

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)**

CASE NO. EL 1246/2023

In the matter between:

LADY OCTAVIA NDILEKA NGCEKE

Applicant

and

**THE CHIEF FINANCIAL OFFICER,
BUFFALO CITY METROPOLITAN
MUNICIPALITY**

First Respondent

**THE MUNICIPALITY MANAGER,
BUFFALO CITY METROPOLITAN
MUNICIPALITY**

Second Respondent

JUDGMENT

HARTLE J

[1] In an application for judicial review¹ launched on 16 August 2023 the applicant seeks an order directing the respondents to comply with its enquiries and appeal procedure set forth in its credit control policy (“*the Policy*”) pursuant to her having lodged a dispute with it regarding the calculation of outstanding balances purportedly due by her on her consumer account. The charges in contention relate to billing for the consumption of water.²

[2] Although the formal dispute was lodged with the respondents (“*the Municipality*”) on 8 May 2023 it remains unresolved with the Municipality not even having acknowledged receipt thereof, let alone having administratively dealt with the substance of it.³

[3] The Municipality does not deny that it had been tardy in dealing with the applicant’s complaint but lays the blame for this squarely at her door and on the basis that she failed to follow certain processes prescribed in clause 4 (6)(h) of the Policy regarding what to do when a consumer of municipal services is beleaguered by a water leak that might be contributing to excessive water consumption charges.

¹ The applicant relies on the provisions of the Promotion of Administrative Justice Act, No. 3 of 2000 (“*PAJA*”) more specifically section 6 (3)(b) thereof, contending that whereas in terms of the Policy the Municipality was obliged to take a decision within 60 days, the respondents, in their capacities as administrator and despite that obligation, have failed to make a decision. The remedy sought in the peculiar circumstances is one in terms of section 8 (2) of PAJA enjoining them in the making of the required decision.

² The primary concern is the billing. The tangent is that the charges have attracted penalties and interest as well as a reconnection fee in circumstances where a disconnection should not have been effected in the first place.

³ In its answering affidavit it simply records that it is aware of the dispute and is investigating the matter.

[4] It moreover contends that the applicant failed to exhaust internal remedies prescribed by section 62 of the Local Government: Municipal Systems Act, No. 32 of 2000 (“*the Systems Act*”) before her resort to the present litigation. For the latter reason it contends that the applicant failed to comply with the provisions of section 7 (2) of the Promotion of Administrative Justice Act, No. 3 of 2000 (“*PAJA*”), rendering the application premature.

[5] Interestingly it offers no solution to the formal complaint but its counsel has sought to justify its opposition of the application on the basis “*that the Municipality is well within its rights to resist applications lodged pre-maturely and without exhausting internal remedies available thereby preventing opportunistic litigation and sav(ing) municipal resources which remain scarce.*”

Factual background:

[6] The applicant owns property in West Bank, East London.

[7] She is a consumer of municipal services such as water, refuse removal and sewerage in respect of the property for which she is billed on a month to month basis.

[8] In June 2021 she received a shocking monthly statement comprising of a hefty debit in the sum of R29 101.70 purportedly in respect of water consumed by her at the property over the period 10 October 2020 to 10 May 2021.

[9] She doubted that the amount could be correct or consistent with her consumption of water during the relevant period and decided that the Municipality must have made a mistake in its calculations. She was, for example, concerned that two different water meter numbers were reflected on the statement of account over the relevant period, the one reflecting a reading of 109 kiloliters and the other 159 kiloliters. In the three months preceding the June statement, an interim meter reading of 15 kiloliters per month had been invoiced.

[10] A reconnection fee of R461.00 had also been charged to her account on 25 December 2021 consequent to a disconnection which she also objected to on the basis that this should never have been effected in the first place. Penalties and arrear interest were also invoiced to the account.

[11] Upon the advice of the Municipality, she took the step of appointing a plumber, Mr. Mahe, in November 2021 to assess the property for any leakages. He found that there was no water leak in the house or within the applicant's erf but opined that one existed between the municipal water meter and the fencing of the applicant's property. Evidently the 20ml PVC pipe had cracked due to age. The broken pipe was replaced at the applicant's own cost even though the leakage, according to Mr. Mahe, had emanated from municipal property.

[12] At the time, she filed Mr. Mahe's report (and trade certificate) with the Municipality. It explains what he found and how he fixed the problem. (His letter addressed for the attention of the Municipal Manager, Water & Sanitation properly reflects both the erf number of the applicant's property as well as her

consumer account number that should have been sufficient to have registered with the Municipality that its own infrastructure had been found wanting in relation to the leak established by him and that this could have been the reason for the excessive water charges passed on to her.)⁴

[13] On 8 May 2023 the applicant's attorneys addressed a formal dispute to the Municipality on her behalf, marked for the attention of both the Chief Financial Officer and the Municipal Manager challenging her supposed liability for the excessive charges ("*the dispute*"). In it they exhort, primarily, that the calculation of the outstanding balance purportedly payable by her is not correct and must be re calculated. Also mentioned in the dispute framed is the fact that she had engaged the services of Mr. Mahe, but nowhere is it asserted that she is necessarily entitled to a rebate as a result thereof.

[14] The dispute was delivered by hand to the municipal manager's office on 8 May 2023.

[15] It is unnecessary to repeat the full contents thereof. It is common cause however that the Municipality has not replied to its substance or followed the applicant's attorney's suggestions regarding a common sense resolve of the matter. It is abundantly clear though that the applicant disputes liability for the excessive charges and requires that the account be recalculated. That is the applicant's primary concern.

⁴ The letter is undated but the applicant alleged (in her formal dispute) that she had filed it with the municipal manager "*at that period*". The respondents have not denied receipt.

[16] In response to the accusation by the Municipality that she had supposedly not complied with the provisions of section 4 (6) (h) of its Policy applicable at the time that dictates to a consumer what to do when water leaks are found on properties, the applicant in her replying affidavit clarified that not only did she declare the dispute formally in May 2023 as set out above, but that during 2002 she had brought the fact of the leak (vouched for by a plumber as required) to the Municipality's attention. She adverted to an affidavit made by her on 10 April 2022 in which she explains that she had called in the services of Mr. Mahe at the time and in which she emphasizes what the problem was concerning the leak, and how he had resolved it. She claims that she had provided the affidavit to the Municipality's officials at the time at their prompting.

[17] Nobody had suggested to her that the procedure adopted by her in this respect had been at all wrong (or not in accordance with the Policy) but in any event it occurs to me that this is a side issue. The applicant's complaint relates primarily to inaccurate billing and it is that concern that forms the subject matter of the dispute.

The Policy:

[18] The parties made available to this court the policies that applied at the time the applicant both reported the leak as well as when she lodged the formal dispute.

[19] I am less concerned at this juncture with the applicant's supposed non-compliance with the exacting steps that were required to be taken in respect of her discovery of a leak on the premises or whether she complied with the letter

of the applicable policy in this respect. This may become relevant at the point the Municipality decides in respect of the dispute and how to resolve it. In my opinion though she has substantively complied and it concerns me that the Municipality resorts to point taking in this respect as if this somehow absolves it from the primary problem that it is required to address. If it does not accept the fact that there was a leak, it must say so and invite the applicant to substantiate the information provided in this regard if it considers it to be lacking in any way.

[20] But first and foremost, the Municipality must “*respond*” to the applicant’s dispute which on its own merit complies with the provisions of section 7 (1) and (2) of the applicable Policy regarding how to address a grievance or query to the Chief Financial Officer concerning charges for municipal rates and services.

[21] I am satisfied in this respect that the applicant has adequately stated the basis of her dissatisfaction and the desired resolution of her dispute. Moreover the dispute relates to “*specific charges raised on the account*” which the Policy behoves her to highlight. This she has done and in my view there is more than enough information that has been placed before the respondents to cut right to the problem and to be constitutionally accountable to the applicant as per the guiding principles under their Policy.

[22] The Policy mandates the Municipality under section 7 (4) to respond to all inquiries from customers in writing “*within sixty days from the lodging of the enquiry.*”⁵

[23] By the respondents’ own admission, the Policy has the force of law.⁶

The applicant’s alleged failure to have exhausted internal remedies:

[24] It is so that section 62 of the Systems Act provides in terms for an internal appeal. The section reads as follows:

“62. Appeals.—(1) A person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or sub-delegated by a delegating authority to the political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision.

(2) The municipal manager must promptly submit the appeal to the appropriate appeal authority mentioned in subsection (4).

(3) The appeal authority must consider the appeal, and confirm, vary or revoke the decision, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.

(4) When the appeal is against a decision taken by—

(a) a staff member other than the municipal manager, the municipal manager is the appeal authority;

(b) the municipal manager, the executive committee or executive mayor is the appeal authority, or, if the municipality does not have an executive committee or executive mayor, the council of the municipality is the appeal authority; or

(c) a political structure or political office bearer, or a councillor—

⁵ The period expired on 8 July 2023.

⁶ *Ntaniso v Buffalo City Metropolitan Municipality* (EL869/2023; EL895/2023) [2023] ZACELLC 22 (1 August 2023); *Hlazi v Buffalo City Metropolitan Municipality* (EL2070/2023; EL2065/2023) [2023] ZACELLC 19 2023 (6) SA 464 (ECEL) (25 July 2023).

- (i) the municipal council is the appeal authority where the council comprises less than 15 councillors; or
 - (ii) a committee of councillors who were not involved in the decision and appointed by the municipal council for this purpose is the appeal authority where the council comprises more than 14 councillors.
- (5) An appeal authority must commence with an appeal within six weeks and decide the appeal within a reasonable period.
- (6) The provisions of this section do not detract from any appropriate appeal procedure provided for in any other applicable law.”

[25] Despite an acceptance by the applicant latterly that the responsibility for the effective implementation of the Policy has been delegated to the Chief Financial Officer, she still takes issue (and fairly so in my view) with the absence of the jurisdictional basis for such appeal, being that she is a person whose rights are affected by a decision *taken* by the delegated official. By the respondents’ own admission no decision has been taken as yet.

[26] “*Decision*” is not defined in the Systems Act and must be understood in its ordinary meaning. In other words, not as referenced or understood in PAJA and certainly not as suggested by the respondents by reading in the word “*deemed*” before it because its delegated official has thus far failed to make a decision. Further, since subsection (3) authorises the appeal authority to consider the appeal and to confirm, vary or revoke *the decision*, and adds the proviso that no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision, contextually this implies that the decision must be one actually taken and existing. A failure to take a decision concerning a billing enquiry can hardly vest any rights in a consumer.

[27] The Policy that the respondents rely upon also says nothing about a deemed decision and frankly does not provide for a situation where the tardiness

or neglect comes from the Municipality. This in effect means that a consumer invoking the dispute procedure is up a creek without a paddle as it were if the Chief Financial Officer does not respond to the enquiry within the more than ample sixty days provided for in section 7 (4) of the Policy. Admittedly the complaining consumer enjoys the benefit of some form of immunity during this waiting period, but this does not translate to a default expungement from liability when the period runs out.

[28] In the result, since no decision has been taken by the Chief Financial Officer *in casu* to date, there is no decision that falls to be considered on appeal by the relevant authority in terms of section 62 of the Systems Act.

[29] That means, in turn, that there was no obligation on the applicant to have exhausted an internal remedy before she turned to this court to intervene.

[30] The further suggestion by the respondents that the application was premature and that the applicant effectively obstructed the enquiry from being dealt with by her failure to have followed the procedure that applies (for a consumer's benefit) in the case of a reputed leak (in circumstances where the decision maker has failed to engage with the facts that she has put forward that might provide an answer for the excessive debits to her consumer account) is so unmeritorious as to be rejected out of hand and visited with an appropriate cost order. This supposed lack on her part was in any event only revealed after the issue of the present application. Indeed, this matter is so far removed from the category of opportunistic litigation contended for by the Municipality.

Conclusion:

[31] The applicant has clearly been traumatized by the excessive billing that has been in play for almost three years now. If a consumer cannot under the constraints of the Policy approach a municipal official at a counter and have his/her queries summarily dealt with or concerns allayed, they must at least be entitled to legitimately expect fair administrative procedures by accountable local government in accordance with the applicable policy in force at the time.

[32] The Municipality has abysmally failed to meet its constitutional and legal mandate to the applicant in this instance.

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

1. The first respondent's failure to comply with the enquiries and appeals procedures detailed in the Credit Control Policy of the Buffalo City Metropolitan Municipality ("*the Policy*"), more specifically in respect of the enquiry lodged by the applicant on 8 May 2023 with regards to the calculation and correctness of the municipal charges levied relative to her property described as Erf [...] (Account No. [...]) ("*the dispute*"), is declared unlawful.
2. The first respondent is directed, within 10 days of this Order, to respond appropriately to the applicant's dispute in writing.
3. The first and/or second respondents are directed to pay the costs of the application jointly and severally, the one paying the other to be absolved.

B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING : 16 May 2024

DATE OF JUDGMENT : 18 June 2024

Appearances:

For the applicant : Mr. B C Tarr instructed by Niewoudt – Du Plessis Inc., East London (ref. ND15/0001/MTHUNZI)

For the respondents: Mr. C Novukela instructed by Bangani Attorneys, East London ref. Mr Bangani).