

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)**

Case no: EL1386/2023

In the matter between:

BUFFALO METROPOLITAN MUNICIPALITY	1st Applicant
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THE MUNICIPAL MANAGER: BUFFALO CITY METROPOLITAN MUNICIPALITY	2nd Applicant
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and

TONY MAGQAZANA	Respondent
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JUDGMENT ON APPLICATION FOR LEAVE TO APEAL

Zono AJ

Introduction

- [1] Pursuant to judgment granted on 05th March 2024, the applicant to application for leave to appeal, which is the Municipality parties, launched an application for leave to appeal. I propose to refer to the parties as follows: The Municipality and the Municipal Manager will be the applicants and Mr Tony Magqazana will be referred to as the respondent.

[2] The applicants' grounds of appeal are couched in the following terms:

- "1 The learned Judge erred finding that the termination/disconnection/discontinuation/blocking of service of the electricity supply is unlawful.*
- 2. The learned Judge ought to consider and accept that the Respondents did in fact deliver the pre-termination notice, and that service by placing a copy of the document in the post-box of the Applicant's home is compliance with the 14-day period, when the premises were kept secured and thus prevented alternative service.*
- 3. The learned Judge ought to disallow new matter in reply, when no case of whether the Applicant received the notice or not, was not made in the founding affidavit. The new matter was known to the Applicant when the application was launched.(sic)*
- 4. The learned Judge erred in not examining whether the determination of the new matter would prejudice the Respondents, when they had in fact complied with the service of the pre-termination notice.*
- 5. The learned Judge erred in finding that the service of the pre-termination notice, otherwise than in terms of Item 6(1)(a)-(e) is a nullity or is null and void, ineffectual and must be taken to not have been done. Whereas the learned Judge held that the real issue for determination was whether the Applicant was given the requisite notification before the disconnection of the electricity supply to her premises.*
- 6. The finding of the learned Judge on that the service of the notice is invalid, as it did not comply with the imperative provisions of the empowering provisions is unduly favourable.*
- 7. The learned Judge should have considered that the Respondents have an empowering constitutional obligation, to ensure the provision of services*

to communities in a sustainable manner, and in order to do so municipal services must be paid for by consumers.

8. The Respondents have a right to disconnect supply, subject to the 14-days written notice where the person liable to do so, fails to pay any charge due to the Respondents in connection with any supply of electricity, which such person may have received from the Respondents in respect of such premises.

9. The learned Judge ought to consider that disconnection of electricity supply is a legitimate method for the collection of arrears and may be followed by legal action to recover payment.

10. If the Applicant is permitted to run up substantial arrears without the termination of services, the Respondents would fail in its constitutional duty to provide sustainable municipal services.”

- [3] The enabling provision for an application for leave to appeal is Section 17(1) of Superior Court Act 10 of 2013 which provides as follows:

“(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—

- a) (i) the appeal would have a reasonable prospect of success; or*
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;*
- b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and*
- c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.*

- [4] Stripped of wordiness the applicants seek leave to appeal on the basis that there was misdirection in finding that there was no termination notice delivered in terms of Municipality Electricity ByLaws. The applicants hold the view that

the issue of whether or not the applicant received the notice was a new matter not raised in the founding affidavit. The court should have found that the applicants have a right to disconnect/terminate electricity supply from the respondent's premises. The court should have considered applicants' alternative submission of substantial compliance vi-a-vis applicants' duty to exact strict compliance with the provisions of item 6(1)(a)- (e) of the Electricity ByLaws. The court should have considered the termination as a legitimate method for arrear collection and may be followed by legal action to recover payment.

- [5] Whether or not this application falls within the ambit of section 17(1)(a)(b) of the Superior Court Act 10 of 2013, it is important to deal and refer to the provisions of section 16(2) of the same Act which read as follows:

“2(a)(i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

(ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs.”

- [6] The object of the subsection is to alleviate the heavy workload of courts of appeal¹. It is founded upon the principle that courts of law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions or to advise upon differing contentions. If there is no longer live issue between the parties, for instance because all issues that formally existed were resolved by agreement, there is no appeal that the court can deal with.²

¹ **ABSA Bank Ltd v Van Rensburg** 2014 (4) SA 626 SCA at 631E, **Legal Aid South Africa v Magidiwana** 2015(2) SA 656 (SCA) at 570H-571B

² **Port Elizabeth Municipality v Smith** 2002 (4) SA 241 SCA at 246 I-247 A

- [7] It is not in issue that an order of final nature was taken by consent between the parties on 01st September 2023. It is not contested in this application for leave to appeal that, in the consent order granted on 01st September 2023 an expressed concession of unlawfulness of disconnection and termination of electricity supply to applicant's premises was made.³ The parties settled their dispute in terms of the court order aforementioned. The applicant does not seek to controvert that finding in this application for leave to appeal. On that basis alone this application stands to fail. I do not agree with applicant's Counsel that such concession to unlawfulness would expire somewhere in the future. However, he regretted the unfortunate manner in which that consent order was taken.
- [8] Secondly, there is no practical effect that may be achieved if this matter may be decided in favour of the applicants. No practical benefit may be enjoyed by the applicants by merely decided this matter or appeal in their favour. The electricity supply to respondent's property that was restored by consent could not be taken away or disconnected by a mere dismissal of the application *a quo*. The situation will invariably remain the same, namely reconnection of electricity supply. Dismissal of respondent's application cannot conceivably result in the disconnection and termination of the electricity supply that is presently enjoyed in the respondent's premises or property. There is no live controversy or issue for settlement by court in this matter.⁴ In the light of section 16 (2) of the Superior Court Act 10 of 2013, the application cannot succeed.
- [9] In **President of Republic of South Africa v Democratic Alliance**⁵ Mogoeng CJ writing for the majority restated the trite principle as follows:
"35] This Court cannot decide the merits that the High Court and the Supreme Court of Appeal did not decide. The President himself says "the order of Vally J no longer has any practical effect between the parties and has become academic". This Court is thus being asked to advise or guide the President.

³ Para 46-48 of the main judgment

⁴ **Minister of Tourism and others v Afri forum NPC and another** 2023 (6) BCLR 752 (CC) Para 23

⁵ 2020 (1) SA 428 (CC) Para 35

That is the only real purpose to be served by entertaining this appeal. And courts should be loath to fulfil an advisory role, particularly for the benefit of those who have dependable advice abundantly available to them and in circumstances where no actual purpose would be served by that decision now. Entertaining this application requires that we expend judicial resources that are already in short supply especially at this level. Frugality is therefore called for here.”

[10] In this court **Majiki J**⁶ had this to say:

“ 17 It is trite that a case is moot and therefore not justiciable if it no longer present an existing or live controversy or prejudice, or threat of prejudice no longer exists. A case that is moot must be dismissed and that conclusion must apply to all the issues.”

[11] Deciding this matter on appeal can only be academic as it will serve no practical purpose. The matter is therefore moot and accordingly not necessary to be decided on appeal. This application must therefore fail. I do not agree with applicant’s Counsel when he submits that the dismissal of the application *a quo* would entitle the respondents to terminate electricity supply without recourse to the provisions of the item 21 and 6 of municipality electricity ByLaws. On the contrary to avoid self-help fresh notice would have to be issued.

[12] Nowhere do the applicants in their application for leave to appeal deal with the imperative nature of the provisions of item 6(1) of the Electricity ByLaws. Similarly, the legal consequences of non-compliance with imperative provisions of the Electricity ByLaws are not part of the grounds for leave to appeal. It does not help the applicant to marshal grounds of appeal over the bar which have not been set out clearly and succinctly in the notice for leave to appeal, no matter how meritorious these might be.⁷

⁶ **GKG Africa Pty Ltd v Eastern Cape Rural Developmnet Agency and Others** Case No: L 1074/219, East London Circuit Court Para 17

⁷ **Municipality of Thabazimbi v Badenhorst** (66933/2011) [2024 ZAGPHC 212 (26 February 2024) Para 12-15

- [13] The parameters, which are extensively dealt with in the main judgment, within which the organ of state or state functionaries must operate when exercising public power is not an issue in this application for leave to appeal.⁸ Valid exercise of public power must have a source in Law. That is a requirement of the doctrine of legality.⁹ Service of the pretermination notice otherwise than in terms of the applicable Electricity ByLaws has no lawful basis. Unjustified deviation from the imperative provisions thereof is legally impermissible. Applicant's Counsel was at pains in dealing with the maxim of interpretation *unius est exclusio alterius* referred to in paragraph 29 of the main Judgment.
- [14] It is not clear from the application for leave to appeal why it was wrong for this court to enforce the applicant's own Electricity ByLaws. **Jafta J**¹⁰ once said: "[99] In our democratic order, it is the duty of courts to apply and enforce legislation.....If the validity of legislation is not impugned, there can be no justification for not enforcing it." This is a Constitutional obligation reposed to courts.¹¹ This matter was about enforcement of Municipality's Electricity ByLaws, or failure to so comply therewith. It is not disputed that there was non-compliance with item 6(1) read with item 21 of the Municipality's Electricity ByLaws, hence an alternative argument about substantial compliance.
- [15] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless is not enough. There must be a sound, rational basis to conclude that there is a

⁸ Para 17-19 of the main judgment

⁹ **AAA Investment (Proprietary)Limited v Micro Finance Regulatory Council and Another** 2007(1) SA 343 (CC) Para 68; **Lester v Ndlambe Municipality and another** 2015 (6) SA 283 (SCA) Para 26

¹⁰ **Cools Ideas 1186 CC v Hubbard and another** 2014 (4) SA (CC) Para 99

¹¹ Section 165(2) of the Constitution

reasonable prospect of success on appeal.¹² The applicants in this application for leave to appeal are far from satisfying these requirements.

[16] With regard to criticism that the court allowed a new matter that was not raised in the founding affidavit, I disagree. Infact the very basis of this application was that the respondent did not receive or was not served with a pretermination notice in terms of the Electricity ByLaws. The respondent's complaint was about non-compliance with item 6(1) read with item 21 of the Municipality's Electricity ByLaws. In what follows I refer to relevant paragraphs in the founding affidavit, which demonstrate the incorrectness in the applicants' proposition aforesaid.

[17] In paragraph 18-19 of founding affidavit the respondent alleges as follows:
"18 I had not received any notice from the respondents advising me about the intended termination of electricity supply to the aforesated premises being house No 2[...], Zone 10, Zwelitsha, Eastern Cape.

19. The actions of the respondents are in contravention of the first respondents' electricity ByLaws..."

[18] The respondent continues to state as follows:
"22. This application is premised in terms of section 21 of the Buffalo City Municipality Electricity ByLaws promulgated on the 10TH December 2009 in terms of which the first respondent is required to disconnect the supply of electricity to any premises with (sic) fourteen (14) days written notice where-

22.1 the person liable to do so fails to pay any charge due to the Municipality in connection with any supply of electricity which such person may have received;

22.2 any of the provisions of the ByLaws and/or are contravened and the person responsible has failed to remedy such default after such notice has been given.

¹² **S v Smith** 2012 (1) SACR 567 (SCA) Para 7; **MEC for Health, Eastern Cape v Mkhitha and another** (1221/2015) [2016] ZASCA 176 (25 November 2016) Para 17

23. *In all the foregoing, I confirm that I have never received any notice with the supply of electricity to the premises and the meter number in question despite such frivolous allegations.*

24. *I have been unlawfully deprived of all my lawful and basic services that go with having electricity in the premises, including **inter alia**, the supply of electricity for basic living.”*

[19] Lastly in paragraph 13 of the founding affidavit the relevant part reads as follows:

“13..... Mr N. Ngqongqo then called me to ensure that I am aware of such notice which I told him that I am unaware of then replied to their email immediately stating that the respondents still have not served the applicant with this notice in accordance with section 6 of the respondent’s ByLaws, and that if they do not unblock me by end of business day Sunday on the 27th of August 2023 then an application will be brought to court on an urgent basis.”

[20] In the light of the above I find the criticism to be unjustified and preposterous as it finds no support on the pleaded case of the respondent.

[21] With regard to the fact that the court should have considered that the disconnection is a method of collection of arrears, I disagree. The respondent’s case was less about arrear collection and more about unlawfulness of the termination of the electricity supply to the property. That was a case served before court. It is impermissible to decide a case that is not brought before court by the parties.¹³

[22] On the subject the Constitutional Court¹⁴ made the following dictum:

“82. Sound judicial policy requires us to decide only that which is demanded by the facts of the case and is necessary for its proper disposal. This is particularly

¹³ **Fischer v Ramahlele and others** 2014 (4) SA 614 SCA Para 13

¹⁴ **Albutt v Centre for the Study of Violence and Reconciliation and others** 2010 (3) SA 293 (CC) Para 82

so in constitutional matters, where jurisprudence must be allowed to develop incrementally. At times it may be tempting, as in the present case, to go beyond that which is strictly necessary for a proper disposition of the case. Judicial wisdom requires us to resist the temptation and to wait for an occasion when both the facts and the proper disposition of the case require an issue to be confronted. This is not the occasion to do so. There may well be cases, and they are very rare, when it may be necessary to decide an ancillary issue in the public interest. This is not such a case. It may well be said that the President is anxious to know whether the exercise of the power to grant pardon constitutes administrative action and whether PAJA applies to applications for pardon. The anxiety of the President should adequately be addressed by what I have said above, namely, that the High Court erred in reaching these questions.”

- [23] In the amalgam of all the above factors, I come to a conclusion that there is no reasonable, realistic chance of success on appeal. Accordingly, this application must fail with costs.

Order

- [24] I accordingly make the following order:

24.1 Application for leave to appeal is dismissed.

24.2 The applicant in the application for leave to appeal is ordered to pay costs of the application for leave to appeal.

ZONO AJ

ACTING JUDGE OF THE HIGH COURT

Appearances

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29th April 2024

Date Delivered:

02 May 2024