

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

Case No: 398/2023

In the matter between:

SIPHOKAZI MAFILIKA & 5 OTHERS

Applicant

And

ELUNDINI MUNICIPALITY

First Respondent

THE MUNICIPAL MANAGER:

ELUNDINI MUNICIPALITY

Second Respondent

JUDGMENT

BESHE J:

[1] It is common cause that officials of first respondent disconnected or terminated the supply of electricity from Erf 3[...] Maclear, which falls under the Elundini Municipality. It is also common cause that the owner of the said premises is **Ms Nosipho Flora Nyezi**. Water supply was also disconnected albeit it not being common cause by whose officials it was disconnected. In this application, the applicants seek an order that pending Part B of the application, the respondents be directed to restore water and electricity within two hours of receipt of the court order, at the said premises. That, they be interdicted and restrained from unlawfully terminating / disconnecting the supply of electricity to the premises pending the determination of Part B of the application.

[2] As I understand their case, applicants' complaint is that the electricity and water supply was disconnected without prior notice and therefore unlawfully. Which I also understand to be the gist of the declaratory that will be sought in Part B of the application. Namely: That the conduct of the respondents in terminating the electricity supply and water without notice be declared unlawful, null and void *ab initio*.

[3] The applicants' case as would appear from **Ms Mafilika's** affidavit, is that they reside in the said premises and their occupation of the premises is lawful as it stems from a rental agreement with their landlady/agent **Ms Pinky Madikane**. They also make the point that they purchase water and electricity from first respondent (municipality). On the 7 February 2023 two officials from the respondents' office arrived at the premises concerned and informed **Ms Mafilika** that they were from the office of the respondents with instructions there being to terminate the supply of electricity and effectively block them from usage thereof.¹ Attempts to establish the reason for the disconnection were not forthcoming from the said officials. On the 8th February 2023 officials from the municipality terminated the water supply without any pre termination notice. This, they assert, as based on the Constitution and the principles of natural justice as well as the municipal by-laws. I was however not referred to any such by-laws relevant to the first respondent. Applicants go on to demonstrate how they have satisfied the requirements for the grant of an interim interdict / relief.

[4] Essentially the case of the respondents is that the owner or title holder in respect of the said premises, **Ms Nosipho Flora Nyezi**, with whom the municipality had contract to supply electricity and other services, addressed a letter to the municipality. The letter is dated 4 February 2023, but came to the Municipal Manager's attention on the 6 February 2023. The letter was accompanied by all the relevant documents pertaining to the title holder as well as being account holder in respect of the property with the municipality wherein she requested that the electricity to the property be disconnected. The following documents are attached.

¹ Page 12 of the indexed papers paragraph [18].

Letter from Ms Nyezi wherein she requests second respondent to temporarily disconnect the power connection and issue her with the final electricity/rate bill. Copy of her ID. Copy of consumer statement. Copy of Title Deed and copy of local plan of the property. To this end, she paid the requisite disconnection fee. The request was complied with the municipality according to the Municipal Manager had no option but to action the request. The fact that the owner of the premises requested the disconnection obviated the need to give prior notice of disconnection. In addition, previously all the communication has always been with **Ms Nyezi**. Respondents therefore deny that the disconnection of the electricity supply was unlawful.

[5] Respondents state that they do not know if the applicants purchase electricity and water from the first respondent. Further deny that the persons who were found on the premises were not informed of the reason for the disconnection of the electricity supply. **Mr Faca** who was responsible for the physical disconnection states that he told people who were outside the premises of the reason for his visit and even gave them the opportunity to read the letter that was received from the owner of the property.

[6] In their reply the applicants insist that the respondents owed them a duty of procedural fairness by affording them an opportunity to make representations before taking the decision to disconnect the supply of electricity and water to the property or notify them of the reasons for doing so.

[7] It is trite that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.² This entails *inter alia* giving adequate notice of the nature and purpose of the administrative action.

[8] Administrative action is defined under *Section 1 of Promotion of Administrative Justice Act*. The applicants move from the premise that the respondents were performing an administrative act in terminating the supply of electricity and water to the property.

² Section 3 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

[9] Perhaps it is apposite that I deal with the issue of the disconnection of water supply at this stage. Respondents deny that they disconnected the supply of water and assert that the Joe Gqabi District is better placed to answer questions in this regard. It is common cause that the disconnection of electricity and that of water did not occur on the same day. This in my view lends credence to the respondents' assertion that the Joe Gqabi District Municipality was responsible for the disconnection of water. It is my finding therefore that the respondents' point *in limine* of non-joinder in this regard ought to be upheld.

[10] Did the disconnecting the supply of electricity to the said property in the circumstances put forward by the respondents amount to administrative action or did they act in terms of a contract between the first respondent and **Ms Nyezi** and at **Ms Nyezi's** instance? In ***Sanparks v Mto Forestry***³ the following was said in this regard:

“[37] There is no bright-line test for determining whether administrative principles intrude in relation to a contract involving an organ of state and a private party. However, there are indicators. One might rightly ask whether coercive state power can be brought to bear by a state organ on the private party. Further, one will be constrained to consider whether the public interest is affected by the exercise of the contractual right”

In ***Chirwa v Transnet Ltd and Others***⁴ the Constitutional Court had this to say:

“[139] However, the fact that the conduct of Transnet in terminating the applicant's employment contract involves the exercise of public power is not decisive of the question whether the exercise of the power in question constitutes administrative action. The question whether particular conduct constitutes administrative action must be determined by reference to s 33 of the Constitution. Section 33 of the Constitution confines its operation to

³ 2018 (5) SA 177 SCA at 192 paragraph [37].

⁴ 2008 (4) SA 367 CC at 414 [139].

'administrative action', as does PAJA. Therefore to determine whether conduct is subject to review under s 33 and thus under PAJA, the threshold question is whether the conduct under consideration constitutes administrative action. PAJA only comes into the picture once it is determined that the conduct in question constitutes administrative action under s 33. The appropriate starting point is to determine whether the conduct in question constitutes administrative action within the meaning of s 33 of the Constitution. The question therefore is whether the conduct of Transnet in terminating the applicant's contract of employment constitutes administrative action under s 33."

And later at paragraph 142 had this to say:

"[142] The subject-matter of the power involved here is the termination of a contract of employment for poor work performance. The source of the power is the employment contract between the applicant and Transnet. The nature of the power involved here is therefore contractual. The fact that Transnet is a creature of statute does not detract from the fact that in terminating the applicant's contract of employment, it was exercising its contractual power. It does not involve the implementation of legislation which constitutes administrative action. The conduct of Transnet in terminating the employment contract does not in my view constitute administration. It is more concerned with labour and employment relations. The mere fact that Transnet is an organ of State which exercises public power does not transform its conduct in terminating the applicant's employment contract into administrative action. Section 33 is not concerned with every act of administration performed by an organ of State. It follows therefore that the conduct of Transnet did not constitute administrative action under s 33."

[11] Applicants placed a lot of reliance on the matter of ***Joseph v City of Johannesburg***.⁵ This matter also concerned the termination of the electricity supply to the applicants' place of residence following the accumulation by the landlord, of

⁵ 2010 (4) SA 56 CC.

substantial arrears in payments to the respondent. The applicants were tenants in a block of 44 apartments. The court identified the difficulty that arose from the case as stemming from the fact that applicants are tenants who have no contractual right to receive electricity from City Power.⁶ The issues in this matter concerned more than just the contractual relationship between the City Power and the landlord, but also concerned a by-law(s) in so far as they relate or define customer and occupier. We have established that *in casu* we are not dealing with any municipal by-laws. This in my view distinguishes the case under consideration and the **Joseph's** case. This is one of the distinguishing features. I say so because at paragraph [17] of the **Joseph's** matter the court states that the case concerns the interpretation of PAJA and its application to municipal bylaws – the credit bylaw. There are other distinguishing features between the two matters. Each case should be decided on its own unique facts.

[12] Another significant distinguishing feature in my view, is that unlike in the **Joseph's** matter, the respondents did not set out to disconnect the supply of electricity on their own, did not strictly speaking take a decision, based on failure to pay for rates and services. The respondents were instructed by the title holder of the property, with whom they had a contract, to do so. She certainly did not require a pre disconnection notice. Because she requested the disconnection of electricity to the premises. It is therefore my view that the respondents were not performing an administrative act but in compliance with an instruction by the title holder to suspend the supply of electricity to the property.

[13] Furthermore, those that were found in the premises were informed of the reason for the disconnection and shown the letter from **Ms Nyezi**. The dispute of fact in this regard is resolved on the basis of what was stated in **NDPP v Zuma**⁷ regarding the dispute whether the appellants or some of them were informed of the reason for the disconnection of electricity and whether there was a real dispute in this regard. In my view, the applicants have not succeeded in establishing that they have *prima facie* right requiring protection *vis-à-vis* the respondents. I do not believe

⁶ Joseph *supra* paragraph [2].

⁷ 2009 (2) SA 277.

that the applicants enjoy prospects of success of being successful in Part B of the application.

[14] Accordingly, the application is dismissed with costs.

N G BESHE
JUDGE OF THE HIGH COURT

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