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

Case Number : 36664/2022

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES
DATE: 3 August 2022

In the matter between:

MORGAN CREEK PROPERTIES 311 (PTY) LTD Applicant

and

THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

[1] This is an urgent application to prohibit the respondent from terminating the electricity supply to the applicant's property situated at [....] E[....] S[....], Koedoespoort , Pretoria ("the premises")

Background

[2] The threat by the respondent to terminate the electricity supply to the applicant's premises is based on an alleged outstanding balance of R 2 106 566, 20 under three different account numbers, to wit [....], [....] and [....].

[3] During the period 2014 to 2018 a dispute ("the 2018 dispute") arose between the applicant and the respondent in respect of electricity consumption and charges under the applicant's account number [....]. The parties were unable to resolve the dispute and the dispute was referred to the National Energy Regulator of South Africa during April 2018.

[4] I pause to mention that the referral is in terms of By-Law 9 of the respondent's Standard Electricity By-Laws, which By-Laws were published in the Provincial Gazette Extraordinary, (No. 234 of 25 June 2003), Authority Notice 1132 (as amended in 2013) and reads as follows:

> *"If at any time any difference or dispute arises between the Municipality and the consumer about the construction, meaning or effect of these By-Laws or about the rights,* ***obligations or*** *liabilities of the consumer or Municipality under the By-Laws, the difference or* ***dispute*** *must be referred to the NERSA for a decision, failing which the difference or* ***dispute*** *must be settled by arbitration in terms of the provisions of the Arbitration Act, 1964 (Act 42 of 1965)."* (own emphasis")

[5] Notwithstanding the aforesaid referral, the respondent continued with its threat to terminate the electricity supply to the applicant's premises. This forced the applicant to launch an urgent application in June 2018 for an interim interdict prohibiting the respondent from terminating the supply.

[6] On 19 June 2018 the applicant obtained an interdict in the following terms against the respondent:

> *"The respondent is interdicted from implementing its debt collection and credit control measures by terminating any of the services of the applicant that are*

rendered to the applicant on the immovable property known as [....] E[....] S[....], Koedoespoort, Pretoria in respect of account [....] – [....];"

[7] Despite the court order and the pending dispute submitted to NERSA, the respondent continued to include the disputed amount in the monthly invoices rendered to the applicant under account number [....]. To add insult to injury, the respondent also added interest on the disputed amount on a monthly basis.

[8] Due to the aforesaid and notwithstanding regular payments in respect of the monthly fees charged for electricity consumption on the premises, account number [....] ("the old account") reflected an arrear amount of R 1 828 532, 00 on 1 March 2022.

[9] Unbeknownst to the applicant, and during February 2022, the respondent opened a new prepaid account under account number [....] ("the new account") for the applicant. Invoices were rendered on the new account from 1 March 2022.

[10] The applicant being unaware of the new account, continued to make monthly payments in respect of municipal charges into the old account. Notwithstanding the aforesaid, the account still reflects an outstanding balance of R 1 828 532, 00 during June 2022. The applicant disputes the arrear amount and contends that the amount does not take the payments it has made since March 2022 to date into account.

[11] The applicant only became aware of the new account when its electricity supply was disconnected on 10 June 2022. At that stage the new account was in arrear in the amount of R 749 443, 00. Although the account is in respect of municipal services for the period March to June 2022, the account also does not reflect the payments the applicant had made in respect of such services. It is at this stage unclear what happened to the payments made by the applicant in the aforesaid period.

[12] Despite several attempts to clarify the obvious discrepancies in respect of the two accounts, the applicant received a notice from the respondent on 6 July 2022, informing the applicant that the power supply to its property will be discontinued

within 7 days if the outstanding amount of R 2 106 566, 20 on account number [....], the third account is not paid.

[13] The notice was, however, accompanied by an invoice under the new account, which invoice reflected an arrear amount of R 110 302, 39.

[14] Having made regular payments towards the municipal charges on the premises, the applicant disputed ("the 2022 dispute") the arrear amount and lodged a written request to resolve the dispute in terms of section 95(f) read with section 102(2) of the Local Government: Municipal Systems Act, 32 of 2000, on 6 July 2022.

[15] In terms of section 102(2) the respondent may not implement any debt collection or credit control measures until the dispute is finalised.

OPPOSTION

Point in limine

[16] The respondent raised a point *in limine* that the deponent to the applicant's founding affidavit, Hendrick Spoelstra ("Spoelstra"), does not have authority to institute legal proceedings on behalf of the applicant. Although Spoelstra alleged in the founding affidavit that he has such authority, a resolution of the applicant was not annexed to the papers.

[17] In pursuance of the point, the respondent delivered a rule 7(1) notice in terms of which the applicant was informed that the respondent:

> *"…disputes the authority of the Applicant's Attorney of record to act on behalf of the Applicant and therefore request the Applicant's Attorneys to provide a written Power of Attorney as a proof of authority to act.."*

[18] The applicant's attorneys duly filed a power of authority in terms of which Spoelstra in his capacity as director of the applicant, nominated, constituted and appointed the applicant's attorneys.

[19] During the hearing of the matter Mr Kwinda, counsel for the respondent, stated that a resolution by the directors of the applicant should have been attached to the power of attorney. Mr Kwinda referred to the CIPC company search of the applicant that is attached to the founding papers and which clearly indicates that the applicant has two directors, to wit Spoelstra and Raymond Taxi Mashau (Mashau"). Mr Kwinda emphasised that it is not the lack of authority of Spoelstra to depose to the applicant's founding affidavit that is in dispute, but Spoelstra's lack of authority to institute the application on behalf of the applicant.

[20] In *Poolquip Industries (Pty) Ltd v Griffin* 1978 (4) SA 353 W, the court also dealt with the lack of authority to institute legal proceedings. The court held as follows at 356 E – H:

> *"It is usual and desirable for the resolution of the board of directors of a company, authorising the litigation, to be annexed to and proved by the founding affidavits. When it is not, but the probabilities indicated by the allegations in those affidavits justify the conclusion that the company has authorised the application, in the absence of evidence to the contrary, the failure to annex the resolution need not result in the dismissal of the application.*
>
> *In Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk 1957 (2) SA 347 (C) WATERMEYER J said at 352A:*
> *"The best evidence that the proceedings have been properly authorised would be provided by an affidavit made by an official of the company annexing a copy of the resolution but I do not consider that form of proof is necessary in every case. Each case must be considered on its own merits and the Court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorised person on its behalf." See also Dowson and Dobson Ltd v Evans and Kerns (Pty) Ltd 1973 (4) SA 136 (E) at 137H - 138A; African Land and Investment Co Ltd v Newhoff and Others 1929 WLD 133; Geldenhuis Deep Ltd v Superior Trading Co (Pty) Ltd 1934 WLD 117; Hocken v Union Trawling Co 1959 (2)*

SA 250 (N) at 252G. Mr Browde relied on Griffiths and Inglis (Pty) Ltd v Southern Cape Blasters (Pty) Ltd 1972 (4) SA 249 (C) for his contentions. That application was founded simply on an allegation that the deponent to the main supporting affidavit was the managing director and majority shareholder. There was no mention of authorisation by the company. In the reply it was alleged that he was authorised in that the other directors were aware of the application without stating when they became aware and gave authority. That did not constitute the "minimum of evidence" of authority".

[21] In *casu* Spoelstra stated in the founding affidavit that he is the director of the applicant and that he is duly authorised to depose to the affidavit on behalf of the applicant. He further stated that he is duly authorised to represent the applicant in the proceedings.

[22] Spoelstra did not deal with the lack of authority point in his replying affidavit.

[23] In the premises, this court does not know whether the other director of the company, Mashau, is aware of the litigation and/or whether he supports the application. A company can only act through a resolution of its directors and the respondent's point *in limine* must be upheld.

[24] This is, however, not the end of the matter. A court may at any stage during the proceedings of the matter, afford a party whose authority has been challenged an opportunity to provide the necessary proof of its authority.

[25] I am of the view, that I should grant the applicant such an opportunity in the circumstance. My view is premised on the following:

[25.1] although the aforesaid point was taken *in limine* the parties proceeded to address me in full on the merits of the matter;

[25.2] the matter is clearly urgent and the issue between the parties should, in the interests of justice, be adjudicated upon speedily and without undue delay.

Order

In the premises, I issue the following order:

1. The respondent's point *in limine* is upheld with costs.

2. The applicant is afforded a period of three days from date of this order, to file proof of its authority to institute these proceedings.

3. Judgment is reserved.

N. JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

DATE HEARD PER COVID19 DIRECTIVES:
26 July 2022

DATE DELIVERED PER COVID19 DIRECTIVES:
3 August 2022

APPEARANCES

For the Applicant:	Adv Voster
Instructed by:	Albert Hibbert Attorneys Inc
For the Respondent:	Adv T Kwinda
Instructed by:	JL Raphiri Inc