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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case no: **D4758/2023**

In the matter between:

ISMAIL MAHOMED HANSA

FIRST APPLICANT

HOUSEN MAHOMED HANSA

SECOND APPLICANT

and

ETHEKWINI MUNICIPALITY

RESPONDENT

Coram: Mossop J

Heard: 28 August 2024

Delivered: 30 August 2024

ORDER

The following order is granted:

The respondent is directed to pay the costs of the application, including the costs reserved on 15 May 2023, such to be taxed on scale B.

JUDGMENT

MOSSOP J:

[1] In a letter dated 31 July 2023, the attorneys acting for the respondent, the eThekweni Municipality, stated that the respondent subscribes to, and endorses, the principle of Batho Pele. That, translated, means ‘people first’.¹ Despite this avowedly being a core value embraced by the respondent in dealing with its ratepayers, it does not appear that the respondent actually conducts itself in accordance with that principle. The facts of the matter will reveal the basis for that conclusion.

[2] It is to these facts that I now turn. The first applicant is the joint executor of the estate of the late Mahomed Ebrahim Hansa (the deceased) and a trustee of a trust created by the deceased’s will (the Trust). The second applicant is the brother of the first applicant and is the other executor of the estate and a co-trustee. The deceased, who was the father of the applicants, passed away in October 1973.

[3] One of the assets of the Trust is certain immovable property situated at 4[...] 4[...] S[...] C[...] Road, Clairwood, Durban (the property). The property has both a residential and commercial component to it. Three shops are located at the front of the property and a residential dwelling (the dwelling) is located behind the shops. The dwelling is occupied by the two applicants and their respective extended families.

[4] Two of the three shops have been vacant since 2017 and the third shop (the third shop) has been utilised by the applicants to run what was called in the founding affidavit ‘the family business’. This is a general dealership that principally involves the buying and selling of furniture.

[5] The third shop and the dwelling are supplied with electricity and water by the respondent. A single meter records electricity consumption in respect of both the third shop and the dwelling. The same is true for the supply of water, where a single meter serves both the third shop and the dwelling. The two vacant shops do not receive a supply of electricity or water, for obvious reasons.

¹ *Joseph and others v City of Johannesburg and others* [2009] ZACC 30; 2010 (3) BCLR 212 (CC) fn 39.

[6] The Trust claims that it, more or less, kept up to date with its payment obligations to the respondent in respect of the consumption of water and electricity. It did not always receive monthly invoices from the respondent and in those months where an invoice was not received, it paid what it estimated was owing to the respondent. That estimation was not always accurate. It appears, as well, that during the pandemic, the Trust may not have paid everything that was due to the respondent due to financial hardship. But, in general, where money was owed to the respondent by the Trust, the amount was not particularly substantial and was manageable.

[7] That, however, all changed in May 2020, when an account was received from the respondent that indicated that, in addition to its regular monthly charge, an amount of R524 901.08, plus VAT, was owed by the Trust. I shall refer to the amount claimed hereafter as 'the exorbitant charge'.

[8] The exorbitant charge appeared to be comprised of:

(a) A minimum monthly service charge in respect of an electricity meter with number 5[...]. The amount of the charge arising from this meter was not for electricity consumed and recorded on this meter: no electricity had actually been consumed. The charge was simply for having the meter, which was found by the Trust in one of the unused shops. That shop had been occupied by a former tenant who had left the shop prior to August 2017. The account for that meter was never in the Trust's name but was held in the name of the erstwhile tenant; and

(b) Charges arising from a second meter with number 3[...]. That meter could not be located. It was simply not on the property at all. Charges were raised and claimed by the respondent for services over the extended period of April 2001 to August 2019. It was assumed by the Trust that there may have been a meter in place in one of the vacant shops at some time in the past that may have been installed by a former tenant, but it must have been removed because it was no longer *in situ*.

[9] According to the Trust, all that it legitimately owed the respondent was an amount of approximately R12 000. The first account reflecting the exorbitant charge was received by the Trust during the height of the Covid pandemic and getting to the respondent's offices to complain about the respondent's billing was no easy matter. The first applicant finally got to the respondent's offices in October 2020. He was received by the respondent's servants, but he did not experience the benefits of the application of the Batho Pele principle.

[10] In fact, the first applicant did not receive a sympathetic hearing at all. He was told that the Trust had no option but to pay the account and if it could not do so, then payment arrangements to the satisfaction of the respondent would have to be agreed upon. But the exorbitant charge would have to be paid. The Trust plainly lacked the ability to do this. But, more importantly, the Trust was adamant that it did not owe the money to the respondent. This, however, made no impression on the respondent's servants. There consequently existed a stalemate.

[11] The Trust continued to receive monthly accounts reflecting the exorbitant charge, which continued to grow with the addition of interest. In November 2021, after being unable to resolve the matter with the respondent, the Trust approached its attorney, Mr Donachie (the Trust's attorney), for assistance. The Trust's attorney penned a letter on behalf of the Trust to the respondent dated 29 November 2021. It set out in some detail the cause of complaint and sought assistance to resolve an intolerable situation for which the Trust was not responsible nor liable. No reply to that letter was received.

[12] The Trusts' attorney consequently wrote an email to the respondent, dated 25 February 2022. The email was addressed to the head of the revenue management section of the respondent, Mr Peet du Plessis (Mr du Plessis). The Trust's attorney again explained the problem and sought assistance for the Trust. Mr du Plessis ignored this email.

[13] A follow up email was consequently sent to Mr du Plessis on 4 April 2022. He did not respond to that email either. A further email was written that same day by the Trust's attorney to the apparent new head of the revenue section, identified as being

Mr Ndzulu (Mr Ndzulu). To his credit, Mr Ndzulu did respond to the email and he immediately referred the matter to Ms Khanyi Gama (Ms Gama) of the revenue management section of the respondent. However, nothing appears to have been done by Ms Gama.

[14] On 5 April 2023, a day after Ms Gama was requested to assist the Trust, a servant of the respondent arrived at the property with the disclosed purpose of disconnecting the electricity supply to it. The first applicant managed to avert this temporarily. He contacted the Trust's attorney and met with him the next day and also went to the respondent's service centre to obtain an assurance from the respondent that the electricity supply to the property would not be disconnected while the issue of the exorbitant charge was resolved. That undertaking does not appear to have been forthcoming because the Trust's attorney then set about preparing the application papers that presently serve before me.

[15] Ms Gama appears to have done nothing for several weeks. On 24 April 2023, the Trust's attorney sent an email to her and attached, as a courtesy, a copy of the Trust's draft application papers. In that email, the Trust's attorney indicated that his client was of 'meagre means' and had been forced to incur the expense of preparing the draft application papers because of the lack of assistance received from the respondent. It was also specifically drawn to Ms Gama's attention that the draft application papers sent to her included, as an annexure, all the 'trustee documentation' that she apparently required. Ms Gama was invited to consider the draft application papers and to give an undertaking that the electricity and water supply to the property would not be disconnected whilst the respondent investigated the addition of the exorbitant charge to the Trust's account.

[16] Ms Gama responded to the Trust's attorney in the early evening of 24 April 2023 and stated that she still required the 'trust deed documentation'. The undertaking sought from her was consequently not given. The Trust's attorney responded later that evening and indicated that the Trust was a testamentary trust and specifically drew Ms Gama's attention to annexure 'IMH1' to the draft application papers, which was a certified copy of the letters of executorship issued in favour of the applicants. The Trust's attorneys ended the email with the following words:

‘The refusal to engage with our offices over the pending application is at the peril of the eThekweni municipality.’

[17] The next day, 25 April 2023, Ms Gama sent an email to the Trust’s attorney indicating that she now sought:

‘... the correct documentation to engage’.

It appeared to the Trust’s attorney that what she was referring to was a trust deed.

[18] With admirable restraint, the Trust’s attorney sent a lengthy email to Ms Gama and Mr Ndzulu on the same day, explaining, in granular detail, that the Trust was a testamentary trust and not an inter vivos trust and that it had been established prior to the enactment of the Trust Property Control Act 57 of 1988. There was, thus, no trust deed.

[19] No further progress was made to resolve the matter. This application was then launched and was set down as an urgent application on 15 May 2023. An order in two parts was sought. The first part was an interdict preventing the respondent from disconnecting the supply of water and electricity to the property. The second part of the order was, essentially, confirmation of the first part of the order, and costs.

[20] On 15 May 2023, the respondent was represented at court, as was the Trust, and an order was taken by consent. The order provided that the Trust was to file a formal objection with the respondent to the invoice of May 2020 which had first introduced the exorbitant charge onto the Trust’s account. While this was being done, the respondent undertook not to disconnect the supply of electricity or water to the property.

[21] The Trust complied with the order and filed the formal objection. In due course, the objection was considered by the respondent and was upheld. The exorbitant charge was duly reversed by the respondent and disappeared from the Trust’s account.

[22] The Trust must have been content with this, for it had achieved its goal of reversing the obligation to pay the exorbitant charge and had thereby avoided the possibility of the disconnection of the supply of electricity to the property. The respondent must have been content because it had resolved a problem for a ratepayer. But, in truth, neither party was content. The reason for the discontent was a perennial problem in litigation: who would pay the legal costs of this application?

[23] Having resolved the Trust's problem, the respondent wanted this application to be withdrawn and its costs paid by the Trust. The Trust would not agree to pay the respondent's costs. It was, however, prepared to withdraw the application on condition that the respondent paid its costs. The respondent was not prepared to do so. And thus, the matter is before me to decide only the issue of who should pay the costs of this application.

[24] The basic approach to the question of costs is that they are awarded in the exercise of the discretion of the court² and they usually follow the result. The reason that costs are awarded to the successful litigant is in order

‘... to indemnify him for the expense to which he has been put through having been unjustly compelled either to initiate or to defend litigation as the case may be. Owing to the necessary operation of taxation, [however,] such an award is seldom a complete indemnity; but that does not affect the principle on which it is based.’³

[25] There can be no doubt that the Trust was unjustly compelled to bring this application as a consequence of the incorrect addition of the exorbitant charge to its account by the respondent. Why this occurred has never been explained by the respondent. Mr Ntshebe, who appeared for the respondent, submitted that by the time the respondent delivered its answering affidavit, the exorbitant charge had been reversed and there was no need to deal with why it had been added to the Trust's account in the first place. In my view, it ought to have been dealt with. But for the

² *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others* [1996] ZACC 27; 1996 (2) SA 621 (CC); 1996 (1) BCLR 1 (CC) para 3; *KSL v AL* [2024] ZASCA 96 para 34.

³ *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 at 488.

addition of the exorbitant amount to the Trust's account, this application would not have seen the light of day.

[26] Moreover, the error made by the respondent in doing so was not recognised, or admitted, by its servants and the Trust was initially told that it was required to pay the exorbitant charge. Thereafter, the Trust was given the run around by the respondent when it tried to get the respondent to rectify the situation that it had created. During this, the respondent threatened to disconnect the supply of electricity to the property. The Trust's attorney wrote to the respondent several times to resolve the issue and was simply ignored. Even a cursory consideration of these primary facts would lead to the insight that such conduct on the part of the respondent is unlikely to result in this court being prepared to exercise its discretion in the respondent's favour.

[27] The respondent submits that it should not have to bear the costs of the application because the Trust ought to have followed a different channel in trying to resolve the problem. It refers in this regard to the provisions of the eThekweni Municipality: Credit Control and Debt Collection By-Law, 2017 and the Credit Control and Debt Collection Policy 2021-2022. Specific reference was made to paragraph 16 of the By-law, which reads, in part, as follows:

'16. (1) A person must lodge a written dispute with the Municipality to challenge the correctness or accuracy of any amount due and payable by such person reflected in an account rendered by the Municipality in terms of this By-law: Provided that such dispute must be lodged with the Municipality before or on the due date for payment specified in the account concerned.

(2) A person must, pending resolution of the dispute, continue to make regular monthly payments in respect of rates, if applicable, or in respect of any municipal service, as the case may be, based on the average monthly fees for the preceding three months prior to the dispute arising, plus interest if applicable, until the dispute is resolved.

(3) Where a person fails to lodge a dispute within the period mentioned in subsection (1), any correspondence received from the person after such period concerning the correctness or accuracy of an account, will be treated as an enquiry and –

- (a) the account will not be suspended; and
- (b) such enquiry must be accompanied by the payment of at least an amount equal to the average amount per month that was due and payable in respect of the municipal service concerned during the preceding three months.'

[28] None of the respondent's servants drew this to the Trust's attention. Instead, both Mr Ndzulu and Ms Gama purported to engage with the Trust's attorney in a manner that created the impression that they were prepared to deal with the problem and resolve it. Indeed, in involving Ms Gama in the matter, Mr Ndzulu sent an email to her which read:

'Please assist on the query and advise on resolving it.'

[29] Ms Gama provided no assistance and no advice to the Trust's attorney. She certainly did not draw his attention to the complaint channel insisted upon in the court order. The respondent knew full well what the complaint was. It had received it in writing on a number of occasions from the Trust's attorney and it was encapsulated in the draft application papers that had been sent to it in advance of the application being brought. In each instance, it was invited to reconsider its position, but chose not to do so. It did not have to insist on a formal complaint being lodged. Insisting that this be done only when before the court smacks of cynicism, in my view, and places form before substance.

[30] The Trust was ultimately vindicated and did not have to pay the exorbitant charge and thus the risk of disconnection of its water and electricity supply was brought to an end. The Trust was, in other words, entirely successful in what it set out to achieve.

[31] Instead of simply paying lip service to slick slogans such as Batho Pele, the respondent would be better advised to simply treat its constituents in a civil and helpful manner and to attempt to solve the problems reported to them as quickly as is reasonably possible.

[32] Given the facts of this matter, and the unsatisfactory conduct of the respondent throughout, I have no hesitation in exercising my discretion on the question of costs in favour of the Trust.

[33] I accordingly grant the following order:

The respondent is directed to pay the costs of the application, including the costs reserved on 15 May 2023, such to be taxed on scale B.

MOSSOP J

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