

**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable

Case no: 1346/2022

In the matter between:

**CITY OF TSHWANE
METROPOLITAN MUNICIPALITY**

APPELLANT

and

**VRESTHENA (PTY) LTD
(Registration No 2001/05148/07)**

FIRST RESPONDENT

THE BODY CORPORATE OF ZAMBEZI

RETAIL PARK

SECOND RESPONDENT

ZAMBEZI RETAIL PARK INVESTMENTS

(PTY) LTD

THIRD RESPONDENT

THUMOS PROPERTIES (PTY) LTD

FOURTH RESPONDENT

ZRJ PROPERTIES (PTY) LTD

FIFTH RESPONDENT

In Re:

VRESTHENA (PTY) LTD

(Registration No 2001/05148/07)

APPLICANT

CITY OF TSHWANE

METROPOLITAN MUNICIPALITY

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FIFTH RESPONDENT

Neutral citation: *City of Tshwane Metropolitan Municipality v Vresthena (Pty) Ltd and Others* (1346/2022) [2024] ZASCA 51 (18 April 2024)

Coram: MOCUMIE, MBATHA and HUGHES JJA and KATHREE-SETILOANE and KEIGHTLEY AJJA

Heard: 10 November 2023

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 18 April 2024.

Summary: Civil Practice – Appealability of interim orders - order held to be final in nature and appealable; municipal law – deliberate non-payment of services - appellant failed to establish a prima facie right to continue to receive electricity without payment.

ORDER

On appeal from; Gauteng Division of the High Court, Pretoria (Ndlovane AJ sitting as a court of first instance):

- 1 Condonation is granted and the appeal is reinstated.
- 2 The appeal is upheld with costs, such costs to include the costs consequent upon the employment of two counsel where applicable.
- 3 The orders of the high court are set aside and replaced by the following order:
‘The application is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel where applicable.’

JUDGMENT

Mbatha JA (Mocumie and Hughes JJA and Kathree-Setiloane and Keightley AJJA concurring):

[1] The issues before this Court are whether the order granted by the Gauteng Division of the High Court, Pretoria, per Ndlovane AJ (the high court) is appealable and if so, whether this Court should grant condonation, reinstate the appeal and consider the merits thereof.

Background

[2] A brief summary of the history is required. The Zambezi Retail Park Centre (the Retail Park) is a large commercial property situated at Erf 5 Derdepoort, R573 Meloto & R513 Zambezi. The Zambezi Retail Park Sectional Title Scheme was established in 2006 comprising eight sections. On 8 July 2010

the scheme was extended to include section 9. Section 1 to 4, 7 and 8 in the building are owned by the First Respondent, Vresthena (Pty) Ltd (Vresthena), which leases them to various business entities. The management of the scheme in terms of the Sectional Titles Act 95 of 1986 (the Act) vests in the Body Corporate's trustees elected on 19 June 2018.

[3] The City provides electricity to the aforementioned properties, through the Body Corporate of Zambezi Retail Park (the Body Corporate). It is common cause that historically a petrol station, situated within the scheme, has always had a separate account with the City and a separate electricity connection. Save for the petrol station, the owner of which is not a party to this appeal, the City supplies electricity through a single supply point to the different sectional title units. The Body Corporate is billed accordingly. As of January 2022, due to the continuous failure by the Body Corporate to pay for services, the City implemented credit control measures, which included the disconnection of electricity in an attempt to collect the outstanding revenue. These measures were resisted by Vresthena. Consequently, Vresthena filed an urgent application in the high court. In Part A, which dealt with urgent relief, it sought an order compelling the City to accept and reconsider its application for a separate electricity connection for its sections of the Retail Park. In addition, it sought restoration of the electricity and water supply to the Retail Park. The relief in Part B, which was not sought urgently, was conditional on the application for a separate electricity connection being rejected by the City. In that case, Vresthena recorded in Part B that it would seek an order reviewing the rejection.

[4] On 20 June 2022, the high court granted the following order in respect of the urgent, Part A, relief:

‘1. The matter is certified as semi-urgent and the parties may approach the opposed motion Registrar for an expedited hearing date on the opposed motion roll where the remainder of the relief, and Part B will be dealt with.

2. Pending the hearing, the first respondent is ordered to restore electricity and/or water supply to the property known as Erf 5 Derdepoort, R573 Meloto & R513 Zambezi within 14 days of this order.

3. The first respondent is ordered to provide an updated and accurate reconciliation of the second respondent’s electricity consumption account, reflecting the current and due outstanding amount, to the second respondent’s attorney of record by 24 June 2022.

4. In the event that the second respondent wishes to dispute any of the amounts reflected on the reconciliation referred to in paragraph 2 above, then and in that event:

4.1 the second respondent will declare a formal dispute in terms of the Credit Control By-laws of the first respondent within 10 days after the receipt of the reconciliation as contemplated in paragraph 2 above, which [dispute] will be served via email on the following addresses:

4.1.1 M[...]

4.1.2 W[...]

4.1.3 c[...]a

4.2 The first respondent will provide the second respondent with a written response to the aforementioned dispute within 14 days after receipt of such dispute.

4.3 The necessary adjustments will be made on the account of the second respondent.

4.4 This does not affect the rights of any party to follow any process that is available to them in law.

5. The applicant is ordered to table a resolution to the second respondent and its members within 7 days of the order being granted, to the effect that:

5.1 The second respondent will monitor *alternatively* appoint an independent service provider to monitor, the consumption of each of the section owners.

5.2 The second respondent will account to the owners and collect payment [from each] section owner’s consumption of electricity.

5.3 The second respondent will pay over the funds so collected from members to the first respondent timeously.

5.4 Each section owner will be liable for, and will duly pay, its electricity consumption to the second respondent and should any member of the second respondent fail to do so, the second

respondent be authorised to internally disconnect the electricity supply to the non-paying section.

6. In the event that the first respondent fails to comply with paragraph 2 of this order timeously, the applicant is authorised to instruct an electrician and/or service provider to reconnect the electricity and/or water supply in such event, the applicant reserves its right to claim such reasonable costs from the first respondent.

7. For as long as the electricity is connected to Erf 5 Derdepoort, R573 Meloto & R513 Zambezi, the applicant will make payment of its consumption to the first respondent unless the parties come to an alternative arrangement.

8. In relation to the proceedings of 16 June 2022, each party will pay their own costs.

9. Both parties are authorised to approach this Honourable Court in the future, if need be, on the same papers, duly supplemented for further relief as the case may be necessary.'

For the sake of clarity, the reference to 'first respondent' in the order is to the City, and the 'second respondent' is a reference to the Body Corporate. Dissatisfied with the outcome of the application the City sought leave to appeal. The appeal serves before us with leave of the high court.'

Appealability of the order

[5] Vresthena submitted that the order was not appealable on the basis of its interim nature. In that regard, it submitted that: (a) the order caters for the interim period until the remainder of the relief in Part A and Part B have been determined on an expedited basis; (b) that in terms of paragraph 9 of the order the parties may supplement their papers and approach the court for further relief; (c) that its application for a separate supply of electricity was attached to its court application and upon the granting of the order the City would decide on the application; (d) if the application is granted, nothing will prevent the City from pursuing the Body Corporate for arrear amounts; (e) and if the application is not granted only then would the matter proceed to the balance of Part A and Part B.

[6] In addition, Vresthena advanced the argument that the order is not definitive of the rights of the parties in that paragraph 1 of the order in Part A dispenses with the argument that the order dispossesses the City of a substantial portion of the relief sought. Additionally, it submitted that as the order falls outside of the *Zweni* triad, it is not appealable on other grounds. Lastly, Vresthena contended that paragraph 1 of Part A opened the door to any of the litigants to approach the court on an expedited hearing date on the opposed motion roll where the remainder of the relief, and Part B will be dealt with.

[7] To the contrary, the City contended that the order is appealable in that it is final in effect and falls within the *Zweni* triad.¹ It submitted that the order granted by the high court is not purely interlocutory as it cannot be corrected, altered or set aside by the judge who granted it at any time before the final judgment. In addition, it argued that the order failed to take into account the constitutional obligation that rests on the City to collect outstanding revenue for the purpose of providing basic services to the residents in its area of jurisdiction, as contemplated in the Constitution of the Republic of South Africa, Act 108 of 1996 (the Constitution) and other relevant legislation. The order was granted in favour of Vresthena even though it did not meet all the requirements of an interdict, in particular the consideration of other possible remedies at the disposal of Vresthena.

The legal principles regarding the appealability of court orders

[8] The traditional approach to appealability of court orders is generally regarded as being that set out in *Zweni*. In that case it was held that for an order to be appealable, ‘the decision must be final in effect and not susceptible to alteration by the court that granted the order, it must be definitive of the rights

¹ *Zweni v Minister of Law and Order of the Republic of South Africa* [1992] ZASCA 197; [1993] 1 All SA 365 (A).

of the parties and it must have the effect of disposing of at least a substantial portion of the relief sought in the proceedings’.² These principles have been confirmed in various decisions as extrapolated in the judgment of this Court in *FirstRand Bank Ltd v McLachlan and Others*.³ However, as noted recently by this Court, there have subsequently been significant developments in our law in this regard.⁴ In *City of Cape Town v South African Human Rights Commission*⁵ it was held that:

‘After confirming that the interests of justice were paramount in assessing the appealability of an interim order, the Constitutional Court in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* went on to set out what factors a court should consider in assessing where the interests of justice lay:

“ . . . To that end, [a court] must have regard to and weigh carefully all the germane circumstances. Whether an interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review is a relevant and important consideration. Yet, it is not the only or always decisive consideration. It is just as important to assess whether the temporary restraining order has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable.”

The interests of justice standard will inevitably involve a consideration of any irreparable harm. To successfully appeal an interim order an applicant will have to show that it will suffer irreparable harm if the interim appeal were not granted. Even so, stated the Constitutional Court in *International Trade Administration Commission v SCAW South Africa (Pty) Limited*, irreparable harm although important, is not the sole consideration and the interests of justice require an evaluation of a number of factors:

“ . . . The test of irreparable harm must take its place alongside other important and relevant considerations that speak to what is in the interests of justice, such as the kind and importance of the constitutional issue raised; whether there are prospects of success; whether the decision, although interlocutory, has a final effect; and whether irreparable harm will result if the appeal is not granted . . . ”

² Ibid para 12.

³ *FirstRand Bank Ltd v McLachlan and Others* [2020] ZASCA 31; 2020 (6) SA 46 (SCA) paras 21-22.

⁴ *Cyril and Another v Commissioner for the South African Revenue Service* [2024] ZASCA 32 para 7.

⁵ *City of Cape Town v South African Human Rights Commission* [2021] ZASCA 182 paras 10-12.

The first enquiry is to ascertain whether the orders granted by the high court have a final effect. For this it is necessary to compare the orders granted in respect of Part A and the orders sought in Part B, to ascertain to what extent they overlap.’

[9] In *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and others (TWK)*,⁶ this Court dealt with the issue of appealability and, in particular the role of the overarching principle of the interests of justice. It favoured the doctrine of finality as the lodestar guiding the determination of whether an order is appealable because:

‘... It allows for the orderly use of the capacity of this Court to hear appeals that warrant its attention. It prevents piecemeal appeals that are often costly and delay the resolution of matters before the high court. It reinforces the duty of the high court to bring matters to an expeditious, and final, conclusion. And it provides criteria so that litigants can determine, with tolerable certainty, whether a matter is appealable. These are the hallmarks of what the rule of law requires.’⁷

The sentiments expressed in *TWK*, regarding avoiding the piecemeal adjudication of an appeal and its consequences, were affirmed by the Constitutional Court in *Cloete and Another v S; Sekgala v Nedbank Limited*⁸ where it held that:

‘In any event, this Court has held that in considering whether to grant leave to appeal, it is necessary to consider whether “allowing the appeal would lead to piecemeal adjudication and prolong the litigation or lead to the wasteful use of judicial resources or costs”. Similarly, in *TAC I*, this Court stated that “it is undesirable to fragment a case by bringing appeals on individual aspects of the case prior to the proper resolution of the matter in the court of first instance”. This is one of the main reasons why interlocutory orders are generally not appealable while final orders are.’

⁶ *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and Others* [2023] ZASCA 63; 2023 (5) SA 163 (SCA) para 19.

⁷ *Ibid* para 21.

⁸ *Cloete and Another v S; Sekgala v Nedbank Limited* [2019] ZACC 6; 2019 (5) BCLR 544 (CC); 2019 (4) SA 268 (CC) para 57.

[10] *TWK* did not consider the Constitutional Court's judgment in *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others*,⁹ which affirmed the role of the interests of justice in this Court's consideration of the question of appealability. The effect of *Lebashe* is that just because an order is interlocutory is not decisive as to its appealability.¹⁰ This Court recently held in *Nedbank Limited and Another v Survé and Others*¹¹ that '(i)n a matter where no case was made out for an interim interdict and the order accordingly ought never to have been granted in the first place, along with other relevant considerations, interests of justice might well render an interim interdict appealable despite the *Zweni* requirements not having been met'. In *Lebashe*, the Constitutional Court was moved to consider an interim order appealable because of the grave prejudice it caused to the constitutional protection of freedom of expression.¹² In *Survé* this Court similarly found an interim order that was based on a *prima facie* finding, by the equality court, that the interdicted party had committed an act of unfair racial discrimination, to be appealable. In arriving at that decision, this Court took into account the serious reputational repercussions for the interdicted party in allowing an order to stand in circumstances where it ought never to have been made in the first place.¹³

[11] In sum, then, on the jurisprudence as it stands, an interim order may be appealable, taking into account a range of factors. The *Zweni* requirements play an important role in determining the issue of appealability in a particular case, but they are not immutable. The interests of justice continue to play a substantial role in the inquiry. What those interests are involves a finely weighed consideration of relevant factors in each case.

⁹ *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* [2022] ZACC 34; 2023 (1) SA 353 (CC); 2022 (12) BCLR 1521 (CC).

¹⁰ *Cyril* para 8.

¹¹ *Nedbank Limited and Another v Survé and Others* [2023] ZASCA 178; [2024] 1 All SA 615 (SCA) para 18.

¹² *Lebashe* para 45.

¹³ *Survé* para 30.

Evaluation

[12] With regard to the orders granted by the high court in Part A and Part B in this matter, one of the questions that need to be considered is whether the orders are final in nature, more particularly in their effect, rather than their form.¹⁴ I agree with the City's submissions that what needs to be considered is the consequences of the orders and the conditions brought about by what Vresthena considers to be interim orders. The effects thereof which may not be capable of being undone and a fresh order may be required to reverse the final effect thereof.

[13] The orders that were granted by the high court have a number of shortcomings. First, the order does not make reference to the application for an additional electricity service connection as sought by Vresthena in paragraph 1 of Part B of the notice of motion. Second, the duration of the order is indefinite which means that it shall endure until such time that the legal process in Part B is completed. This leaves all the parties in a state of uncertainty. Third, there is no causal link between the order granted by the court in Part A and Part B of the notice of motion. Part A directs the City to continue to supply electricity and water to the entire Retail Park pending the resolution of Part B. However, Part B is directed only at a possible review of a possible decision by the City to refuse Vresthena's application for a separate supply to the units or sections owned by it. What is more, there is no time frame laid down for the anticipated review or for Vresthena to file its application with the City for a separate electricity supply as contemplated in s 7 of its By-laws. Therefore, the court order does not set out steps to regulate Part B of the application. Fourth, the restoration of electricity without the provision for the payment of arrears creates an anomaly in that the City is forced to provide electricity to the property where payment is

¹⁴ *Lebashe* para 41.

not being made. Lastly, the chilling effect of the order is that it compels the City to act contrary to the prevailing law and its constitutional mandate: it must continue to supply electricity to users who are in arrears and have a history of non-payment for the foreseeable future, and at the same time the City is denied the statutory power to terminate services without approaching a court to obtain leave to do so. These characteristics of the order demonstrate that its effect is final in nature. At the very least, for reasons I traverse below, this is one of those cases where the relief sought ought to have never been granted, and the order is appealable on this basis too.

[14] I do not agree with the argument submitted on behalf of Vresthena on a number of grounds. The doctrine of finality as envisaged in *TWK* cannot be blindly applied to an interim order which is final in effect and where a grave injustice would result. It was submitted on behalf of Vresthena that Part A of the order balanced the competing interest of the parties, pending the hearing of Part B, in that electricity will be provided and Vresthena will pay the City for the electricity consumed, whilst the dispute relating to the accuracy of the account can be registered and reviewed in the interim. As alluded to already, this argument is flawed as it does not address the payment of arrears. In addition, the argument is made against the backdrop that the electricity would be restored to the entire Retail Park. Disturbingly, however, the order places no direct obligation on other owners to pay for their consumption of electricity. It merely directs the applicant to place a resolution before the Body Corporate as to how payment to it, and hence to the City, should be dealt with in future. In other words, the City is obliged to reconnect services to all owners without a concomitant obligation on all of them to pay for the services they use. Lastly, there was no mention that Vresthena has made any arrangements for the payment of arrears to the City or the Body Corporate. The order simply

insulates the Body Corporate and its members from payment for the consumption of electricity. This is bound to lead to irreparable harm to the City.

[15] Vresthena's argument that Part B would be determined on an expedited basis is misplaced as the order is silent on the time frames. Vresthena relies on paragraph 9 of the order in Part A which states that 'both parties are authorized to approach this honourable Court in the future, if needs be, on the same papers duly supplemented for further relief as the case may be'. The order as framed is disjunctive. As it stands, paragraph 9 refers to the variation of the orders which have no relation to each other. This would have the effect that Vresthena and the Body Corporate would enjoy *carte blanche* the supply of the electricity to the Retail Park without making payments to the City. I conclude by making a finding that the order is thus appealable.

[16] This finding on appealability of the order has a direct link to the determination of the application for condonation for the late filling of the notice of appeal and reinstatement of the appeal by the City. Having considered the opposed application on this, I find the explanation reasonable and that there are indeed strong prospects of success on the merits. Consequently, condonation is granted and the appeal is reinstated.

The merits of the application

The law

[17] In Vresthena's application for an interdict, it sought an order directing the City to continue to restore and continue to supply the whole Retail Park with electricity while it applied for a separate electricity supply point. The question is whether the high court erred in finding that it had met the requirements for an interdict of this nature, particularly in light of the City's powers and obligations in respect of the supply of electricity.

[18] It is important that I should set out the relevant provisions of the law that govern the supply of electricity to the people of South Africa. The duty of the municipality to provide electricity is regulated by the Constitution, statutes and By-laws. The relevant provisions of the Constitution are as follows:

‘152. Objects of local government

(1) The objects of local government are—

(b) To ensure the provision of services to communities in a sustainable manner;. . .

(2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).

153. Developmental duties of municipalities

A municipality must—

(a) Structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the

community; and . . .

156. Powers and functions of municipalities

(1) A municipality has executive authority in respect of, and has the right to administer—

(a) The local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and ...

(2) A municipality may make and administer By-laws for the effective administration of the matters which it has the right to administer.’ (Emphasis Added.)

[19] The provision of electricity is a local government competency. Amongst the general duties of a municipality set out in s 73(1)(c) of the Local Government Municipal Systems Act 23 of 2000 (the Systems Act), is that a municipality ‘must ensure that all members of the local community have access to at least the minimum level of basic services’. Section 73(2)(c) requires a municipality to be financially sustainable. In order to realise that goal, Chapter 9 of the Systems Act regulates credit control and debt collection measures for

services rendered by the municipality. Section 96 of the Systems Act¹⁵ places the debt collection responsibility on the municipality. As a result, in terms of s 98 of the Systems Act, a municipal council must adopt By-laws to give effect to its credit control and debt collection policy, its implementation and enforcement.¹⁶

[20] It is apposite that I should highlight the relevant provisions of the City of Tshwane Metropolitan Municipality Standard Electricity Supply By-laws (2013) (the By-laws):

‘1. Definitions

“**Consumer**” means the occupier of any premises of which the Municipality has agreed to supply or is actually supplying electricity. . .

4. Supply by agreement

(1) No person may use and no person is entitled to use an electricity supply (new or existing) or consume electricity from the Municipality unless or until such a person has:

(a) *entered into an agreement in writing with the Municipality for the supply and consumption of electricity*, and the agreement, together with the provisions of these By-laws, in all respects governs the supply and consumption of electricity to and by the relevant person with whom the municipality concludes such agreement; and . . .

(3) *If in respect of any premises, an applicant, occupier or consumer is not the registered owner of the premises, an agreement in writing between the owner of the premises and the consumer for the rendering of a connection is required beforehand. The agreement reached binds both the consumer and the owner of the premises. . .*

18. Payment of charges

¹⁵ **Debt collection responsibility of municipalities.** —A municipality—

(a) must collect all money that is due and payable to it, subject to this Act and any other applicable legislation; and

(b) for this purpose, must adopt, maintain and implement a credit control and debt collection policy which is consistent with its rates and tariff policies and complies with the provisions of this Act.

¹⁶ **By-laws to give effect to policy.** — (1) A municipal council must adopt By-laws to give effect to the municipality’s credit control and debt collection policy, its implementation and enforcement.

(2) By-laws in terms of subsection (1) may differentiate between different categories of ratepayers, users of services, debtors, taxes, services, service standards and other matters as long as the differentiation does not amount to unfair discrimination.

(1) *The consumer is liable for all electricity supplied, whether metered or unmetered, to his or her premises, including electricity supplied on a prepayment basis, at the prescribed tariff, a copy of which is obtainable from the Municipality during normal office hours at the prescribed fee.*

(2) *The Municipality must render an account to the consumer on a regular basis in respect of electricity which is metered by means of a conventional meter (excluding consumers with unmetered electricity supply in accordance with an agreement with the Municipality). The municipality must provide on the account all information (meter readings, dates, etc) on which the account is based.*

(3) *All accounts envisaged in sub-section (2) are deemed payable on the due date reflected on the account and, on the consumer's failure to pay, the Municipality must notify the consumer and eventually disconnect the electricity supply to the premises of the consumer. The account as issued is considered the first notification of the amount payable.*

(4) *As regards the accounts envisaged in sub-section 2, an error or omission on any account from the Municipality or failure by the Municipality to render an account does not relieve the consumer of the obligation to pay the amount due for electricity supplied to and consumed at the premises. The onus is on the consumer to ensure that the account rendered is in accordance with the prescribed tariff, charges and fees for and in respect of the electricity supplied to the premises.*

...

21. Right to disconnect and suspend supply and the purchase of electricity on a prepayment basis

(1) *The Municipality and the contractor acting on the instruction of the Municipality, shall have the right, after giving notice, to disconnect, suspend, curtail or reduce the electricity supply to any premises and/or suspend, curtail, reduce, or halt the purchase of electricity by a consumer on a prepayment basis if –*

(a) *the consumer or another person liable for payment for the supply of electricity to the premises and/or for payment for any other municipal services in respect of the premises, fails to pay any charge due to the Municipality in respect of any electricity supplied and/or any other municipal service provided by the Municipality in respect of the premises, has failed to effect payment timeously to the Municipality.’ (Emphasis Added.)*

Evaluation of the merits

[21] I have taken into account that Vresthena does not have a contract with the City. The contract is between the City and the Body Corporate. The Body Corporate, which Vresthena alleges to be dysfunctional did not bring the application. Although the Body Corporate was cited as the second respondent, it did not oppose the application nor did it file any supplementary affidavits in support of the application by Vresthena.

[22] It is common cause that there is a history of non-payment for electricity services since the time when the property was under the control of the previous owner of the relevant sections Div Prop 11 (Pty) Ltd and Div Prop 12 (Pty) Ltd (Div Prop), and thereafter their liquidators. As long ago as 11 December 2015, the City was ordered to reconnect the electricity supply to Div Prop's sections and Div Prop was ordered to settle the amount of R2.7 million owed to the City in tranches. On 15 January 2016 Mystra (Pty) Ltd (Mystra), which owned the Super Spar and Tops, applied for a separate electricity account. The application was, however, declined by the City engineer. The reason given was that no separate connections can be given to sectional title sections, as the contract was with the Body Corporate. In terms of the court order, the liquidators had until September 2017 to settle their debt with the City, which they did.

[23] On the 3 October 2017, the Body Corporate had applied for a new account with the City and entered into a new agreement for the provision of services for the Retail Park. On 14 February 2018, the City disconnected electricity due to non-payment. Mystra and Vresthena brought an urgent application to court for the reconnection of the electricity supply, and they sought a separate electricity supply. They did not cite the Body Corporate in that application.

[24] The most significant development was that on 19 June 2018 a special general meeting of the Body Corporate was held, where new trustees were

elected. They were given the mandate to address the electricity issue. According to Vresthena they did nothing. Vresthena alleged that on 19 February 2019 they applied for a prepaid meter, which application was declined by the City. The City always maintained a view that owners of the sections must sort out the governance with the Body Corporate that had a contract with the City. The City maintained that by January 2022 the Retail Park owed it an amount in excess of R24 million. No payment had been made since November 2017 when the Body Corporate took over from the liquidators. The bulk supply system, according to the City was chosen by the Body Corporate and as a result, Vresthena could not seek to have a separate meter installed. Vresthena countered by stating that they were not liable for the entire amount to the City as part of the debt had prescribed.

[25] The Constitutional Court in *Mkontwana v Nelson Mandela Metropolitan Municipality*¹⁷ held that electricity is a component of basic services and that municipalities are constitutionally and statutorily obliged to provide their residents with electricity. However, non-payment for such services has a negative impact on the provision of such services by the municipalities. In that regard citizens have to pay for such services. As a form of credit control, any municipality has a statutory right to terminate such services on notice. Section 102 of the Systems Act gives municipalities a discretion to implement any debt collection and credit control measures provided for in the Act. The City relies on s 21 of the Standard Electricity Supply By-law (2013) (the Electricity By-Law), which reaffirms its right to disconnect the supply of electricity.

[26] Section 4(1) of the Electricity By-law provides that the provision of electricity is governed by the agreement between the City and the relevant

¹⁷ *Mkontwana v Nelson Mandela Metropolitan Municipality* [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) paras 35 and 38.

person who has concluded the agreement with the City. Section 4(3) provides for cases where the applicant is not the registered owner of the premises. In that case, there must be an agreement in writing between the parties which binds both the consumer and the owner of the premises. Section 18 regulates the payment for all the electricity supplied, whether metered or unmetered. The City is obligated to render an account to the consumer on a regular basis. In the event that the consumer fails to pay, the City must notify the consumer and eventually disconnect the electricity supply to the premises of the consumer, which is in terms of s 18(3). Section 18 (4) provides that ‘[a]s regards the accounts envisaged in sub-section 2, an error or omission from the Municipality or failure by the Municipality to render an account does not relieve the consumer of any obligation to pay for the amount due for electricity supplied to and consumed at the premises. The onus is on the consumer to ensure that the account rendered is in accordance with prescribed tariff, charges and fees in respect of the electricity supplied to the premises’.

[27] In *Joseph and Others v City of Johannesburg and Others*¹⁸ (*Joseph*) the Constitutional Court held that municipalities are obliged to provide electricity to residents in their area as a matter of public duty. The duty to provide electricity is set out in ss 152(1) and 153 of the Constitution read together with the duties of the municipal councils set out in ss 4(2) and s 73 of the Systems Act. This creates a reciprocal obligation. If debts are not paid to the municipality it has a constitutional duty to implement debt collection measures. The Constitutional Court in *Joseph* as per Yacoob J held that ‘it is important for unpaid municipal debt to be reduced by all legitimate means’.¹⁹ In a separate concurring judgment O’Regan J affirmed that ‘[t]here can be no doubt that municipalities bear an

¹⁸ *Joseph and Others v City of Johannesburg and Others* [2009] ZACC 30; 2010 (3) BCLR 212 (CC) 2010 (4) SA 55 (CC).

¹⁹ Ibid 42.

important constitutional obligation and a statutory responsibility to take appropriate steps to ensure the efficient recovery of debt'.²⁰

[28] Vresthena submitted that since the disconnection of electricity on 13 April 2022, the Body Corporate endeavoured to negotiate the outstanding account with the City, but to no avail. It submitted that part of the debt was no longer claimable as it had prescribed. The responsibility for the payment of electricity rested squarely on the Body Corporate, that is the Body Corporate manager, the Retail Park and no one else, as it had entered into a contract for a bulk supply of electricity with the City as from October 2017. The owners of the various sections of the Sectional Titles Scheme are in terms of the Sectional Titles Act, obliged to pay their levies to the Body Corporate, who in turn must pay for electricity and other services.

[29] Vresthena has not given any reasons why the Body Corporate has failed to make payment for the consumption of the electricity in the Retail Park. There was no averment by Vresthena that, they, as owners of various sections, have made payments to the Body Corporate, nor compelled the Body Corporate to perform its mandate. They simply allege that the Body Corporate is dysfunctional and expect the municipality to regulate the Body Corporate's affairs. A municipality has no right to interfere in the affairs of the Sectional Titles Scheme. I find it disturbing that instead of compelling the Body Corporate, whom Vresthena cited as a second respondent, to perform its mandate, it failed to do that. Vresthena and other owners have a remedy in terms of the Sectional Titles Act, which entitles them to appoint new and effective trustees, but they have not resorted to that.

²⁰ Ibid 43.

[30] In its founding affidavit, Vresthena merely states that new trustees were appointed, and their mandate was to sort the electricity issue out, but nothing happened. The Retail Park is a business complex which leases premises to ‘blue chip companies’, but its Body Corporate fails to pay the necessary dues to the City. This means that the City is financing Vresthena and other sectional title owners in their business interests.

[31] Electricity is a basic municipal service.²¹ Section 2 of the National Energy Act 34 of 2008 provides that its object amongst others, is to ensure an uninterrupted supply of energy to the nation and to facilitate energy access to improve the quality of life of South African people. However, the right to access electricity is not absolute. Non-payment for the provision of electricity impacts negatively on the supply thereof. Chapter 9 of the Systems Act regulates the credit control and debt collection processes of the municipality, which ensures the viability of the municipalities.

[32] From this it may be concluded that Vresthena and the other owners of the sections had no right, even *prima facie*, to continue to receive electricity without payment for those services. The City was enjoined to implement the credit and debt collection measures against the Body Corporate and terminate the supply of electricity to the Retail Park. The order of the high court failed to take this into account. It assumed, despite the history of ongoing non-payment over many years, that Vresthena and the other owners had a right to receive electricity and ordered the restoration of its supply without imposing the reciprocal obligation on the owners for payment of the substantial arrear amount. It even sanctioned the illegal reconnection of electricity by civilians other than the City. The high court failed to consider whether Vresthena had other alternatives, when it

²¹ *Joseph and Others v City of Johannesburg and Others* [2009] ZACC 30; 2010 (3) BCLR 212 (CC) 2010 (4) SA 55 (CC) para 34.

clearly did. As already alluded to, Vresthena and the other owners have recourse against the Body Corporate. It is not enough for them to say that the Body Corporate is dysfunctional and, therefore, it cannot take steps to rectify the situation regarding payment to the City for the electricity consumed by the commercial owners of sections in the Retail Park.

[33] In effect, the high court's order impermissibly interfered with the constitutional obligation on the City to ensure the collection of revenue for the services it provides. Consequently, the high court should not have granted the order as it did not satisfy the requirements of an interdict.

[34] As a result, the following orders are made:

- 1 Condonation is granted and the appeal is reinstated.
- 2 The appeal is upheld with costs, such costs to include the costs consequent upon the employment of two counsel where applicable.
- 3 The orders of the high court are set aside and replaced by the following order:
'The application is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel where applicable.'

Y T MBATHA
JUDGE OF APPEAL

Appearances

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Honey Attorneys, Bloemfontein.

For the respondent: M Louw
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