REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

10 /07 /2013 .

CASE NO: 47730/2011

(1) REPORTABLE: YES / ~~NO~~

(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~

10/07/2013
DATE

SIGNATURE

In the matter between:

JACOBS & SMILOWSKI CC **APPLICANT**

and

THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY **RESPONDENT**

JUDGMENT

KUBUSHI, J

[1] This is an opposed application, the purpose of which is to order the respondent to restore the water and electricity supply to the applicant's property and to restrain the respondent from suspending and/or disconnecting any services in respect of the said property. Ancillary to that order the applicant also requested an order declaring the respondent in contempt of a court order of the magistrate court Pretoria which was granted in favour of the applicant against the respondent in that court.

[2] The application was initially brought to court on an urgent basis on 19 August 2011. A rule *nisi* was granted on that day with the return date of 27 September 2011. The rule *nisi* was extended to 18 October 2011, further extended to 28 November 2011 and again extended to 30 January 2012. It is not clear from the record what happened in court on 30 January 2012. Nothing is recorded on the file nor is there any documentation in the file indicating what happened on that date. In fact there is nothing on record for the whole of 2012. The matter was in court again on 13 March 2013 and it was postponed *sine die*. When the matter appeared before me on 22 April 2013 the rule *nisi* had expired but the applicant still persisted with the relief sought.

[3] The respondent's counsel in her heads of argument raised a point *in limine* that the applicant's replying affidavit was not properly attested and that it should not be considered as part of the papers before court. When the matter was argued the parties' counsel informed me that the point has since fallen away and will not be pursued.

[4] The applicant is the registered owner of a property known as 262 Charles Street Brooklyn, Pretoria (the property). The said property is registered as a zone 1 residential area. The respondent is a municipality duly incorporated in terms of section 12 of the Local Government: Municipal Structures Act 117 of 1998. The respondent as a municipality is empowered by the Local Government: Municipal Property Rates Act 6 of 2004 (the Property Rates Act) to levy rates in respect of the property.

[5] According to the applicant the respondent is levying incorrect rates for the property. His case is that he informed the respondent in 2008 that he is using the property for residential and business purposes. He also lodged an application for the rezoning of the property from residential to business usage and the application is still pending. The parties as a result, agreed that a

business and commercial rate be levied against the property. He has since then been paying those rates and is to date hereof still paying them. However, during 2008, the respondent unilaterally without consulting him began imposing other rates on the property which are three times higher than the normal rates levied in respect of business and commercial property. He lodged a complaint with the respondent and instead of resolving the complaint the respondent opted to disrupt the water and electricity supply to the property. He only became aware in 2010 that he was being charged rates on a special scale for 'non-permitted use' of the property. He contends that the respondent is not entitled to charge these rates because the Property Rates Act does not authorise it to do so.

[6] The applicant's counsel contended in argument that the respondent is not entitled to cut the water and electricity supply to the property because the applicant is not in arrears with his payments to the respondent. He has been paying the full amount of the rates for business and commercial usage as agreed with the respondent. The respondent is actually charging the applicant a penalty on top of the agreed levy.

[7] The applicant's counsel contended further that the applicant's monthly payments for the water and electricity account in respect of the property are also paid up to date. The respondent could not rely on the provisions of section 102 of the Systems Act which allows a municipality to consolidate the accounts of a rate payer for purposes of debt collection. The respondent did not consolidate the accounts and could not have done so because of the dispute which existed between the parties in respect of the rates' account.

[8] On the contrary, the respondent's contention is that it is correctly levying the property under the 'non-permitted use' category. According to the respondent different scales for rates are levied for different usages of property. The applicant is using the property for different purposes for which it has been

zoned for. In terms of the municipal by-laws, a property used for a different purpose than what it is zoned for falls under the 'non-permitted use' category. Rates for 'non-permitted use' of property are higher than those for the correct usage of the property.

[9] The respondent's counsel contended in argument that the applicant's premise is flawed in that pending the finalisation of the application for rezoning it cannot be said that the property falls under the business and commercial use but it falls under the 'non-permitted use' category. He contended further that the respondent was not bound by the provisions of section 102 to consolidate the applicant's accounts in respect of the property for purposes of debt collection. The respondent was however, entitled in terms of section 5.2 of the City of Tshwane Metropolitan Municipality Credit Control By-Laws (the Credit By-Laws) to discontinue the services to the property because the applicant was in arrears with the payment of the rates to the property. The applicant is paying a lesser amount than that required for a monthly levy for the 'non-permitted use' category.

[10] Despite numerous attempts the parties were not able to resolve this issue. The respondent intermittently cut the water and electricity supply to the property. It even instituted a claim against the applicant in the magistrate's court for the recovery of the 'arrear' amounts. For reasons which I shall refer to later in this judgment when I deal with the order for contempt of court, those proceedings were dismissed. Even after the dismissal of the proceedings, the respondent proceeded to cut the supply of services to the property.

[11] The applicant as a result launched this application and on 19 August 2011 Van der Bijl J granted an *interim* order which read thus:

"BY AGREEMENT and having read the papers filed of record, I make the following order:

1. The Respondent is called upon to show cause before this Honourable Court on or before **Tuesday 27 September 2011** why the following *interim* order should not be made final:

   1.1 Ordering the respondent to immediately restore the water and electricity supply to the property known as 262 Charles Street, Brooklyn, Pretoria.

   1.2 Interdicting and restraining the respondent, in the absence of a court order, from further interrupting the water and electricity supply to the Applicant's property known as 262 Charles Street, Brooklyn, Pretoria.

   1.3 Declaring that the Respondent is in contempt of the order granted by the Magistrates Court under case number 22210/2011 in failing to furnish the Applicant with corrected statements and continuously interrupting the water and electricity supply to the Applicant's property known as 262 Charles Street, Brooklyn, Pretoria.

   1.4 Ordering the Respondent to submit an amended account of the water and electricity consumption at the premises referred to in paragraph 1.1 above, within 30 days from date of this order.

   1.5 That the respondent pays the costs of the application on an attorney and own client scale.

   1.6 Further and/or alternative relief.

2. That the *Rule Nisi* shall operate as an *interim* interdict with immediate effect in terms of paragraph 1.1 and 1.2 above until the return date.

3. Ordering the Municipal Manager: **Oupa Nkowane** to disclose to the Applicant's attorneys of record the name of the person actually charged with compliance of the order made in the Magistrate's Court under case number: 22210/2011.

4. The costs occasioned on Friday 19 August 2011 are reserved to be decided by the Court adjudicating upon the *rule nisi*."

RESTORATION OF WATER AND ELECTRICITY SUPPLY

IS THE APPLICANT IN ARREARS WITH RATES & TAXES

[12] I am not in agreement with the applicant that the respondent is not entitled to charge the rate for 'non-permitted use' in respect of the property. His counsel's contention that the respondent is charging a special levy or penalty is also not valid. The 'non-permitted use' is one of the categories of property on which the respondent is entitled to levy rates. This category is included in the respondent's rates policy and implemented through the by-laws.

[13] The respondent, as a municipality is empowered by the Property Rates Act to impose rates on property.

Section 2 of the Property Rates Act states that –

> "**Power to levy rates**
>
> (1) A metropolitan or local municipality may levy a rate on property in its area.
>
> (2) . . .
>
> (3) A municipality must exercise its power to levy a rate on property subject to –
>
> (a) section 229 and other applicable provisions of the Constitution;
>
> (b) the provisions of this Act; and
>
> (c) the rates policy it must adopt in terms of section 3."

[14] Section 3 of the Property Rates Act provides that –

"**Adoption and contents of rates policy**

(1) The council of a municipality must adopt a policy consistent with this Act on the levying of rates on rateable property in the municipality.

(2) . . .

(3) A rates policy must

(a) . . .

(b) determine the criteria to be applied by the municipality if it –

(i) levies different rates for different categories of properties;

(ii) . . ."

[15] Section 6 of the Property Rates Act reads as follows:

"**By-laws to give effect to rates policy**

(1) A municipality must adopt by-laws to give effect to the implementation of its rates policy.

(2) By-laws in terms of subsection (1) may differentiate between –

(a) different categories of properties; and

(b) different categories of owners of properties liable for the payment of rates."

[16] Section 8 of the Property Rates Act provides that –

> "(1) Subject to section 19, a municipality may in terms of the criteria set out in its rates and policy levy different rates for different categories of rateable property, which may include categories determined according to the –
>
> (a) use of the property;
>
> (b) permitted use of the property; or
>
> (c) geographical area in which the property is situated."

[17] Subsection 8 (2) thereof sets out a list of categories of rateable property that a municipality may determine in terms of subsection (1) to include amongst others, residential property, business and commercial property etc.

[18] The Council of a municipality must in terms of section 3 (1) of the Property Rates Act adopt a policy consistent with that Act for the levying of rates on rateable property in the municipality. Hence, the respondent adopted a policy, the Property Rates Policy, for the determination of criteria for levying rates. Paragraph 3 thereof provides for the determination of different categories and rates of properties. It also set out a list of categories of rateable property determined by the municipality for purposes of levying differential rates. Included in the list is the category of 'non-permitted use'. Implementation of this policy takes place in terms of section 2 of Chapter 2 of the Property Rates By-Laws. Section 2 (2) (j) thereof provides for 'non-permitted use' as a category of rateable property for purposes of levying differential rates.

[19] It can be argued that the categories enumerated in section 8 (2) of the Property Rates Act do not include 'non-permitted use' as a category of rateable property. However, the section does not put a limit to the categories that a municipality may determine. The provisions of the section are very

explicit and are not peremptory. That subsection sets out categories of rateable property which a municipality *may* determine and it may include some of the categories listed therein. It does not, in my view, state categorically that the categories specified therein must be determined.

[20] In relation to property, 'non-permitted use' is defined in both the policy and the by-laws as any use of a property that is inconsistent with or in contravention with the permitted use of that property in which event and without condoning the 'non-permitted use' thereof, the property shall be valued as if it were used for such non-permitted purposes only.

[21] The applicant's property thus falls squarely within this category. It is common cause that the property is currently zoned for residential usage. Even though the applicant alleges that he has applied for the rezoning of the property, it is not in dispute that the property has not been rezoned. By operating a business on the property the applicant is doing so in contravention with the permitted use of the property. The respondent is thus entitled to levy the rates as it does. There is no reason and the applicant himself provided none, for the respondent to be charging rates for business and commercial usage. There is no category provided for in either the policy or the by-laws for the rates which the applicant wants to enforce. The property is currently zoned as residential and residential use rates must be applicable but since the applicant is using the property for the purpose for which it is not zoned, 'non-permitted use' rates must be levied.

[22] It is common cause that the rates levied for 'non-permitted use' are higher than those for residential use. According to the Property Rates Schedule (the Schedule) for the financial year 1 July 2012 to 30 June 2013, the tariff for residential properties is calculated at 1, 354 whereas that for 'non-permitted use' is calculated at 6, 014. The applicant's contention is that he is paying a rate for business and commercial usage. This rate is also lower than that for

'non-permitted use'. According to the Schedule the tariff for business and commercial use is calculated at 2, 708 which is far less than the tariff applicable to 'non-permitted use'. On this summation and on his own evidence the applicant would be in arrears with the payment of his rates account.

IS THE RESPONDENT ENTITLED TO DISCONNECT THE APPLICANT'S WATER AND ELECTRICITY SUPPLY?

[23] The Local Government: Systems Act, 32 of 2000 (the Systems Act) is a legislative measure that seeks to support and strengthen the capacity of municipalities to manage their own affairs. Section 96 thereof provides for every municipality to have a credit control and debt collection policy. The municipalities are therefore mandated by section 96 (1) (a) to collect all money that is due and payable. In terms of section 97 (1) a credit control and debt collection policy must provide for amongst others: (a) credit control procedures and mechanisms; (b) debt collection procedures and mechanisms and (g) provision for termination of municipal services or restriction of the provision of municipal services when payments of ratepayers are in arrears. Section 98 provides that a municipal council must adopt by-laws to give effect to the municipality's credit control and debt collection policy. See **RADEMAN v MOQHAKA MUNICIPALITY AND OTHERS** 2012 (2) SA 387 (SCA) para [13].

[24] It is clear from the above mentioned that a municipality has the power to terminate or restrict the provision of municipal services when a resident is in arrears with the payments for services. In this instance, the applicant is not in arrears with the payment of the water and electricity account to the property. He is therefore of the view that the respondent should not have terminated the supply of water and electricity to the property. He also contends that the respondent cannot rely on the provisions of section 102 of the Systems Act which allows a municipality to consolidate the accounts of a ratepayer for

purposes of debt collection because the respondent did not consolidate the accounts to the property.

[25] To my mind, the argument by the respondent's counsel, that the respondent was not compelled by section 102 of the Systems Act to consolidate the respondent's accounts before it could terminate the supply of water and electricity to the property, is correct. The provisions of this section are not peremptory. As such the respondent did not have to rely on this section but he relied on section 5.2 of the City of Tshwane Metropolitan Municipality: Credit Control By-Laws (Credit Control By-Laws).

[26] The Systems Act empowers a municipality to adopt its own credit control and debt collection policy. The respondent has as a result adopted a credit control and debt collection policy which is implemented through the Credit Control By-Laws. Section 5.2 (a) (i) of the by-laws empowers the municipality to restrict and disconnect the supply of municipal services. The section provides that –

> "The Council may, restrict or discontinue the supply of water and electricity, or discontinue any other service to any premises whenever a user of any service fails to make full payment on the due date or fails to make acceptable arrangements for the payment of any amount for services, rates or taxes."

[26] On the basis of the by-laws the respondent is therefore entitled to terminate the services of water and electricity to the property if the applicant is in arrears with his payments in respect of any of his services. In this instance, as I have already made a finding, the applicant is in arrears with the payment of the rates account of the property.

[27] The issue of whether a municipality is entitled without a court order to terminate municipal services to residents who refuse or fail to pay their rates has been laid to rest by the Supreme Court of Appeal. In that judgment the court made a finding that there is no statutory instrument which requires a municipality to obtain a court order authorising the discontinuation of a municipal service. See **RADEMAN v MOQHAKA MUNICIPALITY AND OTHERS** 2012 (2) SA 387 (SCA) para [21].

[28] Consequently, clause 1.1 and 1.2 of the *interim* order should be discharged.

AN ORDER FOR CONTEMPT OF COURT

[29] When the dispute about the amount owed by the applicant to the respondent could not be resolved, the applicant's account was handed over to the respondent's attorneys for collection. Summons was issued in the magistrate's court, Pretoria for the amount of R76, 760.00. On 19 January 2011 pursuant to a notice of application in terms of rule 60 (3) of the Uniform Rules of Court, served and filed by the applicant, the respondent was ordered to provide the applicant with certain requested documents. The respondent failed to provide the requested documentation and on 12 May 2011 the action was dismissed. The order dismissing the action read as follows:

"AFTER HAVING READ THE DOCUMENTS FILED OF RECORD AND AFTER HEARING COUNSEL FOR APPLICANT, THE FOLLOWING ORDER IS MADE:

1. The action instituted by the Respondent/Plaintiff under case number 22210/2010 is dismissed;

2. The Respondent is ordered to pay the costs of suit on the scale as between attorney and client, which costs shall include the costs of Counsel as per the parameters of the Pretoria Bar, subject to the direction of the taxing master;

3. The Respondent is ordered to supplement its records to reflect the content of this order with immediate effect."

[30] It is the applicant's case that the respondent has failed to comply with paragraph 3 of the order. According to him, the parties understood the content of paragraph 3 of the order to mean that the amounts that were claimed by the respondent under case number 2221/2010 had to be deducted from the monthly statements and the respondent's record had to reflect the contents of the aforementioned order with immediate effect. Paragraph 1.3 of the *interim* order seeks to declare the respondent in contempt of the order granted under case number 2221/2010 in failing to furnish the applicant with corrected statements and continuously interrupting the water and electricity supply to the applicant's property.

[31] The respondent in resisting this allegation raises a number of defences but in particular contends that it has complied with the order.

[32] I beg to differ with the applicant in this regard. Besides the fact that the applicant does not in his papers set out a case for non-compliance with the order under case number 2221/2010, I am of the view that the respondent has complied with the order. The order does not require the respondent to furnish the applicant with corrected statements neither does it order the respondent to not continuously interrupt the water and electricity supply to the property. The court order is explicit in my view. Paragraph 1.3 of the order requires the respondent to '*supplement its records to reflect the content of this order with immediate effect*'. The respondent in its opposing affidavit states that it complied with the court order by making a note on their file and records that the action was dismissed. There are only two issues stated in the court order, namely, the dismissal of the action and the payment of costs. These are the issues which the court ordered to be reflected with immediate effect in the records of the respondent. This to me is sufficient compliance. How the

parties interpreted the order is of no consequence as what is to be given effect to is the court order itself and not what the parties understood the order to mean.

[33] In the premises, paragraphs 1.3 and 1.4 of the *interim* order fall to be discharged as well.

COSTS

[34] The court granted an order for costs on an attorney and client cost in the *interim* order and reserved costs occasioned on Friday 19 August 2011 to be decided by this court. Before me, the applicant still persisted for a punitive cost order on the basis that the respondent was in default. The respondent also argued for a punitive cost order against the applicant on the basis that the applicant did not act responsibly.

The respondent is the successful party in this instance and is entitled to its costs of suit which should include the costs of Friday 19 August 2011. I am of the view that there are no special circumstances entitling it to a punitive costs order. Normal party and party costs should be awarded.

[35] I therefore make the following order:

(a) The *rule nisi* is discharged with costs.

(b) the respondent is awarded the costs of suit including the costs occasioned on 19 August 2011.

E. M. KUBUSHI
JUDGE OF THE HIGH COURT

Appearances:

HEARD ON THE	: 22 APRIL 2013
DATE OF JUDGMENT	: 10 JULY 2013
APPLICANTS' COUNSEL	: ADV A. P. L. ELS
APPLICANTS' ATTORNEY	: HATZENBERG INCORPORATED
RESPONDENT'S COUNSEL	: ADV N. ERASMUS
RESPONDENT'S ATTORNEY	: MATABANE INCORPORATED