



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO. D9343/2023

In the matter between:

WESTVILLE RATEPAYERS ASSOCIATION

APPLICANT

and

ETHEKWINI MUNICIPALITY

RESPONDENT

CASE NO. D9946/2023

In the matter between:

ANGELA MERRILL COCKERELL

FIRST APPLICANT

WESTVILLE RATEPAYERS ASSOCIATION

SECOND APPLICANT

and

ETHEKWINI MUNICIPALITY

RESPONDENT

CASE NO. D9947/2023

In the matter between:

SUSAN JANE MERCER

FIRST APPLICANT

WESTVILLE RATEPAYERS ASSOCIATION

SECOND APPLICANT

and

ETHEKWINI MUNICIPALITY

RESPONDENT

CASE NO. D9948/2023

In the matter between:

AHMED MAHMOOD KADWA

FIRST APPLICANT

WESTVILLE RATEPAYERS ASSOCIATION

SECOND APPLICANT

and

ETHEKWINI MUNICIPALITY

RESPONDENT

CASE NO. D9949/2023

In the matter between:

UNITA GOVENDER

FIRST APPLICANT

WESTVILLE RATEPAYERS ASSOCIATION

SECOND APPLICANT

and

ETHEKWINI MUNICIPALITY

RESPONDENT

CASE NO. D9950/2023

In the matter between:

ABDUR RAHMAN KADER

FIRST APPLICANT

WESTVILLE RATEPAYERS ASSOCIATION

SECOND APPLICANT

and

ETHEKWINI MUNICIPALITY

RESPONDENT

Coram: Thobela-Mkhulisi AJ

Heard: 14 September 2023

Delivered: 27 October 2023

ORDER

The following order is granted:

1. The applications under case numbers D9343/2023, D9946/2023, D9947/2023, D9948/2023, D9949/2023 and D9950/2023 are dismissed.
2. The applicant(s) in each application shall pay the costs of such application, and where two applicants have launched the application their liability for costs shall be joint and several, the one paying the other to be absolved.

JUDGMENT

Thobela-Mkhulisi AJ

Introduction

[1] On 8 September 2023 six applications came before me on the basis of urgency. Each application stems from the same dispute between the Westville Ratepayers Association (the Association) and eThekweni Municipality (the Municipality), and accordingly these applications were heard together and are dealt with in a similar way in this judgment.

The parties

[2] The applicant in case number D9343/2023 is the Association, a voluntary association established on 25 January 2022. The first applicant in case number

D9946/2023 is Angela Merrill Cockerell, a sales representative residing in Westville. The first applicant in case number D9947/2023 is Susan Jane Mercer, the chairperson of the Association. The first applicant in case number D9948/2023 is Ahmed Mahmood Kadwa, a medical vascular surgeon who resides in Westville. The first applicant in case number D9949/2023 is Unita Govender, a paralegal who resides in Westville. The first applicant in case number D9950/2023 is Abdur Rahman Kader who also resides in Westville.

[3] The Association is cited as the second applicant in each of the applications by the individual applicants.

[4] The Municipality is the respondent in each application.

The relevant facts

[5] The Association, in its application issued in August 2023, and as the only applicant under case number D9343/20323 (the main application), set out the relief it seeks in its notice of motion as follows:

‘KINDLY TAKE NOTICE THAT that (sic) application will be made on behalf of the abovenamed applicant at 09:30am on 1 November 2023 or so soon thereafter as Counsel may be heard for an order in the following terms:

1. That the Respondent be and is hereby interdicted and restrained from disconnecting municipal services *inter alia* water supply, electricity supply and refuse collection to the persons so listed in annexure ‘X’ hereto, pending the finalisation of a dispute lodged by the applicant on 30 June 2023.
2. The Respondent is directed to produce written reasons for any decision taken by it in respect of the dispute within 30 days of the finalisation of the dispute.
3. That the First Respondent be directed to pay the costs of this application.
4. Further and/or alternative relief.’

[6] The Association later filed a supplementary affidavit to which it attached a draft amended order prayed. The only amendment to the above was to frame the order sought in the form of Rule nisi. At the hearing of the matter this too was later changed by the

Association and it was submitted that final relief is sought in the manner initially set out and paragraph 2 is no longer persisted with.

[7] The Association describes itself as a watchdog that ensures that municipal services are delivered, and its mission is to ensure that local government evinces a character and culture of respect, dignity and service delivery. In April 2023, the Municipality published its draft municipal budget for the 2023/2024 financial year and it looked to adopt this budget at the end of that month. The Association lodged a complaint with the Municipality that it afforded ratepayers insufficient time within which to review and comment on the draft budget. It sent written requests to the Municipality for a meeting to be held, at which it wanted to submit its objections and comments to the draft budget. The Municipality did not respond to these written requests. Instead, in an email dated 18 May 2023, the Municipality informed the Association and other ratepayers associations that a mass meeting would be held at Moses Mabhida Stadium to discuss the draft budget. The Association states that it was given only three days' notice of this meeting which it attended when it was held on 24 May 2023. At this meeting the Association delivered a memorandum comprising "an extensive list of objections highlighting gross non-compliance with the public participation process and the concerns detailed in the Auditor General's reports which the [Municipality] had not responded to". Those objections include allegations that 615 million litres of water are lost daily which equates to R2 billion; that the Municipality's credit control policy is failing as the outstanding debt has increased by R4.7 billion; that the proposed tariff increase by Umgeni Water is only 5% but the Municipality's proposal is to pass on a 15% increase to ratepayers; that informal settlements are growing larger every day and 800 000 people live in informal settlements; and that the Municipality should postpone any decision to increase tariffs until an enquiry, purportedly by the provincial government, has been completed.

[8] Notwithstanding receipt of this memorandum and other similar complaints, the Municipality adopted the draft budget, inclusive of the tariff increases that the Association objected to. This prompted a further meeting between the two sides, held on 22 June 2023, which the Association states did not go as planned. Ultimately, on 30 June 2023,

the Association lodged a dispute in terms of section 102 of the Local Government: Municipal Systems Act, No. 32 of 2000 (the Systems Act). The Association describes its dispute as being 'against tariff increases, non-compliance with the public participation process and a capitulation of historical failures resulting in an incorrect budget'. More specifically, in the dispute declared in terms of section 102, the Association repeats some of the complaints listed in the memorandum given to the Municipality on 24 May 2023, such as Municipality's proposal of a higher than normal tariff which is stated to be adopted without the approval of the National Energy Regulator of South Africa (NERSA). The declared dispute also lists, amongst other complaints, the failure to take disciplinary action against employees of the Municipality who are responsible for unauthorised, irregular and fruitless expenditure. Finally, the declared dispute records that the Association 'will not pay for any rates and services starting from 1 July 2023 until and unless the City engages with [it]'.

[9] On 7 July 2023, the Association sent further correspondence to the Municipality that records *inter alia*, that the electricity tariff increase approved by NERSA for the Municipality is 15.1% and that this will have an impact on the 2023/2024 budget, which is not explained in the letter, save to state that if the Municipality ignores this recommendation from NERSA, it will be acting in contravention of its licence agreement with NERSA, and in that event, the Association will take the matter further. The letter also states that if the Municipality does not accede to an urgent meeting, the ratepayers are prepared to go on a boycott and they are prepared to face any consequences which may result, legal or otherwise.

[10] The Municipality, on 14 July 2023, responded to the accusation by the Association that it had not responded to the several letters the Association had sent to it, by referring to its letter dated 29 May 2023. This letter was a response to the memorandum from the Association delivered on 24 May 2023, and it stated that 'in line with its policies and by-law credit control measures are being and will continue to be implemented on accounts that are in arrears, which measures include disconnections and penalties'. In response, the Association sent two letters on 15 July 2023. In the first letter, the Association states

that the letter from the Municipality demonstrates disrespect to the provisions of section 102(2) of the Systems Act. In the second letter, the Association records that the Municipality is aware of the dispute lodged in terms of the Systems Act, and that the consequences of a rates boycott will mean the inability of the Municipality to meet its financial obligations, the repayments of its loans, and that if the Municipality does not convene a meeting with the Association, it 'will proceed with a rates boycott as an act of protest'. The Association has also written to President of South Africa, various provincial departments, the Department of Co-Operative Governance and Traditional Affairs, and other government bodies.

[11] After an announcement by the Municipality on the news that any rates protest will be unlawful, the Association, sent a further letter to the Municipality in which it repeated its previously communicated complaints. Ultimately, on 10 August 2023, the Association met with the Municipality where it delivered a list of further demands to it. In total 11 demands are listed, including that the 2023/2024 tariff increase be set aside, a tariff increase be renegotiated which is affordable to everyone, all electricity disconnections must cease, and all credit agreements must be reviewed.

[12] The Municipality was not persuaded. On 15 August 2023, it delivered to ratepayers that were in arrears tax invoices for rates, water and sanitation, sewage disposal, electricity, cleansing, and solid waste, that contained the following demand: 'Urgent: Please note that your account is in arrears. Should payment not be received we advise that we intend to cut off or restrict your service after 14 days'. A further meeting ensued between the Mayor and the Association, this time on 17 August 2023, followed by a further letter on 18 August 2023 that the Association says was from it, and in which it is demanded that the Municipality undertakes that it will not implement its credit control measures until such time as the matter is resolved at court. However, the letter that the Association claims it wrote on 18 August 2023 is, in fact, a letter from a different association, the eThekweni Ratepayers Movement (ERPM). Mr Asad Gaffar, the deponent to the affidavits in the main application, alleges that he is the chairperson of the Association and his role in ERPM is not explained anywhere in the papers.

[13] On 24 August 2023, the ERPM wrote a further letter in which it informed the Municipality that it has been forced to bring an application to interdict the Municipality from implementing its credit control measures. The following day, on 25 August 2023, the Association launched these proceedings.

[14] Despite the notice of motion setting the matter down for hearing on the unopposed roll on 1 November 2023, on 8 September 2023, the Association filed a supplementary affidavit to which it attached the list of persons set out in annexure X, which had been omitted from its founding affidavit. The supplementary affidavit explains that the Municipality disconnected electricity supply to the first applicants in the applicants by the individual applicants above. The Association requested the Municipality to give an undertaking that it would reconnect these applicants' electricity supply. The Municipality did not give such an undertaking. This caused the Association to bring the hearing of its application forward. This supplementary affidavit was deposed to on 7 September 2023 and the matter set down on an urgent basis on 8 September 2023.

[15] The Municipality arrived at court to oppose the now urgent application, but given the short notice it had been given it had not prepared answering papers. I adjourned the matter to the following Thursday, 14 September 2023, when I would again be in motion court, and an order agreeing to time periods for the exchange of papers and the filing of heads of argument was granted by consent.

[16] In its answering affidavit, the Municipality opposes the relief sought on the ground that the underlying dispute is not one that falls within section 102 of the Systems Act. Further, the Municipality states that it did respond to the letter from the ERPM on 4 September 2023. In this letter, the Municipality asserts that the Association purports to act for ratepayers of the Municipality, without stating the names of the ratepayers; that the letter fails to point out the specifics of what is disputed in the amounts billed, as required by section 102 of the Systems Act; and that the letter, read together with all the documents contained in a lever arch file comprising of a spreadsheet with addresses,

figures, account numbers and people's names, with no further information, does not raise a dispute in terms of section 102.

[17] In reply, the Association raised the selective enforcement by the Municipality. It asserts that on 8 September 2023, the Mayor of the Municipality was published in two publications, the Sowetan and IOL online, to have declared war by announcing a 'hit list' of persons that would be targeted by the Municipality. The mayor was quoted to have said that -

'Don't think everyone who resides in Westville has decided to withdraw their rates. It is only two or three streets and we will be dealing with those. If they don't pay us we will cut them off...We have a list of the people who are withholding their rates. They gave us that list in court. We know our first targets. Those who are not paying us we must cut them off because it is unlawful to withhold rates payments.'

[18] The Municipality did not request an opportunity to answer the accusation of selective enforcement against it and the matter was argued on the basis of the papers as they were.

The issues

[19] The fundamental issue in all the applications is whether a dispute in terms of section 102 of the Systems Act is pending between the Association and the Municipality. If no such dispute exists, the relief sought by the applicants cannot be granted. Selective enforcement by the Municipality is also in issue.

Discussion

[20] Prior to turning to section 102, I enquired from the parties what the precise nature of the relief sought by the Association was. Initially, counsel for the Association stated that the Association seeks interim relief, notwithstanding the amended order prayed framed the order in the form of a Rule. The Municipality argued that final relief was sought because the manner in which the order is drafted does not give another court anything else to determine. The Association conceded that it seeks final relief, that the papers are ripe for the issues to be determined.

[21] Section 102 reads as follows:

102. Accounts.— (1) A municipality may—

- (a) 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
 - (c) 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.¹

[22] It is common cause that the only service the Municipality disconnected is the supply of electricity. The individual applicants still receive the supply of water, sewage disposal and refuse removal. It is also common cause that the individual applicants have not paid the Municipality the amounts that remain outstanding on each of their bills for all services provided by the Municipality, inclusive of the services not disconnected. The applicants contend that they shall continue to not pay the Municipality for all of the itemised amounts on the bills they have received from the Municipality, and that despite the position taken by the applicants to boycott payment for all services, the Municipality must continue to provide services. When I pressed counsel for the Municipality to explain what entitles the applicants to demand services whilst refusing to pay for such services counsel relied on the dispute that the Association states is pending between the it and the Municipality in terms of section 102(2).

[23] In *Croftdene*,¹ the Supreme Court of Appeal provided a summation of section 102(2). The facts in that case were that Croftdene Mall, developed by entities which are referred to in that judgment as ‘the Croftas’, was initially operated as a share block scheme and later converted into a sectional title scheme. The Croftas went into liquidation

¹ *Body Corporate Croftdene Mall v eThekweni Municipality* [2011] ZASCA 188; 2012 (4) SA 169 (SCA).

and the sectional title units they owned in the scheme were sold to third parties during the liquidation process. The eThekweni Municipality held two accounts for the mall, one in the name of the mall and another in the name of the Croftas. Sometime later, the Municipality consolidated the mall's rates account with water, electricity and refuse removal. The mall fell into arrears on its accounts and in proceedings launched against the Municipality, asserted that the latter could not disconnect the electricity and water services to the mall as a dispute existed between the mall and the Municipality in the manner contemplated in section 102(2) of the Systems Act. One of the issues disputed was the right of the Municipality to consolidate the accounts in the manner that it had done, and to allocate payments made for water and electricity charges to the 'undifferentiated consolidated historical debt'. The question to be determined was whether section 102 of the Systems Act empowers a local authority to disconnect a ratepayer's water and electricity supply due to outstanding debt for municipal rates. At the beginning of the court's analysis, it stated the following about section 102(2):

'Section 102(1) of the Systems Act presents no controversy. The question for determination is whether the respondent was entitled in the circumstances of this case, to terminate the services to the property in order to enforce payment of arrear rates in view of the provisions of s 102(2). The provisions of this section exclude the application of ss (1), "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". Clause 22 of the policy makes provision for dispute resolution. Clause 22.1 thereof requires a customer who disputes a municipal account to submit it in writing to the chief financial officer stating the reasons therefor and any relevant facts, information or representation which the chief financial officer should consider to resolve it. But, in terms of clause 22.3, the submission of a dispute "shall not stop or defer the continuation of any legal procedure already instituted for the recovery of arrear payment relating to such dispute".'²

[24] The reference to 'policy' is a reference to the policy a municipality is obliged to have on credit control and debt collection in terms of section 97 of the Systems Act. This policy is not in issue in this application. However, it seems clear that what must be in dispute for section 102(2) to be invoked, is a specific amount claimed by the municipality from that person. In this regard, May JA opined that:

² Ibid para 20. See also paras 11-23.

'It is, in my view, of importance that s 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.*'

[25] The dispute purported to be in existence between the Municipality and the Association is not a dispute contemplated in section 102(2). The Association's dispute with the Municipality is a different dispute about tariff increases, the failure to discipline officials of the Municipality, wasteful expenditure and all of the issues listed in the summary of the relevant facts above. None of the matters listed in the correspondence with the Municipality, whether from the Association or from the EPRM, are matters in which a dispute about a specific amount is raised. Moreover, the individual applicants, in their short affidavits filed under the different case numbers above, are silent about a dispute with the Municipality, save that they rely on the allegations by the Association in the main application, which allegations turn on a dispute in terms of section 102(2). As submitted by *Mr Goddard SC* in argument, the Municipality resolved the question of a pending dispute when it informed the ERPM in its letter on 4 September 2023, that 'the letter read together with all the documents contained in the arch lever file do not raise any dispute contemplated in section 102 of the (Systems Act) read together with the Policy'.

[26] The Association is embarking on a payment boycott whilst demanding the provision of services. This is an entirely different matter, one that does not fall within section 102(2) and about which entirely different legal principles apply.

[27] I turn next to the submissions made in relation to 'selective enforcement'. *Mr Suleman* for the Association relies on *Walker*³ in making the submission that the

³ *Pretoria City Council v Walker* 1998 (2) SA 363 (CC).

utterances by the mayor in the newspaper articles referred to in the replying affidavit, amount to selective enforcement carried out by targeting members of the Association. The facts in *Walker* are entirely distinguishable from the present facts. In that case, residents in what was referred to as old Pretoria complained that they were charged a metered rate for services whilst residents in Mamelodi and Atteridgeville were charged a flat rate. Whilst residents in all three areas owed the Pretoria Council payment, the council adopted the policy of enforcing payment of arrear charges in Old Pretoria whilst encouraging payment in Mamelodi and Atteridgeville.

[28] In the application brought by the Association and in the individual applications, no facts are alleged that evidence ‘selective enforcement’. The entire argument on selective enforcement rests on statements which are alleged to have been uttered by the mayor in newspaper articles that the Municipality has a list of the few streets that are withholding payment of their rates. There is no evidence in any of the affidavits filed for the Association, showing as a matter of fact, that the Municipality has only disconnected the electricity supply of the members of the Association. The case on selective enforcement is at best speculative and unsupported by the Association’s own papers which contain a list of its members that runs to four pages, where the electricity supply to only five members has been disconnected. There is no allegation made that no other disconnections to electricity have been carried out by the Municipality, nor is any evidence in this regard attached to the papers. It follows that the submissions made on selective enforcement are unsupported by facts and must be rejected.

[29] The only question that remains is that of costs. *Mr Suleman* asked this court to apply the *Biowatch* principle and to not grant a costs order against the Association and the individual applicants in the event that they are unsuccessful. In *Biowatch*,⁴ the Constitutional Court established the principle that generally, in litigation between the State and private parties seeking to assert a fundamental right, and the State is shown to have failed to fulfil its constitutional and statutory obligations, the State should bear the costs of litigants who have been successful against it, and ordinarily there should be no costs

⁴ *Biowatch Trust v Registrar, Genetic Resources, and others* [2009] ZACC 14; 2009 (6) SA 232 (CC).

order against any private litigants who have become involved. The present proceedings do not constitute litigation between private persons and the State in which fundamental rights in the Bill of Rights are asserted. Neither the Association nor the individual applicants make out a case in this regard. The private parties have been unsuccessful, the *Biowatch* principle finds no application and I find no reason for why costs should not follow the cause.

Order

[30] The following order is granted:

1. The applications under case numbers D9343/2023, D9946/2023, D9947/2023, D9948/2023, D9949/2023 and D9950/2023 are dismissed.
2. The applicant(s) in each application shall pay the costs of such application, and where two applicants have launched the application their liability for costs shall be joint and several, the one paying the other to be absolved.

THOBELA-MKHULISI AJ

Heard: 14 September 2023

Delivered: 27 October 2023

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