CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 41/12
[2013] ZACC 11

In the matter between:

OLGA RADEMAN	Applicant
and	
MOQHAKA LOCAL MUNICIPALITY	First Respondent
M A MOKGOSI	Second Respondent
M V DUMA	Third Respondent
JIMMY MASWANGAYI	Fourth Respondent
RUDOLPH MEYER	Fifth Respondent

Heard on : 5 February 2013

Decided on : 26 April 2013

JUDGMENT

ZONDO J (Mogoeng CJ, Moseneke DCJ, Jafta J, Mhlantla AJ, Nkabinde J, Skweyiya J and Van der Westhuizen J concurring):

Introduction

[1] The applicant is Ms Olga Rademan, a resident of Kroonstad, a town that falls under the Moqhaka Local Municipality (Municipality) in the Free State. The first respondent is the Municipality. The second and further respondents are officials of the Municipality who have not participated in the proceedings in this Court.

[2] Ms Rademan has brought an application to this Court for leave to appeal against a judgment and order of the Supreme Court of Appeal[1] in terms of which that Court dismissed her appeal against a decision of the Free State High Court, Bloemfontein (High Court). Whereas Rule 19(2) of the Rules of this Court required Ms Rademan to bring her application within 15 court days from the date of the delivery of the judgment sought to be appealed against, she brought her application about five and a half months after the expiry of the prescribed period. She has brought an application for the condonation of her failure in this regard. That condonation application is based on an affidavit that has been deposed to by her attorney in these proceedings.

[3] The explanation given by the attorney for the delay leaves much to be desired. However, there are, in my view, reasonable prospects of success in that the matter is reasonably arguable and, more importantly, not only has the Municipality not opposed

[1] *Rademan v Moqhaka Municipality and Others* [2011] ZASCA 244; 2012 (2) SA 387 (SCA).

her condonation application but it in effect consents to the granting of condonation. In this regard the Municipality has urged us to deal with the matter on the merits because it says that the matter raises issues of great importance and interest to local government authorities throughout the country on which they need certainty that can only come with a pronouncement of this Court on those issues. In the light of this, I am of the opinion that, even though the period of delay was excessive and the explanation less than satisfactory, the other factors mentioned by the Municipality, the fact that the Municipality effectively consents to the granting of condonation and that there are reasonable prospects of success persuade me that it is in the interests of justice that condonation be granted.

Background

[4] Ms Rademan decided not to pay her rates in respect of her property in Kroonstad because she was unhappy about what she regarded as poor or inefficient service delivery by the Municipality. She was not the only one who did this. The Moqhaka Ratepayers and Residents' Association (Association) of which Ms Rademan is a member had decided that this was what residents should do in the light of the alleged poor or inefficient service delivery. Other members of the Association did the same. Ms Rademan, nevertheless, continued to pay for her electricity and other services provided by the Municipality.

[5] The Municipality gave Ms Rademan notice that it would cut off electricity supply to her property in the light of her failure to pay part of her account with the Municipality.

This did not make Ms Rademan change her mind about not paying the whole amount she owed the Municipality. The Municipality then disconnected the supply of electricity to Ms Rademan's property.

Magistrate's Court

[6] Ms Rademan brought an application in the Magistrate's Court, Kroonstad (Magistrate's Court), for an order for the restoration of her electricity supply. Although in her founding affidavit Ms Rademan gave poor or inefficient service delivery by the Municipality as her reason for not paying her rates, that reason was not the ground upon which she contended that the Municipality had no power to disconnect her electricity supply. Ms Rademan advanced three grounds upon which she contended that the Municipality had no power to disconnect her electricity supply. The one was the absence of an order of court. In this regard her case seems to have been one for a spoliation order. Another one was that her electricity account was not in arrears. Yet another one was the absence of any one of the three conditions prescribed in section 21(5)(a), (b) and (c) of the Electricity Regulation Act[2] (ERA). She said that none of the three conditions was present in her case. The Municipality opposed the application. The Court found in favour of Ms Rademan and made an order for the restoration of the supply of electricity to her property.

[2] 4 of 2006. Section 21(5) is quoted in [35] below.

High Court

[7] On appeal the High Court concluded that the Municipality was not required to obtain an order of court before it could cut off a resident's electricity supply where the resident owed the Municipality payment. It also took the view that the fact that Ms Rademan was not in arrears in respect of her electricity account did not preclude the Municipality from cutting off her electricity supply since she owed money to the Municipality. The High Court upheld the Municipality's appeal, set aside the order of the Magistrate's Court and replaced it with an order dismissing Ms Rademan's application.

Supreme Court of Appeal

[8] Ms Rademan appealed to the Supreme Court of Appeal against the judgment and order of the High Court. A reading of the judgment of the Supreme Court of Appeal suggests that two contentions were advanced on behalf of Ms Rademan. The first was that the Municipality's failure to obtain an order of court authorising the termination of the electricity supply to Ms Rademan's property before it terminated the supply rendered the termination unlawful. The other was that the Municipality had no right or power to terminate the electricity supply since Ms Rademan's electricity account was not in arrears. According to counsel for Ms Rademan there was another contention that was addressed to the Supreme Court of Appeal with which the Court did not deal in its judgment. That contention was that the Municipality's power to terminate a resident's electricity supply was limited to the grounds listed in section 21(5) of the ERA and, unless the Municipality could show that one of the grounds listed in that subsection

exists, a resident's electricity supply cannot be terminated. It is true that this contention was not addressed in the judgment of the Supreme Court of Appeal.

[9] The Supreme Court of Appeal rejected both contentions. As to the first contention, the Court held that there was nothing in the Local Government: Municipal Systems Act[3] (Systems Act) to justify the contention that the Municipality needed an order of court before it could cut off a resident's electricity supply. With regard to the second contention, the Court referred to the provisions of section 102 of the Systems Act[4] which confer power upon a municipality to consolidate accounts and concluded that a municipality had power to consolidate all the various accounts of a resident into one account in which event the resident is required to pay the whole account. The Supreme Court of Appeal said that, in such a case, if the resident did not pay the whole amount due, the Municipality had power to cut off the electricity supply to the resident's property. It dismissed the appeal with costs.

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[3] 32 of 2000.

[4] Section 102 of the Systems Act reads as follows:

> "(1) A municipality may—
>
> (a) consolidate any separate accounts of persons liable for payments to the municipality;
>
> (b) credit a payment by such a person against any account of that person; and
>
> (c) implement any of the debt collection and credit control measures provided for in this Chapter in relation to any arrears on any of the accounts of such a person.
>
> (2) Subsection (1) does not apply where there is a dispute between the municipality and a person referred to in that subsection concerning any specific amount claimed by the municipality from that person.
>
> (3) A municipality must provide an owner of a property in its jurisdiction with copies of accounts sent to the occupier of the property for municipal services supplied to such a property if the owner requests such accounts in writing from the municipality concerned."

Constitutional matter

[10] The parties are agreed that this matter raises a constitutional issue. The provision of municipal services to communities in a sustainable manner is one of the objects of local government.[5] A local government is enjoined to strive, within its financial and administrative capacity, to achieve, among others, its object of ensuring the provision of services to its communities in a sustainable manner.[6] The Constitution confers upon a municipality "the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation as provided for in the Constitution."[7] The national and provincial governments must, by legislative and other measures, support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.[8] The Systems Act is a legislative measure intended to support and strengthen the capacity of municipalities to manage their own affairs, exercise their powers and perform their functions. There can be no doubt that this matter is a constitutional matter. Accordingly, this Court has jurisdiction.

[5] Section 152(1)(b) of the Constitution.

[6] Id section 152(2).

[7] Id section 151(3).

[8] Id section 154.

Interests of justice

[11] Both parties are agreed that it is in the interests of justice that this Court grants the applicants leave to appeal. They base this on the importance of the matter and the fact that it is in the public interest that this dispute be resolved by this Court. I agree and would grant leave to appeal.

The appeal in this Court

[12] Before us Ms Rademan's counsel advanced two grounds upon which he urged us to set aside the order of the Supreme Court of Appeal. The one was that, since Ms Rademan's electricity account was not in arrears, the Municipality had no power to cut her electricity supply off even though her rates account was in arrears. In other words the submission was that Ms Rademan's electricity account had to be in arrears first before the Municipality could acquire the power to cut her electricity supply off. The second was that, in any event, the Municipality's right or power to cut off Ms Rademan's electricity supply was circumscribed by section 21(5) of the ERA and it could only exercise that power if at least one of the conditions prescribed in that provision is met. Section 21(5) precludes a licensee (in this case the Municipality) from reducing or terminating the supply of electricity to a customer (Ms Rademan in this case) unless at least one of three conditions is met. The first is that the customer is insolvent. The second is that the customer has failed to honour, or refuses to enter into, an agreement for the supply of electricity. The third is that the customer has contravened the payment conditions of the licensee.

[13] It is common cause that the Municipality is a licensee as contemplated in section 21(5) and that Ms Rademan is a customer as contemplated in the same provision. No elaboration is needed in respect of the first condition. With regard to the second condition, the reference to an agreement for the supply of electricity is a reference to an agreement between a customer and, for example, the municipality that has the obligation to provide the electricity to the customer. Although it is common cause between the parties that the condition in section 21(5)(a) is not present, the parties are in dispute with regard to the conditions in section 21(5)(b) and (c). The presence of any one of the three conditions would have entitled the Municipality to cut Ms Rademan's electricity off. As the parties focussed on the condition in section 21(5)(c), I propose to deal with that condition first and, depending on the conclusion I reach in regard to that condition, it may be unnecessary to decide whether the condition in section 21(5)(b) is present.

[14] Before I deal with the parties' contentions, it is necessary first to discuss the Municipality's power, if any, to cut off the electricity supply to residents or consumers within its area of jurisdiction. Since the supply of electricity is a service provided by the Municipality, it is necessary to begin the discussion with a reference to the Municipality's obligation to provide services to its residents and ratepayers, the residents' obligation to pay for such services and to pay municipal taxes and the Municipality's remedy when residents or ratepayers do not comply with their obligations towards the Municipality in this regard. That discussion will also encompass conditions of payment, if any, that the

Municipality had stipulated for customers as contemplated in section 21(5) of the ERA. I begin with a discussion of the relevant parts of the Constitution.

Constitutional provisions

[15] The executive and legislative authority of a municipality vests in its Municipal Council.[9] A municipality has "the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution."[10] The "national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions."[11]

[16] Section 152 sets out the objects of local government. Two of these are "to provide democratic and accountable government for local communities" and "to ensure the provision of services to communities in a sustainable manner". The national and provincial governments are enjoined to support, by legislative and other measures, the "capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions".[12]

[9] Id section 151(2).

[10] Id section 151(3).

[11] Id section 151(4).

[12] Id section 154(1).

[17] Section 156 sets out the powers and functions of municipalities. Section 156(1) provides that a municipality has executive authority in respect of, and has the right to administer—

> "(a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and
> (b) any other matter assigned to it by national or provincial legislation."

Electricity and gas reticulation is one of the matters listed in Part B of Schedule 4. Section 156(2) provides:

> "A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer."

It is necessary to also refer to certain provisions of the Systems Act.

The Systems Act

[18] The Systems Act is a legislative measure that seeks to support and strengthen the capacity of municipalities to manage their own affairs, exercise their powers and to perform their functions.[13] Section 4(3) of the Systems Act requires a municipality, in the exercise of its executive and legislative authority, to "respect the rights of citizens and those of other persons protected by the Bill of Rights." Section 5(1)(g) provides that "[m]embers of the local community have the right to have access to municipal services

[13] Id.

which the municipality provides, provided the duties set out in subsection (2)(b) are complied with." These are dealt with below.

[19] Section 5(2)(a) places a duty on members of the local community, when exercising their rights, to observe the mechanisms, processes and procedures of the municipality. Section 5(2)(b) places upon members of the local community, where applicable and subject to section 97(1)(c), the obligation "*to pay promptly service fees, surcharges on fees, rates on property and other taxes, levies and duties imposed by the municipality*". (Emphasis added.) Section 5(2)(e) places a duty on members of the local community "*to comply with by-laws of the municipality applicable to them*." (Emphasis added.)

[20] A municipality is obliged to collect all money that is due and payable to it, subject to the Systems Act and any other applicable legislation.[14] It is further enjoined, for the purposes of the collection of all money due and payable to it, to provide for a credit control and debt collection policy.[15] Section 102(1) of the Systems Act reads:

> "A municipality may—
>
> (a) consolidate any separate accounts of persons liable for payments to the municipality;
>
> (b) credit a payment by such a person against any account of that person; and
>
> (c) implement any of the debt collection and credit control measures provided for in this Chapter in relation to any arrears on any of the accounts of such a person."

[14] Section 96(a) of the Systems Act.

[15] Id section 96(b).

The by-laws

[21] Chapter 1 of the Moqhaka Local Municipality Credit Control and Debt Collection By-Laws[16] (by-laws) defines "municipal services", for purposes of the by-laws, as "services provided by the Council or its authorised agent, including refuse removal, water supply, sanitation, electricity supply and rates or any one of the above." Section 11(1) of the by-laws provides:

> "A customer shall be responsible for payment of *all municipal services consumed by him/her or it* from the commencement date of the agreement until his/her or its account *has been settled in full and the Council or its authorised agent must recover all applicable charges due to the Council*." (Emphasis added.)

This provision means that a customer is liable for payment in full of all municipal services including rates, electricity supply, refuse removal, water supply, sanitation and others.

[22] The provisions of section 12 of the by-laws are important. They read as follows:

> "(1) Where an account is not settled in full, any lesser amount tendered to and accepted shall not be deemed to be in final settlement of such an account.
>
> (2) Sub-section (1) shall prevail notwithstanding the fact that such lesser payment was tendered and/or accepted in full and final settlement, unless the Municipal Manager or the Manager of the Council's authorised agent made such acceptance in writing."

[16] Published in the *Free State Provincial Gazette* 38 of 14 May 2004.

[23] Section 18 bears the heading: "Consolidated Debt". Section 18(1) reads:

> "*If one account is rendered for more than one municipal service provided the amount due and payable by a customer constitutes a consolidated debt, and any payment made by a customer of an amount less than the total amount due, will be allocated in reduction of the consolidated debt* in the following order—
>
> (a) towards payment of the current account;
>
> (b) towards payment of arrears; and
>
> (c) towards payment of interest where applicable." (Emphasis added.)

Section 18(3) precludes a customer from electing how an account is to be settled if it is not settled in full or if there are arrears. It reads:

> "*A customer may not elect how an account is to be settled if it is not settled in full or if there are arrears*." (Emphasis added.)

[24] Section 19 of the by-laws deals with queries or complaints in respect of accounts. Section 19(1) allows a customer to lodge a query or complaint "in respect of a specific municipal service as reflected on the account rendered." Section 19(4) provides:

> "A query or complaint must be accompanied by the payment of at least the total amount, excluding the amount in respect of which a query or complaint is lodged, due and payable in respect of the account."

If a customer lodges a query or complaint in accordance with section 19 of the by-laws, the Municipal Council (Council) or its authorised agent is required to investigate the complaint and make a finding within nine days of the lodgement of the complaint. There

is a right to appeal against the finding of the Council. The appeal goes to an appeals committee whose decision is final in terms of the procedures and mechanisms in the by-laws.[17]

[25] Section 25(1) of the by-laws reads in relevant part:

> "The Municipality may restrict or disconnect the supply of water and electricity or discontinue any other service to any premises whenever a user of any service—
>
> (a) *fails to make full payment on the due date or fails to make acceptable arrangements for the repayment of any amount for services, rates or taxes*;
>
> (b) *fails to comply with a condition of supply imposed by the Municipality*". (Emphasis added.)

Section 25(3) reads as follows:

> "The right to restrict, disconnect or terminate service due to non-payment shall be in respect of *any service rendered by the Municipality and shall prevail notwithstanding the fact that payment has been made in respect of any specific service and shall prevail notwithstanding the fact that the person who entered into agreement for supply of services with the municipality and the owner are different entities or persons, as the case may be.*" (Emphasis added.)

[17] Section 20 of the by-laws.

Agreement for the provision of municipal services

[26] Under the by-laws of the respondent a customer is defined as "a person with whom the Council or its authorised agent has concluded an agreement for the provision of municipal services". Section 1 of the by-laws provides:

> "No person shall be entitled to municipal services unless application has been made to, and approved by, the Council or its authorised agent on the prescribed form."

Section 1(g) reads:

> "An application for services submitted by a customer and approved by the Council or its authorised agent shall constitute an agreement between the Council or its authorised agent and the customer, and such agreement shall take effect on the date referred to or stipulated in such agreement."

Section 1(j) reads:

> "Municipal services rendered to a customer are subject to the provisions of these by-laws, any applicable by-laws and conditions contained in the agreement."

[27] The by-laws contain, in annexure "A", a sample of the application for municipal services that a customer would sign which in terms of the by-laws constitutes an agreement between the Council and the customer. That agreement reads as follows:

> "I, the undersigned hereby make application for the supply of electricity, water, refuse removal and sanitation to the above-mentioned property (or properties), and agree to be bound by the By-laws, Regulations or Policies adopted by the Moqhaka Local Municipality for the purpose of controlling and distributing the supplies, and for

collecting or enforcing payment thereof, and sign this agreement as being of all intents and purposes, cognisant of such by-laws, regulations and policies.

I hereby accept the conditions and tariffs of the Moqhaka Local Municipality services supply by-laws and regulations as amended, for the supply of services to the above property which by-laws and tariffs shall be deemed incorporated in, and to form part of this contract.

. . .

. . .

Signature of Applicant or Authorised Representative ……

Name of Representative (Please Print) …….

I.D. Number: ……

Date: ……20……".

[28] It is clear from the provisions of section 1 of the by-laws that no customer may be provided with municipal services unless he or she has applied to the Council for the supply of the relevant municipal service. Section 1(g) of the by-laws makes it clear that the application for the municipal services that a resident or ratepayer makes to the Council constitutes the agreement between the Municipality and the customer concerned. It is also clear from a reading of the Systems Act and the by-laws that residents and ratepayers are bound by the by-laws. Indeed, in the application for municipal services that a resident or ratepayer makes to the municipal Council, he or she agrees to be bound by the by-laws, regulations and policies of the respondent relating to the control and distribution of supplies and for the collection or enforcement of payment thereof. In fact he or she also accepts therein "*the conditions and tariffs of the Moqhaka Local*

Municipality services supply by-laws and regulations, as amended, for the supply of services" (emphasis added).

[29] It is clear from the above that the Municipality's conditions of payment for the provision of its services and payment of rates are to be found in the provisions of the Constitution, the Systems Act, particularly sections 5(2)(b), 96(a) and (b) 97(1)(c) and 102, on the one hand, and, on the other, the provisions of the by-laws, particularly sections 12(1) and (2), 18(1) and (3), 19 and 25 and the agreement between the customer and the Municipality. The conditions include:

(a) the obligation on the customer's part "to pay promptly service fees, surcharges on fees, rates on property and other taxes, levies and duties imposed by the Municipality";[18]

(b) the obligation "to comply with the by-laws of the Municipality applicable to them";[19]

(c) payment of "all municipal services consumed by [the customer] from the commencement date of the agreement until [her] account has been settled in full";[20]

(d) that "a customer may not elect how an account is to be settled if it is not settled in full or if there are arrears";[21]

[18] Section 5(2)(b) of the Systems Act.

[19] Id section 5(2)(e).

[20] Section 11(1) of the by-laws.

[21] Id section 18(3).

(e) that whenever a user of *any* service—

(i) fails to make *full* payment on the due date or fails to make acceptable arrangements for the repayment of any amount for services, rates or taxes;

(ii) fails to comply with a condition of supply imposed by the Municipality;

the Municipality "may restrict or disconnect the supply of water and electricity or discontinue any other service to any premises"; [22]

(f) "the right to restrict, disconnect or terminate a service due to non-payment shall be in respect of any service rendered by the Municipality and shall prevail notwithstanding the fact that payment has been made in respect of any specific service"; [23] and

(g) that, where one account is rendered for more than one municipal service provided, all arrears due and payable by a customer constitute a consolidated debt, and any payment made by a customer of an amount less than the total amount due will be allocated in reduction of the consolidated debt in the following order towards—

(i) payment of the current account;

(ii) payment of arrears;

(iii) payment of interest where applicable; and

[22] Id section 25(1).

[23] Id section 25(3).

(iv) costs incurred in taking relevant action to collect amounts due and payable.[24]

[30] It is also important to draw attention to the provisions of section 102 of the Systems Act which have been quoted in [19] above as well as those of section 25(1) and (3) of the by-laws. Those provisions give the respondent the power to consolidate the accounts of a consumer or consumers. When that has been done, the various amounts due become what the by-laws call a consolidated debt.[25] Counsel for the applicant submitted that the term "consolidation" meant putting together two or more accounts relating to different properties as opposed to putting together different accounts for different services relating to the same property. Counsel sought to rely on the language of the provision of section 102 of the Systems Act to justify this restricted meaning of the term "consolidation". There is nothing in the language of section 102 to justify counsel's submission in this regard. The term "consolidation" is wide enough to include both scenarios. Accordingly, this contention falls to be rejected.

[31] Counsel for the respondent submitted that, once various accounts have been consolidated, they lose their individual identities and become one account. Counsel for the applicant did not dispute the correctness of this submission. I agree with this submission.

[24] Id section 22(1).

[25] Id section 18.

[32] The effect of the various accounts becoming one consolidated account is that it is not open to the customer who is presented with such an account to speak about an electricity account or a refuse removal account or a rates account or to say that he or she will pay one or more of those accounts and not others. This is because there are no longer separate accounts but only one account with various components such as the electricity component and the rates component.

[33] Another effect of the consolidation of accounts is that, if a customer pays only part of the account and not the whole account, the customer is in breach of his or her obligations and has contravened the respondent's conditions of payment because one of those conditions is that a customer must pay his or her account. None of these options applies to a case where the customer has made an arrangement with the Municipality to settle his or her account by instalments.

[34] In the light of all the above, it seems to me that, in paying the various components of her account but not paying the rates, Ms Rademan elected how she was to settle her account which is precluded by section 18(3) of the by-laws and placed herself in default. This was in breach of her obligations towards the respondent. This constituted a contravention by Ms Rademan of the respondent's conditions of payment of an account consisting of various components. This also means that the contention that, since

Ms Rademan did not owe anything on electricity, the respondent was not entitled to cut her electricity off, falls to be rejected.

[35] During the hearing there was much debate about whether there is a conflict between section 21(5) of the ERA and the by-laws which confer power upon a municipality to cut a ratepayer's electricity supply off in certain circumstances. Section 21(5) reads as follows:

> "A licensee may not reduce or terminate the supply of electricity to a customer, unless—
>
> (a) the customer is insolvent;
>
> (b) the customer has failed to honour, or refuses to enter into, an agreement for the supply of electricity; or
>
> (c) the customer has contravened the payment conditions of that licensee."

[36] The condition in (a) is clear and not in issue. Section 21(5)(b) contemplates two scenarios. The one scenario is where there is an agreement between a resident and the municipality as to the supply of electricity by the municipality to the customer and the customer refuses to honour the agreement. The other scenario is where there is no agreement for the supply of electricity and the customer refuses to enter into an agreement. In either case the municipality would be entitled to cut off the electricity supply to the resident or customer if it was already supplying electricity to the customer. Section 21(5)(c) is very important. It contemplates conditions of payment that the municipality may have stipulated even if they were not agreed to with the customer or resident. If the condition in section 21(5)(c) is not applicable, then that means that the

municipality cannot rely upon section 21(5)(c) to terminate the electricity supply to a resident's property.

[37] The contention advanced on Ms Rademan's behalf is that the Municipality's power to cut off a resident's electricity supply is limited to situations where at least one of the conditions prescribed in section 21(5) is present. Counsel implied that, in so far as the by-laws may grant the Municipality power to cut off a resident's electricity supply in circumstances that fall outside the conditions in section 21(5), there is a conflict between section 21(5) and the provisions of the by-laws. He submitted that in such a case the provisions of section 21(5) must prevail because the ERA is an Act that specifically deals with the supply of electricity. Counsel for the Municipality contended that there is no conflict between section 21(5) and the relevant provisions of the by-laws governing the Municipality's power to terminate a resident's electricity supply.

[38] I pointed out earlier that it was common cause between the parties that Ms Rademan is a consumer as contemplated in section 21(5) and that the Municipality is a licensee as contemplated in that provision. For purposes of the present matter I am prepared to assume, without deciding, that the Municipality had to show that the condition in section 21(5)(c) was present before it could exercise its power to terminate Ms Rademan's supply of electricity. On that assumption, the question that arises is whether the condition in section 21(5)(c) was present when the Municipality cut Ms Rademan's electricity supply off. The determination of that question requires

ascertaining the conditions of payment of the Municipality that were applicable to Ms Rademan and whether she had contravened them. Counsel on both sides accepted that the Municipality's conditions of payment are to be found in the provisions of the Systems Act and the by-laws. Earlier on I referred to them.

[39] One of the Municipality's conditions of payment is that a resident or ratepayer has no right to decide on the manner of settlement of his or her account for municipal services if he or she does not settle his or her account in full or is in arrears. Another one is that, when the Municipality has consolidated a resident's accounts for various services, the various accounts become one consolidated account and the resident is obliged to pay the whole consolidated debt. If a resident pays for one component of the account and not others or pays for some components but not another one, he or she contravenes the Municipality's conditions of payment. This, then, entitles the Municipality to cut off the resident's electricity supply or the supply of any other service. The Municipality is not confined to cutting off the supply of a particular service but may cut off the supply of any service to the resident. In this case Ms Rademan failed to pay her rates account and the Municipality cut her electricity supply off. It was entitled to do so in the circumstances of this case.

[40] It was submitted that the effect of section 21(5)(c) was that the Municipality could not consolidate the electricity component of Ms Rademan's account with other components and disconnect the electricity supply if Ms Rademan was in arrears in

respect of any one of the components of her account. I am unable to uphold this submission. Section 21(5)(c) contemplates a licensee which has its own conditions of payment for electricity. It is not prescriptive of the conditions of payment that a licensee is expected to have. Accordingly, the conditions of payment of a licensee can be any conditions that are not illegal or unlawful. In this case it has not been suggested that the Municipality's conditions of payment are illegal.

[41] There was some debate during the hearing on what the remedy of a resident or ratepayer is where the municipality demands payment for a service or for services in circumstances where the municipality has not provided the service or services. Counsel for the respondent suggested that the resident or ratepayer would not be able to refuse to pay in such a case but would have to approach a court of competent jurisdiction for a declaratory order.

[42] Before dealing with the question of what remedy a resident has in a case where the municipality is demanding payment for services not rendered, it is necessary to point out that in the present matter it was not Ms Rademan's case that the Municipality claimed payment for services that it had not rendered. Indeed, in the present matter it has not been proved that the Municipality was claiming payment for services that had been rendered poorly or inefficiently. However, where a municipality claims payment from a resident or ratepayer for services, it is only entitled to payment for services that it has rendered. By the same token, where a municipality claims from a resident, customer or

ratepayer payment for services, the resident, customer or ratepayer is only obliged to pay the municipality for services that have been rendered. There is no obligation on a resident, customer or ratepayer to pay the municipality for a service that has not been rendered. Accordingly, where, for example, a municipality included in a customer's account for services an item for electricity when in fact no electricity has been connected to the particular property and, therefore, no electricity was supplied, the customer is entitled to take the stance that he or she will pay the total bill less the amount claimed for electricity supply.

[43] Section 10 of the by-laws requires the Council to "ensure that all money that is *due and payable* to the Municipality is collected, subject to the Municipal Systems Act." (Emphasis added.) No money is due and payable to a municipality for a service not rendered. If a dispute arises between the resident or ratepayer or customer, on the one hand, and the Municipality, on the other, about whether or not electricity was supplied to the particular property during the relevant period, either party may institute legal proceedings to have a court adjudicate that dispute. In this regard section 17(5)(b)(iii) of the by-laws envisages the Municipality instituting legal action to recover an amount that has been due for forty days.

[44] In addition to the option – not an obligation – referred to above, the resident, ratepayer or customer may also lodge a complaint or query concerning "the accuracy of an amount due and payable in respect of a specific municipal service as reflected on the

account rendered".[26] In terms of section 19(4) of the by-laws such a query or complaint must be accompanied by the payment of the undisputed amount. The result of this is that the customer does not have to pay the disputed portion of the account pending the outcome of his or her appeal to an appeals committee provided for in the by-laws. The decision of the appeals committee is final. That, of course, is final in terms of internal remedies.[27] There is nothing in the Systems Act that confers upon a municipality the right or power to claim payment for services not rendered nor is there anything obliging residents or ratepayers to pay municipalities for services not rendered.

[45] It will be seen from the above discussion that, contrary to the contention that there is a conflict between section 21(5), on the one hand, and the Systems Act and provisions of the by-laws, on the other, there is no such conflict and these pieces of legislation are harmonious in the respect raised in this matter.

Summary of essential conclusions

[46] In the light of all the above I conclude that—

(a) the applicant failed to settle her account in full as she withheld payment for the rates;

[26] Section 19(1) of the by-laws.

[27] Id section 20.

(b) the fact that the applicant had paid the electricity component of her account did not preclude the respondent from cutting off her electricity supply after she had failed to pay her account in full;

(c) the applicant, as a customer of the respondent, contravened the respondent's conditions of payment as set out in the by-laws read with the Systems Act and the agreement between the parties;

(d) the condition prescribed by section 21(5)(c) of the ERA for the termination of a customer's electricity supply by the respondent was met; and

(e) the respondent was entitled or had power to cut off the applicant's electricity supply.

Order

[47] In the result I make the following order:

1. Condonation is granted.
2. Leave to appeal is granted.
3. The appeal is dismissed.
4. There is no order as to costs.

FRONEMAN J:

[48] The main judgment disposes of the case on a legal basis different to the one advanced by the Moqhaka Local Municipality (Municipality) on the record before this

Court,[28] an approach I have no problem with because the facts are not in dispute and what is at issue is the interpretation of legislation. In these circumstances there is no prejudice to the parties. However, because I have some difficulty in appreciating why section 21(5) of the Electricity Regulation Act[29] (ERA) applies to the case at all, I prefer to add another string to the bow by dealing with the alleged conflict between the provisions of the Local Government: Municipal Systems Act[30] (Systems Act) and the ERA from a different angle.

[49] This is a case about the failure to pay property rates, not the failure to pay for electricity. The ERA deals only with the supply of electricity.[31] It does not deal with the

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[28] The Municipality's case relied on the provisions of section 21(5)(b) of the Electricity Regulation Act 4 of 2006 (ERA), namely that (1) the agreement between the applicant and the Municipality encompassed its by-laws and that, accordingly, because of the breach of the by-laws, the condition in the sub-section was fulfilled; (2) alternatively, the words in the subsection should be interpreted to read "has failed to honour an agreement for the supply of electricity *or any other municipal service*." The italicised words were those it contended should be read into the sub-section.

[29] 4 of 2006.

[30] 32 of 2000.

[31] The long title of the ERA reads:

> "To establish a national regulatory framework for the electricity supply industry; to make the National Energy Regulator of South Africa the custodian and enforcer of the national electricity regulatory framework; to provide for licences and registration as the manner in which generation, transmission, distribution, reticulation, trading and the import and export of electricity are regulated; to regulate the reticulation of electricity by municipalities, and to provide for matters connected therewith."

Section 2 sets out the objects of the ERA:

> "The objects of this Act are to—
>
> (a) achieve the efficient, effective, sustainable and orderly development and operation of electricity supply infrastructure in South Africa;
>
> (b) ensure that the interests and needs of present and future electricity customers and end users are safeguarded and met, having regard to the governance, efficiency, effectiveness and long-term sustainability of the electricity supply industry within the broader context of economic energy regulation in the Republic;
>
> (c) facilitate investment in the electricity supply industry;

payment of rates; the Systems Act and the by-laws made by the Municipality do. The applicant has not attacked the constitutionality of any of the provisions of the Systems Act or the by-laws. They provide, as set out in the main judgment, the manner and conditions for the payment of rates. The applicant has failed to abide by these conditions.

[50] In *Gauteng Development Tribunal*,[32] this Court recognised the autonomy for each sphere of government,[33] even when the different spheres deal with overlapping areas:

> "It is, however, true that the functional areas allocated to the various spheres of government are not contained in hermetically sealed compartments. But that notwithstanding, they remain distinct from one another. . . . The distinctiveness lies in the level at which a particular power is exercised".[34]

[51] The ERA deals with the termination of electricity in the context of a functional area of national government, namely providing the national regulatory framework for the electricity supply industry. The Systems Act and the municipal by-laws deal with the termination of electricity in the context of local government, namely, in this case, the

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(d) facilitate universal access to electricity;

(e) promote the use of diverse energy sources and energy efficiency;

(f) promote competitiveness and customer and end user choice; and

(g) facilitate a fair balance between the interests of customers and end users, licensees, investors in the electricity supply industry and the public."

[32] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC) (*Gauteng Development Tribunal*).

[33] Id at para 43.

[34] Id at para 55.

imposition and payment of rates, which falls within the Municipality's competence.[35] In relation to the termination of electricity, the two Acts deal with different spheres of government. There is, on the case before us, no constitutional challenge to the termination of municipal services, including electricity, for non-payment of rates in accordance with the Systems Act and the municipal by-laws.[36] Section 21(5) of the ERA is simply not applicable here.

[52] Save for this, a different contextualisation within which the Systems Act and municipal by-laws must be assessed, I concur in the main judgment.

[35] See *City of Cape Town and Another v Robertson and Another* [2004] ZACC 21; 2005 (2) SA 323 (CC) at para 67.

[36] See *Body Corporate Croftdene Mall v Ethekwini Municipality* 2012 (4) SA 169 (SCA) at para 19.

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