

SOUTH AFRICA / JUDGMENT

Mogale Local Municipality v YYY Trading CC (00016/2018) [2019] ZAGPJHC 524 (29 March 2019) [2019] ZAGPJHC 524

COURT

South Gauteng High Court, Johannesburg

BEFORE

Siwendu, Bhikha

CASE / FILE NUMBER

00016/2018

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IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG
LOCAL DIVISION, JOHANNESBURG
CASE
NUMBER: 00016/2018
In

the matter between: MOGALE
 LOCAL
 MUNICIPALITY APPELLANT
 AND
 YYY
 TRADING
 CC RESPONDENT

JUDGMENT

SIWENDU J:

- [1] This appeal is against the judgment and order of the Magistrate Court, sitting in Krugersdorp. The respondent, YYY Trading CC,

successfully obtained a judgment against the appellant, Mogale Local Municipality (the Municipality), for the repayment of R71 182.34 plus interest. YYY Trading CC claimed the amount was paid under protest to obtain a rates clearance certificate to facilitate the transfer of the property it had sold to a third party. It claimed the Municipality incorrectly debited its account. The amount was a debt due by the previous owner, Broome Park Properties in terms of Section 118 of the Municipal Systems Act.

- [2] In holding the Municipality liable, the court a quo found YYY Trading CC proved the debt a historical debt. The Municipality had not proved to whom it sent previous accounts as there was no water consumption agreement with YYY Trading CC. Whether there was a meter in a working condition had not been established. The Municipality had not proved the correctness of the accounts.
- [3] The Municipality appeals against the decision on account that the trial court erred because YYY Trading CC failed to prove that the amount was a historical debt due by the previous owner of the property. It contends the previous owner's account was in credit at the time of the transfer of the property to YYY Trading CC. There was no "previous debt."
- [4] The Municipality also bases its appeal on a reversal of the onus. It takes issue with the findings by the court a quo that it bore the onus to prove the correctness of the amounts due in the rates Clearance Certificate issued as well as the correctness of the water meter readings on the property. It claims it discharged its duty and proved the correctness of its accounts. It contends YYY Trading CC did not base its claim on the correctness of the meter readings.

BACKGROUND

- [5] At the time of the action proceedings, YYY Trading CC had been the registered owner of the property described as Portion 63 (A Portion of Portion 3) of the Farm Nooitgedacht 534, JQ Limpopo Province. It is classified as agricultural land and falls within the jurisdiction of the Municipality. YYY Trading CC took transfer of the property from Isabella Scannell in March 2006. The Deeds Registry records reveal that between 1997 and 2005, the property was registered in the name of Broome Park Properties. When Isabella Scannell purchased the property in 2005, she appears to have held it for a short period, because in October 2005, she sold the property to YYY Trading CC.
- [6] As at 12 January 2006 the account for the rates clearance certificate (clearance certificate) issued by the Municipality to YYY Trading CC to enable the transfer from Scannell to YYY Trading CC reflected an amount of R 5 833 as the balance owing on the property. The clearance certificate also reflected a "zero" sum balance for water, electricity and sundry services consumption. The clearance certificate states that all monies due to the Municipality have been paid up to 30 June 2006.

[7] After holding the property for approximately nine years, YYY Trading CC sold the property to Umnotho for Empowerment in August

2015. When YYY Trading CC applied for a rates clearance certificate, the Municipality presented it an account dated 19 October

2015. The account reflected a total debt of R 81 512.56. The relevant entries reflected read as follows:

“Balance of other Accounts R 78 163.80

Owner 1101383629 YYY Trading CC R 6981.37

Tenant 0901438913 M Broome Park Properties R 71 182.43”

[8] YYY Trading CC alleges it became aware for the first time of the amount owing upon the request for the clearance certificate. It disputed liability in a letter dated 20 October 2015, asserting the debt was due by Broom Park Properties before 2005 and more than ten years ago. It contended the Municipality was entitled to recover arrears for a two-year period.

[9] YYY Trading CC claimed its own account number 399722 was up to date since it took transfer of the property. On 27 October 2015, it nevertheless paid the account under protest to enable the transfer of the property. In doing so, YYY Trading CC through Mr. Engelbrecht, its managing director, wrote as follows:

“We are instructed to pay the amount above under protest as follows: We reiterate that the amount of R71 182.43 reflected on your account is not due and payable by our client, but is, in fact, due and payable by a previous owner, Broom Park Properties.”

[10] Mr. Engelbrecht’s evidence was that the only account received was for rates and taxes which he paid regularly. He had gone to great lengths to get an explanation of what the consumption was for but could not get an answer from the Municipality. Despite Rule 23 (1) and (15) applications to compel discovery, he could not obtain an answer. The Municipality filed an affidavit stating the documents supporting the amount claimed did not exist and/or were destroyed. He had never received a water consumption account from the Municipality. He was advised on the morning of the trial that the account was for water consumption.

[11] The Municipality denied that the issue of the clearance certificate constitutes proof of payment of all arrear amounts owing on the property. It also denied that the debt was due by Broom Park Properties.

[12] It was common cause on the evidence before the court a quo, that after taking transfer, neither Isabella Scannell nor YYY Trading CC opened a separate consumer account with the Municipality.

Mr. Khort who testified for the Municipality confirmed the common cause position and that Broom Park Properties Pty Ltd did not close its consumer account reflected as account number 805776.

[13] It is a further common cause that, according to the Municipality system, there was an “owner account.” The Municipality

raised charges for rates and taxes under that account. The Municipality had a separate tenant account for other consumption charges like electricity and water. Accounts were raised separately for the consumption charges.

[14] Ms. Pule, a supervisor at the Rates Clearance section called on behalf of Mogale confirmed account number 399722 belonged to YYY Trading CC. At the time of the issue of the clearance certificate, it had a debit balance of R 1 648.21 plus interest of R 24.37. There was another balance attributable to YYY Trading CC for R 6 981.37. The second Account No 0901438913 was a “hand over,” and the account of M Broom Properties in the sum of R71 182.43. She testified that the entries under inscription 201502 and 201106 were hand over journal entries made when the account was in arrears.

[15] Even though YYY Trading CC asserted that the debt was a historic debt, based on the information provided on the clearance certificate,

the ultimate issue in this appeal is whether the court a quo was correct in ordering the repayment of the amount to YYY Trading CC.

[16] In my view, the answer rests on the obligations of the Municipality in terms of Chapter 9, Section 95 (d), (e) and (f) of the Municipal Systems Act 32 of 2000.[1] It is whether the Municipality correctly attributed the consumption charges to YYY Trading CC and provided it with a regular, accurate account that indicated the basis of its liability. The existence of the meter and the correctness of the readings are important ancillary points, to the extent that the existence of the meter was denied by YYY Trading CC.

[17] Given the assertion by the Municipality that it discharged the burden to prove its accounts, I first deal with the evidence of the accounts and the financial documents presented before the court a quo.

ANALYSIS

OF THE EVIDENCE

[18] The Municipality is obliged to prove its accounts. In *Mkontwana v Nelson Mandela Metropolitan Municipality*,[2] the court held:

“It is necessary for all municipalities to ensure that they have reasonably accurate records and that they are able to provide complete, credible, comprehensible and reasonably detailed information in relation to consumption charges that are owing within a reasonable time of being requested to furnish it.”

In Euphorbia (Pty) Ltd t/a Gallagher Estates v City of Johannesburg^[3] the court held:

“In the absence of special circumstances, considerations of policy, practice and fairness require that the City is saddled with the onus of proving the correctness of its meters, the measurements of water consumption and statements of account rendered pursuant thereto. It cannot reasonably be expected from the consumer, having raised a bona fide dispute concerning the services delivered by the City, to pierce the municipal veil in order to prove aspects that peculiarly fall within the knowledge of and are controlled by the City. In the present matter it was impossible for Euphorbia to perform its own test on the contentious meter as, firstly, only Termets was legally permitted to perform the tests and, as it happened, the meter was untimely disposed of by the City. The statements and other data concerning the water usage were in the possession and under control of the City. Euphorbia relied on justified inferences arising from a sudden spike in water consumption arising from its own comprehensive investigation, in order to verify the correctness thereof. It accordingly raised a bona fide dispute as to the City’s billing in regard to the services, and the City bore the onus to prove the correctness thereof.”

The three accounts presented are dealt with ad seriatim.

Account number 805776 in Broom Park Properties’ name.

- [19] As of 30 June 2005, Broom Park Properties’ consumer account had a credit balance of R 25 944.57. An amount of R 9.79 described as “a levy” was debited monthly from the account that year. The monthly levy of R 9.79 increased the following year to R 10.39. The debits from this account were from July 2006 until October 2006. By 8 June 2006, the account reflected interest accrued in the sum of R 4 848.41. The account reflected a credit balance of R30 675.50 after an internal adjustment.
- [20] Between December 2006 and December 2009, monthly debits described under a code “183000063” were made progressively in sums ranging between R446.57, R418.47, R451.83 and R520.71 per month. As of 31 May 2010, the account reflected a credit balance of R 12 362.05.
- [21] Mr. Khort had testified that until 30 June 2010, the account was in credit because the Municipality debited all its consumption charges from the credit balance accrued to the Broom Park Properties account. All the debits for consumption charges went through this account.
- [22] In June and July 2010, two debits for levies in the sum of R15 763.44 and R23 985.60 were raised, leaving the account with the debit balance of R27 386.99. Mr. Khort attributed the R15 763.44 debit to a huge water consumption based on a meter reading resulting in a debit of R 3 400.01.
- [23] In August and September 2010, debits under the same code description, “183000063” were raised in the sum of R5 905.20 and R2 952.60 respectively. In October 2011, Mogale City credited the account in the amount of R61 420.55, leaving a debit balance of R 8079.91. I pause to note that by this time, the monthly levy raised on the account had increased to R 509.24. Mr. Khort’s evidence was that the accumulated debt resulted in the handover of the

account as confirmed in the journal entry dated 10 October 2011. There is no evidence from whom recovery was sought, and no evidence led from the debt collection department of the Municipality. For a period, there were “zero” debits on the account. Evidence is that “zero” meant there was no consumption put through the meter.

[24] In August 2012, the Municipality raised a single debit of R 4 145.

72. Other than in respect of nominal amounts, there were no monthly debits raised from the account in 2013 and 2014. By 31 May 2015, the debit balance of R 9761.88 on the account was adjusted by a journal entry of the same amount, leaving a “nil” balance. Ms. Pule confirmed the “handover” journal entry for R 9761.88 referred to above. Once more there was no evidence of a recovery of the amount.

[25] Ms. Pule, responsible for issuing the clearance certificate, could not shed light on what she based the rates clearance figures on. It was not her role to verify the accounts. She took what was reflected on the billing system. She testified that the accounts were in arrears on the financial system at the time of issuing the clearance certificate. She confirmed that after the payment of R 81 000 00, by YYY Trading CC, the account was in credit. However, the “hand over” account was in debt to the sum of R71 182 43.

[26] The second witness called by the Municipality, Mr. Khort, testified that the account was based on water consumption. He assumed since the account was in the name of Broom Park Properties, there was a tenant on the property. He confirmed that there were two accounts, one for rates and taxes, and a separate consumer account with meter information.

[27] Mr. Khort also testified that the Municipality installed a new water meter on the property in 2011. An inspector, Mr. Henk, recorded there was a borehole on the property. Water supply was restricted presumably because of the outstanding amounts. He could not say when the water supply was restricted. There had been a handover of R 9 661.00 of account 805776 in June 2015.

[28] I must observe that it is factually incorrect that there was a tenant on the property. I am however mindful that the Municipality may not know who is in occupation of the property from time to time. Nevertheless, as stated, there was no evidence presented of

proceedings instituted against Broom Park or YYY Trading to recover the “handed over” amounts. The Municipality did not call anyone from its debt collection department.

Account Number 399722 in the name of YYY Trading CC

[29] The second account presented commenced on 11 July 2006, approximately four months after YYY Trading CC took transfer of the property. The ledger presented shows a levy interest described as “138 00 00 63” in the amount of R 371.82 which was debited monthly from the account. Between 2008 and 2009, this levy increased to R425.65 per month. By 30 June 2009, the account reflected a debt of R 1 954. 21 which was paid. In 2010, the levy ranged between R 250. and R275. On 29 March 2012, there was a payment of R2 544,77

credited to the account clearing the accumulated balance. Between 2013 and 11 June 2015, the account reflected an accumulated debt balance of R 8 604,38. This was adjusted following the payment of a credit amounting to R 6 981.37.

- [30] As already stated, when YYY Trading CC applied for the rates clearance certificate to transfer the property to Umnotho, it was presented with an account which reflected its account number 39722 and the credit balance of R 6 981.37 referred to above. Besides the same account, reflected another account number 0901438913, described as a tenant account by Broom Park Properties. It had a debit balance of R71 182.43.
- [31] However, when YYY Trading CC made the payment of R 81 512.56 under protest, the ledger shows that the account was in debt for the sum of R 1672.58. As of 17 September 2016, at the end of the ledger report, the account had a credit balance of R 72 731. 99. Ms. Pule confirmed the credit balance under cross examination. Curiously, when re-examined on the issue, her evidence was that the hand over account remained in debt notwithstanding the payment. There was no explanation offered for this.

“A 0371 Water Business Consumption” from 15 April 2011 to 22 August 2016.

- [32] Mogale City also presented what it referred to as a “0371 Water Business Consumption” dating from 15 April 2011 to 22 August

2016. This reflects the water meter readings on the property. On a normal reading, there was a “zero” water consumption throughout this period. It also recorded estimated readings of nominal amounts which were adjusted once a normal reading was undertaken.

- [33] I have considered the totality of the evidence of these accounts. It does not tally with Mr. Khort’s evidence that the R72 731 99 (which became a credit on YYY Trading CC’s account) was due to the history of water consumption on the property. Curiously, Mr. Khort could not account for the credit in Broom Park Property’s account because it belonged to the previous billing system. The journal entry of R15 763.44 was not explained by a reference to source documents or the water consumption account above. The water meter readings do not support the assertion of the huge water consumption. Mr. Khort did not know what the charge of R 23 985.60 was for but attributed it to a replacement of a meter. Given that there was no consumption agreement, the basis for the installation of the new water meter for which the charge of R 23 985.60 was attributed, remained a mystery. Mr. Engelbrecht disputed the knowledge of the installation of this meter.
- [34] Contrary to the argument by the Municipality, that it was impossible for the Municipality to prove the water meter installed functioned correctly, these shortcomings before the court a quo were not based on the functioning of the water meter but on the explanation offered for the debits made.

- [35] There is a stark contrast on the evidence which shows that despite meter readings, between September 2012 and X ,there had been no consumption or water usage. This strengthened Mr. Engelbrecht's evidence that they sourced water supply from the borehole with tanks. This fact was recorded in the notes by Mr. Henk.
- [36] What further defeats the Municipality's assertion that it discharged the onus to prove its accounts, is that much of Mr. Khort's evidence was based on numerous assumptions. He relied on notes by a Mr. Henk regarding the installation of the second water meters on the property in 2011. Mr. Henk was not called to testify.
- [37] The late attempt by way of an amendment to its plea as well as Mr Khort's evidence that there was an inspection of the property the day before the trial and a water meter was found buried inside, does not cure the shortcomings on the evidence. The relevance of the ancillary issue of the meter required that the Municipality clearly attributes the charges it raised to the meter installed on the property. Mr Khort could not achieve this. Based on the decision in *Euphorbia (Pty) Ltd t/a Gallagher Estates v City of Johannesburg*,^[4] the appeal must fail on these grounds alone.
- [38] It is necessary, however, that I briefly deal with the legal argument by Mr. Botha concerning the onus of proof based on the

characterisation of the claim set out in the Particulars of Claim. He contends that YYY Trading premised its claim on a *condictio in debiti*. YYY Trading CC has the onus to prove the payment was in respect of historic debt and not due and payable.

- [39] A *condictio indebiti* requires that the payment sought to be recovered is paid *sine causa*. Justus error is integral to the claim for recovery. In this case, the payment was not made in error but to release a rates clearance certificate. The

application of this Roman-Dutch Law principle in the context of the Municipality's constitutional and administrative law duty misconstrues its primary obligation - to supply services and fulfil a public function. Determining the issue on this basis is untenable. It would unduly limit local municipal accountability and bar the ability to recover amounts incorrectly paid to a local authority. Significantly, it would subvert the onus a Municipality bears in the discharge of its constitutional and administrative law duty.

- [40] The Municipality cannot succeed in the appeal. Accordingly, I make the following order:

- [1] The appeal is dismissed.
- [2] The appellant is ordered to pay the costs.

SIWENDU J

BHIKHA AJ

APPEARANCES:

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Date of Hearing: 25

March 2019

Date of Judgment: 29

March 2019

[1] “(d) where the consumption of services has to be measured, take reasonable steps to ensure that the consumption by individual users

of services is measured through accurate and verifiable metering systems; (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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[2] 2005 (1) SA 530 (CC).

[3] 2016 JDR 1309 (GJ) at para 17.

[4] 2016 JDR 1309 (GJ).

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