

SOUTH AFRICA / JUDGMENT

Brandfort Forum and Others v Masilonyana Local Municipality and Others (5520/2021) [2023] ZAFSHC 71 (10 March 2023)

[2023] ZAFSHC 71

COURT

Free State High Court, Bloemfontein

BEFORE

P.J. Loubser, S.S. Jonase

CASE / FILE NUMBER

5520/2021

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

number: 5520/2021

Reportable:

YES/NO

Of

Interest to other Judges: YES/NO

Circulate

to Magistrates: YES/NO

In

the matter between:

BRANDFORT

FORUM First

Applicant

INA

BEUKES N.O. Second

Applicant

FRANS

BESTER POSTHUMUS N.O. Third

Applicant

JOHAN

ALBERTUS FOURIE N.O. Fourth

Applicant

and

MASILONYANA

LOCAL MUNICIPALITY First

Respondent
LEJWELEPUTSWA DISTRICT
MUNICIPALITY Second
Respondent
MAFUMA
CONSULTING (PTY) LTD Third
Respondent

CORAM: LOUBSER, J et JONASE, AJ
HEARD
ON: 20
FEBRUARY 2023

JUDGEMENT

BY: LOUBSER, J

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 10 MARCH 2023. The date and time for hand-down is deemed to be 10 MARCH 2023 at 14:00

- [1] This is in essence an application for the reviewing and setting aside of the first respondent's decision to install prepaid electricity meters and to distribute electricity by means of such meters, and for the reviewing and setting aside of the appointment of the third respondent to install the said meters and to administer the supply and sale of prepaid electricity to consumers in the town of Brandfort. Certain ancillary relief is also sought by the applicants.
- [2] The application is premised on the proposition that the first respondent failed to act in accordance with the law when it made the impugned decision, and in doing so, that it violated the rule of law, being a founding value of the Constitution. It is further contended by the applicants that the first respondent procured the services of the third respondent for the installation of the prepaid meters without complying with the terms of its own supply chain management policy or with the provisions of The Local Government: Municipal System Act.[1]
- [3] The first applicant in the application is an association which conducts its activities in Brandfort with the objective, inter alia, to serve the interest of the residents of Brandfort and to act as a mouthpiece for all taxpayers and residents of Brandfort. The

second, third and fourth applicants are cited in their capacities as trustees of the Masilonyana Brandfort Forum Trust. The first

respondent resorts under the second respondent district municipality.

- [4] The position adopted by the first respondent in this application is precarious, to put it softly. The notice of motion was served on the first respondent and on its attorneys as long ago as 26 November

2021. On 7 December 2021 a notice of intention to oppose was filed on behalf of the first and third respondents by their attorneys, Kruger Venter attorneys incorporated of Welkom. However, answering affidavits were never filed by the first and third respondent ever since. On 10 August 2022 the record in terms of Rule 53(1)(b) was filed by the respondents with the registrar of this court. On 28 October 2022 the abovementioned attorneys of the first respondent filed a notice on its behalf to the effect that the first respondent does not oppose the application and that “they will abide by the decision of the above Honourable Court”. After receipt of this notice to abide, the attorney for the applicants filed a notice of set down of the application for 20 February 2023. This notice was served on the respondents’ attorneys on 4 November 2022.
- [5] Following the notice of set down, the attorneys for the first and second respondents withdraw as their attorneys of record on 20 December 2022. This notice of withdrawal was only filed with the registrar of this court on 18 January 2023.
- [6] As could be expected in the circumstances, no heads of argument were filed on behalf of the respondents prior to the hearing of the application on 20 February 2023, as it is required by the practice directives of this Court. Comprehensive heads of argument were indeed filed on behalf of the applicants. On the date of the hearing, namely 20 February 2023, mr. Grewar appeared for the third respondent. There was no appearance for any of the other respondents in the courtroom, nor were any of the respondents present themselves. It was clear to the court that the matter was indeed unopposed. Mr. Grewar informed the court that he is not opposing the application on behalf of the third respondent. I therefore proceeded to hear counsel appearing for the applicants, and decided to reserve judgement since I regard the matter to be in the public interest.
- [7] Before I even started with the writing of this judgement, and on 1st March 2023, a notice of withdrawal of the notice to abide and notice to oppose was filed with the registrar by the very same attorneys who had received the notice of set down and who had withdrawn as attorneys of record of the respondents earlier. This notice reads as follows: “Kindly take notice that the first respondent hereby withdraws its notice to abide by the decision of the court and herewith affords their intention to oppose the review application”.
- [8] I regard the filing of this last mentioned notice as preposterous and a gross abuse of the process of this court. The attorneys concerned and the respondents themselves very well knew that the application had already served before the court and that their notice was filed far too late and out of time. Notwithstanding, they did not even deem it appropriate to file an application for condonation for the late filing of the notice. There is consequently no explanation for the late filing before me. I regard this as highly irregular, especially in view of the fact that the first respondent had indicated that it does not oppose and that it abides by the decision of the court as far back as 28 October 2022. In the premises, the judgement is prepared on the basis that the application remains unopposed.

[9] I now turn to the substance of the application. The applicants' main cause of concern is that the first respondent

never adopted a bylaw for the sale of electricity or for the supply and sale of prepaid electricity. No resolution was taken by the municipal council to such effect, and there was no resolution that the municipality would migrate from conventional electricity metering to prepaid metering. To make matters worse, no proper procurement process was followed in the appointment of the third respondent as a service provider for either the installation of prepaid meters or for the sale of prepaid electricity. It is further alleged in the founding papers that the community of Brandfort were informed that the installation of the prepaid meters is voluntary, but the meters were installed even against their wishes.

[10] None of these allegations were disputed by the respondents on the papers before me, and it must be accepted as common cause between the parties. In the process of this litigation so far the first respondent has not produced any resolution by its council authorising the steps allowed to above, nor has it produced any proof that due process was followed in the appointment of the third respondent.

[11] Sections 12 to 15 of the Systems Act[2] contains the requirements for the valid adoption and coming into effect of a bylaw. Such bylaw must be published for public comment,

for instance. In this case no bylaws were even adopted by the council relating to the issues here in question.

[12] To this end Khampepe J held in *Liebenberg NO v Bergrivier Municipality*[3] "If we are to give cognisance to the fact that the Constitution now empowers municipalities to exercise original legislative powers, we must also accept that municipal authorities may no longer adopt an informal approach to the exercise of their powers. Similarly, it cannot be the case that municipalities are empowered to extract taxes pursuant to "laws" that they devise, when citizens are unable to find those laws anywhere in the statute books. That is wholly inconsistent with a State founded on the principle of legality."

[13] In this respect it needs mentioning that the first respondent also failed to determine tariffs for the supply and sale of electricity by prepaid meters. In failing to do so, the first respondent failed to comply with the peremptory provisions of amongst others, the Systems Act. This Act provides[4] that the executive and legislative authority of a municipality is exercised by the council of the municipality, by inter alia administering and regulating its internal affairs and the local government affairs of the local community. In the present case there is no indication at all that the council of the first respondent had exercised its powers to implement the installation of prepaid meters by the publication of a bylaw to that effect.

[14] For this reason alone, the appointment of the third respondent as a service provider was inherently irregular, apart from the fact that the correct procedure for the appointment was not followed as provided for in the Systems Act.

- [15] In the premises, the application ought to be granted. Mr. Snellenburg, appearing for the applicants, has provided me with a draft order. The draft order will be made an order of this court, as amended in certain respects.
- [16] As for costs, this court has to be mindful of the fact that the costs in the earlier interdict proceedings against the respondents under case no. 4949/2021 were reserved for later adjudication. In those proceedings the applicants moved for orders compelling the first respondent to provide information and documentation underscoring its decision to install prepaid meters and to appoint the third respondent. This application was successful. This court is also mindful of the fact that the present application remains uncontested, as set out above. In the circumstances, the first respondent should pay the costs of the interdict proceedings, while the first respondent should also pay the costs of this review application.
- [17] In presenting argument before this court, mr. Snellenburg made out a strong case for the costs to be on the attorney and client scale. Although I agree with his submission in this respect, such orders of costs will ultimately impact on the taxpayers of Brandfort, and therefore I view such orders on a party and party scale more appropriate.
- [18] Having due regard to all the circumstances of this application, the following orders are made:
1. The first and/or second respondents are interdicted and restrained from installing any prepaid electricity meters in its jurisdiction, including Brandfort, Free State Province, and from selling electricity by means of prepaid metering before:
 - 1.1 Duly and lawfully adopting bylaws authorising the supply and sale of electricity by means of prepaid metering, alternatively duly amending or supplementing the existing bylaw to authorise the supply and sale of electricity by prepaid metering, and/or
 - 1.2 The first respondent's council duly and in transparent manner adopts a resolution to supply and sell electricity by means of prepaid meters and metering to consumers in Brandfort, and/or
 - 1.3 The transparent determination of tariffs/charges for the distribution and sale of electricity through or by means of prepaid meters and metering, and/or
 - 1.4 If an external service provider is to be appointed to render service to the first respondent, then the appointment of a service provider(s) in terms of a competitive bidding process in terms of the first respondent's Supply Chain Management Policy, alternatively a lawful procurement process to install prepaid electricity meters; and/or to sell the prepaid electricity and/or to administer the payment of prepaid electricity in Brandfort must be complied with, and/or

1.5 Compliance by the appointed service provider(s) and, insofar as relevant the first respondent, with the registration requirements for the supply and/or sale, alternatively resale of electricity in terms of the Electricity Regulation Act, alternatively due and proper compliance with the provisions of section 7 read with Schedule 2 of the ERA for exemption of the service provider for the supply and sale, alternatively resale, alternatively trading in the supply and/or sale in electricity.

2. The first respondent is ordered to forthwith remove prepaid meters already installed and/or to convert the supply and sale of electricity to the conventional metering basis until such time as the first respondent has complied with the content of paragraph 1.1 to 1.5 above.
3. The appointment by the first respondent of the third respondent to install and administer the supply, alternative sale, alternatively the supply and sale of prepaid electricity to consumers in Brandfort is reviewed and set aside.
4. It is declared that the service level agreement concluded between the first and third respondent is invalid, void and unlawful and the aforesaid service level agreement is set aside;
5. The following actions and omissions (conduct) of the first respondent are declared to be unconstitutional:

5.1 Implementing steps to migrate from conventional electricity supply and metering to prepaid supply and metering of electricity by inter alia installing prepaid meters and selling electricity on prepaid basis without a resolution to that effect being duly adopted by the first respondent's council,

5.2 appointing the third respondent to install prepaid meters in absence of a proper procurement process, and

5.3 Appointing and allowing the third respondent to trade in electricity without complying with the requirements for exemption in terms of the provisions of Schedule 2 of the Electricity Regulation Act, 2006, and

5.4 Installing prepaid meters in absence of a duly adopted bylaw, and

5.5 Installing prepaid meters and compelling the purchase of electricity through prepaid metering in absence of transparent and lawful determination of tariffs and charges for the distribution and sale of electricity by prepaid metering, and

5.6 Sale of electricity by means of prepaid metering against charges/tariffs exceeding the charge/tariffs determined and published for the 2021/2022 financial year for the distribution and sale of electricity by means of conventional metering to consumers in Brandfort, and

5.7 Installing prepaid meters against the consumers election not to have the prepaid meters installed when the Brandfort community were informed that they have an election to have the prepaid meters installed or not, and

5.8 Distributing, alternatively allowing the resale of electricity through the third respondent without the requirements in terms of paragraph 7 read with Schedule 2 of the ERA for exemption of a person/entity to resell electricity being complied with, and

5.9 The first respondent's failure to comply with the provisions of the Local Government: Municipal Systems Act 32 of 2000 when deciding to appoint an external service provider and after conclusion of a service level agreement, and

5.10 Failing to follow a proper public participation process before deciding to migrate from conventional electricity supply and metering to prepaid electricity supply and metering, and

5.11 Failing to give prompt responses to written or oral communications from the first respondent's community, including complaints to the municipal council, and

5.12 Failing to inform the first respondent's community of decisions of the municipal council which affects their rights, property and reasonable expectations.

6. The first respondent shall pay the reserved costs of case number 4949/2021 on the party and party scale.

7. The first respondent shall pay the costs of this application on the party and party scale.

P. J. LOUBSER, J

I concur:

S.S. JONASE, AJ

For the applicants: Adv. N. Snellenburg SC

Instructed by:

Symington and De Kok

Bloemfontein

/roosthuizen

[1] Act 32 of 2000

[2] Supra

[3] 2013(5) SA 246 (CC)

[4] Section 11

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Prepared on 12 October 2026 · Esheria