




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

Case Number: 27423/2018

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
01/09/2021	
DATE	SIGNATURE

In the matter between:

ESTA (PTY) LIMITED

Applicant

and

**THE CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY**

First Respondent

CITY POWER (PTY) LTD

Second Respondent

JOHANNESBURG WATER (PTY) LTD

Third Respondent

JUDGMENT

YACOOB, J:

INTRODUCTION

1. The applicant ("Esta"), initially approached this court on an urgent basis for:

- 1.1. the reconnection of water to its property at 107 Nugget Street (“the premises”);
 - 1.2. the repair of the hazardous electricity connection at the premises;
 - 1.3. a declaration that debt for consumption charges at the premises which predated 30 June 2015 had prescribed;
 - 1.4. an order that the three respondents rectify Esta’s municipal accounts to reflect actual meter readings and municipal tariffs, for the period after 30 June 2015, and
 - 1.5. that debatement take place 60 days after rectified accounts had been provided.
2. At the first hearing of the matter, counsel for Esta indicated that the relief sought in prayers 1 and 2 of the notice of motion (for reconnection of water and repair of the hazardous connection) was no longer necessary. He also indicated that prayer 5, for debatement, had been included in an attempt to avoid further litigation but that it would not be pursued if the court accepted the respondents’ submission that an order for debatement is not possible.
3. Esta also sought to amend its notice of motion, to include an alternative prayer that the charges in dispute be ringfenced to allow the respondents to issue

summons on the disputed debt.

4. For convenience I shall refer to the three respondents collectively as “the City” unless it is necessary to differentiate among them. They have made common cause in opposing this application.
5. At the first hearing of the matter counsel for the City contended that much has been done to correct the problems raised by Esta. In addition it was contended that Esta’s case was now based on its replying affidavit instead of its founding affidavit. This was due to Esta having set out new developments in the case, including new information obtained from the City. In the City’s answering affidavit, the contention was made that the City had been forced to answer before it had completed its investigations and that it was still in the process of investigating the issues raised.
6. Taking into account the City’s contentions, that litigation is a fluid process particularly when it deals with ongoing events, and that the developments were due to the City only responding substantively to Esta’s complaints after the application was brought, the matter was postponed *sine die* and the City directed to file a supplementary answering affidavit, which was to include what further investigations it had undertaken since the answering affidavit was filed, what the result was of those investigations, and an explanation of the information contained in the invoices Esta had attached to its replying affidavit, which the City had provided to Esta about eight months after it had filed its

answering affidavit. Esta was permitted to file a supplementary replying affidavit, and did so.

7. Before I deal with the later developments in the matter, I set out the facts leading up to this application.

FACTUAL BACKGROUND

8. Esta has since 1966 owned business premises at 107 Nugget Street, Johannesburg, and has an account with the first respondent (“the City”) for payment of services provided to the premises, including water, sanitation and electricity.
9. In 2008 Esta notified the City that its account contained incorrect information, including readings on faulty electricity meters, readings on non-existent meters, and readings based on estimations. The City did not respond, and Esta again addressed correspondence to the City in July 2009 dealing with the same complaints. There was still no response from the City.
10. In September 2014, according to the Esta, the faulty meters at the property were removed and a new electricity meter, number 63018985, was installed, with a zero reading. The City nonetheless continued to charge Esta based on estimated readings for meters which had been replaced.

11. In December 2014, the City's attorneys addressed correspondence to Esta regarding its alleged outstanding debt. Correspondence was exchanged between Esta and the attorneys during 2015 regarding the debt and the deficiencies. Throughout this period, the City continued to bill incorrectly. In May 2016, the City began charging Esta in accordance with readings on the new meter, but still failed to remedy the charges that had been levied on the old meters. The City's attorneys acknowledged in June 2016 that only now were correct readings being recorded for both water and electricity for the property.
12. In February 2018 the water was disconnected from the property, and this prompted the urgent approach to court, for the relief set out earlier, although the relief sought has now evolved. The application was instituted in July 2018.
13. In its answering affidavit (filed in December 2018) the City acknowledges that there were errors in the accounts and sets out what the City has done to correct the errors, as well as deal with the other complaints the application seeks to have remedied. It also acknowledges that it only took steps to correct the errors after the application had been served. It complains that despite asking for more time to complete investigations, it was forced to file the affidavit. It asserts that the electricity account is still being investigated.
14. According to the City there was a three phase electricity meter in place at the property during 2014 (numbers 505480, 505953 and A707827045). The

meters were replaced in 2015 with a new meter, 63029924. The closing readings of the old meters and the opening reading on the new meter was not available. The deponent undertook to make that information available to the court by way of supplementary affidavit as soon as it was obtained. The 2015 meter was replaced in 2018 with meter number 6301895. I note that this is unlikely, considering that Esta already was referring to meter number 6301895 in correspondence dating from at least 2015.

15. The City acknowledged that there had been “overlap” among the meters which resulted in double charges.
16. In August 2019 the City provided Esta with “recalculations”, which Esta annexed to its replying affidavit. The City did not provide the information in a supplementary affidavit as it had undertaken to do. Instead it objected to Esta adjusting the relief it sought in accordance with the new information provided to it extracurially by the City and which Esta had to then place before the court.
17. The invoices containing these recalculations begin with a balance brought forward on 17 March 2010 of R231 514.23, for electricity. There is no explanation or calculation supporting this amount. As will be seen below, this amount is now the main issue of contention between the parties.
18. The calculations also show that the City allocated Esta’s payments to disputed arrears amounts despite an alleged agreement between Esta and the City that

this would not be done. Esta relies on letters it sent to the City's erstwhile attorney after it met with them as proof of this agreement.

19. In addition, the new statements show that faulty or non-existent meter numbers were used, with only estimated charges, even after the new meter was installed. The first recorded reading of the new meter was in May 2016.

THE SUPPLEMENTARY AFFIDAVITS AND THE SECOND HEARING

20. Oddly, despite the City's allegations in its answering affidavit regarding ongoing investigations, it emerged that the City had not in fact conducted or continued any investigations after the date of the first answering affidavit, apart from recalculating amounts as set out in the invoices annexed to Esta's replying affidavit. No explanation was given why those recalculations could not have been done in time to be included in the first answering affidavit.
21. As I have already mentioned, recalculation relied on readings from various meter numbers, which are not accepted by Esta. It also relied on an amount carried forward in March 2010 when the system was changed, of which no account or calculation is given. Taking into account that Esta's complaints date from at least 2008, the City's failure to account is more than a little problematic.
22. According to the deponent of the supplementary affidavit the City only has the information captured on its SAP system and everyone is obliged to accept the

correctness of that data. Evidence must be produced that the data is incorrect before it can be changed. However there was no explanation why the City for at least eight years simply ignored Esta's complaints that the information was being captured incorrectly. This is directly at odds with the City's obligation to keep proper records and bill correctly.

23. The City migrated to the SAP system on 17 March 2010. Although the deponent does not say so, this is presumably the reason for the unexplained balance brought forward. Whether the City still possesses the raw data from which that balance was gleaned is unclear.
24. The City, oddly, insists that the new meter was only installed on 11 September 2015, despite Esta referring to the number of the new meter already in May 2015. It seems to me that this insistence is unreasonable and shows an unwillingness to accept responsibility for errors and failure to account. The City relies on meter reading schedules which it attaches to the supplementary replying affidavit for its insistence.
25. By the time of the second hearing, the relief sought by Esta had once again evolved, as a result of the information contained in the City's supplementary affidavit.
26. Esta proposed that, despite the fact that the City's calculations were obviously unsubstantiated, according to Esta's analysis in its supplementary replying

affidavit, it be ordered to pay the full amount owing as from March 2010, excluding interest, and that the amount before March 2010 be written off, with interest, on the basis either that it had prescribed or that the City in any event could not substantiate those charges.

27. The City still, at the hearing, persisted with arguments based on Esta having continually “moved the goalposts”. But that movement has been occasioned solely by the City having only dealt with Esta’s complaints after Esta brought this application. Esta cannot be faulted for having trimmed the relief sought in these circumstances. It would not have been competent to continue to seek the same relief in the circumstances.
28. The City is responsible for the moving of the goalposts, as it did not produce the required information timeously, or comply with its duties of service delivery, adequate record keeping and transparency in a way that would have allowed Esta to seek at the outset the more reasonable relief it seeks now.
29. To the extent that there is a dispute of fact, it is about something that ought to have been within the City’s knowledge, and which the City ought to have produced, and is unable to. Esta could not have foreseen that. The City cannot rely on its own errors to support a contention that Esta is blameworthy.
30. The City suggests that it cannot be faulted for allocating Esta’s payments to older debt. This is disingenuous in circumstances where the older debt is

disputed. It means that Esta can never be free of the debt because the City considers the old debt to have been paid and it cannot therefore prescribe or otherwise be dealt with. There is no incentive for the City to deal with the dispute because it has a hold over Esta if Esta wants to continue to receive the services which it is paying for, and which it cannot procure from anybody else.

31. The City's rights in terms of the by-laws are intended to be applied fairly and in circumstances where the City is doing its job. They are not intended to be used as a tool in bullying people who have no choice. Esta's undertaking to continue to pay for consumption in terms of the new meter and performance of that undertaking cannot in good faith be used to undermine Esta's rights to dispute something it has been disputing for over a decade. By applying the payments to the disputed debt, the City then has no need to substantiate the amounts Esta disputes, since from the City's point of view these have now been paid. This is patently unfair.
32. For these reasons I am satisfied that the City in the circumstances of this case was incorrect to allocate Esta's payment to the disputed debt. Had the City responded to Esta's complaints when they were raised in 2008 this whole debacle would have been avoided. It did not do so and it is not appropriate that Esta bear the burden of the City's failure. The City must substantiate its claim for the amount brought forward on 17 March 2010 if it still wants to claim

it.

33. The City submits that an order cannot be made that the amount has prescribed, because part of that amount is in the nature of tax, and that does not prescribe. I agree. Esta bears the burden of proving which part of the debt may have prescribed and it has not done so.
34. For these reasons, I consider it appropriate that the debt dating from before 17 March 2010 be “ringfenced” and none of Esta’s payments be allocated towards that debt. The City may bring action proceedings to claim that debt if it so wishes. However, the City may not use that debt against Esta in any way, until and unless it has been determined by a court that that debt is in fact owing.
35. In these circumstances, it is appropriate that the City recalculate Esta’s debt to exclude the amount brought forward from 17 March 2010, but otherwise on the same basis as in the invoices dated 12 August 2019.

COSTS

36. I can see no reason why costs should not follow the result. Esta has been substantially successful and has been forced to come to court in order to get the City to pay attention to its complaints.

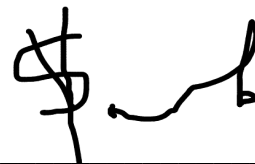
37. For these reasons I make the following order:

37.1. The City is directed to recalculate Esta's debt on the account 206176537 on the same basis as that set out in the invoices dated 12 August 2019, but omitting the balance brought forward on 17 March 2010.

37.2. Esta shall pay the recalculated amount within 30 days of the recalculation being provided to it.

37.3. The City is directed not to treat the balance brought forward on 17 March 2010 as outstanding arrears owing by Esta until and unless the amount has been claimed in a Court and that Court has determined the claim.

37.4. The respondents are to pay the costs of this application, jointly and severally.



S. YACOOB
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

Counsel for the applicant:	Mr AJ du Plooy
Instructed by:	Mervyn Smith Attorneys
Counsel for the first respondent:	Mr SD Maritz
Instructed by:	Mohamed Randera & Associates
Date of hearing:	23/06/2020 and 23/11/2020
Date of judgment:	01/09/2021