IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 9793/13

In the matter between:

27/3/2014

AM VAN ROOYEN Applicant

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

and

26/03/14
DATE

SIGNATURE

CITY OF TSHWANE METROPOLITAN MUNICIPALITY Respondent

JUDGMENT

Tuchten J:

1 The applicant lives in Erasmusrand, Pretoria. He receives services, including a water supply, from the respondent ("the City"). He has always paid what he has been charged for the services supplied to him. But in September and again in October 2010, he received accounts for water way in excess of anything he had previously had to pay.

2 While the applicant's monthly average account for water services since he started receiving services in 2010 was some R900 per month, the accounts for water for September and October 2010 were R7 004,57 and R4 920,47 respectively. When the applicant got the September account, he thought there must be something wrong. He went to the City's offices and filled in and signed a form. This form was an application by the applicant for his water meter to be tested. The form reflects that the applicant agreed to pay for the test.

3 The request that the meter be tested was made against the background of by-law 24 of the City's Water By-Laws ("the By-Laws")[1] which gives a customer the right to have his meter tested if he has "reason to believe" that his meter might be defective. He must pay for the test unless the meter is shown to be defective, by virtue of under- or over-registration, in which case the City must pay for the test. Then, under by-law 24(5)(b), the City must

> ... determine the water supply services for which the customer is to be charged on the basis set out in section 27.

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[1] City of Tshwane Metropolitan Municipality Water Supply By-Laws, promulgated in a local authority notice on 5 November 2003 in terms of Premier's Notice no. 6770 of 2000 as amended.

4 "Actual consumption" is defined in by-law 1 as the measured consumption of any customer. But there is nothing in the By-Laws that renders a customer liable to pay for the "actual consumption". By-law 7 renders the owner, occupier and customer jointly and severally liable for

> ... all water services consumed in respect of the premises.

5 There is no definition of "consumed" in the By-Laws. The ordinary meaning of the term is therefore applicable. This means that the persons named are liable for water which actually flows from the City's pipeline through the meter applicable to the premises or, if there is no meter, the water which actually reaches such premises.

6 By-law 8 provides that in certain circumstances and after notice in terms of by-law 50, the City may take certain coercive action if

> ... the customer has ... failed to comply with the provisions of these by-laws ... ; or ... failed to pay any ... charges due and payable by him ... .

7 At the risk of repetition, I must stress that a customer only fails to comply with the By-Laws in relation to payment of amounts for which he was billed if he fails to pay for water supply services

... *consumed* in respect of the premises.

8 The meter was duly tested. The result of the test, obtained in November 2010, was that the meter was defective. But it was defective, at least when it was tested, in favour of the applicant. At the time the meter was tested, it would have under-registered the amount of water consumed by the applicant. A report to this effect by Acquametron Verilab CC, a service provider to the City, to this effect was presented to the City. The report reflects that the date of rejection of the meter was 28 November 2010. There is also a handwritten note on the report reading "METER FAILED: UNDER-REGISTRATION.

9 The applicant then sent an email to the City's customer care centre. It is undated but must have been sent before 7 March 2012, the date of a letter from the applicant's attorney to the City, under cover of which a copy of this email was transmitted to the City. In this email, the applicant records his contention that he did not owe the amount billed because the meter was faulty. On a fair reading of the correspondence, in context, the essence of the applicant's complaint was that the meter had reflected a flow of water to the applicant in excess of the actual flow; in other words that the applicant had been charged for water which he had not received or, to use the term in the By-Laws, that he had not consumed all the water billed. The applicant

proceeded to assess himself for what he regarded as his probable consumption for the two months in question and to pay these amounts to the City.

10 The applicant sent another email to the City dated 11 April 2011. In that email he made the point that the meter was defective, regardless of how it registered. The clear implication of this email was that the applicant was disputing the amount of water which the City claimed he had consumed during the two months in question. If the meter is defective, the applicant reasoned, then one cannot rely on the meter to establish consumption. I find this reasoning persuasive.

11 In a letter dated 20 June 2012,[2] the City responded to the applicant's attorney in writing: the City's case was that the meter had "been tested[3] and found to be accurate at the normal to high flows". But the test report attached to the papers does not say that. The report says that water was leaking round the lens of the meter and that the "accuracy of the meter at Qmin flow rate failed to comply with the requirements of SANS 1529-1".

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2 The officer who signed the letter recorded that he signed it on 10 July 2012.

3 A reference to the investigation by Acquametron.

12 The City's case as further set out in this letter was that "initial investigation found no reason for the increased consumption other than a possible internal leak". The City recorded that it had found no further grounds to support a credit.

13 The applicant proceeded to prepare a schedule setting out what he paid for water from May 2010 to December 2012. The next highest amount billed, leaving aside the two spikes of which the applicant complains, was R2 386,21. In only three other instances did the applicant's water account exceed R2 000. The average over the period was, as I have said, about R900 per month.

14 The applicant, relying heavily on the schedule of his payments that he had produced, was adamant: he had not, he said, consumed all the water billed him in the two months in question.

15 The City was equally unmoved by the applicant's further representations. Its attitude was that it had investigated the matter and concluded that the applicant had consumed all the water billed for the two months in question. It threatened to use the coercive machinery of the By-Laws against the applicant. That machinery entitles the City in certain circumstances to terminate or reduce to water supply to a

consumer or to allocate amounts paid in respect of other services to the unpaid account.

16 The applicant then moved this court urgently for interim relief. That relief was granted in the form of a rule nisi pending the determination of this application, prohibiting the City from restricting or terminating the water supply to the applicant. I may add that the applicant has continued to pay all amounts billed him for services by the City. All that is in issue are the true amounts due for water consumed by the applicant during the two months in issue.

17 In his notice of motion, the applicant seeks an interim interdict to operate until the dispute declared by the applicant with the City has been determined by a court or other appropriate tribunal. The fact that another court has granted the applicant temporary relief has no bearing on the enquiry which I mst undertake.

18 This being an application for an interim interdict, the following principles apply: Once a well grounded apprehension of irreparable harm is established, in the absence of an adequate ordinary remedy, the court is vested with a discretion, which will usually resolve into a consideration of prospects of success and the balance of convenience. The stronger the prospects of success, the less need for

such balance to favour the applicant. Conversely, the weaker the prospects of success, the greater the need for the balance of convenience to favour the applicant. *Cipla Medipro (Pty) Ltd v Aventis Pharma SA and Related Appeal* 2013 4 SA 579 SCA para 40.

19 Counsel for the City attacked the contention of the applicant that he had prospects of success in the determination of the dispute the applicant alleges exists between the parties. The first basis is that there no longer is a dispute. Counsel submitted that the City was not only a party to the dispute but had been vested by its By-Laws with an administrative power to determine the dispute. That determination, counsel, submitted, had been made when the City rejected the applicant's claim that the meter was defective in its letter dated 20 June 2012. Counsel argued that the dispute was whether the meter had malfunctioned. Once the City had determined that there had been a malfunction, but that this malfunction operated in favour of the applicant, so ran the argument, the applicant was faced with an administrative decision that was valid[4] until it had been set aside.

20 I cannot agree that the By-Laws have conferred any power on the City to adjudicate disputes with its water consumers. By-law 7 obliges a customer to pay for all water services *consumed* in respect of the

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[4] Compare *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 SCA

premises. To state the obvious: a customer is not liable under by-law 7 for any water service that has not been consumed in respect of the property. *Consume* is not defined; it therefore means, where the service is measured by a device such as a meter, water that has *actually* flowed through the measuring device. By-law 8(2)(b) empowers the City, after due notice as provided for in the by-law, to terminate the service if the customer has "failed to comply with the provisions of these by-laws" or "failed to pay any tariffs or charges due and payable ...".

21 A customer is not guilty of a failure to comply with the By-Laws and does not fail to pay any tariffs or charges due and payable unless that customer has actually consumed the water for which the City has billed him. To state, again, the obvious: the City does not provide proof of consumption in a case such as the present by asserting that the water in question has been consumed; proof of consumption is provided when it is demonstrated, on a balance of probabilities, that the water in question has actually passed through the measuring device applicable to the premises in question, in the present case the water meter dedicated to the measurement of the flow of water to the applicant's premises.

22 By-law 27(1)(a) provides that if the meter is found to be defective (I emphasise again whether by reason of over- or under-registration), the City may estimate the amount of water consumed. In such a case, by-law 27(1)(a) provides that, if an estimate is possible, the estimate must be based

> ... on the average monthly consumption of water on the premises served by the measuring device during the three months prior to the registration of the defect.

23 As a calculation of the average monthly consumption was perfectly possible - the payment figures for the undisputed monthly bills give these data - the City should have proceeded to make the estimate. It did not. The provisions of by-law 27(1)(a) provide strong support for the conclusion that where the meter is defective as contemplated by the By-Laws, the City cannot lawfully use the results generated by the defective meter to determine the amount owed by the customer.

24 The provisions of by-law 9 are similarly destructive of the contention of counsel for the City that the City itself is empowered to determine a dispute with its customer. Under by-law 9, the City Engineer may restrict or discontinue water supply services, *inter alia*, where the customer has "failed to pay the applicable charges"[5] or has "failed to

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[5] By-law 9(1)(a)

comply with any other provisions of these by-laws".[6] At the risk of stating, I hope for the last time, the obvious: the Engineer is not empowered to exercise these powers where he, or some other functionary, *believes* that the customer has failed to pay the applicable charges or *believes* that the customer has otherwise failed to comply with the By-Laws. The Engineer is only empowered to exercise these powers (subject to notice where required) where, *objectively*, it is established that there has been a failure to pay what is due or a breach of the By-Laws.

25 It will be seen that I have reached these conclusions independently of the provisions of the Local Government: Municipal Systems Act, 32 of 2000 ("the Systems Act"). Under s 95(a), a municipality must, In relation to the charging of fees for municipal services, establish a sound customer management system that aims to create a positive and reciprocal relationship in relation to persons liable for these payments. Under s 96(a), a municipality must collect all money that is due and payable to it. Section 98 empowers a municipality to adopt by-laws to give effect to the municipality's credit control and debt collection policy, its implementation and enforcement. Counsel for the applicant argued the case on the basis that the By-Laws complied with the provisions of s 98 and I shall accept that they do. The contrary was

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6 By-law 9(1)(b)

not argued on behalf of the respondent. Under s 100 the Municipal Manager of the City must collect money that is due and payable to the City.

26 I have discussed these provisions of the Systems Act by way of background to a consideration of the provisions of s 102 which provides, in relevant part:

> Accounts
> (1) A municipality may-
> (a) consolidate any separate accounts of persons liable for payments to the municipality;
> (b) credit a payment by such a person against any account of that person; and
> (c) implement any of the debt collection and credit control measures provided for in this Chapter in relation to any arrears on any of the accounts of such a person.
> (2) **Subsection (1) does not apply where there is a dispute between the municipality and a person referred to in that subsection concerning any specific amount claimed by the municipality from that person.** [my emphasis]

27 These provisions of the Systems Act establish two points of central importance to the present case: firstly that municipalities are empowered, and required, to collect what is *actually* due to them, not what they merely *assert* is due to them; and, secondly that where

there is a *dispute* between, say, a customer and the City, the power to use the coercive powers in *this section* (those provided for in the Act and, in the present case, the By-Laws) is suspended until the dispute has been resolved.

28 So the ultimate question, on this aspect of the case, is whether on the facts a genuine, unresolved dispute exists between the applicant and the City. The following factors weigh with me:

28.1 The discrepancies between the spikes in the two months in question compared with actual billed amounts for water consumed in respect of the premises over a substantial period.

28.2 The fact that the meter was faulty.

28.3 It was suggested by counsel for the City that the applicant may be deliberately untruthful or confused about the amount of water concerned on his premises during the months in question. There is no reason to suspect that the applicant is anything but an honest, aggrieved citizen. He has paid all amounts which he maintains are due to the City. He has even self-assessed, and paid, his liability for water actually consumed during the two months in question. It is unlikely that

the applicant would go to the trouble and expense of an opposed application in the High Court if he were not *bona fide*.

28.4 There is no evidence to indicate that there was a leak internal to the applicant's premises.

28.5 The probabilities, as they appear to me, are that either the meter over-registered during the months in question or that the person who read the meter wrongly recorded the amount of water consumed.

29 There is, accordingly, on the probabilities, an unresolved dispute in existence between the applicant and the City in relation to the quantities of water consumed in respect of the applicant's premises during the months of September and October 2010. The harm which the applicant fears is self-evident: that his water might be cut off. By threatening to use its coercive powers in the face of this dispute, the City is acting in conflict with s 102(2) of the Systems Act. The applicant has therefore established the right required for the grant of an interim interdict. There remains for consideration the balance of convenience.

30 One of the coercive powers which the City maintains it is, no doubt subject to notice, entitled to exercise against the applicant is the restriction or termination of his water supply. Against that, if the City is ultimately proved right in the dispute, the City will have had to wait for its few thousand rands but may well be entitled to interest on the outstanding amounts.

31 At the other end of the coercive scale, the City would, if not interdicted, be entitled to apply monies paid by the applicant in respect of, say, electricity, towards payment of the City's water supply claims for the two months in question. I think that to allow the City to reimburse itself in this manner in the present circumstances would be an affront to the reasonable person's sense of fairness. There is no reason why the applicant should be out of pocket in advance of the determination of the dispute. If the determination of the dispute goes against the applicant, there is every indication that he will be able to pay and will pay what he owes, with any interest awarded.

32 I hold that the balance of convenience strongly favours the applicant. It follows that an interim interdict should issue. I was told from the bar that the City, unlike eg Cape Town,[7] has no dispute resolution mechanism to cater for this type of dispute. The matter will therefore

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[7] See *City of Cape Town v Strümpher* 2012 4 SA 204 SCA para 14.

have to go to court. As the City claims that what is due to it has not been paid, the City must institute action for the recovery of these amounts and such interest to which it may believe it is entitled.

33 I wish to make clear that I come to no final conclusions on any of the issues with which I have dealt in this judgment. I stress this to ensure that the court which determines the dispute is not in any way fettered by my findings which are, of necessity, based only on what the parties have put before me and made in the context of interim relief. Other evidentiary materials and other arguments may perhaps be put before the court which determines the dispute which persuade that court that my findings are wrong or subject to qualification.

34 In making this characterisation, I have not overlooked the provisions of by-law 23 which deem the quantity of water measured by a measuring device to be, until the contrary is proved, that which is measured by the device. Whether any reliance can be placed on the measurements of a device which, it is common cause, was faulty, is for the court determining the dispute to decide.

35 I make the following order:

1 The respondent ("the City") is hereby interdicted from disconnecting or restricting any municipal services rendered to the applicant at 378 Emus Erasmus Avenue Erasmusrand Pretoria ("the premises") and from otherwise implementing any of the debt collection and credit control measures contemplated in s 102 of the Local Government: Municipal Systems Act, 32 of 2000, pending the final determination of the dispute existing between the applicant and the City in relation to the quantities of water consumed in respect of the premises during the months of September and October 2010;

2 The City must serve a summons out of a court of competent jurisdiction on the applicant within one month of the date of this order in which the City claims payment of the amounts in dispute.

3 The costs of this application are reserved for consideration by this court after the final determination of the dispute; provided, however, that if the City does not issue summons as directed in paragraph 2 above, the applicant may set the matter down in this court on the present papers, supplemented as he may be advised, for any final interdictory relief that may be appropriate and for costs.

NB Tuchten
Judge of the High Court
26 March 2014

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