

**IN THE MAGISTRATE'S COURT FOR THE DISTRICT OF ILEMBE
HELD AT KWADUKUZA**

In the matter between:

Case No: 718/2022

OMAN INVESTMENTS (PTY) LTD

APPLICANT

AND

ILEMBE DISTRICT MUNICIPALITY

RESPONDENT

JUDGEMENT

Delivered on: 13 April 2023

1.

This is a Spoliation Application wherein an Interim Order was granted for the Respondent to restore the supply of bulk water meter i.e providing water supply to the Applicant's property described as Erf 5329 Stanger, 8 Haysom Road, Kwadukuza.

2.

The issue before court is whether or not to confirm the Interim Order granted on 22 March 2023, i.e the Spoliation Order.

3.

The Application was opposed by the Respondent, namely Ilembe Municipality, on the grounds that the Applicant was provided with a statement in which it was indicated that failure to pay the arrears on the account disconnection would be effected and that the Municipality By Laws permit disconnection without notice.

Both parties submitted Heads of Argument, which I have considered in preparation of this judgement and shall therefore not repeat the contents thereof herein.

4.

In summary it was argued on the part of the Applicant, inter alia; that:-

- 4.1 "in a Spoliation application the merits of the matter are irrelevant, the issue is whether the party seeking spoliation was in possession and dispossessed.
- 4.2 It was also argued that the correct procedure preceding termination or disconnection of supply was not followed as set out in the case of *City of Cape Town v Strumpher, 2012* and in the case of *Leon Joseph & Others v City of Johannesburg & Others, 2009*.
- 4.3 Further, it was argued that this court has jurisdiction to hear the matter on the ground that each month's billing is a separate legal action, therefore the court has the necessary jurisdiction.
- 4.4 It was further argued that according to the *Strumpher* case, where there are multiple tenants/occupants disconnection can only be effected if the occupants are afforded procedural fairness in the form of a pre- termination notice; namely atleast 14 days notice of the intended disconnection.

- 4.5 Moreover, it was argued that in view of the dispute of facts, in light of the Respondent's submission that the invoices sent to the applicant amounted to notices, the presence of the By-Laws giving the Municipality a right to disconnect without further notice meet the requirement of notices being given to the applicant.
- 4.6 The Applicant argued further that the Plascon Evans rule should be applied in this matter and the court should not accept Respondent's version.
- 4.7 Lastly it was argued that by virtue of Respondent's conduct the Applicant is entitled to confirmation of the Interim order with costs on an Attorney and client scale, by virtue of the Municipality having a host of Councilors, and Departments including the Legal department which ought to have advised the Municipality properly and that the Municipality cannot be categorized as a layperson and its frivolous opposition of the application should be punished by the court."

5.

It was argued on the part of the Respondent that:-

- 5.1 "the disconnection was not unlawful, it was in terms of the Respondent's credit policy, particularly clause 14.1.
- 5.2 It was also argued that the Invoice issued on 31 March 2022 reflect the amount owed by the Applicant and warns the Applicant that in the event of the amount being unpaid, including arrears the water consumption may be restricted or disconnected.
- 5.3 Further it was argued that the disconnection was not unlawful as the Respondent acted within its Policy requirements.
- 5.4 It was also stated that the Applicant is in arrears of over R4 Million and makes payments of R50 000 per month which is insufficient to settle the debt.

5.5 Lastly it was argued that the Costs on an Attorney and client scale is a punitive one and should not be awarded as the Municipality was acting within its mandate. The Application ought to be dismissed, alternatively, the Applicant should approach the Municipality for a suitable payment arrangement."

6.

Applicable Law

6.1 Section 34 of the Constitution of the Republic of South Africa Act 108 of 1996 states:-

"everyone has a right to have any dispute that can be resolved by the application of Law decided in a fair public hearing before a court or where appropriate, another independent and impartial Tribunal or Forum."

6.2 Section 30 of the Magistrate's court Act 32 of 1944 states:-

"subject to the limits of jurisdiction prescribed by this Act, the Court may grant against persons and things orders for attachments, interdicts and mandament van spolie."

7.

I find that this Court has the necessary Jurisdiction to hear the matter as it is a *mandament van spolie* application as mentioned in section 30 quoted above.

8.

As quoted by the Applicant's legal representative, in the case of Leon Joseph v City of Johannesburg, 2009 the learned Judge Skweyiya stated:-

"however as is evident from what has been said above, persons in the position of the Applicants, who are not customers for purposes of the credit control by-laws, are entitled to procedural fairness where their rights are materially and adversely affected by the termination of a Municipal service. By-Law 15(3) must accordingly be read with by-law 15(4)(d) and in light of PAJA, to require that the pre-termination notice must be sent to all persons whose rights may be materially and adversely affected by the termination of Municipal service. Practically this reading protects the procedural fairness rights of affected persons, without obstructing the City's credit control and debt collection policies."

9.

Section 195 of the Constitution, 1996 states:-

- (1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
 - (a) A high standard of professional ethics must be promoted and maintained.
 - (b) Efficient, economic and effective use of resources must be promoted.
 - (c) Public administration must be development oriented.
 - (d) Services must be provided impartially, fairly, equitably and without bias.
 - (e) People's needs must be responded to, and the public must be encouraged to participate in Policy making.
 - (f) Public administration must be accountable.
 - (g) Transparency must be fastened by providing the public with timely, accessible and accurate information.
 - (h) Good human resource management and career development practices, to maximize human potential, must be cultivated.

- (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation."

10.

APPLICATION OF THE LAW

- 10.1 It would appear from the Respondent's opposition of the Application that the main point of contention and or opposition of the Application is that the Respondent acted within its Policy on credit control in disconnecting the water services to the Applicant.
- 10.2 There does not appear to be any submission or proof of the relevant notice of disconnection being served on the Applicant.
- 7.3 The Respondent merely seeks to rely on the invoice issued to the Applicant in which it is stated that should the balance owing for water include an amount that is unpaid the Municipality may restrict or disconnect water supply without any further notice.
- 7.4 The test in the Constitutional Court Case of Leon Joseph, 2009 relied on by the Applicant is to the effect that atleast 14 days notice of the intended disconnection should be served on the party that will be affected by the disconnection. Notice in this regard is in the form of a letter or written notice specifically informing and or giving the recipient notification of the intended disconnection.
- 7.5 The by-law authorizing the Municipality not to give notification of the intended disconnection was challenged in the Joseph case and it was found to be un-Constitutional.

- 7.6 It therefore follows, as submitted by the Applicant's legal representative that since the Joseph case was decided in the Constitutional court it is binding on all Municipalities, including the Respondent thus it ought to follow the directives set out in the said case.
- 7.7 It would appear on the reading of Respondent's papers that this was not done and absence an explanation as to why notice was not given can only lead one to the conclusion that the Representatives of the Respondent were not aware of the Joseph decision and principles set out therein. This is supported by the Respondent's reliance on provisions of a by-law which is similar to the one relied on in the Joseph case and which was declared un-Constitutional.

8.

Finding

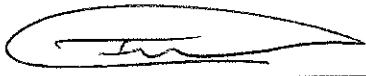
I am satisfied that the Applicant has made out a case, as such I find that the Applicant's rights were indeed affected in a manner that is not procedurally fair.

I am not satisfied that the invoice as relied on by the Respondent constitute sufficient notice in line with the Joseph case and principles set out therein.

Accordingly, the Respondent's act of disconnection of water supply by the removal of the bulk water meter in Applicant's property was unlawful.

In the end I confirm the Interim Order granted on 22 March 2022.

On the question of Costs it follows that the Costs follow the result and I award Costs to the Applicant as claimed on an Attorney and Client scale; such to include the costs of preparation, incidental court appearances and argument of the matter, as may be allowed by the Taxing Master.



IB BLOSE

ADDITIONAL MAGISTRATE: KWADUKUZA

