REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

27/5/16

CASE NO: 32443/15

DATE OF JUDGMENT:

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

Kooverjie

In the matter between:-

PETRUS LOUW HERBST First Applicant

JACOBS & SMILAWSKI CC Second Applicant

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY Respondent

JUDGMENT

KOOVERJIE AJ:

A. APPLICATION:-

1. The Applicant seeks interim interdictory relief against the Respondent from terminating the water and electricity supply to the property, pending the outcome of the action to be instituted by the Second Applicant for a declarator to be instituted by the second applicant within 15 days.

Previous Litigation

2. At this juncture it is necessary to deal with the previous applications brought by the applicants. The issues between the parties have been dealt with by our courts since 2011.

3. In 2011 the second applicant launched an application against the respondent requesting the restoration of the water and electricity supply to the property coupled with an order declaring the respondent to be in contempt of court in respect of a Magistrate's court decision.. An interim order was granted in the second applicant's favour. However the *rule nisi* lapsed.

4. The opposed application was then set down before Judge Kubushi on 10 July 2013 and was dismissed with costs. The order read that the *rule nisi* was discharged. This judgment has been attached as Annexure "COT1" to the respondent's answering papers and will be dealt with in detail below.

5. The second applicant obtained leave to appeal to the Supreme Court of Appeal. The Supreme Court of Appeal requested additional heads in *inter*

alia addressing the court on whether or not the order was appealable due to the fact that the *rule nisi* had lapsed. The applicants decided not to proceed with the appeal and filed their notice of withdrawal on 20 August 2014.

6. Counsel for the respondent, submitted that the issues in dispute had already been dealt with by Judge Kubushi and raised the point of *res judicata* . The matter was dealt with as an opposed matter. Although the *rule nisi* had already lapsed, counsel representing both parties agreed between themselves and approached Judge Kubushi that the matter would be argued on the basis that the Applicant seeks a final order as set out in the Notice of Motion.

7. It was further submitted that the order given by Kubushi J namely that the "*rule nisi* is discharged" instead of dismissing the application with costs was an oversight on her part.

8. This explanation was relayed to the Supreme Court of Appeal by way of heads which the Judge President had requested.

9. However, counsel for the applicant submitted that since Kubushi J's order is irregular or the term she used "non sensical" this court should not have regard to it. In light of this a dispute still persists between the parties and no determination has been made in this regard.

10. On the conspectus of the evidence before me, I find that Kubushi J dealt with the issues in dispute and the application proceeded as an opposed application where the parties agreed to a final determination. I reiterate paragraph 2 of Kubushi J's judgment:

> ***"...The matter was in court again on 13 March 2013 and it was postponed sine die. When the matter appeared before me on 22 April 2013, the rule nisi had expired but the applicant still persisted with the relief sought."***

On this basis, therefore this court would consider the judgment of Kubushi J.

B. BACKGROUND:-

11. The Second Applicant is the registered owner of the property situated at 262 Charles Street, Brooklyn in Pretoria.

12. There are two separate accounts in respect of the property. The water and electricity account is in the name of AB Truter, a previous tenant of the property. This account is not in arrears and is duly paid. The First Applicant resides and runs a business from this property. Since occupation, the first applicant has not changed the account to his or his business' name.

13. The rates and taxes account is in the name of the second applicant. The Second Applicant is obliged to pay the rates and taxes account. He alleges in the papers that he pays an amount of R3 500,00 per month. At the time of the application, the property was zoned as a "residential area". Since the Applicants are conducting a dive business on the property, the property was considered to fall under "non-permitted use".

14. The rates and taxes account remains in substantial arrears. As a result thereof the electricity services to the property had been terminated on or about August 2011. It was on this basis that the Applicants approached Court for urgent relief.

(i) **"A Dispute"**

15. Counsel for the applicant argued that a dispute between the parties still exist concerning the calculation of the rates and taxes amount, hence they are entitled to the interim relief.

16. The Applicants rely on Section 102(2) of the Local Government Municipal Systems Act, 32 of 2000 (*"the Municipal Systems Act"*). On their understanding thereof, the municipality may not consolidate the separate accounts of persons nor implement debt collection in respect of the arrear amount, if there is a dispute between the municipality and a person referred to concerning any specific amount claimed by the municipality from that

person. In other words since a dispute persists between the parties, the municipality is prohibited from enforcing its debt collection on the arrear amount. Counsel for the respondent submitted that the applicants have misconceived the interpretation of Section 102 of the aforesaid Act. Reference was made to ***Rademan v Moghaka Municipality & Others 2012 (2) SA 387 (SCA) in par 19***, where it clarified the interpretation of the aforesaid section:

> ***"[19] This section makes it clear that in pursuit of its obligations to charge and receive payments for municipal services, a municipality has the option to consolidate the accounts for various services it provides... It should be borne in mind that water and electricity are not the only municipal services that a municipality is responsible for... Thus a failure to pay rates and taxes is likely to have very serious consquences."***

17. The Respondent contended on the papers, that no dispute existed between the parties, neither has any formal dispute been lodged by the Applicants as required in terms of the by-laws.

18. The Applicant's argument was *inter alia* the following:

18.1 a dispute exists in respect of the arrear amount in respect of the rates and taxes;

18.2 the word "dispute" has not been defined in the Municipal Systems Act. It is thus imperative for the court in the action proceedings make a determination.

18.3 the Applicants submitted that, despite the meeting held on 18 August 2014 and the Second Applicant's letters dated 20 August 2014 and 21 May 2015, the Respondent had failed to provide the Second Applicant with an explanation upon which the calculation was made.

18.4 the Respondent persists with its view that it is entitled to charge the rates and taxes based on the ***"non-permitted use"*** of the property. The Respondent is not entitled to charge a higher rate in respect of the full property as a result of the fact that only 30% is being used for business purposes.

18.5 The Respondent is not entitled to charge a penalty to the First Applicant since the property is used for multiple purposes as contemplated in Sections 9(1) and 9(2) of the Municipal Property Rates Act. The rates should have been calculated in accordance with these provisions.

18.6 The Applicants further contended that at no stage prior to this application had the Respondent formally notified the Applicants of its intention to terminate the water and electricity services. It

is on this basis that the Applicants should be granted interim relief.

(ii) **Judge Kubushi's Judgment**

19. As already alluded to above, this Court's attention was drawn to a previous matter launched by the second applicant under case number 47730/2011, in the matter between ***Jacobs and Smilawaski and the City of Tshwane Metropolitan Municipality.*** Having read the judgment I find that, Judge Kubushi had dealt with the aforesaid issue in dispute. This very ***"dispute"*** has once again been brought before this Court.

20. The Court made the following findings in respect of the aforesaid dipute:

- **Paragraph 21**

> ***"The Applicants' property thus falls squarely within the category. It is common cause that the property is currently zoned for residential usage. Even though the Applicant alleges that he has applied for the rezoning of the property, it is not in dispute that the property has not been rezoned. By operating a business on the property the Applicant is doing so in contravention with the permitted use of the property. The Respondent is thus entitled to levy the rate as it does. There is no reason and the Applicant himself has provided none for the Respondent to be charging rates for business and commercial usage. There is no reason provided for in either policy or the bylaws for the rates which the Applicant wants to enforce. The property is currently 3 areas as residential and residential use rates must be applicable but once the Applicant is using the property for the purpose for which it is not zoned 'non permitted use' rates must be levied."*** (my emphasis)

- When considering whether the Respondent was entitled to disconnect the Applicants water and electricity supply, Kubushi J stated at para 23:

"The Local Government Systems Act 32 of 200 (the Systems Act) is a legislative measure that seeks to support and strengthen the capacity of municipalities to manage their own affairs. Section 96 thereof provides for every municipality a credit control and debt collection policy. The municipalities are therefore mandated by Section 96(1)(a) to collect all money that is due and payable. In terms of Section 97(1) a credit control and debt collection policy must provide for amongst (a) credit control procedures and mechanisms (b) debt collection procedures and mechanisms and (g) provision for termination of municipal services or restriction of the provision of municipal services when payments of ratepayers are in arrears....

- At paragraphs 24 and 26 she makes the following findings:

> *[24] It is clear from the above mentioned that a municipality has the power to terminate or restrict the provision of municipal services when a resident is in arrears for payments for services..."*
>
> *[26] On the basis of the bylaws the Respondent is therefore entitled to terminate the services of water and electricity to the property of the Applicant when he is in arrears with his payments in respect of any of his services. In this instance, I have already made a finding; the Applicant is in arrears with the payment of the rates account of the property."* (my emphasis)

21. This Court is of the view that the dispute is before the Court on the same facts and in respect of the same parties. The relief sought however was different. In the previous matter the Second Applicant (the Applicant in that matter) requested relief to order the Respondent to restore the water and electricity account. In this matter the relief sought is to interdict the Respondent for ***"terminating the water and/or electricity supply".***

22. Since the Court has already made a finding on the ***"dispute"*** it falls away. I am in agreement that with the findings therein and had further applied my mind to the provisions of the relevant legislation. The respective provisions the Municipal Systems Act as well as the

Credit Control By-Law which empowers the municipality to restrict and disconnect the supply of municipal services.

23. More specifically: cognisance is taken of the relevant legislative provisions namely:

- Section 97(1)(g) of the Municipal Systems Act stipulates:

  "(1) A credit control and debt collection policy provide for –

  (g) termination of services or the restriction of the provisions of services when payments are in arrears."

- Section 5(2)(b) of the Municipal Systems Act stipulates that members of the community have a duty to pay service fees, sub-charges on fees, rates on property and other taxes, levies and duties imposed by the municipality promptly.

- Section 5(2)(a)(i) of the Credit Control By-Law further stipulates:

  "(a) The council may, restrict or disconnect the supply of water, gas and electricity, or discontinue any other service to any premises whenever a user of any service:

  (i) fails to make full payment on the due date or fails to make acceptable arrangements for the repayment of any amount for services, rates of taxes."

- Clause 5.2(d) of the Credit Control By-Laws empowers the entities of the municipality to terminate services of one account if another account is in arrears, even when the account is in the name of a different person.

- Clause 5.4(b) of the Credit Control By-Laws stipulates that even in the event that a dispute exists in respect of the amount owing by an owner in respect of municipal services the owner is required to make regular minimum payments based on the calculation of the average municipal account.

C. INTERIM RELIEF

24. It is settled law that for the Applicants to succeed in obtaining interim relief it has to establish:

24.1 a *prima facie* right;

24.2 a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief if it is eventually granted;

24.3 a balance of convenience in favour of the granting of the interim relief; and

24.4 the absence of any other satisfactory remedy.

(i) *Prima facie* rights

25. In demonstrating that the Applicants have a *prima facie* right they have to demonstrate that they have a right upon a balance of probabilities and that the Respondent has threatened such right.

26. The high watermark of the Applicant's case and consequently their rights was premised on Section 102(1) and 102(2) of the Municipal Systems Act. In essence, since a dispute exists between the parties, Section 102(2) prevents the Respondent from pursuing the arrear rates and taxes as well as restricting the water and electricity supply.

27. This court finds that the Applicant's rights are premised on a misconstrued interpretation of the aforesaid provision.

28. As already alluded to above, the relevant provisions of the Credit By-Laws entitles the Respondent to terminate the water and electricity services. Kubushi J had dealt with the issues in dispute between the parties and made a finding thereon.

Irreparable Harm

29. The test in this regard is an objective one i.e. on the basis of the facts presented to it, the court must decide whether there is any basis for the entertainment of a reasonable apprehension of injury to the Applicant.

Irreparable loss in this instance would be if the Applicants are entitled to the services in issue and it is taken away from them.

30. It is trite law that if the Applicant establishes a clear right then this test is not necessary. In ***Setlogelo v Setlogelo 1914 AD 221 at 227***, the court stated **"the test must be applied whether the continuance of a thing against which an interdict is sought would cause irreparable injury to the applicant."**

31. The Applicants have not established a *prima facie* right and thus there exists no basis to entertain if there would be irreparable injury caused to the Applicant.

Balance of Convenience

32. In this instance this court must weigh the prejudice to the Applicant if the interim interdict is refused against the prejudice to the Respondent if it is granted. This is normally considered in light of the prospects of success in the main action. The stronger the prospect of success, the less need for the balance of convenience to favour the Applicant. The weaker the prospects of success, the greater the need for the balance of convenience to favour him.

33. The Applicants have indicated that a business is being managed on the premises and the provision of water and electricity services are crucial to the operation of the business. The Respondent on the other hand, submitted that

arrears in municipal accounts are detrimental to the efficient running of the Respondent.

34. I find that the Applicants' prospects of success in the main action are not promising. As already alluded to above, they have not established a *prima facie* right.

No Other Satisfactory Remedy

35. In the absence of another adequate remedy, a court should grant interim relief. Counsel for the Applicants emphasised that the applicants have no other alternative remedy. The Respondent is the service provider who is responsible to make the municipal services available to the Applicant. They require these services for their business.[1]

36. The alternative remedy is to comply with Clause 5.4(b) of the Credit By-Laws by making the minimum payments or enter into an arrangement with the Respondent on the outstanding arrears.

37. It is trite law that a court should exercise its discretion judicially upon a consideration of all facts. This court further takes cognisance of the fact that the "dispute" between the parties have been ongoing long before the first application was lodged in the Magistrate's Court.

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[1] Olympic Passenger Service (Pty) Ltd v Ramlagan 1957 (2) SA 382 (D) at 383 E - F

38. Kubushi J dealt with the facts of this matter in detail, the same issues in dispute which were again presented in this court, which judgment had already been delivered on 10 July 2013. After lodging an appeal in the Supreme Court of Appeal, they withdrew such appeal on 20 August 2014. There are no new facts before this court, particularly on what the Applicant has done to resolve the matter, and in settling the arrear rates and taxes .

39. It is common cause that this account is in arrears. Kubushi J had made a finding that the calculation method applied by the Respondent was in line with premises which fell under "non-permitted uses".

D. CONCLUSION:-

40. Consequently the Applicants are not entitled to the interim relief they seek. This court has noted that the Applicant has requested the Respondent to furnish it with the calculation formula. The Respondent has an obligation to furnish the Applicant with the calculation method and the updated calculation itself.

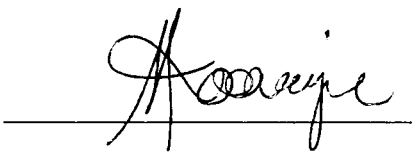
ORDER:-

41. The following order is made:

(1) The application is dismissed with costs.

(2) The Respondent is requested to furnish the Applicant with a detailed updated calculation of the arrear amount in respect of the rates and taxes to date, as well as the calculation method it applied within 5 days of date of judgment.

(3) The Respondent restricted from terminating the access of the water and electricity services to the property for a period of 1 month, which period is calculated from the date of this judgment.



KOOVERJIE AJ
Acting Judge

Date of hearing: 7 June 2016

Parties:	**Applicants' attorney:**	**Schoonraad Attorneys**
	Applicants' counsel:	**Adv. C Grobler**
	Respondent's attorney:	**Matabane Attorneys**
	Respondent's counsel:	**Adv. N Erasmus**