

THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

A. KAJEE Appellant

AND

THE TOWN COUNCIL FOR THE

BOROUGH OF STANGER Respondent

Coram: BOTHA, NESTADT, EKSTEEN, HARMS, JJA et NICHOLAS,

AJA

Heard: 28 February 1994 Delivered: 25

March 1994

J U D G M E N T

EKSTEEN, JA :

The respondent (which I shall refer to as "plaintiff") sued the appellant (to whom I shall refer as "defendant") in the magistrate's court of Stanger for the payment of R460 being for "electricity availability charges" which it alleged were owing to it by the defendant for the period 1 August 1978 to 30 April 1986. By the time summons was issued much of this had become prescribed and the plaintiff reduced its claim to R280 being in respect of the years 1983 to 1986.

The magistrate dismissed plaintiff's claim with costs on the higher scale, but, on an

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appeal to the Natal Provincial Division (reported in 1990 (1) SA 250 (N))

this judgment was reversed. The defendant now comes before us on appeal

with the leave of the latter court.

Neither party led evidence at the trial and the matter was decided on the pleadings as amplified by certain admissions made by the defendant, and by certain documents handed in by consent. From these it appears to be common cause that the defendant was the owner of a property known as Lot 142, Tinley Manor, and that Tinley Manor is situated outside the boundaries of the borough of Stanger. The plaintiff was a supplier of electricity in

terms of the Electricity Act 40 of 1958. In terms of sections 38 and 40 of the Act, and with the permission of the Electricity Control Board, it was authorised to supply electricity not only within the borough of Stanger but also to surrounding areas including Tinley Manor. The local authority of Tinley Manor had also consented to such supply. The defendant's property was not connected to the plaintiff's electricity system, but plaintiff's main electricity cable passed within 23 metres of defendant's property, and it could therefore readily have been connected had defendant wanted it.

In its particulars of claim plaintiff

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allege that:

"7. In terms of section 266(1)(f) of the said Ordinance (i.e. Ordinance 25 of 1974 (Natal)) read with paragraph 8(10) of the Plaintiff's tariff of charges as promulgated under Municipal Notice 219/83, the Defendant is liable for the payment to the Plaintiff of an electricity availability charge in respect of the said property ..."

In his plea defendant denied that plaintiff was entitled to levy such a charge in respect of his property "by reason of the fact that it owns and operates a main electricity cable which passes within 23 metres of defendant's property" . Defendant then went on to plead that:

"a) The Defendant avers that the Plaintiff is not competent to impose an electricity availability charge in

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respect of the Defendant's property, which property is not situate within the municipal boundaries of the Borough of Stanger. b)

Alternatively to (a) above and if

this Honourable Court holds that the Plaintiff is competent to impose such charge in respect of properties not situate within its municipal boundaries, the Defendant denies that the tariff of charges published under Municipal Notice 219/83 is applicable to the Defendant's property."

Plaintiff handed in Municipal Notices nos 104 of 1976, 6 of 1978, 77 of 1979, 219 of 1983 and 2 of 1985. Each of these notices is headed "Tariffs of Charges" and fixes the tariffs of charges in respect of a wide range of municipal services such as building plan fees, fees in respect of the supply of water, stall

rentals at the municipal market and cemetery fees,

to name but a few. Each of them also purports to

levy and fix an electricity availability charge.

Municipal Notices 219 of 1983 and 2 of 1985 -

which are the only ones relevant to the present

issue - provide i a that

"In respect of any approved subdivision, with or without improvements, which is not connected to the Council's electricity scheme and which can reasonably be so connected, the owner shall pay to the Council an electricity availability charge as stipulated hereunder "

A copy of plaintiff's "Electricity

Supply Bylaws" was also handed in. These bylaws

provide for the requirements attendant on the

supply of electricity but contain no reference to

any liability to pay an electricity availability

charge.

The relevant portions of section 266(1)

of the Local Authorities Ordinance 1974 (25 of 1974)

(Natal) ("the Ordinance") provided that :

"266(1) Subject to the provisions of sections 265, 268, 269 and 270, the council may make bylaws for giving proper effect to any of the powers and duties conferred or imposed upon it by this Ordinance or any other law, ... and also, without affecting the generality of the foregoing for all or any of the following purposes :

(f) Electricity and gas -

(i) regulating all matters relating to the supply and utilisation of electricity and gas within or without the borough, ... prescribing an availability

electricity charge in respect of properties, with or without improvements which are not connected to the council's electricity scheme if such properties can reasonably be so connected "

This appeal first came before this Court on 12 November 1992 when counsel was asked whether the bylaw authorising the council to impose an availability charge, and which did not form part of the papers before us, could be made available to us. Despite a brief adjournment to enable counsel to make enquiries they were unable to produce the bylaw or to give us any reference to it. Both counsel then agreed to ask for a postponement to enable them to make proper and more thorough

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enquiries, and this was granted. The matter has

now come before us again without any further bylaw

having been produced. Instead plaintiff's counsel referred us to the provisions of

section 268(4) of the Ordinance as it existed prior to its amendment by section

11 of Ordinance 28 of 1985. Section 268 dealt with the procedure to be followed

for the making of valid bylaws, and then provided:

"268(4) The provisions of this section shall not apply in respect of any charges which may be levied by the council in terms of this or any other Ordinance and notwithstanding anything in section 266 contained, the council shall impose fees and frame tariffs of charges only by resolution as provided in section 265(1)."

Counsel contended that this subsection empowered the plaintiff "to make bylaws the effect of which was to impose fees in terms of section 266(1)(f)(i) of the Ordinance without following the procedure laid down in section 268". He then went on to submit that -

"in terms of the provisions of section 268(4) of the Ordinance, the making of a valid bylaw imposing fees such as availability electricity charges did not require that it be promulgated in terms of the procedure laid down in section 268".

The promulgation of the Municipal Notices 219 of 1983 and 2 of 1985 imposing charges according to tariffs prescribed by a resolution of the council, he submitted, constituted the making of valid by-

laws.

I cannot agree with this argument.

Section 266(1) empowers a council to

"make bylaws for giving proper effect to any

of the powers conferred upon it by

this Ordinance."

One of the powers so conferred upon it is to prescribe an availability electricity

charge. It therefore requires that any council seeking to exercise that power should

pass a bylaw to that effect. Counsel's argument as set out above seems to recognize

this. He then goes on to submit, however, that when it comes to the imposition of an

availability charge, section 268(4) allows a bylaw to be made by a simple resolution

published as a municipal

notice. Section 268(4) is not, in my view, susceptible of such an interpretation. It simply provides that a bylaw will not be required in respect of any charges which the council is already empowered to levy in terms of "this or any other ordinance". Nor does it require a bylaw to impose fees or to frame tariffs of charges. This may be done by resolution. But before a council can impose fees or frame tariffs it must be properly empowered to do so. Section 266(1) does not empower every council in the province to levy an availability charge, but it does allow a council as a matter of general policy to take that power by passing a valid bylaw

to that effect. Once it has done so, and acquired the power, it may frame the necessary tariff by resolution. It follows, too, that any subsequent amendment of the tariff may conveniently be done by resolution. (Cf R v Hughes 1935 CPD 409 at 416.) Section 265(1) (a) of the Ordinance as it read prior to its amendment by section 10 of Ordinance 28 of 1985 tends to make this clear in its provision that :

"All charges which the council is empowered to make in terms of this Ordinance or any other law shall ... be imposed according to tariffs prescribed by resolution " (my emphasis.)

(Section 10 of Ordinance 28 of 1985 amended the

italicised words to read "All charges which a

council may make ... " This, however, does not change the essential import of the section.)

The municipal notices 219 of 1983 and 2 of 1985 on which the plaintiff relies, purport to have been made in terms of section 265(1) of the Ordinance and are headed "Tariffs of Charges". Nowhere do they purport to be bylaws.

Among the admissions made by the defendant in the magistrate's court was one that -

"The relevant tariffs - being schedule (4) of the plaintiff's electricity supply bylaws -are those set out in the following Municipal Notices published in the official Gazette for the Province of Natal ..."

and then followed the references to the five Municipal notices I have mentioned above. However,

as I have already pointed out, and as indeed is
common cause, the electricity supply bylaws for
the borough of Stanger make no reference to an availability charge, and
certainly do not empower the plaintiff to levy such a charge. In fact there is
no valid bylaw passed in accordance with the requirements of section 268
conferring such a power on plaintiff. It follows, therefore, that the plaintiff
had no such power, and that the municipal notices purporting to prescribe
such a tariff by resolution can have no legal effect.

The appeal therefore succeeds with costs including the
costs of the postponed hearing

of the matter on 12 November 1992 and the order of the court a quo is altered to

read:

"The appeal is dismissed with costs".

J.P.G. EKSTEEN, JA

BOTHA	JA)	
NESTADT,	JA)	
HARMS,	JA)	concur
NICHOLAS, AJA)		