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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case no: **5026/2022**

In the matter between:

THE HIILANDALE HOMEOWNERS ASSOCIATION t/a WOODLAND HILLS WILDLIFE ESTATE HOMEOWNERS ASSOCIATION (REG NO: 2005/010574/08)	APPLICANT
And	
THE MANGAUNG METROPOLITAN MUNICIPALITY	1st RESPONDENT
THE MEMBER OF THE EXECUTIVE COUNCIL: CO-0PERATIVE GOVERNANCE & TRADITIONAL AFFAIRS, FREE STATE	2nd RESPONDENT

JUDGMENT BY: **MOLITSOANE, J**

HEARD ON: **10 AUGUST 2023**

DELIVERED ON: **13 DECEMBER 2023**

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[1] The Applicant seeks, firstly, an order declaring it entitled to perform its own refuse removal services within the Woodlands Hills Township and thus divesting the First Respondent of the said obligation. Consequently, it also seeks an order that the First Respondent shall forthwith cease to levy fees related to refuse removal services in respect of all immovable properties situated within the Woodland Hills Township. Only the First Respondent opposes the granting of the relief sought.

[2] The Applicant is the Hillandale Homeowners Association, a non-profit company duly incorporated in terms of the statutes of the Republic of South Africa, with registration number 2005/01057/08, trading as the Woodland Hills Wildlife Estate Homeowners Association.

[3] The First Respondent is the Mangaung Metropolitan Municipality**,** a metropolitan municipality duly established in terms of the provisions of section 12 of the Local Government: Municipal Structures Act, 117 of 1998.

[4] The Second Respondent is the Member of Executive Council**,** responsible for the Department of Co-operative Governance & Traditional Affairs in the Free State, being the functionary responsible for the Provincial Department of Spatial Planning.

[5] During or about August 2000, the developers of Woodlands Hills Township, ultimately known as Woodland Wildlife Estate('Woodlands') submitted a duly completed application form for its township establishment to the Second Respondent for approval. On 20 August 2000, the Head of Department in the Department of Local Government and Housing in approving the application informed Cebo Planning[1] in writing as follows:

"*Approval in terms of section 10 of the Township Ordinance, 1969(Ordinance, No. 9 of 1969) has been granted for the establishment of a town Hillandale subject to the following:*

[1] Cebo Planning was commissioned by the developers to compile the township establishment application and lodge it. - See FA page 14 para29.

- *A signed service agreement between the developer and the Municipality of Bloemfontein comprising the rendering of all services.*
- *An agreement concerning the administration of the town as a section 21 company.*
- *The Town- Planning Scheme of Bloemfontein has to be amended to include the entire town as a special use regulating all uses of all the erven.*
- *The final erf numbers will have to be obtained before the land developments is proclaimed.*
- *All the above will have to be resolved satisfactorily before proclamation takes place."*

[6] On 16 April 2004 Phase 1 of Woodlands was included in the Municipality as Bloemfontein Extension 166 by way of a Proclamation of even date by the responsible Member of the Executive Council. On 9 March 2018, Phase 2 thereof was also included in the Municipality as Bloemfontein Extension 275, also by Proclamation by the responsible Member of the Executive Council. The Proclamations herein aforementioned contain the conditions in terms of which Woodlands was established. These conditions dealt with streets, electricity, water, sanitation services and removal of household refuse, endowment, protection services, buildings and golf course. Both Proclamations stipulated in their respective paragraphsA.4(c) that:

"The Town Owner shall be responsible for the removal of household refuse in the town"

[7] It is common cause that the Applicant and the First Respondent concluded a service level agreement (SLA)pertaining to the first phase of the development in the township proclaimed as Extension 166 and a second service level agreement in respect of Extension 275, referred to as the Extension agreement in this judgment.

[8] The essence of the Applicant's case is aimed at enforcing a single condition of the establishment of Woodlands as a township relating to refuse removal as set out in the Proclamations of the Second Respondent dated 16 April 2004 and 9 March 2018. The Applicant contends that the approval of the establishment of Woodlands followed a process as set out in the letter from the Second Defendant. The said approval occurred after several role players including the First Respondent approved its establishment. Such approval was subject to the terms as set out in the Proclamations mentioned above.

[9] The Applicant acknowledges that at all material times the First Respondent rendered the refuse removal service either by doing so itself or by hiring private contractors. While the Applicant contends that there are other reasons why the Applicant seeks to render the refuse removal service, it contends however, that its reason for seeking relief in this application is simply that the condition of establishment relating to refuse removal was never implemented, hence the need for the relief sought.

[10] Because the First Respondent renders refuse removal services, it charges all Woodlands property owners a fee for such service. The contention of the Applicant is that, should the first leg of the relief sought be granted, then in that case, there will be no reason for the First Respondent charge a fee for removal.

[11] The First Respondent, on the other hand, contends that the Applicant was granted approval to establish Woodlands by the Second Respondent subject to the developer signing a service level agreement with the First Respondent "comprising of **all services**"[2].Pursuant to the said approval the developer and the First Respondent concluded a Service Level Agreement and later its "*Extension*[3]" for the provision of all services as envisaged in the approval letter.

[2] FA3, para 2, first bullet point- emphasis by Respondent.
[3] AA, para 4.4 and 4.5.

[12] The First Respondent contends that at all times it was and it still renders all the services on the ervens subject to the authority of the Applicant in accordance with the Service Level and Extension Agreements. The defences raised by the First Respondent are not articulated in a familiar manner but the deponent in the answering affidavit engages in somewhat rhetoric questions/statements instead of pertinently responding to the allegations of the Applicant. For this reason, the answering affidavit must be cautiously approached lest the defences be misinterpreted and consequently misunderstood.

a) Firstly, it seems upon reading the whole answering affidavit, that according to the Respondent, since the establishment of the township was subject to the condition that the developer and the Municipality had to conclude a Service Level Agreement(SLA) for the rendering of all services, then in that case, the First Respondent contends that the Applicant is prevented from relying on the Proclamations, instead of the SLA and its Extension. It is prudent to quote the defences of the First Responded are set out in the answering affidavit :[4]

"4.7 *Has First Respondent, at all times relevant hereto rendered and is still rendering all the services to and on the erven as referred to in 4.6 in accordance with the Service Level Agreement and its extension.*

4.8 Has Applicant at all times relevant hereto not amended or applied for amendment of the SLA and the Extension Agreement.

4.8.1 Applicant will, if he applies for the amendment will have to comply with the relevant provisions with Ordinance 9/69 for purposes of notice, advertisement and forum.

4.9 Is Applicant estopped from denying the existence of the agreement and its extension?

4.10 Is the relief applied for in the Notice of Motion, paragraph 1 and paragraph 2 contrary to and acceding the service agreement? The Service Level Agreement, referred to in 4.4 and 4.4.1 and the extension to the Service Level Agreement referred to in 4.5 and 4.5.1 and impairing First Respondent's rights and is First Respondent prejudiced by the mentioned relief in the Notice of Motion, Paragraphs 1 and 2."

[4] AA, pages 114-115.

b) *Secondly, it is contended that the "First Respondent has "the exclusive authority in respect of and the right to administer refuse removal, refuse dumps and solid waste disposal and the Council of the First Respondent has a duty to ensure that municipal services are provided to Applicant and have equitable access to the municipal services."*

c) *And thirdly, it is contended that the Applicant, has not invoked the provisions of the Service Level Agreement relating to resolution of disputes.*

[13] In my view the following issues call for determination:

a) Whether the First Respondent has the exclusive authority in respect of the right to administer refuse removal and to impose fees and/or surcharges for such removal and the Applicant, being the recipient of such services to pay for such service;

b) Whether the Applicant is enjoined to invoke the dispute resolutions mechanism as set out in clauses 10.2 and 10.3 of the Service Level Agreement.

c) Whether the Service Level and Extension Agreements prevent the Applicant in seeking relief sought, from relying on the Proclamations dated 16 April 2004 and 9 March 2018, instead of the Service Level Agreement and its Extension;

d) If any of the above issues are answered in favour of the Applicant, then, in that case, whether the Applicant would effectually be entitled to an order that the First Respondent must cease to charge fees for refuse removal service in respect of the properties situated in the Woodlands Township.

[14] Section 152(b) of the Constitution obliges municipalities to ensure the provision of services to communities in a sustainable manner. Section 73 of the Local Government: Municipal Systems Act,32 of 2000 gives effect to this constitutional imperative by providing that:

1) A municipality must give effect to the provision of the Constitution and-
    a) Give priority to the basic needs of the local community;
    b) Provide the development of the local community; and
    c) Ensure that all members of the local community have access to at least the minimum level of basic municipal services.

[15] These services include provision of electricity, roads and storm water drainage, water supply, refuse removal as well as water supply. The provision of these services may be given by the municipality itself or same may be provided by the municipality through some other arrangements with other municipal service partnerships,[5] in which case the municipality hires the service providers to provide these much needed services. The fact that the municipality may render the provision for services through a third party does not however relieve the municipality of its constitutional obligation to provide the basic municipal services to the citizens.

[16] In the Heads of Argument, Counsel for the Applicant submits that 'it is trite that the provision of refuse removal services is a municipal executive and legislative competency and a service which municipalities usually render' but stresses that it is not a right. I agree with the submission. Section 104(1)(b) of the Constitution empowers the provincial legislatures to pass legislation for their provinces with regard to any matters within the functional areas listed in Schedule 5 of the Constitution. With this in mind, it is important to note that local government matters enumerated in Part B of Schedule 5 are reserved for the municipalities. In this regard, s156(1)(a) of the Constitution provides that the "municipality has executive authority in respect of, and has

[5] See s76(b) of the Local Government: Municipal Systems Act, 32 of 2000.

the right to administer the local government matters listed in Part A of Schedule 4 and Part 5 of Schedule 5."

[17] If one were to accept that the obligation to render refuse removal services is an executive and legislative competency of a municipality and not a right of the municipality together with what I say later in this judgment,[6] it is difficult to accept the submission by the First Respondent that it has the exclusive authority to remove the refuse within the township of Woodlands.

[18] Although the First Respondent holds the view that it has the exclusive authority to render refuse removal service, it appears that the reason for denying the Applicant to remove refuse within Woodlands stated in the correspondence dated 15 July 2021[7]centres around revenue generation as opposed to the alleged exclusive authority. In the said correspondence, upon a request for a meeting to discuss the 'taking over' of the refuse removal by the Applicant, the First Respondent indicated that refuse removal was one of the competencies available to it for income generation. It also indicated that "*giving away such competency will have adverse effects on the Municipality's revenue and workforce".* The First Respondent, in this correspondence does not contend that refuse removal falls within its exclusive authority but it is more worried about the revenue it will not generate. It thus appears that the First Respondent vacillates from the notion that it has exclusive authority to render refuse removal to refusing to 'hand over the service' solely for fear of losing income.

[19] The First Respondent contends that the Applicant has failed to invoke clauses 10.2 and 10.3 of the SLA for the purposes of the Dispute Resolution. The First Respondent contends[8] that Clauses 10.1,10.2 and 10.3 are *"prescriptive provisions to be followed in Resolution of Disputes for mediation and then arbitration."* Although the First Respondent does not pertinently say so, I understand this contention to mean that the Applicant

[6] On the Proclamations by the Second Respondents and the right to impose levies on the removal of refuse.
[7] FA, Annexure 9 page 92.
[8] By reference to footnote 14 on page 116 in the AA.

was obligated to exhaust the dispute resolutions contained in the SLA before embarking on the process before me. It is necessary to set out the said provisions of the SLA which provide as follows:

RESOLUTION OF DISPUTES

"10.1 Should any dispute arise between the parties hereto with regard to the interpretation or implementation of any one or more of the provisions of this Agreement, the parties shall in the first instance attempt to resolve such dispute by amicable negotiation.

10.2 Should any dispute remain unresolved, either party may require that the matter be referred by the parties, with or without legal representation, to a

mediator at a place and at such time as to be determined by the mediator…. The opinion of the mediator shall be final and binding upon the parties until otherwise ordered as contemplated in 10.3 or 10.4.

10.3. if any of the parties is dissatisfied with or unwilling to accept the opinion expressed by the mediator or if the parties are not able to agree to a mediator…then either party may by way of written notice to the other give notice of the existence of the dispute and request that same be referred to

arbitration."

[20] Clause 10.1 of the SLA reveal that the 'dispute' envisaged in the 'Resolution of Disputes' paragraph deals with the *'interpretation or implementation of one or more of the provisions of the Agreemen*t." As I will later show, the refuse removal services were not included in the SLA notwithstanding that there is reference to "all services" in Annexure FA 3 attached to the founding affidavit. The dispute between the parties does not arise from the interpretation or implementation of the terms of the SLA but solely on the question of whether the First Respondent is bound and should give effect to the Proclamations of the Second Defendant. There is in my view no

necessity for the Applicant to first engage the mechanism of dispute resolution set out in the SLA before embarking on the process before me. The contention by the First Respondent must thus fail.

[21] It appears that the First Respondent holds the view that the refuse removal was contained in the SLA as being one of the conditions included in the letter dated of approval of the first phase where office of the Second Respondent approved the township establishment subject to a "signed agreement between the developer and the municipality of Bloemfontein comprising the *rendering of all services*" (my emphasis). On 30 March 2004 the First Respondent and the developers signed the SLA. The SLA deals with what it terms external services, internal services, engineering services (standards and designs, external engineering services (levels, description and completion), internal engineering services, maintenance services and so on. All these services deal in essence with what one can term engineering services. The SLA and its Extension also deal pertinently with the supply of electricity, water and sewerage effluent. No reference whatsoever is made to refuse removal in the SLA. With reference to refuse removal it was specifically proclaimed that the *"town owner shall be responsible for the removal of household refuse in the town."*

[22] Years later, the second phase of Woodlands was proclaimed. The second Proclamation contained the same clause regarding refuse removal as the first Proclamation, namely, that the town owner was responsible for the removal of household refuse in the town. In my view, it is difficult to understand why the First Respondent would have allowed the two Proclamations to be gazetted without any objection thereto. Section 9 of the Ordinance prescribes the procedure to be followed when considering the application for the township establishment. Such procedure includes publication of the application in the Gazette and a newspaper circulating in the area of the township to be established. On the part of the First Respondent, this publication was even superfluous although it is a statutory obligation in view of the fact that the developers were enjoined to conclude a

SLA with it. Bottom line is that the First Respondent played an active part in the establishment of the township and must have been aware of the conditions of the establishment.

[23] Of importance, section 9 of the Ordinance makes provision for objections and representations concerning the application. I am unable to comprehend why the First Respondent did not object to the reservation of refuse removal to the town owner. If for whatever reason the First Respondent was remiss during the Proclamation of the First Phase, certainly one would have expected this issue to have been differently dealt with in the second Proclamation. The first Proclamation occurred barely seventeen days after the signing of the SLA.

[24] In my view, the express exclusion of refuse removal a mere seventeen days' after signing the SLA as well as in the Extension agreement together with the reservation of the refuse removal by the town owner in the two Proclamations, implies that refuse removal was reserved for the Applicant and was never intended to be a service to be performed by the First Respondent. For this reason, I am of the considered view that refuse removal in this case is a service to be rendered by the Applicant. The Second Respondent expressly reserved it for the town owner. I can only remark that the First Respondent in the answering affidavit or during submissions before me made no reference whatsoever to any clause in the SLA or its Extension to assert that the refuse removal in this particular township falls within the competency of the First Respondent. I am unable to agree with the First Respondent that the removal of household waste is a service envisaged in the SLA and its Extension and that the Applicant ought to have sought the amendment of the SLA and its Extension before launching these proceedings.

[25] The next issue to decide is whether the Applicant will become effectually entitled to an order that the Municipality must cease to charge refuse removal fees in the properties situated in Woodlands.

[26] This question should in my view be decided having regard to the fact that the Applicant will be responsible for removal of the refuse in the township but dump it in the municipality landfill site. This calls for the above question to be couched thus: Is it legally permissible to allow the residents of Woodlands to enjoy and use the landfill site of the Municipality without paying for its maintenance and/or upkeep.

[27] It is trite that the Constitution imposes certain obligations on municipalities. As a result, municipalities discharge certain important functions including seeking to provide the communities in which they operate with an environment which is not harmful. Keeping and maintaining an environmentally friendly landfill site is one of its functions. It cannot be disputed that the residents of Woodlands, even if the service of refuse removal is taken away by the Applicant, will still enjoy the use of the dumping site of the municipality.

[28] Reference to *Rademan v Moqhaka Local Municipality*[9] is appropriate. The court in that case said the following:

> "Where a municipality claims payment from a resident or ratepayer for services, it is only entitled to payment of services that it has rendered. By the same token, where a municipality claims from a resident, customer or rate payer 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."

[29] The residents of Woodlands, in spite of the fact that the Applicant will be entitled to remove household refuse from their township, remain the end users of the landfill site of the municipality. It only makes sense that if they enjoy the use of the said site, then in that case, they must pay for it. There is however no counter application from the First Respondent claiming imposition of the levies of the use of the site and consequently I am unable

[9] 2013(4) SA 225(CC) para 42.

to make that order. It does follow that the First respondent is not entitled to levy refuse removal fees where it does not render a service. The application must accordingly succeed. I accordingly make the following order:

ORDER

1. It is declared that the Applicant shall be responsible for the removal of household refuse from Woodland Hills Township, being Bloemfontein Extension 166, situated on Portion 1 of the Farm Hillandale, Administrative District Bloemfontein, and Bloemfontein Extension 275, situated on the remainder of the Farm Hillandale 2960, Administrative District of Bloemfontein (Collectively referred to as 'Woodland Hills Township'), to a designated landfill site in Bloemfontein;

2. The First Respondent shall forthwith cease to charge fees related to refuse removal services in respect of all immovable properties situated within the Woodlands Hills Township;

3. The First Respondent shall be liable for the costs of this application, which costs shall include the costs occasioned by the employment of two counsels.

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P. E. MOLITSOANE, J

On behalf of the Applicant:	Adv. S. Grobler SC
Appearing with	Adv. JS Rautenbach
Instructed by	Symington & De Kok BLOEMFONTEIN
On behalf of the 1st Respondent:	Adv. AH Burger
Instructed by	Rampai Attorneys

BLOEMFONTEIN

On behalf of the 2nd Respondent: No Appearance