

SOUTH AFRICA / JUDGMENT

Applemint Properties 108 (Pty) Ltd v Rustenburg Local Municipality and Another (Reasons) (3855/2024) [2024] ZANWHC 249 (25 September 2024) [2024] ZANWHC 249

COURT

North West High Court, Mafikeng

BEFORE

T Masike

CASE / FILE NUMBER

3855/2024

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IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST PROVINCIAL DIVISION, MAHIKENG

CASE NO.: 3855/2024

Reportable: YES/NO

Circulate to Judges: YES/NO

Circulate to Magistrates: YES/NO

Circulate to Regional Magistrates: YES/NO

In the matter between:

APPLEMINT PROPERTIES 108 (PTY) LTD

Applicant

and

RUSTENBURG LOCAL MUNICIPALITY

First Respondent

THE ACTING MUNICIPAL MANAGER: RUSTENBURG

LOCAL MUNICIPALITY

Second Respondent

REASONS

FOR THE ORDER DATED 25 SEPTEMBER 2024

MASIKE AJ

INTRODUCTION:

[1] The Applicant, Applemint Properties 108 (Pty) Ltd, a company with limited liability duly registered and incorporated in terms of the Company Laws of the Republic of South Africa with registered address at portion 264 of the Farm Waterkloof, 305 JQ, Rustenburg, North West Province and with registration number: 201002499207, approached the Court on a urgent basis in terms of which relief was sought against the First Respondent, Rustenburg Local Municipality and the Second Respondent, the Acting Municipal Manager: Rustenburg Local Municipality in the following terms:

1.1 That the non-compliance by the applicant with the ordinary time frames, process, service and time periods and / or modes of service and notice provided for in the Uniform Rule of Court, and in the relevant practice directives be condoned by disposing of this application under the provisions of Uniform 6(12) as a matter of urgency.

1.2 That a rule nisi is issued calling upon any of the respondents to show cause on the 28 day of November 2024 at 10H00 or as soon thereafter as the matter may be heard, why an order in the following terms should not be made final.

1.3 That the Respondents are ordered and directed to reconnect and restore the electricity connection to the property situated at Portion 264, Farm Waterkloof 305, Deed no. T53864/2011, RUSTENBURG, NORTH WEST PROVINCE under account number: 2[...] (“the subject property”) within 2 hours from service of the order;

1.4 “That pending the finalisation, outcome, resolution and/or adjudication of the dispute, lodged with the First Respondent in terms of section 95(f), read together with section 102 of the Local Government: Municipal Systems Act, 32 of 2002:

1.4.1 The respondents be interdicted, restrained and prohibited from terminating and/or disconnecting and/or limiting the electricity supply and municipal services to the applicant’s subject property situated at Portion 264 of the farm, namely Waterkloof at Portion 264 of the farm, namely Waterkloof 305 JQ, Rustenburg, North West Province (“the subject property”) of the applicant.

1.5 In the event that the respondents fail to reconnect and restore the municipal services to the applicant's subject property within 2 (two) hours of service of the order as sought, that the applicant be authorised, ordered and permitted to employ the services of a duly qualified person(s) to attend to the reconnection of electricity to the applicant's subject property at the expense of the respondents.

1.6 That the second respondent is ordered and directed to oversee and ensure that the relief as set out in paragraph 2 to 5 is duly complied with, and executed, by the first respondent.

1.7 That the order referred to and contained in the abovementioned paragraphs shall operate as an interim interdict with immediate effect,

1.8 That the applicant be granted leave to file a supplementary affidavit should the need arise.

1.9 That the respondents be ordered to pay the applicant's High Court costs of the application, only in the event of opposition, alternatively that the costs be reserved pending the finalisation of the application, in both these instances the scale of costs which will be sought would be as per Scale B on a High Court scale, inclusive of costs of counsel in terms of Uniform Rule 67A, jointly and severally, the one paying the other to be absolved.

1.10 That such further and/or alternative relief be granted to the applicant, which this court deems reasonable and appropriate under the prevailing circumstances."

[2] The application sat before the Court on 26 July 2024. When the matter was heard the First and Second Respondent had not filed their answering affidavits to the founding affidavit of the Applicant. Counsel for the First and Second Respondent, Advocate Kok, informed the Court that the First and Second Respondent were served with the papers at 15H18 on 25 July 2024. The attorneys of the First and Second Respondent could not get hold of a person(s) to depose to the answering affidavits of the First and Second Respondent.

[3] Counsel for the Applicant, Advocate Prinsloo, informed the Court that the unissued application was emailed at 12H45 on 25 July 2024 to the First and / or Second Respondent. Counsel for the Applicant conceded that officials of the First and / or Second Respondent were not called after the purported service of the unissued application to verify if the First and / or Second Respondent received the application. The Court further noted that there wasn't a service affidavit before the Court confirming that the First and or Second Respondent were served with the unissued application at 12H45 on 25 July 2024 by way of email.

[4] The notice of motion that was served on the First and Second Respondent on 25 July 2024 at 15H18 called upon the First and Second Respondent to:

4.1 "to file and deliver your notice of intention to oppose on/before Thursday, 25 July 2024 at 14H00;

4.2 to file and deliver your answering affidavit, if any, together with any relevant documents on or before Thursday, 25 July 2024 at 16H00; and

4.3 to appoint in such notification, an address at which you will accept notice and service of all documents in these proceedings.”

[5] The application was to be heard at 10H00 on 26 July 2024. From the reading of the notice of motion, the Applicant had afforded the First and Second Respondent just over 40 minutes to consult, draft, serve and file an answering affidavit.

[6] The attorney of the Applicant should have attended to the following to ensure effective service:

6.1 The attorney of the Applicant should have identified the names and contact details of the officials of the First Respondent who have the authority to address the application and the contact details of the Second Respondent;

6.2 At the earliest moment after deciding to bring the urgent application, contact should have been made with the official who has authority to deal with the application to demand compliance with the relief sought and to alert the person of the intention to bring the urgent application stating where and when it is likely to be heard, when it is likely to be served and the identity of the judge on urgent duty. Agreement should have been reached about who should receive service on behalf of the First and / or Second Respondent by email.

6.3 When the papers were ready for service, direct contact should again have been made with the person dealing with the matter on behalf of the First and / or Second Respondent. Where delays occur, the First and / or Second Respondent must be kept informed by interim calls to report progress.

6.4 Sufficient time must be allowed for the respondents to read and digest the papers.

6.5 Once served in any manner other than by physical delivery, the attorney of the applicant should have immediately called the First and / or Second Respondents representative directly to confirm actual receipt of the papers. (See: *South African Airways Soc v BDFM Publishers (Pty) Ltd* 2016

(2) SA 561 (GJ) at 571C – 573B)

[7] Counsel for the First and Second Respondent informed the Court that the First and Second Respondent would base their argument on the papers of the Applicant. The Court understood this to mean the First and Second Respondent intended to raise questions of law only. A respondent should, generally, file his or her answering affidavit on the merits at the same time as he or she takes a preliminary objection on a point of law. Should the respondent choose not to file an answering affidavit in response to the applicant's allegations but take a legal point only, the Court is faced with two

unsatisfactory alternatives should the objection fail. The first is to hear the case without giving the respondent an opportunity to file answering affidavit on the merits, something that the Court would be most reluctant to do. The Second is to grant a postponement to enable the respondent to prepare and file an answering affidavit, a course which gives rise to an undue protraction of the proceedings and a piecemeal handling of the matter. (See: Erasmus, Superior Court Practice, Second Edition, Volume 2 at page D1 Rule 6 – 27)

ARGUMENT ON 26 JULY 2024

- [8] Urgency was not an issue in dispute. Counsel for the Applicant stood by the founding papers of the Applicant, that there had been a dispute regarding the invoices submitted to the Applicant by the First Respondent for electricity consumption to the subject property. In terms of Section 102(2) of the Municipal Systems Act, 32 of 2000 as amended (“the MSA”), a letter from the attorneys of the Applicant dated 11 October 2023 was forwarded to the First Respondent in terms of which the First Respondent was notified of the dispute as it relates to the amount payable by the Applicant to the First Respondent for electricity consumption. The First Respondent, despite being aware of the dispute, caused to be disconnected the electricity supply to the property of the Applicant without resolving the dispute on various dates the most recent being 24 July 2024.
- [9] Counsel for the First and Second Respondent submitted to the Court that the alleged dispute of the Applicant had been overtaken by events. The representative of the Applicant by his own admission in the founding affidavit of the Applicant had signed an acknowledgement of debt and undertaking to pay on 19 April 2024. The acknowledgement of debt and undertaking to pay, contained a provision that the First Respondent may discontinue any service to the Applicant should the Applicant fail to pay any amounts due in terms of the acknowledgement of debt and undertaking to pay.
- [10] Counsel for the First and Second Respondent when dealing with the averment in the founding affidavit of the representative of the Applicant that he had signed the acknowledgement of debt and undertaking to pay on 19 April 2024, under duress referred the Court to authority dealing with duress and highlighted that the representative of the Applicant should have alleged that the threat by the First Respondent was a threat of considerable evil, that the fear was reasonable, that the threat was of an imminent or inevitable evil and induced fear, that the threat was unlawful or contra bonos mores and that the contract was concluded because of the duress. Counsel for the First and Second Respondent submitted that the representative of the Applicant failed to show in the founding affidavit that the threat to cut the electricity supply to the property of the Applicant if there was no payment of the outstanding account was an immoral act.
- [11] Counsel for the First and Second Respondent was engaged by the Court on the following issue: the representative of the Applicant having signed the acknowledgement of debt and undertaking to pay on 19 April 2024, the representative of the Applicant averring that payment had been made to the First Respondent as per the amounts reflected in the

acknowledgement of debt as well as the amounts as per the monthly invoices, the electricity was never the less disconnected on 11 July 2024 by the First Respondent. The electricity supply to the property was then reconnected on 18 July 2024. What happened between 11 July

2024 and 18 July 2024 that resulted in the First Respondent causing the electricity supply of the Applicant to be reconnected. Counsel for the First and Second Respondent submitted to the Court that he did not know what caused the First Respondent to cause for the electricity supply to the property to be reconnected on 18 July 2024.

[12] In reply, Counsel for the Applicant referred the Court to the letter from the attorneys of the Applicant to the First Respondent dated 15 July 2024 and submitted it was as a result of this letter that the First Respondent caused for the electricity supply to the property to be reconnected.

[13] The Court was satisfied that the matter was urgent. There had not been a delay in bringing the application before the Court. The urgency of the Applicant is of commercial interests. The First Respondent had caused for the electricity supply to the property to be disconnected on 11 July 2024 and reconnected on 18 July 2024. No explanation was given as to why the First Respondent had chosen not to be bound by the terms of the acknowledgement of debt and undertaking to pay signed on 19 April 2024 and why the electricity supply was terminated again on 24 July 2024. The dispute forwarded to the First Respondent in the letter dated 11 October 2023 had not been resolved and in terms of Section 120(2) of the MSA, the debt collection and credit control measures could not be implemented until the raised dispute was resolved. The Applicant had made out a proper case for an interim interdict. The Court made an interim order coupled with a rule nisi in the following terms:

13.1 That the non-compliance by the applicant with the ordinary time frames, process, service and time periods and / or modes of service and notice provided for in the Uniform Rule of Court, and in the relevant practice directives be condoned by disposing of this application under the provisions of Uniform 6(12) as a matter of urgency.

13.2 A rule nisi is issued calling upon any of the respondents to show cause on the 27th day of August 2024 at 10H00 or as soon thereafter as the matter may be heard, why an order in the following terms should not be made final.

13.3 That the Respondents are ordered and directed to reconnect and restore the electricity connection to the property situated at Portion 264, Farm Waterkloof 305, Deed no. T53864/2011, RUSTENBURG, NORTH WEST PROVINCE under account number: 2[...] ("the subject property") within 2 hours from service of the order;

13.4 "That pending the finalisation, outcome, resolution and/or adjudication of the dispute, lodged with the First Respondent in terms of section 95(f), read together with section 102 of the Local Government: Municipal Systems Act, 32 of 2002:

13.4.1 The respondents be interdicted, restrained and prohibited from terminating and/or disconnecting and/or limiting the electricity supply and municipal services to the applicant's subject property situated at Portion 264 of the farm, namely Waterkloof at Portion 264 of the farm, namely Waterkloof 305 JQ, Rustenburg, North West Province under account number: 2[...] ("the subject property") of the Applicant.

13.5 In the event that the Respondents fail to reconnect and restore the municipal services to the applicant's subject property within 2 (two) hours of service of the order as sought, that the applicant be authorised, ordered and permitted to employ the services of a duly qualified person(s) to attend to the reconnection of electricity to the applicant's subject property at the expense of the Respondents.

13.6 That the Second Respondent is ordered and directed to oversee and ensure that the relief as set out in paragraph 2 to 5 is duly complied with, and executed, by the first respondent.

13.7 That the order referred to and contained in the abovementioned paragraphs shall operate as an interim interdict with immediate effect,

13.8 The costs be reserved pending finalization of the application.

13.9 The timeframes for the filing of further affidavits are set out as follows:

13.9.1 Respondents to file their answering affidavit, if any on / before 12th day of August 2024.

13.9.2 Applicant to file its replying affidavit, if any on / before 19th day of August 2024

13.9.3 The parties to file their respective heads of argument, and joint practice note on 26th day of August 2024"

[14] The Court considered that the First and Second Respondent were not mala fide in their failure to file an affidavit on the merits and justice demands that the First and Second Respondent should be given an opportunity to present their case and there would not be prejudice to the Applicant as an interim order had been granted in its favor. The matter was accordingly postponed to 27 August 2024 for argument and to enable the parties to file their respective answering, replying affidavits and respective heads of argument.

THE CASE OF THE APPLICANT

[15] The Applicant is the owner of the subject property. The subject property was until 11 August 2011 registered in the name Nico Roux. The subject property was transferred into the name of the Applicant on or about 11 August

2011. Up until October 2020 all Municipal charges in relation to the subject property were charged to the account of Nico Roux Wildbedryf with account number 0[...] ("Nico Roux Account"). During October 2020 the First Respondent opened an account for municipal charges in the name of the Applicant with account number 2[...] ("the Applemint Account").

- [16] Applicant avers that towards June 2022, it disputed historic miscellaneous amounts concerning electricity adjustments charged on its municipal account. According to the Applicant, the First Respondent unlawfully levied miscellaneous charges on the account of the Applicant dating back to 2011. Despite the Applicant having raised the dispute, no response was received from the First Respondent.
- [17] On 11 October 2023, a formal dispute was lodged in terms of Section 102 of the Municipal Systems Act, Act 32 of 2000 in the form of a letter from the attorneys of the Applicant. The dispute of the Applicant relates to the transfer of the electricity charges from the Nico Roux Account to the Applemint Account. The Applicant avers that the transfer of the charges was affected without the necessary corrections of the erroneous calculations which were made earlier as well as not taking into account payments in the Nico Roux Account.
- [18] The meter readings and unit prices per electricity delivered were incorrectly calculated during the period which span from September 2011 to September 2023.
- [19] During June 2022, two employees of the First Respondent, namely Mr. Thabiso Mkhwanazi and Ms. Busisiwe Fako assisted the Applicant in transferring the account from the name Nico Roux Wildbedryf to the name of the Applicant.
- [20] According to the tax invoice for the new account, the Applemint Account dated 2 June 2022, an amount of R 4 958 422.84 was due and payable under the new account. The Applicant avers that this is incorrect because a tax invoice dated 31 July 2022 for the Nico Roux Account reflects a credit of R 3 203 320.82. The Applicant avers that the First Respondent on 2 June 2022, issued a credit note on the Nico Roux Account in the amount of R 5 329 340.35 and simply loaded this amount of the Applemint Account and alleged that it is due when it was already paid for.
- [21] The Applicant avers that the First Respondent is attempting to collect debts which have already prescribed in law. Despite the attorneys of the Applicant having forwarded to the First Respondent a formal dispute, the dispute has not been resolved. The attorneys of the Applicant requested the First Respondent to rectify the account within 7 days.

THE CASE OF THE FIRST AND SECOND RESPONDENT

- [22] The deponent to the answering affidavit of the First and Second Respondent avers that there is no acting municipal manager of the First Respondent. The deponent to the answering affidavit of the First and Second Respondent is the Municipal Manager of the First Respondent. The Municipal Manager is the head of the Municipality's administration, appointed in terms of Section 54A of the Local Government: Municipal Systems Act, Act 32 of 2000 ("the Systems Act").
- [23] On 2 June 2022, there was an adjustment in the amount of R 5 329 340.35 credited to the Nico Roux Account. This was as a result of the reversal of estimate readings on the account. This caused the Nico Roux Account to reflect a credit balance of R 3 385 596.56.

- [24] On 14 September 2022, there was an adjustment in the amount of R 232 420.28 that was credited to the Nico Roux Account. This was as a result of an interest write – off on the account. On 4 October 2022, an amount of R 3 435 741.10 was debited to the Nico Roux Account. This was the result of the credit balance in the same amount being transferred to the Applemint Account.
- [25] On 1 September 2023, a number of adjustments were processed on the Nico Roux Account and an amount of R 244 845.38 (credit) was transferred to the Applemint Account. These adjustments as well as earlier adjustments caused all electricity charges to have been transferred to the Applemint Account together with associated payments. The Nico Roux Account was finalized on 1 September 2023 and closed off with a nil balance.
- [26] The deponent to the answering affidavit of the First and Second Respondent avers that when transferring the amounts between the Nico Roux Account and the Applemint Account, the First Respondent was mindful that some of the charges have prescribed and such prescribed charges, where they existed, were not transferred.
- [27] The deponent to the answering affidavit of the First and Second Respondent denies that there was any unlawful conduct by the First Respondent in terminating the electricity supply to the property of the Applicant. It is further denied that there is a valid or outstanding dispute lodged with the First Respondent relating to any specific amount claimed by the First Respondent from the Applicant.
- [28] It is averred that by signing the acknowledgement of debt on 19 April 2024, the Applicant indicated its indebtedness and has waived any reliance on any dispute raised prior to 19 April 2024.
- [29] The deponent to the answering affidavit of the First and Second Respondent avers that on 29 January 2024, the head of billing unit of the First Respondent, Ms. Busisiwe Faku issued a reconnection instruction, indicating that there was a possible dispute on the account of the Applicant that should be resolved by 29 February 2024. This was as a result of the letter from the attorneys of the Applicant dated 11 October 2023 which had been brought to her attention. It is averred that an investigation was conducted, and it was found that the Applemint Account was in order and that there is no outstanding issues to be resolved on the account.

THE LAW

- [30] Section 102 of the Local Government Municipal Systems Act 32 of 2000 (“the systems Act”) reads as follows:

“102 Accounts

- (1) A municipality may-

consolidate any separate accounts of persons liable for payments to the municipality;

- (b) credit a payment by such a person against any account of that person; and
 - (a) implement any of the debt collection and credit control measures provided for in this Chapter in relation to any arrears on any of the accounts of such a person.
 - (2) Subsection (1) does not apply where there is a dispute between the municipality and a person referred to in that subsection concerning any specific amount claimed by the municipality from that person.
 - (3) A municipality must provide an owner of a property in its jurisdiction with copies of accounts sent to the occupier of the property for municipal services supplied to such a property if the owner requests such accounts in writing from the municipality concerned.”
- [31] In *Body Corporate Croftdene Mall v Ethekewini Municipality* (603/2010) [2011] ZASCA 188 (10 October 2011) at paragraph 22, Maya JA (as she was then) stated the following: “It is, in my view, of importance that subsec 102(2) of the Systems Act requires that the dispute must relate to a ‘specific amount’

claimed by the municipality. Quite obviously, its objective must be to prevent a ratepayer from delaying payment of an account by raising a dispute in general terms. The ratepayer is required to furnish facts that would adequately enable the municipality to ascertain or identify the disputed item or items and the basis for the ratepayer’s objection thereto. If an item is properly identified and a dispute properly raised, debt collection and credit control measures could not be implemented in regard to that item because of the provisions of the subsection. But the measures could be implemented in regard to the balance in arrears; and they could be implemented in respect of the entire amount if an item is not properly identified and a dispute in relation thereto is not properly raised. (my underlining)

ANALYSIS

[32] The issues in this matter are the following: (a) does Section 102(2) find application to the issue between the Applicant and the First Respondent, (b) what is the effect of the acknowledgement of debt and undertaking to pay that was signed by the representative of the Applicant on 19 April 2024, does it amount to a waiver of the dispute raised by the Applicant through its attorneys in the letter dated 11 October 2023, and (c) what if any is the effect of the representative

of the Applicant signing “under protest” to the acknowledgement of debt and undertaking to pay on 19 April 2024 on

behalf of the Applicant.

- [33] In the answering affidavit of the First and Second Respondent, it is contended that there is no pending dispute between the Applicant and the First Respondent because the dispute as contained in the letter dated 11 October 2023 was investigated and it was found that the Applemint Account was in order and there were no outstanding issues to be resolved on the account.
- [34] In the heads of argument of the First and Second Respondent and in argument before the Court, the argument was slightly morphed. Counsel for the First and Second Respondent submitted that the dispute raised by the Applicant was so broad and in general terms also it was forwarded only after demand for payment was sent that it cannot be said to comply with the requirements for a valid dispute as set out in *Body Corporate Croftdene Mall v Ethekewini Municipality* supra.
- [35] It would be apt to consider the contents of the letter dated 11 October 2023 against the requirements set out in *Body Corporate Croftdene Mall v Ethekewini Municipality* supra. The Applicant is disputing the correctness of the billing for electricity consumption for the period September 2011 to September 2023 to the Nico Roux Account and the Applemint Account. A specific amount claimed by the First Respondent is reflected in paragraph 11 of the letter. At paragraph 12, the author of the letter disputes the correctness of the calculations.
- [36] Similarly, at paragraph 14 and 15 of the letter, specific amounts are referred to in the letter. At paragraph 16 of the letter, the author states “The problems with regard to the erroneous calculations in the account of Nico Roux Wildbedryf remain.” The author further writes “Furthermore the Rustenburg Local Municipality is attempting to collect debts which have already prescribed.”
- [37] At paragraph 17 of the letter, the author writes that accounts rendered to the Applicant subsequent to June 2022 have been paid, further full payment had been made of amounts claimed after July 2016 in respect of the previous accounts of Nico Roux Wildbedryf.
- [38] At paragraph 13 it is stated “several e-mails” were sent to the Rustenburg Local Municipality in which the problem was pointed out. This is in reference to what is stated in paragraph 11 and 12 of the letter. The author of the letter has in my view furnished facts that would adequately enable the First Respondent to identify the disputed items and the basis for the Applicants objection thereto.
- [39] I am not convinced that the dispute referred to in letter dated 11 October 2023 is in broad and in general terms. My view on this issue is solidified by what the deponent to the answering affidavit of the First and Second Respondent stated in paragraphs 36.6 and 36.7 of the answering affidavit, namely, that the head of the billing Unit of the First Respondent was able to investigate the complaint of the Applicant after the letter dated 11 October 2023 was brought to her attention. The inescapable inference that can be drawn from these paragraphs is that the head of the billing unit of the First Respondent, understood exactly what the dispute was about, the facts raised in the letter dated 11 October 2023 were

sufficient to enable her to identify the disputed items and the basis for the Applicants objection thereto.

- [40] On the issue that the dispute was raised belatedly (i.e only after demand for payment was sent). Counsel for the First and Second Respondent relies on what the deponent to the answering affidavit of the First and Second Respondent stated in paragraph 36.1 of the answering affidavit that is during August 2023, a final demand was hand delivered to the property by a contractor of the First Respondent to demand payment of the arrear amount then reflected upon the Applemint Account.
- [41] In reply to the averment, the deponent to the replying affidavit of the Applicant denies what is stated in paragraph 36.1. The deponent goes on to deny that the amount set out as owing on 3 October 2023 in the amount of R 1 495 953.53 is correct and states that it forms part of the dispute.
- [42] In application proceedings, the affidavits take the place not only of the pleadings in an action, but also of the essential evidence which would be led at trial. (See: *Skog NO v Agullus* 2024 (1) SA 72 (SCA) at paragraph 18).
- [43] It follows that affidavits must, as a general rule, contain admissible evidence. Inadmissible material falls to be struck out of affidavits. (See: *Erasmus Superior Court Practice*, Second Edition, Volume 2 page D1 Rule 6 – 13; See: *FirstRand Bank Limited v Kruger* 2017 (1) SA 533 (GJ) at paragraph 13)
- [44] Mr. Ashmar Ranthekeng Khuduge (“Mr. Khuduge”), the Municipal Manager of the First Respondent is the deponent to the answering affidavit of the First and Second Respondent. It will be apt to quote what Mr. Khuduge stated in paragraph 4 of the answering affidavit he deposed to dated 13 August 2024. Mr. Khuduge stated the following: “I have access to the books, documents and systems of the First Respondent and the facts herein contained are within my personal knowledge, unless otherwise stated or apparent from the context, and are both true and correct and I can and do swear positively hereto. In as far as I do not have personal knowledge, I attach hereto the necessary confirmatory affidavits by the relevant officials of the First Respondent who do possess personal knowledge of the relevant facts.”
- [45] The relevance in quoting what Mr. Khuduge stated in paragraph 4 is because of what is missing in the answering affidavit of the First and Second Respondent as it relates to what is stated in paragraph 36.1 of the answering affidavit of the First and Second Respondent. Mr. Khuduge does not state the name of the contractor of the First Respondent who hand delivered a final demand to the property of the Applicant to demand payment of the arrear amount then reflected upon the Applemint Account in August 2023.
- [46] Mr. Khuduge does not state from whom he obtained the information he relies upon as stated in paragraph 36.1 of his answering affidavit. The unnamed contractor can provide direct evidence to support the averment that a final demand was hand delivered to the property to demand payment of the arrear amount reflected upon the Applemint Account in August

2023. His or her affidavit is not attached and there is no evidence to indicate why the unnamed contractor was unable to depose to a confirmatory affidavit. Moreover an allegation of fact in an affidavit which in truth comprises no more than information that others may have provided cannot be elevated to real evidence simply because the deponent, under a standardised statement at the commencement of the affidavit, believes it to be true and correct. (See: *FirsrtRand Bank Limited v Kruger supra* at paragraph 10).
- [47] The submission that the dispute was delivered late is further frustrated by what Mr. Khuduge states in paragraph 36.6 of the answering affidavit, that the Head of the Billing Unit of the First Respondent Ms. Busiswe Faku (“Ms. Faku”) issued a reconnection instruction on 29 January 2024, indicating that there was a possible dispute to the Applemint Account. This was as a result of the letter dated 11 October 2023.
- [48] If the dispute as contained in the letter dated 11 October 2023 was belated. Why would the Head of the Billing Unit entertain the dispute and issue a reconnection instruction. I am of the view that what Mr. Khuduge stated in paragraph 36.1, that a final demand was hand delivered to the property during August 2023 for payment of the arrear amount reflected on the Applemint Account is hearsay. I am further convinced by the conduct of Ms. Faku on 29 January 2024 in issuing a reconnection instruction because of the dispute dated 11 October 2023, that the dispute was not raised belatedly.
- [49] It was submitted on behalf of the First and Second Respondent that the dispute cannot stand because the dispute has been investigated and it was found that the Applemint Account is in order and there are no issues to be resolved on the account. In reply the Applicant denied that the dispute had been resolved and in argument before the Court, Counsel for the Applicant submitted that the Applicant was not part of the investigation, and the dispute cannot be resolved by the First Respondent without the Applicant.
- [50] What Mr. Khuduge has stated in paragraph 36.9 of the answering affidavit of the First and Second Respondent confirms what Counsel for the Applicant submitted in his heads of argument and in argument before the Court. It further supplements the denial by the Applicant that the dispute been resolved. Mr. Khuduge states as follows at paragraph 36.9 “The disconnection must have prompted the deponent to the founding affidavit (hereinafter referred to as “Mr. Roux”) to attend at the First Respondent’s premises where he was advised that there was no valid dispute of the account and that the account reflected an amount of R 2 139 750.84.”
- [51] In paragraph 36.8 and 36.9, Mr. Khuduge once more does not state the identity of the official(s) of the First Respondent that dealt with Mr. Roux and advised Mr. Roux that the investigation had been concluded and that there was no valid dispute. He further has not attached the confirmatory affidavits of the official(s). The Applicant has denied that it was advised of the outcome of the dispute. The averment dealing with Mr. Roux, the representative of the Applicant being advised of the outcome of the dispute is hearsay. The First and Second Respondent have not dealt with how the dispute was resolved without

including the Applicant. I agree with Counsel for the Applicant that the dispute could not be resolved without the Applicant. I accordingly find that the dispute lodged in the letter from the Attorneys of the Applicant dated 11 October 2023 has not been resolved.

- [52] The First and Second Respondent further rely on the acknowledgement of debt and undertaking to pay which was entered into by the Applicant on 19 April 2024. Counsel for the Applicant submitted that by signing the acknowledgement of debt and undertaking to pay, the Applicant did not waive its rights to the dispute raised prior to 19 April 2024. It is common cause that the acknowledgement of debt was signed and the representative of the Applicant wrote next to his signature “under protest.”
- [53] In the founding affidavit, the Applicant sought to make a case for writing the words “under protest” is an indication of entering into an agreement under duress. Counsel for the First and Second Respondent has dealt with the requirements for the party relying on duress. The facts that must be alleged and proved have been quoted in paragraph 10 herein above. Counsel for the First and Second Respondent submitted the Applicant failed to allege and prove the requirements for duress and in the absence of duress the acknowledgement of debt and undertaking to pay stands and must be read as a waiver by Applemint on the reliance on any dispute allegedly by or on behalf of Applemint. Counsel for the First and Second Respondent submitted further that by the Applicant performing in terms of the acknowledgement of debt and undertaking to pay, it is a clear indication of its waiver of the earlier (putative) dispute.
- [54] In *Commissioner of Inland Revenue v First National Industrial Bank Ltd* [1990] ZASCA 49; 1990 (3) SA 641 at 649G – J, Nienaber AJA said the following: “The addition of the words ‘under protest’ when a payment is tendered can, so it seems, fulfil one or more of several functions:
- (i) The phrase can serve as confirmation that, in the broad sense, the payment was not a voluntary one or, in the narrower sense, that it was due to duress. The failure so to stipulate could support an inference that the payment was voluntary or that in truth there was no duress. (ii) It can serve to anticipate or negate an inference of acquiescence, lest it be thought that, by paying without protest, the solvens conceded the validity or the legality of the debt, or his liability to pay it, or the correctness of the amount claimed. The object is to reserve the right to seek to reverse the payment. The effect is not to create a new cause of action but to preserve and protect an existing one - namely, that the payment was an *indebitum solutum* which is recoverable in law, eg by means of the *condictio indebiti* or in terms of s 32(1)(a) of the Stamp Duties Act, 1968. (iii) It could serve as the basis for an agreement between the parties on what should happen if the contested issue is tested and resolved in favour of the solvens. Such an agreement would indeed create a new and independent cause of action.” (My underlining)

- [55] Waiver is a defence on a point of law that can be raised on the facts, provided that whenever it is invoked the other side has a fair opportunity to respond. (See: Erasmus Superior Court Practice Rule 6(5)(d)(ii) B1 – 45).
- [56] An intention to waive must be inferred reasonably, there should be an outward or perceptible indication, no one can be presumed to have waived rights without clear proof. The test for such intention is objective, that means, the intention to waive, like intention generally, is pronounced by its outwards manifestations. Some outward manifestation in the form of words or conduct is required, silence and inaction will do when a positive duty to act or speak arises. Mental reservations not communicated, are of no legal consequence. The outward manifestations of intention are pronounced from the perspective of the other party concerned, that is to say, from the perspective of the latter's notional alter ego, the reasonable person standing in his shoes. The conduct from which waiver is inferred, so it has frequently been stated, must be unequivocal, that is to say consistent with no other hypothesis. (See: Road Accident Fund v Mothupi 2000 (4) SA 38 SCA paragraphs 15, 16, 18 and 19)
- [57] Having considered the matters of Commissioner of Inland Revenue v First National Industrial Bank Ltd supra and Road Accident Fund v Mothupi supra. I am not convinced that when the representative of the Applicant was signing the acknowledgement of debt and undertaking to pay and inserted the words "under protest", the acknowledgement of debt and undertaking to pay must be read as a waiver by Applemint of the reliance on any dispute allegedly raised by or on behalf of Applemint.
- [58] I am of the view, the insertion of the words "under protest" served as confirmation in the broad sense that the tender to pay the monies demanded by the First Respondent was not voluntary. The insertion of the words was intended to negate an inference of acquiescence by the Applicant lest it be thought that, by paying without protest the Applicant conceded the validity of the debt or its liability to pay it and the correctness of the amount claimed.
- The object was further in my view to reserve the right to seek to reverse the tender to pay.
- [59] In the heads of argument of the First and Second Respondent, it was submitted that the Applicant had not made any payments to the First Respondent from 30 April 2024 for electricity consumption. During argument of the matter on 27 August 2024, Counsel for the First and Second Respondent submitted that the Applicant had made a payment in the last week of August 2024 for electricity consumption.
- [60] At the hearing of the matter on 27 August 2024, Counsel for the First and Second Respondent further submitted to the Court that Counsel for the Applicant in his heads of argument was asking for a final order and had made submissions as it relates to a final order. Counsel for the First and Second Respondent submitted that the Court should under the circumstances approach the matter as set out in Plascon – Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd

[1984] ZASCA 51; 1984 (3) SA 623 (A) that is where there is a dispute as to the facts a final interdict should only be granted in motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavit justify such an order.

[61] Counsel for the Applicant in his heads of argument submits “seeing that an interim interdict has already been granted and this is the return date, the applicant is tasked with making out a case and showing due compliance with the requirements for a final interdict namely:

61.1 A clear right on the part of the applicant;

61.2 An injury actually committed or reasonably apprehended;

61.3 That there is no satisfactory remedy available to the applicant.”

[62] In light of the submissions made by Counsel for the Applicant and Counsel for the First and Second Respondent. I am tasked with making a decision on the question whether the interdict being sought, although interlocutory (interim) in form, is nevertheless final in substance. An interim interdict pending the determination of an action is not final in effect. (See: Cipla Agrimed (Pty) Ltd v Merck Sharp Dohme Corporation 2018 (6) SA 440 (SCA) at paragraph 19).

[63] In *Thabang v North West University and Another* (UM 27/2023) [2023] ZANWHC 42 (20 April 2023) at paragraph 27, Reddy AJ (as he was then) held as follows: “An interim interdict is a court order preserving or restoring the status quo pending the determination of the rights of the parties. It is important to emphasize that an interim interdict does not involve a final determination of these rights and does not affect their final determination.”

[64] The concept of a rule nisi is to be distinguished from that of a provisional order. A rule nisi is an order to show cause on a return date why a particular order should not be made. On its own, a rule nisi has no legal effect other than to put those to whom it is addressed on notice that specified relief will be sought on the return day. An interim provisional order is different. The order has specified legal consequences beyond mere notice of the prospect of final relief being granted. Often rule nisi and an interim interdict are issued on the same order at the same time, but that does not mean they are the same thing. When a rule nisi is coupled with an interim interdict, the order sought to be confirmed on the return day will have interim effect until the return

day. If the return day passes with no appearance by representative of the Applicant then both the rule and the interdict expire. (See: *Nzwalo Investments (Pty) Ltd v Infoguard (Pty) Ltd* (6950/2020) [2021] ZAGPJHC 95 (23 July 2021) at paragraph 13 – 15).

[65] In determining whether the relief sought is interlocutory (interim) or final, regard should be had to the substance rather than the form of the relief sought. (See: *Knox D’Arcy Ltd and Others v Jamieson and Others* 1995 (2) SA 579 (W) at 600G – 602E).

[66] From the reading of the notice of motion and in particular, paragraphs 3, 4 and 4.1 of the notice of motion of the Applicant. It is obvious that the relief sought by the Applicant is interim in nature. The order sought is temporary, it will remain in place pending the finalization, outcome, resolution and / or adjudication of the dispute lodged with the First Respondent. Once the dispute is resolved either in favor of the Applicant or against the Applicant, the order will cease to exist. Although the Court made an interim order on 26 July 2024 coupled with a rule nisi calling on the First and Second Respondent to show cause on 27 August 2024, why the orders in paragraphs 3, 4, 4.1, 5, 6, 7 and 8 should not be made part of a final order, that does not mean on the return date if the rule nisi is confirmed, that would have the effect of determining the rights of the parties.

COSTS:

[67] The general rule in matters of costs is that the successful party should be given his or her costs and this rule should not be departed from except where there be good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. (See: *Union Government v Gass* 1959 (4) SA 401 (A) at page 413C – D).

[68] I have found no reason to depart from the rule and accordingly the costs must follow the cause.

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ORDER:

[69] Resultantly, the following order is made: -

- (i) The rule nisi issued on 26 July 2024 is confirmed;
- (ii) The First Respondent is ordered to pay the costs of the application on a party and party Scale, Scale “B”.

T MASIKE

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

Date of Hearing:

25 September 2024

Date of Judgment:

03 October 2024

For the Applicant:

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Instructed by:

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c/o Labuschage Attorneys

For the Respondent:

Adv I. Kok

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Prepared on 12 October 2026 · Esheria