



**IN THE HIGH COURT OF SOUTH AFRICA**

(GAUTENG DIVISION, PRETORIA)

9/3/2017

Case no: 70550/14

(1) REPORTABLE: ~~YES~~ NO  
 (2) OF INTEREST TO OTHER JUDGES: ~~YES~~ NO  
 (3) REVISED.  
 09/03/2017  
 DATE

*[Signature]*  
 SIGNATURE

In the matter between:

**AFGRI OPERATIONS LIMITED**

Applicant

and

**DIPALESENG LOCAL MUNICIPALITY**

Respondent

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**JUDGMENT**

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**MAGARDIE AJ**

1. In this matter, the applicant approached the court for a declaratory order to the effect that the respondent is not entitled to levy the applicant with a maximum demand charge for electricity supply in the absence of a municipal tariff policy and/or a by-law authorising same. In the alternative, the applicant seeks an order directing the respondent to use the applicant's own electronic electricity meter reading as the only source of determining the applicant's electricity consumption.
2. On the one hand, the applicant contends that neither the respondent's tariff policy or by-laws contain any provision for the maximum demand charge justifying the levying of the additional charge; on the other hand, the applicant also contends that it is being overcharged for its actual electricity consumption due to the respondent's functionaries not employing the correct consumption method when calculating the applicable tariff.
3. The deponent to the applicant's founding affidavit is an electrical maintenance manager. He gave a detailed list of his qualifications and work experience in the electricity field. The deponent spent a considerable amount of time presenting a narrative on different electricity meters and how they function as well as the basis for the applicant's conclusion that it is being overcharged.
4. I must hasten to highlight that the applicant's prayers are not interrelated. One would have expected that if the applicant's gripe was about overcharging, the

plausible thing to do would have been to approach the respondent with a complaint before rushing to court. The applicant's rushing to make a court application deprives the respondent of an opportunity to rectify the alleged wrongs. This point was indeed contended in the respondent's papers. However, the applicant's reply thereto was that neither the tariff policy nor the by-laws make provision for an internal appeal.

5. At the outset, it is apposite to highlight the fact that the respondent's approach to this application leaves a lot to be desired. Various implausible points *in limine* were taken by the respondent arguing, *inter alia*, that the applicant's affidavit was vague and embarrassing and making it difficult for the respondent to answer to same. The respondent's points *in limine* are certainly not easily understood insofar as I could not really share the respondent's view. It is simple to delineate what the applicant's case is all about and to deal with the pertinent issues raised therein. There was certainly no substance in the points *in limine* raised by the respondent.
  
6. Apart from the points *in limine* in the answering affidavit, the respondent also filed what appears to be a legal opinion crafted to advise the respondent on this matter. The respondent also seeks condonation for the late filing of its answering affidavit which application is not opposed by the applicant. This lackadaisical conduct displayed by the respondent is certainly baffling especially when regard is had to the fact that we are dealing with an organ of state, and more particularly one of the three layers of government. The little

said about the conduct of the legal representatives who assisted the respondent the better.

7. As a result of the approach I have adopted herein, I have found it unnecessary to traverse the issues pertaining to functionality, mechanical composition and the SABS compliance of electricity meters.

8. The following points are at the heart of this application, namely:

8.1. Whether the respondent's maximum demand charges is lawful; and

8.2. Whether the court can order the respondent to use the applicant's own electricity meters to determine the applicant's electricity consumption for billing purposes.

9. In **Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Another**, the following was said:

*"[56] These provisions imply that a local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition - it is a fundamental principle of the rule of law recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law - to the extent at least that it expresses this principle of*

*legality - is generally understood to be a fundamental principle of constitutional law.”<sup>1</sup>*

10. Section 229 of the Constitution provides that a municipality may impose rates on property and surcharges on fees for services provided by or on behalf of the municipality, and if authorised by national legislation, other taxes and levies.<sup>2</sup> Needless to say that electricity, as in this instance, is one of the services rendered by a municipality.
  
11. **In Pharmaceutical Manufacturers Association of South Africa & Another: In re ex parte President of the Republic of South Africa & Others** it was held that the exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law.<sup>3</sup>
  
12. Section 74(1) of the Local Government: Municipal Systems Act 32 of 2000 as amended (“the Municipal Systems Act”) provides that a municipal council must adopt and implement a tariff policy on the levying of fees for services provided by or on behalf of a municipality, of which policy should comply with the provisions of the said Act. Section 74(2) of the Municipal Systems Act provides for principles that a municipal tariff policy should cover.

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<sup>1</sup> 1999 (1) SA 374 (CC) paragraph 56. See also *South African Property Owner Association v The Council of the City of Johannesburg Metropolitan Municipality & Other* 2013 (1) SA 420 (SCA) paragraph 5.

<sup>2</sup> Constitution of the Republic of South Africa 108 of 1996 (as amended).

<sup>3</sup> 2000 (2) SA 674 (CC) paragraph 20.

13. Section 74(3) of the Municipal Systems Act provides that a tariff policy may differentiate between categories of users, debtors, service providers, services, service standards, geographical areas, and other matters as long as such differentiation does not amount to unfair discrimination.
14. Section 75 of the Municipal Systems Act provides that a municipal council must adopt by-laws to give effect to the implementation and enforcement of its tariff policy. Like the tariff policy, such by-laws may also differentiate between different categories of users, debtors, service providers, services, service standards, geographical areas, and other matters as long as such differentiation does not amount to unfair discrimination.
15. In **Liebenberg NO & Others v Bergrivier Municipality**, the Constitutional Court said that:

*"[26] Therefore, a failure by a municipality to comply with relevant statutory provisions does not necessarily lead to the actions under scrutiny being rendered invalid. The question is whether there has been substantial compliance, taking into account the relevant statutory provisions in particular and the legislative scheme as a whole."*<sup>4</sup>

16. In a letter dated 17 July 2014, the applicant's attorneys demanded that the respondent should *"prescribe a process in terms whereof our client can have*

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<sup>4</sup> 2013 (5) SA 246 (CC) at page 255 paragraph 26.

*the dispute, set out in this letter, resolved.*<sup>5</sup> Although having narrated the gist of the applicant's grievance, the applicant's attorneys did not seek any action insofar as rectification or correcting the alleged wrong visited upon the applicant was concerned; instead, the envisaged solution that was demanded was the creation of an internal dispute resolution process.

17. This issue warrants some pertinent consideration when regard is had to the fact that, further down in the last page of the said letter, in particular paragraphs 4.9 to 4.12, the applicant also made further three demands, including furnishing the applicant with approved electricity tariffs for the past three years, recalculation of the applicant's electricity consumption and the crediting of the applicant's account.
18. It is curious that in the current application to which the aforementioned letter is attached to the founding affidavit, the applicant is seeking none of the four demands listed in paragraphs 4.9 to 4.12. The prayers in the application are also not similar to those in annexure **FA06**.
19. Insofar as the issue of the maximum demand charge is concerned, I have had regard to what the tariff policy of the respondent provides. I am not persuaded by the applicant's argument in this regard. In **Virginia Land Estate Co Ltd v Virginia Village Board of Management & Another 1961 (1) SA 167 (O)** it was held that electricity is supplied to and when available to a consumer, not only when it is used.

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<sup>5</sup> See paginated papers annexure FA06 at page 73-78.

20. Against the forgoing backdrop, I am of the considered view that the respondent indeed made available to the applicant three-phase electricity and is therefore entitled to charge the applicant for same. The fact that the applicant has not consumed the quantities supplied cannot be decisive. The bottom line is that the three-phase supply has always been available to the applicant if it wanted to use same in circumstances that would not require any further efforts on the part of the respondent to coordinate the maximum supply.
21. The tariff policy of the respondent makes provision for the levying of surcharges. The levying of the surcharges is acknowledged in paragraph 3.5 of the applicant's letter marked **FA06** to the founding affidavit. I have to agree with the respondent's submission that the suggestion that there is no regulatory framework to provide for the maximum demand charge is incorrect insofar as the respondent's tariff policy provides for the surcharges. Accordingly, it cannot be correct that the respondent is levying the additional charge without any legal basis.
22. I consider it appropriate to digress herein to visit the provisions of the Municipal Finance Management Act 56 of 2003 as amended ("the MFMA"). Section 60 of the MFMA provides that a municipal manager is the accounting officer of the municipality and provides guidance and advices in terms of the MFMA, to the political structures of the municipality.

23. Section 64(1) of the MFMA provides that the municipal manager is responsible for the management of the revenue of the municipality. Section 64(2)(b) of the MFMA provides that the municipal manager must ensure that all revenue due to the municipality is calculated on a monthly basis.
24. Section 59(1)(b) of the Municipal Systems Act, provides that the municipal council must develop a system of delegation that maximizes administrative and operational efficiency and provide for adequate checks and balances, and in accordance with that system, may instruct any such political structure, political office bearer, councilor, or staff member to perform any of the municipality's duties.
25. Section 4(1)(c)(i) and (ii) of the Municipal Systems Act provides that the council of the municipality has the right to finance municipal affairs by charging fees for services and imposing surcharges on fees, rates on properties and, to the extent allowed by national legislation, impose other taxes, levies and duties. I have already dealt with the provision of the MFMA that makes it the responsibility of the municipal manager to collect revenue due to a municipality on a monthly basis.
26. When one considers the legislative scheme referred to herein above, it is categorically correct that a tariff policy of a municipality is enforced by the promulgation of by-laws. To this extent, the Municipal Systems Act requires of the respondent to pass by-laws to give effect of the tariff policy. However, in the event that no specific provision of the by-law deals with a specific

provision of the tariff policy, such does not render the tariff policy ineffective. This must be considered against the backdrop of the doctrine of substantive compliance espoused in the Constitutional Court case cited elsewhere hereinabove.

27. It is clear that the municipal manager's duties in terms of the provisions of the MFMA, to calculate and collect revenue due to a municipality on a monthly basis is in line with the delegation of municipal duty to charge fees for services in terms of the Municipal Systems Act. For this reason, to the extent that the municipal manager or functionaries or agents by him/her charge more money than the municipality is entitled to, a person aggrieved thereby is entitled to invoke the appeal process in terms of the provisions of section 62 of the Municipal Systems Act.
28. Accordingly, contrary to the applicant's views, it is clear that any person aggrieved by whatever decision made by any functionary of a municipality, in the exercise of delegated powers, has a legislative recourse of internal appeal. Therefore, it cannot be correct that there is no appeal procedure for the kind of grievance that the applicant brought before this court. Section 62(4) of the Municipal Systems Act also provides for the level of authority to which such appeals can be directed, depending on the level of the first functionary/agent against whose decision or action the appeal is directed.
29. Having considered the invoice together with the respondent's rate policy, it is correct that there is no mention of "*maximum demand charge*" in either

document. There are standard basic charges for electricity, followed by the extent of the actual monthly consumption and the amount which is now referred to as "*maximum demand charge*". It is the last-mentioned charge that the applicant is aggrieved about.

30. Insofar as the merits are concerned, the respondent's argument is that the maximum demand tariff is intended at discouraging over usage of electricity and that the charge can easily be located under the municipal's powers to levy surcharges for services rendered. Whatever the rationale for the maximum demand charge, if the applicant is aggrieved thereby, the applicant must exhaust the internal remedy provided in section 62 of the Municipal Systems Act.
31. The applicant contends that in the event of the court not finding in its favour in respect of the first prayer, it seeks an order to the effect that its electricity consumption should be determined from the electricity meter that the applicant installed. It contents that the respondent has been overcharging insofar as the respondent's calculation methods were incorrect. The respondent made telling submissions against the applicant's prayer that it basically amounted to self-help. I am inclined to agree with the respondent in this regard. The fact that the applicant installed its own electricity meter in the presence of the respondent's agent does not change the colour of the action. The presence of the respondent's agent cannot be used to denote the respondent's acceptance to the unlawful action. For all intents and purposes, the applicant's action of installing an alternative electricity meter was unlawful.

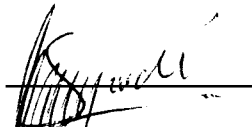
Consequently, the court can neither be requested to order an organ of state to perform an unlawful act nor condone an unlawful action performed by the applicant.

32. Sight should not be lost of the fact that the nub of the applicant's case is succinctly summarized in paragraphs 4.8 to 4.12 of **FA06**, namely the method of calculation, not the functionality of the respondent's electricity meter. The applicant categorically stated that it is not contesting the functionality of the respondent's electricity meter. The gripe is with the functionaries or the contractors of the respondent who are responsible for the meter reading during each monthly cycle in preparation of electricity bills. With the applicant not contesting the meter reading but the method of calculation of the charges, it is not easily understood why the issue was brought to court without approaching the respondent with an appeal against such as provided for in section 62 of the Municipal Systems Act.

33. The application cannot succeed. There is also no reason why the costs should not follow the result. The respondent has been successful herein and as such, is entitled to the costs. In the result, I make the following order:

33.1 Condonation is granted for the late filing of the respondent's answering affidavit.

33.2 The application is dismissed with costs.



**S L MAGARDIE**

**ACTING JUDGE OF THE HIGH COURT**

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