

SOUTH AFRICA / JUDGMENT

**Kwadukuza Municipality v Kwadukuza
Mall (Pty) Ltd (D3860/2024) [2025]
ZAKZDHC 6 (9 January 2025)
[2025] ZAKZDHC 6**

COURT
Kwazulu-Natal High Court, Durban

BEFORE
Mathenjwa

CASE / FILE NUMBER
D3860/2024

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IN
THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL
DIVISION, DURBAN
CASE
NO: D3860/2024
In

the matter between:

KWADUKUZA
MUNICIPALITY
PLAINTIFF/RESPONDENT
and
KWADUKUZA
MALL (PTY) LTD
DEFENDANT/EXCIPIENT
REGISTRATION
NO: 2016/267719/07
ORDER
In

the premises the
following order is made:

The
exception is dismissed with costs, including costs of two counsel, on
scale C.

JUDGMENT

Mathenjwa J

- [1] The excipient, the defendant in the action has excepted to the plaintiff's particulars of claim on the grounds that they do not disclose a cause of action in that they fail to allege compliance with the essential provisions of the Local Government: Municipal Systems Act ('the Act'). [1]
- [2] The plaintiff alleges in its particulars of claim that the defendant owes it two amounts arising from two accounts held by the defendant in respect of electricity supplied and consumed by the defendant to its property. The defendant raises an exception on the grounds that the plaintiff has purported to advance its claim for payment of the sum of the two accounts pursuant to "consolidation" of the two accounts absent the allegations in terms of s 102 of the Act that it was entitled to consolidate the two accounts and to claim payment given that there is no dispute between the plaintiff and the defendant concerning any specific amount thus claimed by the plaintiff from the defendant.
- [3] Section 102 of Act provides that:
- '(1) A municipality may-
- (a) consolidate any separate accounts of persons liable for payments 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 a dispute between the municipality and a person referred to in that subsection concerning any specific amount claimed by the municipality from that person.'
- [4] The defendant contends that the plaintiff's claim is advanced on the basis that two specific amounts are owing in terms of statement of accounts which originally reflected on different or separate accounts. In order for these accounts to be made the subject of the debt collection measure, which the institution of the present action amounts to, the plaintiff had to consolidate the separate accounts of the defendant in the manner provided for in s 102(1) of the Act. That section provides that where there does exist a dispute between the municipality and the person concerning the amount which the municipality purported to claim, the municipality does not have the power to consolidate that person's account. The absence of any such dispute is thus the pre-requisite to the exercise by the municipality of the powers conferred upon it in terms of s

102. The absence of any dispute, the argument went, is an essential element of the cause of action which the municipality has purported to advance. The absence of any allegation to the effect that the amount which has been claimed is not subject to a dispute between the parties is accordingly fatal to the cause of action which the plaintiff has attempted to advance.
- [5] The plaintiff contends that the defendant's exception is bad in law in that the particulars of claim reflect that the defendant's account in respect of electricity supplied to the defendant's property is in arrears, the defendant is the owner of the property and is liable for the sum claimed. The plaintiff disputes that s 102(2) of the Act precludes litigation, and submits that it instead restricts the municipality's implementation of those measures mentioned in Chapter 9. Plaintiff's counsel referred this court to s 3(1) of the Institution of Legal Proceedings Against Certain Organs of State Act[2] which prohibits the institution of legal proceedings against organs of state unless the creditor has given the organ of state notice in writing of his or her intention to institute the legal proceedings. The application of s 3 (1) shows that while it governs

the institution of legal proceedings, it is not a fact of jurisdiction that ought to be established for lawsuits against organs

of state.

- [6] The issues for determination in this application are:
- (a) whether the provisions of s 102(2) of the Act are jurisdictional facts necessary for the exercise of the municipality's power to consolidate separate accounts in terms of s 102(1) of the Act; and
 - (b) whether the absence of an allegation that there is no dispute between the municipality and the defendant renders the pleadings excipiable for lack of a cause of action.
- [7] The starting point in determining the meaning and scope of the provisions of s102 is the interpretation of the Act. The current approach in our law regarding the interpretation of statutes was expressed in *Natal Joint Municipal Pension Fund v Endumeni Municipality*. [3] At paragraph 18 Wallis JA stated that:

'... The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production ... The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.' (Footnotes

omitted.)

In *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others*[4] Unterhalter AJA endorsed the guidance offered by Endumeni on the approach to the interpretation of the words, but added that:[5]

‘... the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitute the enterprise by recourse to which a coherent and salient interpretation is determined...’

[8] My analysis of s 102 of the Act must commence by placing it within the framework of the scheme of credit control and debt collection procedures outlined in Chapter 9 of the Act. Chapter 9 is designed to provide for responsibilities and obligations of municipalities in maintaining credit control and debt collection in its areas. A municipality’s powers to provide services and impose surcharges on fees for services provided is sourced directly from the Constitution.[6] These responsibilities and obligations are succinctly stated in *Body Corporate Croftdene Mall v Ethekekwini Municipality*. [7] At paragraph 15 Maya JA stated as follows:

‘Chapter 9 of the Systems Act provides for municipal credit control and debt collection. Section 96 deals with the “debt collection

responsibility of municipalities” and enjoins a municipality to (a) collect all money that is due and payable to it, subject to the Act and any other applicable legislation; and (b) for that purpose, to adopt, maintain and implement a credit control and debt collection policy which is consistent with its rates and tariff policies and complies with the provisions of the Act. Section 97 requires the credit control and debt collection policy to provide, inter alia, for credit control and debt collection procedures and mechanisms, interest on arrears where appropriate, and the termination of services or the restriction of the provision of services where payments are in arrears. ...’

[9] The cause of action in respect of the debt collection mechanism provided for under Chapter 9 arises from an agreement between a municipality and a credit debtor to render services; the actual rendering of the services; and payment for rendering the services. In the absence of an allegation that services were rendered to the credit debtor no obligation arises to pay for the services and no cause of action would be made out in the particulars of claim for services rendered.[8] In the present matter the plaintiff instituted an action in terms of s 102 of the Act which bestows municipalities with a discretion to consolidate accounts for different services it provides. The purpose of this section is to enhance the realisation of municipalities

responsibilities to receive payments for services rendered and provide democratic and accountable government for local

communities. In expressing the objective of s 102, Bosielo JA in *Rademan v Moqhaka Municipality and Others*[9] stated that:

‘This section makes it clear that in pursuit of the obligation to charge and receive payments for municipal services, a municipality

has the option to consolidate the accounts for various services it provides. This is intended to circumvent the very problem confronting

us in this appeal, that is, allowing residents to choose which account they wish to pay and which they will not pay...’

[10] Defendant’s counsel referred this court to case law which he submits supports his contention that an “allegation of absence of dispute” in the particulars of claim is an essential element of the cause of action if litigation is instituted in terms of s 102 of the Act. In *SZC Investments (Pty) Ltd v Swindon Property Services (Pty) Ltd*[10] an exception was taken to the plaintiff’s claim for estates agent commission. Section 26 of the Estate Agency Affairs

Act[11] prohibits any person from performing any act as an estate agent unless a valid fund certificate had been issued to that person and s 34A prohibits any person from receiving remuneration or other payment in respect of the performance of any act as an estate agent unless at the time of the performance of the act a valid fidelity fund certificate has been issued to that person. At paragraph 32 Koen J found that a failure on the part of the plaintiff to have alleged and attached a fidelity fund certificate covering the relevant period when he rendered the services was fatal to the plaintiff’s claim as pleaded and the exception succeeded.

[11] In *Van Heerden v Nolte*[12] the defendant excepted to the plaintiff’s particulars of claim on the ground that they lacked averments necessary to sustain an action in that they failed to allege compliance with the essential provisions of the National Credit Act (‘the NCA’).[13] Section 129(1) (b) of the NCA prohibits commencement of litigation by a credit provider before he or she has complied with the provisions of s 129. The court found that the particulars of claim were excipiable on the grounds that they did not allege compliance with s 129. In paragraph 19 of the judgment the court held that:

‘If the agreements are credit agreements, then the averments in the particulars of claim must include allegations that the plaintiff has complied with the provisions of ss 129 and 130 of the NCA, which permit a credit provider to enforce an agreement only once alternative procedures have been pursued.’

[12] It is appropriate to point out that both *Van Heerden* and *SZC Investments* are distinguishable from the present matter. In those judgments the plaintiffs were required to perform positive acts and take steps before they were entitled to litigate for debts due to them. In *SZC Investments* the plaintiff was obliged to register as an estate agent and obtain a fidelity fund certificate before he could perform functions of an estate agent. In *Van Heerden* the plaintiff was obliged to issue notices to the credit debtor before it could institute legal proceedings.

Also, the provisions of s 3(1) of the Institution of Legal Proceedings Against Certain Organs of State Act upon which the plaintiff's counsel relies is not relevant to the current issue in that s 3(1)(a) requires a creditor to take positive steps and issue notice before institution of legal proceedings, and s 3(4)(b) empowers a court to condone non-compliance with s 3(1)(a). Section 102(1) of the Act does not require a municipality to take any positive steps before consolidating the accounts in terms of s 102(2). The municipality relies on its credit records, which would have shown that the debtor was in arrears with the account, when deciding to start legal action to collect debt related to a particular account or several accounts. The facts and reasons alleged by the credit debtor regarding the existence of a dispute on an account will only become known to the municipality at the time it is raised by the credit debtor .

[13] When considering the context of s 102 of the Act within the credit control and debt collection scheme under Chapter 9 it appears that the consolidation of different accounts is not an element of the cause of action nor is the absence of dispute an essential element of the cause of action . A cause of action has been defined by the courts as:[14]

‘...every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.’

The excipient bears the onus to satisfy the court that the defendant's or plaintiff's pleading does not disclose a cause of action.[15] In order to succeed with an exception that the pleading does not disclose a cause of action the excipient must show that ex facie the allegations made by a plaintiff upon which its cause of action is based is bad in law.[16] It is trite law that in deciding an exception a court ‘may uphold the exception to the pleading only if the excipient has satisfied the court that the cause of action or conclusion of law in the pleading cannot be supported on every interpretation that can be put on the facts’.[17]

[14] It is instructive to note that an interpretation of s102 of the Act has received judicial attention in Body Corporate Croftdene Mall, where it was held that ‘the dispute must relate to a specific amount claimed by the municipality’.[18] The ratepayer is required to furnish facts that would enable the municipality to identify the disputed item and the basis for the

dispute. If the dispute is properly identified the debt collection measure is not implemented in respect of that item. The dispute does not bar a collection of the whole consolidated account, but bars only the collection of the disputed item. In the event a genuine dispute is raised the municipality must investigate the dispute, verify the accounts and provide redress for inaccurate accounts, if any.[19] Thus, an allegation on absence of dispute is not a jurisdictional fact for the institution of legal proceedings in terms of s 102. For these reasons the exception must be dismissed and the costs should follow the results.

Order

[15] In the premises the following order is made:

Date of hearing:

26 November 2024

Date of judgment:

9 January 2025

Appearances:

Plaintiff/Respondent's counsel: Mr I Pillay Instructed by: Andrew Incorporated Defendant/
excipient's counsel : Mr A Stokes assisted by Mr M M Swain Instructed by: V Chetty Incorporated
Attorneys

[1] Local Government: Municipal Systems Act 32 of 2000.

[2] Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002.

[3] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA).

[4] Capitec Bank Holdings Ltd and another v Coral Lagoon Investments 194 (Pty) Ltd and Others
2022 (1) SA 100 (SCA).

[5] Ibid para 25.

[6] In terms of s 152(1)(b) of the Constitution, the provision of services to communities is one of
the objects of local government; and s 229(1)(a) empowers municipalities to impose 'rates on
property and surcharges on fees for services provided by or on behalf of the
municipality'.

[7] Body Corporate Croftdene Mall v Ethekeeni Municipality 2012

(4) SA 169 SCA.

[8] City of Johannesburg Metropolitan Municipality v Mir-Air Prop (Pty) Limited

[2024] ZAGPJHC 977 paras 29 and 140.

[9] Rademan v Moqhaka Municipality and Others 2012 (2) SA 287 (SCA) para 19.

[10] SZC Investments (Pty) Ltd v Swindon Property Services (Pty) Ltd [2022] ZAKZPHC 63.

[11] Estate Agency Affairs Act 112 of 1976.

[12] Van Heerden v Nolte 2014

(4) SA 584 (GP).

[13] National Credit Act 34 of 2005.

[14] See McKenzie v Farmers' Co-operative Meat Industries Ltd 1922 AD 16 at 23; Evins v
Insurance Co Ltd 1980 (2) SA 814 (A) at 838E-F.

- [15] Frank v Premier Hangers CC 2008 (3) SA 594 (WC) para 11.
- [16] Vermeulen v Goose Valley Investments (Pty) Ltd 2001 (3) 986 (SCA) para 7.
- [17] Pretorius and Another v Transport Pension Fund and Others 2019 (2) SA 37 (CC) para 15.
- [18] Body Corporate Croftdene Mall v Ethekwini Municipality para 22.
- [19] Section 95 of the Act provides that in ‘the levying of rates and other taxes by a municipality and the charging of fees for municipal services, a municipality must, within its financial and administrative capacity- ... (e) ensure that persons liable for payments, receive regular and accurate accounts that indicate the basis for calculating the amounts due; (f) provide accessible mechanisms for those persons to query or verify accounts and metered consumption, and appeal procedures which allow such persons to receive prompt redress for inaccurate accounts;’
- [19] Section 95 of the Act provides that in ‘the levying of rates and other taxes by a municipality and the charging of fees for municipal services, a municipality must, within its financial and administrative capacity-
- ...
- (e) ensure that persons liable for payments, receive regular and accurate accounts that indicate the basis for calculating the amounts due;
- (f) provide accessible mechanisms for those persons to query or verify accounts and metered consumption, and appeal procedures which allow such persons to receive prompt redress for inaccurate accounts;’

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