THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NUMBER: 51/98

In the matter between:

KEMPTON PARK/TEMBISA
METROPOLITAN SUBSTRUCTURE APPELLANT

and

SIMON JAN JACOB KELDER RESPONDENT

CORAM: **HEFER, OLIVIER and PLEWMAN JJA; MELUNSKY and MTHIYANE AJJA**

DATE OF HEARING: **17 MARCH 2000**

DATE OF JUDGMENT: **31 MARCH 2000**

JUDGMENT

Municipal council - Interpretation of Council Resolutions - Mandamus to Compel Compliance.

PLEWMAN JA

[1] The issues to be decided in this appeal fall within a very narrow compass. This is the consequence of the manner in which the case was presented and the basis upon which the appeal was argued. The underlying problem as the decision in *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) illustrates, has much wider implications. This will become apparent from the facts set out below. It will also be clear therefrom that the real differences between the parties could well have been addressed on different grounds. But the parties restricted the enquiry to the issue whether appellant, a local government, can be compelled by a mandamus to carry into effect certain resolutions passed by its council in circumstances to be more fully outlined. For this reason it is unnecessary to consider matters such as those raised

in the *Walker* case. Both lower courts consequently decided the matter on this narrow ground. The matter is one which, in the interests of justice, this Court should decide. The jurisdictional requirements of the constitutional order existing at the time when the proceedings were initiated are thus established.

[2] Appellant is the Kempton Park/Tembisa Metropolitan Substructure. It was brought into existence by proclamations issued in terms of the Local Government Transition Act 209 of 1993 and Chapter 10 of the Interim Constitution Act 200 of 1993. These proclamations brought about the amalgamation of the earlier municipal structures of Kempton Park, the Township of Tembisa and certain other minor entities. I will refer to appellant as the council. Respondent was a resident and ratepayer of Kempton Park and is now a resident and ratepayer of the enlarged entity.

[3] The proclamations and the statutes referred to brought about profound changes in this country at local government level. The significance of these changes was extensively reviewed in the case of *Fedsure Life Assurance and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC).

[4] This case concerns the provision of electricity in the enlarged area by the council as the supply authority. Tembisa has a population of between 600 000 and 1 million - no precise figure can be established. It contains 30 000 formal housing units and an undetermined (and seemingly indeterminable) number of informal housing units. By 1981, 24 500 of the formal units had been provided with electricity and equipped with meters to measure each unit's consumption of electricity. In the years which followed approximately

9 000 of these meters were rendered inoperative because they were vandalized or otherwise interfered with. The remaining 5 500 formal units had not at any time been supplied with electricity and none of the informal units enjoyed a supply of electricity.

There was a large influx of people into Tembisa, particularly in the years after 1986 when influx control ceased to be enforced. A period of intense political activity followed. A rent boycott was organized and there were disturbances which led in the end to a loss of administrative control in the area. In this situation many inhabitants simply installed or made illegal connections to the electricity supply network to draw power therefrom. There is an estimate in the papers that approximately 10 000 such connections were made. These, as is obvious, were not metered and the electricity consumed was not paid for. This practice also caused overloading of the supply system and

frequent blackouts in various areas - a marked source of friction between the inhabitants and those in authority. Attempts to remove the illegal connections proved not only futile because they were merely re-established but also dangerous in so far as the persons effecting the removal were concerned.

The position in November 1995 was that, not taking the illegal connections into account, there were approximately 24 500 housing units in the area wired for and consuming electricity of which 9 000 were not metered. While the supply to those which were wired was unreliable, the majority of the inhabitants did not enjoy a supply of electricity at all. There was also by this time an entrenched "culture of non-payment" for services and the overall recovery of electricity charges was very low. The entire system of administration was in fact in serious disarray.

[5] The council's approach to the difficulties it faced in Tembisa was aimed at a re-assertion of control which would enable it to recover electricity charges. But it recognized that enforcement of a uniform structure of electricity tariffs in its entire supply area and universally enforceable against all was an end which was not immediately achievable. It accordingly resolved on 22 August 1995 to adopt a "Business Plan to Normalise the Electricity Supply to Tembisa" prepared earlier by its Director of Electricity in conjunction with its Electrical Engineering Services Committee. In so far as the recovery of electricity charges is concerned, the Plan proposed remedial steps to be implemented in phases all directed at the ultimate objective of normality.

[6] The object of respondent's application was to force the council to cut off the supply of electricity to persons who failed to pay the

charges therefor and to maintain such discontinuation until all outstanding debts and fines had in such cases been paid by the defaulters. This relief is covered by the first and second prayer in the Notice of Motion. It is alleged in the founding affidavits that the council had by resolution adopted a credit control procedure which directed that it follow this course in cases of non-payment. The third prayer is in a sense supplementary in that it sought to compel the council also to initiate legal proceedings to recover any unpaid electricity charges. The fourth prayer is directed at compelling the council to disconnect and remove on a continuing basis all unlawful electrical connections and to prosecute all persons who effected illegal connections to the system.

[7] Respondent's contention in support of the first three prayers is that the council is obliged to take the specified steps because it had by

such resolutions decided to enforce its credit control policy in that manner. The council, for its part, contests the matter mainly on the ground that the relevant resolutions (or rather, as will be seen, the only relevant resolution) did not have the content suggested by respondent. It also argues that the remedy invoked is a discretionary one and that its application will be inappropriate in the circumstances.

[8] In the Witwatersrand Local Division Mynhardt J refused the application (particularly in so far as the first three prayers are concerned) on the ground that the council was not obliged to enforce its credit control procedures against defaulters because the relevant procedures were a matter within the council's discretion. The reasoning was that s 87(1) of the Local Government Ordinance No 17 of 1939 (Transvaal) (which is still in force), being permissive and not peremptory, preserved the council's discretion as to whether it would

cut off the supply to defaulters and as to the manner or method by which unpaid charges were to be recovered.

[9] The court *a quo* overruled Mynhardt J and made the following order:

> "The respondent is ordered -
>
> 1. to terminate the supply of electricity to any consumer where such usage can be metered whose account is overdue and with whom is has not arrived at an arrangement contemplated by clause 1.1, 1.2 or 1.3 of its credit control policy.
> 2. to maintain the discontinuation of any service which has been terminated pursuant to the order in paragraph 1 until such time as the debt has been discharged or the consumer and the respondent have arrived at an arrangement contemplated by the credit control policy;
> 3. to take all reasonable steps to recover payment of outstanding electricity accounts including legal steps where it is satisfied that no reasonable prospect of recovering such debt exists unless legal steps are taken;
> 4.1 to take all reasonable and practical steps to terminate any unlawful connection to the electrical reticulation system under its control;
> 4.2 to lay charges against any person who appears to have

> committed a criminal offence in relation to the use of electricity or any connection with the electrical reticulation system under its control."

It is against this order that the council appeals.

[**10**] In my view the court *a quo* erred in granting the first three prayers. Its decision in that regard can be set aside on any one of several grounds but I prefer to show no more than that it misconstrued the only relevant resolution.

[11] As mentioned earlier respondent's case is essentially that the council is obliged to put its resolutions into effect. In his heads of argument resolutions, said to have been adopted on 27 June 1995, 31 July 1995 and 29 August 1995, were mentioned; but in the course of the debate it became clear that the only resolution upon which reliance was placed is the one passed on 29 August 1995.

[12] It is essentially paragraphs (a) and (b) of the resolution of 29

August 1995 which call for consideration. But it is advisable that I also quote paragraphs (c) and (d) thereof. The remainder of the rather lengthy resolution does not assist in the interpretation of paragraphs (a) and (b) and is therefore omitted. The relevant parts read:

> "(a) That the Substructure RECONFIRMS its principle of uniform tariffs for the total community of the area of its jurisdiction.
> (b) That the Substructure RECONFIRMS the principle that where consumption can be metered, the metered rates as well as the normal credit control measures BE IMPLEMENTED.
> (c) That all efforts BE MADE to have meters installed as soon as possible.
> (d) That all existing meters BE CHECKED for correctness and fixed where necessary.
> (e) ....."

[13] It is common cause that cutting off the supply of electricity to defaulters was included in the "normal credit control measures". The question is whether the credit control measures were to be enforced

immediately against all defaulters. I do not think the resolution can be read in this manner. The words "reconfirm" of themselves take one back to a previous enunciation of the principle. This was the adoption on 22 August of the Business Plan. The use of the words "its principle" and "the principle" contrasted with the positive terms of paragraph (c) and (d) clearly show that the council merely reaffirmed its commitment to the Business Plan which, as stated earlier, provided for a phased implementation of the credit control policy in order to avoid the very steps listed in the Notice of Motion. Indeed the word "principle" would be meaningless on the respondent's construction of the clause. For these reasons alone respondent's assertion that a firm decision had been taken to enforce the council's credit control policy immediately must be rejected.

[14] The court *a quo*'s conclusion as to the effect of the council's resolutions seems to have been influenced by the nature of the duties it held to have been imposed on the counsel. The court held that the council stands in a fiduciary position in relation to its ratepayers because "[t]he recognition and maintenance of a fiduciary relationship is at the heart of representative local government in an open and democratic society." As a consequence, it found, "other duties culled from those recognized as attaching to a trustee" are imposed on the council. Certain duties derived from the private law of trusts were then identified and relied upon in order to justify a mandamus.

[15] I am unable to support this approach. That there is in a broad sense a fiduciary relationship between the council and its ratepayers

is plainly correct. As Feetham AJA explained in *Sinovich v Hercules Municipal Council* 1946 AD 783 at 820

> "[i]t may, I think, be safely affirmed that the main object of establishing municipal councils and similar bodies for purposes of municipal government, as understood and carried on in the Union of South Africa ....., is to enable representatives of the inhabitants of given areas to administer, subject to some degree of control by a central authority, the local affairs of those areas in the general interests of their respective communities; and, in order to make such administration adequate and effective, it has now become a common practice to give to each municipal council wide powers to decide according to its discretion, subject to certain checks and safeguards, what measures will or will not serve 'a useful civic or municipal purpose' in its own area."

That local government should be representative of the inhabitants of its area of jurisdiction and that its actions should be open and transparent can certainly not be doubted. No one would, in this day and age, question these propositions. But I do not subscribe to the attribution to the council of private law duties derived from the law of trusts. The

council, as has been stated, owes its existence to the provisions of the Local Government Transition Act 209 of 1993 and the proclamations made in terms thereof. Its powers and duties are conferred by the Constitution, by other statutes and the relevant principles of public and administrative law. To impose upon it additional duties in accordance with the principles of private law seems to me to negate its function as an organ of state and a branch of government.

[16] I mention this because the duties imposed on trustees also formed the basis on which the court *a quo* granted the fourth prayer. In my view that prayer should not have been granted, firstly, because it effectively deprives the council of the discretion which it plainly has in regard to the way in which to deal with the illegal connections and the persons who make them and, secondly, because it ignores what has happened in the past and what the disconnection of illegal

connections entails. In the answering affidavits it is said that the removal of these connections has proved futile in past attempts because they are immediately re-established; that their removal is a life-threatening operation; and that the council has estimated that it would take approximately 10 000 employees working day and night to remove them - a force which it simply cannot afford or muster. This being so, what further "reasonable and practical steps" are expected?

[17] For these reasons I am of the view that the appeal must be upheld. There was some argument on costs with a suggestion that respondent has been acting in a public-spirited manner and should not be mulcted in costs. I am unpersuaded that this is the spirit in which he has been acting or, even if he has, that there is any reason not to apply the ordinary rule that costs follow the result. I am also satisfied that the matter is sufficiently complex and important for the appellant

to have employed two counsel.

The appeal accordingly succeeds with costs including the costs of two counsel. The order of the court *a quo* is set aside. Substituted therefor is an order dismissing the appeal with costs.

C PLEWMAN JA

CONCUR:

HEFER JA)
OLIVIER JA)
MELUNSKY AJA)
MTHIYANE AJA)