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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 7844/2020

REPORTABLE: **NO**

OF INTEREST TO OTHER JUDGES: **NO**

REVISED: **NO**

17/09/2021

In the matter between:

TUHF LIMITED

Applicant

and

**68 WOLMARANS STREET JOHANNESBURG
(PTY) LTD**

First Respondent

10 FIFE AVENUE BEREA (PTY) LTD

Second Respondent

MARK MORRIS FARBER

Third Respondent

JUDGMENT

Delivered: *By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered. The date for hand-down is deemed to be 17 September 2021.*

SENYATSI J:

[1] This is an opposed application in terms of which the applicant (TUHF Limited) seeks an order; *inter alia*, foreclosing on the first respondent's immovable property, being 68 Wolmarans Street situated downtown Johannesburg and known as Wolbane Mansions, which is a residential apartment building and accelerating repayment of the full loan amount.

[2] The first respondent operates a rental apartment business and uses the proceeds thereof to service loan repayments to the applicant, which loan agreement is secured by a mortgage bond registered over the immovable property.

[3] The second and third respondents are sued pursuant to the deeds of suretyships executed by them in favour of the applicant for the debts of the first respondent.

[4] According to the applicant, the first respondent is in breach of the loan agreement, not because it has failed to meet its monthly loan repayment obligations, but due to its failure to pay for rates, taxes, utilities, and other charges and imposts due to the City of Johannesburg ("CoJ").

[5] The applicant also alleges that the first respondent has breached the loan agreement in the following respects, namely:

- (a) its failure to obtain and provide an updated electrical compliance certificate in respect of the elevators at Wolbane Mansions;
- (b) its failure to obtain and provide the requested fire safety certificate in respect of Walbane Mansions;
- (c) its failure to provide proof of payment of municipal charges to the applicant and;
- (d) its failure to provide the applicant with copies of municipal statements.

[6] This application pertains to municipal account number [...] ("the account") at the CoJ. The respondents have addressed this in their replying papers. This has been dealt with in detail by the respondents in their replying papers.¹

[7] The ownership of 68 Wolmarans Street Johannesburg was acquired by the first respondent during March 2014, from around that time, the respondents' charges for electricity consumption at the premises were debited to the account through the readings of electricity meter [...]. The first respondent disputes that electricity meter [...] is installed at 68 Wolmarans Street and contends the correct electricity metre number installed is 63038264 ("electricity meter").

[8] As evidenced by Mr Patel's correspondences of 04 May 2017, 29 August 2018, 29 November 2018 and 12 February 2019, the respondent has repeatedly attempted to resolve the issue. However, the disputed electricity charges remain unresolved.

[9] The CoJ disconnected electricity supply to the premises during April 2016. This was done despite the debatement of the account, not having been resolved. The first respondent then approached court for relief which was granted on 5 May 2016.

[10] In terms of the May 2016 Court Order, the CoJ was ordered to:

- (a) provide the first respondent with a statement and debatement of the account number [...]with itself (CoJ);
- (b) credit to the first respondent's account mentioned in (a) with all charges which were incorrectly levied against it;
- (c) credit the first respondent's account mentioned in (a) above with all parties which were incorrectly levied against it;
- (d) certified confirmation from it (CoJ) of the allocation of free water as stipulated in the Water Services Act No 108 of 1997 in section 9(1) thereof;

¹ AA, page 003 on Case Lines

(e) the CoJ was interdicted from unlawfully disconnecting water and electricity supply to the account mentioned in (a) above.

[12] The CoJ was furthermore directed to deliver accounts on the correct tariff to the first respondent in relation to the actual consumption of water incurred, from the date of the order and duly supported by actual consumption remedies directing the first respondent to effect payment thereof.

[12] The applicant's case is that the respondent is in breach of the loan agreement by *inter alia* failing to pay rates, taxes and electricity charges owed to the CoJ.

[13] Notwithstanding the pending litigation between the first respondent and CoJ over the alleged failure to pay, the applicant maintains it is entitled to cancel the loan agreement and accelerate payment.²

[14] In addition, the applicant contends that the entitlement to cancel and accelerate the loan exists although the loan repayments are up to date. The other assertions are in my view not material as to lead to the cancellation of the agreement and acceleration of the loan repayment.

[15] The issue for determination is whether the applicant is entitled to such cancellation and acceleration of payment under these circumstances.

[16] It is within that consumption of principal services that the Municipality disputes the account which does not accord with the services rendered by the municipality. This dispute is in fact common cause between the parties in this application.

[17] The applicant's counsel has referred me to several cases.³ Having considered the cases, I believe the reliance on the referred cases is misplaced, since the cases are about overdue municipal accounts in which the Municipality is the litigant. The same cannot be said about this matter.

² FA, para 52-55, page 001-35 - 36

³ Body Corporate Croftdene Mall v Ethekewini Municipality 2012 (4) SA 169 (SCA); PA Pearson (Pty) Ltd v Ethekewini Municipality and Others 2017 (6) SA 82 (SCA); BCE Bank Ltd v Tshwane Metropolitan Municipality 2005 (4) SA 336 (SCA)

[18] In the instant case, the applicant, has in my view taken the responsibility of forcing the first respondent to pay the municipal account for services, rates and taxes despite the fact that the CoJ has not itself asserted its rights. This is, in my view, impermissible as the CoJ has clearly failed to comply with the existing court order for debatement of account.

[19] It follows therefore that the first respondent, would only be in breach of the contractual term of the loan agreement if the CoJ asserted its rights and obtained judgment against the first respondent. Absent such action, a court order that the first respondent is ordered to pay for whatever turns out to be due and payable to the CoJ is premature, in my respectful view, allowing the applicant to rely on non-payment of such services, electricity, rates, and taxes as a ground to allege a breach of the loan agreement entitling it to the cancellation, accelerated payment, and cession of rental revenue generated by the first respondent would be prejudicial to the first respondent. Allowing the applicant to take such draconian steps when the first respondent is in fact up to date with its loan repayments will be an injustice of great proportion.

[20] Accordingly, I hold the view that the applicant has not succeeded in making out a case.

[21] **THE CONDONATION APPLICATION**

The respondent's application for condonation arising from its failure to file the answering affidavit timeously is granted.

ORDER

[22] The following order is made:

(b) The application is dismissed with costs.

SENYATSI ML

***Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg***

REPRESENTATION

Date of hearing: 19 May 2021 and 20 May 2021

Date of Judgment: 17 September 2021

Applicants Counsel: Adv E Eksteen

Instructed by: Schindlers Attorneys

Respondent's Counsel: Adv G Wickins

Adv M De Oliveira

Instructed by: Gavin Simpson Attorneys