**REPUBLIC OF SOUTH AFRICA**

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

**CASE NO: A5053/2016**

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

**10 MARCH 2017** **EHD VAN OOSTEN**

In the matter between

**CITY OF JOHANNESBURG** **APPELLANT**

and

**FEROX INVESTMENTS (PTY) LTD** **RESPONDENT**

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**J U D G M E N T**

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**VAN OOSTEN J:**

**Introduction**

[1] The issue in this appeal concerns the respondent's claim for a refund in regard to the appellant's alleged incorrect manual posting of a debit on its water and sanitation account, in respect of the premises known as 24 Central, Erf 7, Portion 20, Sandown (the property), which was heard as a sequel to the respondent's application seeking a statement and debatement of that account (the application). The application was, after filing of a full set of affidavits and supplementary affidavits, referred for the

hearing of oral evidence which came up for hearing before Wright J. The respondent (Ferox), who conducted business in the letting of properties owned by it, led the evidence of one witness in support of its claim for a refund. The appellant (the City) did not call any witnesses to testify. Wright J granted judgment in favour of the respondent, for payment of the sum of R1 192 932,41 together with *mora* interest and costs. The appeal is directed against the whole of the judgment and order of the court a quo and is with its leave.

**The background facts**

[2] It is common cause between the parties that the property was sold in 2010 and transferred to the purchaser on 31 August 2010. Prior to the transfer of the property the City issued rates clearance figures, the payment of which was required for the issuing of a clearance certificate, in terms of s 118 of the Local Government: Municipal Systems Act 32 of 2000. The respondent duly paid the sum of R1 004 421,86 and a clearance certificate was issued. It is common cause between the parties that a refund by the City was due to Ferox, both in regard to rates and taxes and water and sewerage payments. The refund in respect of rates and taxes was duly paid but disputes arose concerning the calculation of the refund in respect of water and sanitation, which became the subject matter of the application and the subsequent trial.

**Litigation background**

[3] The application was launched on 8 March 2012, in which a 'true and proper statement and debatement of the account, relating to water and sewerage for the period 8 July 2010 until 17 August 2011' and the delivery to the respondent, within one month, of an invoice reflecting 'the exact breakdown' of the City's 'manual posting of R1 182 768,26, made on 11 August 2011' (the manual posting) was sought. In addition an order was sought for the City to 'make whatever payment is due to the applicant upon debate of the account'.

[4] The application was heard by Tshabalala J, who granted an order for the rendering by the City of a 'true and proper' statement of the account, to deliver an invoice reflecting the exact breakdown of the manual posting and to debate the

account within one month of rendering the account. In purported compliance with the order, the City by notice furnished the respondent with a breakdown of the manual posting, a statement of accounts in respect of water and sewerage charges from 8 July 2010 to 9 June 2011, and a schedule of payments. The respondent was not satisfied that the City had properly complied with the order of Tshabalala J and filed a further affidavit setting out its complaints, inter alia the absence of an invoice regarding the manual posting. Attached to the further affidavit was a copy of the City's invoice to Ferox, dated 3 November 2010, reflecting a credit due to it in the sum of R1 637 210,31 and a spread sheet reconciliation of the account, prepared by Michelle van der Merwe, Ferox's utility manager, showing a refund due to Ferox, in the amount of R1 637 210,31. The application was enrolled for hearing on 4 December 2012, but was postponed to afford the City time to file an answering affidavit and the opportunity to properly comply with the order of Tshabalala J.

[5] In its answering affidavit the City disclosed further documents, including an Adjustment Calculation in respect of the manual posting and disputed the correctness of Van der Merwe's reconciliation. Ferox filed a replying affidavit thereto in which reference is made to three water consumption meters at the property, two of which were alleged to be 'combination municipal meters namely #8026 and #5575' and the third, 'a check meter #2397'. The existence of the three meters on the premises at the property and their numbering are common cause facts. What is in dispute is Van der Merwe's classification of the third meter #2397, as a 'check meter' and not a water consumption meter. In summary, the contention raised in the replying affidavit and repeated in the hearing before Wright J, was that the meter reading on check meter #2397 was 'a combination of the readings on meters #8026 plus #5575' with the result that Ferox was mistakenly double-charged for water consumption in regard to the check meter #2397. I will revert in more detail to the contention later in the judgment.

[6] The application was once again enrolled for hearing on 24 May 2013 and came before Jordaan AJ. The learned judge, by agreement between the parties and in terms of a draft order, referred the application for the hearing of oral evidence in regard to the debatement of the correctness of the accounts and other documents filed or by agreement to be filed, relating to the issue, and further ordered that

'[f]ollowing such debatement the Court will is (sic) requested to enter judgment in favour of the applicant of the amount, if any, which may be found to be due, owing and payable to it'.

[7] At the pre-trial conference the parties agreed to prepare 'a statement of issues' to be adjudicated upon by the court and that the respondent would 'begin and the onus of proof is as determined on the pleadings'. Nothing however, was discussed or agreed on as regards the statement and debatement of the account. The respondent filed its list of issues in which the following two issues were listed:

1. Whether the manual posting of R1 182 760,26, levied by the defendant on 11 August 2011, in respect of water consumption, is correct.

2. Did the back charge on the check meter #2397 on the premises constitute an overcharge in respect of water consumption?

[8] For the sake of completeness it is necessary to refer to the provisional sentence proceedings instituted in 2011, by Ferox, against the City, based on an alleged undertaking to pay a refund in the sum of R1 627 038,16, specified in the City's email addressed to Van der Merwe on behalf of Ferox, on 11 August 2011. The City indeed paid a refund in the sum of R444 277,19 while the provisional sentence proceedings were still pending. The payment was made by the City as the balance owing in respect of a refund, after having raised a debit charge on the account by way of the manual posting. The hearing of the provisional sentence proceedings came before Tsoka J, who, on 26 August 2011, refused provisional sentence with costs, on the basis that the email relied on by Ferox was ambiguous and did not constitute an acknowledgement of debt.

[9] Against this procedural background the trial, which is the subject matter of this appeal, proceeded before Wright J.

**The proceedings in the court a quo**

[10] At the commencement of the trial, counsel for the City asked for a postponement of the matter on the ground that the City was not ready to proceed with the trial. Wright J was disinclined to postpone the matter and ordered the parties to 'hold a meeting in court' and 'to debate the matter in an attempt to get to grips with the problem'. The matter stood down for that purpose and an inspection *in loco* was

held by the parties and their legal representatives. Nothing came of it and counsel for the City once again at the reconvening of the court, sought a postponement on the ground of, as the learned judge a quo put it, 'an alleged need on the part of his client to wait for reports that had been commissioned by the City the day before'. The learned judge refused a postponement on the ground of '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'.

[11] In accordance with the purported agreement concerning the onus at the pre-trial conference I have referred to, Ferox commenced by calling Ms van der Merwe to testify on its behalf. Ms Van der Merwe was tasked with overseeing and obtaining electricity and water meter readings of 'all different types of buildings on our portfolio'. Her duties comprised obtaining and recording meter readings of all tenants of the buildings, which were read by a meter reading company, which she referred to as JMS, now Motla, on their behalf, and to correlate those with the municipal meter readings of the City (the municipal readings). All the readings were then on a monthly basis, captured and allocated on a spread sheet, for the purpose of verifying the correctness of the municipal readings, which was necessary not only for billing the individual tenants but also for obtaining the approval required by the financial manager for payment of the municipal accounts.

[12] In regard to the property, Ms Van der Merwe testified that the building consisted of units occupied by sub-tenants, each separately metered by a sub-meter as were the common areas, such as the cooling towers. The meter reading company also recorded the readings of the three municipal water consumption meters on the property. The City's billing in respect of water consumption, she testified, until August 2010, was limited to readings obtained from 'combination' meters #8026 and #5575. In August 2009 she was informed that meter #5575 had stopped working and that meter #8026 was faulty. This gave rise to complications in the calculations which showed a discrepancy of some 50 000 litres of water. The meters were however repaired and the November 2009 billing was once again based on actual meter readings. In December 2009 the City relapsed into estimated meter readings, until actual meter readings were once again taken in October 2010, which were accounted for in the December 2010 billing. In regard to the estimated meter

readings in the period from December 2009 to October 2010, Ms Van der Merwe maintained that 'these readings were in line with check meter 2397'.

[13] In the City's October 2010 account adjustments in respect of past estimated meter readings were reflected, with resultant adjustments and a bottom line credit due to Ferox of R1 637 210,31.

[14] An email trail followed in which Ms Van der Merwe attempted to obtain payment of the admitted credit and except for promises of payment forthcoming, nothing happened. In an email to Ms Van der Merwe, dated 30 June 2011, the City informed her as follows:

> 'Meter investigation was done X 3. Found meter number [961] 2397 with reading 214356. Can you help to confirm?'

Ms van der Merwe responded that the third meter #2397 was a 'check meter' to the 'bulk meter' and further attached to the email the 'consumption that went through this meter' and subsequent thereto, at the City's request, furnished further details concerning meter readings. In response thereto the City paid to Ferox a refund in the sum of only R444 277-90 which upon enquiry by Ms Van der Merwe was explained having resulted from the debit arising from the manual posting on 11 August 2011, in the sum of R1 182 760,26.

[15] It is noted in the City's Adjustment Calculation that it was prepared on 21 July 2011 and it reflects meter #2397. The document further reflects water consumption charges in the total amount of R1 182 760,26, inclusive of VAT, for the period 18 July 2008 to the date of transfer of the property, 31 August 2010. Ms Van der Merwe relying on the calculations she had made, accordingly concluded that Ferox had been double-billed by the City's introduction and billing in respect of meter #2397, which she maintained was a check meter and not a separate water consumption meter as is reflected in the City's Adjustment Calculation.

[16] In the cross-examination of Ms Van der Merwe, issue was taken with her calculations of the various amounts arrived at in comparing the reading of the meters she utilised to substantiate the conclusion she had arrived at. In the view I take of the matter it is not necessary to delve any further into those aspects.

[17] I have already referred to the absence of any evidence on behalf of the City. Much was made of this in argument by counsel for Ferox, who submitted that the evidence of Ms Van der Merwe remained uncontested, for that reason it should be found by this court that the meter #2397 in fact was a check meter in respect of which Ferox had been double-billed.

**Discussion**

***Statement and debatement of account: competent?***

[18] The application for a statement and debatement of account, as well as the orders of Tshabalala J and Jordaan AJ granting the relief sought in the application were fundamentally flawed, if regard is had to the judgment of the Supreme Court of Appeal in *Absa Bank Bpk v Janse van Rensburg* 2002 (3) SA 701 (SCA) to which counsel were directed prior to the hearing of the appeal. In that case Brand JA, writing for the court, held that in order to succeed in a claim for delivery and debatement of an account, a party would have to prove either one of the following categories of relationships: firstly, the existence of a fiduciary relationship between the parties; secondly, a contractual obligation to do so; and, thirdly, the existence of a statutory duty obliging the other party to deliver and debate an account. In *Moila v City of Tshwane Metropolitan Municipality* (76403/2010) [2015] ZAGPPHC 1029 (18 December 2015), Ranchod J held that the relationship existing between a local authority and a consumer does not enable the consumer to demand a statement and debatement of account.

[19] Applied to the present matter, the relationship between the parties did not entitle Ferox to a statement and debatement of account. But, this was clearly overlooked as no objection to the procedure was raised by the City at any stage in the litigation. In addition two court orders were made in effect ordering a statement and debatement of account. Those orders stand, were not appealed against and must be obeyed. It follows that this mater falls to be adjudicated on the basis of a statement and debatement of account by the City. Inherent in the order of Jordaan AJ was 'Following such debatement the Court will is requested to enter judgment in favour of the applicant of the amount, if any, which may be found to be due, owing and payable to it'. I merely need to add that the order was granted by agreement

between the parties which, in itself, constitutes an agreement by the City to the statement and debatement of the account.

***Onus***

[20] The City was saddled with the onus of proving a proper accounting to Ferox. In *Euphorbia (Pty) Ltd t/a Gallagher Estates v City of Johannesburg* (A5052/2015) [2016] ZAGPPHC 548 (17 June 2016) para 17)[1] I, writing for the Full Court, held as follows:

> 'In the absence of special circumstances, considerations of policy, practice and fairness require that the City is saddled with the onus of proving the correctness of its meters, the measurements of water consumption and statements of account rendered pursuant thereto. It cannot reasonably be expected from the consumer, having raised a bona fide dispute concerning the services delivered by the City, to pierce the municipal veil in order to prove aspects that peculiarly fall within the knowledge of and are controlled by the City. In the present matter it was impossible for Euphorbia to perform its own test on the contentious meter as, firstly, only Termets was legally permitted to perform the tests and, as it happened, the meter was untimely disposed of by the City. The statements and other data concerning the water usage were in the possession and under control of the City. Euphorbia relied on justified inferences arising from a sudden spike in water consumption arising from its own comprehensive investigation, in order to verify the correctness thereof. It accordingly raised a bona fide dispute as to the City's billing in regard to the services, and the City bore the onus to prove the correctness thereof.'

(see also *Eskom v First National Bank of Southern Africa Limited* 1995 (2) SA 386 (SCA)).

[21] In regard to onus the court a quo erred in holding that the onus was on Ferox, based on the agreement recorded in the minutes of the pre-trial conference (cf *Janda v First National Bank* [2006] JOL 18258 (LC)). I have already referred to the pre-trial conference and the view then taken by Ferox that it was to begin with adducing evidence but, it is specifically recorded that the onus would be determined

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[1] On 26 September 2016 the Supreme Court of Appeal dismissed an application for special leave to appeal against the judgment on the grounds 'that the requirements for special leave appeal are not satisfied'.

by 'the pleadings', which is a clear misnomer for 'papers filed in the application'. In consequence of the two orders I have referred to, the City, in my view, bore the onus of proving, firstly, that 'a true and proper statement of account, together with substantiating documents, reflecting, firstly, payment made by Ferox, secondly, water reading dates, thirdly, water consumption and, fourthly, water and sewerage charges' and, moreover, that an invoice reflecting the exact breakdown of the manual posting (paragraphs 1 and 2 of the order of Tshabalala J) were rendered. In addition, a debatement of the correctness of the account by way of oral evidence was to follow in respect of which 'the court will is requested to enter judgment in favour of the applicant (Ferox) of the amount, if any, which may be found to be due, owing and payable to it' (paragraph 1, 2 and 3 of the order of Jordaan AJ). Put differently: the City was required to prove the Rands and cents of the total amount debited and the correctness thereof, for the period 18 July 2008 to August 2010, in respect of meter #2397.

**Discussion**

[22] Against this backdrop it is necessary to consider the contention advanced by counsel for the City that the issue to be decided on appeal is whether Ferox has discharged the onus to prove that meter #2397 was a check meter of water consumption meters #8026 and #5575. The contention, in view of what I have set out above, and, for the reasons I now turn to deal with, is misconceived in its premise and falls to be rejected. In my view counsel for Ferox correctly prior to the hearing, identified the issue as follows: 'whether the manual posting of R1 182 760-26, levied by the defendant on 11 August 2011, in respect of water consumption, is correct'. The manual posting, it will be remembered, followed upon the City's admission and undertaking to pay to Ferox the amount of R1 637 210,31. The City failed to comply with its undertaking made at the pre-trial conference, to file a statement identifying the issues to be determined by the trial court. It entered the fray well informed that the manual posting was directly placed in dispute in the relief sought by Ferox in the application. Long before that, and immediately after the manual posting had emerged, the City was fully apprised in the email correspondence I have alluded to, of Ferox's stance in regard to the third meter. The City in response obtained readings in respect of that very meter from Ms Van der

Merwe. Almost four years later the City, with astounding unpreparedness, unsuccessfully at the trial twice sought a postponement to get its house in order. As the learned judge a quo appositely remarked, the City's neglect and indifference to the matter for almost four years had caught up with it. Significantly, counsel for the City, although, as the learned judge a quo aptly observed, having little at his disposal in the cross-examination of Ms Van der Merwe, seemingly failed to inform the court a quo, in particular after the inspection in loco was held, of the issue now raised on appeal.

[23] It is true that the description ascribed to meter #2397, of a 'check meter', was introduced and indeed relied upon by Ferox. That, however, does not in any way disturb the incidence of onus of proof that throughout remained on the City. It goes no further than providing a possible explanation by Ferox for the City's unexpected manual posting of a debit in regard to meter #2397. Whether that explanation is correct or not, or, for that matter, whether Ferox has proved that meter #2397 was a check meter or not, constitute nothing but ancillary matters obfuscating the real issue, which is that the City, in regard to the manual posting, was required to prove, firstly, that the Adjustment Calculation, was a true and proper statement of account in respect of the water consumption relating to readings obtained from meter #2397, and secondly, the water reading dates of that meter, and thirdly, the water consumption.

[24] On the facts before the court a quo, no evidence existed in regard to the requirements I have referred to. To the contrary, the only evidence, in the long and arduous line of litigation concerning the Adjustment Calculation, consists of Ms Van der Merwe's reference to the email trail I have already alluded to. On her evidence, which the court a quo correctly found was truthful, the Adjustment Calculation document, which notably was *prepared* on 21 July 2011, many years after the commencement date referred to therein, emerged much as a knee-jerk reaction to the City having discovered a third water meter on the premises. Nothing was put before the court a quo either by way of evidence or otherwise, to show whether any meter readings were taken during that period. Ferox was merely presented with the Adjustment Calculation, in respect of which there is a glaring absence of evidence. The notion of Ferox being held liable on this basis finally flounders at the

consideration that this was the only document ever produced by the City in regard to meter readings and resultant calculations since 18 July 2008 in respect of meter #2397.

[25] For all these reasons the court a quo correctly granted judgment in favour of Ferox and it follows that the appeal must fail.

**The condonation applications**

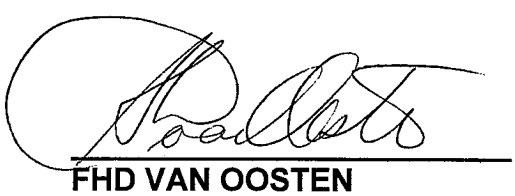
[26] Finally, I turn to deal with four applications before this court. These consist of two applications by the City seeking condonation for the late filing of its notice of appeal and the late filing of an application to the Registrar for a date for the hearing of the appeal. Both these applications are opposed and voluminous papers were filed. The two further applications are by Ferox, one for a declarator that the appeal has lapsed (which is opposed) and the other, for leave to file a supplementary affidavit in the City's condonation applications.

[27] In view of the conclusion arrived at concerning the merits of the appeal, I do not consider it necessary to deal with any of the applications, save to hold that it would be just and equitable for the City to pay the costs of opposition to its condonation applications.

**Order**

[28] In the result the following order is made:

1. The appeal is dismissed.
2. The appellant is ordered to pay the costs of the appeal including the respondent's costs of opposing the appellant's applications for condonation.



**FHD VAN OOSTEN**
**JUDGE OF THE HIGH COURT**

I agree.

**WL WEPENER**
**JUDGE OF THE HIGH COURT**

I agree.

**LR ADAMS**
**JUDGE OF THE HIGH COURT**

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| ***DATE OF HEARING*** | ***24 FEBRUARY 2017*** |
| ***DATE OF JUDGMENT*** | ***10 MARCH 2017*** |