REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: A5059/2015

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

1 JUNE 2016 **FHD VAN OOSTEN**

In the matter between

EKURHULENI METROPLITAN MUNICIPALITY **APPELLANT**

and

ANZOTRAX (PTY) LTD t/a TOPBET GERMISTON **RESPONDENT**

J U D G M E N T

VAN OOSTEN J:

Introduction

[1] The narrow issue in this appeal concerns the proper interpretation of s 34 of the Ekurhuleni Metropolitan Municipality Electricity By-Laws [date of commencement 24 April 2002] (the By-laws), read with s 102 of The Local Government: Municipal Systems Act 32 of 2000 (the Act). The nub of the dispute between the parties, broadly stated, concerns the question whether the municipality is empowered by these provisions to disconnect the electricity supply to a tenant, who holds its own consumer agreement with the municipality in respect of electricity supply and which is fully paid, in regard to arrear property rates and taxes owed by the owner/landlord.

That is exactly the fate that befell the respondent in April 2015, which prompted the launching of an urgent application to this court for an order directing the municipality to forthwith reconnect the electricity supply to the leased premised and an interdict restraining the municipality from further terminating the electricity supply, save in the event of the respondent being in arrears in terms of its own electricity consumer agreement. The municipality opposed the application which came up for hearing before Twala AJ. Having heard argument the learned judge granted the relief sought. The appeal is before this court with leave of the court a quo, limited to the proper interpretation to be afforded to the sections I have referred to (the empowering sections). The learned judge, in addition, ordered that the relief granted in the main application would remain of full force and effect pending the outcome of this appeal.

Factual background

[2] The factual matrix relevant to a proper interpretation of the empowering sections is the following. The erstwhile second respondent in the urgent application, Robfair Investments No 287 CC (Robfair), was the owner/landlord of the property situate at 217 Meyer Drive, Germiston. The respondent was the tenant of a portion of the building on the property, known as shop no 1, in terms of an agreement of lease concluded on 11 April 2011. On 1 March 2012 the respondent concluded a separate consumer agreement with the municipality for the supply of electricity, water as well as the supply of sewerage and refuse services at the leased premises. On 4 December 2013 the municipality, without notice served on the respondent, terminated the electricity supply to the leased premises. The respondent account was paid up to date. The arrears of some R300 000, relied on by the municipality for an entitlement to disconnect the electricity supply, was that of Robfair, in regard to rates and taxes, as reflected on its account with the municipality. The respondent under duress paid six monthly instalments of R32 000 each, that were due on Robfair's account, merely to secure a reconnection and further supply of electricity to the premises, which amount it intended to offset against the rentals payable to Robfair. This however did not meet with the approval of Robfair, for the reason proffered that such payments would prejudice Robfair's pending opposed litigation against the municipality in regard to disputed rates and taxes. The respondent accordingly ceased making any further payments on Robfair's account, which, once

again, led to the municipality terminating the electricity supply to the leased premises on 9 April 2015.

The effect of the appellant's proposed interpretation

[3] Before I turn to a consideration of the wording of the empowering sections, it is necessary to make some preliminary observations concerning the consequences of the municipality's contention, on the assumption that the proposed interpretation of the empowering sections is legally tenable. Generally stated the municipality, in essence, contends for an interpretation of the empowering sections, read with its Credit Control and Debt Collection Policy: 2012-02, as empowering it to consolidate the separate accounts held with it by, firstly, the owner/landlord in respect of rates and taxes and, secondly, the tenant in respect of electricity consumption, into one account, on the basis of the owner and the tenant being jointly and severally liable for payment of all debts owing to the municipality in respect of the property. There are considerable difficulties with this approach. First and most importantly it may lead to manifest absurdities and could never have been the intention of the lawgivers (see EA Kellaway: *Principles of Legal Interpretation* p120-122)

[4] It is necessary to say something on the general nature and content of the concept of joint and several liability (Christie *The law of contract in South Africa* 6ed p 263). In contract joint and several liability exists if imposed by express words or necessary implication (*Tucker and Another v Carruthers* 1915 AD 251). *In solidum* liability may also be imposed by statute, as is illustrated by ss 17(5) and 23(5) of the Matrimonial Property Act 88 of 1984. Both these subsections, in express terms, provide for joint and several liability of spouses in regard to joint household necessaries. In regard to joint and several liability for payment of debts our law pre-supposes a pre-existing underlying liability of all parties in respect of that debt, with the exception of voluntary assumed *in solidum* liability, for example, as surety and co-principal debtor to the principal debtor (*Wille's Principles of South African Law* 9ed 817). Applied to the facts of the present matter, no legal basis of any nature or kind exists for holding an owner/landlord and a tenant jointly and severally liable in regard to the latter's rates and taxes. The reasons therefore are not hard to find: firstly, no *vinculum iuris* exists between them, and, secondly, even if the empowering sections were to be interpreted as imposing joint and several liability in the circumstances of this case, it

notionally might not pass Constitutional muster. For these reasons alone the appeal is without merit and cannot succeed.

Interpretation of the empowering sections

[5] Section 34 of the By-laws provides as follows:

> **34. Owner's and consumers liability**
>
> (1) The owner and the consumer shall be jointly and severally liable for compliance with any financial obligation, except as provided in section 34(2) or other requirement imposed upon them by these By-laws.
>
> (2) The liability for compliance with any financial obligation in respect of the consumption of electricity, shall be the sole responsibility of the consumer.

The court a quo held that s 34(1) was not applicable to the present case and further expressed the view that the section is intended for defaulting tenants who disappear leaving behind their municipal account in arrears.

[6] The clause, in my view, contains clear and unambiguous wording (*Du Plessis v Joubert* 1968 (1) SA 585 (A) 594H-595B). The consumer, in terms of the definitions clause 'means a person to whom the Council has agreed to supply electricity or is actually supplying electricity, or if there is no such person, the owner of the premises'. Joint and several liability in respect of 'any financial obligation', in terms of ss (2), excludes indebtedness arising from the consumption of electricity. The reference to 'these By-laws' is to the Electricity By-laws, which as stated in the pre-amble, 'provide for the supply and usage of electricity within the municipal area of the municipality' and for 'matters incidental thereto' and accordingly do not 'impose' any financial obligation in regard to rates and taxes, which are imposed in terms of the Local Government: Municipal Property Rates Act 6 of 2004. I do not see how to get over these plain words of the enactment and nothing of substance was advanced which would justify straining the language in order to read anything else into the section than what the ordinary and plain words clearly convey. Counsel for the municipality sought to find some aid in the interpretation of this section, in the municipality's Credit Control and Debt Collection Policy: 2012-02, which I hardly need to say, is wholly inappropriate. In conclusion the definite terms of the section can and should be adhered to and I read them as meaning exactly what they say.

On this basis alone the municipality's proposed interpretation to found joint and several liability of the respondent in respect of the owner's rates and taxes, is clearly misconceived.

[7] The Act is a legislative measure that seeks to support and strengthen the capacity of municipalities to manage their own affairs, exercise their powers and to perform their functions (see *Nelson Mandela Bay Metropolitan Municipality v Nobumba NO and Others* 2010 (1) SA 561 (ECG) para 10-21). Section 4(3) of the Act requires a municipality, in the exercise of its executive and legislative authority to 'respect the rights of citizens and those other persons protected by the Bill of Rights'. Section 102 of the Act provides:

> '(1) A municipality may:
>
> (a) consolidate any separate accounts of persons liable for payment to the municipality;
>
> (b) credit a payment by such a person against any account of that person; and
>
> (c) implement any of the debt collection and credit control measures provided for in this Chapter in relation to any arrears on any of the accounts of such a person.
>
> (2) Subsection (1) does not apply where there is dispute between the municipality and a person referred to in that subsection concerning any specific amount claimed by the municipality from that person.'

The municipality contends that the section empowers the municipality to consolidate the accounts of different, independent consumers into one consolidated account with one consolidated debt in respect of which all account holders become jointly and severally liable. The contention falls to be rejected. Wide as the term 'consolidation' may be (see *Rademan* referred to below, para 30), the wording of the section clearly provides for the consolidation of separate accounts of *a person* and there is nothing supporting an interpretation that the municipality may freely, of its own accord, simply consolidate accounts of any number of persons who are liable for payment to it. Had that been the intention of the legislator, clear, unequivocal wording expressing as much in no uncertain terms, would have been used of which there are none. On the contrary ss (b) and (c) specifically refer to *such person* and moreover, and in ss (b) there is a reference to *any account of that person,* which cannot in any

way be reconciled with the consolidation of the accounts of any number of persons. Finally, the apparent anomalies and glaring absurdities arising from the municipality's interpretation militate against the proposed interpretation.

[8] Counsel for the municipality sought to find support for the municipality's approach in the judgment of the Constitutional Court in *Rademan v Moqhaka Municipality* ([2013] ZACC 11); 2013 (4) SA 225 (CC). The judgment however, deals with a consolidated municipal account of the consumer, the appellant, in respect of which it was held that it represented a single consolidated debt which the consumer was liable to pay, precluding her to elect how the account would be settled. Because she was in arrears with payment of rates and taxes, the Constitutional Court held, the municipality was entitled to cut off her electricity or for that matter, refuse the supply any other service. In the present case the municipality seeks to hold a tenant jointly and severally liable for the rates and taxes debt of the landlord which is entirely different and distinguishable from the facts in *Rademan*.

Costs

[9] Counsel for the respondent asked for a punitive costs order against the municipality in respect of which it was submitted that the municipality's conduct in relying on an unsustainable interpretation of the empowering sections was irresponsible, opportunistic and *mala fide*. I agree. The municipality in cutting off the respondent's electricity supply, unduly and improperly exerted pressure on the respondent for payment of its landlord's arrear rates and taxes, in the face of a pending dispute with the landlord concerning those very rates and taxes. A notice by the municipality advising of the termination of the electricity supply was left at the property in circumstances where proper service on the respondent of such a drastic measure would have been appropriate. The respondent not surprisingly denied having received the notice (see *Darries and Others v City of Johannesburg and Others* 2009 (5) SA 284 (GSJ) paras 19 and 31). The municipality accordingly unfairly discriminated against the respondent, in breach of its duty to uphold and maintain unfair discrimination in the execution of its mandate to adopt, maintain and implement credit control and debt collection policies, including the termination of services, provided for in terms of s 96, 97 and 98 of the Act. For this reason alone the municipality's opposition to the urgent application, right from the outset, was

unfounded. The ensuing litigation became unduly protracted and the municipality's persistence with the appeal was ill-considered and irresponsible (see *Senekal v Trust Bank of Africa Ltd* 1978 (3) SA 375 (A) 387G; *Madzunye and Another v Road Accident Fund* [2006] SCA 103 (RSA); 2007 (1) SA 165 (SCA) paras 16 and 18). Spurious arguments on its behalf proposing an unsustainable interpretation were advanced and persisted with in this court (*Page v Absa Bank Ltd* 2000 (2) SA 661 (ECD) 667E). A punitive costs order, in my view, is the appropriate sanction to be imposed as a mark of this court's disapproval of such conduct (*Nel v Waterberg Landbouwers Ko-Operatieve Vereeniging* 1946 AD 597 at 607; *Rautenbach v Symington* [1995] 1 ALL SA 184 (O)).

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

1. The appeal is dismissed.

2. The appellant is ordered to pay the costs of the appeal such costs to be taxed on the scale as between attorney and client.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

I agree.

P BORUCHOWITZ
JUDGE OF THE HIGH COURT

I agree.

HJ DE VOS
JUDGE OF THE HIGH COURT

COUNSEL FOR APPELLANT ***ADV P SIEBERHAGEN***