

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

CASE NO : **2022/030828**

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE YES/NO
- (2) OF INTEREST TO OTHER JUDGES YES/NO
- (3) REVISED

[REDACTED]

.....
SIGNATURE

DATE 20 November 2024

In the matter between:

BIDCORP FOOD PROPERTIES (PTY) LIMITED
CHIPKINS PURATOS (PTY) LIMITED

First Applicant
Second Applicant

and

**THE CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY**
JOHANNESBURG WATER (SOC) LIMITED

First Respondent
Second Respondent

JUDGMENT

THERON AJ:

- [1] The Applicants are, respectively, the owner and tenant of a property subject to the Water Services Bylaws (“Bylaws”) and Water Services Tariffs imposed by the First and/or Second Respondents, the City of Johannesburg Metropolitan Municipality and Johannesburg Water (SOC) Limited (“the City”).
- [2] At the outset of the hearing of this matter, I raised with counsel whether a court may *mero motu* raise and determine a question of law where the common approach of the parties proceeds on a wrong perception of the law.
- [3] I also appraised them of my *prima facie* views.
- [4] Counsel, at my request, filed supplementary heads to deal with the points of law raised by me for consideration by them.
- [5] I am indebted to Mr Paige-Green and Mr Qithi for their comprehensive and helpful supplementary heads of argument.

- [6] The parties departed from the common premise that certain decisions (if properly so called) of the City constituted administrative action reviewable in terms of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”).
- [7] The decisions, if properly so called, which the Applicants seek to review, are:
- [7.1] the decision to unilaterally open Johannesburg water account number;
 - [7.2] the decision to raise Industrial and Domestic Effluent charges from July 2018 to date before providing the Applicants with adequate notice of its intention to do so and allowing the Applicants to make reasonable representations in regard thereto;
 - [7.3] the decision to raise industrial effluent charges based on Chemical Oxygen Demand (“COD”) levels when the permit obtained does not impose a condition to manage COD levels;
 - [7.4] reviewing the decision by the First Respondent to charge the First Applicant sewerage on the commercial and industrial tariff

on municipal account number and the Second Respondent's decision to charge the Applicants Domestic Effluent on Johannesburg Water account number between July 2018 and June 2020 and in May and June 2022.

[8] The parties were *ad idem* in their heads of argument that where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception, a court is not only entitled but is obliged, *mero motu*, to raise the point of law and require the parties to deal therewith as I had done.¹

[9] Section 1(a), (cc) and (dd) of PAJA defines “*administrative action*” as follows:

“any decision taken, or any failure to take a decision by:

(a) *An organ of state, when-*

(i) *exercising a power in terms of the Constitution or a provincial constitution; or*

¹ *Cusa v Tao Ying Metal Industries and Others* 2009 (2) SA 204 (CC) at paragraph [68] and authorities there cited and *Amabhungane Centre for Investigative Journalism and Another v Minister of Justice and Correctional Services and Others* 2021 (3) SA 246 (CC) at paragraph [58]

- (ii) *exercising a public power or performing a public function in terms of any legislation; or*

which adversely affects the rights of any person and which has a direct, external legal effect, but does not include-

- (cc) *the executive powers or functions of a municipal council;*

- (dd) *the legislative functions of Parliament, a provincial legislature or a municipal council”*

[10] In terms of the provisions of PAJA, all administrative action is subject to review.

[11] The exercise of executive powers or the performing of executive functions of a municipal council and the legislative functions of a municipal council are excluded from the definition of administrative action.

[12] The First Respondent is a municipality described in Section 2 of the Local Government Municipal Systems Act (“MSA”).²

[13] Section 11 of the MSA states as follows:

“(1) The executive and legislative authority of a municipality is exercised by the council of the municipality, and the council takes all the decisions of the municipality subject to section 59.

(2) ...

(3) A municipality exercises its legislative or executive authority by-

(i) imposing and recovering rates, taxes, levies, duties, service fees and surcharges on fees, including setting and implementing tariff, rates and tax and debt collection policies;”

[14] The City’s Bylaws defines “*water services*” to mean water supply services and sanitation services, as defined in the bylaws and includes the collection and disposal of industrial effluent.

[15] “*Sanitation services*” are defined as the collection, removal, and disposal or purification of human excreta, sewage, and other effluent, including domestic and industrial effluent, from the use of water.

[16] Section 4(2) and (3) of the Bylaws reads as follows:

“(2) An application for the use of water services approved by the Council constitutes an agreement between the Council and the applicant, and takes effect on the date referred to in the application.

(3) The person referred to in subsection (2) will be liable for all the prescribed fees in respect of water services rendered to him or her until the agreement has been terminated in accordance with these Bylaws, and is the consumer for all purposes during the currency of the agreement”

[17] Section 82 of the Bylaws deals with the quality standards for the disposal of industrial effluent.

[18] Section 82(1) of the Bylaws reads as follows:

“82(1) A person to whom permission has been granted in terms of section 80 must ensure that no industrial effluent is discharged into the sewage disposal system of the Council, unless it complies with the standards and criteria set out in section 62, read with Schedule D.”

[19] Part II of Schedule A to the Bylaws prescribes general rules regarding

fees for industrial effluent:

“The following rules are applicable for the purposes of sections 80, 81 and 83 in connection with the fees determined by the Council which are payable for the acceptance, conveyance and treatment of industrial effluent discharged from any premises;

- 1. The owner or occupier of premises on which any trade or industry is carried on and from which, as a result of such trade or industry or of any process incidental thereto, any effluent is discharged to the municipal sewer, shall, in addition to any other fees determined by the Council for which he or she may become liable, pay to the Council an industrial effluent fee including any minimum fee, which fees must be determined by the Council and must be calculated –*
 - (a) on the quantity of water discharged during the half-year forming the period of the fee; and*
 - (b) in accordance with the arithmetic mean of the results of the analyses, specified in item 3, of not less than eight grab samples of effluent taken at any time during a three month assessment period: Provided that the Council may*

in its discretion use another method of assessment if in its opinion it will lead to a fairer result.

2.

3. *The analyses referred to in rule 1 must be in accordance with the methods of chemical analysis normally used by the Council for the purpose and may include –*

Chemical Oxygen Demand (COD)

Total Kjeldahl Nitrogen

Nitrate as N

Ammonia as N

Total phosphorus

Orthophosphate as P

pH

Substances listed in Schedule C (Rule 5.9) and D”

[20] Schedule D to the Bylaws sets maximum levels for:

Fat, oil, grease, waxes and like substances from mineral and vegetable origin;

Chlorides;

Anionic surface active agents;

Sulphates;

Nitrates; and

a list of metals (inorganic compounds); and

radioactive waste.

[21] The resolutions of Council applicable to the relevant financial years were placed before me by the City.

[22] The resolutions for the relevant years read the same and I quote:

“That Council, after careful consideration of the analysis of comments made in terms of Section 11(3)(i) and 75A(1) and (2) of the Local Government : Municipal Systems Act 2000, 32 of 2000, as amended read with Section 24(2)(c)(ii) of the Local Government : Municipal Finance Management Act, 56 of 2003 hereby, approved the proposed rates and tariffs for the [applicable] financial year”

[23] The charges for industrial effluent approved by Council in terms of the relevant resolutions contain the same formula.

- [24] The formula is
$$\frac{C+T \cdot (\text{COD})}{700} \text{ sent} - \text{kilolitre}$$

C is the symbol for conveyance which attracts a rate revised annually.

T is a symbol for transport and attracts a rate revised annually.

COD stands for chemical oxygen demand.

- [25] Chemical oxygen demand is a measure of the amount of oxygen needed to oxidise organic matter in water and is used to determine the concentration of organic pollutants in water.
- [26] The schedule further states that domestic effluent discharge from the premises of any trade or industry for which a charge for industrial effluent is levied attracts a charge per kilolitre.
- [27] Section 75A of the MSA reads as follows:

“75A General power to levy and recover fees, charges and tariffs

(1) A municipality may-

(a) levy and recover fees, charges or tariffs in respect of any function or service of the municipality; and

- (b) recover collection charges and interest on any outstanding amount.*
- (2) The fees, charges or tariffs referred to in subsection (1) are levied by a municipality by resolution passed by the municipal council with a supporting vote of a majority of its members.*
- (3) After a resolution contemplated in subsection (2) has been passed, the municipal manager must, without delay-*
 - (a) conspicuously display a copy of the resolution for a period of at least 30 days at the main administrative office of the municipality and at such other places within the municipality to which the public has access as the municipal manager may determine;*
 - (b) publish in a newspaper of general circulation in the municipality a notice stating-*
 - (i) that a resolution as contemplated in subsection (2) has been passed by the council;*
 - (ii) that a copy of the resolution is available for*

public inspection during office hours at the main administrative office of the municipality and at the other places specified in the notice; and

(iii) the date on which the determination will come into operation; and

(c) seek to convey the information referred to in paragraph (b) to the local community by means of radio broadcasts covering the area of the municipality.”

[28] Section 75A(3) sets out the tariff notification requirements for each financial year.

[29] I am therefore compelled to find that the decisions set out in paragraph 7 of this judgment are excluded from review in terms of PAJA.

[30] Prayer 5 of the notice of motion, which is couched as an alternative to the reviews, is not an alternative but dependant on a successful review.

[31] The prayer for reversal of disputed duplicate charges is dependant on the resolution of irresolvable disputes of fact.

[32] I must say something about the City's conduct that led to this application. I quote certain portions of Section 95 of the MSA which reads as follows:

"95 Customer care and management

In relation to the levying of rates and other taxes by a municipality and the charging of fees for municipal services, a municipality must, within its financial and administrative capacity-

(a) ...

(d) where the consumption of services has to be measured, take reasonable steps to ensure that the consumption by individual users of services is measured through accurate and verifiable metering systems;

(e) ensure that persons liable for payments, receive regular and accurate accounts that indicate the basis for calculating the amounts due;

(f) provide accessible mechanisms for those persons to query or verify accounts and metered consumption, and appeal procedures which allow such persons to receive prompt redress for inaccurate accounts;"

[33] Section 102(1) of the MSA reads as follows:

“102 Accounts

- (1) *A municipality may-*
 - (a) *consolidate any separate accounts of persons liable for payments to the municipality;*
 - (b) *credit a payment by such a person against any account of that person; and*
 - (c) *implement any of the debt collection and credit control measures provided for in this Chapter in relation to any arrears on any of the accounts of such a person.*
- (2) *Subsection (1) does not apply where there is a dispute between the municipality and a person referred to in that subsection concerning any specific amount claimed by the municipality from that person.”*

[34] The City’s Credit Control and Debt Collection Policy, in Section 16 of the current version thereof, sets out a procedure for logging a query which, if unresolved to the satisfaction of the customer, may be escalated to the declaration of a dispute in writing lodged with the City.

[35] The policy, contrary to Section 102 of the MSA, requires payment of

the amount demanded by the City despite the existence of a dispute.

- [36] If after 90 days of the declaration of a dispute, the dispute has not been resolved to the satisfaction of the customer, the customer may either appeal the decision to the City manager in terms of Section 62 of the MSA or refer the dispute to the office of the City Ombudsman.
- [37] The Applicants followed the dispute resolution mechanism provided for in the policy and eventually lodged the appeal to the City Manager on 23 August 2022 but received no response during any of the stages of the dispute resolution mechanism created by the policy.
- [38] In response to the pertinent allegations made by the Applicants regarding the City's lack of response, the City merely notes the allegations.
- [39] It is clear that the City pays lip service to its obligation to have a dispute resolution mechanism that works.
- [40] The City creates a stalemate due to the working of Section 102 and the municipal manager's failure to determine the appeal.
- [41] The City's actions are inimical to the rule of law and constitute a failure

by the City to discharge its constitutional obligations.

[42] The disputes between the Applicants and the City remain unresolved and may only be resolved in future litigation between the City and the Applicants. For this reason, and to be clear:

[42.1] I make no finding on whether the Water Services Bylaws complies with the MSA.

[42.2] I make no finding on the effect of non-compliance by the City with Section 95 of the MSA.

[42.3] I make no finding on whether COD is an appropriate test for volumes of substances determined in Schedule D to the Bylaws.

[42.4] I make no finding on whether the inclusion of COD in the formula for the industrial effluent tariff is appropriate or rationally connected to any purpose.

[42.5] I make no finding on the correctness of any account or balance.

[43] The City's conduct set out above is relevant to the exercise of my

discretion on costs.

In the result I make the following order:

1. The application is dismissed.
2. Each party shall pay their own costs.



THERON AJ

Acting Judge of the High Court

Date of hearing: 5 November 2024

Date of judgment: 20 November 2024

Appearances:

Counsel for Applicants: Adv T Paige-Green
Instructed by: Boruchowitz Attorneys

Counsel for Respondent: Adv V Qithi
Instructed by: Garnet Ngubane & Partners