REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 2017/40710

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

……………………………… 03.11.2018
SIGNATURE **DATE**

In the matter between:

ABDUL RASAQ OLAWALE AREWA **APPLICANT**

And

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY **RESPONDENT**

JUDGMENT

<u>WINDELL, J:</u>

INTRODUCTION

[1] This is an application for the repayment of an amount of R147 437.22 paid by the applicant to the respondent under protest. The payment was effected to obtain a clearance certificate from the respondent in terms of section 118 (1) of the Local Government Municipal Systems Act 32 of 2000.

[2] The respondent opposes the application and contends that the payment does not constitute a payment under protest and that the applicant should instead have applied for a refund in terms of the respondent's Credit Control and Debt Collection By-Laws. The respondent also disputes that the applicant is entitled to the repayment of the amount of R 147 437.22 and contends that after it had vetted the municipal account pertaining to the applicant's property, it found only R 10 634.71 due to the applicant. This court, so it is argued, is therefore unable to determine the amount owed to the applicant on application as the amount is not liquidated and/or capable of easy and prompt ascertainment.

BACKGROUND FACTS

[3] The applicant was the registered owner of a residential property, Erf 2120, Blairgowrie ("the property"). There had always been issues with the municipal account of the property and when the property was sold in 2016, and in an attempt to resolve the disputed municipal account once and for all, the applicant launched an application on 7

June 2016 for an order against the respondent to deliver a duly vouched and accurate account in respect of the municipal services to the property.

[4] On 20 September 2016 this court granted an order against the respondent and ordered it to deliver a duly vouched and accurate account in respect of the municipal services. In addition the court ordered the respondent to furnish the applicant with the amount required to be paid in order for the respondent to produce the clearance certificate necessary to effect registration of transfer. The respondent complied with the order and provided the applicant with an account of R37 060.37. This amount was paid by the applicant. Since then the respondent has provided the applicant with monthly accounts which were duly paid.

[5] The sale of the property fell through as a result of what applicant describes as "issues relating to the municipal account", but was sold again on 29 May 2017. On 3 June 2017, the applicant's transferring attorneys applied for clearance figures from the respondent. The respondent failed to provide the figures and the applicant, for the second time in one year, had to approach the court for an order compelling the respondent to provide the figures.

[6] On 20 September 2017, a court order was handed down ordering the respondent to furnish the applicant with the outstanding balance. On 21 September 2017, the respondent provided the clearance figures to the applicant and indicated that an amount of R152 241.21 was payable to the respondent in order for it to produce a clearance certificate. The applicant's attorneys immediately responded and addressed a letter to

the respondent wherein the following was stated:

[6.1] The amount of R 152 241.21 is incorrect.

[6.2] Due to the long history of the matter coupled with the fact that the property needs to be transferred in terms of the Deed of Sale the applicant will pay the amount of R 152 241.21 under protest in order to obtain the required clearance certificate to affect transfer.

[6.3] Upon obtaining the clearance certificate the applicant will bring an application for the repayment of R 152 241.21.

[7] No response was received to this letter. On 27 September 2017, the clearance amount of R 152 241.21 was paid by the applicant. On 24 October 2017, the applicant launched this application for repayment of the amount on the basis that the amount paid was not due to the respondent and was paid under protest.

[8] On 31 October 2017, the property was transferred to the new owner.

PAID UNDER PROTEST

[9] The first issue that needs to be considered is the nature of the applicant's cause of action. Is it based on an enrichment action in the form of the *condictio indebiti* or instead on a tacit agreement?

[10] It is now settled law that the *condictio indebiti* is not confined to the recovery of an *indebitum solutum* which was involuntary because it was paid by mistake. It is also available when the payment (or indeed any performance), although deliberate, perhaps even advised, was nevertheless involuntary because it was effected under pressure and protest.[1]

[11] The applicant seeks the repayment of an amount paid under protest. Payment under protest does not of itself equate to payment under duress. The protest requirement is potentially but one element of a cause of action based on duress. It is clear from the papers – and these equate to pleadings and evidence - that the applicant's cause of action is not based on payment under duress and the elements necessary to prove duress were not pleaded. The question that then arises is the following: Does our law make provision for an enrichment claim where transfer of money or property under protest but without compulsion occurred? In *Commissioner for Inland Revenue v First National Industrial Bank Ltd*[2], Nienaber AJA, writing for the majority, found that in the absence of mistake or compulsion, *the condictio indebiti* would not be available and held that the cause of action in such cases, provided the facts justified it, could be based on a tacit contract, which agreement would create a new and independent cause of action. The applicant can therefore not rely on the *condictio indebiti* for the repayment of the money paid to the respondent.

[12] But did the applicant and the respondent in this case conclude a tacit agreement?

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[1] *Commissioner for Inland Revenue v First National Industrial Bank Ltd* 1990(3) SA641 (A) at 647 C-D.
[2] At 649 G-J

In *Commissioner* Nienaber AJA held that determining whether such an agreement was concluded will be a question of interpretation of the exchanges between the parties and by merely adding the words 'under protest' to a payment a debtor cannot unilaterally foist an agreement to repay on his creditor. With reference to *Lilienfeld & Co v Bourke*[3] the court held that to create a true alternative cause of action, the understanding between the parties would have to be that the creditor undertakes to repay the money if it is eventually determined not to have been due. In such a case the creditor's promise to repay would be conditional on the finding that the debtor's prior payment to him was wrongly made. In *Port Elizabeth Municipality v Uitenhage Municipality*[4], the Uitenhage municipality reclaimed an increased electricity tariff that the Port Elizabeth municipality had imposed on it. The Uitenhage municipality had paid the tariff, but had protested at the time, and expressly reserved its rights to reclaim the money if it were subsequently found that the increase had been unlawfully demanded. Muller AJA held that the respondents had not only denied liability and protested when making payment, but had, by "express stipulation" reserved the right to reclaim the money. Since the Port Elizabeth municipality had noted these protests, but did not object to the respondent's reservation of its rights, "[i]t must, therefore, I think, be regarded as having by implication agreed to accept the monies subject to the reservations made". As a result, the Appellate Division held that the payments in excess of the original tariff that had already been made could indeed be recovered by the Uitenhage municipality.

[3] 1921 TPD 365
[4] 1971 (1) SA 724 (A)

[13] In the letter dated 21 September 2017, the applicant, in no uncertain terms, informed the respondent that he disputes the amount allegedly due to the respondent, and that he makes payment of the amount under protest. He further made it clear that he only makes payment of the amount to obtain the clearance certificate he required to finalize the sale of the property. He also expressly reserved his rights to reclaim the money. The respondent failed to object to the respondent's reservation of his rights and accepted the payment. I am satisfied that by this conduct a tacit agreement came into existence between the parties and any amount that is found to be due to the applicant can be recovered by the applicant.

WAS THE DEBT DUE?

[14] On 20 September 2016 the court ordered the respondent to provide the applicant with a vetted and accurate account. The respondent complied and provided the applicant with an account of R37 060.37. This amount was paid by the applicant. Thereafter the applicant received monthly accounts from the respondent. The account for September 2017 (the same month the clearance figures were issued) indicated that an amount of R4 803.99 was due to the respondent.

[15] The respondent's main defence is that it vetted the municipal account and found only R10 634.71 due to the applicant. In support of this allegation the respondent annexed annexure "TN2" to its answering affidavit and alleges that the account shows all the charges on the property over the entire period that the applicant was the owner as well as all the payments/transfers received.

[16] The respondent itself had vetted and scrutinized the same account as per a court order in September 2016 and provided the applicant with an amount of R37 060.37 that the applicant duly paid. It is submitted that the allegation by the respondent that the account went up by R152 241.21 in a year with the applicant paying monthly accounts received from the respondent, cannot be upheld and the account in any event does not show all the payments/transfers received from the applicant. The applicant therefore submits that the amount that needs to be repaid to the applicant can simply be calculated as follows: R152 241.21 (clearance figures paid) – R4 803.99 (amount due in September 2017) = amount payable to applicant.

[17] Section 96 of the Local Government: Municipal Systems Act 32 of 2000 holds that:

> "A municipality –
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> (a) must collect all money that is due and payable to it, subject to this Act and any other applicable legislation; and
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> (b) for this purpose, must 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 this Act."

[18] In the matter of *Jordaan and Others v City of Tshwane Metropolitan Municipality and Others*[5], the Constitutional Court specifically dealt with the duty imposed on Municipalities under section 96 of the Municipal Systems Act. The court pointed out that

[5] 2017 (6) SA 287 (CC)

a municipality has a duty to send out regular accounts, develop a culture of payment, disconnect the supply of electricity and water in appropriate circumstances and take appropriate steps to collect amounts due.

[19] In *Euphorbia (Pty) Ltd t/a Gallagher Estates v City of Johannesburg* [6] the full court held that the duty to accurately account lies with the respondent. The respondent should have all the information (including the specific payments received) relating to the account on its system and the duty is on the Municipality to prove the correctness of its accounts. In my view the respondent has failed in its duty to supply the applicant with regular and accurate accounts.

[20] After the respondent vetted the account in September 2016, following the court order referred to above, it sent the applicant monthly accounts, the last account being in September 2017, which showed that an amount of R4 803.99 was due to the applicant. The allegation that the account had gone into arrears by R152 241.21 in a year (with the applicant receiving monthly accounts which he paid) after the account had been vetted by the respondent in September 2016, can be found on these papers not to be plausible. The calculation relied upon by the applicant is an easy and quick one, and the amount due to the applicant is capable of easy and prompt ascertainment.

[21] The applicant is entitled to the repayment of the amount paid under protest. In the result the respondent is ordered to make the following payment to the applicant:

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[6] 2016 JDR 1309 (GJ).

[21.1] An amount of R 147 437.22 within 20 days of this order.

[21.2] Interest on the amount at the rate of 10,25% per annum from date of judgment to date of payment.

[21.3] Costs of the application.

L. WINDELL

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Attorney for applicant:	Neels Engelbrecht Attorneys
Counsel for applicant:	Advocate D Landman-Louw
Attorney for respondent:	Sello Ramashilo Attorneys
Counsel for respondent:	Advocate P.J. Kok
Date matter heard:	28 August 2018
Judgment date:	23 November 2018