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**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2022/8750

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED.

25 November 2022

In the matter between:

In the matter between

**OCCUPIERS OF INDUSTRY HOUSE,
[....] D [....] STREET, DOORNFONTEIN**

Applicants

and

CITY OF JOHANNESBURG

First Respondent

**EXECUTIVE MAYOR OF THE CITY
OF JOHANNESBURG MPHO PHALATSE**

Second Respondent

CITY POWER

Third Respondent

JOHANNESBURG WATER

Fourth Respondent

MAYFIN PTY (LTD)

Fifth Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 25 November 2022.

JUDGMENT

MALINDI J

Introduction

[1] The first respondent is the City of Johannesburg Metropolitan Municipality (“the COJ” or “the City”), a metropolitan municipality established in terms of the applicable provisions of the Constitution of the Republic of South Africa, 1996, and legislation dealing with local government.

[2] The second respondent is Dr Mpho Phalatse, cited in her official capacity as the Executive Mayor of the City of Johannesburg (“the Mayor”).

[3] The third respondent is City Power Johannesburg Ltd (SOC) (“City Power”), an independent municipal entity, wholly owned and controlled by the City of Johannesburg.

[4] The fourth respondent is Johannesburg Water (SOC) Ltd (“Johannesburg Water”), an independent municipal entity, wholly owned and controlled by the City of Johannesburg.

[5] The fifth respondent is Mayfin Pty (Ltd), the owner of the property.

[6] This is an urgent application seeking the reconnection of the supply of electricity services following the disconnection of these services for the residents of Industry House, [...] D [...] Street, New Doornfontein (“Industry House”), on 11 August 2022. The residents had been without electricity since that date. The order dismissing their application was made on....

[7] The applicants seek an order condoning their non-compliance with the rules and practice directives, recognising the matter as urgent and directing the first, second and third respondents to reconnect the supply of electricity to Industry House. The applicants seek this relief in final form, alternatively as interim relief.

[8] The applicants aver that the first to third respondents are actively frustrating every attempt by the residents to regularise their electricity account in several ways that are unlawful. They contend further that the respondents' submissions that the property has damaged and unsafe infrastructure; insisting on the registered owner of the property opening the account; and making it a prerequisite for a compliance certificate – are all without merit. They assert that issues of damage and the compliance certificate are aspects in respect of which the respondents' legal obligations are to advise and assist the residents, but that they are raised as cynical barriers to the supply of electricity services to the residents of Industry House.

[9] The first, second and third respondents oppose the application on the basis that:

9.1. Firstly, that the Applicants seek the performance of an illegality,

9.2. Secondly, that the requirements for mandatory interdict have not been met.

9.3. Thirdly, Applicants seeks an order for reconnection of a service to an account that was disconnected as early as 2011. The respondents alleged that any supply of electricity to the building in question has been a subject of illegal connection/s as no active account is or has been held with the Third Respondent since then; and

9.4. Fourthly, the applicants have also failed to demonstrate that they are entitled in law to be connected to the Third Respondents grid.

[10] The fifth respondent opposes the application on the basis that City Power has previously resisted opening an account for the Industry House residents on the basis that they are not the owner of the property and that the owner has not made the application on their behalf.

[11] The owner also opposes reconnection relief in this matter.

Background

[12] The applicants are approximately 428 residents of Industry House. They have resided at Industry House over an extended period. Most of them have lived there for over ten years with some residents having lived there for up to 15 years. The residents have always been provided with water and electricity by the municipality. It is a five story building with a single water access point which was installed by Johannesburg Water in 2017. Annexure “B” to the Founding Affidavit is an email from Johannesburg Water regarding the installation of the stent pipe on the property.

[13] On 12 June 2019, the owner received a pre-termination notice of electricity from the City of Johannesburg. On this date the owner’s account number [....] was in arrears of R53527.44.

[14] The owner cancelled or caused the account to be cancelled with effect from August 2011. The property has had no municipal account since then.

[15] The owner has not been in control of the property since 2013 when it was registered in its name and the residents would not move out. Evictions were instituted on 22 July 2022 and a report from the City of Johannesburg regarding alternative accommodation was filed. The owner instituted motion proceedings in this court seeking:

“4. That the Applicant is permitted to attend to its building to empty and clean the filthy basement filled and/or loaded with sewage and conduct necessary cleaning and renovations, including building toilets, bathrooms, kitchens and

installing sewage pipes as well as fire extinguishers at the building owned by the Applicant and occupied by the 1st to the 3rd Respondents.

5. That the Applicant be permitted to facilitate the supply of clean running water throughout the building and further facilitate supply of legal, safe and properly connected electricity into the property and the Occupiers be directed to pay reasonable amount for such services and the amount to be determined by this Honourable Court.

6. That the Applicant be permitted and authorised to install a turnstile gate at the main entrance of its property, and collect data and register fingerprint access system of all occupiers at Industry House, and further to allow all occupiers entry and exit to their respective rooms in the property.”

[16] The owner alleges that Annexure CPJ3 dated 8 August 2022 is a request to the City that the pillar box be replaced at its adjacent property number [...] D [...] Street from where electricity is illegally connected to the property at [...] D [...] Street.

[17] The City attaches photographs that depict the state of illegal or unsafe connections inside the property. The rooms are divided by use of dry walling and other fire prone materials.

[18] Since the cancellation of the municipal account, power was at times supplied by the City. For example, a new box had been installed at the relevant time that triggered this application SA7. There also had been a prepaid meter installed and residents paying R500 per month.

[19] The provisions of electricity without an account attached to the property is explained further in annexure “SA10”. On 17 August 2022 the City called a meeting with client (the applicants) together with their legal representatives. The e-mail details the following problems:

19.1. The size of the building does not qualify for a prepaid meter.

19.2. There is no meter on site.

19.3. Illegal connections which were removed.

19.4. It is the first time that the City is informed of the existence of an account number.

19.5. The pillar box from which illegal connections were made was removed.

19.6. A new pillar box was installed.

19.7. A new meter has to be installed against a correct account.

19.8. Connectivity can be reinstated after proper facts are established as to the above queries.

[20] In a preceding e-mail from Socio-Economic Rights Institute (“SERI”) to City Power/City of Johannesburg of the same day as annexure “SA10” the following is stated:

20.1. City Power has records of two accounts for the property

20.2. One account under the name of Gcinumuzi Mzikayifani Shabalala is marked as fraudulent. The property had been fraudulently transferred to him in 2008.

20.3. One account is under Bonginkosi Langa who no longer resides on the property.

[21] Preceding this urgent application, the Applicants launched proceedings for the restoration of electricity on 4 March 2022.

[22] The Respondents undertook to restore both water and electricity.

[23] The Applicants' attorneys demanded specifics as to the date and time of such restoration on the same day.

[24] The Applicants' attorneys state in their letter of 23 August 2022 that:

"3. On 7 August 2022, the Local Ward Councillor attended to the property accompanied by officials from City Power with an intention to disconnect our clients' electricity because of the state of the electricity box. Our clients advised them that the electricity box was in such a state because of the reconnection by the City's officials."

[25] The letter states further that:

"4.... she found City Power officials who advised that they were on the property to disconnect the electricity, because there is an illegal connection and because they had received a complaint from the church, a few blocks away from the property."

[26] On 17 August 2022 the applicant's attorneys wrote to the City stating the following:

"...on Thursday, 11 August 2022, the electricity on the property tripped and property has been without power since then.

On a Friday, 12 August 2022, our clients approached City Power to query the meter issue and to have the issue of the trip electricity resolved. Upon their arrival at City Power they discovered that there are two accounts for the property. The first is under the name Mzikayifani, apparently this account is marked as fraudulent. The second account is under Bonginkosi Langa who is known to our clients, however, Mr. Langa no longer resides on the property and our clients have no contact with him. Accordingly, we request that your office assist our clients with a new meter number that will enable them to pay for their electricity. In the meantime, while the issue of the meter

number is being resolved, we are instructed to demand City Power to fix the electricity that has tripped on the property.”

[27] On the same day, 17 August 2022, the City responded to the applicants’ attorneys by expressing dismay that there was an account number at their property because previously, they were told that there was not one on site. They state that the pillar box that was posing danger and from which illegal connections were made, was removed and a new one installed after cutting illegal connections in the building.

[28] After these exchanges of correspondence, it was resolved that the parties hold a meeting on 22 August 2022. At the meeting of 22 August 2022, the occupiers were advised that the electricity problem can only be resolved if the occupiers apply for a new meter and account number because all account numbers that can be traced to the property have been closed. After this meeting, the occupiers proceeded to another office in Region F to make the applications as advised. While they were there, they allege, City Power officials attended at their property and removed the electricity box.

[29] The attendance by the officials at the premises was in terms of a notice dated 22 August 2022, with the address set out as [...] D [...] Street. The notice does not reflect any account number or meter number. The notice states:

“Dear City Power Customer,

Kindly note that City Power urgently requires access to your property to conduct an audit as to ensure that all electricity connections are safe and comply with the electricity standards. Or pleased note that City Power found the following reason(s) in your property”

[30] Of the options to mark thereunder “illegal connection” is marked. Below those options is a requirement to specify the stated reason and what is stated is that there is no meter found on the property.

[31] The Applicants submit that if this was intended to be a pre-termination notice, it is defective in that it does not state that it is a pre-termination notice and further that even if it were the Applicants were not afforded an opportunity to make any representations since the officials arrived on 22 August 2022 with this notice in hand and acted thereupon immediately. On the other hand, the Respondents submit that, indeed, this was not intended to be a pre-termination of services notice, but an attendance at the premises on the strength of the complaint about illegal connections, including amongst others, from the ward councillor.

Submissions

[32] There is no question that the provisions of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") apply should the municipality contemplate the termination of services. Sub-section (4) of Bylaw 15 states explicitly that fair administrative action demands that residents be given fair notice of such action.

[33] The right to a "mandatory pre-termination notice to any person whose rights may be materially and adversely affected by the termination" of electricity does not apply in this situation as it is distinguishable from the Joseph case¹ in which the Constitutional Court determined that by-laws 15(3) and 15(4)(d) of the electricity Bylaws must be read to extend the right to receive pre-termination notice to the residents and consequently that Bylaw 14(1) is declared invalid to the extent that it limited the right to such a notice to a municipalities "customer" as defined.

[34] The Respondents submit that the By-Laws of 1999 under Notice 1610 of 1999 permit illegal disconnections. No notice is required if the connection is illegal. This is a case of a removal of illegal connection, not a disconnection of a service that had been provided in discharge of the City's obligation.

[35] The Applicants contend that the meeting of 22 August 2022 between themselves and the City was for the purposes of regularising the municipal accounts

¹ Joseph v City of Johannesburg [2009] ZACC 30; 2010 (4) SA 55 (CC).

relating to the property and that they were at this meeting in order to open or update their account.

[36] Mr. Brickhill, for the applicants, has submitted that the relief that should be granted is one that reconnects electricity as it existed on 22 August 2022. He submitted that the respondents must be ordered to re-install the electricity box that was removed on 10 August 2022 and to take reasonable steps to resupply power to the property. In response to the owner's submissions that the pending proceedings brought by the owner provide adequate and substantial redress to the applicants and that this application be struck off the roll as lacking of urgency, Mr. Brickhill submitted that the court should not allow the owner to use its resources to coerce the applicants into accepting its deal.

[37] The owner's application was set down for 26 July 2022 and was struck off or removed removed from the roll for lack of urgency. The notice of motion, in addition to the prayer that the matter be heard on an urgent basis, makes the following prayers:

"2. That the first to the third respondents herein hereby restrained and interdicted from blocking and/or denying the applicant and its employees, as well as agents, entry, access, control and possession of applicant's property known as Industry House at ERF [...] Doornfontein, located at number [...] D [...] Street, Doornfontein Johannesburg herein after referred to as "the property.

3. That the first to third respondents are interdicted and restrained from encouraging, facilitating any unlawful activities on the applicant's premises, activities which shall include but not be limited to:

3.1 interfering with access to entry from and the free movement of the applicants in its premises and the applicant's employees, and all those who have lawful reason to move onto, off and upon the said premises

3.2 assaulting, threatening, intimidating, collecting rentals, coercing or otherwise interfering in any manner with the free movement, bodily integrity, psychological and mental well-being and any other constitutional rights of the applicants, employees, and all other persons who have lawful reason to move onto, off and upon the said premises

4. That the applicant is permitted to attend to its building to empty and clean the filthy basement filled and/or loaded with sewage and conduct necessary cleaning and renovations, including building toilets, bathrooms, kitchens and installing sewage pipes as well as fire extinguishers at the building owned by the applicant and occupied by the first to the third respondents.

5. That the applicant be permitted to facilitate the supply of clean running water throughout the building and further facilitate supply of legal, safe and properly connected electricity into the property and occupiers be directed to pay a reasonable amount for such services and the amount to be determined by this honorable Court

6. Is that the applicant and be permitted and authorized to install a tinstyle gate at the main entrance of its property, and collect data and register fingerprint system of all occupiers at Industry House, and further to allow all occupiers entry and exit to the respective rooms in the property

7. Permitting the applicant to station security guard at the entrance of the property, number [...] of D [...] Street Doornfontein, and control common areas including the corridors, basement and electricity box as well as providing safety and security to all occupiers, without interfering with any of the occupiers constitutional and/or any other rights of occupation enjoyed by the respondents in their specific rooms in the property.”

[38] Counsel for the owner, Mr. Mhlanga, submitted that paragraph 5, in particular, renders this application not urgent as the prayer in paragraph 5 deals exactly with the issue that this application is about and that this application by the owner is already set down for 1 November 2022.

[39] Having traversed the chronology of events in this matter. It is clear to me that this is a situation colloquially referred to as “building hijacking”. The applicants opposed the owner's application as urgent and it stands opposed at the hearing on 1 November 2022. They choose to stay in the squalid conditions that are described in the respondents’ papers and in the notice of motion referred to above. In their own application papers, they give no better description of the premises than is described by the respondents. The question is to what purpose or to whose interest. It is illogical that the applicants seek a stamp of approval by the court that they be confined to squalid, dangerous and unhealthy conditions as described even in their papers. They also seek from this court a stamp of approval for the continued unlawful consumption of electricity when they are not consumers as envisaged in all the legislation and case law that has been referred to in this matter.

[40] They pray that there must be a reinstallation or reconnection of power as there was on 22 August 2022. What was the status of 22 August 2022 was a situation of illegal connection. The respondents responded to the complaints of illegal connections armed with a document giving them access to the premises and identified illegal connections which were then removed. If what has to be reinstalled is the box that was removed on 10 August 2022, the question is, should the respondents reconnect electricity as they are obliged by the law? Clearly not, as the premises have no account linking the service to the building as required by law. The city has no obligation to provide municipal services to a hijacked building.

[41] This applies also to the residents who have previously been classified as Expanded Social Package (“ESP”) beneficiaries. The supply of minimum water and electricity as the City is obligated by law, requires that the municipality must have a relationship with the residents that is governed by a lawful connection in the sense that electricity must be provided through a municipal account to a known customer. The City must be in a position to be able to measure that consumption and to control it. Currently, the occupants of Industry House are resisting all measures by the owner to ensure orderly and lawful facilitation of the residency.

[42] This Court has no access to the City's report in the pending action by the owner against the applicants and can therefore not comment regarding the extent to which the City is offering to ameliorate the situation at the premises.

[43] The reinstallation of the box as there was on 10 August 2022 and the prayer that the respondents take reasonable steps to resupply power is unworkable. The restoration of power has to be through an account held by a customer, even if the customer is a conduit for the benefit of the residents of the premises.

[44] The applicants who qualify and the ESP programme beneficiaries will come on in this case, find relief in the City's report in the pending action, if alternative accommodation is recommended or if the owner is allowed to run the building in the terms that permit ESP beneficiaries to continue with the benefit.

Analysis

[45] As stated above the owner has not since 2013 had control over the property. The owner was granted an eviction order on 3 September 2015. The applicants and the owner have agreed, subsequent to the leave to appeal being granted, to restart the eviction proceedings and to join the City.

[46] After 15 May 2018 when the City was joined to the eviction proceedings it assessed the residents of Industry House and registered them under ESP in November 2018. It filed its report in October 2019 in the pending eviction proceedings. The report does not form part of these proceedings.

[47] As ESP beneficiaries, the residents are entitled, among others, to social assistance in the form of 10 kilo liters to 15 kilo liters of water per household and 50 kilo watts to 150 kilo watts of electricity pay household, in addition to a rebate of 70% to 100% in respect of sanitation charges.

[48] The municipal services extended to the applicants since 2013 were therefore not provided in pursuance of an agreement between the City and an owner of the property. They were not receiving the services "as a matter of right" arising from an

existing agreement between the owner and the City – the owner being a conduit in supplying the electricity.

[49] “Customer” is defined in the By-Laws as follows:

“any occupier of premises to which the Council has agreed to provide or is actually providing any municipal service, or if there is no occupier, the owner of the premises concerned.”

[50] In answering the question whether there is a relationship between City Power as a public service provider and users of this service with whom it has no formal contract, Skweyiya J extended the contractual relationship between the owner and the City by stating the following:

“Mr. Nel concluded a contract as a “customer” with City Power for the sole purpose of facilitating the supply of electricity to tenants in his building, he was a conduit in supplying electricity to Ennerdale Mentions, City Power knew that it was providing Electricity to tenants living in the building.”

[51] At paragraph 47 Skweyiya J states the following:

“When the applicants received the electricity, they did so by virtue of their corresponding public law right to receive this basic municipal service. In depriving them of a service which they were already receiving as a matter of right, City Power was obliged to afford them procedural fairness before taking a decision which would materially and adversely affect that right.” (my emphasis)

[52] At paragraph 74, the Constitutional Court held that the phrase “or is actually providing a municipal service” in the definition of “customer” must be interpreted as catering for situations where the municipality has supplied a service and a *bona fide* but erroneous belief that a contract existed.” In this case there was no bona fide but erroneous belief that a contract existed between the municipality and the owner. The residents fail therefore on both the alternative definitions of “customer”. They are

therefore not regarded as customers because their access to electricity was not through the provisioning thereof by the municipality in discharge of its constitutional duties. Illegal connection is therefore not a municipal service.

[53] The Court held that the contractual relationship between Mr. Nel and City Power was not unrelated to the benefits that accrued to the Applicants under this contract. It must be stated immediately that this case is distinguishable in that the property owner does not have a contractual relationship with the City and therefore there could be no artificial link between the City and the residents. The owner has disavowed any suggestion that he holds a contract on behalf of the tenants.

[54] As to the ESP beneficiaries and broader constitutional obligations to provide basic services, section 152(2) the Constitution provides as follows:

“A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in sub-paragraph (1).”

[55] The relevant object falls under sub-paragraph (1) which is that the municipality is obliged “to ensure the provision of safe services to communities in a sustainable manner.”

[56] The Local Government: Systems Act 32 of 2000 (“Systems Act”) gives legislative content to the constitutional duties of municipalities under section 152 of the Constitution. Section 4(2)(f) of the Systems Act provides as follows:

“(2) the Council of a municipality, within the municipalities financial and administrative capacity and having regard to practical considerations, has the duty to-

...

(f) give members of the local community equitable access to the municipal services to which they are entitled.”

[57] The applicants submitted further that dismissing the application would result in their right to receive the minimum levels of electricity being denied. Section 73 of the

Systems Act provides that a municipality must give effect to the provisions of the Constitution by, amongst others, ensuring that all members of the local community have access to at least the minimum level of basic municipal services. The question arises therefore whether even if there is no agreement between the owner and the City to supply electricity to the property the city is nevertheless obliged to continue the supply this service to the applicants.

[58] These constitutional obligations, read with relevant legislation, oblige local municipalities to provide these services, not for the residents or citizens to resort to self-help.

[59] The other question that arises in this case is how a municipality would be able to “ensure that all members of the local community have access to at least the minimum level of basic municipal services.” It was submitted on behalf of the Applicants that the action of the municipality has resulted in depriving them of the minimum level of basic municipal services in the form of electricity by terminating this service. The question is how the provision of the minimum level that the residents are entitled to as registered under the ESP would be determined in this circumstances where the residents have illegally connected themselves to the grid.

[60] To the extent that the applicants submit that the termination of electricity in this case is analogous to the cases of *Motswagae*² and *Residents of Industry House*³, I disagree. The two matters involved an inevitable forcing out of a resident from their house by virtue of construction works that the Municipality was undertaking adjacent to her property without being consulted, and the raiding by the police of Industry House and other properties in order to force the eviction of unlawful occupiers, respectively. This case is therefore distinguishable from the two cases. In this case the owner’s proceedings seek the refurbishment of the property and for the applicants to pay reasonable rates The City has terminated unlawfully consumed electricity and insists on reinstatement of electricity upon the applicants

² *Motswagae v Rustenburg* LM 2013 (2) SA 613 (CC).

³ *Residents of Industry House v Minister of Police and Others* (CCT 136/20) [2021] ZACC 37.

being clients or customers as defined. They would therefore not lose the right to occupation if their occupation is lawful. There is no obliteration of the right to occupy.

Conclusion

[61] Citizens have a constitutional right to essential services such as electricity in terms of section 152 of the Constitution and the municipality is obliged to provide the service.

[62] Where such a right has not been provided by the municipality, the question is whether rights have been acquired. Put differently, do the citizens that have not been placed in possession thereof possess a right that is justiciable?

[63] In this case, the owner of the property has terminated his agreement with the municipality that it provide any of the services. There is therefore no agreement by the municipality to provide the services to the owner and/or by extension to the tenants. It is common cause that the agreement between the owner and the municipality terminated in 2013. However, the municipality continued to provide the service of electricity from time to time and under the ESP programme.

[64] I therefore make the following order:

1. The Application is dismissed.
2. No order as to costs.

G MALINDI

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

Appearances

For the applicants:

Adv. J Brickhill

Instructed by: Seri Law Clinic

For the first to third respondents: Adv. G. Mokonto

Instructed by: Gareth Ngubane & Partners Inc.

For the fifth respondent: Adv. L. Mhlanga

Instructed by: Precious Muleya Attorneys

Date of hearing: 15 September 2022

Date of order: 15 September 2022

Date of judgment: 25 November 2022