



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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Emalahleni Local Municipality v Lehlaka Property Development (Pty) Ltd (600/2022) [2023] ZASCA 138 (25 October 2023)

Today, the Supreme Court of Appeal (SCA) dismissed an appeal with costs, including the costs of two counsel, against the decision of the Mpumalanga Division of the High Court, Middelburg (the high court), which granted declaratory and interdictory relief sought by the respondent, Lehlaka Property Development (Pty) Ltd (Lehlaka), against the appellant, Emalahleni Local Municipality (the Municipality).

The facts of the matter were briefly as follows. Lehlaka was the owner of eight properties in a mining village known as Rietspruit in Mpumalanga, which were invaded by unlawful occupiers. Lehlaka, as owner, and in terms of its consumer agreement with the Municipality, in accordance with the Emalahleni Local Municipality Electricity By-laws (the Electricity By-laws), continued to pay for the municipal services. On 23 April 2020, Lehlaka addressed a letter of termination of the consumer agreement. The Municipality however asserted that it had the discretion whether or not to accept the termination, which it refused to accept.

The issues before the SCA were, firstly, whether the unlawful occupiers on Lehlaka's properties ought to have been joined to the proceedings, and secondly, whether the decision of the Municipality not to accept Lehlaka's termination of the agreement was an administrative action, and thus, whether the procedure that ought to have been adopted was by way of review under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and not declaratory or interdictory relief, as sought by Lehlaka.

The SCA, through the majority judgment penned by Nicholls JA (Weiner JA and Siwendu AJA concurring), found that the point *in limine* regarding the non-joinder issue fell to be dismissed. This was because there existed no public law relationship between Lehlaka and the unlawful occupiers. That there may have been one between the Municipality and the unlawful occupiers to provide basic services did not mean that the unlawful occupiers had a direct and substantial interest in the dispute as to whether Lehlaka had a right to terminate its consumer agreement with the Municipality. Or, as the Municipality contended, whether it had a discretion not to accept the termination.

The majority judgment found that if Lehlaka owed no duty to supply electricity to the unlawful occupiers in discharge of a public duty (and had no private law duty to do so), then whether or not the contract between Lehlaka and the Municipality was terminated, gave rise to no legal

interest by the unlawful occupiers in that dispute. It found further that if the unlawful occupiers had a right to electricity as part of their constitutional right to basic services, then this was an obligation to be borne by the Municipality. To find otherwise, would have been to make private citizens responsible for the State's constitutional duties. The notion of a 'special cluster of relationships' did not translate into imposing obligations on private individuals, nor did it convert a contractual relationship into an administrative one.

With regard to the applicability of PAJA, the majority judgment found that the Municipality's decision to refuse to terminate the consumer agreement did not amount to administrative action as defined in PAJA, and was consequently not susceptible to judicial review in terms of s 6 of PAJA. It found that once it was accepted that the consumer had a right to terminate a consumer's agreement on the requisite notice, there was no choice to be made by the Municipality and thus no decision, other than a mechanical one, to be made. In this regard, the majority judgment found that other than the requisite 14 days' written notice, which the Municipality had accepted was given by 23 April 2020, the Municipality had no discretion to refuse to terminate the consumer agreement. Thus, Lehlaka was entitled to terminate the contract with the Municipality. Consequently, the SCA held that the appeal fell to be dismissed.

Siwendu AJA penned a separate concurring judgment, in which she agreed that given the contractual nature of the relationships between Lehlaka (as the owner of the occupied properties) and the Municipality (a sphere of government), a joinder of the unlawful occupiers was not necessary. Siwendu AJA found that the crux of the dispute involved Lehlaka's right to resile from and terminate the consumer agreement and the Municipality's refusal to accept Lehlaka's termination notice. Siwendu AJA found that there was no basis or power in law for the Municipality to impose a contractual relationship on an unwilling party, who was entitled in law to resile from a contract. Further, that absent the purported 'special cluster of relationships' as between Lehlaka and the Municipality, the dispute was purely contractual. Thus, the unlawful occupiers had no right or claim in the subject matter of the termination dispute.

A minority judgment penned by Hughes JA (Mocumie JA concurring) would have upheld the appeal on the basis of non-joinder of the unlawful occupiers. It found that the issue was squarely raised by the Municipality as a point *in limine* before the high court. Despite it being raised, the high court did not address it at all. The minority judgment found that the unlawful occupiers ought to have been joined to the application in the high court. It further found that there was a 'special cluster relationship' that invoked the application of PAJA on the facts of this case. The Municipality had a public law duty to supply electricity to its constituents, the unlawful occupiers included. The corollary was that the unlawful occupiers had a right to insist that the Municipality discharged its public law duty to supply electricity. It was that right that was adversely affected in this 'special cluster relationship', which required that the unlawful occupiers be joined to the proceedings. This was because they had a direct, substantial and legal interest that was affected by the order made by the high court. It was thus necessary that Lehlaka should have joined the unlawful occupiers.

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