

SOUTH AFRICA / JUDGMENT

Tetani and Another v Buffalo City Metropolitan Municipality and Another (EL406/2019) [2019] ZAECELLC 31 (14 November 2019)

[2019] ZAECELLC 31

COURT

Eastern Cape High Court, East London Local Court

BEFORE

SM Mfenyana

CASE / FILE NUMBER

EL 406/2019

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IN THE HIGH COURT OF
SOUTH AFRICA
(EAST LONDON CIRCUIT
LOCAL DIVISION)

CASE

NO.: EL 406/2019

Date

heard: 17 October 2019

Date

delivered: 14 November 2019

In

the matter between:

TEMLAKAZI
TEMLISA TETANI
First Applicant
NKOSINATHI
STEVEN TETANI
Second Applicant
And
BUFFALO
CITY METROPOLITAN MUNICIPALITY
First Respondent
THE MANAGER: BUFFALO CITY
METROPOLITAN
MUNICIPALITY
Second Respondent

JUDGMENT

MFENYANA AJ

Introduction

- [1] The applicants are husband and wife. They brought an urgent application in which they sought a rule nisi calling upon the respondents to show cause why they should not be interdicted and restrained from unlawfully disconnecting the electricity supply to the applicants' premises, and be directed to reconnect the electricity supply to the applicant's premises. The application was brought on an urgent basis. On 17 April 2019 Smith J, granted the following order:

"1. The Applicants' non- compliance with the rules relating to service of processes and papers as well as the timeframes set out, including the 72 hours' notice referred to in section 36 of the General Law Amendment Act, 1955 (Act 62 of 1955) be and is hereby condoned;

2. That the Applicants be granted leave to proceed with this application by way of urgency in terms of rule 6(12);
3. That the Applicants be granted leave to serve the application papers and any order granted by this Honourable Court on the Respondent's physical address.
4. That a rule nisi issue calling upon the Respondents to show cause on 14 May 2019 at 09h30 or soon thereafter as the matter may be heard why an order in the following terms should not be made final:
 1. That the termination/disconnection/blockage of electricity supply to Mhlophe Avenue, Sunnyridge, East London ("the premises") on Tuesday, 16 April 2019 be and is hereby declared unlawful;
 2. That the Respondents be and are hereby directed to reconnect the electricity supply to the premises forthwith within one hour after service of the court order at the offices of the Second Respondent;
 3. That the Respondents be and are hereby interdicted and restrained from charging the Applicants a reconnection fee as a result of the unlawful disconnection on 16 April 2019
 4. That the Respondents are interdicted and restrained from unlawfully terminating/ disconnecting/blocking the supply of electricity to the premises;
 5. That the Respondents are directed to pay the costs of this Application on an attorney and client scale; and
 6. ...
 7. ..."

- [2] The application is opposed by the respondents.
- [3] On 3 May 2019, following a further disconnection of electricity supply to the applicants' premises, the applicants brought another urgent application, and on which day the rule nisi was extended to 14 May 2019. On 14 May 2019, the rule nisi was further extended to 28 May 2019 and on that day, further extended to an unspecified date until confirmed or discharged. The present proceedings are a culmination of the happenings stated above.
- [4] At the heart of the matter, is a dispute emanating from the said disconnection of electricity supply to the applicants' premises by the respondents. The applicants reside on the premises and are the registered owners thereof.
- [5] It is alleged that on 16 April 2019, the first respondent, without prior notification, caused the electricity supply to the premises to be abruptly discontinued. The respondents deny that there was no prior notification and aver that they issued various notices

to the applicants. In his answering affidavit the second respondent refers the Court to numerous notices which he states were served on the applicants. He further states that in an endeavour to keep costs to a minimum, the second respondent elected to send notices of termination by ordinary mail. This is nothing short of a concession that the notices were not served as required in terms of the by-laws. The second respondent also does not, and cannot say when the alleged 'service' took place.

Submissions

- [6] Ms Van Vuuren, acting on behalf of the applicant stated that the issue to be determined is whether the first respondent complied with its own by-laws. She argued that there was no prior notification given by the first respondent to the applicants, and the applicants were not called upon to make representations, as is required in terms of the by-laws. In so doing, so she continued, the respondents acted contrary to their own by-laws and their conduct is therefore unlawful. She further argued that the notices annexed to the respondents' answering affidavit were only print-outs with no original remittance from the post office and not in compliance with section 6[1]. She argued that the evidentiary burden lies with the respondents to prove that the notice had been despatched to the applicants in compliance with the respondents' own by-laws.
- [7] Mr Nyangiwe, who appeared for the respondents argued on the contrary, that the issue to be decided by the Court is whether the applicants received the notice. He argued that the first respondent has to satisfy the manner of service only if the applicants deny receipt of the notice. In the present case, so he stated, the applicants do not deny that they received the notice of termination of their electricity supply. He was constrained to concede that the notice was not served in terms of the by-laws. He however argued that

it was 'issued' in accordance therewith and that the applicants could not receive a notice that was not served or sent to them as they do not deny that they received the notices

Legal framework

[8] It is imperative to consider the relevant provisions of the Buffalo City Metropolitan Municipality by-laws[2] as codified in the Provincial Gazette. Section 21 thereof states:

“(1) The Municipality has the right to disconnect the supply of electricity to any premises:

(a) . . .

(b) subject to 14 (fourteen) days written notice where – (i) – (vi) . . .

(vii) 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 from the Municipality in respect of such premises; and

(viii) ...

(ix) after any such disconnection, the fee as prescribed by the Municipality shall be paid”.

[9] Section 6 deals with service of the notice. The provisions thereof, relevant to the present proceedings state that any notice that is served on any person in terms of this by-law is regarded as having been served when:

(a) it has been delivered personally to the person concerned;

(b) it has been left at that person’s place of residence or business with a person apparently over the age of sixteen years;

(c) it has been posted by registered or certified mail to that person’s last known residential or business address in the Republic and an acknowledgement of the posting thereof has been obtained from the postal service.

[10] It is common cause that on 16 April 2019, the respondents terminated the supply of electricity to the applicants’ premises. This, the respondents argue, was precipitated by the applicants’ failure to pay arrear amounts due to the first respondent in respect of such electricity supply. The applicants do not gainsay that their electricity account with the respondents was in arrears. It is also common cause that on 30 April 2019, the respondents terminated the electricity supply to the

applicants’ premises again. This led the applicants to once again approach the court on an urgent basis whereat this Court, per Bodlani AJ issued a further rule nisi on 3 May 2010. The two applications were subsequently consolidated.

[11] The applicants argue that the termination of the electricity was done without the requisite prior notice to them. This is disputed

by the respondents, who argue that the requisite notice was in fact issued and posted to the applicants, albeit not by registered or certified mail. This is the nub of the present matter, i.e. whether the pre-termination notice was served as stipulated in the by-laws. Mr Nyangiwe argued

that the applicants have not disputed receipt of the notice, but only argue that it was not sent to them as required by the law. They therefore do not regard it as a notice, he stated. He argues that this Court should find that the applicants did in fact receive the notice. I do not agree. Section 6 is set out in unambiguous terms. It requires the respondents to serve the pre-termination notice in any one of the prescribed methods. It was not argued on behalf of the respondents that they have served the notice in any one of the prescribed ways. In fact, it is common cause that they did not.

[12] Both parties placed reliance on the judgment of this Court, per Stretch J in *Dumbela*[3], where the learned Judge found that the Municipality had not complied with its by-laws. Ms Van Vuuren, argued that the present matter is on all fours with the *Dumbela* matter. Mr Nyangiwe, on the other hand placed reliance on the issue to be decided as identified in *Dumbela*, that being whether the applicant had received the notice. While agreeing with the ratio in *Dumbela*, he however argued that the present case is distinguishable from *Dumbela* in that in the present case, the applicants do not deny that they received the notice.

[13] What belies Mr Nyangiwe's submission is the learned Judge's obiter dicta further in the judgment where she states that:

"It is so that in the ordinary course of business letters are presumed to have been despatched and received by the addressee, and it is for the latter to rebut such a presumption. ... that presumption only comes into effect when the contents of the notice (have) been conveyed to the recipient in any one of a number of ways which have been codified in terms of the by-laws (Own emphasis). If it is alleged that none of these measures have been taken, it is for the respondents to demonstrate that they have."[4]

[14] He further submitted and placed reliance on section 33 of the Postal Services Act[5] which provides that the delivery of a postal article to the house or office or agent of the addressee is regarded as delivery to the person to whom the article is addressed. I do not think that this assists the respondents for two reasons. The first is that the respondents are neither able to assert when the said notice was 'delivered', nor do they argue that it was 'delivered'

at the applicants' house, office or to their agent. The second reason, as I have already found, is that delivery of the notice does not amount to service of the notice as is required in terms of the by-laws.

[15] It is common cause that the first respondent embarked on the impugned conduct as a means of collecting a debt owed to it by the applicants. This manner of debt collection has received widespread criticism from the courts and is regarded as draconian. It needs to be impressed that the purpose of the requirement to issue a notice is not intended to impose an undue burden on the respondents, but is in keeping with the rule of law which in this case, will ensure that rights are not taken away arbitrarily.

[16] To the extent that the first respondent was performing an administrative action, Ms Van Vuuren pointed out, correctly in my view, that this act must be justified by some lawful authority.

[17] It is thus settled law that when a municipality supplies electricity, it does so in fulfilment of its constitutional and statutory duty to provide basic municipal services. It follows therefore that any deprivation of such right must be preceded by some prior

notification. The respondents are obliged to afford the applicants procedural fairness before taking a decision that would materially

affect that right. In Joseph[6] Skweyiya J stated:

“I am of the view that this case is similarly about the “special cluster of relationships” that exist between a municipality and citizens, which is fundamentally cemented by the public responsibilities that a municipality bears in terms of the Constitution and legislation in respect of the persons living in its jurisdiction. . . .”[7]

Conclusion

[18] It appears to me that in view of the fact that the contents of the notice were not conveyed to the applicants in any one of the prescribed methods, there can be no merit to the respondents’ opposition. It does not avail the respondents to argue that they had issued and even mailed the notice in any manner other than that prescribed in the by-laws. Were this to be allowed, it would fly in the face of the respondents’ own by- laws. It can therefore not be condoned.

[19] It is clear that the respondents have failed to comply with their own by-laws in terminating the electricity supply at the applicants’ premises on 16 and 30 April 2019 respectively. The application must therefore succeed.

Costs

[20] With regard to the issue of costs, Mr Nyangiwe, counsel for the respondents, submitted that the principle in Biowatch[8] should apply, which suggests that in the event of the respondents succeeding in their opposition, they would spare the applicants of the burden of costs. Having found as I have, that the respondents failed to comply with their own by-laws, that presupposes that the applicants have been successful in their application. I can therefore find no reason to deviate from the general rule that costs should follow the cause.

Order

[21] In the result, I make the following order:

- (i) The rule nisi is confirmed.
- (ii) The respondents are ordered to pay the costs of the application.

SM MFENYANA

ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the applicants: Ms L Van Vuuren

Instructed by: SJ

Ngqongqo Attorneys

East London

Counsel for the respondents: Mr X Nyangiwe

Instructed by: Dyushu & Majebe Inc.

- [1] Section 6 of the Buffalo City Metropolitan Municipality – Electricity Supply By-Laws: Provincial Gazette Extraordinary, 10 December 2009, No.2245.
- [2] Id. Buffalo City Metropolitan Municipality – Electricity Supply By-Laws: Provincial Gazette Extraordinary, 10 December 2009, No.2245.
- [3] Dumbela v Buffalo City Metropolitan Municipality and Another EL 298/2019 (Dumbela).
- [4] Id at paras 17 – 18.
- [5] Postal Services Act No.34 of 1998.
- [6] Joseph and Others v City of Johannesburg and Others [2009] ZACC 30; 2010 (3) BCLR 212 (CC); 2010 (4) SA 55 (CC) (Joseph).
- [7] Id at para 25.
- [8] Biowatch Trust v Registrar Genetic Resources and Others [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (Biowatch).

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