

SOUTH AFRICA / JUDGMENT

Corub Property (Pty) Ltd v Barbuzano (427/2022) [2023] ZASCA 89 (8 June 2023)

[2023] ZASCA 89

COURT

Supreme Court of Appeal

BEFORE

Dambuza, Nicholls, Gorven, Meyer, Goosen

CASE / FILE NUMBER

427/2022

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 427/2022

In the matter between:

CORUB PROPERTY (PTY) LTD

APPELLANT

and

PAUL GANCALVES BARBUZANO

RESPONDENT

Neutral Citation: Corub Property (Pty) Ltd v Barbuzano (427/2022) [2023] ZASCA 89 (8 June 2023)

Coram: DAMBUZA ADP and NICHOLLS, GORVEN, MEYER and GOOSEN JJA

Heard: 10 May 2023

Delivered: This judgment was handed down electronically by circulation to the parties' representative via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time of hand-down is deemed to be 11:00 am on 8 June 2023.

Summary: Lease – commercial premises – interpretation of certain provisions of written lease agreement governing lessee’s liability to pay to lessor municipal electricity and water charges consumed on the leased premises – whether lessor established such liability and the amount thereof.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Victor and Mahalelo JJ) sitting as a court of appeal):

1. The appeal is upheld with costs to the extent set out in paragraph 2 below.
2. The order of the full bench of the Gauteng Division of the High Court, Johannesburg, is set aside and substituted with the following:

‘2.1 Save for the reduction of the amount set out below, the appeal against the order of the Regional Court, Roodepoort is dismissed with costs:

The amount of R400 000.00 stated in paragraph (a) of the order is substituted with the amount of R308 167.22.

2.2 The review application is dismissed with no order as to costs.’

Meyer JA (Dambuza ADP and Nicholls, Gorven and Goosen JJA concurring):

- [1] This appeal concerns the interpretation of certain provisions of a written lease agreement of premises situated in a shopping centre. The disputed provisions govern the lessee’s liability to pay to the lessor municipal electricity and water charges consumed on the leased premises. The appeal also concerns the question whether the lessor has proven the amount of such liability.
- [2] The appellant, Corub Property (Pty) Ltd qua owner of the Lindhaven Shopping Centre, Lindhaven, Johannesburg (the shopping centre) and lessor of various shops in the shopping centre (the lessor), initiated action proceedings in the Regional Court, Roodepoort (the regional court) against the respondent, Mr Paul Gancalves Barbuzano qua lessee of leased premises in the shopping centre (shop 9). It, inter alia, claimed payment of arrear municipal electricity and water charges consumed on the leased premises, which included shop 9 and the common areas. It succeeded with its claims. The regional court ordered the lessee to pay to the lessor the amount of R400 000 plus interest and costs.
- [3] Aggrieved by that order, the lessee appealed to the Gauteng Division of the High Court, Johannesburg (the high court). A full bench of the high court (Victor and Mahalelo JJ) upheld the appeal. Regrettably, it did not set aside the regional court’s order and substitute it with its own. Special leave to appeal the high court’s order

was granted to the lessor by this Court.

[4] The utility account of the shopping centre was previously managed by a company referred to in the evidence as 'Oxers'. During February 2014 the lessor appointed a company called 'Collective Utility Management' (CUM) as its agent to manage the shopping centre's utility account on its behalf. The services rendered

by it to the lessor included monthly meter readings, the calculations in accordance with the applicable municipal by-laws and the

compilation of the monthly invoices rendered to the tenants of the shopping centre.

[5] The four witnesses called on behalf of the lessor were all employees of CUM (the CUM witnesses): two were meter readers (the meter readers), one a director and technical manager who underwent in-service practical and theoretical training provided by experienced former Eskom employees in various aspects of electricity and meters, including the workings of meters, the identification of different meters, the installation of and fault finding in meters. He was also trained in the tariff structures of the different electricity supply authorities which included the tariffs prescribed by the City of Johannesburg municipality and approved by the National Energy Regulator of South Africa (NERSA).[1] The last witness was a senior tariff analyst of utility accounts, the identification of arrears, cost reduction and potential over and undercharges pertaining to various supply authorities (the tariff analyst).

[6] The only question that remained for determination by the time the appeal was heard by this Court, was whether the lessee was, in terms of the lease agreement, liable to pay to the lessor for the kilovolt amp (KVa) component, over and above for the kilowatt hour (KWh) component of the monthly readings of the electronic electricity meter that was installed for shop 9. The determination of this question requires the interpretation of the relevant provisions of the lease

agreement. It is well-settled that the triad – language, context, and purpose – finds application in the interpretative

analysis of a written instrument, such as the lease agreement under consideration.[2]

[7] The pertinent, broader contextual facts are straightforward and essentially uncontroversial. The Van der Linde Family Trust (VLFT) was the previous owner of the shopping centre. On 31 October 2008, the lessee and VLFT concluded the written lease agreement (the lease) in terms whereof VLFT let shop 9 to the lessee for a period of five years from 1 July 2008 until 31 August 2013. The lessor purchased the shopping centre from VLFT, and ownership passed to it on 11 September 2012. With the termination of the lease looming, the lessee, on 13 June 2013, renewed the lease with the lessor on the same terms of the initial lease he had concluded with VLFT.

[8] The Greater Johannesburg Metropolitan Council (the municipality) has adopted a uniform set of electricity by-laws for the entire Metropolitan area served by Metropolitan Electricity, namely the 'Greater Johannesburg Metropolitan Electricity By-laws' (the applicable municipal by-laws).[3] The lessor purchases the electricity supplied to the shopping centre by the municipality and, in turn, resells the electricity to its tenants.[4] Additionally, the applicable municipal by-laws state that:

'Such electricity shall, in respect of each purchaser, be metered through a sub-meter... '[5]

[9] The lessee conducted the business of a supermarket from shop 9 and was an anchor tenant. The supermarket initially had a bakery. The electricity meter that was installed for shop 9 is, what was referred to in the evidence, a 'Buy-Rite' or 'CT' or 'low voltage demand' meter. The rationale for the installation of that type of electricity meter is that an anchor tenant usually requires a bigger circuit breaker because it is usually a large electricity consumer. The circuit breaker installed for shop 9 is a 200 Ampere circuit breaker. The electricity meter has two registers: a kilovolt (KV_a) register and a kilowatt hour (KWh) register. Monthly electricity readings are taken and captured from both registers.

[10] The pertinent provisions of the lease are these:

'18 ELECTRICITY, WATER AND SANITARY FEES

18.1 The LESSEE shall pay on demand to the LESSOR:

18.1.1 The cost of all electricity, water and gas, if any, consumed on the leased premises; and

18.1.2 . . .

18.2 The LESSEE'S liability for charges for electricity, water and gas shall be determined as calculated by the LESSOR in accordance with the provisions of the applicable municipal by-laws together with such amount as the LESSOR is entitled to charge in respect of the service charge of the meter of the leased premises.

[11] The words used in clauses 18.1.1. and 18.2 are clear and unambiguous. These provisions make it plain that the lessee is obliged to pay on demand to the lessor the charges for all electricity consumed on the leased premises. The lessor is obliged to determine such liability of the lessee. The lessor's obligation is to calculate such liability 'in accordance with the applicable municipal by-laws'. The lessee's obligation is to pay to the lessor the cost of electricity that was so calculated by the lessor in accordance with the applicable municipal by-laws. Nothing in the context of the lease as a whole or in the broader factual context detracts from this interpretation of the words used in clauses 18.1.1 and 18.2. The purpose of clause 18 is self-evident: it is to place the obligation on the lessee to pay the lessor the cost of electricity consumed on the premises as calculated in accordance with the applicable municipal by-laws.

[12] In an all too brief judgment on the question under consideration, the high court reached the conclusion, without more, that the lessee is not liable for the KVa component of the monthly electricity charges. In this regard it held:

‘There was also a dispute about the cost of the 200 AMP circuit breaker in the leased premises. Only an 80 AMP was necessary. Mr SM Colling testified that the circuit breaker had its own electricity meter for which KWh and KVa was read. In our view it was clear that the need for a 200 AMP meter was objected to years before with the appellant requesting its removal. The respondent failed to remove the meter and continued to charge the appellant. We find that the appellant’s version on this aspect was plausible. The reason for the 200AMP meter was because there was a bakery in the shop. The bakery had been closed for years.’[6]

[13] However, no such obligation and breach thereof formed part of the lessee’s pleaded case. It is trite that a court should not pronounce upon a claim or defence not raised in the pleadings nor was evidence to that effect led by the lessee. In *Member of the Executive Council, Department of Education, Eastern Cape v Komani School and Office Suppliers CC t/a Komati Stationers*, [7] this Court re-emphasised that-

‘One of the enduring tenets of judicial adjudication is that courts are enjoined to decide only the issues placed before them by litigants. And that it is not open to court to change the factual issues presented by the parties or introduce new issues.’

[14] The discretionary power referred to in *Shill v Milner*, [8] which is an incident of the inherent power of the court, [9] should also not be exercised in this instance. There, this Court recognised that a court enjoys a discretion to give some latitude to a litigant to raise issues at the trial that were not explicitly pleaded, where to do so gives rise to no prejudice, and where all the facts have been placed before the trial court. [10]

[15] To give latitude in this instance would prejudice the lessor. Apart from the fact that no obligation to remove the 200 Ampere meter had been pleaded, the necessary facts had not been placed before the regional court. In his plea, the lessee placed in dispute the correctness of the invoices rendered by CUM on behalf of the lessor and the validity or correctness of the meter readings and charges. It is safe to assume that the lessor accordingly only called the CUM witnesses to testify at the trial and no director of CUM testified. During their cross-examination, the CUM witnesses were confronted with averments concerning the lessee’s requests to the landlord to have the 200 Ampere circuit breaker to shop 9 replaced with an ‘80 Ampere A3 Phase’ electricity supply circuit breaker and the lessor’s refusal to accede to such requests. They were unable to reply thereto. The technical manager explained that CUM is a utility management company and was only appointed to do the utility

management on behalf of the lessor. It does not perform electrical installations, upgrades, or downgrades. As mentioned, the lessee led no evidence at all, satisfying himself with putting a version to the witnesses which neither arose on the pleadings nor was testified to by any witness.

- [16] Through the evidence of the meter readers, the lessor established that the monthly meter readings at the shopping centre generally, and specifically those of shop 9, were properly undertaken and correctly recorded jointly by the two meter readers, for capturing and preparation of invoices at CUM's offices. The meter readers corroborated the evidence of each other in material respects.
- [17] The technical manager's uncontroverted evidence was that upon being appointed by the lessor as its agent to manage the shopping centre's utility account during February 2014, CUM undertook a complete technical investigation of all the electrical and water meters in the shopping centre, including those installed for shop 9, and found them to be in good working order. Through his evidence, the lessor further established that the lessee of shop 9 was to be classified as a large consumer with low voltage demand. The electrical installation fitted for shop 9 was one with a bigger 200 Ampere circuit breaker and a meter from which KWh and KVA readings were obtained. The electricity tariff prescribed by the applicable municipal by-laws for a large consumer with low voltage demand is payment for a minimum of 70 KVA. The technical manager received the meter readings from the meter readers. He was responsible for putting the data into a computer program, designed to prepare the invoices with reference to the meter readings and the use of the correct tariffs prescribed by the applicable municipal by-laws. Despite the prescript of the applicable municipal by-laws, he levied the lessee for the actual monthly reading of shop 9's KVA register, which was less than 70 KVA specified in the by-laws. Through the evidence of the tariff analyst, who analysed the invoices for electricity and water compiled by CUM for shop 9, the lessor corroborated the evidence of the technical manager in its material respects. His analysis revealed that the lessee was charged the correct tariff for the KWh electricity component and for the water consumed in shop 9. The average monthly KVA electricity readings for shop 9 ranged between 40-50 KVA, and the lessee was charged according to those readings only.
- [18] A reading of the record shows that the judgment of the regional court correctly analysed the pleadings and the factual issues presented by the parties. The favourable credibility findings made by the regional court in respect of the four CUM witnesses were justified and correct. Indeed, each one's evidence was credible and correctly accepted by the learned regional court magistrate.[11] Their evidence in respect of the facts relevant to a determination of this appeal was neither refuted by the lessee and his witnesses, nor did the lessee present countervailing evidence.
- [19] Indeed, the lessee's father, Mr Barbuzano (snr), who assists his son in the running of the supermarket business from shop 9, testified that he had no knowledge as to how the lessor's electricity charges for shop 9 were calculated. The lessee agreed that shop 9 had a 200 Ampere circuit breaker. He testified that they did not have a problem with the meter readings as such. He also testified that he did not know the prescripts of the applicable municipal by-laws.

[20] The inevitable conclusion, therefore, is that the lessor proved the lessee's liability and the amount of such liability as claimed by the lessor for the municipal electricity and water charges consumed on the leased premises during the relevant period.

[21] The lessor abandoned its claim for certain charges that were included in the amount of R400 000 awarded by the regional court. On appeal before us it only persisted with its claim for the municipal electricity and water charges, which amounts to R312 377.71. We were thus requested to amend paragraph (a) of the regional court's order accordingly.

[22] In the result, the following order is made:

1. The appeal is upheld with costs to the extent set out in paragraph 2 below.
2. The order of the full bench of the Gauteng Division of the High Court, Johannesburg, is set aside and substituted with the following:

'2.1 Save for the reduction of the amount set out below, the appeal against the order of the Regional Court, Roodepoort is dismissed with costs:

2.2 The review application is dismissed with no order as to costs.'

P. A. Meyer

Judge of Appeal

Appearances

For the appellant: S McTurk Instructed by: Otto Krause Inc, Roodepoort Honey Attorneys, Bloemfontein
For the respondent: R Erasmus Instructed by: Riekie Erasmus Attorneys, Roodepoort Symington & De Kok Attorneys, Bloemfontein

[1] NERSA is a regulatory authority established in terms of s 3 of the National Energy Regulator Act 40 of 2004.

[2] Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others

[2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) para 25.

[3] Gauteng Gazette No 16, Notice No 1610 of 1999, Greater Johannesburg Metropolitan Council.

[4] Section 17 of the Greater Johannesburg Metropolitan Electricity By-laws.

[5] Ibid s 17(1).

[6] Para 37 of the high court judgment.

[7] Education, Eastern Cape v Komani School and Office Suppliers CC t/a Komati Stationers

[2022] ZASCA 13; 2022 (3) SA 361 (SCA) para 53.

[8] Shill v Milner 1937 AD 101 at 105.

- [9] Close-Up Mining (Pty) Ltd and Others v The Arbitrator, Judge Phillip Boruchowitz and Another [2020] ZASCA 43 para 35.
- [10] Ibid para 8.
- [11] Standard Bank of South Africa Ltd v Sibanda [2019] ZAGPJHC 481; 2021 (5) SA 276 (GJ) paras 3-14.
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