


IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

SIGNATURE		DATE
		27/10/2016
CASE NO		
19347/2014		
(3) REVISED		
(2) OF INTEREST TO OTHER JUDGES: YES/NO		
(1) REPORTABLE: YES/NO		
DELETE WHICHEVER IS NOT APPLICABLE		

19347/2014

28/10/2016

In the matter between

BAREND JOHANNES VAN DER MERWE

APPLICANT

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

RESPONDENT

JUDGMENT

LI VORSTER, AJ:

1. This case concerns the question whether an owner of property within a municipal area is liable to the Local Authority in question for the payment of electricity charges incurred by a tenant of its property.
2. The relevant facts are simple and can be summarized as follows:-

- 2.1 The Plaintiff is and was at all relevant times the owner of two properties situated within the area of jurisdiction of the Defendant as Local Authority: Erf 99 Bellview situated at 521 Moreleta Street, Bellview, Pretoria and Erf 98 Bellview situated at 266 Robert Street, Bellview, Pretoria.
- 2.2 Both these erven are zoned industrial and were let by the Plaintiff to a company named Classique Sales (Pty) Ltd. The company entered into an agreement with the Defendant for the supply of electricity by the Defendant to the company in relation to the aforesaid two properties.
- 2.3 During the period 1st of March 2010 and 30 October 2013, the aforesaid company incurred debts for electricity supply. In the course of time the company got into arrears with its payment of electricity charges and has since become liquidated.
- 2.4 The Defendant contends that the Plaintiff as owner of the aforesaid properties is liable for payment of the electrical charges of the aforesaid company incurred whilst it was the tenant of the aforesaid two properties. The Plaintiff disputed its liability to the Defendant as alleged by the Defendant and approached this Court for a declaratory order. The declaratory order is an order declaring that the Plaintiff as owner of the said properties is not liable for the electrical charges of its

erstwhile tenant. The Defendant filed a counterclaim in which the Defendant claims from the Plaintiff an amount of R2 104 803,03 and interest and costs, being the alleged liability of the Plaintiff in respect of the electricity charges which had become payable by the aforesaid company as the tenant of the Plaintiff in respect of the aforesaid two properties.

3. As appears from what I have already said, the crucial legal question in this case is whether, and to what extent, an owner of property within a municipal area is liable for electrical charges contracted for by its tenant in the event of such charges not being paid by the tenant.
4. In essence the Defendant alleges in its contention that the Plaintiff as lessor, is liable for the electrical charges of its tenant, the Defendant implicitly relies on joint and several liability of the Plaintiff and its lessee in respect of payment of the electricity charges. There can be no other legal ground on which the Plaintiff as lessor can be held liable for the electricity charges of its tenant which is a completely separate legal persona than the Plaintiff. At common law, joint and several liability for payment of debts presupposes a pre-existing underlying liability of all parties in respect of that debt - for example, as surety and co-principal debtor to the principal debtor which is a voluntarily assumed *in solidum* liability, by agreement.

Vide: Ekurhuleni Metropolitan Municipality v Anzotrax (Pty) Ltd
(2016) ZAGPJHC 178, a decision of the Full Bench of the
Gauteng Local Division, Johannesburg.

In casu, there is no allegation of an agreed contractual relationship between the Plaintiff, the tenant and the Defendant in terms of which the Plaintiff assumed liability for the debts of its lessee. What remains to be considered is the question whether there is any statutory authority for the proposition that the Plaintiff is liable for the debts of its lessee in respect of electricity charges. The Defendant relies on the City of Tshwane Metropolitan Municipality Standard Electricity Supply Bylaws published in terms of Local Authority Notice No 1076 published in the Extraordinary Provincial Gazette dated 7th of August 2013. The concluding paragraph of that Local Authority notice provides that the bylaws and policy will come into operation on date of promulgation thereof. In Section 1 thereof the concept of consumer is defined as follows:

"Consumer' means the occupier of any premises in which the municipality has agreed to supply or is actually supplying electricity, or, if there is no occupier, the person who has entered into a current valid agreement with the municipality for the supply of electricity to the premises, or if such a person does not exist or cannot be traced or has absconded or for whatever reason is not able to pay, the owner of the premises."

5. Municipal bylaws are subordinate legislation which, for their validity, depends on the question whether they fall within or outside the limits of the empowering legislation which provides for their formulation and promulgation. That much, with respect, is trite law. The tail cannot wag the dog.
6. Section 118(3) of the Municipal Systems Act (Act No 32 of 2000) provides as follows:-

"(3) An amount due for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties is a charge upon the property in connection with which the amount is owing and enjoys preference over any mortgage bond registered against the property."

Section 118(3) of the Municipal Systems Act has been interpreted to mean nothing more than the imposition of a burden on the property which affords security to the Local Authority in the event of insolvency or a sale in execution of the property concerned.

Vide: City of Tshwane Metropolitan Municipality v Thomas Mathabathe & another (502/12) (2013) ZASCA 60.

Perregrine Joseph Mitchell v City of Tshwane Metropolitan Municipal Authority, case no. 50816/14 SCA at 23, where the

following was said:

"In the absence of an agreement to that effect, the (Respondent) has not become a co-debtor with regard to the principal debt. But, as has been shown above, the sale in execution and subsequent transfer of the property into the name of the Respondent did not extinguish the hypothec created by section 118(3) of the Act in favour of the Appellant."

7. The definition of "consumer" in the electricity bylaws quoted above saddles the owner of the land in question with liability *in solidum* for payment of the charges and fees in respect of electricity consumption which such occupiers or lessees have contracted with the Local Authority to pay. That is clearly a deviation of the common law which I have referred to above. I find no authority in Section 162 of the Constitution or the provisions of the Municipal Systems Act authorising bylaws rendering the owner of property liable *in solidum* for the electrical consumption fees of occupiers or lessees or whoever else on the property. I am consequently driven to the conclusion that the definition of "occupier" in the electrical bylaws is *ultra vires* the empowering sections of any legislation in terms of which it was formulated or promulgated, to the extent that an owner of land is liable for the electricity charges of anyone else but the owner itself. Consequently, in my view, the Defendant did not make out a case that the Plaintiff as owner of the properties is liable for the electricity charges of the tenants. It also follows that I am of

the view that the Plaintiff is entitled to the declaratory order it seeks.

8. There is in my view another obstacle in the way of the Defendant in respect of its counterclaim. It is common cause that the lessees incurred debts in respect of electrical charges between the period 1st of March 2010 and 30th of October 2013. The standard electricity supply bylaws of the Defendant were promulgated on the 7th of August 2013. They came into operation on that date which is clear from the last paragraph of the Local Authority Notice No 227/1076 promulgated on the 7th of August 2013. Section 13(b) of the Municipal Structures Act provides that a bylaw passed by a Municipal Council takes effect when published, unless a future date is determined by or in terms of the bylaw. In the instant case the bylaws took effect on the 7th of August 2013, being the date of promulgation. It follows that, prior to 7th of August 2013, the bylaws had no effect on the Plaintiff. Consequently all debts incurred by the tenants prior to 7th of August 2013 could not, in terms of the bylaws, be debts for which the Plaintiff as owner became liable. There was no evidence indicating what portion of the amount claimed by the Defendant in the counterclaim is debts incurred before and after 7th of August 2013. On this ground also, the Defendant cannot succeed with its counterclaim.
9. In the premises of the foregoing, it follows that I am of the view that the Plaintiff succeeded in proving its entitlement to the declaratory order it seeks and that the Defendant failed to prove any entitlement in terms of its counterclaim. I make the following order:

- "a) The Plaintiff is declared to be not liable for the debt incurred by Classique Sales CC to the Defendant in respect of electricity charges for electricity consumed up and until 30th of October 2013;**
- b) The Defendant's counterclaim is dismissed;**
- c) The Defendant is ordered to pay the Plaintiff's costs of suit."**



L I VORSTER, AJ
27 October 2016