IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable: NO

Of Interest to other Judges: NO

Circulate to Magistrates: NO

Case no: **1751/2024**

In the matter between:

HARRISMITH INTABAZWE TSIAME RESIDENTS ASSOCIATION (PTY) LTD ("HIT") (Reg no: 2019[…])	1st Applicant
WILHELM KONIG	2nd Applicant
MAJOR BRICKS (PTY) LTD (Reg no: 1986[…])	3rd Applicant
CHRISTO LUDWIG LIEBENBERG	4th Applicant

And

MALUTI-A-PHOFUNG LOCAL MUNICIPALITY	1st Respondent
AMOS GOLIATH, ACTING MUNICIPAL MANAGER	2nd Respondent

CORAM: JP DAFFUE J

URGENT APPLICATION HEARD ON: 05 APRIL 2024

ORDERS GRANTED ON: 10 APRIL 2024

REASONS DELIVERED ON: 21 MAY 2024

These reasons were handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 13h00 on 21 May 2024.

Introduction

[1] On 5 April 2024 I heard an urgent application for the restoration of electricity supply to the premises of third and fourth applicants. On 10 April 2024 I granted an order for restoration of the electricity supply and stated that the reasons for my or er would be delivered in due course. Contrary to the general rule that the successful party is entitled to their costs, I ordered the first, second and third applicants to pay the costs of the opposed application, including the respondents' costs in opposing the application. These are my reasons.

[2] The application was brought in terms of the *mandament van spolie.* The old Roman remedy, *spoliatus ante omnia restituendus est* still applies to this day in South African law. In terms hereof anyone unlawfully deprived of property is entitled to be restored to possession before the court will decide any competing claims to the property. The common law has taught us that even a thief is entitled to the protection of the *mandament van spo/ie.* Cameron JA put it as follows in *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others:*[1]

> 'Even an unlawful possessor - a fraud, a thief or a robber - is entitled to the *mandamenfs* protection. The principle is that illicit deprivation must be remedied before the Courts will decide competing claims to the object or property.'

[1] 2007 (6) SA 511 (SCA) para 21.

The Parties

[3] The first applicant is the Harrismith Intabazwe Tsiame Residents Association (Pty) Ltd (HIT), duly registered as a non-profit organisation, who prides itself of assisting its members in litigation against 'the defunct Municipality of Maluti-a-Phofung' (the municipality).[2]

[4] The second applicant is Mr Wilhelm Konig, chairperson of HIT, he being 'personally involved' in the 'attempt to resolve the accounting mes_s' of the municipality. He professes to be well-acquainted with the 'workings and business' of the third and fourth applicants. HIT has declared various disputes with the municipality on behalf of • members, inclusive of the third applicant, in the past.[3]

[5] The third applicant is Major Bricks (Pty) Ltd, a registered company with business address situated at Portion 22, Farm Dorps Gronden, Harrismith. The fourth applicant is Mr Christo Ludwig Liebenberg, an adult businessman residing at Sunnymead Farm, Harrisniith. Both the third and the fourth applicants are members of HIT.

[6] The first respondent is cited as the Maluti-a-Phofung Local Municipality. Its municipal manager, Mr Amos Goliath, is cited as the second respondent.

The relevant history

[7] The applicants, and particularly first, second and third applicants, referred to disputes pertaining to historic debts. Mr Konig insisted that 'the disputes are real and are of a similar nature across all HIT members'.[4]

[8] The applicants are aggrieved by poor service delivery endemic in Harrismith and surroundings and also complained about the costs of refuse removal and the fact that HIT members have to attend to removal of refuse themselves. The

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[2] Founding affidavit, para 7.
[3] *Ibid,* para 2.
[4] Founding affidavit, para 18.1.

complaint also related to the lack of water in Harrismith due to a lack of maintenance, potholes terrorising motorists and power outages. These complaints are totally irrelevant to the present dispute and have apparently been raised with one intention only, and that is to portray the municipality in a bad light.

[9] On 8 June 2022 the municipality sent a termination notice to the third applicant pertaining to its electricity supply. The disputes were recorded whereupon the municipality 'ostensibly abandoned its decision to terminate the supply'.[5] Reliance is placed on the third applicant's dispute raised in writing on 3 July 2023, dealing with so-called historic debts and the recording of incorrect outstanding amounts.[6] This dispute will be dealt with hereunder in detail when I consider costs to be awarded.

[10] The applicants alleged that on 25 March 2024 and without any notice to the applicants, the municipality had terminated the electricity supply to the third and the fourth applicants' premises. They alleged that the municipality's actions were unlawful.[7] I shall show later herein that the fourth applicant's electricity supply was not disconnected by the municipality, but that a technical problem caused the discontinuance of the electricity supply. I shall deal with the alleged payment by the third and fourth applicants and the dispute raised by the third applicant hereunder when exercising my discretion in respect of the costs of the application.s

[11] The application was issued out of this court on 28 March 2023. The respondents were informed that the applicants would move an urgent application on Friday, 5 April 2024 at 10h00. They had to file their answering affidavits by 17h00 on Wednesday, 3 April 2024. The applicants agreed to an exchange of papers via email.

[12] I informed the parties that I would be in Harrismith on 5 April 2024 to deliver judgment in a criminal matter unrelated to the present application. As the judge on duty during the April court recess, I made myself available to hear the application by way of MS-Teams between 12h00 and 13h00 that day. The parties were also

[5] Founding affidavit, para 19.
[6] Annexure WK2, pp 29 -32.
[7] Founding affidavit, paras 22 & 23.

requested to send all relevant documents pertaining to the application to my secretary by email. At about 22h00 on Thursday evening, 4 April 2024 and whilst I was still in the process of finalising my judgment in the criminal matter, I received the respondents' answering affidavit via email.

[13] On Friday morning, 5 April 2024 and whilst delivering judgment in the criminal matter, the replying affidavit and both parties' heads of argument were sent to my secretary by email. I finished judgment in the criminal case at about 12h00 whereupon arrangements were made immediately for the MS-Teams' hearing to start. By then I did not have an opportunity to read the replying affidavit, or the heads of argument. After considering the oral arguments of both parties, I reserved judgment and adjourned at approximately 13h45. By then I had to drive back to Bloemfontein immediately as two other urgent applications had to be adjudicated later that afternoon. It can be seen from this that I did my utmost to accommodate the parties.

The mandament van spolie

[14] The legal principles pertaining to the *mandament van spolie* and as applicable to termination of electricity supply are clear and need not be considered in any detail. Although trite, the three characteristics are the following:

a. it is a possessory remedy;

b. it is an extraordinary and robust remedy; and

c. it is a speedy remedy.[8]

[15] In *Blendrite (Pty) Ltd and Another v Moonisami and Another* the Supreme Court of Appeal provided the following summary:[9]

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[8] DG Kleyn, *Die Mandament van Spo/ie in die Suid-Afrikaanse Reg* (unpublished LLD theses, University of Pretoria 1986) 297 and further; *Van Loggerenberg, Erasmus: Superior Court Practice* D7-1 - D7-20 for a general discussion; *Blendrile (Pty) Ltd and Another v Moonisami and Another* 2021 (5) SA 61 (SCA).
[9] 2021 (5) SA 61 (SCA) para 6.

> 'The *mandament van spolie* is designed to be a robust, speedy remedy which serves to prevent recourse to self-help. The sole requirements are that the dispossessed person had 'possession of a kind which warrants the protection accorded by the remedy, and that he was unlawfully ousted'. All that must be proved is the fact of prior possession and that the possessor was deprived of that possession unlawfully. Unlawfully here means without agreement or recourse to law.'

[16] It is therefore trite: the object of the relief sought under the *mandament van spolie* is to restore the *status quo ante* of the unlawful action. The rule *spoliatus ante omnia restituendus est* is absolute and a relatively few recognised defences may be put up by the spoliator.[10] Once possession has been restored, a dispute as to the legality of any right relied upon could be considered.

[17] The Constitutional Court summarised the applicable principles pertaining to the *mandament van spolie* in *Ngqukumba v Minister of Safety and Security (Ngqukumba)* as *follows:*[11]

> "[10] The essence of the mandament van spolie is the restoration before all else of unlawfully deprived possession to the possessor. It finds expression in the maxim spoliatus ante omnia restituendus est (the despoiled person must be restored to possession before all else). The spoliation order is meant to prevent the taking of possession otherwise than in accordance with the law. Its underlying philosophy is that no one should resort to self-help to obtain or regain possession. The main purpose of the mandament van spolie is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to follow due process.
>
> [11] .....

[10] *Ibid* para 5; see also *Yeko v Qana* 1973 (4) SA 735 (A) at 739 and numerous authorities hereafter.
[11] 2014 (5) SA 112 (CC) paras 10 - 13.

[12] A spoliation order is available even against government entities for the simple reason that unfortunately excesses by those entities do occur. Those excesses, like acts of self-help by individuals, may lead to breaches of the peace: that is what the spoliation order, which is deeply rooted in the rule of law, seeks to avert. The likely consequences aside, the rule of law must be vindicated. The spoliation order serves exactly that purpose.

[13] It matters not that a government entity may be purporting to act under colour of a law, statutory or otherwise. The real issue is whether it is properly acting within the law. After all, the principle of legality requires of state organs always to act in terms of the law. All that the despoiled person need prove is that-

(a) she was in possession of the object; and

(b) she was deprived of possession unlawfully.'

[18] In *Ngqukumba* the Constitutional Court disagreed with the Supreme Court of Appeal which held that the *mandament van.spolie* could not have succeed insofar as the return of the vehicle to the applicant would mean that the court would be prepared to order delivery of the vehicle to a person who may not lawfully possess same. The Constitutional Court dealt with this issue, in finding that a conclusion as to whether the vehicle may be lawfully possessed could only be reached after a proper enquiry on the merits of the lawfulness of the applicant's possession and concluded as follows:[12] Those merits are irrelevant in proceedings for a spoliation order: the despoiler must restore possession *before all else.* Self-help is so repugnant to our constitutional values that where it has been resorted to in despoiling someone, it must be purged before any enquiry into the lawfulness of the possession of the person despoiled. Earlier I made the point that restoration of possession may even be to a person who might eventually be shown to be a thief or robber.'

[12] *Ibid,* para 21.

The right to electricity supply

[19] I have had occasion to deal with the restoration of electricity supply in *Harrismith Intabazwe Tsiame Residents Association (Pty) Ltd and Others v Maluti-A- Phofung Local Municipality and Another*[13] (the 2022 judgment). I concluded in that judgment with reference to *Eskom Holdings SOC Ltd v Masinda (Masinda),*[14] *Impala Water Users Association v Lourens NO and Others (Jrripala)*[15] and *Makeshift 1190 (Ply) Ltd v Cilliers*[16] that the consumers' rights to the supply of electricity in that case were incidental and so closely connected to their rights to occupation of the particular business premises that these could be considered as the subjects of *quasi*-possessio.[17] Therefore, spoliation of such *quasi-possessio* were acts of spoliation in relation to the respective premises. The same principle applies *in casu.*

[20] In *Mkontwana v Nelson Mandela Metropolitan Municipality*[18] *(Mkontwana)* the Constitutional Court held that electricity is a component of basic services and consequently, municipalities a e constitutionally and statutorily obliged to provide their residents with water and electricity, this being their public duty. This was also confirmed in *Joseph and Others v City of Johannesburg and Others (Joseph).*[19] The court reiterated this public duty as follows in *Joseph:*[20]

> 'The provision of basic municipal services is a cardinal function, if not the most important function, of every municipal government. …. The respondents accepted that the provision of electricity is one of those services that local government is required to provide. Indeed they could not have contended otherwise. …Electricity is one of the most common and important basic municipal services and has become virtually indispensable, particularly in urban society.'

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[13] (567/2022) [2022] ZAFSHC 151 (14 June 2022).
[14] 2019 (5) SA 386 (SCA).
[15] 2008 (2) SA 495 (SCA).
[16] 2020 (5) SA 538 (WCC).
[17] *Masinda loc cit* para 16; *Impala loc cit* paras 18 - 21; and see also *Firstrand Ltd t/a Rand Merchant Bank* v *Scholtz NO and others* 2008 (2) SA 503 (SCA) paras 12 & 13.
[18] [2004] ZACC 9; 2005 (1) SA 530 (CC) paras 35 and 38.
[19] [2009] ZACC 30; 2010 (4) SA 55 (CC) para 34.
[20] 2010 (4) SA 55 (CC) para 34.

[21] In order to give effect toss 152, 153 and 156 of the Constitution, read with Part B of Schedule 4 and Part B of Schedule 5, s 73(1)(c) of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act) provides 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) of the Systems Act requires that municipalities should be financially sustainable and consequently, Chapter 9 of that Act regulates credit control and debt collection measures. Debt collection is a municipality's responsibility as set out in s 96 of the Systems Act. Section 98 stipulates that a municipal council must adopt by-laws in order to give effect to the municipality's credit control and debt collection policy.

[22] The Electricity Regulation Act 4 of 2006 (the Electricity Act) was promulgated to *inter alia* regulate the reticulation of electricity by municipalities.[21] The objects of the Electricity Act are contained in s 2. The objects relevant for purposes hereof are to:

> *'(a)* achieve the efficient, effective, sustainable and orderly development and operation of electricity supply infrastructure in South Africa;
> *(b)* ensure that the interests and needs of present and future electricity customers and end users are safeguarded and met, having regard to the governance, efficiency, effectiveness and long-term sustainability of the electricity supply industry within t e broader context of economic energy regulation in the Republic;
> *(c)*
> *(d)*
> *(e)*
> *(f)*
> *(g)* facilitate a fair balance between the interests of customers and end users, licensees, investors in the electricity supply industry and the public.'

[23] It is also apposite to mention the National Energy Act 34 of 2008 (the Energy Act). The objects of the Energy Act are tabulated in s 2. Some are either

[21] See long title of the Electricity Act 4 of 2006.

directly or indirectly applicable *in casu.* I refer to the following: *ie* to 'ensure uninterrupted supply of energy to the Republic; promote diversity of supply of energy and its sources; provide for optimal supply, transformation, transportation, storage and demand of energy that are planned, organised and implemented in accordance with a balanced consideration of security of supply, economics, consumer protection and a sustainable development; facilitate energy access for improvement of the quality of life of the people of Republic; ensure effective planning for energy supply, transportation and consumption; and contribute to sustainable development of South Africa's economy.'

[24] No doubt, the right to access to electricity supply is not absolute. Non-payment by electricity users impacts negatively on the economy in general and a supplier of electricity - the municipality *in casu* - in particular.

Evaluation of the evidence and submissions by the parties in respect of the requirements of the mandament van spolie

[25] I shall only deal with the evidence and the parties' submissions pertaining to the requirements of the *mandament van spolie* under this heading. The evidence and submissions considered in awarding costs will be dealt with hereunder under the appropriate heading.

[26] Mr Botes submitted that the third applicant was not in peaceful arid undisturbed possession by virtue of its indebtedness and consequently, when the municipality disconnected its electricity supply, it did not act unlawfully. He is wrong. The facts speak for themselves: electricity was disconnected in respect of the third applicant without any prior and proper warning. The municipality was not entitled to terminate the electricity supply in the present factual matrix.

[27] The municipality's by-laws were placed before the court in the 2022 judgment. Although there was a dispute in respect thereof, these were not again placed before me in this instance. The applicants raised the by-laws for the first time in their replying affidavit. The applicants apparently accepted that a termination notice was sent electronically to the email address of the third applicant's former

director, but having referred thereto, mentioned that the by-laws do not make provision for termination notices to be sent electronically. On their version, only personal service, service at the place of residence or business, registered mail or certified mail were acceptable. Annexures AA5 and AA6[22] to the answering affidavit are termination notices dated 14 February 2024 addressed to the third applicant at its business address. The respondents failed to prove that these notices were actually delivered at this physical address. Adv Wijnbeek submitted that the consumers were entitled to just administrative action and that the municipality had acted contrary to the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) in disconnecting the electricity supply without any prior warning and thus failing to afford the consumers adequate pre-termination notices. He insisted that fairness dictated that a minimum of 14 days' notice should have been given.

[28] I was satisfied that no proper notice of termination had been given to the third applicant, whether in terms of the municipality's by-laws, or PAJA. I do not deal with the fourth applicant's complaint at this stage insofar as his position is different from that of the third applicant as I shall explain when I consider the award of costs.

[29] The applicants sought final relief, alternatively that a rule nisi be issued calling upon the respondents to show cause on the return date, why a final order should not be made. Having considered the detailed affidavits and heads of argument of the parties, I came to the conclusion that it would serve no purpose to issue a *rule nisi* and therefore a final order was issued. The applicants proved the requirements of the *mandament van spolie* and I was satisfied that the municipality did not put up a recognised defence. I agreed with Mr Wijnbeek's submissions referred to the previous paragraphs and consequently, I ordered the restoration of the electricity supply.

[30] The order that I granted should not be seen as a *carte blanche* to the third applicant, or any other defaulting consumers to enjoy the supply of electricity without making any payments to the municipality. I made the order to restore electricity supply based on the trite principles relating to the *mandament van spolie.* The municipality was not entitled to self-help. It failed to take appropriate debt collection steps.

[22] Record: pp 98 & 99.

Costs

[31] The third applicant incorrectly alleged that it did not receive any invoices from the municipality despite attempts to obtain these. I shall revert hereto. The following important allegation was made in respect of the alleged payment of their accounts by both the third and fourth applicants. I quote *verbatim:*[23]

> '25. The issue can certainly not be that of arrears in payment of electricity either.
> 25.1 By way of example and not to make the papers unnecessarily prolix, I attach proofs of payments made by Fourth Applicant to the First Respondent marked as annexures **"WK5 -WK7".'**
> The fourth applicant's three payments in the amount of R1 600 each were received on 27 September 2023, 28 January 2024 and 26 February 2024 *ex facie* these annexures. It is evident from the papers that the fourth applicant is conducting a relatively small business. However, for reasons that Mr Konig did not properly explain, he failed to attach, for example, proof of payment for October, November and December 2023.

[32] It is appropriate to deal with the fourth applicant's situation at first. In doing so I shall consider the answering affidavit and the applicants' reply thereto. During oral argument there was a discussion as to whether the dispute between the fourth applicant and the municipality had been settled. The respondents submitted in their answering affidavit that the fourth applicant had withdrawn 'as an applicant in this application'.[24] The applicants placed on record that the fourth applicant was willing to withdraw subject to a tender of costs and an undertaking to restore his electricity supply. I accept that the matter was not settled as the municipality was not prepared to tender the fourth applicant's costs. However, I also accept the information as tendered from the bar that the fourth applicant's electricity supply had not been disconnected, but that a technical problem had arisen which caused the failure to supply electricity. I refer in this regard also to the email correspondence between the

[23] Founding affidavit, para 25.
[24] Record p 71, para 10.

municipality and applicants' attorney of 3 April 2024.[25] On all probabilities the electricity supply issue raised by the fourth applicant could have been solved easily, cheaply and without litigation. This application which culminated in the eventual hearing on 5 April 2024 was essentially brought to assist the third applicant. Little time and effort was spent on the fourth applicant's dispute. The whole of the answering affidavit and all annexures thereto focused on the third applicant's alleged indebtedness. The same applies to a large extent to the replying affidavit, the heads of argument and the oral submissions.

[33] More importantly, for purpose of the adjudication of this application, and in particular the costs order that I have made, no proof of payment was provided in respect of the third applicant's electricity supply. In fact, it was not even suggested during argument that the third applicant had made any payments to the municipality recently. After dealing with the requisites for the *mandament van spolie,* the applicants stated that the HIT members' prejudice far outweighed any prejudice that the municipality might suffer, *inter alia* as the '[M]embers tendered full payment of the monthly current account - and is in fact doing so'.[26] I rejected that version as false insofar as it referred to the third applicant. I reiterate that there is no proof of any recent payments by the third applicant as is evident from annexure AA3 to the answering affidavit. The third applicant failed to respond appropriately, as one would have expected, to the allegations in the answering affidavit, supported by documentary evidence contained in annexure AA3.

[34] The third applicant alleged that it could not produce any bricks and had suffered damages in excess of R300 000[27] since the termination of electricity supply on 25 March 2024, *ie* in the period of only three days until 28 March 2024 when the founding affidavit was deposed to. Based on this allegation, the monthly income must then be ten times that amount, to wit approximately R3 million. It reiterated that it was not commercially viable to manufacture bricks whilst using power provided by a generator as it is simply unaffordable as its ovens use too much electricity.

[35] The third applicant had an obvious interest to know how much it was owing and the municipality was obliged to provide regular and accurate accounts as set out

[25] Record p 116: annexure WK12 to the replying affidavit.
[26] Founding affidavit, para 41.1.
[27] founding affidavit, para 39.1.

in s 95(e) of the Systems Act. The Constitutional Court confirmed this principle in a case where the property was rented out in *Mkontwana.*[28] I quote:

> 'Fairness requires a municipality to provide an owner of property with copies of all accounts if the owner requests them. The absence of this requirement would render the deprivation in this case procedurally unfair. It is accordingly appropriate to declare that every municipality is obliged to provide copies of monthly accounts in respect of amounts owing for water and electricity by occupiers of property where the owner is not the occupier on the written request of the owner.'
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> Obviously in this case the properties are not rented out, but occupied by the owners who are, no doubt, entitled to receive monthly statements of account.

[36] Although the first, second and third applicants were successful, I have grave concerns about their *bona tides.* I granted a costs order against them contrary to the general rule applicable. I considered several issues in the exercise of my discretion. It is common cause that the municipality is in dire financial straits, owing Eskom an amount of R 7.2 billion.[29] It is well-documented that the municipality's administration is in a mess as mentioned by Mr Konig, but that does not relieve honest electricity consumers to do their best to pay for their consumption, even if they have to rely on estimates, or average consumption, in the absence of invoices.

[37] In its answering affidavit the municipality placed on record that electricity supply to the third applicant is provided through two separate electricity meters. The disputed historic debt arose from electricity supplied in terms of an old meter. The meter was disconnected pending the outcome of that dispute. Reliance was placed on consumption and payment records of various consumers, including the third applicant, over the period from 1 July 2020 to 30 June 2023. Annexure AA2 represents the consumption records of various customers, including the third applicant, until June 2023 and Annexure AA3 the payment records of various customers, including the third applicant for the financial years 2020/2021, 2021/2022

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[28] 2005 (1) SA 530 (CC) para 67.
[29] Information supplied by Dr Henk Boshoff, the National Commissioner of the South African Human Rights Commission during an official news conference recently.

and 2022/2023. It is not the opportune moment to make any finding on the value to be placed on and/or the correctness of these documents, but it is reiterated that these documents reflect the third applicant's failure to pay for electricity supply over this extended period. Mr Botes exaggerated when he submitted that the third applicant had not paid a cent over the last two years. His client's own records dispel such a submission.[30] I accepted that the payments made by the third applicant during the above three financial years *ex facie* annexure AA3 differ from the figures provided by the municipality's deponent. However, it is apparent that no payments had been received for the full 2022/2023 financial year on the deponent's version as corroborated by annexure AA3. The applicants failed to deal properly with the documents annexed as annexures AA2 and AA3.

[38] I agree, as alleged in paragraph 14 of the replying affidavit, that annexures AA2 and AA3 do not constitute invoices, but repeat that the applicants failed to respond meaningfully to them. The allegation that the print, quality and size of characters in the annexures are 'so poor and small that applicants cannot really make anything of it' is relied upon as a feeble excuse not to deal with the serious allegations contained in the answering affidavit regarding third applicant's indebtedness to the municipality. These documents were sent by email and if it was possible for me to increase the size of the characters in the annexures, there was no reason why the applicants' legal representatives could not do the same. Instead of admitting that third applicant had been using electricity all the time without paying, the old refrain was repeated, *ie* that 'it is common cause that nothing turns on annexures AA1 to AA3 as a formal dispute is pending. To take collection steps whilst the dispute is pending, is unlawful'.[31] The third applicant's tender to pay any arrear amount within 30 days once the disputes have duly been resolved was a meek and poor attempt to show its *bona tides.* These were hollow words indeed, especially when I considered the allegation that it was HIT's intention at all times 'to take [the municipality's] hand assisting the latter back to financial stability.' Also, the declaring of disputes on behalf of members related to 'certain historic disputes' which were regarded as 'real and are of a similar nature across all HIT members.'[32]

[39] The municipality attached two invoices issued to the third applicant for February 2024 in respect of the two different meters as annexures AA7 and AA8 to its

[30] Answering affidavit paras 14, 15 & 16, read with annexures AA2 and AA3.
[31] Replying affidavit, para 16.
[32] Founding affidavit, paras 16 & 17.

answering affidavit. The billing date thereof is 15 March 2024. The charges for electricity in respect of February 2024 are R172 731.23 and R 6 520.41 respectively. The total amounts due, reflected in the two invoices, are R 3 224 950.52 and R 942 092.02 respectively. Clearly, the amounts of electricity consumed are quite excessive. It is apparent that the third applicant is conducting business on an enormous scale. Upon reading the replying affidavit, the inescapable conclusion to which I arrived at was that the third applicant had no intention to pay anything to the municipality until the 'pending disputes dating from 2020' are resolved.[33]

[40] I repeat that the first, second and third applicants failed to meaningfully respond to the municipality's clear and unambiguous allegation that a cumulative amount in excess of R3.8 million is outstanding in respect of the two new meters installed after the old meter was disconnected as a consequence of the historic dispute. They merely elected to rely on the old dispute which has nothing to do with electricity supply through the newly installed meters. The municipality conceded that an amount of R7 865 063.23 in respect of the period until May 2020, the historic debt, is in dispute. It did not disconnect the third applicant's electricity supply in respect of this historic and disputed debt. Its claim against the third applicant is in respect of its consumption and payment records since installation of the new electricity meters which have nothing to do with the historic debt. There can be no doubt that the third applicant was supplied with electricity in excess of a few million rand over an extended period of time to enable it to carry on with its business operations, but that it failed to pay any significant amounts to the municipality during the aforesaid period.

[41] The third applicant cannot carry on with its business operations whilst using electricity for free. It and HIT have access to qualified electricians, bearing in mind the order sought and granted. It would be easy to calculate the electricity usage on a monthly basis by taking down the meter readings at the beginning and end of each and every r:nonth to ascertain how much electricity was consumed by the third applicant. In fact, Mr Botha of the third applicant contradicted himself in the written dispute filed on 3 July 2023. Eventually, in the handwritten document attached to annexure WK2, it is mentioned that the 'whole account' was in dispute and because

[33] Replying affidavit: para 18 read with para 38.

'not receiving accounts' Mr Botha 'requested a detailed account of the past 3 years in order to correspond (sic) readings with account.' Undoubtedly, the writer meant to refer to a conciliation of the meter readings and electricity accounts. The inescapable deduction from this is that the third applicant had taken meter readings and should be in a position to state exactly what was in dispute in respect of all invoices received over the period. It failed to do so, but blamed the municipality that its administration was in shambles. I indicated earlier that disputes have been raised earlier, but those are in respect of historical debts. Any possible further disputes have been raised so vaguely that it is impossible to gather what is in dispute and what not. The first three paragraphs of Mr Botha's letter of 3 July 2023 read as follows:[34]

> 'I refer to your letter dated **08 June 2022** and some recent statements (see attached) regarding outstanding amounts of R427 129.30, etc. and would hereby like to bring under your attention the following:
>
> 1. New ownership of premises since 2020/1.
>
> 2. We do not agree with provided statements and hereby request detailed statements with accurate monthly readings taken and clearly showing debited and credited amounts from 01 January 2020 to date.' (emphasis added)

Attached to the letter of Mr Botha dated 25 March 2024[35] is an undated document that was allegedly handed in at the municipality. The majority of the complaints therein relates to irrelevant issues. However, an admission was made that municipal accounts were received, although not monthly and that 'they [the municipal accounts] do not always follow in chronological date sequence'. The applicants' unequivocal version under oath,[36] repeated by Adv Wijnbeek during oral argument, that the third applicant did not receive any invoices, is contradicted by the above documentation.

[42] The applicants' version that because the third applicant did not receive invoices, it did not have to make any payment for electricity usage is unacceptable in the present factual matrix. I indicated in the previous paragraph that it had been

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[34] Annexure WK2 pp 29 and 30.
[35] Annexure WK8 pp 42 & 43.
[36] Founding affidavit para 26.

receiving invoices on its own version. It has been earning millions of rands in the previous financial years without paying the municipality for elec ricity supply, save for the relatively small amounts evident from annexure AA3. The third applicant's morality is doubted. I am satisfied, having considered the totality of the evidence and in particular the third applicant's failure to play open cards, particularly infailing to deal at all with the municipality's records of non-payment, that it has been and is still sponging of the municipality. It has been receiving electricity supply over an extended period with paying or even offering to pay what it could estimate to be due.

[43] In my view an error or omission by the municipality, or even a failure to render accounts regularly, did not relieve the third applicant of its obligation to pay for electricity supplied and consumed. The evidence showed that it would be easy for the third applicant, supported by Mr Konig and HIT, to ensure that the municipality was paid for electricity supplied and consumed based on the meter readings, prescribed tariff, charges and fees in respect of the applicable premises. If the third applicant showed that it had paid amounts to the municipality over the last three years, based on its estimates of electricity consumption, that would go a long way to prove its bona tides, but unfortunately it failed to make any substantial payments *ex facie* the documents presented to me.

[44] The applicants accept that the third applicant, to wit Major Bricks (Pty) Ltd, registration number: 2013[…], is the relevant consumer. However, Mr Valks, the sole director of the company *ex facie* annexure WK1 of the founding affidavit, should also be blamed for the confusion created in the email attached as WK13 to the replying affidavit. In terms thereof he informed Mr Danie Truter of Eskom that the 'new owner' was Brick Mecca CC, but provided his personal email address. This was done on 2 July 2021. He carbon-copied the previous director of third applicant, Mr Gau, but not any municipal official. There is no indication that Mr Valks and/or anyone of the third applicant company presented the municipality with the correct details.

[45] The first and second applicants are entitled to assist their members, the first applicant being a civic organisation. However, in order to do so and embark upon litigation, they should ensure that their members are *bona fide* and not guilty of unreasonable and/or obstina e conduct. The refrain of being entitled to resist payment

because an old dispute has not been settled does not hold water. It is unreasonable in the present factual matrix.

[46] The Supreme Court of Appeal delivered a judgment on 18 April 2024, *ie* after I heard argument in this matter. I refer to the unanimous decision of that court in *City of Tshwane Metropolitan Municipality v Vresthena (Pty) Ltd and Others*[37]. It also referred to the two Constitutional Court judgments referred to earlier in this judgment, to wit *Mkontwana v Nelson Mandela Metropolitan Municipality* and *Joseph and Others v City of Johannesburg and Others.*[38] Although the Supreme Court of Appeal confirmed the obligation of municipalities to provide electricity to their residents as a matter of public duty, it emphasised that there is a reciprocal obligation on residents to settle their dues, failing which municipalities have a constitutional duty to implement debt collection measures in order to ensure that unpaid municipal debt is reduced by legitimate means.[39] It criticised the relief granted by the High Court and pointed out several shortcomings in the court a *quo's* judgment. I quote the fourth and the last grounds relied upon by the Supreme Court of Appeal in *Vresthena:*[40]

> '... Fourth, the restoration of electricity without the provision for the payment of arrears creates an anomaly ... 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.' (emphasis added)

[47] I am satisfied that the facts in this case differ from the facts in the 2022 judgment. The parties showed in that case that they had filed proper disputes worthy

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[37](1346/2022) [2024] ZASCA 51 (18 April 2024).
[38] *Ibid* at para 25 and further.
[39] *Ibid* para 27.
[40] *Ibid* para 13.

of being considered before their electricity connections were terminated. If the applicants are allowed to continue raising disputes in respect of each and every account rendered, the third applicant will be allowed to indefinitely consume electricity without paying. This court is not prepared to allow this to happen. I trust that the costs order granted herein will go a long way to ensure that the third applicant will start paying for its electricity consumption.

[48] I dealt with the fourth applicant's participation in the litigation earlier and do not intend to repeat that.[41] It would be extremely difficult, if not impossible, to carve out an order in terms whereof the municipality should pay the fourth applicant's costs of the application. He played an insignificant role in this application as I have indicated. He was represented by HIT. The same attorneys and counsel appeared for all the applicants. He could have dealt with his dispute in a separate application if really necessary, but decided to make common cause with the first three applicants and thereby jumped in the same bed. I decided not to hold him liable for the costs of the municipality, but in the same breath, I was not prepared to grant a costs order in his favour. Another aspect was also considered. It would be a nightmare on taxation for a registrar to establish for which fees and expanses the municipality should be held liable if a separate costs order were to be made in favour of the fourth applicant. The order that I made is in my view fair to the parties.

[49] I considered granting attorney and client costs as well as the costs of two counsel as requested by Mr Botes, but decided not to do so. No special grounds existed to issue a punitive costs order, particularly bearing in mind that the municipality has been relying on self-help without following a fair process, either in terms of its by- laws, or in terms of the principles pertaining to administrative justice.

JP DAFFUE J

On behalf of the Applicants: Adv DH Wijnbeek

[41] Para 32 of these reasons.

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