IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

CASE NUMBER: 38549/2014

DATE: 25 SEPTEMBER 2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

THE BODY CORPORATE OF RIVERVIEW

SECTIONAL TITLE SCHEME **APPLICANT**

And

THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY **RESPONDENT**

JUDGMENT

MAVUNDLA J.

[1] The applicant initiated this application by way of urgency, which was found to be lacking by Tsoka J who struck it off the urgent roll on the 3rd June 2014. The reenrolled the matter on the opposed motion roll. The applicant seeks an order in terms of which the respondent is ordered to restore full water supply to the Riverview Sectional Title Scheme, with immediate effect with a cost order. During the hearing of the matter, it was submitted on behalf of the applicant that a punitive costs order should be granted against the respondent. I shall later address the punitive cost order. It needs mention that the matter was opposed.

[2] The applicant is established in terms of the provisions of section 36(1) (c)

Of the *Sectional Titles Act* No 95 of 1986 *("the Sectional Titles Act"),* and is instituting the application in its name in respect of and in connection with the water supply to the buildings which consist of the property, being the units and common areas in the Riverview Sectional Scheme, the applicant and or the owners of the relevant sectional title scheme, they are jointly liable for, being the units and common areas in the Riverview Sectional Scheme. The scheme comprise of 27 sectional title units. The *locus standi* of the applicant was not

in dispute.

[3] It is common cause that there is a long standing dispute between the applicant and the respondent in respect of an (original) amount of approximately R278, 956. 30 which was debited by the respondent to the applicant's municipality account number, 3325098592 during or about July 2012. The applicant disputes its liability in respect of this account, contending that this amount was a debt of the developer; Fasbou Projekte (the developer).

[4] It is common cause that on or about 1 September 2007 the applicant had its own municipality account number, 330128121. During or about July 2012 the respondent readjusted the applicant's account by debiting it with an amount of R244, 698.52 and VAT of R34, 257.78 totalling an amount of R278, 956. 30. The applicant disputes that it is indebted to the respondent in the aforesaid amount. The applicant further averred that the respondent neglected and or refused to take cognisance of the dispute raised by the applicant and on the 21 May 2014 the respondent proceeded to restrict the scheme's water supply, without serving prior notice of its intention to do so. The action of the respondent was therefore unlawful.

[5] Mthiyane DP in the matter of *City of Cape Town v Strumpher*[1], re-iterated the fact that the right to water is a basic right guaranteed and enshrined in terms of 27(l)(b) of the Constitution and given effect to in s3(l) of the Water Services Act No 108 of 1997 and also by s 152(2)(b) of the Constitution Act NO 108 of 1996, which places a duty and obligation on the National Government. This duty and obligation extends to, *inter alia,* municipalities, as quite correctly, with respect, held by Yaccob J in *Mkontwana v Nelson Mandela Metropolitan Municipality*[2].

[6] It is trite that in spoliation proceedings, the applicant must prove that he was in undisturbed possession and has been unlawfully or wrongfully deprived. The despoiled is entitled to restoration, without the court having to interrogate any dispute regarding the items falling subject of spoliation; *vide Stocks Housing v Department of Education and Culture Services.*[3] The Courts have since held that the use of water is a consequence of possession and therefore fell within the concept of *'quassi用ossessio.'* and the right to water is capable of protection through spoliation; *vide* FirstRand *Ltd t/a Rand Merchant Bank v Sholtz NO*[4].

[7] In *Stocks Housing v Department of Education and Culture Services*[5] the Court held that: "The qualification to the rule that a person who has been despoiled of possession must be restored to possession before any dispute as to who is entitled to possession will be investigated is that, if the applicant goes further than to claim spoliatory relief, and claims a substantive right to possession, whether based or upon vindication or upon contract, then the respondent may answer such additional claim of right and may demonstrate, if he can, that the applicant does not not have the right to possession the relief of which it

claims. The Court will not order return of possession of the property in such a case if respondent succeeds in refuting the applicant's claim of right to possession." *In casu,* the applicant did not confine itself to the fact that it was in lawful possession and was unlawfully deprived, but went further to state that it disputes its indebtedness to the respondent in that the amount in dispute should have been demanded from the previous developer and that the action of the respondent was unfair.

[8] The respondent is constitutionally and statutorily obliged to provide services to its residents. The residents are also obliged to pay for the services provided by the municipality. The municipality, in order to meet its obligations to provide services, such as water, *inter alia,* must through its credit control system collect revenue from the residents, and if need be, terminate and reduce the services it provides to a recalcitrant resident. It can suspend such services even without a court order, as Bosielo JA found in the matter of *Rademan v Moqhaka Municipality.*[6] In my view, where the respondent, as *in casu,* reduced the water supply of the applicant, it cannot be said that such steps taken was, unfair. In my view, the respondent was within its rights to reduce the water service supply to the applicant, and therefore spoliation action is inappropriate and therefore the application stands to be dismissed.

[9] In the matter of *Body Corporate Croftdene Mall v Ethekwini Municipality*[7] Hugh-Madondo AJ (as she then was) held that sl02 of the *Local Government: Municipal Systems Act* 32 of 2000 (the Systems Act) empowered a local authority (i) to consolidate any separate accounts of persons liable for payments to municipality; (this was done by the respondent *in casu.)* (ii) to implement any of the debt collection and credit control measures provided in relation to arrears on any of the account of such person; (iii) to disconnect a ratepayer's water and electricity supply because of an outstanding debt for municipal rates; (*In casu,* it is common cause that the respondent *did not disconnect but merely reduced the supply.)* (iv) provided there is no proper dispute lodged between the parties. (In casu the parties are not *ad idem* on this point.) This decision was on appeal confirmed by Maya JA in *Body Corporate Croftdene Mall v Ethekwinin Municipality*[8] that it is the prerogative of the municipality to consolidate a rate payer's accounts where appropriate and to unilaterally cut off supply of services.

[10] The developer *in casu* was Fasbou Projekte. In terms of Section 36(1) of the *Sectional Titles Act* 95 of 1986 the developer is the owner and member in the body corporate. The effect of the consolidation, in my view, merely subsumed the original debt into the newly allocated and consolidated account, with the debt together with subsequent monthly debits being carried over from one month to another. The applicant continued to effect payment into the consolidated account[9], thereby acknowledging it's indebtedness to the respondent. Maya JA in the *Body Corporate Croftdene Mall v Ethekwinin Municipality (supra)* matter held that Section 37 of the *Sectional Titles Act* 95 of 1986 obliges the body corporate, *inter alia,* to establish an administrative-expenses fund for the payment of rates and taxes and other local authorities charges for the

supply of electric current, water, etc. and to require the owners to make contributions to such fund for the payment of such services and found that the body corporate failed to carry out its legal obligations to impose levies on its members and collect from them a sufficient amount to enable it to pay for the relevant municipal charges and levies, similarly hereto in my view. I deem it not necessary to decide the contention of the applicant that the amounts owing as reflected in the monthly statements sent to it by the respondent have prescribed. What is of importance is the fact that the account of the applicant is in arrears, consequently the respondent decided, quite correctly so in my view, to reduce the water supply.

[11] It is my view, as stated herein above, that the respondent was within its rights to summarily reduce the water supply. I deem it not necessary to interrogate the rest of other issues raised by and on behalf of the applicant.

[12] In the result the application is dismissed with costs.

N.M.MAVUNDLA

Date of Judgment : 25/ 09 / 2014

APPLICANTS'ADVOCATE :ADV J.C.G HAMMAN.

INSTRUCTED BY : OOSTHUIZEN DU TOIT BERG & BOON

DEFENDANT'S ADVOCATE: ADV U. B. MAKUYA

INSTRUCTED BY : B CEYLON ATTORNEYS

[1] **2012 (4) SA 207 (SCA) at 210C-G et212D**

[2]2005 (1) SA 530 (CC) at 548D-E.

[3]1996 (4) SA 231 at244B-D.

[4]2008 (2)SA 503 (SCA) at 509F-G.

[5] ***Supra* at 244B-D.**

[6]2012 (2) SA 387 (SCA) at paragraphs [9] - [17].

[7] **[2010] 4 ALL SA 513 (KZD).**

[8] ***Supra* at 177A-B**

[9]Vide **para 49 of applicant痴 founding affidavit at paginated page 22.**