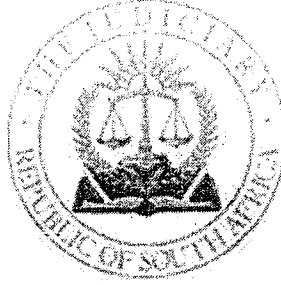


REPUBLIC OF SOUTH AFRICA



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

CASE NO: 16396/2019

(1)	<u>REPORTABLE: NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: NO</u>
(3)	
4 July 2019
DATE	SIGNATURE

In the matter between:

DUNROSE INVESTMENTS 224 (PTY) LTD

Applicant

and

**THE CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY**

First Respondent

JUDGMENT

MIA, AJ

- [1] The applicant is the owner of a commercial property with a number of tenants making use of public space. The respondent is a municipality which supplies the applicant with services including water, refuse removal and collects rates on the immovable property. The applicant at the time of the application owed the respondent an amount of R9 477 787.30 which included interest on arrear rates and water charges. The respondent terminated the water supply to the applicant

after serving a pre-termination notice. The applicant contends it was spoliated and brought an application on an urgent basis for the following relief:

- “1. That the Honourable Court dispense with the rules relating to Notice and Service and hear this matter as one of Urgency in terms of Rule 6(12) of the Rules of this Honourable Court;
2. The Respondent is ordered to do all things necessary to restore the supply of water to the applicant’s premises situated at Oriental City Rivonia Shopping Centre;
3. The Respondent is interdicted from discontinuing the services (including but not limited to water and electricity) rendered to the Applicant by the Respondent, pending the outcome of:
 - 3.1 The conclusion of the Respondent’s review procedure in respect of the municipal valuation property in terms of Section 52 of the Municipal Property Rates Act 6 of 2004;
 - 3.2 The investigations being conducted by Motla Utilities (Pty) Ltd in respect of the water meter readings on the Property situated at Erf 224 Edenburg Township (the shopping centre) which are to be finalised by no later than 31 July 2019; alternatively
 - 3.3 Pending a review of the Respondent’s municipal valuation of the property which application is to be instituted within 1(ONE) month of the outcome of the Respondent’s internal review procedure as set out in Section 52 of the Municipal Property Rates Act 6 of 2004.
4. Costs of the application on the attorney client scale.

- [2] The applicant’s amended notice of motion was filed on 24 June 2019 and served on the respondent by way of email. The essence of the relief was to seek the reconnection of the water which the applicant contends the respondent disconnected unlawfully. In addition to the spoliatory relief the applicant persisted with the relief sought in the main application filed earlier this year in the form of an interdict

preventing the disconnection of services and contends that the spoliatory relief is inextricably linked to the relief sought in the main application.

- [3] The basis for the relief sought in the main application and raised again in the amended notice is that the applicant lodged an objection to the valuation of the property in 2013 in terms of section 52 of the Municipal Property Rates Act 6 of 2004, which is pending before the Review Board. The review has not been finalised. The applicant still pays rates based on the 2013 valuation. The applicant places in dispute that the rates it is charged in terms of the 2013 valuation. In 2018 the Municipality valued the same property at a lower value which corresponded with the value which the applicant had valued the property.

- [4] The applicant contends further it has been overcharged for water and rates since 2013 due to an over valuation of the property for the period 2013 to 2019. It contends the rates charges and water charges are inordinately high and contend it has been charged approximately R100 000 more per month in rates than it should be paying.

- [5] In respect of the water charge the applicant avers that the amounts charged are inordinately high and also disputed the water charge and appointed an independent company to conduct meter readings namely Motla Utilities (Pty) Ltd. Whilst the applicant contends there is an inordinately high charge for water it is unable to dispute this charge at this point as it has no readings to counter the municipalities readings. The investigation conducted by Motla Utilities has not been completed and the applicants have not established that the municipal readings are incorrect or erroneous for the relevant periods charged.

- [6] In making out a case that the respondent has acted unlawfully in disconnecting the water supply the applicant refers to the Municipal Systems Act 32 of 2000 which provides in section 95:

"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 its financial and administrative 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) establish mechanisms for users of services and ratepayers to give feedback to the municipality or other service provider regarding the quality of the services and the performance of the service provider;
- (c) take reasonable steps to ensure that users of services are informed of the costs involved in service provision, the reasons for the payment of service fees, and the manner in which monies raised from the service are utilised;
- (d) where the consumption of services has to be measured, take reasonable steps to ensure that the consumption by individual users of services is measured through accurate and verifiable metering systems;
- (e) ensure that persons liable for payments, receive regular and accurate accounts that indicate the basis for calculating the amounts due;
- (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;

- (h) provide mechanisms to monitor the response time and efficiency in complying with paragraph (g); and
- (i) provide accessible pay points and other mechanisms for settling accounts or for making pre-payments for services.”

[7] The applicant contends that it did not receive accurate accounts and disputed the amounts due on the accounts it received. It did not however state that it did not receive regular accounts. The applicant received a pre- termination notice on 5 October 2018 indicating an indebtedness of R7 341 665.03. The notice required the amount to be paid within 14 days of 3 October 2018, failing which services would be discontinued or restricted. The applicant requested clarity on discrepancies in the account and relied on the “inaccurate” valuation for 2013. As the payment was due by 9 October 2018 and the applicant could not pay the amount it approached the court for an interdict to prevent respondent from discontinuing services. This led to negotiations between the parties.

[8] The parties engaged in negotiations and attempted a statement and debatement of the account provided the applicant removed the matter from the roll. This meeting took place six months later in April 2019. The meeting did not resolve the issue of the arrears, the disputed valuation or realise a payment plan to meet the expectation of either of the parties. The applicant received a revised account with the updated charges which had increased the outstanding amount to R9 477 787.30. The applicant contends the amount is substantially inflated and includes inordinate water charges which are under investigation by Motla Utilities. The applicant contends further that the respondent proposed that Motla Utilities be appointed as an independent entity to carry out the water meter readings. Motla Utilities has been conducting water meter readings since 15 April 2019 and

would have completed the investigation in July 2019 had the water not been cut and the water meters not been removed. This process cannot be completed with the respondent having cut the water supply and removed the water meters.

[9] The applicant received a further pre- termination notice dated 30 April 2019 indicating that the respondent intended discontinuing services which included the supply of water to the shopping centre. The 14 day notice expired on 14 May 2019. The applicant requested the respondent not to discontinue services as the 2013 review was not complete in terms of section 52 of the Municipal Property Rates Act 6 of 2004 and there was an independent investigation regarding the water meter readings by Motla Utilities. Mr Edwards, appearing for the applicant, argued that the disconnection of water was inconsistent with the Constitutional Court finding in *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC).

[10] Mr Edwards, argued that the respondent was not able to indicate the basis for the amount which was due and they were thus in violation of Section 95(e) of the Municipal Systems Act 32 of 2000. He argued further that the applicant's right to water is entrenched in the Constitution and there was a duty to provide access to water services as set out in section 11 of the Water Services Act 108 of 1997. In particular he referred to section 11(4) of the Water Services Act 108 of 1997 which provided that a water service authority could not unreasonably refuse or fail to give access to water services to a consumer or potential consumer in its area of jurisdiction. He argued that the applicant's right to water is not a purely personal and contractual right but rather one which can be construed as an incident of possession of the property bestowed upon the applicant by statute. He submitted that the water supply be recognised as an incorporeal right, the possession of which is capable of protection under the

mandement van spolie as set out in *Impala Water Users Association v Lourens NO & Others* 2008 (2) SA 495 (SCA).

- [11] The respondent resisted the application on the basis that it was not urgent further that no act of spoliation occurred. Mr Nyangiwe, appearing for the respondent, argued that the applicant's water connection had been previously terminated in 2017. The applicant had reconnected the water supply illegally and tampered with the water supply. This illegal connection and tampering with the water supply permitted the respondent to remove the water meter which was classified as a level three disconnection.
- [12] As regards the urgent interdictory relief he argued that it was common cause that the applicant challenged the municipal value attached to the property. The review which followed upon the objection did not defer the payment of current rates which accounted for the current account. The respondent was addressing the review of the valuations. The applicant was ill-advised in raising a dispute over indebtedness regarding rates as it could not defer such payment. This would defeat the Municipal Property Rates Act 6 of 2004. The applicant accepted the indebtedness and was unable to make payment of the whole or a large portion of the debt. To the extent it averred it was inflated it was required to pay the rates and be reimbursed later in terms of the legislation.
- [13] The applicant received a pre-termination notice regarding the water supply on or about 30 April 2019 in compliance with the procedural rights required in *Joseph*. The matter was removed from the roll and applicant was afforded an opportunity to make representations. The negotiations were not successful. The applicant did not accept the terms proposed by the respondent that it pay R2 000 000.00 and settle the balance in twelve monthly instalments. He argued further that section 97(1) (g) of the Municipal Systems Act 32 of 2000 provides for

the termination of municipal services when payments of ratepayers are in arrears.

[14] He referred to *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) where the Court held:

“Local government is as important a tier of public administration as any. It has to continue functioning for the common good; it however cannot do so efficiently and effectively if every person who has a grievance about the conduct of a public official or a governmental structure were to take the law into his or her own hands or resort to self-help by withholding payment for services rendered. That conduct carries with it the potential for chaos and anarchy and can therefore not be appropriate”

[15] In view of the above submission he argued therefore that the disconnection of the water supply and the removal of the water meter was lawful and the application stood to be dismissed with costs.

[16] In determining the issue whether the disconnection of the water supply and removal of the water meter was unlawful, I have had regard to the Municipal Property Rates Act 6 of 2004 and the Municipal Systems Act 32 of 2000. The Municipal Property Rates Act 6 of 2004 is special in character and prevails over the Municipal Systems Act 32 of 2000. Section 50(6) of the Municipal Property Rates Act 6 of 2004 provides that the lodging of an objection does not defer liability for payment of rates beyond the date determined for payment. The applicant is thus required to pay the rates raised until the objection is resolved.

[17] The applicant has a right to water which attaches to its occupation of the immovable property. The Water Act provides in section 4(3) as follows:

“...3) Procedures for the limitation or discontinuation of water services must—

(a) be fair and equitable;

- (b) provide for reasonable notice of intention to limit or discontinue water services and for an opportunity to make representations, unless—
 - (i) other consumers would be prejudiced;
 - (ii) there is an emergency situation; or
 - (iii) the consumer has interfered with a limited or discontinued service; “

[18] In an unreported decision from this division *Claudia Niehaus v High Meadow Grove Body Corporate* Case no: 40667/2018 Van der Linde J, held in favour of the applicant and granted the relief sought. His Lordship referred to a number of cases then stated at para [20]

[20] Accordingly, **where the incorporeal right, such as a right to the supply of electricity, is – as a matter of fact – an incident of the possession of immovable property, then the *mandament van spolie* will protect interference with such possession**, as if it were (partial) interference with possession of the immovable property itself. See *Impala Water Users Association v Lourens NO and Others*, [2204] 2 All SA 476 (SCA).”(My emphasis)

[19] In light of the *Impala decision* the applicant has a right to water capable of protection by way of a spoliation order. What remains to be determined is whether the respondent’s termination of the supply is to be regarded as lawful so that no spoliation can be held to have taken place. In this regard the question is answered by having regard to debt collection responsibilities of the municipality having regard to the legislation referred to. I have already addressed the issue of the outstanding rates which must be paid and cannot be deferred.

[20] Section 4(3) of the Water Act provides for termination of water supply on reasonable notice and allows for representations. There has been

two occasions when pre- terminations notices had been given and time afforded for representations. There had been interference with the water meter which has resulted in the level three disconnection. The applicant's non-payment triggered the respondent's power to terminate service in terms of the legislation and by laws.

- [21] The municipality's power to discontinue services in the context of non-payment was affirmed in *Mkontwana v Nelson Mandela Metropolitan Municipality, Bisset & Others v Buffalo Municipality & Others; Transfer Rights Action Campaign & Others v MEC, Local Government and Housing, Gauteng & Others (Kwazulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) at para 52 where the Court remarked:

“ It is emphasised that municipalities are obliged to provide water and electricity and that it is therefore important for unpaid municipal debt to be reduced by all legitimate means. It bears repeating that the purpose is laudable, has the potential to encourage regular payments of consumption charges, contributes to the effective discharge by municipalities of their obligations and encourages owners of property to fulfil their civic responsibility.”

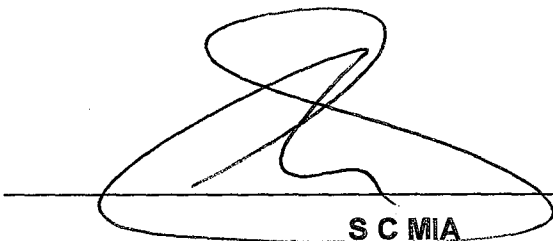
- [22] The applicant did not contend it did not receive regular accounts. It attached its accounts to the main applications to which the court was referred to. The full statement was not attached and a complete explanation was not forthcoming. Mr Edwards was not able to submit satisfactorily the different statements were attached and the affidavits are silent regarding the differences in the statements attached. The amounts do not appear to be conflated as submitted by counsel or as the applicant contends as the statement clearly indicates the amounts brought forward and the amounts charged each month. The reverse side of the statement reflects the breakdown in terms of the rates

portion, the water consumption and the refuse and waste collection portion. Mr Edwards submitted that the applicant undertook to pay the current usage, however the history of payments were erratic and the negotiations appear to have broken down. There is no reason why the applicant should not pay promptly the service fees, surcharge fees, rates and other taxes imposed by the municipality as required by section 97(1)(c) of the Municipal Systems Act 32 of 2000, the legislation to which it holds the municipality accountable.

- [23] The respondent has provided statements indicating the amounts for rates which are to be paid until the review is finalised. The applicant has not demonstrated that the charges raised by the respondent are incorrect. The respondent contends its water charges are correct and denies it required an independent meter reader. The applicant is not able and has not been able to address the arrears for some time. The respondent has shown that it was not acting unlawfully in applying the applicable legislation by issuing a pre-termination notice and negotiating with the applicant. The legislation provides for termination of a connection where there has been a tampering with the water supply connection and non payment for services.

ORDER

- [24] For the reasons above the application is dismissed with costs



S C MIA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

On behalf of the applicant	:	Adv B Edwards
Instructed by	:	BDK Attorneys
On behalf of the respondent	:	Adv L Nyangiwe
Instructed by	:	Kunene Ramapala Incorporated
Dates of hearing	:	27 June 2019
Date of judgment	:	4 July 2019