

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: HC-MD-CIV-MOT-REV-2021/00217

In the matter between:

**ELIFAS EBSON KHOESEB**

**APPLICANT**

and

**CITY OF WINDHOEK**

**FIRST RESPONDENT**

**CITY OF WINDHOEK GEORGE MAYUMBELO**

**SECOND RESPONDENT**

**ATTORNEY GENERAL FESTUS MBANDEKA**

**THIRD RESPONDENT**

**MINISTER OF URBAN AND RURAL DEVELOPMENT**

**FOURTH RESPONDENT**

**Neutral citation:** *Khoeseb v City of Windhoek* (HC-MD-CIV-MOT-REV-2021/00217)

[2023] NAHCMD 387 (7 July 2023)

**Coram:** CLAASEN J

**Heard:** 16 April 2023

**Delivered:** 7 July 2023

**Flynote:** Administrative act – Disconnection of water supply to resident within the boundaries of the local authority – First respondent acted in terms of Water

Regulations which provides for the suspension of the supply of water if the charges are not paid before the expiry of the last day specified in the account – Credit Control and Debt Collection Policy and Procedures implemented for sustainable recovery of outstanding municipal debt, which caters for arrangements that can be made by debtors that defaulted on payment – First respondent acted in terms of breach of contract and it was an ordinary business decision, not amounting to administrative act as contemplated by Article 18 of the Namibian Constitution – Application dismissed.

**Summary:** The applicant approached the court, in person, seeking an administrative review of the disconnection of the water supply to the property that he occupies. It was his late mother's house which had been encumbered by a substantial municipal debt. He approached the municipality and wrote a letter for condonation to write off the debt. The Chief Executive Officer responded with a letter stating that the debt could not be written off as the late mother was not a pensioner and that he needs to make arrangements to pay off his debt over a longer period of time. Subsequent thereto on 21 April 2021, the first respondent disconnected the water supply to the said residence. The applicant, upon the advice from a community activist, regarded the disconnection as illegal because it contravenes the COVID-19 directives. Apart from writing another request for the debt to be written off, the applicant and other residents, handed a petition to the first respondent, and eventually the applicant approached the court for administrative review. The principal issue was whether the disconnection of water supply to the said house, is subject to administrative review in terms of Article 18 of the Namibian Constitution.

*Held:* that Regulation 14 issued under the State of Emergency Regulations and directives to Regional Councils and Local Authority Councils Regulations was declared unconstitutional in *Namibia Employers Federation v President of the Republic of Namibia* and the applicant could no longer rely on that premise for his case.

*Held* further: that the first respondent's power to disconnect water supply to residents derived from Water Regulations which provides for the suspension of the supply of water if the charges are not paid before the expiry of the last day specified in the account as well as Credit Control and Debt Collection Policy and Procedures implemented for sustainable recovery of outstanding municipal debt. The remedy was provided for in these by-laws for defaulting customers.

*Held* further: that the supply of water to the said erf is contractual in nature, with the first respondent supplying water to the said erf against payment for the service by the owner and/or occupiers. It does not amount to an administrative action for purposes of Article 18 of the Constitution.

---

### **ORDER**

---

1. The application is dismissed.
  2. There shall be no order as to costs.
  3. The matter is removed from the roll and regarded as finalised.
- 

### **JUDGMENT**

---

CLAASEN J:

#### Introduction

[1] This administrative review concerns the disconnection of water supply by the City of Windhoek on 13 April 2021 to a certain residence in Windhoek. The applicant is a 44 year old Namibian citizen, residing at erf 3382 Sukkot street, Windhoek. The applicant approached the court, in person, seeking an administrative review of the disconnection of the water supply to the property that he occupies.

[2] Essentially, the applicant prays that the court set aside the act of the disconnection of water to the said property, on the basis of Regulation issued during the COVID-19 pandemic. The applicant's papers are longwinded and not a model of clarity. Gathering from the notice of motion, it appears that the applicant also ask further relief not just for himself but also for other persons. The relevant prayers were phrased as follows:

'2. And also show cause why other residents should equally not be treated the same as well assisted through the same process.

3. As well as show cause why this honorable court should not make a determination regarding the condonation application applied for, since the respondents already acted contrary and in direct contravention of that process.

4. Also also show cause, why the process should not be reversed in order to cater for all Windhoek residents that had or still have municipal debt from as far as 5 to 10 years, amongst whom might have been forced to pay the municipal debt against the threat of auctioning off the houses without being accorded the same.'

[3] The review was opposed by the first respondent and second respondent, being the Municipality of Windhoek, established in terms of the Local Authority Act 23 of 1992, (hereafter referred to as 'the Act') situated at no 80 c/o Independence Avenue and Garten Street, Windhoek. The further respondents did not partake in the application before court. The matter was argued by Ms Shifotoka on behalf of the first respondent.

#### Background Facts

[4] For purposes of setting out the backdrop of the applicant's case, I will extract the salient allegations made by the applicant. In the main, his case was that:

[5] The applicant knew his late mother had this property but he was under the impression that it was sold long ago. That belief turned out not to be true, as he learnt that the property was still in his late mother's name. The applicant does not

state whether he is the executor of his mother's estate or a heir of the property, or the designated family representative.

[6] The applicant approached the office of the first respondent and spoke to a certain Mr Abel Isaacks in an effort to resolve 'issues' regarding his late mother's property. The said official advised him about 'an application for condonation in lieu of debt accumulated on the said property'<sup>1</sup>. The applicant wrote a letter dated 12 October 2020, and it was addressed to the CEO of the first respondent. The letter is quoted verbatim.

'Re: OUTSTANDING BALANCE OF A HOUSE TRANSFERRED

Pursuant to my visit to your office and the subsequent discussion we had on the matter above this letter has reference.

As discussed with you, dear sir, Ef 3382 Sukkot street was a property initially owned by my late mother Chrisiana Khoeses. Over the years (25). This property had been dubiously occupied through an illegal deal by also late Maria Isaacks and her son Josef Auseb who failed to honor the payment of municipal services which skyrocketed up to N\$74 000.00 Upon acquisition of the property, I had been paying seen my take over the current in order to prevent further increases. However, I am not at liberty to inherit the debt incurred and services that were utilized by people that previously occupied the property.

It is in light of the above mentioned that I submit to your office to transfer this debt to the estate of Ms Maria Isaacks, Erf 1766, Sin Street Dolam or alternatively write it off so that I, as a new occupant, should not be unduly punished for a debt I did not incur.' (Sic)

[7] The applicant also sought advice from a community activist, one Mr Januarie who 'proceeded to advise me on the content of the letter and the true meaning of certain phrases and words such as the meaning of condonation and the legal implications thereof'<sup>2</sup> as well as reminded him of the COVID-19 pandemic on Namibia and the government notice that water is to remain open to every household in

---

<sup>1</sup> Founding affidavit para 5.

<sup>2</sup> Founding affidavit para 8.

Namibia. Having obtained the advice, he wrote to the Manager of the department of Debt Management and again asked for condonation on humanitarian grounds.

[8] The applicant disclosed that after he made his story public, other residents who also have astronomical municipal debt, joined issue with him and Mr January. As such, he and Mr Januarie handed a petition to the municipality and they proposed to act as advisors to other residents across the country in order to have their water reconnected.

[9] The applicant furthermore deposed that the decision to disconnect his water supply was unlawful (as his condonation application was still under consideration) and it was illegal because of the COVID-19 regulations. The applicant did not specify the exact regulation on which he relied. However, counsel for the first respondent referred the court to the relevant regulations being State of Emergency – COVID-19 Regulations published under Proclamation No. 9 of 28 March 2020 (hereinafter referred to as the regulations) and the applicant did not contest that reference. It is apparent from the relief prayed for that the applicant seeks that the court review and set aside the disconnection of the water supply as well as to absolve him and others from paying outstanding municipal debts, which relief he seeks under Article 18 of the Namibian Constitution.

[10] The answering affidavit of the first respondent was made by Ms Jennifer Comalie, who at the material time, was the Acting Chief Executive Officer of the Municipal Council of Windhoek. I turn to the first respondent's case as it was set out by Ms Comalie.

[11] The applicant approached the municipality towards the end of 2020 to enquire about an outstanding debt on the erf in question, which account was for the estate of the late Ms Khoeses. The applicant met with an employee at the debt management department, Mr Isaacks, who informed the applicant that the debt must be paid by the estate or the heirs of the estate and advised him of payment options. The applicant was advised of the Credit Control and Debt Collection Policy and Procedures (hereinafter referred to as the Credit Policy) in terms of which an

arrangement could be made to pay off the outstanding debt by either paying off 50 percent or at least one third of the outstanding amount or, alternatively to apply for a payment plan for twelve months, as the debt is owed by the estate.’<sup>3</sup>

[12] The applicant wrote a letter, dated 12 October 2020, about the outstanding balance on the account and he requested the first respondent to transfer the debt to the estate of a certain Maria Isaack who occupied the property or to write the debt off altogether. The deponent replied to that request in a letter dated 8 December 2020, wherein she informed him that the debt cannot be written off because his late mother was not a pensioner and advised him to make alternative arrangements for the debt. The content of the letter is set out below.

‘RE: OUTSTANDING BALANCE ON A HOUSE TRANSFERRED

Your letter dated 12 October 2020 on the above subject matter refers. Our Mr Abel Isaacks have basically explained to you that, if you are the sibling of the legit heirs to the property, you have inherited the debts as well, as you normally inherit such properties “as is”.

In terms of your request of debt write off based on the age of your late mother, that property is now regarded as an Estate Late, and cannot benefit under the Pensioner debt write off project.

You were advised to rather apply for condonation to repay your debts over a longer period, as you explained that you cannot meet the requirements of our Credit Control Policy requirements. Hence, please make a turn at our Debt Management Division accordingly.’

[13] Subsequent thereto the applicant handed in another letter dated 6 January 2021, with a heading ‘application for condonation,’ wherein he requested that the first respondent must ‘excuse and condone’ the outstanding debt of N\$74 345. Based on that, the deponent to the answering affidavit, formed the impression that the applicant misconstrued ‘condonation’ to mean an act of forgiveness, as that is what he asked, but that is not feasible. Furthermore, that as per her letter, the applicant was advised to make arrangements to pay off the debt over a longer period. He was informed that

---

<sup>3</sup> Answering affidavit para 10 and para 28.

a debtor must pay one third or more of the outstanding debt and continue to pay the current account as well as an amount determined in accordance with the debtors' income.

[14] The deponent declares that the only manner in which the first respondent could supply water to any resident and customer, is upon the owner or occupier's request. The first respondent's position is that the supply of water to the said erf is contractual in nature, with the first respondent supplying water to said erf against payment for the service by the owner and or occupiers, and that the late Christina Khoeses applied for the water connection at the time, though they were unable to locate the form. That is the premise of which water was supplied to the said house. The first respondent's accounting records indicates the late Christina Khoeses as the owner and the monthly accounts are rendered under the name of that estate. That account reflect an outstanding debt for use of water, electricity, refuse removal and sewerage in the amount of N\$74 345. That debt has not been paid as such, which amounts to breach of contract.

[15] The deponent further avers that the applicant was informed about the position of the debt not only by Mr Isaacks, but also by her subsequent letter dated 8 December 2020 that he had to make arrangements for payment, which payment criteria is governed by clause 13 of the first respondent's Credit Policy. The deponent deposed that the supply of water for all residents within the area of the municipal boundaries is regulated by the Regulations<sup>4</sup> (hereinafter referred to as the Water Regulations). In particular, she referred to regulation 4(4) and regulation 21(1) which, inter alia, provides for a service contract and that the suspension of the service will follow due to non-payment by a customer. Thus, the act of disconnecting the water is not an administrative decision subject to review, but it was the remedy available in terms of its by-laws to defaulting customers.

[16] In the event that the court regards the disconnection as an administrative act, the first respondent contends that the applicant was well aware of the outstanding

---

<sup>4</sup> Regulations General Notice No. 367 of 16 December 1996, as amended by General Notice No. 151 of 1 July 1997 further amended by General Notice No.294 of 2006.



amount on the said erf as well as the stance of the first respondent and failed to either pay or make arrangements as required.

[17] The deponent also dealt with the applicant's reliance on the COVID-19 directives made by the fourth respondent under regulation 14(1) and (3) of the State of Emergency – COVID-19 Regulations published under Proclamation No. 9 of 28 March 2020 and stated that regulation 14 was declared unconstitutional in *Namibia Employers Federation v President of the Republic of Namibia*.<sup>5</sup>

#### The legislative framework

[18] Before considering the parties' contentions it is necessary to consider the framework within which the municipality operates, whereafter I intend to deal with the question of whether the first respondent has the authority to disconnect water supply to the residents within its area of jurisdiction and finally whether the act in this case amounts to an administrative action.

[19] Municipalities fulfill an important role in the overall scheme of government as they are the first line of delivery of services to the residents of the land. The Local Authorities Act 23 of 1992 (hereinafter referred to as 'the LAA') provides for the determination of local authority councils; the establishment of such local authority councils; and to define the powers, duties and functions of local authority councils; and to provide for incidental matters thereto. In respect of the supply of water, s 30(1) of the LAA provides inter alia that a local authority council shall have the power to supply water to the residents in its area for household, business or industrial purposes.

[20] Municipalities are allowed to make by laws i.e. rules and regulations to regulate the orderly and effective administration over the affairs that they have the right to administer. Section 94 (1) of the LAA states that a local authority council may, after consultation with the Minister, make regulations by notice in the Gazette in relation to

---

<sup>5</sup> *Namibian Employers' Federation v President of the Republic of Namibia* (HC-MD-CIV-MOT-GEN-2020/00136) [2020] NAHCMD 248 (23 June 2020).

'(a) the supply, distribution and use of water in its local authority area, including –

(i).....

(ii) .....

(vi) the cutting off of water on account of failure to pay any charges or fees determined in respect of the supply of water of water or on account of the contravention of any provision relating to waste, misuse or contamination of water...'

[21] The first respondent pointed to regulation 4(4) of the Water Regulations which oversees the supply of water to any customer within the local authority. The nub thereof is that the supply (whether it is an initial connection or reconnection) of water occurs upon application by a customer and that the customer concludes a contract with the Chief Executive Officer signing on behalf of the Council.

[22] Additionally, regulations 21(1) and 21(3)<sup>6</sup> of the Water Regulations, are also relevant and it provides that:

'(1) If an account rendered by the Council in respect of –

(i) The supply of water;

(ii) rates leviable in respect of such premises in terms of the Act; or

(iii) bthe fees, charges or other monies due to the Council in respect of any service, amenity or facility supplied to the premises in terms of the Act, inclusive of any availability charge or minimum charge leviable under section 30(1)(u) of the Act, whether it relates to a service rendered in terms of these regulations or not,

is not paid by a consumer before the expiry of the last day for such payment specified in the account, the Council may forthwith suspend the supply of water to such consumer until the amount due is paid by the consumer, together with the charges referred to in subregulation (3).'

'(3) If the supply of water to any premises is suspended under subregulation (1) or (2), the consumer concerned shall, before such supply is restored by the Council - (a) pay the charges determined for suspension of the supply of water and for the restoration of such

---

<sup>6</sup> Regulation 21 is amended by Government Notice 294 of 2006.

supply; and (b) pay or make acceptable arrangements for the payment of arrear rates or the fees, charges or other monies due to the Council in respect of any service, amenity or facility supplied to premises in terms of the Act, inclusive of any availability charge or minimum charge leviable under section 30(1)(u) of the Act, whether it relates to a service rendered in terms of this regulation or not.'

[23] The first respondent's Credit Policy is also germane to the matter. The said policy caters for 'Arrangements' for residential debtors and the relevant paragraphs therein read as follows:

'13.2. All debtors who are in arrears and apply to make arrangements to reschedule their debt will be subject to the following payment requirements at the time of making the arrangement:

13.2.1.1 One third of the arrears (30%) +

13.2.1.2 Current account +

13.2.1.3 An agreed payment towards arrears based on the principles contained in this policy and paragraphs 13.1.3 and 13.1.4. '

[24] In addition, para 13.1.3 states that the debtor may be required to prove his level of income and must agree to a monthly payment based on the ability to pay or based on his total liquidity if Council so desires. Paragraph 13.1.4 provides that all negotiations with the debtor should strive to result in an agreement that is sustainable and beneficial to the Council.

[25] I return to consider the arguments by the applicant that the first respondent's disconnection was unlawful and the explanations he advanced for that. It is prudent to briefly pause at the contentions pertaining to the act being flawed and unfair and it offends against COVID-19 regulations. That constituted the greater part of the case for the applicant. The argument was that first respondent was obliged to ensure residents had access to water and the disconnection was contrary to the regulation in question. However, the applicant has conceded that in view of the said regulations being declared unconstitutional, he cannot place reliance on that for his application. In view of the concession, there is no need to belabour this judgment with that.

[26] The nub of the remainder of the applicant's arguments were that the decision to cut off his water supply was un-procedural, and unfair, in contravention with Article 18 of the Namibian Constitution. He informed the court that he was aggrieved because he was not given *audi partem* prior to the disconnection and that the first respondents did so in the face of him having applied for condonation. As such, he argued that he had a legitimate expectation for the debt to have been written off and for the first respondent to have called or consulted him prior to the disconnection. During the course of his argument he acknowledged, to some extent, that it not realistic to expect the first respondent to make appointments and consult each resident who is in default with payments, before it cuts off the supply of the services.

[27] The material facts are rather straightforward and are largely common cause. At the time of the application, the applicant occupied his late mother's house, which accumulated a substantial amount of outstanding municipal debt. The applicant initially had a conversation with one Mr Isaacks at the first respondent's Office who gave information as regards the outstanding debt. The parties were at a slight variance as to what Mr Isaacks stated at that initial visit. According to the applicant Mr Isaacks told him to apply for condonation whereas the first respondent's papers state that Mr Isaacks not only spoke about the debt, but also informed the applicant of the various routes which could be followed for outstanding debt, including the first respondent's Credit Policy's requirements. Thereafter, he wrote a letter to the CEO and asked for the debt to be transferred or written off. The applicant contended that there was no confirmatory affidavit by Mr Isaacks, which was clearly a misapprehension, as it was uploaded on eJustice. The applicant appears to have lost sight that the first respondent brought a condonation application before a different court and was granted leave to file answering papers. In my view not much turns on the content of the conversation as the applicant from that point forward wrote the letter for condonation.

[28] Moreover, on his own version, he stated that he had gone to Mr Isaacks. It is also apparent from the applicant's own letter that he spoke with the said employee about an outstanding debt and thereafter the applicant wrote a letter asking that the

debt be transferred or written off. It is also clear from the deponent answering affidavit and her letter dated 8 December 2020, that he was duly that the debt cannot be written off, and that he needs to make arrangements to pay off the debt over a longer period. The applicant has not denied receipt of the said letter.

[29] The attack by the applicant on the inability of the first respondent to locate the application form or contract signed by his late mother does not assist the applicant's case that the disconnection was illegal nor does it bolster his demand for the reconnection of the said service. It emanates from the Water Regulations that no customer may be supplied with water unless he or she applied for it and concluded a contract for that. If there was no such contract from the outset, then the property was not entitled to the supply of water at all, whilst under his late mothers' name. If that was the case the first respondent, in any event, would have so much more reason to have disconnected the said service. However it was not the applicant's case that the property was not in his late mothers' name. Nor was it the applicant's case that his late mother never concluded a contract or that she never consumed water at all on that premises. Moreover the respondent's position is that invoices had been rendered in the name of the estate of the late Ms Khoeses all along and the house was not transferred from that name. For that reason, the applicant was well aware of the situation and the Credit Policy of the first respondent was explained to the applicant, not only by Mr Isaacks but also by the CEO's letter of 8 December 2020, which informed him that arrangements has to be made to pay off the outstanding debt.

[30] Against that background, counsel for the first respondent submitted that the outstanding payments and or arrangements to pay off over a longer period were not made, whereafter the first respondent acted in accordance with the Water Regulations and its Credit Policy. As such, it was an act that was premised on breach of contract and not administrative in nature. In support of that submission, reference was made to *Permanent Secretary of Finance and Others v Ward*<sup>7</sup> which involved the cancellation of a contract of medical services and it was held that when the appellant

---

<sup>7</sup> *Permanent Secretary of Finance and Others v Ward* 2009 (1) NR 314 (SC) P 230.

cancelled the agreement he was not performing a public duty or implementing legislation, but was acting in terms of the agreement entered into by the parties. Therefore, it could not be said that the first appellant was exercising a public power at the time.

Does the act of disconnecting the water supply amount to an administrative act?

[31] I proceed to the fundamental issue as to whether the disconnection of water supply the said house is subject to administrative review in terms of Article 18 of the Namibian Constitution. In contemplation of what types of act constitutes an administrative action Parker states that:

'In Namibia in determining whether a particular action is an administrative action subject to judicial review in terms of art 18 of the Constitution, one should look at the nature and statutory source of the power under which the administrative body or official purported to act.'

<sup>8</sup>

[32] Furthermore, existing case law also provides valuable guidance. Courts have looked at the character of the decision maker, with the first question always whether the decision maker is a public body or State organ clothed with public power. Secondly, to always look at the source and the nature of the power that is exercised. Our courts has accepted the test as stated in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* at para [141]:

'In s 33 the adjective 'administrative' not 'executive' is used to qualify 'action'. This suggests that the test for determining whether conduct constitutes 'administrative action' is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in *Fedsure*, that some acts of a legislature may constitute 'administrative action'. Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the

---

<sup>8</sup> *Administrative Law: Cases and Materials* Windhoek: UNAM Press C Parker 2019 at p 26.

enquiry as to whether conduct is 'administrative action' is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.<sup>9</sup>

[33] In a subsequent paragraph the Constitutional Court said the following:

'[143] Determining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult. It will, as we have said above, depend primarily upon the nature of the power. A series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor. So, too, is the nature of the power, its subject-matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is. While the subject-matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of s 33. Difficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of s 33. These will need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration. This can best be done on a case by case basis.' (Emphasis provided.)

[34] In *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others*<sup>10</sup> case the appellant was an organ of State as defined in s 239 of the South African Constitution. It had cancelled a contract with the respondent (with whom it had contracted to identify non-paying levy payers and to collect outstanding levies) on grounds of material breach of contract involving substantial fraudulent claims. On appeal, Streicher JA remarked:

'[18] The appellant is a public authority and, although it derived its power to enter into the contract with the first respondent from statute, it derived its power to cancel the contract from the terms of the contract and the common law. Those terms were not prescribed by statute and could not be dictated by the appellant by virtue of its position as a

<sup>9</sup> *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at para [141].

<sup>10</sup> *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* 2001 (3) SA 1013 (SCA).

public authority. They were agreed to by the first respondent, a very substantial commercial undertaking. The appellant, when it concluded the contract, was therefore not acting from a position of superiority or authority by virtue of its being a public authority and, in respect of the cancellation, did not, by virtue of its being a public authority, find itself in a stronger position than the position it would have been in had it been a private institution. When it purported to cancel the contract it was not performing a public duty or implementing legislation; it was purporting to exercise a contractual right founded on the consensus of the parties in respect of a commercial contract. In all these circumstances it cannot be said that the appellant was exercising a public power. Section 33 of the Constitution is concerned with the public administration acting as an administrative authority exercising public powers, not with the public administration acting as a contracting party from a position no different from what it would have been in had it been a private individual or institution.’ (Emphasis provided.)

[35] In *Kungwini Local Municipality v Silver Lakes Homeowners Association and another*<sup>11</sup> the issue was the property rates policy and it was held that the levying, recovering and increasing of property rates is a legislative rather than an administrative act.

[36] It is evident from the legislative framework of the first respondent that it had the power to disconnect water supply if the outstanding balance of an outstanding account is not settled and the applicable arrangements in terms of the Credit Policy has not been made. Thus, the first respondent did not act ultra vires its powers in the matter before court.

[37] It is important to look at the nature and function of the act that was performed. The nature and the source of the power exercised by the first respondent is to be found in the Water Regulations and the Credit Policy, which conferred upon the first respondent the power to terminate the supply of water if the fees are not paid. The act of disconnecting the water supply is furthermore regulated by contract in that the first respondent has the obligation to supply water, whilst the customer has the corresponding obligation to pay for the said service, failing which the supply will be

---

<sup>11</sup> *Kungwini Local Municipality v Silver Lakes Homeowners Association and another* [2008] ZASCA 83; [2008] 4 All SA 314 (SCA); 2008 (6) SA 187 (SCA) para 14.



terminated. At the end of the day, the decision to disconnect the supply of water was based on ordinary business principles and common law breach of contract. In this case, the arrears were not paid and the remedy provided for that ensued. I regard it as the day to day enforcement of the applicable policy measures for the efficient recovery of debt and sustainability of the water supply. The decision to do so is not converted into an administrative action, merely because it done by the local authority. I thus endorse the argument by the first respondent that the act in question was contractual in nature and it does not amount to an administrative action.

[38] As regards the prayers for the relief for other persons, it has to be said that no other persons was joined as a party to the suit, nor was the applicant able to refer the court to the authority or basis on which he sought relief for them.

[39] Thus, it follows that the applicant has not made out a case for the relief sought herein and the application for an administrative review stands to fail.

### Costs

[40] Generally, the rule is that costs follow the course. The awarding of costs is a matter that falls entirely within the discretion of the court. It is trite that the discretion must be exercised judiciously whilst having regard to the particular circumstances of each case.<sup>12</sup> Due to the chilling effect that cost orders may have on a litigant that may seek to enforce a constitutional right, courts are at cautious to penalize such litigants. In light of that, this court will not mulct the applicant in costs. This also applies in respect of the costs of the application for leave to appeal which was withdrawn by the applicant.

[41] In the result the following order is made:

1. The application is dismissed.
2. There shall be no order as to costs.
3. The matter is removed from the roll and regarded as finalised,

---

<sup>12</sup> *Malachi v Cape Dance Academy International (Pty) Ltd* [2010] ZACC 24' 2010 (6) SA 1 (CC) 2011(3) BCLR 276 (CC) para 52.

---

JUDGE  
C CLAASEN

APPEARANCES:

FOR THE APPLICANT: ELIFAS EBSON KHOESEB  
In Person

For the Respondents: ADV SHIFOTOKA  
Instructed by Uanivi Gaes Inc.