REPUBLIC OF SOUTH AFRICA

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

CASE NO: 2012/8287

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

....
DATE SIGNATURE

In the matter between:

FEROX INVESTMENTS (PTY) LTD **APPLICANT**

and

CITY OF JOHANNESBURG **RESPONDENT**

J U D G M E N T

WRIGHT J

INTRODUCTION

1. The applicant company owned a piece of immovable property until 31 August 2010 when the applicant's ownership was transferred to a different party. The applicant requested clearance figures from the respondent City before transfer. On 8 July 2010 the City demanded the sum R1 089 090,44. This figure was said by the City to be valid for the period 1 August 2010 to 31

December 2010. The City's figure was an estimate, as the consumption of water to date of transfer was not known in advance. The applicant paid R1 004 421,86 to the City and the property was transferred to the buyer. This payment was made on 27 August 2010. Since transfer, the applicant has been trying to get the City to give the applicant an accounting and payment of the correct amount owing to the applicant. It is common cause that the applicant did not incur any liability to the City after 31 August 2010 for water and sewerage for the property in question. The dispute in this case concerns only water and sewerage charges up to 31 August 2010 for this property.

A SUMMARY

2. On 3 November 2010 the City produced a tax invoice reflecting a credit, owing by the City to the applicant of R1 637 210,31. On 9 June 2011 a representative of the City sent an email to the applicant saying that a refund of R1 627 038,16 was in progress. The discrepancy between R1 637 210,31 and R1 627 038,16 was not explained. On 27 July 2011 the City refunded to the applicant the sum of R444 277,90. The difference between the amount on the invoice of R1 637 210,31 and R444 277,90 is R1 192 932,41.

3. On 11 August 2011 and seemingly out of the blue the City raised a debit of R1 182 760,26. Despite an on-going effort by representatives of the applicant to get the City to explain this debit it took the City until 8 February 2013 to produce a document headed "*Adjustment Calculation*". It did so by way of an attachment to an answering affidavit in the present litigation. This cryptic document, which contains an indication that it was prepared on 21 July 2011 claims an amount of R613 268,67 for water for the period 2008/07/18 to 2010/08/31 and an amount of R424 240,33 for sewerage for the same period. Vat of R145 251,26 was added, giving a total of R1 182 760,26. The City has never produced the underlying documentation for this figure.

4. The difference between R1 192 932,41 and R1 182 760,26 is R10 172,15. I shall revert to this later.

5. In essence, the issue is whether the three meters on the property are all independent of each other, each measuring a different flow of water, (in which

case the City may charge for water flowing through all three meters) or whether one of the meters acts only as a check meter for the other two, in which case the City may not bill for the check meter.

THE LITIGATION UP TO THE START OF EVIDENCE IN THE PRESENT HEARING

6. The applicant began litigating by way of a provisional sentence summons in which it relied on the undertaking of 9 June 2011. That action was unsuccessful, apparently on the basis that the City's email of 9 June 2011 did not amount to an acknowledgement of debt. The applicant launched the present application by serving it on the City on 6 March 2012. In the notice of motion the applicant claims a statement of account supported by vouchers, a debatement of the account and payment of the amount due to the applicant and an invoice for the amount of R1 182 760,26.

7. On 24 May 2013 Jordaan AJ made an order in the form of that made in **Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd 1971 (2) SA 388 W**. In short, Jordaan AJ ordered a debatement of the account to be followed by payment by the City to the applicant of whatever was payable. It was also ordered that the deponents to affidavits appear at a hearing and that in the event of either party wanting to call as a witness a person who had not deposed to an affidavit such party would be obliged to furnish to the other side a summary of that person's evidence not less than ten days before the hearing. The Rules relating to discovery, expert notices and pre-trial conferences were made applicable to the contemplated hearing. The issues to be determined by oral evidence were not defined beyond an order that the account be debated. Jordaan AJ ordered the costs of 23 May 2013 to be in the cause. In my view Jordaan AJ clearly had in mind that a trial type hearing would be needed to determine the matter if the debatement did not resolve the question.

8. On 18 September 2013 Tsoka J postponed the matter sine die and reserved the question of costs.

9. When the matter came before me while sitting on civil trial duty Mr Beharie, for the City requested a postponement saying that he was not in a position to proceed with the matter. It soon became apparent that the City was in a state of disarray regarding the account in question. When I demurred on the postponement Mr Beharie requested 24 hours to enable him, his team and his client to gather their thoughts. Against the argument of Mr Georgiades, for the applicant who wanted to proceed with the matter straight away, I ordered that the matter stand until the next day. I ordered the parties to hold a meeting in court the next morning in my absence and to debate the matter in an attempt to get to grips with the problem. That meeting led to an inspection in loco. When the court reconvened, little if anything had been achieved. Mr Beharie moved again for a postponement citing an alleged need on the part of his client to wait for reports that had been commissioned by the City the day before. Mr Beharie indicated that his client would work tirelessly to come to a state of readiness. I refused the postponement. The City's lack of any indication of an attempt to get to the bottom of the matter over a period of about 4 years had caught up with it.

10. Neither Mr Georgiades nor Mr Beharie could give me any reason why I should not order that when the matter commenced the next morning neither party would be allowed to refer to any document not contained in the affidavits, the applicant's discovery affidavit or in a witness statement prepared by the applicant's utilities manager, Ms Van Der Merwe and handed to the City's attorney on 27 October 2014 at a pre-trial conference.

11. Given:

    11.1 the invoice for a credit,

    11.2 the City's indication to the applicant that the refund was in progress,

    11.3 that both events happening long after transfer of the property and

    11.4 the fact that the unsubstantiated debit of R1 182 760,26 seemed to come out of the blue nearly a year after clearance figures were provided by the City

    I would have thought that the onus may have been on the City to justify not paying the amount of R1 192 932,14 or any part of it and to begin leading

evidence. However, the parties had agreed at a pre-trial conference that the onus would be on the applicant and that it would begin.

12. Prior to commencing the hearing I debated the matter with both counsel in an attempt to get a better understanding of it. Mr Beharie, having taken an instruction from his attorney and a representative of the City, both of whom were sitting next to him, unequivocally admitted on behalf of the City that as at 3 November 2010 the City's invoice of that date, reflecting the credit owed by the City to the applicant was correct. Later Mr Beharie sought to withdraw the admission. I allowed the admission to be withdrawn as I accepted that it may have been made in error.

13. With the debatement having been fruitless, the applicant's real claim is for payment of R1 192 932,41 and interest on the sum of R1 637 210,31 at the rate of 15,5% per annum from 4 November 2010 (the date after the City's invoice of 3 November 2010) to 17 August 2011, being the date of the payment of R444 277,90 and interest at the rate of 15,5% per annum on the sum of R1 192 932,41 from 18 August 2011 to date of payment.

14. Mr Georgiades submitted that R1 182 760,26 was the amount of the applicant's claim. This sum is not claimed in the notice of motion although an invoice in that amount is claimed from the City. In my view this figure does not form either a claim or a basis for it. There is no allegation that this amount was paid by the applicant to the City. There is no suggestion that the City has been enriched at the expense of the applicant. The applicant's case concerning this figure is simply that it is an incorrect debit raised long after the property was transferred. Mr Georgiades did not abandon the amount of R10 172,15 being the difference between R1 192 932,41 and R1 182 760,26.

15. Mr Geordiades requested a ruling that the matter proceed as an application on paper without the need for oral evidence. He submitted that there was no real dispute. I declined to rule in the applicant's favour. In my view the matter was not quite as clear cut as suggested by Mr Geordiades. I ruled that the matter proceed as an application which had been referred to oral evidence and that the applicant bore the overall onus and the duty to begin.

THE PRESENT HEARING

16. Ms Van Der Merwe testified. The applicant lets commercial properties to tenants. She, as utilities manager is tasked, among other things with checking that all tenants are correctly billed for their share of water and sewerage. These billings are checked against accounts received by the applicant from the City. There are three meters on the property in question, one of which she used as a check for the other two. There are separate sub-meters for each tenant. She prepared, from her own workings and readings taken by a meter reading company used by the applicant, a table setting out the balance of R1 637 210,31 owing by the City to the applicant as at the end of October 2010. She checked the billings to sub-tenants, based on actual readings of the sub-meters for each tenant against her figure of R1 637 210,31. She stated unequivocally that in effect the City was double billing because it wrongly considered all three meters to be independent whereas the third meter acted as a check for the other two meters.

17. She confirmed that the City's invoice, dated 3 November 2010 is correct. It was the last account received from the City. Once she had confirmed with the City that transfer of the property had been made out of the name of the applicant she claimed a refund from the City. During the period May 2011 to July 2011 there was correspondence between Ms Van Der Merwe and the City concerning the refund. On 9 June 2011 the City promised a refund of R1 627 038,16. On 17 August 2011 a refund of R444 277,90 was made. Ms Van der Merwe received no explanation for why the refund was so small. It was only in February 2013, after the present litigation had commenced that she first saw the "*Adjustment Calculation*" dated 21 July 2011 as an attachment to an answering affidavit. Ms Van Der Merwe explained that if the check meter was to be read in addition to the other two meters that this would mean that the property was receiving an impossibly high volume of water.

18. She explained that the invoice of 3 November 2010 had been drawn up by the City based on its own actual readings rather than on estimates. She said that the manual posting of R1 182 760,26 was incorrect. The City's invoice is a statement or admission by the City that the amount on it was owing by the City to the applicant.

19. Ms Van Der Merwe struck me as an honest, thorough person who survived a skilful cross-examination by Mr Beharie using the little he had at his disposal.

20. After Ms Van Der Merwe's evidence Mr Geordiades closed his case. Mr Beharie then closed his without leading any evidence.

21. Ms Van Der Merwe's evidence is not contradicted. The City never explained why one of its own meters (said by it to be an independent meter rather than a check meter) escaped the attention of its own officials for a number of years. The City's debit of R1 182 760,26 remains unsubstantiated, undocumented and unexplained. In my view Ms Van Der Merwe's careful workings stand.

22. The applicant's claim arose prior to 1 August 2014 on which date the Minister of Justice and Correctional Services changed the prescribed rate of interest from 15,5% per annum to 9% per annum. See Government Gazette 37831 of 18 July 2014, Volume 589, Regulation Gazette No. 10235, GN 554. The old rate remains applicable to the debt notwithstanding the change. See **Davehill (Pty) Ltd v Community Development Board 1988(1) SA 290 AD** at 300H – 301C.

Order:

1. The respondent is ordered to pay to the applicant:
    a. the sum of R1 192 932,41.
    b. interest on the sum of R1 637 210,31 at the rate of 15,5% per annum from 4 November 2010 to 17 August 2011.
    c. interest on the sum of R1 192 932,41 at 15,5% per annum from 18 August 2011 to date of payment.
2. The respondent is to pay the applicant's costs, which are to include those of 24 May 2013 and 18 September 2013.

GC WRIGHT J
JUDGE OF THE HIGH COURT,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

On behalf of the Applicant:	Adv C Georgiades
	082 496 1763
Instructed by:	Vining Camerer Inc
	011 784 1970
On behalf of the Respondent:	Adv N Beharie
	083 963 3103
Instructed by:	Denga Inc
	011 492 0037
Dates of Hearing:	25, 26, 27 February and
	2 and 3 March 2015
Date of Judgment:	3 March 2015