

**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE DIVISION, GRAHAMSTOWN)**

**Case No: 3633/2018**

In the matter between:

**IKAMVA ARCHITECTS CC**

**First Applicant**

**THE GALLERY QUEENSTOWN CC**

**Second Applicant**

**JOHAN EDUARD DE BEER**

**Third Applicant**

And

**ENOCH MGIJIMA LOCAL MUNICIPALITY**

**Respondent**

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**JUDGMENT**

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**BESHE J:**

**Introduction**

[1] The applicants in this matter seek a mandatory interdict to compel the respondent to provide their premises with uninterrupted three-phase electricity of a specified voltage. To regularly check the electrical lines feeding the applicants' premises and to take all necessary steps to prevent the constant friction between the power lines which *inter alia* result in interrupted electricity supply to the applicants' premises within one month of the granting of this order. To replace all cables supplying and leading to the applicants' premises, which are presently aluminium, or other inappropriate materials, with copper cables within one month of the granting of this order.

## **THE PARTIES**

[2] The first applicant is Ikamva Architects CC, a Close Corporation duly registered in terms of the *Close Corporations Act, Act No. 69 of 1984* with Registration Number 2000/075714/23, and with registered address, 5 Wainwright Street, Queenstown, Province of the Eastern Cape. The second applicant is The Gallery Queenstown CC, a Close Corporation duly registered and incorporated in terms of the *Close Corporations Act, Act No. 69 of 1984* with Registration Number 2008/219543/23, and with registered address, 9 Wainwright Street, Queenstown, Province of the Eastern Cape. Third applicant was granted leave to intervene as such some time after the application was launched. He described himself as a major male architect residing at 97 Livingstone Road, Queenstown, Eastern Cape. Also as the managing member of both the first and second applicants. One of the properties that are the subject of the matter of this application, 97 Livingstone Road, is also his personal property which he owns in his name and resides therein.

[3] The respondent is a municipality that is duly established pursuant to the provisions of *Section 155 of the Constitution, Section 12 of the Municipal Structures Act 117 of 1998* and having its principal place of business at 70 Cathcart Road, Queenstown, Eastern Cape.

### **Applicants' case**

[4] The founding affidavit was deposed to by the third applicant. He lists seven properties as the applicants' business premises in respect of which it is sought an order compelling the respondent to supply uninterrupted electricity thereto. The premises concerned are the following:

- 9 Wainwright Street;
- 7 Wainwright Street;
- 12 Chamberlain Street;

- 14 Chamberlain Street;
- 98 Berry Street;
- 97 Livingstone Road;
- 5 Wainwright Street.

All situated in Queenstown, Province of the Eastern Cape.

[5] **Mr de Beer** sets out the background facts and circumstances, and basis of the application as being the following:

That first applicant employs professional architects who use modern technology to do their work, which heavily relies on a constant electricity supply.

The second applicant comprises of a restaurant, guest hose and art gallery which business employs a large number of employees.

The applicants have experienced a number of difficulties with the supply of electricity by the respondent resulting in a number of calls being made to the respondent's electricity department to rectify the faults.

He goes on to enumerate the following examples of occasions when applicants' hardships were communicated to the respondent:

A letter was addressed to the respondent on the 4 April 2018 after the applicants had their equipment damaged and were required to replace same. In the letter applicants complain that power surges to their electricity supply over the three preceding years have resulted in a number of items of their equipment having to be repaired and replaced. The items are listed in the letter and the total damage is said to be R519 995.68.

[6] On the 10 July 2018 another letter was addressed to the respondent with a list of electrical equipment that had been damaged beyond repairs in "*the more recent months*" reportedly as a result of power surges, voltage

drops. The damage to electrical equipment this time was said to be R339 790.29. A figure of R17 903.45 was given as the amount spent on fuel for the generator to supply applicants with electricity.

[7] Attached to the founding affidavit is a letter penned by **Mr James Bryce** of JAB Electrical. The body of the letter reads as follows:

“Good day

This letter serves as a report to confirm that there have been continuous power surges at Ikamva Architects and The Gallery Restaurant and Guest House.

Due to this numerous damages have occurred.

I hope this report is helpful and feel free to contact me on 079-184-0022 or via email at [jabelec6@gmail.com](mailto:jabelec6@gmail.com) if you have any further queries.”

In a letter addressed to the respondent on the 28 November 2018 in the same vein **Mr de Beer** annexes a photograph said to have been taken on the 26 November 2018 and being of the electricity supply to the Gallery, Guest House and Restaurant. The photograph depicts the words Main Voltage at the top followed by three (3) lines of figures comprising three (3) digits each. He states that one of them shows the voltage in one phase as being above 250V. This is stated in the letter to the Municipal Manager of the respondent.

[8] **Mr de Beer** refers to a meeting and inspection between **Gary Goldschmidt** of Albert Butlers Electrical and respondent’s Electrical Engineer from East London and their joint findings. However, no confirmatory affidavits have been filed outlining the said joint findings.

[9] He also complains of electrical cables that supply the applicants with electricity being aluminium as opposed to copper, stating that aluminium is an inferior cable and affects electrical supply negatively.

[10] The basis upon which applicants assert that respondent is in default of its duties is the following:

That the respondent is legally responsible for the supply of electricity to the applicants as well as for the repair and maintenance of any defective electrical installations within its jurisdiction. Respondent is aware that the interruption of electricity supply for any period of time would be highly detrimental to the business of the applicants. That applicants would suffer loss of income if the electrical supply was interrupted. Applicants assert that the respondent is aware that applicants require a three phase electricity on an uninterrupted basis and that the contract between the applicants and the respondent is for such a three phase electricity supply.

[11] Further accusations are made where it is alleged that the respondent was negligent, it being alleged *inter alia* that:

Its employees failed to react timeously or at all to restore electricity when requested to do so by the applicants.

Failed to make sure that there are systems in place to prevent delays in the restoration of electrical supply, to keep the electricity supply constant.

Due to defective material and equipment and lack of maintenance, respondent failed to ensure electrical supply within the acceptable limited variance from 220 volts.

Applicants assert that the respondent is aware that they require three phase electricity on an interrupted basis and the contract between the applicants and the respondent is for such a three phase electricity supply. Applicants do not provide any details about this alleged contract.<sup>1</sup> It is further alleged at paragraph [30] of founding affidavit that the respondent has an agreement with its ratepayers, including the applicants, to ensure that the electricity

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<sup>1</sup> Paragraph 22 of founding affidavit, page 17.

supply continues unabated and if a power failure occurred, that such electrical installations require repairs, they are repaired without delay. Once again, the basis for alleging the existence of this agreement is not provided by the applicants.

[12] At paragraph 42 of the founding affidavit applicants point out statutory provisions that place the responsibility to provide services and basic needs to the communities on the respondent. Those relevant provisions according to the applicants, *Section 3 of the Local Government Municipal Systems Act*, read with *Section 152 and 153 of the Constitution*. This is not denied by the respondent.

### **Respondent's opposition**

[13] It is not denied by the respondent that numerous complaints about inadequate electricity by the applicants were received by the respondent. According to the respondent's acting Municipal Manager, **Mr Sonwabile Nomandela**, this culminated in an investigation being undertaken during 2018. Following the investigation, a report was received by the respondent in February of 2019 which *inter alia* recorded the following:<sup>2</sup>

"7.1.1. reveals that during cold and windy days calls were received from the gallery for no power or low voltage. The calls were immediately attended to. It was identified that the cause of the voltage problem was that the applicant businesses are situated at the end of the reticulation circuit and are supplied by aluminium conductors which are ageing. It was also identified that during the same weather patterns tree branches cause the cables to clash. At no stage was there a report of damaged appliances made to the respondent;

7.1.2. power outage at 97 Livingstone were always attended to by electricians. It was found that when there were problems, it was because circuit breakers had been burnt and damaged. This happened twice and on each occasion circuit breakers were replaced. The cause of the problem was unbalancing load on the customer's installation. This was reported to the customer. Again, no report of damaged appliances was given; and

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<sup>2</sup> Paragraph 7 of answering affidavit, page 46 – 47 of the record.

7.1.3. testing and adjustments on the electrical reticulation was done at the gallery's supply point and fuses replaced at the overhead supply point. Outages in the area never lasted more than 3 (three) hours. At no stage was low voltage reported.

7.2. 28 February 2019 dealt with the complaint regarding Wainwright/Chamberlain Streets. The supply point to the premises were tested and found to be as per supply standard. The spikes and drops are not known to the municipality. There had been similar complaints in the past but on testing the supply was found to be of proper standard. When there was a burned circuit breaker, it would be replaced."

[14] In addition to these allegations by the respondent which dispute those of the applicants, respondent shows that it is not in a position to replace aluminium cables with copper wires, refurbish the system where necessary, upgrade the infrastructure etc. The precarious position of the respondent is succinctly described in paragraph 10 of the answering affidavit as follows:

"10. Sometime during the middle of the year 2018, it was discovered that the respondent could not and did not fulfil its executive and service delivery obligations in terms of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) ("the Constitution"). The situation was dire and so persistent that the respondent was and continues to be in material breach of its obligations to provide basic services and to meet its obligations and financial commitments. This led to the Head of the Eastern Cape Department of Cooperative Governance and Traditional Affairs addressing a memorandum to the Member of Executive Council responsible for Local Government and Traditional Affairs in the Eastern Cape Province ("the MEC") on 20 July 2018 in terms of which he recommended that the MEC intervenes in the respondent's affairs. A copy of the memorandum in issue is attached hereto and is marked **SN3**. I refer this Court to the entire content of the memorandum, as they did, for the MEC's intervention at the time when same was proposed.

11. On 1 August 2018, the MEC decided to intervene in the respondent's affairs pursuant to the provisions of s 135(1) and (5) of the Constitution. In consequence, the MEC has intervened in the respondent's performance of its financial management function. The MEC thereafter addressed a letter on 14 August 2018 to the Minister of Cooperative Governance and Traditional Affairs ("the Minister") advising of the respondent's situation and seeking the Minister's support as well as setting out the terms of reference of the would be appointed administrator who was to be appointed. I refer this Court to a copy of the MEC's letter, of

which I have attached and marked **SN3**. I draw this Court's attention to the actual terms of reference insofar as reference was made to the respondent's financial management and administration function. The Minister supported the idea of an intervention and the then proposed terms of reference as they were set out in annexure **SN3** to this affidavit. Indeed, Mr Vuyo Mlokothi, has since 14 September 2018, been appointed as the first respondent's administrator on the basis of those terms of reference set out in annexure **SN3** to this affidavit."

[15] **Mr Nomandela** makes the point that applicants could minimise and even eliminate any potential damage power outage might cause to their equipment by installing electric shock preventing devices. He denies that there has been any negligence on the part of the respondent.

[16] **Mr Nomandela's** affidavit is confirmed by **Mr Sparks'** who is responsible for the supervision of electricity supply where it concerns him. He alludes to the reports he compiled following complaints by the applicants. Quoting from the said reports he states as follows:

"5.1.1. reveals that during cold and windy days calls were received from the gallery for no power or low voltage. The calls were immediately attended to. I identified that the cause of the voltage problem was that the applicants' businesses are situated at the end of the reticulation circuit and are supplied by aluminium conductors which are ageing. I also identified that during the same weather patterns tree branches cause the cables to clash. At no stage was there a report of damaged appliances given to me or the respondent;

5.1.2. power outage at 97 Livingstone were always attended to by our electricians. When there were problems, it was because circuit breakers had been burnt and damaged. This happened twice and on each occasion circuit breakers were replaced. The cause of the problem was unbalancing load on the customer's installation. I reported to the customer. Again, no report of damaged appliances was given to me; and

5.1.3. testing and adjustments on the electrical reticulation was done at the gallery's supply point and fuses replaced at the overhead supply point. Outages in the area never lasted more than 3 (three) hours. At no stage was low voltage reported.

5.2. 28 February 2019 dealt with the complaint regarding Wainwright/Chamberlain Streets. The supply point to the premises were tested and found to be as per supply standard. The



spikes and drops are not known to the municipality. There had been similar complaints in the past but on testing the supply was found to be of proper standard. When there was a burned circuit breaker, it would be replaced.”

Reports compiled by **Messrs Zilimbola** and **Mlwawo** who are electricians who attended to reported faults / call out at applicants’ premises are also annexed to the answering affidavit. Both state that in their reports that they found the voltage to be normal.

### **Applicants’ reply**

[17] In reply, **Mr de Beer** deals at length with what he apparently heard or was told by **Mr van Jaarsveld**, whom he describes as a qualified electrician used by all the applicants. He also attaches copies of photograph he apparently took of **Mr van Jaarsveld** reading of applicants’ instruments. He also refers at length to **Mr Mile’s** reports who is also said to be a qualified electrician with many years of experience. However, none of the two deposed to confirmatory affidavits. At paragraph 6 of the reply the following is stated by **Mr de Beer**:

“6. In this regard I refer to this Honourable Court to the confirmatory affidavits of Lizi de Beer, my wife, David Wayne Miles an electrician of DWM Electrical CC and Wynand Hendrick Jacobus Van Jaarsveld, also an electrician, of Stormberg Electrical, Queenstown. Those affidavits will be filed evenly herewith.”

What is attached as RA7 is a two page document purportedly relating to a test dates give as 3 December 2018 to 1 March 2029 and that upon inspection the following were found: Minimum voltage 182 volts. Maximum voltage 263. The second page refers to South African National Standard with no particular reference to any of applicants’ properties and interpretation of the readings. This appears to be an extract from some publication. The report apparently relates to the property situated at 9 Wainwright Street.

[18] **Mr de Beer** also attached a number of photographs with some readings which he alleges were taken during July, August and November 2018 and reflects the voltage on the instruments photographed.

[19] Regarding respondent's assertion that it is unable to carry out upgrades to the infrastructure and other maintenance work, **Mr de Beer** attaches as RA8 respondent's draft recovery plan which runs to 156 pages (November 2018). To refute respondent's assertion that it is not in a financial position to carry out work required to improve the supply of electricity and other services, **Mr de Beer** points out at parts of the plan to show that addressing the electricity supply problem has been budgeted for short, medium and long term. He however seems to suggest that the rescue plan is not without problems, pointing out that the administrator has "fled his office" and moved back to East London.

### **Analysis**

[20] The applicants seek a mandatory interdict aimed at compelling the respondent to supply applicants' premises with electrical supply which should be within the range of 220 volts amongst other things. A mandatory interdict is described as an order requiring a person to do some positive act or remedy a wrongful state of affairs for which he is responsible, or to do something which he ought to do if the complainant is to have his right.<sup>3</sup>

[21] It is trite that in order to succeed the applicants are required to satisfy the following requirements:

*(a) A clear right on the part of the applicant.*

*(b) An injury actually committed or reasonably apprehended.*

*(c) The absence of any other satisfactory remedy available to the applicant.*

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<sup>3</sup> See Administrative Law in South Africa. Cora Hoextet 2<sup>nd</sup> Edition page 561. Jordan and Another v Penmil Investments CC and Another 1991 (2) SA 430 at 436.

[22] It is clear from my summation that the affidavits filed by the parties reveal disputes of fact. Those being *inter alia*, whether applicants' complaints or call outs were responded to and that repairs needed were effected. The problem would be identified, such as when it was determined that the cause of the problem was unbalancing load on the customers' load – some was conveyed to the said customers. Apparently this relates to one of the applicants' properties – 97 Livingstone. Even though there had been complaints about spikes and drops in the supply upon testing supply was found to be of the proper standard. Respondent acknowledges that during cold and windy days calls were received from the gallery, one of the properties, for no power or low voltage – aluminium conductors were found to be one of the cause of the problem. This is confirmed by an affidavit deposed to by **Mr Sparks**, respondent's employee who is responsible for supervising electricity supply.

[23] Respondent disavows the knowledge imputed to it about power failure/s effect on applicants' business or about the type of equipment applicants use. Respondent acknowledges the negative impact of electricity outages or power failure on the general populace within its jurisdiction.

[24] It is trite that where in motion proceedings disputes of fact have arisen on the affidavits, a final order may only be granted if those facts that are averred in the applicant's affidavits which have been admitted by the respondent, together with those alleged by the respondent, justify such an order.<sup>4</sup>

[25] In ***Wightman t/a JW Construction v Headfour (Pty) Ltd and Another***,<sup>5</sup> the following was stated regarding a disputes of fact:

"[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and

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<sup>4</sup> See *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) 623 at 634 H – I.

<sup>5</sup> 2008 (3) SA 371 SCA at [13] G – H.

unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."

[26] It is trite that in application proceedings affidavits take what would be pleadings as well as evidence in action proceedings. It therefore follows that as a general rule affidavits should contain admissible evidence. Allied to this is that an applicant is required to make out its case in the founding affidavit or papers.

[27] For the faults or difficulties with the electricity supply to applicants' properties as contended by them, a lot of reliance is placed on the observations of **Mr Goldschmidt** of Alberts Bryce of JAB Electrical (Pty) Ltd. and **Mr Bezuidenhout** of the respondent. None of these people have deposed to confirmatory affidavits. Surely the evidence in this regard amounts to hearsay evidence. Applicants only went as far as threatening that confirmatory affidavits will be filed but were not filed. Unfortunately the photograph annexed to founding affidavit and the four or so attached to the

replying affidavit which are said to indicate voltage at different times are not helpful at all. These are alleged to be photographs of **Mr van Jaarsveld's** reading of voltage measurements at diverse stages. The photographs are of a very poor quality, barely legible, with no explanation from **Mr Jaarsveld** as to what the numbers therein mean. The one image annexed to the founding affidavit is part of a letter that was addressed to the respondent by **Mr de Beer**. Apart from bold unsubstantiated allegations about the spikes and drops in the voltage, the applicants did not provide any evidence in this regard. No evidence was provided as a basis contending for a three phase electricity. The photographs and reports only relate to mostly the business housing the gallery.

[28] The bold unsubstantiated assertions which appear to be the bedrock of the application are the following:<sup>6</sup>

*“In particular, the Respondent is aware that the Applicants require three-phase electricity on an uninterrupted basis, and the contract between the Applicants and the Respondent is for such a three-phase electricity supply.*

*During 16 January 2017 to 29 May 2018 the Applicants have experienced interrupted electrical supply and on occasion where there are lengthy periods of time when all three phases of electricity are not operational.*

*The Applicants have experienced power surges and voltage drops, day and night, during the aforesaid period, which has caused the damage referred to above to the Applicants' equipment.”*

[29] Respondent's response is assailed as being contradictory i.e. by acknowledging its shortcoming in its provision of services due to financial constraints whilst at the same time denying that power supply at applicants' premises requires an upgrade. It is denied by the respondent that there is a

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<sup>6</sup> Paragraph 22 to 24 of the founding affidavit, page 17 of the indexed papers.

problem with the voltage of applicants' electricity supply. This is supported by acceptable evidence.

[30] I do not see how respondent's evidence can be said to be contradictory. As I understand respondent's evidence, its failure to meet its obligations relate to the supply of electricity through aluminium cables in the area of respondent's jurisdiction. As well as repairs and upgrading of the aging infrastructure. In my view, the respondent has seriously and unambiguously addressed the facts that are in dispute between the parties.

[31] The respondent acknowledges its duties arising from a number of statutory instruments paramount of which is the Constitution. *Section 152 of the Constitution* provides that:

**"152. Objects of local government.**—(1) The objects of local government are—

- (a) to provide democratic and accountable government for local communities;
- (b) to ensure the provision of services to communities in a sustainable manner;
- (c) to promote social and economic development;
- (d) to promote a safe and healthy environment; and
- (e) to encourage the involvement of communities and community organisations in the matters of local government.

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

It has been shown by the respondent that it does not have the financial and even administrative capacity to achieve or meet its obligations as set out in *Section 152 of the Constitution* within the area of its jurisdiction. Further that expending their limited resources to improve the position of the applicants and ignore the plight of the rest of the population will not be appropriate. This will not doubt result in the unequal treatment of citizens of the local municipality in question.

[32] For all the reasons stated above, I am not satisfied that the applicants have made out a case for the relief they seek.

**Order**

**[33] The application is dismissed with costs.**

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**NG BESHE  
JUDGE OF THE HIGH COURT**

**APPEARANCES**

For the Applicants : Adv: G Brown  
Instructed by : WHEELDON RUSHMERE & COLE INC.  
119 High Street  
GRAHAMSTOWN  
Ref: Mr B Brody/Glyn/S21510  
Tel.: 046 – 622 7005

For the Respondent: Adv: Stretch  
Instructed by : MBANE & SOKUTU INC.  
WHITESIDES ATTORNEYS  
53 African Street  
GRAHAMSTOWN  
Ref: Mr G Barrow  
Tel.: 046 – 622 7117

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