REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

22/5/15

CASE NO: 10716/2013

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

20/5/15 .....
DATE SIGNATURE

In the matter between:

FREDERIK VILJOEN MINNAAR NO	First Applicant
LYNETTE JEAN MINNAAR NO	Second Applicant
TREASURY TRUST NO	Third Applicant

and

EKURHULENI METROPOLITAN MUNICIPALITY	Respondent

JUDGMENT

DODSON AJ

Introduction

[1] This judgment deals with the question whether the Ekurhuleni Municipality

may insist upon payment by a property owner of an amount prescribed in its electricity supply tariffs for reinstating an electricity connection that has been removed due to tampering by a tenant with the prepaid electricity meter.

[2] The trust was not legally represented when the matter was heard. The first applicant appeared in person and argued the matter as a lay person.

Factual background

[3] The applicants are the trustees of the Nobilis Trust. It is the owner of the property situated at 2 Kent Avenue, Benoni. It leases the property in order to generate income.

[4] On or about 26 July 2007, the first applicant on behalf of the trust concluded a written "agreement for supply of water and electricity" with the respondent on a standard form.

[5] The electricity is supplied to the premises via a prepaid electricity meter.

[6] On 16 October 2012, the trust received a document which reads as follows:

> *"Dear Sir/Madam*
>
> *NOTIFICATION OF ELECTRICITY METER TAMPER*
>
> *During a recent electricity meter audit at your property [the address and meter number are given] by representatives of the Energy Department, the meter/installation was found tampered. THIS IS ILLEGAL and the following action is taken:*
>
> *1) WARNING ISSUED AND THE INSTALLATION NORMALISED*
>
> *2) REINSTATMENT FEE ISSUED AND THE CONNECTION HAS BEEN SWITCHED OFF: X*
>
> *First incident R2,052.00 (incl VAT) X*
>
> *Second incident R4,104.00 (incl VAT)*
>
> *Third incident: R6,156.00 (incl VAT)*

...

This factual information has now been recorded. It has been noted that any further tampering with the electricity supply to your home / business will result in further disconnection and prosecution. [Reference is then made to sections of the electricity by-law – these are dealt with below.]

The city tariffs make provision for a meter reinstatement fee. Our next audit will see this meter visited within a short period from the date of this letter. If your meter/installation again shows signs of interference, further action will be taken and you may face prosecution in court."

[7] The "X" marks referred to above are written in manuscript to indicate which of the options applies. There is also a handwritten note at the top of the letter which reads:

"Meter bridged inside seal number -340968."

[8] The first applicant confirms that the prepaid electricity meter had been bridged so as to bypass the charging mechanism. The first applicant surmises that this must have been done by his tenant prior to his having vacated the premises at the end of his lease agreement, particularly bearing in mind that he had had a similar problem with the tenant once before.

[9] The first applicant took up the attitude that the amount of R2 052 referred to in the notice was a fine for which he should not be held liable bearing in mind that it was the tenant and not him or the trust that was guilty of tampering with the meter. He entered into correspondence with officials of the municipality in this regard. They did not contest his description of the charge as a fine but insisted that the by-laws rendered him liable for it.

[10] It was essentially that sequence of events that resulted in the present application. In its notice of motion, the trust sought an order simply compelling the municipality to reinstate the electricity supply to the premises

and seeking the costs of the application.

[11] It emerged, however, at the hearing of the matter, that subsequent to the exchange of affidavits the applicant had paid the amount of R2 052 under protest and the electricity supply had been reconnected. The first applicant therefore sought at the hearing and without prior notice to the respondent, to amend his notice of motion in order to provide for relief in the form of repayment by the municipality of the amount paid under protest.

[12] The municipality objected to what it described as an attempt to amend the entire basis of the case at this stage of the proceedings. The amendment was refused but I indicated that I would, in preparing my judgment, give consideration to whether or not the relief should, as the first applicant contended, be granted under the prayer for "further and/or alternative relief" in the original notice of motion. I will assume for purposes of this judgment that the applicants are entitled to do so.

The applicant's contentions

[13] The first applicant argues that the payment of R2 052 demanded in the "notification of electricity meter tamper" amounts to a fine for criminal conduct for which he or the trust cannot in law be held liable as neither he nor the trust committed the offence. What is indicative of this charge amounting to a fine, he argued, is the fact that the charges in respect of other items in "Tariff H" (entitled "Residential time of use") of the electricity

supply tariffs[1] for reconnecting the electricity supply, are much lower. For example, item 3.2 provides a charge of R126,50 plus VAT *"for restoring the supply due to non-payment of the account"*. The same amount is charged in terms of item 4.2 *"for reconnecting a supply at the customer's request"*. By contrast, item 5 provides:

> *"For reinstating a customer connection that has been removed due to tampering by the customer:*
>
> *Estimated cost of material, labour and transport plus 10% with a minimum charge of: VAT exclusive R1800.00.*[2]
>
> *Note 1: The connection reinstated will not necessarily be identical to the one removed.*
>
> *Note 2: The second tampering event will see the fee doubled. The third event will see the above fee tripled."*

[14] The applicant contends that the service or action required to be done by the municipality in the case of tampering is essentially the same as a reconnection, yet the amount charged is more than 14 times greater. This he argues shows that the amount represents a fine and not a fee for the service rendered.

[15] Consistent with this argument that the charge is a fine and not an ordinary charge or fee, he says that the matter is regulated by section 36 of the Ekurhuleni Metropolitan Municipality Electricity by-laws.[3] It provides as follows:

> ***"36. Offences and penalties***
>
> *(1) Any person contravening or failing to comply with any provision of these By-laws shall be guilty of an offence and shall upon conviction*

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[1] The electricity supply tariffs are made in terms of section 75A(3) of the Local Government Municipal Systems Act No. 32 of 2000 and contained in Schedule 2 of the Extraordinary Provincial Gazette No. 159 dated 13 June 2012.

[2] Note that the amount of R2052 is this amount together with VAT.

[3] Council Resolution : MI195/2001 dated 29 November 2001 and CC71/2002 dated 26 March 2002; date of commencement, 24 April 2002.

> *hereof be liable for a fine not exceeding R2000.oo or in default of payment to imprisonment for a period not exceeding 12 months.*
>
> *(2) The occupier, or if there be no occupier, the owner of any premises supplied with electricity, where a breach of these By-laws has occurred, shall be deemed to be guilty of that breach unless he proves that he did not know and could not by the exercise of reasonable diligence have known that it was being or was likely to be committed and that it was committed by some other person over whose acts he had no control."*

[16] To the extent that section 36(2) may render him liable even if he is correct in contending that section 36 applies, the first applicant contends that this provision is unconstitutional. However, no challenge to the constitutionality of this subsection was ever contained in the notice of motion.

[17] The applicant also contends that the amount of the penalty provided for in section 36(1) of the electricity by-laws is also indicative of the charge in the being a fine for a criminal offence because it provides for a fine in a similar amount.

Analysis

A fine for a criminal offence?

[18] It is so that tampering with a prepaid meter constitutes a criminal offence. Thus s 20 of the by-law provides as follows:

> *"20. Tampering*
>
> *(1) No person shall in any manner or for any reason whatsoever paint, deface, tamper or interfere with any meter or service connection or service protection device or supply or any other equipment of the Council. Only an authorized employee of the Council may make any adjustment or repair thereto.*
>
> *(2) When as a result of illegal tampering by a consumer, it is necessary to make alterations to the metering system to prevent further tampering, the consumer shall be liable for the total cost of such alterations."*

[19] The use of the word "illegal" in s 20(2) makes it clear that the infringement of the prohibition contained in s 20(1) constitutes a criminal offence. Beyond that, s 20(2) does not come into play in this matter because there is no evidence to suggest that it was necessary for the municipality to make alterations to the metering system to prevent further tampering. We are therefore concerned only with s 20(1).

[20] The consequences for a criminal contravention of s 20(1) are provided for in s 36(1) of the by-law, which is quoted above. As is apparent from that quotation, that subsection renders contravention of any provision of the by-laws an offence and provides for a fine upon conviction not exceeding R2 000 or imprisonment for a period not exceeding 12 months.

[21] Clearly a prosecution and conviction of such an offence could only take place through the medium of a criminal prosecution in a criminal court having jurisdiction in respect of the offence.

[22] It is the applicant's contention that the municipality has in this instance purported unlawfully to do just that. It has, without having jurisdiction, prosecuted, convicted and sentenced him to a fine of R2 052.

[23] In order to assess the correctness of this contention, it is necessary to establish whether the municipality has indeed followed this unlawful path or whether there is a lawful basis for its actions.

[24] If regard is had to the "notification of electricity meter tamper" it is clear that the notice purports to impose a "reinstatement fee". The fee that it imposes

is an amount of "R2,052.00 (incl VAT)". The reference to a "fee" and not to a penalty is indicative of the municipality seeking to impose a charge and not to impose a penalty. The fact that the amount is inclusive of VAT also points to a fee for a provision of a service rather than the imposition of a penalty.

[25] Further, if regard is had to the amount of R2 052, it is clear that the municipality was seeking to rely on the electricity supply tariffs referred to above, and in particular, item 5 of tariff H. If VAT is added to the amount of R1 800 provided for in item 5, it comes to exactly R2 052.

[26] If regard is had to the phrase "estimated cost of material, labour and transport plus 10% with a minimum charge of" contained in item 5, it is clear that the tariff seeks to charge a fee for a service, rather than to impose a penalty, at least in the case of the first instance of a tampering.

[27] In assessing whether the minimum charge is a realistic one, when compared with the low charge for other forms of reconnection, regard must be had to s 12(5) of the by-law which provides that-

> *".... where Council's equipment has been tampered with to prevent full registration of consumption by the meter, the electricity supply shall be physically removed from those premises and will only be reinstalled upon payment of the applicable fee, as prescribed in the tariff of charges."*

[28] The charge accordingly envisages services beyond mere reconnection. It contemplates the complete reinstallation of a supply, and presumably related apparatus, which has been "physically removed from the premises". This in my view justifies a charge in excess of the lesser charge for a simple

reconnection.

[29] The tariffs are imposed by the municipality in terms of s 75A of the Local Government : Municipal Systems Act No. 32 of 2000. It provides in relevant part as follows:

> *"75A.* ***General power to levy and recover fees, charges and tariffs***
>
> *(1) A municipality may-*
>
> *(a) levy and recover fees, charges or tariffs in respect of any function or service of the municipality; and*
>
> *(b) recover collection charges and interest on any outstanding amount.*
>
> *(2) The fees, charges or tariffs referred to in subsection (1) are levied by a municipality by resolution passed by the municipal council with a supporting vote of a majority of its members."*

[30] The municipality thus had the power to impose the tariff that it did in item 5 of tariff H of the electricity supply tariffs. It is clear from the provincial gazette containing the tariffs that reliance was placed on s 75A. In the circumstances, there can be no suggestion that in imposing the tariff, the municipality was acting outside its powers or purporting to impose a criminal penalty.

[31] It is so that in the case of a second or third tampering, provision is made for the doubling or trebling of the fee. These components of the tariff may well contain a punitive component. However, that is not sufficient in my view to render those charges a criminal fine or to render the conduct of the municipality in imposing that tariff unlawful. In any event, and save for the trust's belated challenge to the constitutionality of s 36(2) of the by-law, no other by-law, tariff, or other administrative action on the part of the municipality was challenged in the proceedings on the basis that it was either unconstitutional or unlawful.

[32] Accordingly, I disagree with the trust's contention that the charge of R2 052 amounted to the unlawful imposition by the municipality of a criminal fine for a criminal offence to which he was not a party.

Basis for joint and several liability?

[33] That still begs the question whether there is a lawful basis for the municipality to hold the trust liable for the conduct of its tenant who was, factually, the consumer of the electricity supplied to the premises (assuming the correctness of the applicants' version, which I am willing to do for purposes of this judgment.)

[34] An appropriate starting point in this analysis is s 12(5) of the by-law which is quoted again for ease of reference:

> *".... where Council's equipment has been tampered with to prevent full registration of consumption by the meter, the electricity supply shall be physically removed from those premises and will only be reinstalled upon payment of the applicable fee, as prescribed in the tariff of charges."*

[35] In this provision it is clear that there was a lawful basis for the municipality to remove the supply of electricity to the premises concerned – indeed it was obliged to do so. Moreover, the municipality is effectively precluded by s 12(5) from reinstalling the supply and associated apparatus, save *"upon payment of the applicable fee, as prescribed in the tariff of charges."* In That is clearly a reference to the amount of R1 800 plus VAT referred to in the electricity supply tariff.

[36] On the basis of this provision alone, it seems to me that the municipality will be entitled to adopt the stance that it did in these proceedings in refusing to

re-install the supply until the amount of R2 052 was paid. It seems to place the question of who should pay the R2 052 outside of the municipality's area of concern, in that it does not identify who should make the payment. That would seemingly, in the present context, be left to be resolved as between the owner and the tenant. This is so regardless of the fact that, in the present context, the effect would be to hold the owner jointly and severally liable with the tenant for the charge.

[37] On this basis alone, I am of the view that the trust would not have been entitled to the relief that it originally sought in the notice of motion ie an order compelling the municipality to reconnect the supply.

[38] I nonetheless proceed to consider whether there is an express basis for the trust to be held liable for the tariff fee of R2 052, outside of any implicit basis in section 12(5) of the by-law.

[39] The starting point in this analysis is s 3 of the by-law. It provides in relevant part as follows:

> *"3. **Consumer's agreement***
>
> *(1) No person shall use or be entitled to use an electrical supply from the Council unless or until such person has entered into an agreement in writing with the Council for such supply, and such agreement together with the provisions of these Bylaws shall in all respects govern such supply. ...*
>
> *(2) ...*
>
> *(3) ...*
>
> *(4) The Council may decide whether a consumer's agreement shall be concluded by Council with the owner of the premises or with the occupier of the premises, or with both, or with any duly authorised person acting on their behalf."*

[40] The terms *"consumer"*, *"occupier"* and *"owner"* are then defined as follows:

> " *'consumer' means a person to whom the Council has agreed to supply electricity or is actually supplying electricity, or if there is no such person, the owner of the premises."*
>
> " *'occupier' in relation to any premises means :*
>
> *(a) Any person in occupation of a premises (sic) at any relevant time;*
>
> *(b) any person legally entitled to occupy the premises;*
>
> *(c) any person in control or management of a premises (sic);*
>
> *'owner' in relation to any premises means:*
>
> *(d) The person in whose name the premises is (sic) registered or the person's authorised agent;*
>
> *(e) ...*
>
> *(f) ...*
>
> *(g) a person receiving rent or profit issuing therefrom, or who would receive such rent or profit, if such premises were let, whether on his own account or as agent for any person entitled thereto or interested therein."*
>
> " *'owner' means and includes the registered owner of the land or premises, or his authorised agent, or any person receiving the rent or profits issuing therefrom, or who would receive such rents or profits, if such land or premises were let, whether on his own account or as agent for any person entitled thereto or interested therein."*[4]

[41] Having regard to the agreement originally signed by the trust with the municipality for the supply of electricity, the trust complies with both the definition of owner and with the definition of *"consumer"* notwithstanding that it may not necessarily itself be in actual occupation of the premises. It is also apparent from the definition of *"consumer"* that the trust's tenant will comply with both the definition of *"occupier"* (because he was legally entitled to occupy the premises) and with the definition of (*"consumer"* because, when he was in the premises, the municipality was *"actually supplying electricity to him"*).

[42] These definitions must be borne in mind when considering the import of

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[4] The duplication in the definition of "owner" comes from the original by-law as published on the Ekurhuleni Municipality website in .pdf form.

s 34 of the by-law. It provides as follows:

> ***"Owner's and consumer's liability***
>
> *(1) The owner and the consumer shall be jointly and severally liable for compliance with any financial obligation, except as provided in section 34(2) or other requirement imposed upon them by these By-laws.*
>
> *(2) The liability for compliance with any financial obligation in respect of the consumption of electricity, shall be the sole responsibility of the consumer."*

[43] The effect of s 34(1) is that even if it is to be assumed that the trust as owner does not fall within the definition of *"consumer"* the trust as owner is nonetheless rendered jointly and severally liable with the tenant as consumer for any financial obligations imposed upon the tenant not falling within the ambit of s 34(2).

[44] Section 34(2) of the by-law would not avail the owner in the present context because it only excuses the owner from liability for compliance with a financial obligation *"in respect of the consumption of electricity"*. In this instance, the charge is in respect of the act of reinstalling the supply of electricity and related equipment. It is not in respect of the consumption of electricity.

[45] Having regard to the provisions of s 34(1), even if the tariff for reinstallation of supply following tampering provided for in item 5 of tariff H of the electricity supply by-laws applies only to the tenant as the person responsible for tampering with the meter,[5] the effect of s 34(1) is to render

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[5] There may be a basis for the argument that item 5 of tariff H of the electricity supply tariffs does not in itself impose liability on the owner. That is because it speaks of *reinstating a customer connection that has been removed due to tampering by the customer*". "Customer" (as distinct from "consumer" is nowhere defined in the tariff or the by-law. In this phrase it would seem to contemplate one and the same person. In the present context, that would be the tenant.

the trust as owner jointly and severally liable for that obligation.

[46] In light of my above finding, it is not necessary for me to consider the further arguments advanced on behalf of the municipality pertaining to s 49 of the Local Government Ordinance No. 17 of 1939 which also makes certain provision for joint and several liability by an owner and/or occupier for "basic charges for electricity".

[47] In the circumstances, even if the trust was entitled under the prayer for further and/or alternative relief to claim repayment of the amount of R2 052 by the municipality, I find that there is no basis for such a claim on the facts before me.

[48] I should add that, whilst I can appreciate the indignation that the applicants feel at this imposition of joint and several liability, the principle of imposing it has received the sanction of, amongst others, the Constitutional Court. That is so even in the context of joint and several liability for electricity and water consumption by an unlawful occupier of premises.[6]

[49] Thus in the majority judgment in *Mkontwana*, Yacoob J held as follows:

> *"There are allegations that tenants and those who hold over reconnect electricity and water illegally after the municipality has effected a disconnection consequent upon the failure by the occupier to pay consumption charges. The submission that it is arbitrary for the owner to bear the risk of non-payment in these circumstances must also be rejected. The relationship between the owner, the property and the consumption charge remains sufficiently close to expect the owner to take the risk. The owner would have chosen the tenant and would*

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[6] *Mkontwana v Nelson Mandela Metropolitan Municipality & Another; Bossett & Others v Buffalo City Municipality & Others; Transfer Rights Action Campaign & Others v MEC, Local Government & Housing, Gauteng, & Others, (KwaZulu-Natal Law Society and Msunduzi Municipality as Amicii Curiae)* 2005 (1) SA 530 (CC) at paras 40, 42, 54 and 109.

> *receive rental where the occupier concerned is a tenant or would be entitled to damages for holding over from an unlawful occupier. The connection is sufficiently strong."*

[50] That case concerned s 118(1) of the Local Government: Municipal Systems Act which has the effect, in the circumstances of a transfer of a property, of imposing liability on the owner seeking to effect registration of transfer of his or her property, for municipal service charges, including the electricity charges incurred by a tenant and left unpaid, during the preceding two years.[7] There too the imposition of joint and several liability was implied, rather than express, by simply prohibiting the registrar of deeds from registering transfer of the property before provision of a certificate from the municipality confirming payment. It did not say who was responsible for making the payment, but the Constitutional Court accepted that it had the effect of imposing liability on the owner, even if the owner had not consumed the services.[8]

[51] I am accordingly of the view that even if the applicants were entitled to claim repayment of the R2052 under the further or alternative relief clause in the notice of motion, they would not be entitled to such repayment.

Costs

[52] The municipality sought to characterise the applicants' conduct in bringing this application as being vexatious and justifying a punitive costs award. I disagree. As appears from the above analysis, the applicable law is

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[7] See also *Real People v City of Johannesburg* 2011 (5) SA 8 (GSJ). There joint and several liability for electricity consumption charges was based on section 49 of the Local Government Ordinance.

[8] At para 33.

anything but simple. The imposition of joint and several liability for financial obligations arising from a tenant's misconduct would justifiably be a matter of concern for property owners. In the circumstances, the applicants are entitled to seek clarity from the courts.

[53] However, this cannot be characterised as a case of a private party seeking to assert a constitutional right as contemplated in *Biowatch Trust v Registrar, Genetic Resources and Others*.[9] The costs must therefore follow the result on the ordinary party and party scale.

[54] I accordingly make the following order:

(1) The application is dismissed.

(2) The applicants are ordered to pay the respondent's costs.

A DODSON
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA

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Date of hearing : 5 May 2015

Date of judgment: 22 May 2015

[9] 2009 (6) 232 (CC) at paras [21] – [25].