REPUBLIC OF SOUTH AFRICA

NORTH GAUTENG HIGH COURT
PRETORIA

CASE NO: 52545/2011
Date: 2013.02.28

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

12 March 2013.

SIGNATURE

In the matter between:

AFRIFORUM Applicant

and

THE MINISTER OF TRADE AND INDUSTRY First Respondent

THE MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS Second Respondent

SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION Third Respondent

J U D G M E N T

VICTOR J:

[1] The Minister of Trade and Industry, the first respondent, deferred the implementation of certain sections of the Consumer Protection Act 68 of 2008, (CPA) by way of two notices. The applicant seeks the setting aside of these two notices issued by the first respondent being Government Notice 221 of 14 March 2011 and Government Notice 898 of 31 October 2011.

[2] The effect of these notices defers statutorily entrenched consumer rights which may be exercised by consumers against municipalities. Issues such as service delivery and dissonance between consumers and their municipalities were raised and are current challenges of our times.

[3] Central to this issue is the proper interpretation of Schedule 2 being the transitional provisions of the CPA and in particular item 2 relating to the incremental effect of the Act.

[4] The first respondent has raised various defences. It challenged the applicant's legal standing to bring this application on two bases. This includes its standing in terms of it being a juristic entity capable of suing in terms of Rule 14 of the Uniform Rules of Court. Secondly it's standing in terms of the Promotion of Administrative Justice Act No 3 of 2000 (PAJA) because it has failed to name specific consumers who have been adversely affected by the CPA and thus the application is premature. The first respondent contends that he did apply his mind to the request by a member of cabinet, the Minister of Co-operative Governance and Traditional Affairs, the third respondent in these proceedings, to the question of deferral of consumer rights to the categories of municipalities

which he excluded in terms of the CPA.

[5] The applicant raised a number issues in respect of the notices based on the principle of legality demanded by s33(1) of the Constitution read with various sections of PAJA. These issues include an argument that the first respondent was functus officio after he issued the first general deferral of the CPA therefore could not issue the subsequent notices. Further grounds of challenge based on PAJA include s6(2)(a)(4i) (not authorised by the empowering section to issue the notices); s6(2)(b) (a mandatory and material procedure not complied with); s6(2)(d) (action materially influenced by an error of law); s6(2)(e)(iii) (irrelevant considerations taken into account and relevant considerations not considered); s6(2)(e)(iv) (action taken because of unauthorised or unwarranted dictates of another body or person); S6(2)(vi) (action taken arbitrarily or capriciously), s6(2)(f)(i) and s6(2)(f)(ii)(cc) the action itself contravenes a law and is not rationally connected to the information before the first respondent.

[6] The effect of this deferment means that persons living in low and medium capacity municipalities cannot seek redress for unsatisfactory services in terms of the CPA.

The legislative vision for municipalities

[7] With the advent of democratisation a new constitutional vision for local government was introduced in South Africa. Chapter 7 of the Constitution defines the object and structure of local government. In particular one of the central objects as set out in s152 (1)(b) and (c) of the Constitution is to ensure the provision of services to communities in a sustainable way and to promote social and economic development.

Municipalities with limited resources and insufficient capacity will nevertheless have to provide basic services to people who did not enjoy them as of right in the past and with rising levels of poverty cannot afford them now. These municipalities will ultimately have to comply with the carefully crafted legislative framework guiding their functioning.

[8] The Legislature's protection of citizens living within municipal structures also includes another very detailed statute. The Local Government Municipal Systems' Act 32 of 2000 (the Act) assented to on 14 November 2000 and is very detailed in the role required of the municipalities. The preamble to this Act refers to the core principles, mechanisms and processes that are necessary to enable municipalities to move progressively towards the upliftment of local communities and ensure universal access to essential services. In addition the new system of local government requires efficient, effective and transparent local administration that conforms to constitutional principles.

[9] Section 73 of the Act defines the general duties of a municipality. A municipality must give effect to the provisions of the Constitution. It must give priority to the basic needs of the local community, promote the development of the local community, and ensure that all members of the local community have access to at least the minimum basic municipal services. Municipal services must be equitable and accessible. It must be provided in a manner that is conducive to the prudent economic, efficient and effective use of available resources and the improvement of standards of quality over time; be financially sustainable; be environmentally sustainable and be regularly assessed with a view to upgrading, extension and improvement.

[10] It follows therefore that the role of municipalities in our society is in

fact at the centre of the quality of life of every person who lives in an area designated as such and is also the fulcrum around which civil society gravitates. Professor Jacklyn Cock, Professor Emeritus of sociology at the University of the Witwatersrand describes a municipality as being akin to a local state and one of the material bases for defining human dignity. Improving the output and quality of municipal services to the people living within metropolitan, district and local municipalities is entrenched in various pieces of legislation and not only those that referred to.

Legislative Framework of the CPA

[11] The extensive and wide reach of consumer protection is imbedded in the CPA itself. Section 3 of the CPA defines its purpose and policy in minute detail. The detailed provisions provide in particular for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally.

[12] A commission was appointed to protect and advance the interests of all consumers and even to report to the responsible Minister, the first respondent on an annual basis any matter relating to the supply of goods and services. Clearly therefore, the reach of Parliament into consumer matters was defined and any deviation from its implementation must bear close scrutiny.

[13] The ambit of the CPA is to develop and employ innovative means to promote the full participation of consumers and to ensure accessible transparent and efficient redress. It is also the purpose of the CPA to strengthen a culture of consumer rights, responsibilities, business innovation and to enhance performance. Once the Legislature has

circumscribed the reach of the CPA in such detail it follows that the first respondent can only defer the rights of those living within those municipalities with caution and precision. Such deferment must obviously be linked to the exigency of the situation and an intention to exclude them from the protection of the CPA can only be done for the shortest possible time period.

[14] The review record which runs to some 800 pages reveals that there are certain municipalities which will never be self-sufficient financially but nonetheless it would be unlawful to exempt those municipalities from the reach of the CPA in perpetuity in the absence of the Legislature making that an express provision.

[15] Once this high bench-mark for consumers has been set by the Legislature itself, deviation from the standard can only take place under conditions of strict control as that set out very clearly in schedule 2 items 23 (a) and (b).

[16] The consumer rights which have been deferred by the first respondent relate to fundamental consumer rights as dealt with in the CPA such as s 8 to 10 differential treatment; s10 provides for equality court jurisdiction where parties can approach the Equality Courts in order to protect their rights. The second tranche of rights which had been deferred are those in s 53 to 61. In particular a consumer in section 54 has the right to demand quality service, so therefore a person living within a particular municipality has an entrenched consumer right to demand quality service. A consumer also has the right to demand to good quality goods and those that are safe.

[17] The CPA was assented to on 24 April 2009. Item 1 of schedule 2 provided that certain sections of the CPA would take effect within 12 months and item 2 the balance of the CPA provisions within 18 months after signature by the president. There is a proviso that 20 business days before the date contemplated in item 2 the first respondent may defer may defer certain provisions for not more than an additional 6 months on the ground that additional time is needed for adequate preparations to ensure effective implementation or on the request from the member of cabinet responsible for local government until further notice. The first respondent contends that 'or' must be read as 'and'.

The words 'and'/ 'or' in statutory interpretation and the functus officio doctrine.

[18] In terms of item 2 of schedule 2 of the Consumer Protection Act, the incremental effect of the Act is clearly defined. Initially the entire Act was deferred for some 18 months to 31 March 2011 after it was signed by the President. Thereafter deferral was permissible in limited and statutorily defined circumstances.

Item 2(3) provides as follows:

> *'The Minister may by notice publish in the Government Gazette at least 20 business days before the date contemplated, in sub-item 2*
>
> *(a) defer the effective date of any provision contemplated in that sub-item for a period of not more than 6 additional months on the grounds that additional time is required for adequate preparation of the administrative assistance necessary to ensure the efficient and effective implementation of that provision,* ***or*** *(my emphasis)*
>
> *(b) on request from the member of Cabinet responsible for local government, defer until further notice the application of this Act to –*

(i) any particular municipality other than a high capacity municipality as defined in terms of the Local Government Municipal Finance Management Act, 56 of 2003; or

(ii) any organ of state that is responsible to a municipal authority

in its capacity as a supplier of any goods or services to consumers on the grounds that additional time is required for adequate preparation of the administrative systems necessary to ensure that the municipality or organ of State can meet its obligations in terms of this Act efficiently and effectively.'

[19] Item 2(3)(a) is followed at the end of the paragraph with the word '**or'** in that upon a request from a member of Cabinet, the first respondent may defer until further notice the application of the CPA to any particular municipality other than a high capacity municipality on the grounds that additional time is needed for adequate preparation of the necessary administrative system.

[20] A member of Cabinet that is the third respondent requested a deferral just days before the end of the 18 month period contemplated being the commencement date to 31 March 2011. The first respondent granted the request and published the first notice. On a proper construction of Schedule 2 the incremental provisions of the CPA was anticipated and necessary to provide for administrative delays. The applicant attacks the fact that the decision by the first respondent was not made a full 20 days before the date contemplated in Item 2(2) i.e. before the expiry of the 18 month period. The record reflects a shortfall in dies. It would be unnecessarily formalistic to non suit the first respondent on the shortfall of a few days.

[22] It the applicant's case that once the first respondent had made the decision to defer for 18 months he could not again exercise a decision to issue the first notice. He was functus officio. If that challenge was not upheld the further functus officio challenge is that the first respondent could not revoke the first notice and then issue the second notice. He again was functus officio.

[23] The first respondent defence to this was that the word **OR** at the end of item 3(2)(a) has to be interpreted to mean **AND**. It is settled law that the primary meaning of the word is relevant but the context and subject matter and its scope and purpose is also relevant. (*Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* 2009 (1) SA 390 (CC) and *Radebe and another v Premier, Free State and Others* 2012 (5) SA 100 (LAC).

[24] In *Standard Bank Investment Corporation Ltd V Competition Commission And Others; Liberty Life Association Of Africa Ltd V Competition Commission And Others* 2000 (2) SA 797 (SCA)In (*Liberty Life Association of Africa Ltd v Competition Commission and others)* 2000 (2) SA 797 (SCA) Schutz JA at para 21 stated;

> "However, as I have endeavoured to show, our law is an enthusiastic supporter of 'purposive construction' in the sense stated by Smalberger JA in Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd and Others 1990 (1) SA 925 (A) at 943G – H - "'Mindful of the fact that the primary aim of statutory interpretation is to arrive at the intention of the Legislature, the purpose of a statutory provision can provide a reliable pointer to such intention where there is ambiguity."

[25] The author E. A. Kellaway in *Principles of Legal Interpretation* states that although words in a statute have a particular meaning there are words that have acquired a recognised general meaning. For example words such as 'or' and 'and 'when the natural meaning would give rise to an interpretation which is unreasonable or if the context renders it absolutely necessary.

[26] Schedule 2 provides specifically for transitional matters and the incremental effect of the CPA. In that context the word 'or' must mean 'and' and therefore the applicant's submission that once a deferment has been made by the first respondent he can issue no further notice as he is functus officio. I find that the interpretation contended for by the first respondent must prevail in that he could issue a notice after the 18 month initial deferral.

[27] It follows therefore that the first respondent was entitled to extend the time period. The context of item 2(3) of schedule 2 introduced flexibility but not unbridled flexibility.

[28] The applicant through its attorneys of record engaged in discussion with the first respondent to try and address the consequences of the publication of the notices. This much is clear from the letters in the application. The parties could not resolve their differences and seven months after the publication of the first notice the first respondent revoked it and published Government Notice 898 of 31 October 2011. The second notice was published in the midst of negotiations and meaningful engagement between the parties. The applicant terminated these discussions when the second notice was published.

What exactly has been deferred?

[29] It is important to consider what it is the first respondent has deferred. In the second notice of the 31st October 2011 the following is stated:

> *"I maintain the deferment granted in March 2011 in relation to section 8 to 10 and sections 53 to 61 of the Consumer Protection Act in respect of medium capacity municipalities until 31 December 2012 subject to the findings of a joint review by the Minister of Trade and Industry and cooperative Governance and Traditional Affairs to be completed before this date."*

The date of 31 December 2012 has passed and the respondents contend that in relation to the medium capacity municipalities the issue is moot.

The Minister goes on to say the following:

" I also maintain the deferment granted in March 2011 for low capacity municipalities in relation to sections 8 to 10 and sections 53 to 61 subject to the findings of a joint review by the Minister of Trade and Industry and Cooperative Governance, and Traditional Affairs, to be completed before 30 June 2014."

[30] It is clear therefore that the deferment notices go to the very heart of consumer rights and those rights that affect the day-to-day functioning of a person living within a municipality.

Locus Standi of the applicant

[31] The central defence which the respondent has proffered in this matter was a challenge to the locus standi of the applicant. The applicant has cited itself as a non-profit company with its main purpose and

objective being the promotion and advocacy of democracy, equality, civil human rights and constitutional rights. The applicant attached its memorandum of incorporation and articles of association. The respondents take the point that the annexure shows the name "Solidariteit Burgerlike Beweging" and this does not enable the applicant to sue as a trade name. A supplementary affidavit was handed in where the applicant explained that the name "Solidariteit Burgerlike Beweging" was changed to "Afrikaanse Forum vir Burgerlike Regte". It also registered the name Afriforum as a trade mark and attached the certificate of registered trade mark.

[32] The issue of standing can be decided by both Section 38 of the Constitution and Rule 14 of the Uniform Rules of court. Rule 14 of the uniform rules of court is sufficiently wide to include a defendant trading under a name or style which was up until the amendment to the Rule not recognised as being specifically covered by the Rule. In (*Mega Flex ('n Divisie van Sentrachem Bpk) en 'n Ander v White River Motor Trading (Edms) Bpk)* 1996 (1) SA 616 (T) at 618A Le Roux J, in discussing the problem with regard to the citation of defendants and its relation to Rule 14, referred with particular reference to the judgment of Levison J in (*Two Sixty Four Investments (Pty) Ltd v Trust Bank*) 1993 (3) SA 384 (W), said the following:

'Levison R bevind (myns insiens korrek) dat Reël 14 van die Eenvormige Hofreëls 'n nuwe era ingelui het wat die locus standi van firmas, verenigings en besighede aanbetref wat deur 'n "alleeneienaar daarvan onder 'n ander naam as sy eie bedryf word" (sien omskrywing van "firma" in Reël 14(1)). Reël 14(2) laat 'n vennootskap, firma of vereniging toe om in sy eie naam te dagvaar of gedagvaar te word. Op 386B sê die geleerde Regter die volgende in verband hiermee:

"Of these Rules Joubert (ed) The Law of South Africa vol 3 para 55 says that they 'are designed to solidify and facilitate actions and applications by or against partnerships, firms and associations which at common law cannot generally sue or be sued in their own names apart from the members constituting it'. I have no doubt that the respondent falls squarely within the definition of 'firm'. It has a sole proprietor, the name of which is set out in the citation in the summons as 'Bankorp Bpk'."

[33] In *Cupido v Kings Lodge Hotel* 1999 (4) SA 257 (E) Horn J found,

> 'The Rule was introduced in order to simplify the method of citation in respect of a number of situations where a business or businesses were being conducted or bore names which were descriptive of them. (Erasmus, Breitenbach and Van Loggerenberg Superior Court Practice at B1-112; see also De Meillon v Montclair Society of the Methodist Church of Southern Africa 1979 (3) SA 1365 (D) at 1369D.) Rule 14 is a procedural remedy whereby a litigant can be brought to Court. It has nothing to do with the substantive law concerning the nature and status of a defendant. It does not elevate a defendant to a status which it did not possess before. In citing a defendant by its trading name, one merely addresses it by the name it is commonly known. (*Parker v Rand Motor Transport Co and Another* 1930 AD 353 at 358; *Simpsons Motors v Flamingo Motors* 1989 (4) SA 797 (W) at 798G-799A; *Ahmed v Belmont Supermarket* 1991 (3) SA 809 (N) at 811B.)'

[34] Section 38 of the Constitution is wide and provides in s38 (d) that anyone can approach the court acting as a member of or in the interest of a group or class or persons. A narrow approach is unnecessary and in this regard a variety of cases were relied upon. (*Freedom Under Law v Acting Chairperson: Judicial Service Commission, and Others* 2011 (3) SA (*Lawyers for Human Rights and Another v The Minister of Home Affairs 2004 (4) SA 125 (CC); Albut v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 CC para [33] to [35].

[35] Accordingly I find that the applicant does have locus standi based upon a proper application of the above principles to the facts in this case.

Judicial deference in Administrative Law and the publication of the Notices

[36] The further question that must be addressed is whether this court can interfere with a decision and policy of the first respondent having regard to the complexity of the entire municipal structure, the types of problems experienced by municipalities and the expertise required to evaluate its functioning. Furthermore whether there should be judicial deference in the technical sense of the word before setting aside these notices. Having said that and mindful of questions of separation of powers, judicial deference and also mindful of transformative constitutionalism it is important that the facts underpinning any decision which this court makes, must be carefully evaluated. In addition the tier of judicial scrutiny which a court must make at this stage without making a finding on the merits of the policy and the facts is a relevant consideration. An 800 page record has been submitted and in my view the contents cannot be ignored because it underpins the assessment and procedural fairness or otherwise of the decision made by the first respondent to defer very important rights. Such judicial scrutiny as it affects the procedure adopted by the first respondent requires a transparent approach.

[37] It would appear from the record that whilst the first respondent has done a considerable amount of work to assess whether the provisions of the CPA can indeed be implemented he it nevertheless overlooked relevant considerations, a contravention described in (s6(2)(e)(ii) of PAJA: for example whether particular municipalities in the medium and low capacity category were ready , e.g. one of the reports by the Cooperative Governance Department deals with section 8 – 10 of the CPA the very

sections that I have referred to and under the column "Is the service provided without discrimination or restriction to all consumers?" The answer is: "Yes". This is one of the jurisdictional facts upon which the first respondent has come to the decision in order to support the Minister of Cooperative Governance's request to grant a deferment when clearly the document states the service can be provided without discrimination or restriction to all consumers.

[38] The record also reflects criticism by the third respondent about the manner in which these municipalities have been classified that is low medium and high capacity municipalities. In the result Item 2 of Schedule 2 and the first respondent follow the threefold classification despite its own record reflecting that these categories are not appropriate tools to assess a municipality's ability to assess services. From the very records submitted by the first respondent there seems to be a different classification: those categories of municipalities that are most vulnerable, the second most vulnerable, the second highest performing and the highest performing. This lack of consensus on even something as basic as categories amply demonstrates that the first respondent should have been more particular about which individual municipality should be deferred from the provisions of the CPA.

[39] The record also reveals that some six months before the first deferral notice a report by the Department of Cooperative Government showed that certain municipalities were experiencing difficulties and there is a very detailed analysis of each and every municipality that is experiencing difficulties. It is therefore inexplicable why the first respondent could not list each and every municipality as required in terms of the schedule 2 for deferral. I find that a particular municipality must indeed be mentioned in the notice and not simply form part of a global group. The first respondent applied a global categorisation to the municipalities and this in my view was administrative action which was

materially influenced by an error in law as required by s6(2)(d) of PAJA.

[40] Some of the difficulties experienced by the municipalities, referred to in the record show that despite years of democracy, increased pressures by communities for the delivery of services and the introduction of free basic services, a number of municipalities are still not in a position to deliver on their mandate. Weaknesses within the present system are especially apparent in a few main categories, financial, service delivery and infrastructure and inability to cope with the growth in population. There is therefore a very detailed amount of information available about what each and every municipality is capable of and what it is able to comply with in terms of the CPA. In addition during the course of the negotiations between the applicant and the first respondent a questionnaire was prepared to assess the readiness of municipalities. Some 23 questionnaires were sent to the municipalities and as at the hearing of this matter the results of those 23 questionnaires were not available. The avenue of enquiry seems to have been abandoned by the first respondent. What is clear is that there is a very detailed mechanism in place whereby the first respondent is able to ascertain exactly what services are lacking and which services cannot comply with the CPA, e.g. the research questionnaires deal with every aspect of life within a municipality, water, sanitation, library services, air control, tourism, airports, health services, public transport, building regulations and alike.

[41] In my view, therefore, the first respondent should have already been in a position to deal with each and every individual municipality when assessing which individual municipality should be exempted from the provisions of the CPA.

[42] The first respondent also had at its disposal a report, a 2011 report

from the President of the South African Institute of Civil Engineers where there is a very detailed report on the structures within municipalities and these include reference to water affairs, waste collection and the like. The report unfortunately reveals deterioration in certain categories but an improvement in others. It is not a difficult task for the first respondent to compile a detailed list of a particular municipality and presumably why such a municipality, where the consumer has entrenched rights, should be exempted from the provisions of the CPA. Nothing of this is said in the answering papers.

[43] There may be some concern that once the CPA applies to every municipality there would be an avalanche of citizens living within those municipalities rushing to enforce their rights in terms of the CPA against those particular municipalities. This is not something which must form the basis of a decision that this court has to make at this stage.

[44] The rights and concerns of consumers cannot be deferred indefinitely. In addition the report that I have referred to deals with challenges which the Government has in respect of these municipalities. They are under resourced. There is a lack of leadership in the municipalities, inadequate accountability measures and poor compliance with legislative and regulatory framework for municipalities. There is Reference in the record to a lack of policy coherence and the weakening of institutional and organizational abilities in many of the municipalities and obviously these have to be addressed and it is not within the ambit of this tier of judicial scrutiny to determine why these particular aspects may impede the particular provision of the CPA. What is clear, however, is that there is a complex problem facing the first respondent in this matter particularly in relation to the entrenched rights in the CPA enjoyed by every consumer. Such complexity or polycentric nature of the problem should not deter a court from assessing whether the first respondent's

action is rationally connected to the information available as defined by s6(2)(f)(ii)(cc) of PAJA.

[45] Cameron JA in *Logbro Properties CC v Bedderson NO and others* 2003 (2) SA 460 (SCA) at para [20] dealt with policy-laden or polycentric issues and judicial deference.

'[21] It is in just such circumstances that a measure of judicial deference is appropriate to the complexity of the task that confronted the committee. Deference in these circumstances has been recommended as

'. . . a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. ... It ought to be shaped not by an unwillingness to scrutinize administrative action, but by a careful weighing up of the need for - and the consequences of - judicial intervention.[1] In a more recent book Professor Hoexter [2] analyses the foundations of the principles of deference in administrative review and also refers to the fact that 'the discourse of deference is ineluctably bound up with the separation of powers and areas of competence of the three branches of law.'

[46] O'Regan J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others* 2004 (4) SA 490 (CC) while recognising the proper constitutional role of the executive and treating the executive

[1] 'Cameron J refers to the works of Cora Hoexter 'The Future of Judicial Review in South African Administrative Law' (2000) 117 SALJ 484 at 501 - 2, citing A Cockrell "'Can You Paradigm?" - Another Perspective on the Public Law/Private Law Divide' 1993 Acta Juridica 227.
[2] In Administrative Law in South Africa 2011

decisions with respect, stated that the complexity of the policy and material should nonetheless not be a barrier to judicial scrutiny. Professor Eric Berger associate professor University of Nebraska in Vol 98 p465 (2012) Iowa law Journal writes that that there must be consistency when judges apply deference or not in review proceedings. A court must be encouraged to do due diligence of the record when making a deference determination. Judicial deference must be addressed openly and systematically '...deference so "important and . . . omnipresent" that it deserves a "sincere effort to craft a principled doctrine,".

[47] Upon a proper application of the above principles and taking into account the role of the court in ensuring that there is fairness in administrative decisions, the applicant must succeed in having the second notice set aside. I agree with the many jurists that within the adjudication process there must be a transformative design to promote a culture of justification in sphere of public law. Pieterse [3], Former Chief Justice Langa (The separation of powers in the South African constitution 2006 SAJHR 2) and Mosenyeke Deputy Chief Justice (Oliver Schreiner memorial lecture: separation of powers, democratic ethos and judicial function 2008 SAJHR 341) encourage transformative adjudication in all spheres. It is this that I find foundational to the proper interpretation that the first respondent cannot defer without accuracy rights as fundamental as consumer rights to the citizenry living within a particular municipality.

[48] Transformative adjudication is enjoined by the Constitution to uphold and advance its transformative design. The ingredients of transformative adjudication must promote a culture of justification in public law. In adjudicating the act of deferring a consumer right the role of judicial deference and the separation of powers has been fully analysed

[3] "what do we mean when we talk about transformative Constitutionalism (2005) 20 S A Public Law 155 ,161-63.

and weighed issue by issue. Despite the intense level of scrutiny which the court has made in relation to the record I still have to take into account the competing interests of the policy makers as well as those of the applicant and the public interest it serves.

[49] The applicant's case is that the principle of legality has been transgressed by the first respondent. The foundational principle of administrative law is that the exercise of power must be authorised by the law. The first respondent failed in the respects referred to.

[50] I find that the first respondent was not authorised and empowered to couch the notice in the way that he did. The first respondent in its answering affidavit has been very careful to detail the great lengths with which he went to in order to come to the decision that he did to publish the notices. In fairness it seems to me that despite those difficulties which the first respondent experienced and relying on the different reports that I have already referred to it is clear that in applying his mind to the request by the Minister of Local Government, that the implementation of the CPA be deferred was not rationally connected to the facts before him. He made no order at all in respect of the medium capacity municipalities. He deferred the application of the CPA to low capacity municipalities until a report was produced and this report had to be produced before the 30th June 2014. This deferral does not ensure that the CPA would apply at that stage.

[51] In summary I find that there has been a contravention of s6(2)(d), s6(2)(e)(iii) and s6(2)(f)(ii)(cc) of PAJA.

[52] The applicant has requested the court to set aside both notices. In fact the first notice has been revoked so it would be an empty exercise to set aside a notice which has already been revoked. The first respondent was not functus officio. Therefore that particular aspect of the relief sought by the applicant cannot succeed. In relation to the second notice it seems to me that based on a judicial scrutiny and a due diligence of the record that has been presented to court and which unfortunately neither counsel took the court through to the most important aspect, the first respondent could have pinpointed with greater precision those municipalities which should be exempted from the provisions of the CPA. I have already referred why that is so, having regard to the extensive nature of the research and record that was at the disposal of the first respondent and which has also been placed before me.

Costs

[53] As regards the question of costs, clearly the first notice has been revoked, yet the applicant has continued to seek relief in respect of that particular notice. It persisted in seeking the setting aside of the first notice right up until the argument in this matter. In addition the question of *locus standi* although the applicant has succeeded on that point, in my view the question of *locus standi* had it been extensively amplified and pleaded in the founding affidavit would not have necessitated the first respondent to go to the length it did and ultimately the length which the applicant had to go to substantiate its *locus standi* in this matter. Again the applicant, in that regard, has caused unnecessary costs.

[54] There is a further feature. A record of some 800 pages was placed before me which was full of information, however the parties hardly touched on what was relevant and what had to be read. On the other hand the first respondent in the midst of bona fide negotiations with the

applicant simply published the second notice and because of this the negotiations broke down and the matter is before court. This too resulted in unnecessary costs.

[55] Both parties have succeeded and failed on the various justiciable issues. In the result although the applicant is successful in relation to the second notice, I find that this is an appropriate case where each party should pay its own costs.

The order that I would make is the following:

1. Government Notice 898 of 31 October 2011 published in Government Gazette 34724 is reviewed and set aside.

2. The setting aside will take effect within 30 days of this order.

3. The first respondent is directed to publish a notice as contemplated in item 23(b)(1) of schedule 2 of the Consumer Protection Act 68 of 2008 by no later than 31 July 2013 listing each and every municipality in respect of which sections 8 – 10 and 53 – 61 of the said Act should be deferred.

4. Each party is to pay its own costs.

Victor J

Date of hearing: 28 February 2013

Counsel for Applicant:

Advocate Q Pelser SC and Adv A T Lamey

Attorney for Applicant: Hurter Spies Inc.

Counsel for first Respondent
Advocate R Bedhesi SC and Adv K Lengani

Attorney for Respondent: State Attorney Attention Mr S M Dawood

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Summary

Consumer Protection Act 68 of 2008 – application of s6 of PAJA to the deferment of consumer rights – judicial deferment in this review process inappropriate despite complex factual material and policy-laden detail on readiness of the municipalities – high level of judicial scrutiny required when consumer rights are deferred. The first respondent not entiled to defer consumer rights to generalised categories of municipalities but only to specific municipalities as required by item 2 of schedule 2 of the Consumer Protection Act.