

SOUTH AFRICA / JUDGMENT

Robarts Flagship Trust v Drakenstein Municipality (A08/2024) [2024] ZAWCHC 140 (27 May 2024)

[2024] ZAWCHC 140

COURT

Western Cape High Court, Cape Town

BEFORE

Salie, Kusevitsky

CASE / FILE NUMBER

A08/2024

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IN

THE HIGH COURT OF SOUTH AFRICA
(WESTERN
CAPE DIVISION, CAPE TOWN)
REPORTABLE

Case

No.: A08/2024

In the matter between:

ROBARTS
FLAGSHIP TRUST
Appellant
v
DRAKENSTEIN
MUNICIPALITY
Respondent
Coram
:
Salie,
J et Kusevitsky, J
Date of
Hearing

:
24 May
2024
Written Judgment
delivered
:
27 May
2024
Attorney for
Appellant
:
NGH
Attorneys
Ref: Mr N G Haupt
Counsel for
Respondent
:
Adv. M
Roman
Attorney for
Respondent
:
Marlo
Laubscher Attorneys

Ref: Mr M Laubscher

JUDGMENT

DELIVERED ELECTRONICALLY ON 27 MAY 2024

SALIE, J:

1] This is an appeal against an order by the Paarl Magistrate's Court on 1 December 2023 which granted judgment against the appellant for payment of prepaid meter electricity charges provided by the municipality and levied to commercial property situate at 348A Main Road, Paarl.

2] The factual background which forms the matrix of this appeal is briefly summarized as follows:

2.1] The appellant is the registered owner of Erf 3[...], Paarl, represented by the trustee, Mr. Robarts. ("Robarts"). The property is divided into six units which are rented out to different tenants. A prepaid electrical meter was installed in one of the shops on the property in 2009 which accrued arrear charges from 2012. Summons was issued in October 2021 and served on the appellant in February 2022 for the arrears which had accrued from 2012 to 2021 in the amount of R71 052,68. I shall refer to the respondent as the municipality unless the context indicate otherwise.

2.2] The particulars of claim set out the claim as an amount for outstanding electricity prepaid fixed charges levied against business consumers for the property in question. The amount outstanding had accrued between the period of 2012 and 2021. From the schedule annexed to the particulars the charges are described as a fixed daily charge reconciled at the end of each financial year commencing 2012 until 2021. The unpaid amount had evidently accrued over the 9 year period as a result of the fact that no prepaid electricity purchases were made during this period against which the daily fixed charge could be set off.

2.3] The version of Robarts is that he had no knowledge of the installation of the prepaid meter as the tenants of the trust were liable for their own electrical consumption. He testified that his lease agreement with his tenants operated on the basis that the tenants had their own prepaid meter for their unit/shop. At record page 68, line 520, Robarts testified in regard to the trust tenants:

“But when the tenants have got their own meter for the internal shop, that is their problem. I only charge operational costs which include electricity for the common areas, for the lighting, for the security fencing...”

(emphasis own)

2.4] That the prepaid meter for this unit had been installed at the behest of one, Mr. W.J. Swart (“Swart”) in 2009, was in all probability on behalf of the tenant whom leased and occupied the premises at that time. The latter conclusion had not been placed in dispute. Robarts however took issue with the fact that he gave no authorization for the prepaid meter installation and that Swart would have done so as an agent or representative of the appellant’s tenant. The costs levied in respect of the prepaid meter was maintained through the consumption of prepaid usage until the said tenant vacated in and during 2012. The tenant vacated the premises sometime during 2012 without informing the appellant as the landlord.

2.5] Robarts attended at the municipal offices in 2018, after his discovery of the prepaid meter, and requested its removal, however the municipality refused to remove it until the debt in respect thereof had been paid by the trust as the registered owner. He maintained however that as the trust had not applied for the meter, it is not responsible for the costs levied in respect of the said prepaid meter. During his testimony (at record page 70, line

599) he stated that:

“They all have prepaid meters. They would have their own arrangement with the municipality.”

2.6] The point of departure for the appellant is that on the basis that he was not aware of the installation of this prepaid meter (nor gave his consent or as per his testimony “delegated authority” (record page 67, line 468), he was not apprised of the accruing costs in respect thereof after the tenant had vacated in 2012 and disputes the liability for and on behalf of the trust as the registered owner. An amount in lieu of the unpaid prepaid meter costs was added to his monthly municipal account in March 2021 under the heading “Sundry Services ADJ Daily fixed charges” and summons issued in respect thereof. (Record page 65, line 420). This amount was R73 963.25,

later adjusted on the account by the municipality to R71 052.68 as the exact amount due for the period and in accordance with the aforesaid schedule. I shall deal with this aspect in more detail later.

2.7] Mr. Brandt (“Brandt”), senior accountant at Drakenstein Municipality, testified as a witness for the municipality regarding the functioning of prepaid electricity meter systems. He explained that the basic daily charge of the prepaid meter had accrued and could not be set off against the prepaid purchase of electricity as no electricity had been purchased during the period 2009 until 2021. Accordingly, the interval between 2012 and 2021 accumulated the arrear amount which forms the subject of the dispute. The municipality does not generate invoices for the prepaid meters, so no monthly accounts are sent out in respect of the accruing costs. At the time when this meter was installed, the municipality accepted

instructions from tenants to install a prepaid meter on presentation of a lease agreement. However, since July 2013 the municipality

adopted the policy that it would no longer engage with tenants as it resulted in the possibility of prepaid meter debt accruing without the owner’s knowledge but in respect of which the owner is liable.

2.8] Brandt testified further that a request for a removal of a meter would only be done if the costs levied to the prepaid meter had been settled. This method had been implemented by the municipality as a means to collect outstanding debt. On this basis, Robarts’ request for the removal was met with the same policy, that being, that the meter could only be removed upon full settlement of the cost due in respect thereof, which Robarts refused to do. In the result, the municipality issued this action for the recovery of the amount so due.

3] The amended plea set out a main defence and two special defences:

3.1] The appellant denied that it was liable to the respondent in respect of any prepaid meter charges on the basis that the appellant did not request the installation thereof, nor did it bear any knowledge of the meter prior to October

2018. Furthermore, it pleaded that it had no use for the meter. In amplification, the appellant pleaded that one, WJ Swart, (upon whose instruction the municipality attended to installation of the meter) had no authority to act on behalf of the registered owner and placed the municipality to the proof thereof.

3.2] In respect of the special pleas, the appellant pleaded that, in the event that it be found that the trust is indebted to the municipality:

3.2.1] The municipality failed to mitigate its losses when in and during October 2018 the appellant, through Robarts, notified it that the appellant had not authorized the installation of the meter, denied liability and requested that the meter be removed. In light of the refusal of the municipality to remove the meter, the appellant raised the special plea that the costs accruing from October 2018 ought not to be for the account of the appellant;

3.2.2] The second special plea raised the defence of prescription on the basis that the debt claimed by the municipality commenced during November 2012. Summons commencing action to recover the debt was only served on the appellant during February 2022. On the basis that the service of summons interrupted prescription, any debt due to the municipality for the period prior to March 2019 had prescribed in terms of the Prescription Act No 68 of 1969.

Judgment

a quo:

4] The magistrate reasoned (at paragraph 12) thereof that he was not persuaded by the appellant's evidence. On the basis that he found that the parties' versions amount to two mutually destructive versions, he found that he was not persuaded by the evidence of the appellant [defendant a quo]. In the result it was held that the defenses raised were baseless, lacked merit and that in its determination no bona fide defenses were raised, dismissing the version by the appellant as a fabrication and which fell to be rejected. It concluded that the claim had to succeed and granted judgment in favour of the municipality for the full amount together with 7% interest calculated from 18 February 2022 and costs.

5] I find the magistrate's reasoning in the judgment highly problematic. The finding of the court a quo amounts to a blanket conclusion of the merits of the matter without considering the three defences raised. Adjudication of the matter by mere finding that the versions are mutually destructive was misdirected. It bears mentioning, for the reasons I set out below, that the testimony of Robarts in respect of the prepaid meter installation had an inherent contradiction. In the premise, the dispute regarding the installation of the meter could and ought to have been determined by a critical evaluation of Robart's testimony. However, that finding would not be dispositive of the matter and it is of no consequence. For the reasons set out below the magistrate did not apply his mind to the various applicable legal principles and the facts relevant to the determination of the dispute.

Discussion of the applicable legal principles:

6] In the consideration of the matter and in particular the basis upon which liability is denied, I proceed to set out the applicable legal principles:

6.1] The Local Government Municipal Systems Act 31 of 2000 ("the Act") places a statutory duty upon municipalities to provide services to the whole of the community within their jurisdictions. The municipalities achieve this Constitutional prerogative through generation of revenue from the provision of the services that they are in turn mandated to provide.

6.2] Section 118 of the Act creates the amounts so due to the municipality over the immovable property as security for the payment of the monies due to it by an owner of an immovable property for rates, taxes, services and consumption charges and deemed as a right of preference. In context of this case, the municipal charges relate to electricity consumption. In *BOE Bank v City of Tshwane Metropolitan Municipality* 2005 (4) SA 336 (SCA) it was held, inter alia, that

“preference” extends to all debts owed to the municipality which have not prescribed. Furthermore, it held that the municipality may thus enforce its preferent right on municipal rates and taxes accumulating for a period of 30 years and in respect of services and consumption charges, a period of 3 years. On appeal to the Constitutional Court it was held that the section does not survive the debt to accrue to the new owner.

6.3] The issue relevant to the subject of this matter is that it is the owner of the immovable property who is liable for the consumption costs due to the municipality. This would be in line with a purposive interpretation of the enabling legislation given that municipalities have an obligation to service the community within its jurisdiction and concomitant duties to collect all money due and payable to it and must implement credit control and debt collection policies consistent with the act. In *Mkontwana v Nelson Mandela Metropolitan Municipality* (CCT 57/03) [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) the court held that (paragraph 41):

“It is self evident that the exact character of the relationship between the owner and the consumption charge will vary depending on whether the property is occupied by the owner, a tenant, a usufructuary, a fiduciary or an unlawful occupier. However, there is a level at which the owner and the debt are usually connected or related regardless of the nature of the relationship between the owner and the occupier and of whether the property is lawfully occupied. This is because the owner is bound to the property by reason of the fact of ownership which.... entails certain rights and responsibilities. Both the owner and the consumption charge are closely related to the property and the property is always the link between the owner on the one hand and the consumption charge in respect of water and electricity provided by the municipality on the other.” (emphasis own)

6.4] At paragraph 53 of *Mkontwana* the Court deals with occupation and consumption by tenants, as well as other category of occupiers, inter alia unlawful occupiers. The Court’s discussion regarding consumption costs relating to landlord and tenant is particularly relevant in this matter.

“The relationship between the owner and the consumption charge is so close as to justify a reasonable expectation that the owner would choose a responsible tenant, monitor payment by the tenant of consumption charges that are due and ensure that the agreement of tenancy is appropriately crafted. An agreement could provide, for example, that the consumption charges must be regularly paid by the tenant, that proof of payment is given to the owner and that eviction or other consequences would follow if there is non-payment. There is therefore no basis to suggest that it would be unreasonable for the owner to bear the risk.” (emphasis own)

6.5] It follows that for the appellant herein as the owner of the property, the consumption costs stemming from the prepaid electricity installed by or on behalf of the appellant’s tenant, remains the ultimate responsibility of the appellant as the owner. The evidence of Robarts was that all the units functioned with a prepaid meter and he adopted an approach that the tenants would have their own arrangement with the municipality. Clearly Robarts was not unaware of the installation of the prepaid meter, which contradicts the basis of his denial of liability, that being that he did not authorize nor did he know about the prepaid meter installation by the tenant of this unit.

However, even if he was not aware and had

not authorized the installation of the meter, the responsibility of the consumption costs would ultimately rest on him. In any event, the issue herein is not that the consumption cost during the occupation of the tenant was unpaid. It is common cause that the costs mounted only from November 2012 when the tenant had vacated from the property. The amount in question relates to costs which had accrued after the tenant had vacated.

6.6] It does not behoove the appellant as the owner to adopt an attitude that it was not aware of the prepaid meter, that it had no use of the prepaid meter and is accordingly not liable. The appellant as the owner bears the incidental risks to its property. This would be similar to where the property is damaged or destroyed. In any event, in my view, it is evident that the appellant had the responsibility to inspect the premises after its tenant vacated and engage the municipality regarding the prepaid meter so as to ensure that it be removed should it not wish to incur further costs. In *Mkwontana* it was held (at paragraph 101) thereof that by keeping a close eye on the extent of service charges, owners can take timely steps to ensure that indebtedness does not get out of hand.

6.7] The Drakenstein Municipality Electricity Supply By-law, 2014 enacted under the provisions of section 156 of the Constitution defines “customer” as the occupier, a person who has a valid existing agreement with the municipality for supply to such premises or if there is no such person or occupier, the owner of the premises. (emphasis own). In any event, absent an occupier, the owner is defined as the customer in the by-law and under an obligation to give notice to the municipality in terms of section 42 of the by-law titled: “Change of Occupier”

6.8] I understand from the facts of this matter that the prepaid meter levies had accrued from the period after the last purchase of prepaid electricity was made by the tenant. Simultaneous to the tenant’s vacation, no further electricity purchases were made and in the result the daily levies charged in respect of the meter had accrued for the account of the appellant as the owner of the premises and as the customer. It follows that the appellant would have incurred liability for prepaid meter daily charges which had been levied in respect of the prepaid meter from 2012, subject to what is stated hereafter in this judgment.

Special Plea: Mitigation of loss

6.9] As regards the special plea raised that the municipality ought to be held liable for the costs accrued after October 2018 when the appellant requested the meter’s removal, my considered view is that the municipality is under the obligation to collect all money due and payable to it. It follows that it is an incidental power to its credit control and debt collection obligation that it is authorized to adopt policies in line with this obligation. The municipality’s refusal to remove the prepaid meter upon the appellant’s request cannot be faulted. I consider this policy to be consistent with both its constitutional obligation and the act as well as being consistent with policy implementation to collect amounts due to the municipality. That the municipality is empowered to disconnect services in terms of section 19 of the by-law must be given a purposive interpretation. The section empowers the municipality with the election to disconnect the supply

of electricity with reasonable written notice (s19(b)) where a customer fails to pay any amounts due to the municipality in connection with electricity supply. However each case should be based on its own merits.

6.10] I find the appellant's submission that the above provision places an obligation upon the municipality to disconnect supply or remove the prepaid meter misguided. This provision is to protect the municipality from supply where it may pose risk if the supply is not disconnected; in circumstances of tampering; non-payment of service; contravention of the by-law and refusal of access by the customer to the municipality to inspect the metering equipment. The purpose of the provision is clearly to protect the municipality in its supply of services to the community and protection in the event of non-payment. The same reasoning applies to the provisions under section 42 of the by-law titled: "Change of Occupier". The sections cannot be seen to remove or limit the municipality's incidental power to ensure payment of arrear costs such as in the case herein. The law affords municipalities a range of tools to ensure that charges are paid. Section 156(5) of the Constitution gives the municipality the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions. The dictionary meaning of "incidental power" defines same as a type of power that is necessary to achieve a specific goal, even though it may not be explicitly granted. Clearly the municipality is constitutionally empowered to implement the policy against removal of prepaid systems until the outstanding payment is due so as to achieve its debt collection imperative subject to the proviso that the arrear amount debt must still be valid in law. For this reason, it follows that the special plea denying liability from October 2018 on the basis that the municipality failed to mitigate its loss must fail.

6.11] In terms of the Prescription Act 68 of 1969 and related case law, rates and sewage costs prescribes after 30 years. In the case of water and electricity charges, the debt so due is extinguished after the lapse of 3 years. Prescription starts to run as soon as the debt is due. The prepaid meter accrues a daily tariff from the last date of purchase. It follows that as the charge levied in respect of the meter falls due on a daily basis, prescription starts to run daily from each and every date.

6.12] In *Argent Industrial Investment (Pty) Ltd v Ekurhuleni Metropolitan Municipality* (17808/2016) [2017] ZAGPJHC 14; 2017 (3) SA 146 (GJ) the court had to consider whether the municipality's claim for water consumption had prescribed. It was held that a consumer who receives a bill for municipal charges for electricity or water for any period older than 3 years cannot be held

liable for the amounts older than 3 years because same had prescribed.

6.13] The principle of prescription is trite law and I view the municipality's claim for the prepaid meter consumption for the whole of the period of 2012 to 2021 opportunistic. I pause to mention that even on a cursory glance, the municipality would have appreciated that billing for costs spanning just under a period of a decade cannot be valid claim. The municipality simply mounted this cost to the appellant's municipal costs and demanded payment. In line with the

principle of good governance and credit control policy which it is constitutionally mandated to do, this act was abusing its positions towards its customer/ consumer, the appellant. A simple journal entry, adjusting the amounts for the preceding 6 years, thereby holding the appellant liable for the preceding period of 3 years would have been appropriate and in fact it had been incumbent on the municipality to do. Instead it maintained a proverbial “David and Goliath” position by summarily billing the appellant for the full period of 9 years. Whilst the municipality does not issue monthly accounts for the prepaid meter system as per the testimony of Brandt, it does not alleviate the municipality from its obligation to assess the costs running and accruing on a prepaid meter over an unduly long period, as in this case, for almost a decade. It is untenable a position (particularly so in the light of its duty to maintain good governance and credit control policies) to one day, after almost a decade, arbitrarily add the costs of the past decade of a prepaid meter for payment. The account issued for March 2021 adds the costs headed as “Sundry Services” at R73 963.25 due and payable on 15 April 2021. The municipality has a litany of measures available to it to ensure payment of the services due to it. However, such protection and power must be exercised in a manner which is reasonable and constitutional, taking appropriate, reasonable and lawful steps to collect amounts due.

6.14] It follows that the municipality cannot sit on its laurels for years without notifying the owner of the accruing costs, followed by an invoice for almost immediate payment after almost a decade of accruing daily charges. Whilst I set out above that the municipality ought to have adjusted their invoice and demanded payment only for the period of 3 years prior March 2021 as the amounts before then March 2019 had clearly prescribed, the municipality was once again confronted with a special plea raising this issue. It ought to have readily conceded the special plea of prescription. It had not done so and maintained its steadfast position to hold the appellant liable for the full period of 9 years. This leaves a consumer in the untenable position to pay the full amount as invoiced alternatively face the risk and consequences of disconnection of services in respect of all or other municipal services to which the consumer is accounted for, legal action and other debt collection measures which in this case included a substantial pro rata amount for the prescribed period of 6 years. The municipality is obliged to give effect to its Credit Policy which must be interpreted with the values enshrined in our Constitution, the Promotion of Administrative Justice Act and good governance as it is required to do in the Municipal Act. The municipality’s silence on the defence of prescription is telling both in the trial court as well as this appeal. The heads of argument filed in this appeal for the respondent makes no reference to the defence on prescription. The conduct on the part of the municipality is remiss and a relevant fact in the consideration of costs, which I deal with hereunder.

6.15] In the circumstances taking into account the trite principles of prescription, I am satisfied that the appellant could only be held liable for amounts which had not yet prescribed. In the premise, the special plea of prescription must succeed. The remaining issues on appeal must fail.

6.16] The municipal manager is the head of the administration of a municipality and has various duties, inter alia, giving guidance and advice to the municipality and also acts as the accounting officer. I am fortified by the conduct of the municipality apropos the prescribed period of 6 years and its persistence in invoicing the appellant in respect thereof as well as the prevalence of these type of municipal conduct in the management of prepaid electricity meters, that a copy of this judgment be placed with the Drakenstein Municipality Manager.

6.17] At the completion of the submissions made by counsel for the municipality in respect of the special defence of prescription, an adjournment was requested by counsel to consult with his instructing attorney who was present in Court. After the adjournment, counsel informed the Court that in the premise where the Court uphold the prescription point, that the municipality makes the concession that it could only claim for the prepaid meter expenses which had not prescribed, in other words, for costs levied after February 2019, representing 3 years prior to the service of the summons in February

2021. I am of the view that the concession was properly made. The parties also agreed that if this Court is to uphold the prescription defence on appeal, that the municipality would present an invoice to the appellant for electricity consumed in respect of the meter for the period 28 October 2019 until 29 October 2021. A draft order to that effect was submitted to the Registrar after the hearing of the matter. I include the terms thereof in the order below.

Costs:

7] In light of the fact that the appellant only remains liable for the debt over a period of 3 years as opposed to 9 years, it follows that the appellant is substantially successful in this appeal. Together with my reasoning as set out in paragraph 6.14 to 6.16 above, I am satisfied that the municipality be ordered to pay the costs of the appellant on scale A.

Order:

8] For the reasons aforesaid and in all circumstances of this appeal, I make the following order:

- (a) The appeal is upheld to the extent of the order set out in paragraph (b) below with costs to be paid by the respondent on scale A.”
- (b) The order of the magistrate’s court dated 1 December 2023 is herewith set aside and substituted as follows:

“The plaintiff is ordered to:

- (i) Reverse all amounts for the electricity prepaid fixed charges added to Municipal Account 0[...] (“the defendant’s account”) on the invoice dated 26 March 2021 (“the invoice”) and in respect of meter number: 0[...] (“the meter”);
- (ii) The plaintiff is directed to present an invoice to the defendant for electricity consumed in respect of the meter, for the period as from 28 October 2019 until 29 October 2021;

- (iii) The defendant is held liable for the amount due and payable in the invoice in (ii) above, payable within 21 days from date of presentation of the invoice.
- (iv) The plaintiff is ordered to pay the defendant’s costs of suit.”
- (c) The Chief Registrar of this Court is herewith directed to serve a copy of this judgment on the Drakenstein Municipality Manager within 7 days hereof.”

SALIE, J

JUDGE OF THE HIGH COURT

WESTERN CAPE

I agree:

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KUSEVITSKY, J

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