

11/12/2009

IN THE HIGH COURT NORTH GAUTENG, PRETORIA

REPUBLIC OF SOUTH AFRICA

☐ STATE WHICH EVER IS NOT APPLICABLE

☒ REPORTABLE: YES/NO

☐ OF INTEREST TO OTHER JUDGES: Y

☐ REVISED

DATE: Dec 2009

REASON: [Signature]

REPORTABLE

CASE NO: 14985/09

In the matter between:

JAN DIRK VREY N.O

First Applicant

LEONARA VREY N.O

Second Applicant

and

CITY OF TSHWANE METROPOLITAN
MUNICIPALITY

Respondent

JUDGMENT

Ismail AJ:

[1] The applicants approached this court on an urgent basis on the 19 February 2009. The respondent without conceding urgency or the merits gave an undertaking that the applicants electricity

would be reconnected. The parties agreed that they would allow each other an opportunity to file papers in order for the matter to be determined on the normal opposed roll.

[2] Mr and Mrs Vrey reside on a property at 275 Eben Roux Street, Rietondale, Pretoria [The property]. The property is registered into the name of the Dirk Vrey Family Trust. The first and second applicants are the trustees of the trust. The applicants occupy the property, however the trust entered into a contract with the respondent for the service of electricity and water supply in respect of the property.

[3] During 2007 problems arose in respect of the water account in respect of the property. The applicants aver in their founding affidavits that these problems manifested after a new water meter was inserted to register the water supply to the property.

[4] The Financial Services Department of the respondent sent a letter to the trust (annexure 22) dated 12 February 2008 demanding payment of the sum of R21 982,29 failing which the matter would be handed over to their attorneys without further notification.

[5] Between February 2008 and 23 October 2008 the first respondent's attorneys, Hartzenberg Inc, wrote diverse letters to the City Council of Tshwane wherein they requested a breakdown of the amounts due and also requesting that meetings be held with the applicants in order to resolve the dispute relating to the water account.

[6] Notwithstanding these letter having been sent the applicant stated that he also contacted one Nonelia an employee of the respondent questioning the meter reading in respect of the water usage for the period 25 July 2007 up to 8 August 2007 which reading indicated that 558 units of water used. He was given a reference number of connection with this query, the number being 500210515.

[7] The applicants seek a spoliation order against the respondent that the respondent be prevented from cutting the power supply to the property as a result of any alleged arrear water payments due to the respondent which may be due to it from time to time.

[8] Mr Strydom acting on behalf of the respondent when he addressed the court requested to know in whose name the application was brought as on the notice of motion the name of the applicant and his wife appeared *nomine officio* as trustees of the trust, whereas in his replying affidavit he stated that he was bringing the application in his personal capacity and that notice of amendment would be served on the respondent shortly thereafter. To date of the hearing no notice of amendment had been served. Adv van der Merwe acting on behalf of the applicants informed the court that he sought an amendment to the effect that the applicants should be Mr and Mrs Vrey in their personal capacities. Mr Strydom did not oppose the amendment and the amendment was accordingly granted.

[9] The merits were argued on that basis. Mr van der Merwe submitted that the respondent was not entitled to cut the electricity to the premises as the applicants created a dispute in terms of section 95 (f) and (g) of the Municipality Systems Act and that the Municipality had to have a mechanism in place in order for persons to question and query debits due and in addition thereto the respondent had to create an appeal procedure.

[10] Section 95 of the municipal Systems Act 32 of 2000 reads as follows:

“ Customer care and management.- In relation to the levying of rates and other taxes by a municipality and the charging of fees for municipal services, a municipality must, within the financial and administration capacity-

- (a) establish a sound customer management system that aims to create a positive and reciprocal relationship between persons liable for these payments and the municipality, and where applicable, a service provider;
- (b)
- (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;
- (g) provide accessible mechanisms for dealing with complaints from such persons, together with prompt replies and corrective action by the municipality;

It was submitted on behalf of the applicant that they created a dispute regarding the water account and that the respondent was obliged to create a forum where this dispute could be ventilated. Notwithstanding the applicants having reported this matter to the respondent through their attorney the issue was not addressed, instead the respondent set out to cut the

electricity supply to the premises. Mr van der Merwe submitted that this was clearly in violation of the provisions of section 95 (f) and (g).

[11] Mr Strydom on the other hand submitted that there was no agreement between the applicants and the respondent and for that reason there was no case against the respondent. He referred to the matter of *Pretoria Belastingbetalersvereniging v City of Tshwane Metropolitan Municipality* [unreported judgment of Bertelsmann J in the North Gauteng High Court under case number 48320/09] where the learned judge referred to the decision of *Shoshanguve Residents Joint Committee v Noordelike Pretoria Metropolitaanse Substrukture* case No 1034/2000 (T) (unreported) which was delivered on June 2000 by Van der Westhuizen, J (then a member of this court) in which he said that, “*if the real cause of action , (and in that case the electricity supply was the cause of action just as it is here), is a matter of contract there can be no class action. It is correct that the contract between the first respondent and members of the applicant is governed by several statutes, but so are virtually all contracts. The mere fact that contracts are governed by statutes does not elevate the issues between the parties to a constitutional issue.*”

Under the circumstances the applicant has no locus standi and while I am convinced that the matter ought to be struck off the roll because it is not urgent, I dismiss it with costs because the applicant does not have locus standi. “

[12] *In casu* Mr Strydom enquired at the beginning of the matter as to who was bringing the application. Whether it was the trust or the applicants in their own capacities. This aspect was clarified by Mr van der Merwe as stated above in para [5] of this judgment, namely that the application was brought by Mr Vrey in his personal capacity. What is also interesting to note is that attorney Hartzenberg wrote all the letters to the respondent on behalf of the trust. [see pages 23 ;27; 29; 31; 33; 35; and 37]. The communications from the respondent in turn were addressed to the trust. This was clearly so because the relationship which existed was between the trust and the respondent in so far as the supply of electricity and other services were concerned.

[13] The principle laid down in the *Pretoria Belastingbetalers - vereniging* matter supra being that no one may litigate on behalf of another, unless the matter is a constitutional case.

[14] The Constitutional Court in *Leon Joseph & Others v The City of Johannesburg & Others* [2009] ZACC 30 - was called upon to determine whether the applicants were entitled to procedural fairness in the form of a notice and were afforded opportunity to make representations to the City of Johannesburg before electricity supply would be terminated. The question was whether the disconnection of electricity was procedurally unfair in terms of section 3 (2)(b) of The Promotion of Administrative Justice Act, 3 of 2000 (PAJA). In that matter the applicants challenged the constitutionality of certain by-laws.

The present matter is distinguishable as no constitutional challenge was raised and in any event notice was given to the trust in the form of a letter of demand. The applicants were clearly aware of the dispute between the respondent and the trust regarding the water bill. The applicants pegged their claim in this matter on the mandament van spolie.

[15] Mr Strydom referred to the matter of *Telkom SA Ltd v Xsinet* 2003 (5) SA 309 as authority that a mandament van spolie is not available to a party where contractual rights are in issue. At paragraph [13] of the *Xsinet* matter Jones AJA stated:

“ [13].... Disconnection denied Xsinet access to the beneficial use of its equipment, which, so the argument goes was an act of spoliation. There is no suggestion that Telkom interfered in any way with Xsinet's physical possession of the equipment. There is no evidence that Xsinet was ever in possession of the mechanisms by which the equipment was connected to the internet. It is not as if Telkom had entered the premises and removed an item of Xsinet's equipment in order to effect disconnection. In these circumstances it is in my opinion both artificial and illogical to conclude on the facts before the Court that Xsinet's use of the telephone, lines, modems or electrical impulses gave it 'possession' of the connection of its corporeal property to Telkom's system”

[16] If the applicant had a right to the mandament van spolie as a tenant of the trust than all those persons living on the property, in the case of a farm the farm workers and on a residential property the domestic helper and gardener if they resided on the premises. These person would not be able to rely on spoliation if the water or electricity was cut, because the relationship between the council and the person who it agreed to supply these utilities is based on contract. The contract is binding inter parties and not to the world at large.

[17] In the *Leon Joseph* matter the tenants paid their electricity contribution to the landlord. The landlord failed to pay the bill to the respondent, who in turn terminated the electrical supply to the building. The constitutional court heard the matter as a class action and ruled that the council should have given notice to the applicant's prior to severing the electricity supply. In casu the applicants were aware that the respondent sent a letter of demand for the outstanding water bill as Mr Very was the trustee of the trust and he received the letter.

[18] Malan AJA in *Firststrand Ltd t/a Rand Merchant Bank v Scholtz* NO 2008 (2) SA 503 (SCA) at para [16] p 512 I stated:

"These rights, arising from contract, are not incidents of the possession or control of their properties but were mere contractual rights relating to the use of the pipelines. The parties could just as well have agreed that the appellants would convey water to the respondents by means of a fleet of water trucks. Neither the use of the pipeline nor use of the fleet of trucks would have been an incident of the possession or control of the properties of the respondents."

See also *Impala Water Users Asssocation v Lourens NO and Others* 2008 (2) SA 495 (SCA)

[19] The facts of this case do not fall within the parameters of cases such as *Naidoo v Moodley* 1982 (4) SA 82 (T); *Painter v Strauss* 1951 (3) SA 307 (O) *Froneman v Habmore Timbers and Hardware (Pty) Ltd* 1984 (3) SA 609 (W) referred to in the *Xsinet* matter.

[20] I am of the view that the applicants have not made out a case that they have locus standi nor that they are entitled to rely on a spoliation for the reasons referred to hereinbefore.

[21] The application is accordingly dismissed with costs.

A handwritten signature in dark ink, appearing to read 'Ismail AJ', is written over a horizontal line.

Ismail AJ

For the applicants: Adv L K vd Merwe instructed by Hartzenberg
Inc, Attorneys, Pretoria

For The respondent: Adv T Strydom instructed by Moduka More
Attorneys, Pretoria

Judgment delivered: 11 December 2009.
