

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



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

**CASE NO:  
EL1386/2023**

**In the matter between:**

**TONY MAGQAZANA Applicant**

**And**

**BUFFALO METROPOLITAN MUNICIPALITY 1<sup>st</sup> Respondent**

**THE MUNICIPAL MANAGER:  
BUFFALO CITY METROPOLITAN  
MUNICIPALITY 2<sup>nd</sup> Respondent**

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**JUDGMENT**

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**ZONO AJ:**

## **Introduction**

[1] The applicant brought this application on urgent basis for hearing on 01<sup>st</sup> September 2023. On 01<sup>st</sup> September 2023 both parties were represented and a Rule *Nisi* was issued in the following terms:

***“It is ordered by agreement that:***

1. *A Rule Nisi is hereby issued calling upon the respondents to show cause on 26<sup>th</sup> September 2023 at 14h00 or so soon thereafter as the matter may be heard why an order in the following terms should not be made final;*
  - 1.1 *The termination/ disconnection/ discontinuation/ blocking of service of the electricity supply to the property at No [...], Zone [...], Zwelitsha (the premises) registered under **electricity meter number [...]** and **account number: [...]** be and is hereby declared unlawful.*
  - 1.2 *The respondents are hereby directed to reconnect/ continue/unblock the electricity supply to the premises within four hours after service of the court order at the office of the second respondent.*
  - 1.3 *The respondents be and are hereby interdicted and restrained from charging the applicant a reconnection fee as a result of the unlawful termination/ disconnection/ blocking of service.*
  - 1.4 *The respondents are interdicted and restrained from unlawfully terminated (sic) disconnecting/ blocking the supply of the electricity to the premises.*
2. *Paragraph 1.1 to 1.4 shall operate as mandamus and/or interim relief pending the final determination of this matter.*
3. *The respondents have to pay costs of this application on a party and party scale.”*

[2] The matter was opposed by the respondents. All sets of affidavit were filed of record. Alternatively, the matter duly served before the opposed court. Applicant’s case is largely common cause.

[3] The applicant is the owner of the immovable property situated at No. [...], Zone [...] Zwelitsha, Eastern Cape (the premises). In the premises there are other families who stay in there.

- [4] On 22<sup>nd</sup> August 2023 the applicant learnt that the Municipality had disconnected the electricity supply to the premises. The applicant, through her attorneys attempted to resolve the matter by addressing a letter to the Municipality. The applicant maintained that she had not received a pre-termination letter in terms of Municipality's By-Laws.
- [5] In response to the applicant's request for reconnection the respondents, through their legal officer, penned an electronic mail to the applicant enclosing the termination notice and sheriff's return of service. The respondents stated that pre-termination notice was duly delivered by sheriff.
- [6] The pre-termination notice aforesaid reads as follows:

**"FOURTEEN DAY PRE –DISCONNECTION FINAL NOTICE**

**MUNICIPAL ACCOUNT NO: [...]**

*Municipal records show that you owe the Municipality a sum of R50 333.95 for rates and/or service charges as at 20/04/2023. This letter serves as a notice of intent to block/disconnect/restrict electricity and/or water to your property, due to non-payment of the aforesaid arrear account. The consequent penalty fee will be debited in your next statement of account that will be delivered to you. In terms of the applicable legislation you will be required to make written representation to your nearest Municipal Revenue Management Office, within period fourteen (14) days from the date of this letter, detailing a valid reason why your services should not be disconnected/ restricted or blocked.*

*If you fail to make such a valid written representation, or to settle the arrear amount in full, or to enter into a formal arrangement with the municipality before the said date, aforesaid services to your property will be disconnected/ restricted or blocked without any further notice. All formal arrangements must be made in person at your nearest Counter Services Department at any Municipal Revenue Management Office. Alternate debt collection action will be implemented on accounts that are not metered.*

Consumers whose total monthly gross household income is equal or less than **R4000.00** are encouraged to apply for an indigent subsidy at their nearest Municipal Revenue Management office.

Should you have a valid account query, whether existing or new, kindly contact your nearest office or the Call Centre (on 086 111 3017) to ensure that the service is protected from credit control action. Only the service under query will be protected and all other services must be kept up to date to avoid blocking or the disconnection of electricity. Any enquiries relating to the proposed suspension of services or to particulars of the account can be made at your nearest Municipal Revenue Management office, or the Call Centre on the number listed above. You must note that this fourteen (14) day pre-termination notice is valid until your outstanding debt as at 20/04/2023 is settled in full.

Kindly ignore this notice if you have settled your Municipal Account.”

[7] The sheriff’s return of service alluded to above also reads as follows:

“  
\_\_\_\_\_  
Return in accordance with the provisions of the Magistrate’s Court  
Act 32 of 1944, as amended

\_\_\_\_\_  
Return of service- Fourteen Day Pre-Disconnection Final Notice.

On this 09 day of May 3023 at 14:03 I properly served this Fourteen Day Pre-Disconnection Final Notice on Magqazana, NT by placing a copy in the Post Box of the RESIDENCE at [...] ZWELITSHA RESIDENTIAL ZWELITSHA [...] ZONE [...] which is kept secured and thus prevents alternative service. Rule 9(5)”,

[8] The applicant insisted on its version that she did not receive the requisite notice prior the termination of electricity supply, notwithstanding reference to the sheriff’s return of service. That version permeated through to the present application.

[9] The real issue for determination is whether the applicant was given the requisite notification before the disconnection of the electricity supply to her premises. The applicant contended that she did not receive the notice. It is not in dispute that the applicant was entitled to the requisite notice prior the termination of the electricity supply.

[10] The applicant relies on the provisions of item 6(1)(a)-(e) and 21(1)(b) of the Municipality's By-Laws published on **10<sup>th</sup> December 2009 in the Provincial Gazette No. 2245-Buffalo City Municipality-Electricity Supply- By- Laws**, for proposition that no compliance has been made by the respondents with those peremptory provisions. The respondents did not only contend that they complied with item 6 of the By-Laws, but also contended that they are entitled to disconnect, block and/ or restrict the supply of services to the consumer who is in arrears in terms of Clause 8 of the Credit Control Policy. The applicant was in arrears in respect of the rates and services.

[11] **Item 21(1)(b) of the Municipality's By-Laws** provides as follows:

***"21 Right to disconnect Supply***

(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-*

(vii) *the person liable to do so fail 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; or*

(viii) *any of the provisions of this By-Law and/ or Regulations are being contravened and the person responsible has failed to remedy the default after such notice has been given, and*

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

Respondents’ right to disconnect the electricity supply is subject to Municipality’s compliance with the notice requirement prescribed in item 21(1)(b) of the By-Laws.

[12] It is not in dispute, as indicated above, that the consumer in the position of the applicant is entitled to at least 14 (fourteen) days written notice to him/her. Service of the written notice adumbrated in item 21(1)(b) is provided for in **item 6 (1)(a)-(e) of the same By-Laws**. The Municipality is charged with the duty to serve the consumer with a written 14 (fourteen) days’ notice before resorting to the termination or disconnection or electricity supply to the premises.

[13] **Item 6(1)** provides as follows:

*“6 Service of notice*

- (1) *Any notice or other document that is served on any person in terms of this by-law is regarded as having been served –*
- (a) *when it has been delivered to that person personally;*
  - (b) *when it has been left at that person's place of residence or business in the Republic with a person apparently over the age of sixteen years;*
  - (c) *when 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 from the postal service is obtained;*
  - (d) *if that person's address in the Republic is unknown, when it has been served on that person's agent or representative in the Republic in the manner provided by paragraphs (a), (b) or (c); or*
  - (e) *if that person's address and agent or representative in the Republic is unknown, when it has been posted in a conspicuous place on the property or premises, if any, to which it relates.”*

The Municipality is charged with responsibility to serve the consumer with 14 (fourteen) days' notice using one of the above-mentioned methods.

[14] The purpose of the service in terms of the provisions of **item 6 (1)(a) - (e) of the Municipality's By-Laws** is to honour an age-old principle of *Audi alteram partem Rule*. At the heart of these proceedings is compliance with the provisions of item 6(1)(a)-(e) of the Municipality By-Laws. Organ of state is constrained to adhere to peremptory provisions of the statute, especially if there is no power of deviation is provided for.

[15] The respondents are organs of state especially the Municipality. **Section 239 of the Constitution** defines "*organ of state*" to means-

- “(a) any department of state or administration in the national, provincial or local sphere of government; or
- (b) any other functionary or institution-
  - (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
  - (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.”

[16] The Municipality is in the local sphere of government exercising power in terms of **Section 156 of the Constitution**. The second respondent exercises public function as the Head of Administration and accounting officer of the Municipality.<sup>1</sup>

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<sup>1</sup> Section 55(1) and (2) of Local Government: Municipal Systems Act No 32 of 2000.

[17] It is fundamental to our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.<sup>2</sup> The Constitutional Court held that<sup>3</sup> “1. *State functionaries, no matter how well–intentioned, may only do what the law empowers them to do.*”

[18] It is discernible from these authorities that public or state functionaries must confine themselves within the limits of the empowering provisions when performing public functions or exercising public power. The primary function of the court is to ensure that those who are charged with the duty to perform public functions in terms of the legislation act within the parameters of the law.<sup>4</sup> Courts have a duty to ensure that the limits to the exercise of public powers are not transgressed. An official is not entitled to arrogate to himself powers which have not been conferred by law.<sup>5</sup>

[19] Judicial review is concerned with determining whether the impugned acts were made within the ambit of the empowering legislation, and in accordance with the precepts of such law, in particular, and the constitution, in general. The merits are only relevant to the extent that

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<sup>2</sup> *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) Para 58; Cora Hoexter: *Administrative Law in South Africa*, 2<sup>nd</sup> Edition, Page 29.

<sup>3</sup> *Head of Department, Department of Education, Free State Province v Welkom High School and another, Free State Province v Harmony High School and another* 2014 (2) SA 228 (CC) Para 1

<sup>4</sup> Baxter: *Administrative Law* Page 305; *Mwelase v The Minister of Social Development and Others* (CA 74/16) [2018] ZAECMHC 16 (22 March 2018) Para 25.

<sup>5</sup> *Minister of Social Development and another v Mpayipheli* (CA135/16) [2018] ZAECMHC 31 (26 June 2018) Para 18.



they establish procedural failure. It is immaterial whether or not the decision was wrong<sup>6</sup>.

[20] In paragraph 3.1 of the notice of motion the applicant seeks an order in terms of which the termination of electricity supply to the premises by the respondents should be declared unlawful. This relief is part of the Rule *Nisi* granted by this court on 01<sup>st</sup> September 2023. The declaratory order, being as flexible as it is, can be used to obtain much the same relief as would be vouchsafed by an interdict or a mandamus. Where it is not necessary that a record of proceedings be put before the court a declaratory order could serve as a review. A court exercising its discretion whether to grant a declaratory order should accordingly in an appropriate case, weigh the same considerations of justice or convenience as it might do in the case of an interdict or review.<sup>7</sup>

[21] At the hearing of this matter, the dispute between the parties narrowed itself down to whether the respondents served the pre-termination notice to the applicant in terms of the methods set out in item 6(1)(a)-(e) of the Municipality's By-Laws. If the Municipality did serve the notice in terms of the empowering provisions, the application must fail. If it did not serve it in terms of the methods prescribed in and by item 6(1)(a)-(e), the application must succeed. Both parties argued their rivalling contentions around this point. The applicant contended that, for the respondents to have complied with the provisions of item

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<sup>6</sup> *MEC for Environmental Affairs & Developmental Planning v Clarison's* CC 2013 (6) SA 235 (SCA) Para 18.

<sup>7</sup> *Naptosa and Others v Minister of Education, Western Cape Government and others* 2001(1) SA 112 (C).

6(1)(a)-(e) of the By-Laws, they must have strictly complied with those provisions, as she submits that the provisions are of imperative nature. They require exact compliance. On the other hand, the respondents placed heavy reliance on the sheriff's return of service which effectively shows that the notice was served by placing a copy thereof in the post-box of the premises which are kept secured. In argument the respondents sought to rely on specific provisions of item 6(1) (e) of the same Municipal By-Laws. Reliance on these provisions is not foreshadowed in the papers.

[22] A litigant who relies on a particular section of a statute is generally expected to either state the number of the section and the statute, or formulate his case sufficiently clear to indicate what he is relying on so as to enable his opponent and the court to know what case the opponent has to meet.<sup>8</sup> However, it is settled Law that where a party in its defence relies on a statute, specific mention of the section is not necessary; all that is needed is that sufficient facts are pleaded. It is sufficient if the facts are pleaded from which the conclusion can be drawn that the provisions of the statute apply.<sup>9</sup>

[23] The paragraphs in the answering affidavit relating to service of the pre-termination notice read as follows:

“15. During March 2023, the Municipality implemented a new distribution method and appointed the sheriff to deliver the pretermination notices to consumers.

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<sup>8</sup> *Yannakou v Appollo Club* 1974(1) SA 614 (A) at 623 G.

<sup>9</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) Para 27.

16. *This change was necessitated by dysfunctionality of the South African post office that resulted in the delay and non-delivery of pretermination notices to the consumers.*
17. *I am advised and submit that the delivery of pretermination notice by the sheriff is compliant both (sic) the National Credit Act.*
22. *save to deny that the Municipality has not complied with section 6 of the By-Law, the respondents admit the rest of the allegations of these paragraphs. The pretermination notice was delivered to the applicant's premises in compliances with the By-Laws and the rules of the Magistrates Court.*
23. *I deny the blockage of the electricity supply to the premises of the applicant was malicious and lacked legal justification. The first respondent delivered a pretermination notice to the account holder through the sheriff of the court of its intention to disconnect electricity giving the account holder 14 (fourteen) days to make representation or the to settle the arrear amount in line with credit control policy referred to in paragraph 11 above.*
25. *I deny that the applicant never received notice and she was unlawfully deprived of basic services that go with electricity. I reiterate that the pretermination notice was delivered to the applicant's address. I have no knowledge of frivolous allegations referred to in paragraph 23.”*

[24] Firstly, the alleged delivery of the notice sought to comply with National Credit Act. No mention is made of the specific provision of the National Credit Act relied upon. I am unable to decipher from the facts which provisions of the National Credit Act were intended to be satisfied by the delivery.

[25] In denying applicant's allegations about respondents' failure to comply with the provisions of item 6 of the By-Laws, the respondents made a bald allegation or bare denial in paragraph 22 of their answering affidavit that “*save to deny that the Municipality had not*

*complied with section 6 of the By-Laws.”* They further state that the pre-termination notice was delivered in compliance with the By-Laws and the Rules of the Magistrate’s Court. No specific provision was mentioned nor the facts set out in the answering affidavit from which a conclusion could be drawn that the delivery was in terms of a particular provision of the By-Laws.

[26] The return of service reveals that the delivery was in terms of **Rule 9(5) of the Magistrates Court Rules. Rule 9(5) of the Magistrates Court Rules** reads as follows:

*“5. Where the person to be served keeps his or her residence or place of business closed and thus prevents the sheriff from serving the process, it shall be sufficient service to affix a copy thereof to the outer or principal door or security gate of such residence or place of business or to place such copy in the post box at such residence or place of business”.*

These are other provisions the sheriff, when delivering the alleged notice, she sought to invoke. There is no equivalent provision in the Municipality’s By-Law.

[27] In ***Liebenberg NO v Bergriver Municipality and Others***<sup>10</sup> the Constitutional Court was emphatic concerning the invocation and reliance on statute that was inapposite as follows:

*“93 In our law, administrative functions performed in terms of incorrect provisions are invalid, even if the functionary is empowered to perform the function concerned by another provision. In accordance with this principle, where a functionary deliberately chooses a provision in terms of which it performs an administrative function but it turns out that the chosen provision does not provide authority, the function cannot be saved from invalidity by the existence of authority in a different provision.”*<sup>11</sup>

<sup>10</sup> 2013 (5) SA 246 (CC) Para 93.

<sup>11</sup> ***Nxumalo v President of Republic of South Africa*** 2014 (12) BCLR 1457 (CC) Para 14; ***Zuma v DA; Acting National Director of Public Prosecutions and another v DA and another*** 2018 (1) SA 200 SCA Para 58.

[28] Item 6 (1)(a)-(e) of the Municipality's By-Laws does not provide for the manner of service by placing a copy of the document in the post-box. Only Rule 9(5) of the Magistrate's Court Rules does. Equally Rule 9(5) does not provide for methods of service prescribed for by item 6(1)(a)(e). There was no service of the notice in terms of item 6(1)(a)-(e) of the Municipality's By-Laws. Even if it can be found that there was service of the notice that notice would still be invalid as it did not comply with the imperative provisions of the empowering provisions.

[29] A maxim of interpretation *Unius est exclusio alterius* applies to the facts of this case, especially when regard is had to the provisions of item 6(1)(a)-(e) of the Municipality's By-Laws. The maxim means that the "*express mention of one thing is the exclusion of the other.*" Express mention of the methods of service in item 6(1)(a)-(e) is an exclusion of any other method that is not specifically mentioned in the item. Service by placing a copy of the document in the post-box is specifically excluded in item 6(1)(a)-(e) of the Municipality's By-Laws. That method of service was not intended by the council when it was making its By-Laws.

[30] A sudden and dramatic change of stance by the respondents occurred during argument. The respondents, during their argument sought refuge on the provisions of item 6(1) (e). I repeat to cite the text of the provisions as follows:

- “1. Any notice or other document that is served on any person in terms of this By-Law is regarded as having been served-
- (e) If that person’s address and agent or representative in the Republic is unknown, when it has been posted in a conspicuous place in the property or premises, if any, to which it relates.”

[31] There are jurisdictional facts that must first be satisfied before one can appositely invoke the provisions of item 6(1) (e) of the By-Law. Jurisdictional facts refer broadly to preconditions or conditions precedent that must exist before the exercise of powers, and the procedures to be followed when exercising that power.<sup>12</sup> In the absence of such preconditions or jurisdictional facts it is said, the administrative authority effectively has no power at all.<sup>13</sup>The respondents dismally failed to show that the jurisdictional facts of these provisions were satisfied. As it will be shown herein below, the Municipality had no power to serve the notice otherwise than in terms of items 6(1)(a)-(e) of By-Laws.

[32] The first jurisdictional fact for invocation of these provisions is that “the person’s address and agent or representative in the Republic is unknown .”

At all material times the respondents knew applicant’s address. I find solace for this proposition in paragraph 25 of the respondents’ answering affidavit, which reads as follows:

“25. I deny that the applicant never received notice and that she was unlawfully deprived of basic services that go with electricity. I reiterate that the pretermination notice was delivered to the applicant’s address...”

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<sup>12</sup> *MEC for Health Eastern Cape and another v Kirland Investment (Pty) Ltd* 2014 (3) SA 481 (CC) Pára 98; *Kimberly Junior School and another v Head of Department of the Northern Cape Education Department and others* 2010(1) SA 2017 (SCA) Para 11.

<sup>13</sup> *Paola v Jeeva NO* 2004 (1) SA 396 SCA Para 11, 14 and 16.

[33] Equally paragraph 22 reads as follows:

*“22 save to deny that the municipality has not complied with section 6 of the By-Laws, the respondents admit the rest of the allegations in these paragraphs. The pretermination notice was delivered to the applicant’s premises in compliance with the By-Laws and the Rules of the Magistrates Court.”*

[34] Paragraph 10 of answering affidavit continues to identify premises or address at which the notice was served in the following words:

*“10. The Rule Nisi must be discharged as the account holder failed to comply with the notice delivered to the account holder address, No 2606, Zone 10, Zwelitsha by the sheriff of the court on 09<sup>th</sup> May 2023....”*

The notice specifically sets out the applicant’s address as the address at which the notice had to be served. At no stage was the applicant’s address not known by the respondents.

[35] When the respondents instructed the sheriff, they specifically gave the sheriff applicant’s address. That was a clear demonstration that applicant’s address was clearly known to the respondents. The respondents argued from the bar that as at the time when the sheriff found the applicant not in the premises, he did not know the applicant’s address. As a corollary the respondents did not know the address. This submission is without merit and is untenable. I agree with applicant’s submissions that a person’s temporal absence from his place cannot mean that his address is unknown.

[36] It is not disputed in the papers that applicant’s premises are also occupied by the tenants. That allegation is taken to have been

admitted.<sup>14</sup> It is not stated why the tenants were not asked about applicant's whereabouts. The argument about applicant's unknown address is farfetched and untenable and is accordingly rejected.

[37] There is little wonder about the contents of sheriff's return of service. There it is stated that the premises were "*kept secured and thus prevents alternative service.*" That report cannot sit comfortably with the admitted fact that there are tenants who live in the premises as families with minor children. Even if it were to be accepted that the service was in terms of the empowering provision, it would still be disbelieved that the premises that reside families with minor children would be in that state to render premises totally inaccessible.

[38] Municipality had all the means to serve in terms of and comply with the provisions of item 6(1)(a)-(e) of the By-Laws. But it did not. Respondents' papers are devoid of or they offer unconvincing reasons for such failure. In a nutshell, I find that respondents opportunistic reliance on the provisions of item 6(1) (e) of the By-Laws is misplaced.

[39] The respondents further changed the stance and sought refuge on the principle of substantial compliance. They requested me to find that they substantially complied. That request cannot be upheld in the light of the difficulties raised in paragraph 34 and 35 above.

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<sup>14</sup> *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) at 375F-376B.



[40] It is common cause that the applicant has a right to 14 (fourteen) days written pre-termination notice. The notice is for the following reasons and it also gives rise to the following further rights:

40.1 For the applicant or consumer to make written representation to her nearest Municipal Revenue Management office.

40.2 For the applicant or consumer to settle the arrear amount in full; and

40.3 For the applicant to enter into a formal arrangement with the Municipality before the expiry of 14 days of receipt of notice. Neither of these rights were exercised by the applicant. I find applicant's denial of the requisite notice to be unlawful and prejudicial to the applicant.<sup>15</sup> As the applicant was undoubtedly denied her rights, as a corollary she was unable to exercise them.

[41] The fundamental maxim *Ubi jus, ibi remedium* (where there is a right there is a remedy) applies to the facts of this case. In elucidating this principle of interpretation the Constitutional Court<sup>16</sup> made reference to some authorities as follows:

*"51....In Harris, Centlivres CJ, with reference to English authorities, stated:*

*"There can to my mind be no doubt that the authors of the Constitution intended that those rights [that is, the rights entrenched in the Constitution] should be enforceable by the courts of law. They could never have intended to confer a right without a remedy. The remedy is, indeed, part*

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<sup>15</sup> Item 21(1) (b) of the Municipality's By-Laws.

<sup>16</sup> *Masemola v Special Pensions Appeal Board and another* 2020(2) SA 1 (CC) Para 51.

*and parcel of the right. Ubi jus, ibi remedium. If authority is needed for what I have said, I refer to the following cases. In Ashby v White Holt CJ said:*

*‘If a plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy, if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.’*

[42] The applicant, by these proceedings seeks to enforce her rights entrenched in item 21(1) (b) of the Municipality’s By-Laws. Right to be given notice. She seeks to vindicate and maintain those rights for they have been violated. It is without a doubt that respondents’ conduct of deviating from the statutorily enshrined methods of delivering the notice, violated applicant’s rights.

[43] Where a statute confers rights, privilege or immunity, such provisions are peremptory<sup>17</sup>. Similarly, where a statute provides time limits and restrictions such provisions are peremptory.<sup>18</sup> Non-compliance with the peremptory provisions is fatal and result in nullity.<sup>19</sup>Service of pre-termination notice otherwise than in terms of item 6(1) (a)-(e) is a nullity or is null and void, ineffectual and must be taken to not have been done.

[44] The Constitutional Court<sup>20</sup> emphasized the responsibility bestowed upon the organs of state as follows:

*“82... On the contrary, there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a*

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<sup>17</sup> LAWSA, 2<sup>ND</sup> Edition, Part 25, Page 400 Para 366.

<sup>18</sup> G.M Cockram: Interpretation of Statute Page 161.

<sup>19</sup> LAWSA, (Supra) Page 399, Para 366.

<sup>20</sup> **MEC for Health Eastern Cape and another v Kirland Investments (Pty)Ltd** 2014 (3) SA 481 Para 82.

*procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly."*

[45] In this case we are dealing with a Municipality, who did not only fail to comply with its own By-laws, but who is also resisting enforcement of its By-Laws. The Municipality is placing itself above the Law. There is no reason why the Municipality cannot be bound by its own By-Laws. There is no case made out as to why the By-Laws referred to above cannot be enforced.

[46] A Rule *Nisi* was granted by consent in the form or shape referred to in paragraph 1 above. It is plain from the order of Beshe J that the court order of 01<sup>st</sup> September 2023 was granted by agreement. It is implied in the consent to the order that the required element of unlawful termination of electricity supply to applicant's premises was conceded. That order is final in effect.

[47] The full court of this Division in Mthatha had an occasion of dealing with a similar matter<sup>21</sup> where a spoliation order was taken by consent. It reads as follows:

*"18. It is plain from the order of Brooks J of 30 September 2016 that it was granted by consent between the parties. It was argued before us that the lawfulness of the impoundment of the vehicle stood over to be dealt with on the return day. However, if this were so the order of Brooks J should not have been agreed to. It was implied in the consent to the spoliation order that the required element of unlawfulness was conceded.*

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<sup>21</sup> **King Sabata Dalindyebo Local Municipality v Noah** (CA&R19/2018) [2018] ZAECMHC 46 (21 August 2018) Para 18-19.

19. *In terms of paragraph 1 of the order of Brooks J the appellant was ordered to return the respondent's motor vehicle forthwith. This order was final in effect and is not subject to the appeal before us."*

This dictum applies to the facts of this case in equal force. The order restoring electricity supply to applicant's premises was granted by consent.

[48] The judgment of the Full Court, Mthatha is binding on this court. The doctrine of precedent obliges courts of equivalent status and those subordinate in the hierarchy to follow only the binding basis of a previous decision.<sup>22</sup>

**[49] In the result I make the following order:**

**49.1 The Rule *Nisi* granted by this court on 01<sup>st</sup> September 2023 is hereby confirmed in the following terms:**

- a) The termination/disconnection/discontinuation/blocking of service of the electricity supply to the property situated at No.[...]. Zone [...], Zwelitsha ("the premises"), registered under electricity meter number: [...] and account number: [...] is hereby declared unlawful;**
- b) The Respondents are hereby directed to reconnect/continue/unblock the electricity supply to the premises within four hours after service of the court order at the offices of the second respondent.**

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<sup>22</sup> **True Motives 84 (Pty) Ltd v Mahdi 2009 (4) SA 153 SCA Para 100-101; Makhanya v The University of Zululand 2010 (1) SA 62 SCA Para 6-7**

- c) **The respondents are hereby interdicted and restrained from charging the applicant a reconnection fee as a result of the unlawful termination/ disconnection/ discontinuation/blocking of service.**
- d) **The respondents are interdicted and restrained from unlawfully terminating/ disconnecting/ blocking the supply of electricity to the premises.**
- e) **The respondents are ordered to pay costs of this application on a party and party scale.**

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**ZONO AJ**

**ACTING JUDGE OF THE HIGH COURT**

**APPEARANCES:**

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**Date heard : 22<sup>nd</sup> February 2024**

**Date Delivered: : 05<sup>th</sup> March 2024**