHER JUDGES: No

REVISED.

27 MAY 2022

In the matter between:

TUHF LIMITED

Applicant

And

28 ESSELEN STREET HILLBROW

First Respondent

266 BREE STREET JOHANNESBURG (PTY) LTD

Second Respondent

10 FIFE AVENUE BEREA (PTY) LTD

Third Respondent

68 WOLMARANS STREET JOHANNESBURG (PTY) LTD

Fourth Respondent

HILLBROW CONSOLIDATED INVESTMENTS CC

Fifth Respondent

MARK MORRIS FARBER

Sixth Respondent

***Case Summary:* APPLICATION – MONEY JUDGMENT**

JUDGMENT

SENYATSI J

[1] This is an opposed application for money judgment and the authority to take cession of any rental amounts payable by the tenants of the first respondent. As an alternative, the applicant prays that its duly authorized agent take cession of any rental amounts payable by the tenants of the first respondents with the amount claimed in the main prayer is paid in full. The applicant also prays for the respondents to sign all documents necessary to facilitate the cession prayed for, failing which the Sheriff be authorized to sign all documents necessary to give effect to the cession.

[2] The applicant furthermore prays that the names of all tenants including copies of their lease agreements and contact information of every tenant who occupies the Waldorf Heights be made available to it. The applicant also ask this court to declare the immovable property at Erf [....] Johannesburg Township, Registration Division I.R. the Province of Gauteng reassuring 495 (four hundred and ninety-five) square meters held by need of transfer under T [....]be declared executable, and that a writ of attachment be issued authorizing the Sheriff of the court to attach the immovable property and to sell it in execution of the court order.

[3] The applicant is a public company with limited liability duly registered and incorporated in terms of the company laws of South Africa.

[4] The applicant is the successor in title of a non-profit company, Trust for Urban Housing Finance, an association incorporated in terms of section 21 of the Companies Act 1973 with registration number 1993/00217/08.

[5] The applicant converted to a private company (registration number: 2007/02/5898/07), which subsequently converted to a public company on 4 November 2014.

[6] The first respondent is a close corporation duly registered and incorporated in terms of the laws of South Africa with a chosen *domicilium citandi et executandi* within the area of jurisdiction of this court.

[7] The second respondent is 266 Bree Street, Johannesburg (Pty) Ltd, a private company duly registered and incorporated in terms of the laws of South Africa with a chosen *domicilium citandi et executandi* within the area of jurisdiction of this court.

[8] The third respondent is 10 Five Avenue Berea (Pty) Ltd, a private company duly registered and incorporated in terms of the laws of South Africa with the chosen *domicilium citandi et executandi* within the area of jurisdiction of this court.

[9] The fourth respondent is 68 Wolmarans Street, Johannesburg (Pty) Ltd, a private company duly registered and incorporated in terms of the laws of the South Africa with the chosen *domicilium citandi et executandi* within the area of jurisdiction of this court.

[10] The fifth respondent is Hillbrow Consolidated Investments CC a close corporation duly registered and incorporated in terms of the laws of South Africa with the chosen *domicilium citandi et executandi* within the area of jurisdiction of this court.

[11] The six respondent is Mark Morris Farber, an adult male businessman who resides within the area of jurisdiction of this court.

[12] All the respondents will be collectively referred to as such.

[13] The applicant advanced a loan in favour of the first respondent in order to assist the second and sixth respondents with the purchase and refurbishment of a building known as Metro Centre Erf [...], Johannesburg ("Metro Centre").

[14] Waldorf Heights on the immovable property is the subject of this litigation and was used as security of the loan for the equity release payment to the first respondent. The security registered was a mortgage bond parsed in favour of the applicant.

[15] In terms of the loan agreement the equity release component of the facility amount was to be disbursed to the account of Brits Muller Attorneys as part of the settlement of the equity contribution due in respect of the purchase of Metro Centre the

purchase price of which was the sum of R7 422 660(seven million four hundred and twenty two thousand six hundred sixty rand) and also funded by the applicant.

[16] The terms of the loan agreement concluded between the parties on 16 October 2016 to 2 November 2016 were *inter alia* as follows:

16.1 The applicant advanced to the first respondent a facility amount in the sum of R19 980 000 (nineteen million nine hundred and eighty thousand rand) (“the facility amount”) for drawdown by the first respondent;

16.2 The first respondent would pay promptly all rates, water and electricity charges and other like prompts that may be payable in respect of the immovable property and provide the applicant with proof of such payments when requested;

16.3 The trigger event of default by the first respondent is failure to pay any amounts due by it in terms of the loan agreement on the due date for payment thereof in breach of any other provision of the loan agreement and failure to remedy any such breach within any applicable cure period;

16.4 If the first respondent triggers an event of default and fails to remedy the default, the applicant would be entitled to accelerate and declare all amounts owing in terms of the loan agreement immediately due and payable.

[17] As a further security to the loan, the parties concluded a written unlimited suretyship in favour of the applicant by all the respondents during 19 October 2016.

[18] A mortgage bond was registered in favour of the applicant over the immovable property for an amount of R14 971 000 (fourteen million nine hundred and seventy-one thousand rand) together with an additional 30% (thirty percent) provision to contingent costs.

[19] In terms of the mortgage bond were that:

19.1 The first respondent is obliged to pay the rates and taxes and other like imposts that may be payable in respect of the immovable property and provide the applicant with proof of such payments;

19.2 As a further collateral security, and in the event of a default, the first respondent ceded its right to rental income and the applicant may recover and receive all rents, income and fruits from the immovable property ("the cession provision").

[20] During August 2017, the first respondent requested a drawdown for equity release and payment of R9 500 000 (nine million five hundred thousand rand) was made in its favour.

[21] Applicant avers that the first respondent or the respondents or its duly authorized agent is the landlord of Waldorf Heights and collects monthly rental from its various tenants who are residents of Waldorf Heights ("the Waldorf Heights").

[22] Applicant contends that the first respondent is meeting its monthly instalments towards repayment of the loan amount but fails to comply with the municipal by laws and fails to provide payments of municipal rates, taxes, utilities and fails to provide the applicant with proof of payment of such municipal account as agreed to in terms of the loan agreement.

[23] Applicant furthermore contends that the first respondent failed to update electrical compliance certificate in respect of the elevator at Waldorf Heights and failed to update the fire safety certificate at Waldorf Heights.

[24] As a consequence, so contends the applicant furthermore, the first respondent is in breach of the loan and the mortgage bond agreements.

[25] A demand letter was addressed to the respondents calling upon them to remedy the breaches. The demand was addressed to them on 20 December 2019. The first respondent avers that the respondents failed to remedy the breaches and that as a consequence, it is entitled to accelerate and declare all amounts owing in terms of the loan agreement, being R9 370 515.22 (nine million three hundred and seventy thousand five hundred and fifteen rand and twenty two rand) as 17 January 2020 including any fees, penalties, costs and charges.

[26] Furthermore, the applicant contends that as a result of the breaches, it is entitled, in terms of the cession provision in the mortgage bond, to all the rights, title and interest to any rental amount payable by the tenants of Waldorf Heights tenants and contends that the first respondent has unlawfully and intentionally refused to facilitate the cession of the rental amounts received from the Waldorf Heights tenants.

[27] The respondents' case is that all monthly loan repayments obligations have been honoured. As a consequence, the applicant is not entitled to foreclose the mortgage bond and accelerate payment of the full balance of the loan. As a consequence, so avers the first respondent furthermore that the applicants is also not entitled to exercise its rights in terms of cession of rental of all tenants of Waldorf Heights to give effect to acceleration of the full outstanding loan.

[28] It is also the first respondent's case, with regards to the alleged breach of the loan agreement by failure to pay the municipal charges as the latter were not due and payable to the City of Johannesburg at the time of that the applicant purported to place the first respondent on terms to remedy such breach.

[29] The first respondent contends as regards the alleged failure to provide an electrical compliance certificate in respect of the elevators at Waldorf Heights that the certificate is in place and was furnished to the applicant as a pre-condition of the mortgage registration.

[30] The first respondent also contends that the obligation to furnish the applicant with a Fire Safety certificate was a pre-condition for registration of the mortgage bond and not a term of the loan agreement, which, if breached, can be a reason for acceleration of the full balance of the loan. It contends that the certificate is in place and was furnished to the applicant before the mortgage bond was registered

[31] With regards to further alleged breaches as contended by the applicant in terms of which the applicant asserts that the first respondent breached the loan agreement by:

31.1 failing to provide the applicant with proof of payment of municipal charges and

31.2 failing to provide the applicant with copies of municipal statements,

the first respondent contends that there are presently no charges due and payable by the first respondent to the City of Johannesburg and / or there were no such charges payable at the time that the applicant purported to place the first respondents on terms to remedy such breach then, so furthermore contends the first respondent, it follows that the first respondent is not in breach of the loan agreement and / or mortgage bond for failing to provide proof of payment of such charges to the applicant.

[32] The first respondent contends furthermore, in addition to its response to alleged various breaches of the loan agreement that it has two further defences, namely: -

32.1 that this application has been instituted for an ulterior purpose in as much as the applicant seeks to exit its relationship with the respondents at any cost and this, so contends the respondents contributes an abuse of court process;

32.2 the applicant has failed to comply in a number of material respects with the provisions of Uniform Rule of Court 46A and

32.3 the applicant has failed to comply with Rule 4(a) of the Uniform Rules of Court

[33] The issue for determination is whether the applicant has made out a case for foreclosure of mortgage bond based on the alleged breaches of the loan agreement. Furthermore, another issue for determination is whether or not there is a genuine dispute of fact which must be determined in these motion proceedings.

[34] The legal framework of principles on dispute of fact will be dealt with first and thereafter a determination whether the applicant has made out a case on papers for the foreclosure of the mortgage bond.

[35] The principles applicable to adjudicating dispute of fact in motion proceedings are trite in our law. In motion proceeding only the affidavits are before court and not witnesses, whereas in trial proceedings there is evidence person and witnesses can be cross-examined.

[36] The leading case on the subject where there is a dispute of facts is *Plascon Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd*¹ where the court restated a general rule as stated in *Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd*² to be:

“...where there is a dispute to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondent together with the admitted facts in the applicant’s affidavit justify such an order... Where it is clear that facts, though not formally admitted, cannot be denied they must be regarded as admitted.”

[37] This rule has been referred to several times by court.³ The court in *Plascon Evans* stated furthermore that the formulation of the general rule requires some

¹ 1984 (3) SA 623 (A)

² 1957 (4) SA 234 (C) at p235 E-G

clarification and qualification. It is correct that, where in proceedings on notice of motion disputes of facts have arisen on the affidavits a final order, whether it be interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent together with the facts alleged by the respondent, justify such order. In absence of that, no final relief can be made.

[38] The power of the court to give such final relief on papers before it, is however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact.⁴ This is so in a case of bare denial without setting out facts upon which such denial is based.

[39] There may be exceptions to this general as, for example, where the allegations or denials of the respondent are so farfetched or clearly untenable that the court is justified in rejecting them merely on papers.⁵

[40] In the instant case, the application concerns three different and separate municipal accounts, namely: -

40.1 Account Number [...] - Historic Account;

40.2 Account Number [...] – Rates Account;

40.3 Account Number [...] – Waldorf Heights Tenants Account.

[41] With respect to the Historic Account number [...], the first respondent avers that it acquired ownership of Waldorf Heights during April 2003. From that time, the electricity consumed at Waldorf Heights were debited to the Historic Account using

³ See *Burnkloof Caterers Ltd v Horseshoe Caterers Ltd* 1976 (2) SA 930 (A) at p938 A-B, *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd* 1982 (1) SA 398 (A) at pp 430-1; *Associated South African Bakeries (Pty) Ltd v Dryx and Vereinigte Bäckereien (Pty) en Andere* 1982 (3) SA (A) at pp 923 G – 924 D)

⁴ See *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 115 (T) at pp 1163-5; *Da Mata v Otto NO* 1972 (3) SA 585 (A) at p 882 D-H.

⁵ See *Associated South African Bakeries (Pty) Ltd v Oryx and Vereinigte Bäckereien (Pty) en Andere* (supra).

readings of electricity meters numbers [...], [...] and [...]. It avers that the City of Johannesburg closed the Historic Account in 2015 and states that all liable charges have prescribed in terms of section 11 (d) and 12 (1) of the Prescription Act. It contends that charges levied to the Historic Account show that the first respondent is in credit by R26 856.00 as at October 2015.

[42] In answer to the contention on the historical account, the applicant contends that the first respondent did not pay anything since 12 February 2015. This contention overlooks the fact that first respondent engaged and even obtained an interdict order against the City of Johannesburg not to switch off the electricity pending the debatement of account. It is therefore, in my view, not up to the applicant to rely on the none payment of this account when there is clearly litigation going on and the City of Johannesburg has not taken steps to recover the so-called overdue charges and as such, this cannot be regarded as a trigger event to entitle the applicant to accelerate payment. It follows in my view, that the principles spelt out in the *Plascon Evans* on the approach why if there is a dispute of fact, no relief on this point can be granted and the version of the respondent should be accepted. The claim of trigger event on the basis of alleged none payment of the charges under these circumstances is pre-mature because the City of Johannesburg has not asserted its rights by enforcing payments from the first respondent. The City of Johannesburg can clearly not take any steps until the account has been debated and the dispute with the first respondent is resolved.

[43] It is trite in terms of section 11(a) of the Prescription Act 68 of 1969 that charges debited to the Historic Account prescribe three years after they become due, being around the time that they were debited to the Historic Account.⁶ It is for that reason that it is likely that when the City of Johannesburg and the first respondent debate the account, this will be a factor to consider by the parties.

[44] In regard to the Rates Account Number [...], it is the first respondent's defence that the charges for electricity consumed at the property were, after the closing of the

⁶ See *Argent Industrial Investment (Pty) Ltd v Ekurhuleni Metropolitan Municipality* 2017 (3) 146 (GJ), *Durban City Council v Glenmore Supermarket and Café* 1981 (1) SA 470 (D);

Historical Account, debited to the Rates Account and the electricity meters that were used in respect of the Historical Account were not reflected on the Rates Account and instead electricity meter number [...] was reflected. No charges were levied on the Rates Account for electricity (between May 2019 to March 2020 until April 2020) when the estimated electricity consumption were reflected. Nothing was reflected for May and June 2020.

[45] It is the first respondent's case that electricity meter number [...] is not installed at the property. The actual electricity meter which is installed on the property, so avers the first respondent, is electricity meter number [...] and it is from this meter that readings should be taken.

[46] The services of an attorney Mr. Ziyaad Patel of Patel Incorporated were engaged to resolve the dispute. The respondent also avers that the administrative assistant of Mr. Faber the shareholder in all the five respondent also engaged the City of Johannesburg to try and resolve the challenge.

[47] The engagements culminated, when nothing was achieved to resolve the problem, in the City of Johannesburg terminating the supply of electricity at Waldorf Heights during March 2018. This led to litigation and the court ordered the City of Johannesburg to restore electricity and subject itself and the first respondent to the debatement of account.

[48] It was only during September 2019 that the City of Johannesburg agreed to furnish Mr. Patel or Mr. Faber with meter readings for electricity meter at Waldorf Heights and job cards.

[49] In reply to the contention made by the first respondent the applicant contends that the average amount ought to have been paid by the first respondent to the City of Johannesburg. The applicant relies on section 11(3) of the City of Johannesburg's Credit Control of Debt Collection By-Law. The reliance on this section is without merit because there was no average amount that was due and payable in respect of the

municipal service concerned, as specified in the accounts for the preceding three months which are not in dispute. This creates a dispute of fact and just on this ground alone it will not be justified to find in favour of the applicant and hold that the first respondent has triggered an event of default by failing to pay the charges when the readings were not taken from the correct meter number.

[50] The first respondent also contends that in addition to the electricity charges on the Rates Account, the City of Johannesburg also debited property meters and taxes, sewer availability charge and waste management services.

[51] The charges and penalty traffic for alleged violation of the By-Law were queried formally on 23 May 2016. It is the first respondent's case that the City of Johannesburg finally agreed to reverse the penalty tariff and credit the rates account. The reversal of the tariff is estimated to be R820 000.00 (eight hundred and twenty thousand rand). The amount has not yet been credited by the City of Johannesburg due to the alleged backlog in the City of Johannesburg.

[52] The applicant contends that no rand value has been set out regarding the amount of R820 000 (eight hundred and twenty thousand rand) as contended by the first respondent. This cannot be so as the rand value amount has been stated in the affidavit. It follows therefore, applying the approach court should follow in the event of conflict facts in motion proceedings that the version of the first respondent on this point should be accepted. Accordingly, furthermore, I do not find that the version of the first respondent of this point is so farfetched that it should be rejected out of hand. The applicant should therefore fail on this ground to discharge the onus that it is entitled to accelerate the full loan repayment based on alleged failure to pay the municipal charges by the first respondent.

[53] I deal with the alleged failure to pay the "sewer availability charge" reflected in the Rates Account. The first respondent states that this line item is a charge meant to be applicable to property owners of undeveloped vacant stands that are able to connect to the main sewerage system. It furthermore states that the Mayoral Committee

convened a meeting on 6 March 2019 to amend the City's tariff charges for Water Services and Sewerage and Sanitation Services: 2019/2020. The first respondent states that it was proposed that "availability" charges would be designated for certain properties not including the property type of Waldorf Heights where water is supplied to residential properties of the type with water meters.

[54] The first respondent argues that the "severe availability charge" reflected on the Rates Account is not due and payable by it to the City of Johannesburg. It estimates the amount to about R540 000 and submit that the non-payment thereof cannot be a ground for breach of the loan agreement.

[55] In reply thereto, the applicant submits that the "sewerage availability" charge should be paid by the first respondent to the City of Johannesburg in order to comply with the By-Laws. There is clearly conflict of fact on this point. Again using the approach already referred to, I am not able to reject the version of the first respondent out of hand as farfetched and untenable and it follows that the first respondent is accepted. The applicant's ground to accelerate the full loan repayment on the alleged breach of the loan agreement on this ground must therefore fail.

[56] I now deal with the line item of "Waste Management Service" from the statement of account, no charge has been raised for such service and has never been charged historically. Although the line item was used by the applicant in the letter of demand to the first respondent, this is clearly pre-mature and ought not to have featured in the letter of demand.

[57] The other account to be dealt with in this judgment is the Waldorf Heights Tenants Account number [...].

[58] The account is not in the name of the first respondent. As the name suggests, it is the Tenants Account at Waldorf Heights. From the evidence adduced on behalf of the first respondent, in terms of the City of Johannesburg's Credit Control and Debt Collection Policy which should be read together with By-Laws, the indigent tenants or

tenants of the abandoned or high-jacked buildings are allowed to open tenants accounts for municipal services. The Policy allows the City of Johannesburg to consolidate various accounts. The City of Johannesburg, so states the first respondent, has not done this or opened an account for water services to Waldorf Heights in the name of the first respondent.

[59] The applicant relies on the Ordinance 17 of 1939 to hold the first respondent liable for the tenants account. Section 49 of the Ordinance provides for the joint and several liability of owners and occupiers. The section does not however, provide that the City of Johannesburg can hold one liable for the charges credited to another's account.

[60] There has not been evidence adduced on behalf of the applicant that the City of Johannesburg has issued a requirement notice in terms of section 49 of the Ordinance to the first respondent liable. As and when the City of Johannesburg does consolidate the accounts or opens a separate water account in the name of the first respondent that will hopefully be dealt with at the appropriate time by the City and the first respondent. It is therefore not up to the applicant to enforce the By-Laws on this line item on behalf of the City of Johannesburg. Accordingly, the version of the first respondent on this line item must be accepted. It follows therefore that the alleged breach of the loan agreement by the applicant on this ground must fail.

[61] What follows is now an analysis of the alleged breach of the loan agreement based on the alleged failure to provide the applicant with an electrical compliance certificate by the first respondent in respect of Waldorf Heights.

[62] The first respondent contends that the requirement to provide the electrical certificate for elevators at Waldorf Heights is not in terms of the loan agreement.

[63] Clause 40 of the Special Conditions Module provides as follows:

“40 Pre- Registration Conditions

Prior to the registration of the Mortgage Bond-

40.1 The Borrower will prove and submit to the Lender:

40.1.1 Proof that a specific, dedicated business account has been opened to accommodate all financial transactions (including the monthly loan instalment) relevant to the Property;

40.1.2 A copy of a current Electrical Certificate issued in respect of the Property, by an accredited electrician confirming that the electrical installations with the building on the property conforms to the standards as stipulated by the relevant authority in terms of the Registrations published in the Government Notice R242 dated 6 March 2009 which regulations have been issued in terms of the Occupational Health and Safety Act, 85 of 1993.”

[64] The clause quoted above has no mention of elevators. It relates to the pre-mortgage bond registration. I have also had regard to clause 41 of the loan agreement under Special Conditions which are also part of the Special Conditions Module. No reference is made to the elevators at Waldorf Heights.

[65] The applicant avers that the first respondent failed to provide the electrical certificate for the elevators and the first respondents states that the certificates were provided prior to the mortgage bond registration. In my view it is highly unlikely that the conveyancers responsible for the mortgage bond registration in favour of the applicant whom they act for in such instance would have failed to insist on compliance with the electrical compliance certificate. It follows therefore that as part of the drawdown conditions of the loan amount that any disbursement of the loan facility would have been given a go-ahead without the basic compliance with the mortgage bond pre-registration condition. It is my considered view therefore that the applicant has failed to discharge the onus that the alleged failure to provide proof of the electrical compliance certificate for the elevators at Waldorf Heights can be a ground of breach in terms of the

loan agreement. It follows that cancellation of the full loan agreement on this ground must fail.

[66] I now deal with the alleged failure to provide fire safety certificate as a ground of breach which the applicant claims entitle it to accelerate the full loan balance. The first respondent protests that failure to provide the fire safety certificate was not addressed or used in the demand letter as a ground to call up the loan but rather an afterthought. The first respondent states that it provided the applicant with Fire Safety Certificate during October 2019.

[67] From papers before me, it appears that the applicant abandoned, quite correctly in my view, this ground as founding a breach of the loan agreement and / or mortgage bond.

[68] I now deal with the contention by the first respondent that the applicant has engaged in the abuse of court process.

[69] The “abuse of court” process is recognized in our law. The Supreme Court of Appeal in *Phillips v Botha*⁷ defines “abuse of court process” as follows:-

“The terse but useful definition of abuse of civil process is to be found in the judgment of Isaacs J in the Australia High Court case of Varawa v Howards Smith Co Ltd Vol 13 CLR (1911) 35 at 91:

‘... the term ‘abuse of process’ connotes that the process is employed for some purpose other than the attainment of the claim in the action. If the proceedings are merely a stalking – horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the court is asked to adjudicate they are regarded as an abuse for this process...’

⁷ 1999 (2) SA 555 (SCA) at 565E

[70] In *Solomon v Magistrate, Pretoria and Another*⁸ it was held that the court has an inherent power to prevent abuse of its process by frivolous or vexatious proceedings.

[71] Where the court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice it is the court's duty to prevent such abuse. This power, however, is to be exercised with great caution and only in a clear case.⁹

[72] In the money lending business, prime objective of any lender is to ensure that monthly loan repayment commitments are met. For as long as that objective is met, hardly any lender would bring a borrower before the court to accelerate full loan repayment on the basis that some other municipal charges have not been paid. This is a strange case indeed because the applicant does concede that, except two short payments in May and June 2020 made during the state of disaster declared by the head of State due to Covid-19, all other subsequent payments were made and are up to date. This court fails to understand why would a lender under these circumstances would want to pull the plug.

[73] In the instant case, the applicant has a PIN in terms of which it is able to access the City of Johannesburg statements that are sent to the first respondent on public utility charges. It is obvious that armed with that information together with its engagement of both City of Johannesburg Billing Department the challenges faced by the first respondent with the billing queries should be manifest.

[74] The billing crisis in the City of Johannesburg is well documented. The applicant is aware that the first respondent has a court order forcing the City of Johannesburg to debate the account with the first respondent due to the many challenges related to the accounts.

⁸ 1950 (3) SA 603 (T)

⁹ See *Hudson v Hudson and Another* 1927 AD 259 at p268.

[75] It is absurd for the applicant to insist on the payment on behalf of the City of Johannesburg when the latter is not asserting its rights due to challenges it has with its billing system. To press the first respondent to pay the charges that are clearly challenged and the subject of litigation, clearly amounts to abuse especially when regard is had that the first respondent meets its monthly loan repayment obligations. It would be a different scenario, in my respective view, if the first respondent was clearly in arrears with its utility charges accounts which were not the subject of a court process initiated by the first respondent. Put differently, if the City of Johannesburg had initiated the recovery court process against the first respondent with no defence by the latter, then of course, the applicant would be entitled to invoke the terms of the loan agreement as a ground for breach thereof. In such a scenario, the applicant would clearly be acting within the tenor of the agreement and would correctly be entitled to accelerate the full loan repayment.

[76] I am of the view therefore that the litigation initiated by the applicant against the respondent is designed to exhaust and paralyze them through a court process so that the applicant can exit its relationship with the respondents.

[77] The abuse of process must and will be stopped by this court. It is therefore appropriate that an appropriate punitive cost order should follow.

ORDER

[78] The following order is made:

- (a) The application for relief in terms of the notice of motion is dismissed.
- (b) The applicant is ordered to pay costs at the scale between client and attorney.

M.L. SENYATSI

JUDGE OF THE HIGH COURT

Heard: 26 October 2021
Judgment: 27 May 2022
Counsel for Applicant: Adv L Peter
Instructed by: Schindlers Attorneys
Counsel for Respondent: Adv M De Oliveira
Instructed by: Gavin Simpson Attorneys,