REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 014489/22

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

1/09/2022
DATE

SIGNATURE

In the matter between:

JOHN VERHOOG EIENDOMSBELEGGINGS Applicant

and

EMFULENI LOCAL MUNICIPALITY Respondent

JUDGMENT

MAKUME, J:

[1] In this matter the Applicant seeks relief on an urgent basis that the Respondent be ordered to reinstate the supply of electricity to the Applicant's business premises situated at Erf 913 Vanderbijlpark South East No 6 Township Registration Division.

[2] It is common cause that the Applicant lets out to business people shops at the said premises who conduct various businesses amongst them a Spar Supermarket as well as a liquor outlet.

[3] On the 11th August 2022 the Respondent disconnected electricity supply to the building and left a letter that the Applicant owes the Respondent an amount of R9 217 117.14. The Respondent had earlier before disconnecting electricity sent out a letter warning of the impending cut off unless payment of the arrear amount is received. That letter had been delivered to the Applicant's premises on the 7th August 2022.

[4] The Applicant contends that the letter was never properly served on a duly authorised person and on that basis alone the Applicant maintains that supply of electricity was unlawfully terminated.

[5] The Applicant further maintain that the Respondent wrongfully debited what was due and owing by one of its sub-tenants namely Omni force to the bulk account of the owner. Applicant says all the tenants have pre-paid meters.

[6] The Applicant says that the amount due is by Omni force not it. It says that Omni force was obliged in terms of its agreement with the "council" to pay the account.

[7] The Applicant maintains that its tenants paid "by electric meters" and that the Respondent had no right to disconnect supply. It is also alleged that Omni force had an agreement with the Respondent since the year 2017.

URGENCY

[8] It is argued by the Applicant that this application is urgent because

i) Tenants are prejudiced in that they can't continue with their business activities.

ii) The tenants will cancel their lease agreements with the Applicant resulting in financial loss.

iii) Tenants have threatened damages claims against the Applicant for loss of perishables and profits.

iv) Tenants are now using Diesel and Petrol generators at great expenses.

v) It is only the Spar or the Tops Liquor outlet which receive electricity supply direct all the other tenants use pre-paid meters supplied by the Respondent.

[9] The Applicant says it has chosen to set this matter down for hearing on a Thursday instead of a Tuesday as prescribed buy the Practice Directive to enable and allow the Respondent sufficient time to file its opposing papers.

[10] Clause 9.1 of the lease agreement between Applicant the Spar Group is to the effect that the tenants shall promptly and regularly pay all charges levied by the relevant authority relation for sewerage and the removal of refuse and the consumption of water and electricity on the premises. The landlord shall furnish a copy of the utility providers bill reflecting the meter readings/consumption charges together with the monthly rental invoice for the above mentioned service.

[11] Clause 9.2 "should the relevant authority levy charges in respect of electricity and or water in respect of the Shopping Centre as opposed to the premises, then the landlord shall procure that separate sub-meters are installed at its costs to measure the consumption of electricity and/or water on the premises as the case may be and the provisions of 9.1 above shall apply *mutatis mutandis.*

[12] The Applicant whilst alleging that the amount is due by Spar/Omni force has not joined Spar or Omni force to the application.

[13] In its Answering Affidavit the Respondent says that the application was only served on Tuesday the 16th August 2022 setting the matter down for hearing on the 18th August 2022. The Respondent maintains that this is not in compliance with the practice directive in that it has failed to set out exceptional circumstances entitling the Applicant to set the matter down for hearing on Thursday.

[14] In a letter dated the 2nd August 2022 addressed to the Applicant the Respondent informed the Applicant that Omni force had queried the electricity bulk meter account which had been billed on their account when it should have been billed to the Applicant as the owner of the premises and the beneficiaries of the bulk supply agreement. The Respondent informed the Applicant that there is an amount of R9 217 117.14 due and that Applicant is required to make payment thereof by the 4th August 2022 alternatively to make arrangements to settle the amount.

[15] It was impressed upon the Applicant that the letter served as a formal notice that should there be no payment or arrangements made the electricity supply to the building will be disconnected.

[16] Although the Applicant denies having received that email it has not disputed that the email address is that of the Applicant. What is strange is that it is the same email address that appears in respect of the Applicants rates and taxes account.

[17] In paragraph 19 of the Answering Affidavit the Respondent says that the Applicant opened an account for rates and taxes under its name and that for the bulk electricity supply under "Omniforce." The rates and taxes account have an outstanding amount of R732 191.57 which amount the Applicant have not paid.

[18] The Applicant failed to comply with the practice directive and strictly speaking I could for that reason only strike the matter off the roll. I however decided that

in view of the circumstances surrounding the cut off and the tenants who are the clients of the Applicant I need to deal with the merits.

THE APPLICANT'S CASE

[19] The Applicant does not say that the amount of R9 217 117.14 is not due and payable to the Respondent what they say is that the amount is due by one of their tenants being the Spar Group who operate a supermarket as well as a liquor outlet on the Applicant's premises.

THE RESPONDENT'S CASE

[20] The Respondent's case is that the Applicant is the owner of the business premises where electricity was cut off. According to the Respondent there is only one bulk meter that supplies electricity to the Applicants premises. The Respondent argues that Omniforce/Spar is a tenant of the Applicant and can therefore not be liable to the municipality for the electricity arrears.

[21] It is common cause that the Respondent is not a party to the arrangements between the Respondent and its subtenant being the Spar and or Omniforce. The question to be answered is whether the Respondent was entitled to disconnect electricity because of non-payment.

[22] Clause 27(1) of the Emfuleni Local Municipality Credit Control and Debt Collection by law for 2022/2023 read as follows:

FINAL DEMAND NOTICE

The final notice demand notice must contain the following statement: -

a) The amount in arrears and any interest payable.

b) That the customer can conclude an agreement with the municipality for payment of the arrears in instalment within three (3) working days of the date of the final demand.

c) That if no such agreement is entered into within the stated period that specified municipal services will be limited or disconnected.

[23] The Respondent sent the final demand as envisaged in clause 27(1) to the Applicant on the 2nd August 2022 in which it not only informed or advised the Applicant about the arrears but invited the Applicant to make arrangements how it intends to settle the arrears by the 4th August 2022. The Applicant ignored that email and chose to come to Court on an urgent basis.

[24] Clause 27(1) must be read together with the provisions of clause 16.1 which reads as follows:

> 16.1 Notwithstanding the provisions of any other sections of these by-laws, the owner of premises shall be liable for the payment of any amounts due and payable to the municipality.

[25] The Applicant is the registered owner of the business premises and has concluded a bulk supply agreement with the Respondent in respect of its property. The Applicant therefore remains liable for charges in respect of not only rates and taxes charged but also bulk electricity supply. It is for the Applicant who is the owner to allocate charges for such services to its tenants in accordance with their lease agreement.

[26] The Respondent has correctly raised the issue of non-joinder as a plea and asks that the application be dismissed on that score also.

[27] It is common cause that the Applicant has in its Founding Affidavit as well as in its Replying Affidavit mentioned two entities namely the Spar Group Ltd as well as Omniforce (Pty) Ltd. Applicant says that it is Omniforce that is liable to pay the amount of arrears. Omniforce which is a sub-tenant of the Spar has not

been joined as an interested party. The Applicant has failed to give an explanation why it has failed to do so.

[28] The substantial test in the plea of non-joinder is whether the party that is alleged to be a necessary party has a legal interest in the subject matter of the litigation, which may be affected prejudicially by the judgment (See: **Bowring NO v Vrededorp Properties CC 2007 (5) SA 391 SCA at paragraphs 21**). In this matter Spar and or Omniforce have a substantial interest in the outcome of this judgment in that if it is true that it is one of them that is liable for payment of the arrears then it means they should have been joined so as to tell their side of the story. The Applicant has made bold allegations that it is Omniforce which his liable without furnishing any evidence to support that.

[29] The Applicant's case is premised on spoliation in which it seeks a final interdict against the Respondent. The Applicant in order to succeed for a final interdict is required to satisfy the following:

a) A clear right.
b) An injury actually committed or reasonable apprehended.
c) The absence of similar protection.

[30] The Applicant has not satisfied this Court of clear right the reason being that the remedy of a spoliation does not protect contractual right unless there is proof that the Respondent did not follow procedure in disconnecting the electricity supply. The contrary is true Applicant was informed well in advance in the form of a letter sent to its email address.

[31] In the letter informing the Applicant about the arrears the Applicant was invited to make arrangements as to how it intends to liquidate the arrears. In my view there is alternative remedy that the Applicant could still utilise that is to have discussion with the municipality as to how it intends to settle the arrears.

[32] Section 102 of the Municipal System Act enjoins a municipality to collect all moneys that are due and payable to it. In this instance the Applicant as the

owner of the premises is liable to pay the municipality for all services rendered to it in accordance with the municipal System Act. The Applicant cannot shift its liability to a third party who has no contractual relationship with the Respondent.

[33] The Applicant referred the Court to the decision in the matter of **Wilsrus Trading CC v The City of Tshwane Metropolitan Municipality and Dey Street Properties (Pty) Ltd Case Number 36299/2022** dated 15th July 2022 a judgment by Kooverjie J.

[34] The Applicant says it relies in the finding of the Court in this application. I do not agree that the facts and issue are similar. In that matter the Applicant sought an interim relief pending finalisation of a review application to be instituted within 30 days. In this matter the Applicant seek final relief.

[35] Secondly in the Wilrus matter the Applicant was a tenant of the landlord who cried foul that the pre-termination notice had not been served on it but on the landlord.

[36] In this matter the Applicant is the owner of the building who had in fact received the pre-termination notice. The Court in Wilrus dismissed the application and at paragraph 33 said the following:

> "It can therefore not be that in every case citizens (tenants or residents) should be given pre-termination notices. Procedural fairness obligations are variable and depend on the facts of each case."

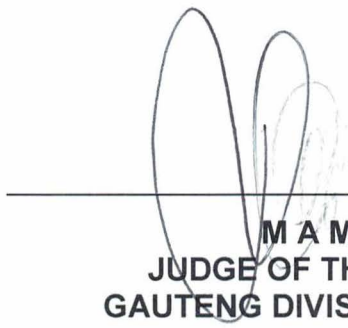
[37] In this case the owner being the Applicant received notice of termination and decided to ignore it to its detriment and to the detriment of its own clients. In the result I make the following order:

Order

1. The application is dismissed.

2. Applicant is ordered to pay the Respondent taxed party and party costs.

Dated at Johannesburg on this 1 day of September 2022



M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances:

DATE OF HEARING	:	18 AUGUST 2022
DATE OF JUDGMENT	:	01 SEPTEMBER 2022
FOR APPLICANT	:	ADV CARSTEN
INSTRUCTED BY	:	MESSRS
FOR RESPONDENT	:	ADV KUNENE
INSTRUCTED BY	:	MESSRS