

SOUTH AFRICA / JUDGMENT

Laubscher and Another v Rustenburg Local Municipality and Another (M56/2016) [2016] ZANWHC 61 (15 December 2016) [2016] ZANWHC 61

COURT

North West High Court, Mafikeng

BEFORE

R D Hendricks

CASE / FILE NUMBER

M56/2016

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IN THE NORTH WEST HIGH COURT, MAHIKENG

CASE NO: M56/2016

Reportable: No

Circulate to Judges: No

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In the matter between:

GERT JOHANNES LAUBSCHER 1st Applicant

MARIA LAUBSCHER 2nd Applicant

and

RUSTENBURG LOCAL MUNICIPALITY 1st Respondent

MAD SECURITY SERVICES CC 2nd Respondent

DATE OF HEARING : 13 OCTOBER 2016

DATE OF REASONS FOR JUDGMENT : 15 DECEMBER 2016

COUNSEL FOR APPLICANT : ADV. MAREE

COUNSEL FOR THE 1ST RESPONDENT : ADV. MASHABA

REASONS**FOR ORDER / JUDGMENT****HENDRICKS J**

[1] On the 13th October 2016 I granted an order in the following terms:

“1. That the Applicants are declared not to be a customer, occupier and/or consumer, as defined and set out in: the 1st Respondent's Credit Control and Debt Collection Policy, the related By-Law and the applicable Electricity Supply By-Law, in respect of the 11KV High Tension service connection for electricity services and charges levied against the property, being PORTION 31 OF THE FARM WATERVAL 306, REGISTRATION DIVISION IQ ("the Property);

2. That the electricity usage and electricity services charged as a result of the 11 KV service connection to the Property, be removed from the Applicants' municipal account, together with the accrued interest billed on arrears accrued on the account due to non-payment;
3. That the Applicants are declared not to be indebted to the 1st Respondent in respect of any electrical services and/or electrical charges billed and/or related to the 11 KV service connection levied on the municipal account in the Applicants' name linked to the Property;
4. That the 1 Respondent pays the costs of this application on an attorney and client scale.”

I also stated that if reasons are required, same must be applied for within ten (10) days from date of this order. On 29th November 2016 a notice was served on the Office of the Registrar of this Court requesting reasons for the order I made on 13th October 2016. It goes without saying that the request was filed way outside the period of ten (10) days as stipulated in the court order. Be that as it may, here follow the reasons for the said order.

- [2] The Applicants are married to each other in community of property. They are the owners of a farm situated in the Rustenburg area. This farm has 3-phase electricity that is supplied by the Rustenburg Municipality (First Respondent). In January 2007 the Applicants successfully applied for a pre-paid system to be installed for this 3-phase electricity supply. This system was fully paid for and no money was due or owing to the Rustenburg Municipality. During January 2008 the farm (property) was leased by Mad Security Services CC (Second Respondent). The 2nd Respondent required electricity supply in excess of what was supplied through the 3-phase pre-paid system. During September 2012 the First Applicant received a telephone call from a debt collector acting for and on behalf of the Rustenburg Municipality. It was said that an amount of R703 997.45 was over – due since July 2012.

[3] This prompted the Applicants to investigate the matter. A copy of the July 2012 account was obtained and it was established that this was the first account that was issued by the Rustenburg Municipality. This account was for a 11KV service connection to the property. The Applicants was unaware of this service connection and did not apply for or requested, arranged, agreed and / or entered into an agreement for the provision of this 11 KV service connection to the property. It was established that:

- no agreement (whether in writing and/or oral) for electricity supply (11KV high tension) between the First Respondent and the Applicants

could be located at Rustenburg Municipality;

- a person known as CARRIM MOHAMMED, an employee working at the Electricity Department of the Rustenburg Municipality, indicated that

an application for electricity services (11 KV) was done by BLUE STAR CRUSHERS CC. Mr. Henzen is a member of the Second Respondent as well as a member of the entity known as BLUE STAR.

- a copy of the application and/or subsequent agreement between BLUE STAR, alternatively the Second Respondent and the First Respondent

could not be obtained and seems to be non-existent. A copy of the agreement was requested from MOHAMMED, which request was unsuccessful.

- a deposit for the provision of electricity to the property was paid to the First Respondent but the Applicants never made payment to the First Respondent of any amount being in respect of a deposit for the provision of electricity via a 11KV electricity service connection to the property. It is evident from the application form that reference is made to MAD SECURITY (the Second Respondent) as the “occupant”, of the property and the deposit required to be paid for electricity at the premises.

MUNICIPAL BY LAWS AND CREDIT CONTROL POLICY

[4] In terms of the definition part of the First Respondent's policy, which came in operation during the middle of 2012, published by-laws (the latest published in the Extra Ordinary Provincial Gazette, number 5992, dated 19 February 2004) [herein referred to as the BY-LAW],

- (i) the consumer is inter alia defined as any occupier of the premises or any other person with whom the Municipality has contracted to supply or is actually supplying electricity thereat,

- (ii) if there is no such person or occupier, the owner of the premises;

- (iii) Chapter 2 (General Conditions of Supply), paragraph 5 states that –

“No person shall use or be entitled to use an electricity supply from the municipality unless or until such person shall have entered into an agreement in writing with the municipality for such supply, and such agreement together with the provision of this by-law shall in all respects govern such supply. If a person uses an electricity supply without entering into an agreement he/she shall be liable for the costs of electricity used as stated in section 44 of this by-law.”

(iv) paragraph 8 inter alia states that: -

“The prospective consumer shall make application for the supply of electricity in writing on the prescribed form obtainable at the

office of the Municipality, and the estimated load, in KVA, of the installation, shall be stated therein. Such application shall be made as early as possible before the supply of electricity is required in order to facilitate the work of the municipality.”

[5] It is not disputed that the Second Responded is the entity –

- whom occupied the property during the period which the 11 KV high tension electricity was installed and/or supplied,
- whom contracted with the 1st Respondent to supply 11KV high tension electricity, and
- to whom the 1st Responded supplied the 11KV high tension electricity.

[5] In my view therefore, the Second Respondent is a consumer as defined in the aforementioned by law. The Second Respondent used the 11 K high tension electricity supply from the First Respondent. No written agreement between the First and Second Respondent could be obtained. Notwithstanding this, and based on the contents of Chapter 2, paragraph 5 (as set out herein above), the Second Respondent is liable to the First Respondent for the said electricity used. The Applicants did not apply for 11 K high tension electricity supply, nor did they consume any such said electricity or occupy the property.

[7] The First Respondent's Credit Control and Debt Collection Policy [herein referred to as the COLLECTION POLICY] inter alia states in paragraph

1. 11 that the customer is defined as:-

The owner of the premises or in exceptional circumstances a tenant, and includes a person or entity liable to the municipality for the payment of tariffs, levies, fees and municipal consumption charges in terms of a service agreement concluded with the municipality...

To reiterate, no service agreement was entered into between the First Respondent and the Applicants with regard to the provision of high tension KV electricity. No such agreement could be obtained from the First Respondent. The only entity that contracted with the First Respondent was the Second Respondent.

[8] In paragraph 1.40 of the COLLECTION POLICY the service agreement is inter alia defined as:

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. . the written agreement concluded between the municipality and a customer for the provision of municipal services to the premises once the municipality has approved the customers official application form for the rendering of such services to the customer and which contains the terms and conditions upon which the municipality will render such services to the customer.

In paragraph 6 of the COLLECTION POLICY (General Principles for Credit Control and Debt Collection) it is inter alia stated that -

All customers must complete an official application form, formally requesting the municipality to provide municipal services to such customer and to a specific premise. The rights and obligations of the customer and the municipality are set out in the service application form and the service agreement, as well as the terms and conditions upon which the municipality will provide the municipal services to the customer.

[9] It is evident from the quoted DEBT COLLECTION PROCEDURES that the supply of electricity by the First Respondent should and must be regulated contractually. No such agreement and/or contract exist between the Applicants and the First Respondent. Therefore no rights and obligation accrued to the Applicants in respect of municipal services rendered pertaining to the supply of electricity to the property. The only agreement, alternatively contract that exists is the one entered into between the First Respondent and Second Respondent for the supply of high tension electricity. The Applicants were never a party to such agreement or contract.

[10] The First Respondent attempts to imply that the Applicants tacitly agreed to the agreement between it and the Second Respondent. This inference is without merit for the following reasons: -

(i) the Applicants were not aware of the application and/or supply of the high tension electricity. This only came to their attention during the end of

2012. Therefore the Applicants could not have tacitly consented to the agreement and/or supply;

(ii) from becoming aware of the said high tension electricity supply, the Applicants took proactive steps to inter alia have the charges removed from their names. Such conduct is not conduct synonym with tacit consent;

(iii) no factual basis, other than "say so" and/or meritless inferences, was placed before this Court from which it can be derived that the Applicants tacitly consented to the supply of 11 KV high tension electricity.

[11] In my view the Applicants cannot be held responsible for the electricity consumption by the Second Respondent in respect of the 11 KV high tension electricity usage because:

(i) the Applicants did not apply, nor consent to such electricity supply. The Applicants cannot be held responsible in circumstances where it did not contract with the First Respondent for such electricity. It is evident, and not in dispute, that it was the Second Respondent who applied for, and therefore contracted with the First Respondent for the supply of 11 KV high tension electricity, and it was the Second Respondent who consumed the said electricity supply;

(ii) if the Applicants were to be held responsible for the contractual obligations of the Second Respondent in circumstances where they were not a party to the agreement between the First and Second Respondent, it would be contra to the basic principles of the law of contract and highly prejudicial to the Applicants. Such view would result therein that municipalities can consolidate any municipality accounts irrespective of the parties thereto.

[12] The following is the submission by the First Respondent:

It was contended on behalf of the First Respondent that “the Applicants gave the Second Respondent the right to utilize their

property. The Second Respondent went a step further and applied for a 11 KV connection on the Applicants' property because "the Second Respondent did require electricity supply more than what can be delivered via a three phase connection to the property". The Applicants cannot be heard crying foul or cannot claim that they are or were not aware who and how the 11KV cable was connected in their property. After all this was their property. All the time were they not aware of this 11 KV connection in their property? They did not even bother to ask the Second Respondent where it got the electricity from? It is the responsibility of the Applicants to pay their municipal account and they will have a right of recourse against the Second Respondent for using electricity on their property during the tenure of their lease agreement. After all the Second Respondent has undertaken to pay for the electricity bill as a result of the electricity it consumed through a 11 KV connection on the Applicants' property. The Applicants can therefore claim their damages against the Second Respondent for using their electricity on their property during the lease agreement tenure or during their stay.

[13] It is correct to state that the property belongs to the Applicants but that in itself does not mean they they must be held accountable for the usage of the electricity after the installation of the 11 KV connection when they infact did not apply for it. The facts speaks for itself. The Second Respondent applied for the installation of the 11KV connection. The Second Respondent and the 1st Respondent had an agreement in this regard. The Second Respondent used the said electricity and must be held accountable therefore by the First Respondent. It is abundantly clear that someone or some people in the employ of the First Respondent did not diligently perform his/her/ their duties. Not only is the agreement between the First and Second Respondent open to severe criticism and intense scrutiny but also the monitoring of the usage of the electricity supplied in terms of the 11 KV connection. Had it been properly monitored and timeously billed in terms of the correct procedure, the First Respondent would not have encountered this problem. The First Respondent must sort

out what it had created. The First Respondent knows that the Second Respondent applied for the installation of the 11 KV connection and that the Second Respondent is liable for the account of the usage of the electricity. The First Respondent must go after the Second Respondent and take the necessary steps against the Second Respondent for the payment of the outstanding account.

CONCLUSION

[14] It is for the aforementioned reasons that granted an order in the terms stated in paragraph [1] hereof.

R D HENDRICKS

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

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