



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable

Case no: 600/2022

In the matter between:

EMALAHLENI LOCAL MUNICIPALITY

APPELLANT

and

LEHLAKA PROPERTY DEVELOPMENT (PTY) LTD

RESPONDENT

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

Coram: MOCUMIE, NICHOLLS, HUGHES and WEINER JJA and SIWENDU AJA

Heard: 18 May 2023

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Summary: Civil law and procedure – practice – joinder – no public law relationship between private landowner and unlawful occupiers – 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 – no direct, substantial and legal interest in dispute where no contractual privity – non-joinder point *in limine* dismissed.

ORDER

On appeal from: Mpumalanga Division of the High Court, Middelburg (Legodi JP, sitting as court of first instance):

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

JUDGMENT

Hughes JA (Mocumie JA concurring):

[1] This is an appeal against the judgment of the Mpumalanga Division of the High Court, Middelburg (the high court) for declaratory and interdictory relief sought by the respondent (applicant in the court *a quo*), Lehlaka Property Development (Pty) Ltd (Lehlaka), against the appellant (respondent in the court *a quo*), Emalahleni Local Municipality (the Municipality). Legodi JP granted the orders in the court *a quo*, which I set out further below. The Municipality sought leave to appeal the orders, which was refused by the court *a quo*. The appeal is with leave of this Court.

[2] At the centre of this appeal is a mining village, Rietspruit. This village was formed by the Rietspruit Colliery Mine (the mine), situated in Witbank from 1978. The village and its infrastructure catered for the miners who worked in the mine. The mine supplied the village with electricity, which was initially obtained from Eskom directly, and later from the Municipality.

[3] During 2002, the mine having exhausted all the resources from the land, ceased mining operations. At the cessation of the mining operations, and in terms of the mines' responsibilities and obligations in accordance with the Mineral and Petroleum Resources Development Act 28 of 2002 (MRPDA),¹ the mine tasked Lehlaka, a property development company, to 'hand-over' the mining village to the community. To this end, in 2004, the Municipality, through a proclamation of the village, established a formal municipal township, Rietspruit Township, commonly known as Rietspruit village.

[4] Thereafter, Lehlaka took ownership of the various properties in Rietspruit village. It complied with its duties in terms of the 'hand-over'; distributed and transferred most of the village property, save for the eight properties which remained under Lehlaka's ownership.

[5] During the course of Lehlaka's ownership of the eight properties, and before the township was proclaimed, in terms of the Emalahleni Local Municipality Electricity By-laws (the Electricity By-laws),² Lehlaka, as an owner, was responsible for the payment of all municipal services. After the township was proclaimed, the responsibility for the payment of the municipal services fell upon the new owners in respect of their individual properties, but for the eight properties which were owned by Lehlaka. For some years, these properties remained unoccupied and were as a result invaded by unlawful occupiers. Lehlaka, as an owner, and in terms of its consumer agreement with the Municipality, in accordance with the Electricity By-laws, continued to pay for the municipal services.

[6] Section 3(1) of the Electricity By-laws states:

'No person shall use or be entitled to use an electrical supply from the Council unless or until such person has entered into an agreement in writing with the Council for such supply, and such agreement together with the provisions of these By-laws shall in all respects govern such supply. If a person uses an electrical supply without entering into an agreement, he shall be liable for the cost of electricity and any other costs incurred by Council in such circumstances.'

¹ Read with the Social and Labour Plan in terms of regulation 46 of the Mineral and Petroleum Resources Development Regulations, GN R527, 23 April 2004.

² Emalahleni Local Municipality Electricity By-laws, LAN 173, *Mpumalanga Provincial Gazette* 2229, 14 November 2013 (MP).

[7] As stated earlier, on proclamation of the township, the supply of electricity to the village was from the Municipality since it had taken over from Eskom. Subsequent to the invasion of the eight properties by unlawful occupiers who utilised the electricity, Lehlaka fell into arrears with its electricity bills. In 2019, Lehlaka and the Municipality concluded a settlement agreement in respect of the arrear charges. Thus, from August 2019, Lehlaka made payments for the electricity as and when they became due, and was up to date with its payments.

[8] However, as is common cause between the parties, on 10 February 2020 Lehlaka gave a notice of termination of its consumer agreement with the Municipality and sought to have the electricity disconnected. Though Lehlaka sought the disconnection of the electricity, it decided against this option, and as stated in the founding affidavit, it accepted that this option had consequences for not only the unlawful occupiers and the Municipality, but it could also 'implicate rights and obligations between them beyond Lehlaka's consumer agreements'. There was however no response from the Municipality.

[9] On 28 February 2020, Lehlaka and the Municipality held a meeting to discuss the letter of termination served on 10 February 2020. In that meeting, the Municipality did not dispute that Lehlaka had a right to terminate the consumer agreement. Instead, it advised Lehlaka to first inform the unlawful occupiers, and then put a plan in place to relocate them before disconnecting the electricity. Before this Court, both parties agreed that the occupation of the properties by the unlawful occupiers and Lehlaka's responsibility to pay rates and electricity had been a topic that they had engaged in for quite a while.

[10] On 23 April 2020, Lehlaka addressed a further letter of termination of the consumer agreement 'for the avoidance of any doubt' about its previous letter of 10 February 2020. In this letter it gave the Municipality 14 days' notice in terms of s 4(1) of the Electricity By-laws – the said period would culminate on 15 May 2020. Section 4(1) provides:

'Subject to the provision of section 7(9) and (13), the consumer's agreement may be terminated by the consumer, or his authorised representative, or by the Council giving

14 days' notice in writing calculated from the date of service thereof, provided that if such notice purports to terminate an agreement on a Saturday, Sunday or public holiday, such termination shall only take effect on the following workday.'

However, in the latter termination notification of 23 April 2020, Lehlaka did not seek the disconnection of the electricity but indicated that, if the Municipality continued to supply electricity to the unlawful occupiers after the proposed termination date, this would be for the Municipality's own account.

[11] In its founding affidavit, Lehlaka stated that it had 'on several occasions' terminated the consumer agreement with the Municipality. The most recent being on 23 April 2020, which it submits was in the prescribed manner, as set out in s 4(1) of the Electricity By-laws. Hence, in terms of the consumer agreement, the agreement was effectively terminated on 15 May 2020. Thus, the issue was purely contractual in nature, and Lehlaka had complied with the terms of the consumer agreement. Therefore, Lehlaka was 'not obliged to continue to pay for the electricity consumed by the unlawful occupiers'.

[12] Although the Municipality did not dispute Lehlaka's right to terminate the consumer agreement, it however asserted that it had the discretion whether or not to accept the termination, which it refused to accept. It reasoned that it could not accept the purported termination without Lehlaka first informing the unlawful occupiers that the electricity supply would be disconnected, and that a plan needed to be put in place by Lehlaka to relocate the unlawful occupiers.

[13] As a result of the Municipality's attitude, Lehlaka approached the high court seeking declaratory and consequential relief, which was fashioned as follows:

- '1. Declaring that the applicant has validly terminated the consumer agreements for the supply of electricity that existed between it and the respondent in respect of the "Rietspruit Properties", fully described in paragraph 13 of the founding affidavit and also annexure "X" to the notice of motion, with effect from 15 May 2020;
2. Declaring that the applicant is not responsible for the payment of any electricity consumed on the Rietspruit Properties after 15 May 2020;
3. Ordering the respondent to reverse any amounts it has charged to the applicant's municipal accounts in respect of the consumption of electricity on the Rietspruit Properties since 15 May 2020;

4. Interdicting the respondent from issuing any further invoices to the applicant in respect of any electricity consumed on the Rietspruit Properties;
5. Directing the respondent to pay the costs of this application in the event of opposition; and
6. Further and/or alternative relief.’

[14] On 26 July 2021, the high court granted the aforesaid relief in its entirety. It is this order that is the subject of this appeal. In the high court, the Municipality raised three points *in limine*. First, that the matter was premature, as in terms of s 4(1) of the Electricity By-laws, the Municipality could terminate the consumer agreement within 14 days’ notice to the consumer, yet, it had not given such notice. Before us, counsel for the Municipality, correctly so, abandoned this point *in limine*. Second, the decision of the Municipality not to accept Lehlaka’s termination of the agreement was an administrative action, and thus, 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. Third, was the issue of non-joinder of the unlawful occupiers on the property of Lehlaka.

[15] The high court did not interrogate these points *in limine* at all. Yet, it found that ‘[t]he non-joinder issue perhaps is a smoke screen’.

[16] I first deal with the issue of non-joinder as it would be dispositive of the appeal, if found to be a good point. In *Matjhabeng Local Municipality v Eskom Holdings Limited and Others*,³ the Constitutional Court held the following:

‘At common law, courts have an inherent power to order joinder of parties where it is necessary to do so even when there is no substantive application for joinder. *A court could, mero motu, raise a question of joinder to safeguard the interest of a necessary party and decline to hear a matter until joinder has been effected. This is consistent with the Constitution.*’⁴ (Emphasis added.)

[17] The Constitutional Court further stated:

³ *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited* [2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC).

⁴ *Ibid* para 91.

'The law on joinder is well settled. No court can make findings adverse to any person's interests, without that person first being a party to the proceedings before it. The purpose of this requirement is to ensure that the person in question knows of the complaint so that they can enlist counsel, gather evidence in support of their position, and prepare themselves adequately in the knowledge that there are personal consequences – including a penalty of committal – for their non-compliance. All of these entitlements are fundamental to ensuring that potential contemnors' rights to freedom and security of the person are, in the end, not arbitrarily deprived.'⁵ (Emphasis added.)

[18] In addition, I am mindful of the assertions made by Van der Westhuizen J in *Gcaba v Minister for Safety and Security and Others*,⁶ that:

'Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in *Chirwa* and not the substantive merits of the case. If Mr Gcaba's case were heard by the High Court, he would have failed for not being able to make out a case for the relief he sought, namely review of an administrative decision. In the event of the Court's jurisdiction being challenged at the outset (*in limine*), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim under the LRA, one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction. An applicant like Mr Gcaba, who is unable to plead facts that sustain a cause of administrative action that is cognisable by the High Court, should thus approach the Labour Court.' (Footnotes omitted.)

[19] The test for non-joinder is set out by the Supreme Court of Appeal in *Absa Bank Ltd v Naude NO and Others*,⁷ in the following terms:

'The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined. In *Gordon v Department of Health, Kwazulu-Natal* it was held that if an order or judgment cannot be sustained without necessarily prejudicing the interest of third parties that

⁵ Ibid para 92.

⁶ *Gcaba v Minister for Safety and Security and Others* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) para 75.

⁷ *Absa Bank Ltd v Naude NO and Others* [2015] ZASCA 97 (SCA); 2016 (6) SA 540 (SCA) para 10.

had not been joined, then those third parties have a legal interest in the matter and must be joined.’

Essentially, the appellant must show that:

- (a) The unlawful occupiers have a direct and substantial interest in the subject matter of the litigation which may prejudice them as they have not been joined; and
- (b) Such interest is not only a substantial interest but is a legal interest which justifies that they must be joined.

[20] It is trite that the determination of a point *in limine* essentially deals with a specific legal point that has a bearing on a jurisdictional matter prior to entertaining the merits of the matter.⁸ Hence, if the point *in limine* of non-joinder raised, is found to be good in law, there will be no need to deal with the merits advanced by Lehlaka, as a jurisdictional issue raised does not necessitate dealing with the merits.

[21] In this Court, Brand JA, in *Judicial Service Commission and Another v Cape Bar Council and Another*,⁹ said the following on the issue of non-joinder:

‘It has by now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – *if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned* (see eg *Bowring NO v Vrededorp Properties CC* 2007(5) SA 391 (SCA) para 21). The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one (see eg *Burger v Rand Water Board* 2007 (1) SA 30 (SCA) para 7; Andries Charl Cilliers, Cheryl Loots and Hendrik Christoffel Nel *Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa* 5 ed vol 1 at 239 and the cases there cited.)’.¹⁰ (Emphasis added.)

[22] As stated earlier, Lehlaka contended that its relationship with the Municipality was purely contractual. The consumer agreement was between the Municipality and itself and as such, it was entitled to seek a termination of the agreement, in line with s 4(1) of the Electricity By-laws, which it had done.

⁸ Ibid para 75.

⁹ *Judicial Service Commission and Another v Cape Bar Council and Another* [2012] ZASCA 115; 2012 (11) BCLR 1239 (SCA); 2013 (1) SA 170 (SCA); [2013] 1 All SA 40 (SCA).

¹⁰ Ibid para 12.

[23] The Municipality stated that the contractual issue that Lehlaka had raised was not as simple, since there was ‘a special cluster relationship’ between it, Lehlaka and the unlawful occupiers: It alleged that this ‘special cluster relationship’ exists between it and Lehlaka, between it and the occupiers, as well as between Lehlaka and the occupiers. The Municipality relied on the case of *Joseph and Others v City of Johannesburg and Others*¹¹ (*Joseph*) and the cases cited therein, where the Constitutional Court explained this ‘special cluster relationship’ as a ‘broader constitutional relationship’ existing between ‘a public service provider and the members of the local community [that] gives rise to rights that require the application of s 3 of [the Promotion of Administrative Justice Act]’.¹²

[24] Furthermore, the Municipality submitted that Lehlaka was well within its right to apply for the termination of the consumer agreement, however the decision to accept such termination rested with the Municipality. This decision by the Municipality – to accept or to reject the termination – amounted to an administrative action, which ought to have been reviewed and set aside in terms of PAJA, if found to be unreasonable. For the aforesaid proposition, the Municipality placed reliance on the special cluster relationship and the Municipality’s public responsibility in terms of Chapter 7 of the Constitution and the relevant legislation, being the Local Government: Municipal Systems Act 32 of 2000 (Municipal Systems Act) and the Municipal Finance Management Act 56 of 2003, in respect of those persons within its jurisdiction. Hence, the Municipality contended that ‘the special cluster relationship’ was governed by administrative law principles.

[25] One of the fundamental duties and functions of a municipality under public law is to provide basic municipal services to the occupants within its constituency, one of these services being the supply of electricity. These constitutionally mandated duties are derived from s 152 of the Constitution under Chapter 7, which states:

- ‘(1) The objects of local government are—
- (a) to provide democratic and accountable government for local communities;

¹¹ *Joseph and Others v City of Johannesburg and Others* [2009] ZACC 30; 2010 (3) BCLR 212 (CC); 2010 (4) SA 55 (CC).

¹² *Ibid* para 32.

- (b) to ensure the provision of services to communities in a sustainable manner;
 - (c) to promote social and economic development;
 - (d) to promote a safe and healthy environment; and
 - (e) to encourage the involvement of communities and community organisations in the matters of local government.
- (2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).'

[26] Over and above, s 73 of the Municipal Systems Act states:

'General duty

- (1) A municipality must give effect to the provisions of the Constitution and—
- (a) give priority to the basic needs of the local community;
 - (b) promote the development of the local community; and
 - (c) ensure that all members of the local community have access to at least the minimum level of basic municipal services.
- (2) Municipal services must—
- (a) be equitable and accessible;
 - (b) be provided in a manner that is conducive to—
 - (i) the prudent, economic, efficient and effective use of available resources; and
 - (ii) the improvement of standards of quality over time;
 - (c) be financially sustainable;
 - (d) be environmentally sustainable; and
 - (e) be regularly reviewed with a view to upgrading, extension and improvement.'

Discussion

[27] The provision of municipal services, which includes the provision of electricity, was highlighted in *Joseph*, where Skweyiya J said:

'The provision of basic municipal services is a cardinal function, if not the most important function, of every municipal government. The central mandate of local government is to develop a service delivery capacity in order to meet the basic needs of all inhabitants of South Africa, irrespective of whether or not they have a contractual relationship with the relevant public service provider. The respondents accepted that the provision of electricity is one of those services that local government is required to provide. Indeed, they could not have contended otherwise. In *Mkontwana*, Yacoob J held that "municipalities are *obliged* to provide water and *electricity* to the residents in their area *as a matter of public duty*." Electricity is one

of the most common and important basic municipal services and has become virtually indispensable, particularly in urban society.¹³

[28] With this legal framework in mind, I now turn to the core issue for consideration by this Court, that is, whether the unlawful occupiers within the Municipality's constituency are entitled to receive basic municipal services, electricity being one of those services, and whether such duty falls upon Lehlaka.

[29] Unfortunately, the Constitution does not spell out the provision of electricity to the occupants in its constituency, as it does in respect of water, yet, electricity is also a basic service that the Municipality is obliged to provide and the occupants have a public law right to hold the Municipality to its public law obligation.¹⁴ As was stated in *Joseph*, the mistake that was made in the high court, as in this case, is 'viewing the issues through an entirely contractual lens'.¹⁵ To apply private law to the matter does not give any credence to the public law rights and obligations. The 'special cluster relationship' takes into account both private and public law. The working of such relationship was eloquently explained in *Joseph*:

'The starting point should therefore be whether any "rights" of the applicants have been affected as that term is understood in PAJA, and if so, whether the relevant municipal by-laws can be read consistently with PAJA. The focus of the enquiry therefore is the relationship, if any, between City Power as a public service provider and users of the service with whom it has no formal contractual relationship. This is similar to the approach adopted by Sachs J in *Residents of Joe Slovo*, in which the lawfulness of the occupation of municipal council land by homeless families was considered. Sachs J observed that this question—

"must be located not in the framework of the common law rights of landowners, but in the context of the special cluster of legal relationships between the council and the occupants established by the Constitution and the Housing Act. . . . The very manner in which these relationships are established and extinguished will be different from the manner in which these relationships might be created by the common law They flow instead from an articulation of public responsibilities . . . and possess an ongoing, organic and dynamic character that evolves over time."¹⁶

¹³ *Joseph* para 33.

¹⁴ *Ibid* para 39.

¹⁵ *Ibid* para 22.

¹⁶ *Ibid* para 23.

[30] In *Joseph*, Skweyiya J pertinently stated the following:

'I am of the view that this case is similarly about the "*special cluster of relationships*" that exist between a municipality and citizens, which is fundamentally cemented by the public responsibilities that a municipality bears in terms of the Constitution and legislation in respect of the persons living in its jurisdiction. At this level, administrative law principles operate to govern these relations beyond the law of contract.'¹⁷ (Emphasis added.)

[31] On these facts, as was the case in *Joseph*, the 'broader constitutional relationship that exists between a public service provider and the members of the local community gives rise to rights'¹⁸ that invoke the application of PAJA. Under PAJA, the notion of a 'right', has to be interpreted 'generously' for purposes of s 3(1) and as such, the interpretation is wider than the approach that is applied in private law, taking into account the public law relationship that is at hand.¹⁹ The Municipality has a public law duty and through just administration, should supply electricity to its constituents, the unlawful occupiers included, by virtue of the Constitution and the Municipal Systems Act. The corollary is that the unlawful occupiers have a right to insist that the Municipality should discharge its public law duty to supply electricity.

[32] It is that right that will be adversely affected in this 'special cluster of relationships', which requires that the unlawful occupiers be joined to the proceedings. This is because they have a direct, substantial and legal interest that is affected by the order made by the high court. The high court was bound to consider the issue of non-joinder and ought to have come to the conclusion that it was necessary that Lehlaka should have joined the unlawful occupiers, and it did not. For this, it erred materially. The converse is true that the Municipality has succeeded to show that the unlawful occupiers have a direct, substantial and legal interest in the subject matter of the litigation which may prejudice them as parties that have not been joined. Thus, it satisfied the test set out by this Court in *Absa Bank Ltd v Naude NO*. For this reason alone, the appeal ought to succeed.

¹⁷ *Joseph* para 24.

¹⁸ *Ibid* para 32; *Cape Gate (Pty) Ltd and Others v Eskom Holdings SOC Ltd and Others* 2019 (4) SA 14 (GJ) para 123.

¹⁹ *Walele v City of Cape Town and Others* [2008] ZACC 11; 2008 (6) SA 129 (CC); 2008 (11) BCLR 1067 (CC); 2008 (6) SA 129 (CC); *Premier, Mpumalanga and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC).

Conclusion

[33] I have had the benefit of reading the third judgment, in support of the second judgment, penned by Siwendu AJA, who wrote separately on two issues which are addressed extensively in both the first and the second judgment. These issues are first, the issue of non-joinder; and second, what she refers to as the purported 'special cluster of relationships'. Siwendu AJA concludes, in respect of the first issue, that '[i]t would be speculative for a court to foretell what that dispute will be or express any view in relation to a matter that is not yet ripe and which was not yet before the high court for adjudication'. I have decided to express my views on this issue, of non-joinder, as it is a jurisdictional question and dispositive of the appeal, as I have already extensively dealt with in this judgment. In addition, I yet again to a very limited extent address, the special cluster of relationships, to underscore its importance in resolving this appeal.

[34] On the first issue, Siwendu AJA contends that 'the source of that right, if it exists, does not lie in the present dispute about the termination of the agreement'. Further, that this issue was not before the high court for adjudication. I thus deem it necessary, to illustrate the correct factual position, in that the issue of the rights of the unlawful occupiers was raised in the high court.

[35] First, the Municipality raised the issue of non-joinder as one of the points *in limine*, the third point *in limine* to be exact, in their answering affidavit. In essence, the Municipality stated that there were still occupiers residing in Rietspruit Mining Village, where Lehlaka sought to cancel its electricity agreement with the Municipality and the Municipality sought direction of Lehlaka as to what would be done in order to deal with this predicament. In its answering affidavit the Municipality makes reference to the miners; the employment of the miners; the details of the employer and the basis for the miners being employed; the underlying employment agreement and terms thereof; and the basis for the present miners residing in Rietspruit Mining Village (not the 1978 miners, unless they are one and the same persons); and finally it wanted to know what steps have been taken by Lehlaka as the miners' employer to deal with the present predicament that the presence of the miners created for all the parties.

[37] Second, the high court noted the contention of the Municipality in its refusal to disconnect the supply of electricity until a plan had been put in place to relocate the unlawful occupiers.

[38] Third, in their supplementary affidavits filed in the high court application both the Municipality and Lehlaka address the existence and non-existence of the unlawful occupiers' right in these proceedings.

[39] In the fourth place, one of the grounds of appeal raised before the high court, with reference to the issue of non-joinder, is phrased as follows:

'The Court erred in fact and in law in finding that the occupants of the Applicant's properties are "illegal occupiers", without the occupants being joined to the proceedings to be heard in this regard. The Court therefore also erred in law in failing to rule on, or failing to uphold, the Respondent's point *in limine* on a non-joinder. It erred in fact and law in finding that the non-joinder issue is a smokescreen.'

[40] Last, and as stated before in this judgment, the high court did not deal pertinently with the point *in limine* of non-joinder, suffice to hold that '[t]he non-joinder issue is perhaps a smoke screen'.

[41] I find, with respect, that the contention that the issue of non-joinder was not raised before the high court or this Court, is gratuitous to say the least, as the record clearly shows that it was raised and dealt with extensively in both courts. It is the high court that failed to deal with it and, thus, this Court was bound to deal with it, as it has done in this judgment.

[42] The issue of 'the purported special cluster of relationships'. The rights of the unlawful occupiers are intrinsically linked to the relief that the judgment would grant. The purported special cluster of relationships cannot be discarded and wished away as the third judgment seems to suggest. It either exists as the Municipality contended or it does not as Lehlaka contended. Both parties dealt with this extensively.

[43] For the conclusion I have reached in the preceding paragraphs, it is not necessary to deal with the merits and other points *in limine*.

[44] Consequently, I would make the following order:

1 The appeal is upheld with costs including the costs for leave to appeal in the high court, such costs to include the costs of two counsel where so employed.

2 The order of the high court is set aside and is substituted with the following:

‘(a) The application is removed from the roll for the applicant to join the unlawful occupiers.

(b) The applicant is to pay the costs of the application.’

W HUGHES
JUDGE OF APPEAL

Nicholls JA (Weiner JA concurring):

[43] I have read the first judgment of my colleague, Hughes JA. Regretfully, I cannot agree with the outcome thereof or its reasoning. In summary, her reasoning is that because the Municipality has a constitutional duty to provide basic municipal services to all occupants within its jurisdiction, it would be incorrect to apply private law in circumstances where there exist public law rights and obligations. Instead, there is ‘a special cluster of relationships’ between a public service provider and members of the community that invokes the application of PAJA. She concludes that the unlawful occupiers have a right to insist on being supplied with electricity, which right will be adversely affected in this ‘special cluster of relationships’ should Lehlaka act in a manner as to terminate the consumer agreement for the supply of electricity. Consequently, as the unlawful occupiers have a direct and substantial interest in the subject matter of the litigation, they should have been joined to the proceedings. On this basis, the first judgment found that the special plea of non-joinder should be upheld.

[44] The facts are set out in the first judgment and need not be repeated here. I am also in agreement with the applicable legislation and the by-laws relating to the termination of the consumer agreement (the Electricity By-laws). My fundamental point

of departure is that there exists no public law relationship between Lehlaka and the unlawful occupiers. That there may be one between the Municipality and the unlawful occupiers to provide basic services does not mean that the unlawful occupiers have a direct and substantial interest in the dispute as to whether Lehlaka has a right to terminate its consumer agreement with the Municipality. Or, as the Municipality contends, whether it has a discretion not to accept the termination.

[45] The first point to be made is that there is no constitutional or other legal obligation on a private property owner to pay for electricity consumed by unlawful occupiers. There is no legislation that provides for this and insofar as it may be suggested that the Constitutional Court has imposed such a duty, this is based on a misunderstanding of the authorities. If Lehlaka owes no duty to supply electricity to the unlawful occupiers in discharge of a public duty (and has no private law duty to do so), then whether or not the contract between Lehlaka and the Municipality is terminated, gives rise to no legal interest by the unlawful occupiers in that dispute.

[46] Much has been written about the nature of the 'interest' that a party must have in order to be joined to proceedings. In *Milani and Another v South African Medical and Dental Council and Another (Milani)*,²⁰ the court, in dealing with this issue, stated: 'Our Courts have at times recognised that certain persons are affected by legal proceedings but they have no right to be joined. The sub-tenant of the tenant in a suit against a lessor is a case in point. (Compare *Sheshe v Vereeniging Municipality* 1951 (3) SA 661 (A) at 667A; and *Ntai and Others v Vereeniging Town Council and Another* 1953 (4) SA 579 (A) at 591.) In the *United Watch* case *supra* Corbett J at 417B-C said about such a sub-tenant:

"The sub-tenants' right to, or interest in, the continued occupancy of the premises sub-leased is inherently a derivative one depending vitally upon the validity and continued existence of the right of the tenant to such occupation. The sub-tenant, in effect, hires a defeasible interest. (See *Ntai and Others v Vereeniging Town Council and Another* 1953 (4) SA 579 (A) at 591.) He can consequently have no direct legal interest in proceedings in which the tenant's continuing right of occupation is in issue, however much the termination of that right may affect him commercially and financially."

²⁰ *Milani and Another v South African Medical and Dental Council and Another* [1990] 3 All SA 633 (T); 1990 (1) SA 899 (T) at 903A-D.

[47] The principles applied in *Milani* are similar to those in issue in this case. The unlawful occupiers may be affected by the termination of the consumer agreement, but that does not amount to the legal interest required to be joined in the proceedings. Furthermore, even if the unlawful occupiers were to be joined, it is unclear what remedy they could possibly seek from Lehlaka.

[48] The first judgment places considerable reliance on the 'special cluster of relationships' to find that the unlawful occupiers should be joined. However, it fails to identify the source of Lehlaka's obligation towards the unlawful occupiers and the basis of their right and interest in the dispute over the termination of the consumer agreement.

[49] The notion of a 'special cluster of relationships' was first coined by Sachs J in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Joe Slovo)*²¹ and quoted with approval in *Joseph and Others v City of Johannesburg and Others (Joseph)*.²² In *Joe Slovo*, the question was whether the residents of the Joe Slovo community were 'unlawful occupiers' in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) and whether the respondents had acted reasonably and constitutionally in seeking the eviction of 20 000 people (the applicants) from land owned by the municipality. The Constitutional Court granted a structured eviction subject to certain conditions.

[50] In a concurring judgment, and considering the lawfulness of the occupation of the residents, Sachs J held that this enquiry was not located in the common law rights of landowners but in the context of the 'special cluster of legal relationships' established by the Constitution and the Housing Act 107 of 1997, between the municipality and the occupants. He drew a distinction between the contractual relationship between private owners of land and occupiers, on the one hand, with that of the relationship between a local government authority and homeless people, on the other. These relationships, he said, 'flow instead from an articulation of public

²¹ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* [2009] ZACC 16; 2009 (9) BCLR 847 (CC); 2010 (3) SA 454 (CC).

²² *Joseph and Others v City of Johannesburg and Others* [2009] ZACC 30; 2010 (3) BCLR 212 (CC); 2010 (4) SA 55 (CC) para 24.

responsibilities . . . and possess an ongoing, organic and dynamic character that evolves over time'.²³ The 'special cluster of legal relationships' was a reference to the constitutional obligations of the municipality to prevent homelessness, derived from a person's constitutional right to access to housing as well as the statutory duties of local government.

[51] In *Joseph*, the focus of the enquiry was the nature of the relationship between a public service provider of electricity and the users of the electricity with which it had no formal contractual relationship. It concerned the termination of electricity following the accumulation of substantial arrears owing by the landlord despite the fact that the tenants had been paying their electricity to the landlord. The City of Johannesburg's electricity service provider, City Power (Pty) Ltd (City Power) had sent a pre-termination notice to the landlord but failed to notify the tenants. The main issue was whether tenants were entitled to procedural fairness in terms of s 3 of PAJA, by being given a pre-termination notice, before City Power cut the electricity supply.

[52] The Constitutional Court found that because City Power knew that it was providing electricity to the tenants in the building, it was artificial to think of the contractual relationship between the landlord and City Power as unrelated to the benefits that accrued to tenants under this contract.²⁴ The landlord was acting merely as a 'conduit' in the circumstances and the high court had failed to take into account the role that PAJA may play with people who have no contractual relationship with the service provider.

[53] In finding that the tenants were entitled to a pre-termination notice, the Constitutional Court referred to the 'special cluster of relationships' between a municipality and its citizens, which was founded in the public responsibility that a municipality bears to its citizens in terms of the Constitution. When City Power supplied electricity to the tenants, it did so in fulfilment of constitutional and statutory duties for municipalities to provide basic services to all persons living within its jurisdiction.²⁵ In such instances, it was found that administrative law governs these relations beyond

²³ *Joe Slovo* para 343.

²⁴ *Joseph* paras 21-22.

²⁵ *Joseph* para 47.

the law of contract.²⁶ The public law duties of the municipality to the occupiers could not be avoided by the contract between the municipality and the landlord. As such, it was held that City Power was obliged to notify the tenants of its intended termination even though the contract was with the landlord.

[54] Once again it is the constitutional obligations of the municipality (a sphere of government) and City Power (an organ of state) that are emphasised, not that of the private landowner. It was the threat of termination of the electricity supply by the municipality that gave rise to the interest of the occupiers because their rights against the municipality were effected.

[55] In the matter before us, however, an order is not sought to terminate the electricity supply to the occupiers, who, unlike the tenants in *Joseph*, are unlawful occupiers, but merely to terminate the consumer agreement Lehlaka has with the Municipality. The Municipality may or may not decide to terminate the electricity supply to the unlawful occupiers. Should it do so, it is only at that stage that the unlawful occupiers may have rights vis-à-vis the Municipality, including the right to procedural fairness in the form of a pre-termination notice.

[56] If the unlawful occupiers have a right to electricity as a component of their constitutional right to basic services, then this is an obligation to be borne by the Municipality. To find otherwise would be to make private citizens responsible for the State's constitutional duties. The notion of a 'special cluster of relationships' does not translate into imposing obligations on private individuals, nor does it convert a contractual relationship into an administrative one. In fact, the Constitutional Court in *Joseph* rejected a submission that the definition of 'customer', in terms of the relevant by-laws, be extended to persons that have no contractual relationship with the service provider.²⁷

²⁶ Ibid para 24.

²⁷ *Joseph* paras 74-75.

[57] The Municipality's reliance on the Constitutional Court judgments of *Mkontwana v Nelson Mandela Metropolitan Municipality (Mkontwana)*²⁸ and *Rademan v Moqhaka Local Municipality and Others (Rademan)*,²⁹ is also misplaced. *Mkontwana* dealt with the constitutionality of a legislative provision that imposed an obligation on an owner wishing to transfer property, to pay up to two years' worth of arrear charges for electricity, irrespective of who incurred them.³⁰ It was argued that the section was inconsistent with s 25 of the Constitution, in that it amounted to an arbitrary deprivation of property. The Constitutional Court pointed out that while the deprivation was not insignificant, it was only for a two-year period, not indefinitely. If desired, an owner could delay transfer for two years and the new occupier would not be liable for the debts of the previous occupier.³¹ Further, there was sufficient justification for the deprivation that occurred because the purpose was compelling; it was not arbitrary.

[58] In the present matter, it is common cause that Lehlaka was involved in attempts to donate the remaining properties to the Municipality in 2005, 2010 and 2018. While initially agreeing to it, in the end the Municipality refused to accept the donation. Notwithstanding this, in the same breath the Municipality complains that 40 756 unlawful households have invaded property within its jurisdiction and it has to deal with 95 000 households who require housing. This, so it claims, is in circumstances where it cannot even provide services adequately to the formal households already in existence. For this state of affairs, it blames the mines for 'enticing many indigent and vulnerable people to the Municipality's jurisdiction'. In essence, it submits that should Lehlaka successfully terminate its consumer agreement, this will mean more households are the responsibility of the Municipality. That a municipality is overwhelmed by its constitutional obligations towards its citizens cannot form a legal basis for transferring these obligations to a private landowner.

²⁸ *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC).

²⁹ *Rademan v Moqhaka Local Municipality and Others* [2013] ZACC 11; 2013 (4) SA 225 (CC); 2013 (7) BCLR 791 (CC).

³⁰ See s 118(1) of Local Government: Municipal Systems Act 32 of 2000.

³¹ *Ibid* para 45. See also O'Regan J, in a separate concurring judgment, para 87, where she found that the owner was not deprived of ownership by s 118 of the Local Government Municipal Systems Act 32 of 2000, but rather one of the incidents of ownership, namely, the ability to alienate immovable property, was impaired. She concluded that the section does constitute a deprivation, but found that it was not arbitrary.

[59] *Rademan* also does not assist. Ms Rademan was amongst a group of ratepayers who refused to pay rates in protest against poor services rendered by a municipality in the Free State. She continued to pay her electricity account. Despite this, the municipality gave her notice and then cut off her electricity supply. This Court held that the municipality could consolidate the rates and the electricity accounts and had the right to terminate the electricity supply without a court order, even though the electricity account was not in arrears. Leave to appeal was granted to the Constitutional Court, and duly dismissed. The Constitutional Court held that consolidation is provided for in the relevant by-laws and once a customer pays only part of the account, that customer is in breach of her obligations to make payment. Therefore, to terminate the electricity supply was not unconstitutional.³²

[60] Here, the consequence of termination of the consumer agreement may be that the unlawful occupiers have to look to the Municipality for the supply of electricity, but that is an incident of the public law duty owed by the Municipality. There is no reason why this duty gives the unlawful occupiers a direct and substantial interest in the private law contract between Lehlaka and the Municipality. Once the contract is terminated between the Municipality and Lehlaka, and should the Municipality proceed to cut off the electricity supply to the unlawful occupiers, they would then have the right to be joined in any proceedings. But at this stage, the question of joinder does not arise.

[61] It should be noted that in its papers the Municipality raised the non-joinder point on the basis that the occupiers were employees and former employees of the mines. It is on this basis that it was submitted that they should have been cited. It was pointed out, and apparently accepted, that the occupiers inhabited the properties unlawfully after the mines ceased operations in 2001. None of the unlawful occupiers are employed by the mine or any related mining company.

[62] It is correct that no court can make a finding adverse to a party, without him or her being party to the proceedings before the court. This is to effectuate the time-

³² *Rademan* paras 32-34.

honoured principle of *audi alterem partem*.³³ Here, whether the termination of the consumer agreement will be adverse to the unlawful occupiers depends entirely on what the Municipality elects to do. It can install pre-paid meters; it can reduce the electricity supplied;³⁴ it can terminate the electricity supply on proper notice; or, it can carry on with the electricity supply unimpeded.

[63] If the matter is a purely contractual one, as I believe the termination of the consumer agreement to be, then there can be no question of joining the unlawful occupiers as there is no contractual privity between them and Lehlaka and/or the Municipality. Lehlaka has no constitutional obligation towards the unlawful occupiers to provide electricity, and the unlawful occupiers have no corresponding legal right to be provided with electricity by Lehlaka free of charge in perpetuity, or whenever the Municipality in its discretion decides to accept the termination. They, therefore, have no legal interest worthy of protection in the current litigation.³⁵ This disposes of the question of joinder. The point *in limine* thus falls to be dismissed.

[64] The other point *in limine* raised by the Municipality, which is directly related to the merits, is the applicability of PAJA. The Municipality submitted that its decision to refuse to terminate the consumer agreement should have been challenged as a review in terms of PAJA. As pointed out in the first judgment, the Municipality does not dispute Lehlaka's right to terminate its consumer agreement with the Municipality. Its stance is that it has a discretion whether or not to accept what it describes as a 'unilateral' termination. According to the Municipality, Lehlaka allowed its properties to be occupied and for municipal services to be consumed. This created an 'administrative relationship' between Lehlaka and the unlawful occupiers, which created 'onerous obligations on [the Municipality] when it comes to charging for electricity supplied to the properties, or the termination of supply in the event of non-payment'.

³³ *South African Riding for the Disabled Association v Regional Land Claims Commissioner and Others* [2017] ZACC 4; 2017 (8) BCLR 1053 (CC); 2017 (5) SA 1 (CC) para 10; *Matjhabeng Local Municipality v Eskom Holdings Limited and Others*; *Mkhonto and Others v Compensation Solutions (Pty) Limited* [2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA (CC) para 93.

³⁴ See *Joseph* para 51.

³⁵ *Allers and Others v Fourie NO and Others* [2006] ZASCA 152 (SCA) para 24.

[65] Administrative action is defined, in s 1 of PAJA, to mean any decision taken, or any failure to take a decision, by an organ of state when exercising a power in terms of the Constitution; or exercising a public power or performing a public function in terms of any legislation.³⁶ In respect of natural or juristic persons, which are not organs of state, for any decisions they make to fall within the ambit of administrative action, they must be exercising a public power or performing a public function in terms of an empowering provision.³⁷

[66] There can be no suggestion that Lehlaka was exercising a public power or performing a public function in terms of an empowering provision when it terminated the consumer agreement. Thus, in order to establish that PAJA applies, the Municipality, as an organ of state, must demonstrate that in refusing to accept the termination of the consumer agreement, it was taking a decision in exercise of a power in terms of the Constitution or a statute. Did the impugned decision entail the exercise by the Municipality of a power in terms the Constitution or provincial constitution, or the exercise of public power in terms if any legislation? If it did not, then it was not administrative action and consequently not susceptible to judicial review in terms of s 6 of PAJA.³⁸

[67] This Court has held that administrative action entails a decision which involves a choice or evaluation, thereby drawing a distinction between discretionary powers and mechanical powers.³⁹ Mechanical powers involve no choice, for example, in instances where certain requirements are met, the decision-maker has no power to refuse. In contrast, there are those circumstances where the decision-maker has to make an assessment and come to a decision.⁴⁰

[68] The termination of a consumer's agreement is provided for in the Electricity By-laws. Section 3(1) of the By-laws provides that no person shall be entitled to the use

³⁶ Section 1(a)(i) and (ii) of PAJA.

³⁷ Section 1(b) of PAJA.

³⁸ *Ma-Afrika Hotels (Pty) Ltd v Cape Peninsula University of Technology* [2023] ZAWCHC 4; [2023] 1 All SA 731 (WCC); 2023 (3) 621 (WCC) para 11.

³⁹ *Nedbank Ltd v Mendelow NO and Another* [2013] ZASCA 98; 2013 (6) SA 130 (SCA) paras 25-28; *Gamevest (Pty) Ltd v Regional Land Claims Commissioner for the Northern Province and Mpumalanga and Others* [2002] ZASCA 117; 2003 (1) SA 373 (SCA) paras 20 and 28.

⁴⁰ C Hoexter and G Penfold *Administrative Law in South Africa* 3 ed (2021) at 250.

of electricity without having entered into a consumer's agreement with the municipal council in writing. If a person does use an electrical supply without entering into such an agreement, he shall be responsible for the costs of electricity. Section 4 deals with the termination of a consumer's agreement and provides:

'Subject to the provision of section 7(9) and (13), the consumer's agreement may be terminated by the consumer, or his authorised representative, or by [the Municipality] giving 14 days' notice in writing calculated from the date of service thereof, provided that if such notice purports to terminate an agreement on a Saturday, Sunday or public holiday, such termination shall only take effect on the following workday.'⁴¹

[69] Other than the requisite 14 days' written notice, which the Municipality has accepted was given by 23 April 2020, the Municipality has no discretion to refuse to terminate the consumer agreement. Insofar as the Electricity By-laws give rise to legislative regulation of the contractual relationship between the Municipality and Lehlaka, the Electricity By-laws do not accord the Municipality the discretionary power to decide whether to accept or refuse a termination. Once that is so, the matter is governed by the ordinary terms of the contract. The public law regulation is limited. Hence, the right to terminate, which the Municipality acknowledges, must prevail because there is no power given to the Municipality to decide whether or not that right may be exercised.

[70] On the Municipality's interpretation, the consumer may not terminate a consumer agreement, but only request the Municipality to do so, which it has a discretion to refuse. It would be extraordinary if a consumer agreement with a public service provider could operate in perpetuity and only be terminated if the service provider agreed to its termination. Once it is accepted that the consumer has a right to terminate a consumer's agreement on the requisite notice, there is no choice to be made by the Municipality and thus no decision, other than a mechanical one, to be made. The decision, therefore, does not amount to administrative action as defined in PAJA.

⁴¹ Sections 7(9) and 7(13) deal with the prescribed disconnection fee and meter reading period once an agreement has been terminated.

[71] For the reasons set out above, Lehlaka is entitled to terminate the contract with the Municipality. Consequently, the appeal falls to be dismissed and the following order is made:

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

C HEATON NICHOLLS
JUDGE OF APPEAL

Siwendu AJA:

[72] I have read the judgments by my colleagues Hughes JA (the first judgment) and Nicholls JA (the second judgment). I concur in the second judgment and order proposed by my colleague, Nicholls JA. I write separately, because in my view given the contractual nature of the relationships between Lehlaka (as the owner of the occupied properties), on the one hand, and the Municipality (a sphere of government), on the other, a joinder of the unlawful occupiers is not necessary.

[73] First, it merits emphasis that only the Municipality singularly bears the outward administrative law obligations in its dealings with its citizens.⁴² Those obligations may not be transferred unless the Municipality contracts with a third party to perform municipal services on its behalf.⁴³ Second, private citizens, like Lehlaka, cannot 'act administratively' and have no reciprocal administrative duties in their dealings with the Municipality in law.

⁴² Section 239 of the Constitution defines an organ of state to include a local sphere of government; See also *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA), where the Court dealt with contractual dealings which derive from the exercise of public power by an organ of state.

⁴³ Section 78 of the Municipal Systems Act 32 of 2000 permits a municipality to decide on mechanisms to deliver municipal services including contracting with private parties.

[74] The crux of the dispute before the high court involves Lehlaka's right to resile from and terminate the consumer agreement (the agreement) it has with the Municipality and the Municipality's refusal to accept Lehlaka's termination notice. The Municipality impermissibly seeks to engineer a tripartite relationship between it, Lehlaka, and the unlawful occupiers to bolster the purported 'special cluster of relationships' between the parties. There is no basis in law for the Municipality to impose a contractual relationship on an unwilling party who is entitled in law to resile from a contract.

[75] It is not disputed that Lehlaka had no prior relationship with the unlawful occupiers, whether as an erstwhile lessor or a conduit for the provision of electricity to the property occupied. The mere incident of ownership of the properties by Lehlaka cannot, without more, create the 'special cluster of relationships' contended for by the Municipality.

[76] Absent the purported 'special cluster of relationships' as between Lehlaka and the Municipality, the dispute about the termination of the agreement is a purely contractual one. The unlawful occupiers are not privy or a party to the agreement. As held by the full court in *Rosebank Mall (Pty) v Cradock Heights (Pty) Ltd*:

'There is a distinction between the case of a party whose rights are purely derived from "the right which is the subject-matter of the litigation" and in which he has no legal interest, on the one hand, and the case where the third party has a right acquired *aliunde* the right which is the subject-matter of the litigation and which would be prejudicially affected if the judgment and order made in the litigation to which he was not a party, were carried into effect.'⁴⁴

[77] On the strength of the above judgment, the unlawful occupiers have no right or claim in the subject matter of the termination dispute. They are strangers to the agreement. The basis for the joinder is that the rights of the unlawful occupiers to be provided with electricity will arise following the termination of the agreement. The difficulty is that the source of that right, if it exists, does not lie in the present dispute about the termination of the agreement. It would be speculative for a court to foretell

⁴⁴ *Rosebank Mall (Pty) and Another v Cradock Heights (Pty) Ltd* [2003] 4 All SA 471 (W); 2004 (2) SA 353 (W) para 37.

what that dispute will be or express any view in relation to a matter that is not yet ripe and which was not yet before the high court for adjudication.

[78] Accordingly, for these additional reasons, I concur in the second judgment that a joinder of the unlawful occupiers to the termination dispute is not necessary.

N T Y SIWENDU
ACTING JUDGE OF APPEAL

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