

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 36299/22

DATE: 15 July 2022

REPORTABLE: YES / NO

OF INTEREST TO OTHER JUDGES: YES / NO

REVISED

In the matter between:-

WILRUS TRADING CC

Applicant

V

**THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY
DEY STREET PROPERTIES (PTY) LTD**

First Respondent

Second Respondent

JUDGMENT

KOOVERJIE J

A APPLICATION

[1] In this urgent application the applicant seeks the reconnection of electrical services pending the finalisation of an action or a review application to be instituted within 30 days of the date of this order, alternatively, any other successful alternative

dispute resolution. The applicant's recourse in this urgent application is against the first respondent, City of Tshwane Metropolitan Municipality, for the restoration of the electricity supply to the second respondent's premises. More specifically, it requests a reconnection of electricity to its pre-paid meter.¹

[2] The applicant based its case on the Constitutional Court matter of Joseph² which, in essence, is authority for the principle that a pre-termination notice must be furnished to any person whose rights may be materially or adversely affected by such termination. The decision to terminate the electricity service constituted unfair administrative action.

B THE FACTS

[3] The main thrust of the applicant's case is that it was entitled to have been informed of the termination of the electricity by virtue of a pre-termination notice. The applicant's electricity supply was disconnected without prior notice having been given to the applicant. The applicant argued that it had not received the 14-day notice of intention to disconnect, nor was it afforded an opportunity to discuss or make payment and/or debate the relevant account with the first respondent. The electricity supply was disconnected on 6 July 2022. Under these circumstances, I proceeded to hear the matter on an urgent basis.

[4] It is not in dispute that the pre-termination notice was served on the second respondent. It appears that the second respondent, the landlord, did not convey such notice of termination to the applicant.

[5] The applicant rents a portion of the second respondent's property situated at 256 Dey Street, Nieu Muckleneuk, Pretoria. The applicant operates as a Shell fuel service station operating under the name of Middelstraat Motors.

¹ Page 4-20 of the record

² Leon Joseph & Five Others v The City of Johannesburg and Three Others, 2009 ZACC 30 at par 76

[6] By virtue of Section 21 of the City of Tshwane Metropolitan Municipality Standard Electricity Supply By-Laws, the municipality is “required to give notice to any person liable for payment before it disconnects such electricity supply. The applicant argued that the first respondent had failed to comply with Section 102(2) of the Municipal Systems Act 32 of 2000 by disconnecting without prior notice.³

[7] From the first respondent’s version, I was able to discern that the second respondent held a service agreement with the municipality with account number [....]. As far back as 2021, the second respondent was made aware that it will be migrated to an AMI pre-payment meter.

[8] On 26 January 2022 the second respondent was informed of the migration and that payment was required to ensure a positive balance on the account in order to avoid a disconnection. From March 2022 the second respondent was invoiced in terms of the new AMI smart meter. It appears that to date the second respondent made no payment. The notification regarding the intended disconnections were sent to the emails and cell phone numbers provided by the second respondent. More specifically, on 2 March 2022 and 5 July 2022 such emails and sms messages were sent to the second respondent informing that the balance was critically low and disconnection had commenced.

[9] The second respondent was further informed of the manner in which the electricity could be topped up through payments. It appears that a notice was issued on 7 February 2022 by email where the second respondent was informed that its electricity credit was depleted and a disconnection is in process.

[10] The first respondent, in arguing that a case has not been made by the applicant, persisted with the following contentions, namely that:

10.1 the notice furnished to the second respondent was sufficient;

³ Page 4-16 of the record

10.2 the applicant was not entitled to any pre-termination notice as no contractual relationship existed with the applicant. Consequently, no obligation existed on the first respondent to serve a pre-termination notice on the applicant. It only has a contractual relationship with the second respondent, that is Dey Street Properties (Pty) Ltd;

10.3 it was also pointed out that the applicant's recourse should have been against the second respondent as there is no *lis* with the first respondent;

10.4 it was argued that the Joseph matter should be distinguished on the facts. There City Power knew that it was providing electricity to tenants. In this instance, a notice was served on the owner through electronic means using details provided by the second respondent to the municipality;

10.5 furthermore, Joseph cannot be an authority for the proposition where notice is not given an interim interdict can be granted. Joseph is authority in respect of the PAJA requirement where it held that a pre-termination notice must be given to those affected by the administrative action.

[11] As the matter now stands, no urgent interim relief against the second respondent is sought. I am therefore confined to determine whether the first respondent's conduct was procedurally fair. The applicant's *locus standi* is thus dependent on whether it was entitled to have been informed of the disconnection via a pre-termination notice by the first respondent.

C JOSEPH APPROACH

[12] The applicant's case was premised on the approach in Joseph that –
the residents were entitled to be treated procedurally fair by the City in relation to the disconnection of the electricity supply to their building. For the purposes of this judgment, it is therefore necessary to extrapolate and highlight the court's reasoning in Joseph.

[13] The court analyzed whether a legal relationship existed between the applicants and City Power outside the bounds of contractual privity that entitled the applicant to procedural fairness before their electricity supply is terminated. In its finding it held that the right to receive the services is not purely contractual in nature.

[14] The Joseph matter is recognized for its substantive approach. The court criticized the formalistic approach of the high court where it went straight to the credit control by-laws and attempted to define whether the applicants fell within the definition of “customers”. It was pointed out that the high court failed to take into account the role that PAJA may play in respect of persons who have no contractual relationship with the service provider and whom it does not regard to be customers.⁴

[15] In its reasoning the court found that the City bore a constitutional and statutory obligation to provide basic municipal services, including electricity and the residents were entitled to receive these services. This in turn triggered an obligation to afford the residents some form of procedural fairness under PAJA before taking a decision to disconnect the electricity supply.⁵

[16] The court found that procedural fairness required the provision of pre-termination notice to the residents as well. Such notice was to have contained all relevant information, including the date and time of the proposed disconnection, the reason for the proposed disconnection, and the place at which the affected parties could challenge the basis of the proposed disconnection. In this way the residents would be afforded

⁴ Par 22 of the Joseph judgment

⁵ Par 47 of the Joseph judgment:

“When City Power supplied electricity to Ennerdale Mansions, it did so in fulfillment of the constitutional and statutory duties of local government to provide basic municipal services to all persons living in its jurisdiction. When the applicants received electricity, they did so by virtue of their corresponding public law right to receive this basic municipal service. In depriving them of a service which they were already receiving as a matter of right, City Power was obliged to afford them procedural fairness before taking a decision which would materially adversely affect that right.”

sufficient time to make any necessary enquiries, investigate, seek legal advice and organize themselves collectively if they so wished.

[17] The court went further on to state that a *nexus* was established with the tenants through the relationship between the landlord, Mr Nel, and the tenants, and, on the other hand, Mr Nel and City Power. It was explained that Mr Nel concluded a contract as a customer with City Power for the sole purpose of facilitating supply of electricity to tenants in his building. He was a conduit in supplying electricity to Ennerdale Mansions. City Power knew it was providing electricity to tenants living in the building. Hence it was a misnomer to reason that the contractual relationship between Nel and City Power was unrelated to the benefits that accrued to the applicant under this contract.

[18] At paragraph [25] the court stated that:

“There is a special cluster of relationship that exists between the municipality and citizens which is fundamentally cemented by the public responsibilities that the municipality bears in terms of the constitution and legislation in respect of persons living in its jurisdiction. At this level administrative law principles operate to govern these relations beyond the law of contract.”

[19] Hence the principle enunciated in Joseph was that a broader constitutional relationship existed between a public service provider and members of the local community which gave rise to rights that require the application of section 3 of PAJA.⁶ Electricity constitutes an important and common basic municipal services. It is one of those services that local government is required to provide. The obligations borne by local government to provide basic municipal services are sourced in both the Constitution and legislation.⁷

⁶ Par 33 of the Joseph judgment

⁷ Par 34 of the Joseph judgment

[20] Section 152 (1) of the Constitution creates an overarching set of constitutional obligations that are to be achieved in accordance with Section 152 (2)⁸. Under section 152 (3) a municipality is obliged to prioritise the basic needs of the community and to promote the social and economic development of the community.

[21] I once again emphasize that the reasoning was that when City Power supplied electricity to Ennerdale Mansions it did so in fulfillment of the constitutional and statutory duties of local government to provide basic municipal services to all persons living in its jurisdiction. When the applicants receive electricity, they did so by virtue of their corresponding public right to receive this basic municipal service. In depriving them of a service which they were already receiving as a matter of right, City Power was obliged to afford them procedural fairness before taking a decision which will materially and adversely affect that right.⁹

[22] The court was, however, not oblivious to the service provider's debt collection obligation. The importance of debt collection by local government was taken into consideration. It acknowledged that the outstanding debts are staggering. Municipalities bear an important constitutional obligation and statutory responsibility to take appropriate steps to ensure the efficient recovery of debt.¹⁰

[23] The court in fact emphasised that the real and acute need for proper debt collection by the City did not justify non-compliance with the procedural fairness obligations of PAJA.

⁸ Section 152 of the Constitution provides:

"The objects of local government are:

- (a) to provide a democratic and accountable government for local communities;*
- (b) to ensure the provision of services to communities in a sustainable manner;*
- (c) to promote social and economic development;*
- (d) to promote a safe and healthy environment; and*
- (e) to encourage involvement of communities in community organisations in the matters of local government.*

2. A municipality must strive within its financial and administrative capacity to achieve the objects set out in subsection (1)."

⁹ Par 47 of the Joseph judgment

¹⁰ Par 51 and 52 of the Joseph judgment

[24] Section 96 of the Municipal System Act makes provision for debt collection as one of the responsibilities of a municipality. It makes provision for the municipality to collect its revenue that is due and payable to it. Section 97 makes provision for credit control and debt collection policy. Section 98 stipulates that a municipality must adopt by-laws to give effect to the municipality's credit control and debt collection policy, its implementation and the enforcement thereof.

D PROCEDURAL FAIRNESS

[25] Of relevance to this matter, our courts, including the court in Joseph, emphasised that fairness needs to be determined in the light of the circumstances of a particular case. The overriding consideration will always be what does fairness demand in the circumstances of a particular case.¹¹

[26] The applicant submitted that the pre-termination notice would have given it an opportunity to make representations. At least a written notice posted in a prominent place at the premises of the second respondent would have sufficed and would constitute adequate notice for the purpose of Section 3(2)(b)(i) of PAJA.¹²

[27] Although I accept the principle as pronounced in Joseph that the first respondent bore a constitutional and statutory obligation to provide electricity, I am mindful that the issue of whether a pre-termination notice should have been served on the applicant, should be determined in the context of the provisions of PAJA and constitutes a separate enquiry.

[28] Section 33(1) of the Constitution gives everyone a right to administrative action that is procedurally fair. The court in Joseph went further in stating that just administrative action must cover the field of public administration in order to ensure good governance. Section 3(1) of PAJA provides that administrative action that

¹¹ Zondi v MEC for Traditional and Local Government Affairs and Others 2005 (3) SA 589 CC (Zondi)

¹² Par 60 of the Joseph judgment

materially and adversely affects the rights of any person must be procedurally fair. In Joseph the court appreciated that the values underlying procedural fairness require a contextual application of these rules and that a strict interpretation of S 3 of PAJA cannot be adopted.¹³

[29] The overriding consideration will always be what fairness demands in the circumstances of a particular case. The decision makers who are entrusted with the authority to make administrative decisions are required to do so in the manner consistent with PAJA.¹⁴ The right to a hearing is flexible in the sense that its context is dependent on the facts.

[30] In Joseph, there were two issues that underpinned the context of procedural fairness, namely, adequate notice and reasonable opportunity to make representation. Generally, adequate notice gives a party an opportunity to prepare intended action before the decision is taken, whereas reasonable opportunity to make representation concerns the period that will be given to allow the party to comment on the intended action.

[31] However, the context of procedural fairness depends on the context of the administrative action and varies from case to case. Such context is important in that the application of fairness is not static but needs to be tailored to the particular circumstances of each case.¹⁵ Fairness, therefore, cannot be reduced to a one-size-fits-all approach.¹⁶ One cannot lay down rigid rules concerning fairness.

[32] Section 3 requires the court's discretion in determining whether procedural fairness requirement was met. The court in Joseph approached this enquiry in a flexible manner.

¹³ Par 42 of the Joseph judgment

¹⁴ Zondi v MEC for Traditional and Local Government Affairs

¹⁵ Bynard – Administratio Publica 124/Vol 18 of 4 November 2010

¹⁶ Hoexter and Penfold, Administrative Law in South Africa, Third Edition, p 504

[33] It can therefore not be that in every case citizens (tenants or residents) should be given pre-termination notices. Procedural fairness obligations are variable and depend on the facts of each case. There are many variables, for instance, when electricity of a private home is disconnected, the service provider is not expected to or would have no reason to believe that anyone but the owner could be living on the property. In these circumstances it would be absurd to expect that the service provider must enquire if there are other individuals that are affected by the conduct of the service provider pointed out such variables.¹⁷ Our courts have therefore in their determination of fairness considered the practicality issue.¹⁸

[34] In these circumstances, the second respondent was given written notice of termination on various occasions. The applicant was oblivious to any such notice until the last hour. It is not disputed that the applicant duly paid its electricity in respect of the prepaid meter. One can only guess how the arrears came about. It was submitted that the prepaid meters were accessed under the second respondent's contract.

[35] In my view, under these particular circumstances, it could not have been expected of the first respondent in carrying out its administrative functions to still make enquiries if there are tenants on the property. The first respondent's by-laws made provision for notice to be given. It had duly complied with such obligation. It was certainly not practical.

[36] In Joseph, the City was well aware that residents were living in the building where it disconnected the electricity. In fact, in the Berea matter the court took cognisance of the fact that in Joseph the City was aware that there were residents other than the owner living on the property.¹⁹

¹⁷ The court in *Occupiers of Erven 39 of Berea and City of Johannesburg and Others* Case No 20/38456 Gauteng Local Division was alive to such variables (Berea matter)

¹⁸ *Reflect – All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 (6) SA 391 CC par 45

¹⁹ Par 22.5 of Berea matter

[37] Consequently, in my view, the applicant has failed to establish a *lis* between it and the first respondent. It therefore does not have *locus standi* in these proceedings against the first respondent. Its remedy lies with the second respondent where it has a contractual lease relationship. Consequently, it is not necessary to address the issue of whether a case has been made on interim relief.

[38] In the context of this matter, the first respondent had fairly complied with Section 3 of PAJA. In the premises, therefore, I make the following order:

1. the application is dismissed with costs.

H KOOVERJIE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the plaintiff: Adv DR du Toit
Instructed by: Rudman & Associates Inc

Counsel for the defendant: Adv S Maganyane
Instructed by: Mothle Jooma Sabdia Inc

Date heard: 12 July 2022
Date of Judgment: 15 July 2022