

JONPENN (PVT) LIMITED
versus
CITY OF HARARE
and
TENDAI MAHACHI N.O. TOWN CLERK

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 10 May 2016 and 1 June 2016

Opposed matter

A Makoni, for the applicant
O Shava, for the respondent

MATANDA-MOYO J: On 21 May 2015 this court granted by consent the following provisional order;

“INTERIM RELIEF GRANTED

- 1) That the respondents be and are hereby ordered to immediately restore water supplies to applicants premises, Bothwell House, No 48 Jason Moyo Avenue Harare.
- 2) That pending finalisation of this matter, the respondents, and all 1st respondent’s employees and assigns be and are hereby interdicted from interfering with applicant’s free possession and control of the premises and water supply point at Bothwell House, No. 48 Jason Moyo Avenue, Harare, by terminating water supply.
- 3) That the respondents shall jointly and severally pay the costs of suit on an Attorney-client scale

The applicants now seek confirmation of the above provisional order in the following;

“TERMS OF FINAL ORDER SOUGHT

- 1) That the termination by the respondents of the applicant’s water supplies on the basis of disputed water bill, in the absence of any order of court; is unlawful self-help.
- 2) That the respondent and all its employees be and are hereby interdicted from interfering whatsoever with, disrupt or terminate applicant’s water supply without the authority of a court order.
- 3) That the respondents jointly and severally, pay the costs of suit on an Attorney-client scale, payment of one absolving the other, in the event that they oppose this application.”

The brief facts are that the applicant is a company duly registered and carrying out business of property management in Zimbabwe. The applicant manages York House, 48 Jason Moyo Avenue, Harare. The applicant is responsible for payment of water bills to the

first respondent. The first respondent sent monthly water bills to the applicant. On 29 April 2015 the applicant challenged the balances on the statement. The applicant complained that certain payments made by it were not reflecting on the statement. The applicant indicated it believed its payments were up to date. No response was received from the respondents. On 6 May 2015 the first respondent issued an “authority for disconnection of supplies at 48 Jason Moyo Avenue, Harare.” Water disconnection was carried out on 11 May 2015. No notice was given for such disconnection resulting in the applicant bringing an urgent application directing the respondents to reconnect water supplies at 48 Jason Moyo Avenue.

The respondents are opposed to the granting of the final order on the following basis;

- 1) That the applicant had failed to show that any amounts had been incorrectly posted to a wrong account,
- 2) That the applicant had failed to show that any figures had been erroneously posted to its account;
- 3) That the water disconnection carried out on 11 May 2015 was lawful and in compliance with s 8 of the water By-Laws 164/1913 as read with s 69 (2) (e) (i) of schedule 3 to the Urban Councils Act [*Chapter 29:15*],
- 4) That the applicant was served with 48 hours’ notice which is more than the required 24 hours’ notice.
- 5) That the respondents do not require a court order first before disconnecting water.

The applicant submitted that the water was terminated the same time that the notice was given in violation of the law. On the other hand the respondents insisted notice had been served on the applicants as far back as February 2015 in the form of statements. The respondents averred that on the statements served on the applicant from February to April 2015 were endorsed the following words;

“Water supplies may be disconnected without further notice if this account remains unpaid after due date.” The parties agree such words were contained on the statement. They disagree whether that constituted notice or not. The parties also agree that the water was terminated on 11 May 2015 upon serving the authority to disconnect water supplies.

It is the applicant’s submission that the respondents flouted their own rules by failing to give 24 hours notice before disconnecting water supplies. The first issue to be determined by this court is whether the statements issued to the applicant between February, and April 2015 constitute ‘notice’ in terms of the law.

Section 8 of the water By-Laws 164/1913 provides;

“The council may, by giving 24 hours notice, in writing, without compensation, and without prejudicing its rights to obtain payment for water supplies to the consumer, discontinue supplies to the consumer

(a) if he shall have failed to pay any sum which in the opinion of the council is due under these conditions or the water by-law.”

Section 69 (2) (e) (i) of schedule 3 to the Urban Council’s Act [*Chapter 29:15*] provides;

“Without derogation to the generality of sub paragraphs (i), by-laws relating to matters referred to in that subparagraph may contain provision for all or any of the following

(a)

(b) Cutting off the supply of water, after not less than twenty four hours notice on account of;

(i) Failure to pay any charges which are due;.....”

It is common cause the City by-laws obliges the City Council to give not less than 24 hours notice for termination of water supplies.

The legal definition of ‘notice’ implies knowledge of certain facts. Herein it implies knowledge by a consumer that water would be disconnected anytime “after 24 hours”. It is information that warns one of something about to happen. I do not share the view that the statements which included an intention to cut water supplies without further notice complies with the City Council by-laws. Statements are documents of accounts meant to inform the consumer of how much is owing to City Council. A notice referred to by the by-laws ought to be specific that water supplies would be disconnected after 24 hours of serving the notice. It is common cause the water disconnections were done together with the serving of the notice in contravention of the law. Such disconnection was not carried out in terms of the law and was unlawful.

The applicant also argued that at the time of the disconnection, the amount owing had been disputed. It argued that in the premise no disconnection should have been carried out before the dispute had been judicially determined in favour of the City Council. It is common cause that the respondents disconnected water without responding to the queries raised by the applicant. The question falling for determination is whether the City Council had a right to terminate water supplies notwithstanding the disputed liability. The City Council argued that the applicant had failed to prove any anomalies in the billing. It contended that there was no proof of any mispostings nor any amounts wrongly accounted.

I am of the view that once the amount owing was disputed, the respondents had no right to resort to self-help through disconnecting water supplies. Such dispute had to be judicially determined before any disconnections could be carried out. I am of the view that

the respondents acted in violation of s 3 of the Administrative Justice Act [*Chapter 10:28*] which provides:

“(1) An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person shall:

(a) act lawfully, reasonably and in a fair manner”.

At least the city council was obligated to respond to the queries raised by the applicant before taking any adverse action against the applicant. Contrary to the tenets of fairness the City Council proceeded to disconnect water supplies without even responding. This also offended against s 68 of the Constitution which gives rights to administrative conduct which is lawful, prompt, ... reasonable – and procedurally fair.

The right to water is now enshrined in our Constitution. Section 77 of the Constitution provides:

“Every person has the right to –

(a) Safe, clean and potable water and

(b)

and the State must take reasonable legislative and other measures within the limits of the resources available to it, to achieve the progressive realisation of this right”.

The South African Supreme Court of Appeal in *City of Cape Town and Marcel Mouzakis Strumphur* (104/2011) (2012) ZASCA 54 interpreted s 27 (1) (b) of their constitution which is similar to our s 77 above. The court had this to say:

“It follows from the above statutory and constitutional provisions that the right to water, claimed by the respondent when he applied for a spoliation order, was not solely on contract which he concluded with the City, but was underpinned by the constitutional and statutory provisions discussed above. This view is fortified by the decision of this court in *Impala Water Users Association v Lourens NO and Ors* 2008 (2) SA 495 SCA...”.

The respondent argued that it is permitted to disconnect water on account of unpaid bills – see s 69 (2) (c) (i) of Schedule 3 to the Urban Council’s Act [*Chapter 29:15*] as read with s 8 of the Water By-Laws 164/1913 referred to *supra*. The respondent contended therefore that the disconnection of water supplies to the applicant was legal. Such argument flies in the face of s 3 of the Administration of Justice Act as read with s 68 of the Constitution which provides for fairness and equity. To expect the applicant to pay a bill it is disputing erodes the very principles of fairness contemplated in the above provisions and the dispute resolution procedures. It is my view that by disconnecting water supplies whilst there remain a pending dispute, the respondent acted unlawfully. At least the respondent should

have dealt with the dispute in a fair and transparent manner, and thereafter advise the applicant of its resolution before carrying out the disconnections. Clearly the respondent acted unlawfully in the circumstances as the respondent disconnected water supplies without establishing the amount owing.

The respondent strongly argued that it does not require a court order to disconnect water supplies. I am of the view that once there is a dispute between the parties, it is trite that such dispute be resolved by a court of law. Before resolution of such dispute the respondent possess no legal right to disconnect water supplies.

I am satisfied that the applicant has managed to justify the granting of para (1) of the Final Order sought.

The applicant also sought to interdict the respondents and all its employees from interfering with, disrupt or terminate the applicant's water supplies without the authority of a court order. The requirements for a final interdict are:

- (1) the existence of a clear right which must be established on a balance of probabilities
- (2) irreparable injury actually committed or reasonably apprehended and
- (3) the absence of a similar protection by any other remedy

See *Zesa Staff Pension Fund v Mushambadzi* (278/2001) [20; *Setlogelo v Setlogelo* 1914 AD 221.

I am of the view that the decision to terminate water supplies constitutes an administrative act against the applicant. The parties have accepted that the applicant was entitled to 24 hour notice before the disconnection, which notice was served but disconnections were carried out immediately upon service.

There is no doubt that administrative efficiency is an important goal in a democracy.

The purpose of the Administrative Justice act is to bring accountability to institutions such as respondent. The respondent cannot act arbitrary without following due process where a dispute has been raised. It follows such that disputes be resolved before any adverse action is taken against the disputant. The respondent argued that s 276 of the Constitution empowers respondent "to levy rates and taxes and generally to raise sufficient revenue for it to carry out its objects and responsibilities". No one has challenged the respondent's powers to levy rates and taxes. The issue is what happens should those levies and rates be challenged. It is my view that the section does not empower the respondent to disconnect supplies in the face of a disputed bill.

I am satisfied that the applicant has established the basis of granting the order sought.

In the result I order as follows:

1. That the termination by the respondents of the applicant's water supplies on the basis of a disputed water bill, in the absence of any order of court, is unlawful self-help.
2. The respondent and all employees be and are hereby interdicted from interfering whatsoever with disrupt or terminate applicant's water supply without the authority of a court order.
3. The respondents to pay costs of suit.

Makoni Legal Practice, applicant's legal practitioners
Mbizo, Muachadehama & Makoni, respondent's legal practitioners