THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

REPORTABLE
Case No: 237/2013

In the matter between:

CAPRICORN DISTRICT MUNICIPALITY **FIRST APPELLANT**

LEPELLE-NKUMPI LOCAL MUNICIPALITY **SECOND APPELLANT**

and

THE SOUTH AFRICAN NATIONAL CIVIC ORGANISATION **RESPONDENT**

Neutral citation: *Capricorn District Municipality v SANCO* (237/2013) [2014] ZASCA 39 (31 March 2014)

Coram: Mthiyane DP, Lewis, Bosielo, Petse and Willis JJA

Heard: **21 February 2014**
Delivered: **31 March 2014**

Summary: High Court granting mandatory interdicts directing municipalities to repair and replace water pipelines and faulty water meters within 12 months and to charge each consumer R70 per month and R50 per month pending such repairs or replacements ─ Orders incompetent and inconsistent with the principles of legality and separation of powers ─ such functions falling within municipalities' executive and legislative powers ─ High Court order set aside on appeal.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Legodi J sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the court below is set aside and replaced with the following:

'The application is dismissed with costs, including the costs of two counsel, where so employed.'

JUDGMENT

Mthiyane DP (Lewis, Bosielo, Petse and Willis JJA concurring)

[1] This is an appeal arising from an order granted by the North Gauteng High Court (Legodi J) in favour of the respondent, directing the appellants to replace or repair all leaking water pipes and all defective water meters in Lebowakgomo Zone A, Limpopo within twelve months from the date of the order; that, pending the final replacement and repair of the above pipes and meters, and the issuing or production of reliable and accurate water accounts to the satisfaction of each respective water consumer, to charge a flat rate of:

(a) R70.00 per household per month for water consumption from 12 September 2011; (being the date on which the application was instituted) and;

(b) R50 per month from August 2009 until 11 September 2011 per household per month for water consumption.

The appeal is before this court with its leave, the court below having refused leave.

[2] The question to be considered in the appeal is whether these mandatory orders are competent in the light of the principles of legality and separation of powers. The appellants contend that the flat rate imposed by the court, as the basis for payment for the water consumed by each household or business entity, contravenes the legal framework for the imposition of water tariffs, and thus the principle of legality. They argue also that the repair and replacement of pipes and water meters are matters which fall within the legislative and executive powers of the municipalities concerned. The orders violate the doctrine of the separation of powers. A further issue is whether the decision of the high court was correct on the facts.

The facts

[3] The appellants are responsible for providing water services in Lebowakgomo Zone A, Limpopo (Zone A). The first appellant, Capricorn District Municipality (the district municipality), is the water service authority[1] and the second appellant, Lepelle-Nkumpi Local Municipality (the local authority) is the water service provider.[2] The local authority manages the bulk water supply to Zone A, on behalf of the district authority, with which it has a water service delivery agreement. I shall refer to them collectively as 'the municipalities'.

[4] The local authority has over the years experienced water leakages and water shortages which it attributes to ageing infrastructure. The reticulation system in

[1] Section 1 of the Water Service Act 108 of 1997, water services authority ─ means any municipality or rural council as defined in the Local Government Transition Act 209 of 1993.

[2] 'Water Service Provider' means any person who provides water to consumers or to another water service institution, but not does include a water service intermediary – see s 1 fn 1 above.

Zone A consists of asbestos pipelines which were installed about 30 years ago and are in need of replacement. The community of Zone A allege that they are issued with inflated water accounts which often do not reflect the actual water consumed by them. They claim that this is due to water leakages and faulty water meters and to local authority employees who do not read water meters but simply make estimates of what they believe should be paid by each consumer. To substantiate the point the respondent, the South African National Civic Organisation (Sanco) which brought these proceedings on the community's behalf, cited the case of an elderly consumer who received a statement of account of approximately R5000, reflecting the same as being in respect of water consumed by her in one month. Sanco calculated this as equivalent to a charge for 296 kilolitres of water ─ a quantity which they say could fill almost a quarter of an Olympic swimming pool.

[5] The local authority has acknowledged that Zone A does sometimes experience water leakages and water shortages and that its reticulation system needs to be rectified by the construction of a new water reticulation network in the entire area. It also acknowledged that its existing ageing infrastructure needed rehabilitation and averred that it had taken steps to attend to the problem.

[6] On 10 May 2011 the district municipality appointed Morwa Consulting Engineers to undertake a comprehensive study of the water provision problems. It was intended that as soon as the engineers had concluded their study, the district municipality would then determine the required budget and the exact bill of quantities needed and thereupon call for tenders for the completion of the entire reticulation system. Morwa Consulting Engineers were expected to deliver their final report during 2012, after which the district municipality would begin practically to address the problem of the reticulation system in Zone A.

[7] Before the municipalities could rectify the water service problem, Sanco called a meeting of the community on 1 November 2009 and, on the following day, mobilized the community to march and 'toi toi' to the offices of the local authority. The marchers presented the mayor with a resolution, demanding: that the local authority 'write off all water debts with immediate effect; that it replace all faulty water meters within Zone A and that, pending adherence to the above demands, each consumer (be it individuals or business owners), pay a flat rate of R50.00 per month to the local authority in respect of their water consumption.

[8] Subsequently, Sanco embarked on further protests, which culminated in another march to the offices of the MEC for Local Government and Housing for the Limpopo Province on 25 February 2010. The MEC was presented with a memorandum prepared by Sanco, which catalogued demands similar to those presented to the mayor during the previous march. There was thereafter further interaction between the community and the municipalities which yielded nothing significant. It bears mention that in none of the interactions between the parties did the affected community members pursue available grievance procedures laid down to address the problem of inflated or erratic statements of accounts allegedly issued by the local authority. In terms thereof, a customer in Zone A who disputed a bill was required to follow a procedure determined by the terms of the Write Off and Irrecoverable Debt Policy. This procedure allows for an orderly system for the resolution of disputes that balances the rights of consumers with the rights and duties of municipalities – Clause 7.14 of the policy document entitled Disputes and Payments during Disputes.

[9] On 12 September 2011 Sanco launched the present application in the North Gauteng High Court for a mandatory interdict, for the relief set out in the opening

paragraph of this judgment and further relief pertaining to the furnishing of members of the community with letters of 'proof of residence' and 'proof of good standing.' It appeared that the local authority had refused to issue these letters to any resident who had not paid his or her water account. There is, however, no longer any dispute between the parties pertaining to the issuing of these letters. The question of whether the mandatory interdicts were competent still remains. So too, it is not clear whether it was established that the water billing system was unreliable as a result of leaking water pipes and defective infrastructure in Zone A.

Legal framework

[10] Before addressing these issues it is helpful to set out briefly the legal framework governing the supply of water and the powers and functions of municipalities in relation thereto. Under our constitution everyone has the right of access to 'sufficient food and water'.[3] The State is enjoined to take reasonable legislative and other measures, within its available resources, to achieve progressive realisation of each of these rights.[4] A municipality has the *executive authority* in respect of and has the right to administer . . . 'potable water systems'[5] and must perform the executive and legislative functions within certain parameters set down in national legislation. In terms of s 74(1) of the Systems Act 32 of 2000 a municipality is obliged to adopt and implement a tariff policy on the levying of fees for municipal services which complies with the Systems Act, the Municipal Finance Management Act 56 of 2003 and other applicable legislation.

[11] In terms of s 74(2) of the Systems Act, tariff policies must reflect various principles including (but not limited to) the following:

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[3] Section 27(1)*(b)* of the Constitution.
[4] Section 27(2) of the Constitution.
[5] Section 156(1) of the Constitution read with Part B of Schedule 4.

(a) Users of services must be treated equitably in the application of tariffs;
(b) The amount that individual users pay for services should generally be in proportion to their use of that service;
(c) Tariffs must reflect the costs reasonably associated with rendering the service, including capital, operating maintenance and administration and replacement costs, and;
(d) Tariffs must be set at levels that facilitate sustainability of the service, taking into account subsidization from sources other than the service concerned.

[12] The general power of a municipality to levy and recover fees, charges and tariffs in respect of any service is sourced in s 75A(1) of the Systems Act. Section 75A(2) provides that fees, charges or tariffs are levied by a municipality by resolution.

[13] There is then the Water Services Act 108 of 1997 which, together with the Systems Act, enjoin municipalities to give effect to the right of access to water protected in the Constitution, subject to applicable norms and standards, including in relation to tariffs.

[14] Section 11 of the Water Services Act imposes important aspects of the duty progressively to ensure access to water services on water services authorities. That is made expressly subject to 'the duty of consumers to pay reasonable charges which must be in accordance with any prescribed norms and standards for tariffs for water services.'[6]

[6] Section 11(2)*(a)*.

[15] I have already referred to the fact that the district municipality concerned in this case is a water service authority. It is responsible for ensuring that adequate investments are made in water services infrastructure so that water provision is ultimately sustainable and that the residents of Zone A and other areas that fall within its jurisdiction receive adequate and reasonable quality water services at all times. The overall responsibility for providing water and sanitation services in Zone A is thus vested in the district municipality.

[16] As I have already mentioned, the local authority is the water service provider and concluded a water service agreement with the district municipality for this purpose. It is the entity that provides water to consumers in Zone A. In performing its functions as a water service provider, it is required to manage retail water distribution and to administer revenue collection. While there is a duty on the local authority, as the water service provider, to provide access to water services, there is a corresponding duty on consumers 'to pay reasonable charges, which must be in accordance with any prescribed norms and standards for tariffs for water services.'[7]

[17] Consumers, in particular those that are indigent, are entitled to a free basic water supply in a determined amount.[8] When water over and above the amount is consumed, it is paid for. It is however not Sanco's case that any of the consumers in Zone A are indigent. The essence of the complaint is that excessive and inaccurate statements of accounts are issued because of faulty meters and water leakages.

[7] Section 1(2)(d) of the Water Services Act.
[8] Section 9 of the Water Services Act and Regulation 3 of Compulsory National Regulations (GN R509 in GG 22355 of 8 June 2001) in terms of which free basic water supply per person per day is 25 litres or 6 kilolitres per month.

The issues in the appeal

[18] It is against this background that I turn to consider the issues in the appeal, commencing with the question whether the order made by the court below, directing the municipalities to replace and repair the pipelines by a certain time and charge a flat rate of water consumed by each consumer in Zone A, was competent.

[19] The legal basis upon which the court below considered itself entitled to issue the mandatory interdicts, directing the municipalities to repair and replace the water leaks and faulty water meters and to charge a flat rate of R70 and R50 respectively for water consumed, is not readily apparent from the judgment. At best the learned judge remarked: 'I think an order for *mandamus* would be dictated by the facts of each case.' Unfortunately that is not always the case. One is dealing here with a sphere of authority which falls within the executive and legislative authority of the municipality as the third level of government. In our constitutional order, local government is recognised as the third sphere of government and in that capacity it exercises both legislative and executive functions. When a decision is taken by a municipality through its council, it will not ordinarily be administrative in character. In these circumstances the executive and legislative powers of a municipality are excluded from judicial scrutiny. See *Mazibuko & others v City of Johannesburg & others*.[9]

[20] In the present matter it appears that the district municipality commissioned a firm of consulting engineers to conduct a study which would ultimately lead to the rehabilitation of the entire reticulation system in Zone A. In doing so it was performing an executive function and the order of the court below, which had the effect of fast tracking the process, offended the doctrine of the separation of

[9] *Mazibuko & others v City of Johannesburg & others* 2010 (4) SA 1 (CC) para 130-131.

powers and the legal framework within which the municipality was acting. In *Mazibuko* the Constitutional Court found that a business plan adopted by the Johannesburg City Council to determine how water services were to be implemented, amounted to the exercise of its executive powers.[10] Similarly, the measure taken in the present matter to address the problem of water leakages and water shortages occurred in the course of the municipalities' exercise of executive powers.

[21] The court below also erred in respect of the imposition of the flat rates. I have already referred to s 74 (1) of the Systems Act in terms of which a municipality is obliged to adopt and implement a tariff policy on the levying of fees for municipal services provided by the municipality which complies with the Systems Act, the Municipal Finance Management Act and any other applicable legislation. Section 74(2) lays down what the tariff policy must reflect. Amongst other things, it provides that consumers must be 'treated equitably', in the application of the tariff (2*(a)*), that they must pay for services 'in proportion to their use of that service' (2*(b)*) and that the tariff must reflect 'the costs reasonably associated with the rendering of service, including capital, operating maintenance and administration and replacement costs' (2*(d)*). It is therefore clear that the order made in the court below flies in the face of these provisions.

[22] The decision of this court in *Kungwini Local Municipality v Silver Lakes Home Owners Association*[11] is instructive. In that case Van Heerden JA said the following:

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[10] *Mazibuko* supra fn 8 para 131.

[11] *Kungwini Local Municipality v Silver Lakes Home Owners Association & another* 2008 (6) SA 187 (SCA) para 14. See also para 44.

'In a post-constitutional South Africa, the power of a municipality to impose a rate on property is derived from the Constitution itself: the Constitutional Court has described it as an "original power" and has held that the exercise of this original constitutional power constitutes a legislative – rather than an administrative – act. The principle of legality, an incident of the rule of law, dictates that in levying, recovering and increasing property rates, a municipality must follow procedure prescribed by the applicable national or provincial legislation in this regard.'

The above principles also apply equally to a case where a municipality is levying fees and charges for water service. The orders imposing a flat rate for water consumption in Zone A were completely out of kilter with the foundational principles of our constitutional order as articulated by our courts and to the applicable legal framework. The orders made were thus not competent.

[23] Turning to the facts, it was submitted that the orders made were based on incorrect factual findings and that, as a matter of fact, it was not established that the water billing system was unreliable as a result of leaking water pipes and defective water meters in Zone A. In coming to the conclusion that water leakages in Zone A led to incorrect billing of consumers, the court relied on what it termed a concession made by the municipalities in this regard. This is in a passage in the initial report of Morwa Consulting Engineers, which reads as follows:

'The total number of households is 2803. The current metering system in the area is also out-dated and malfunctioning, which may result in inaccurate billing of the residents of Lebowakgomo Zone A. Installation of about 2803 new meters is proposed to ensure that every drop of water is accounted for and accurately billed.'

The municipalities argue that this passage does not contain a concession that faulty meters lead to inaccurate billing in Zone but rather a recognition that water meters may malfunction – not that they necessarily do or that all do. The extract they submit, merely shows that there were steps being taken to address the problem.

[24] They also averred that they were indeed proceeding to replace the ageing water meters but did not concede that the existing water meter system was dysfunctional in toto. It was explained by Mr Hlaneki on behalf of the local authority that, pending the replacement of old water meters, disputes were resolved on a case by case basis by the municipalities as provided for in the by-laws.

[25] The municipalities advanced two further reasons why the order cannot be justified on the facts. It is contended that water leakages do not adversely affect consumers for at least two reasons. First, the leakages are not captured by any water meter reflecting what is payable by any consumer. Where a leakage occurs before the point where the water meter is situated, the leaking water would not be captured by the meter as used by the consumer because the water meter cannot register usage of water that has not passed beyond the point where the meter is situated. It is only where the water leakage occurs beyond the point where the water meter is situated that the water meter will register the leaking water as used by the consumer. If this occurs the responsibility no longer rests with the municipalities to repair the leaking pipe. It resides with the consumer.

[26] Secondly, water meter readings are conducted monthly. This is of course disputed by Sanco. Be that as it may, the mandamus granted by the court below is not competent and falls to be set aside.

[27] In the result the following order is made

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the court below is set aside and replaced with the following:

'The application is dismissed with costs, including the costs of two counsel, where so employed.'

K K Mthiyane
Deputy President

Appearances

For the Appellant:	E Labuschagne SC (with him S Cowen) Instructed by: Mabuela Inc, Pretoria Symington and De Kok, Bloemfontein
For the Respondent:	G Kairinos (with him B Stevens) Instructed by: Gildenhuys Malatji, Pretoria Phatshoane Henney Attorneys, Bloemfontein