REPUBLIC OF SOUTH AFRICA

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

CASE NO: A5052/2015

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

17 JUNE 2016 **FHD VAN OOSTEN**

In the matter between

EUPHORBIA (PTY) LTD t/a
GALLAGHER ESTATES **APPELLANT**

And

CITY OF JOHANNESBURG **RESPONDENT**

Local Authority - water supply effluent and incidental charges - consumer disputing liability for payment of – arrears alleged - Municipality disconnected water supply - consumer paid two amounts to municipality in terms of agreements to procure re-connection of water supply and issuing of a rates and taxes clearance certificate - payments made under protest and with reservation of rights - onus on municipality to prove consumer's indebtedness - testing of water measuring meter – failure to use prescribed method of testing – Municipality failed to discharge onus - consumer having over-paid and entitled to refund.

J U D G M E N T

VAN OOSTEN J:

Introduction

[1] The appeal concerns the appellant's (Euphorbia) liability for payment of charges in respect of water supply, effluent and incidental charges (the services) to the respondent (the City), to a property, then owned by Euphorbia, described as Erf 5, H H, E 7 Township, better known as G E, situate at 1 R D M. The City instituted action against Euphorbia, in which it claimed the amount of R4 482 652.96 in respect of the delivery of services, allegedly due owing and payable, for the period 1 October 2001 up to and including 30 November 2008 (the contentious period). Euphorbia filed a plea and two counterclaims for payment of the amounts of R5 031 104.00 and R4 482 652.96 respectively. Three pre-trial conferences were convened, two of which before a judge of this Division. An agreement between the parties in respect of the further admission of facts and limitation of issues was concluded and recorded. The trial of the matter came before Levin AJ. Having heard the evidence on behalf of both parties the learned judge found for the City. Euphorbia subsequently unsuccessfully applied for leave to appeal before Levin AJ but the Supreme Court of Appeal on petition granted leave to appeal to this court.

The facts relevant to the disputes

[2] A broad outline of the relevant facts is the following. In October 2003 the City installed a new combination meter (the contentious meter) to measure water consumption at the Gallagher Estates premises. It was however read for the first time, in March 2005 and the account delivered to Euphorbia pursuant thereto, revealed a spike of 13 times the historic average consumption measured by the old meter. The City, in addition, based the interim charges from October 2003 until March 2005 on the readings obtained from the contentious meter.

[3] Euphorbia, understandably alarmed by the inordinate water consumption as reflected on the City's account, requested, as it was entitled to do under the City's By-laws, the testing of the contentious meter. In February 2006 the City removed the contentious meter and subjected it to testing by the City's flow operational manager

Mr Termets, who testified that he was the only person 'legally allowed' to test the City's meters. Having obtained the test results the City advised Euphorbia that the contentious meter functioned properly and that it was not faulty. Shortly thereafter the City disposed of the contentious meter.

[4] After removal of the contentious meter, the City installed yet another meter. The meter readings obtained from this meter, although Euphorbia's business had by then substantially grown, revealed water consumption three times less than the quantities measured by the contentious meter. From 2006 the City continued billing Euphorbia on the readings obtained from this meter.

[5] Euphorbia made payments to the City based on its own calculations. It was further up to date with all payments in respect of the other services delivered by the City. The dispute between the parties only concerned debits raised in regard to water, effluent and incidental charges, derived from the contentious meter readings. In monetary terms the difference between the amounts billed by the City during the period October 2003 and December 2005 and the amounts paid by Euphorbia lies at the heart of the dispute.

Euphorbia's counter claim

[6] In its plea to the City's declaration, Euphorbia denies all essential allegations. In the plea conclusion a set off in regard to its counterclaims is pleaded.

[7] Euphorbia's first counterclaim is based on an agreement concluded with the City after the City had cut off its water supply in November 2008, which of course had a devastating effect on its business of providing conference facilities. In terms of the agreement, to which I shall revert, Euphorbia paid the amount of R5 031 104-00 under protest to the City, in return for which its water supply was restored.

[8] The second counterclaim is based on a similar agreement, concluded after the issue of summons, for the purpose of Euphorbia obtaining a clearance certificate required for the registration of transfer pursuant to the sale of its property. In terms of this agreement Euphorbia, again under protest, paid the sum of R11 495 483-35, inclusive of the amount claimed in the summons, to the City in return for which the

required clearance certificate, was duly issued. I shall henceforth refer to these agreements as the agreements.

The incidence of onus

[9] The incidence of the onus of proof is decisive in the adjudication of this matter. The learned judge a quo's point of departure was that Euphorbia had accepted the onus of establishing that the amounts were not due. The argument advanced by Euphorbia and found favour with the learned judge was that, where a party pays under protest, the amount paid under protest can only be recovered if that amount was not due. The onus accordingly, so it was held, rested on Euphorbia to prove that the amounts paid under duress were not due. In this court counsel for Euphorbia did not challenge the finding and the contentions advanced were premised on the onus resting on Euphorbia to prove that the amounts were not due.

[10] In my view the premise for both the finding of the court a quo and the acceptance of the onus by counsel for Euphorbia, is flawed. The starting point is to consider the majority judgment of the then Appellate Division in *CIR v National Industrial Bank Ltd* 1990 (3) SA 641 (A), which was exclusively relied on in and by the court a quo. In that matter the respondent Bank, under protest, paid the amount of R488 353-80 to the Commissioner for Inland Revenue, which was claimed in respect of an 'autocard scheme' operated by the Bank. The Bank was of the view that the scheme did not attract stamp duty but the Commissioner, notwithstanding having received the Bank's representations in support of its contention, insisted on payment of the stamp duty and the bank resolved to pay the amount under protest. The Bank did not expressly reserve its rights to recover the sums paid nor did it invite the Commissioner to agree to a suggestion that the sums be repaid if the dispute should be resolved in its favour.

[11] *First National Industrial Bank* was decided on the basis of a finding that the parties tacitly agreed that the sum paid by the Bank to the Commissioner under protest, would be refunded, if the cause for the Commissioner claiming the payment would subsequently prove to be wrong. Premised on the tacit term, it was held, the Bank was entitled to recover the capital amount of the payment. The facts we are here concerned with are fundamentally different and therefore distinguishable. *First*

National Industrial Bank accordingly does not constitute authority for incorporating a tacit term into the agreements that the amounts paid under protest would be refunded only if those amounts were shown by Euphorbia not to be due.

[12] The reason for Euphorbia having made the payments under duress must be considered in the context of the terms of the agreements. It needs to be emphasised that the terms of the agreements were expressly agreed on and are common cause between the parties. As for the first agreement, it was expressly agreed that the payment of R5 031 104-00 was made under protest in order to procure the re-connection of the water supply which had been terminated by the City. It was further agreed that the payment would not be construed as a waiver or abandonment of any of Euphorbia's rights or as an admission of liability on its part that the amount was due owing and payable on that particular date. The terms of the second agreement were identical, except that the payment was made in order for the City to issue the required clearance certificate. The payments accordingly, were not in any way related to the underlying cause for Euphorbia's alleged indebtedness but for a distinctly different reason, entirely unrelated to the question of such liability. Put differently, the City's claim, at all times, remained disputed in respect of all its elements. The express terms of the agreements are dispositive to the incorporation of a tacit term that repayment of the amount would only be made by the City if it was subsequently proved that the amounts were not due. For an entitlement to repayment of the amounts paid under protest, it was incumbent on Euphorbia to prove, first, that the agreements were concluded, second, that the amounts were paid pursuant thereto, and, third, that the water supply was re-connected and the clearance certificate issued. That, as I have mentioned, became common cause at the trial. In the context of the agreements, in particular having regard to the non-waiver and reservation of rights clauses, it remained in issue whether the amounts were due. The saddling of Euphorbia with the onus to prove that the amounts were not due, in my view, cannot be justified on a proper interpretation of the agreements and is accordingly legally untenable.

[13] The court a quo went further and held that Euphorbia bore the onus of establishing that 'the meter readings were defective and, if so, the extent of the loss that it had suffered as a consequence of the defective meter readings'. This finding

was indeed challenged by counsel for Euphorbia. In my view the finding, likewise, was incorrect.

[14] In civil proceedings the incidence of onus of proof, as matter of substantive law, is primarily determined on the factual allegations contained in the pleadings (*Mabaso v Felix* 1981 (3) SA 865 (A)). Considerations of policy, practice and fairness might arise in the determination of the incidence of onus and each of the parties might bear the burden of proof in relation to separate issues in the trial (*Schwikkard Van der Merwe* Principles of Evidence 3rd ed 571-575).

[15] On a conspectus of the pleadings as a whole, the City bore the onus of proof in regard to the accuracy and correctness of the contentious meter readings and, as for its counterclaims, Euphorbia the onus of proving the agreements. Upon a proper construction of the agreements no admission was made as to any of the elements the City was required to prove. A somewhat odd position arose because the second 'under duress' agreement was concluded after the institution of the action. The agreed statement of facts did not affect or shift the incidence of onus: it merely assisted the parties in discharging the onus resting on each of them.

[16] The accurateness and correctness of the contentious meter remained in dispute and the onus in regard thereto accordingly, rested and remained on the City. Euphorbia, in discharging its onus, was assisted by the statement of agreed facts which, in any event, was duly confirmed at the trial by the uncontested evidence of the attorney Yudaken, who acted on its behalf in concluding the agreements.

[17] 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.

Discussion

[18] The case for the City flounders at the testing of the contentious meter. The court a quo was alive to the 'inadequacies' in the evidence of Termets but found it unnecessary to determine the issue as to the validity of the testing of the meter, as in its view the onus rested on Euphorbia to prove the actual or inferential defectiveness to the contentious meter. The validity of the testing conducted by Termets is entirely dependent on whether the proper test was utilised having regard to the diameter size of the meter.

[19] Euphorbia, as I have alluded to, requested the testing of the contentious meter. Section 32 of the City's Water Services By-laws 2003 (the By-laws) provides that in such event, 'the device must be subjected a standard industry test to establish its accuracy'. In terms of s 5(a) of the By-laws, if the outcome of the test shows that the device is within a prescribed range of accuracy, the consumer shall be liable not only for the costs of the tests but also for 'all other amounts outstanding'. The use of the prescribed test was therefore vital to the City's entitlement to payment of all outstanding amounts. The contested meter had a nominal bore of 150mm and therefore fell within the parameters of '100mm but not exceeding 800mm in diameter', in respect of which, in terms of s 32(7)(b) of the By-laws, the test in accordance with SABS Code 1529 Part 4-1998, applied. Termets testified that he used the test contained in SANS 1529-1:2003: Ed 3, of which the particulars were not made available to the trial court, but which he maintained is similar to the test provided for in SANS 1529-1: 2003: Ed 2.2 and Ed 2.3. Those tests however apply to meters with a nominal bore not exceeding 100mm. Termets confirmed that the testing procedure for a meter, such as the contested meter, provided for in SANS 1529-4 applied, but conceded that he did not subject the contentious meter to this test. No evidence was led that the incorrect tests conducted by Termets would yield similar or materially similar results to those of the correct tests. In the absence of proof that the prescribed test was conducted, Euphorbia was not liable to pay the charges measured by the contentious meter. Euphorbia would have become liable to

pay such charges only if the prescribed test had been performed and the meter had been found to have been within the prescribed range of accuracy.

[20] The By-laws further provide that if the measuring device is found to be defective, the City, in terms of s 35 must estimate the quantity of water supplied after having afforded the consumer the right to be heard. That of course, in this case, the City failed to do.

[21] In summary: the expert evidence concerning the testing of the contentious meter, in my view, was seemingly unsatisfactory and insufficient for the purpose of finding that the contentious meter measured the water supply correctly and accurately. The City accordingly failed to discharge the onus to prove its accuracy and it must accordingly be non-suited.

Estimate of Euphorbia's use of water during the contentious period

[22] In its heads of argument as well as in argument in this court, Euphorbia fairly and properly accepted liability for payment of reasonable charges in respect of its water consumption during the contentious period. Counsel for Euphorbia referred to Euphorbia's enrichment flowing from such use and proposed a just and equitable amount in respect thereof in order to facilitate the final determination of the liability of either party. Full details of the premise for the calculation and arithmetic employed were set out in counsels' heads of argument and counsel for the City were invited to advance argument in response thereto. In essence the calculation is based on Euphorbia's average consumption figures during the period of the third and last meter which, as I have alluded to, may well err on the side of an over-estimate, as by then the business of Euphorbia had steadily grown from what it used to be in the contentious period. Counsel for the City did not challenge either the methodology or the correctness of the amounts arrived at. Nor were any alternatives to Euphorbia's proposal advanced. I am satisfied that in the prevailing circumstances, Euphorbia availed itself of the best available method in determining the reasonable charges in respect of Euphorbia's use of water during the contentious period and that the resultant calculations of the amounts due, paid and owing in regard thereto, are accurate. I merely need to add that the bottom end of the calculation reflects an indebtedness by the City in respect of overpayments made by Euphorbia in the sum of R6 397 002-80, together with a refund of interest levied by the City, in the total

sum of R1 727 947-50, resulting in the grand total of R8 124 950-30. It follows that Euphorbia is entitled to an order for payment of this amount.

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

1. The appeal is upheld.
2. The respondent is ordered to pay to the appellant:
   2.1 The sum of R8 124 950-30.
   2.2 Interest on the amount in 2.1 above at the applicable *mora* rate, presently 9% per annum, from date of judgment to date of final payment.
3. The respondent is ordered to pay the costs of the appeal, such costs to include the costs consequent upon the employment of two counsel.

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

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JUDGE OF THE HIGH COURT

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RE MONAMA
JUDGE OF THE HIGH COURT

COUNSEL FOR APPELLANT	***ADV FA SNYCKERS SC*** ***ADV LM SPILLER***
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	ADV N BEHARIE
RESPONDENT'S ATTORNEYS	***MUNNIK BASSON DAGAMA INC***
DATE OF HEARING	***3 JUNE 2016***
DATE OF JUDGMENT	***17 JUNE 2016***