treasury
Department
Treasury
PROVINCE OF KWAZULU-NATAL

Treasury House
145 Chief Albert Luthuli Road
Pietermaritzburg 3201
P O Box 3613
Pietermaritzburg 3200
Tel: +27 (0) 33 897 4200
Fax: +27 (0) 33 342 4662
Internet: www.kzntreasury.gov.za

KZN PROVINCIAL TREASURY

Our Ref: 11/6/13/6
Enquiries: Mr M. Ndumo
Date: 17 March 2017

TO: MUNICIPAL MANAGERS
CHIEF FINANCIAL OFFICERS
KWAZULU-NATAL MUNICIPALITIES
KWAZULU-NATAL MUNICIPAL ENTITIES

PROVINCIAL TREASURY CIRCULAR PT/MF 8 OF 2016/17

COURT JUDGMENT IN THE MATTER BETWEEN ARGENT INDUSTRIAL INVESTMENT (PTY) LIMITED AND EKURHULENI METROPOLITAN MUNICIPALITY

Municipalities and municipal entities are referred to a recent ruling of the High Court against a metropolitan municipality where a consumer was billed based on average consumption for almost six years.

The matter was referred to the High Court.

In terms of Section 62(1)(c)(i) of the Municipal Finance Management Act, Act No. 56 of 2003, *"The accounting officer of a municipality is responsible for managing the financial administration of the municipality, and must for this purpose take all reasonable steps to ensure that the municipality has and maintains effective, efficient and transparent systems of financial and risk management and internal control."*

In essence, municipalities must cease and refrain from charging customers based on estimates but must conduct proper meter readings and charge customers for actual consumption.

Therefore, the onus rests on the Accounting Officer to ensure that the municipality and municipal entity complies with all relevant legislations.

Kindly find attached, a copy of the High Court judgment, as Annexure A, reflecting details on this matter.

Yours faithfully

Mr F. Cassimjee
Chief Director: Municipal Finance

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION JOHANNESBURG

CASE NO: 17808/2016
Reportable: No
Of interest to other judges: No
Revised.

In the matter between:

ARGENT INDUSTRIAL INVESTMENT (PTY) LTD Applicant

and

EKURHULENIMETROPOLITAN MUNICIPALITY Respondent

JUDGMENT

YACOOB.AJ:

[1] The applicant in this matter uses water supplied by the respondent. It was presented with an invoice in March 2015, for consumption based on the reading of a meter which had not been read since September 2009. It seeks relief that with have the effect that it does not pay for consumption that occurred more than three years before March 2015, on the basis that the obligation to pay for that consumption has prescribed, and had already prescribed by the time the invoice was presented. It also seeks to prevent the respondent from terminating its water and electricity services for the reason that the applicant has not paid those charges which, it alleges, have prescribed. Finally, the applicant seeks an order directing how its liability for the three years before March 2015 should be determined, taking into account that no

meter reading was taken between September 2009 and March 2015.

[2] The relevant facts in this matter are common cause. Between September 2009 and March 2015, the applicant was charged, and paid, for estimated water consumption. The meter installed at the applicant's premises was not read between 21 September 2009 and 13 March 2015. After the meter was read on 13 March 2015, the applicant was billed R1 152 666.98 for the difference between its actual usage and the estimated consumption for which it had already paid, during the period September 2009 and March 2015, almost six years. The applicant then raised a dispute regarding the charges for usage that had ocurred more than 3 years before that date.

[3] The applicant does not dispute that it has consumed the water reflected by the meter reading in March 2015. Its only contention is that its obligation to pay for any consumption more than three years before that date had already prescribed by the time the respondent presented the applicant with its invoice.

[4] The respondent does not proffer any reason, on the papers, why no meter reading was taken between September 2009 and March 2015.

[5] The respondent argues, essentially, that the obligation has not prescribed, because prescription on that obligation did not start running until the applicant was billed for that consumption, on 24 March 2015. It submits also that the fact that the applicant regularly paid monthly amounts for its estimated consumption amounts to an acknowledgment of liability which interrupts prescription.

[6] The respondent rests its argument on its constitutional obligations,[1] read with the Local Government: Municipal Systems Act. 32 of 2000 ("the Systems Act") and the Ekurhuleni Metropolitan Municipality Credit Control and Debt Collection Policy 2015/16 ("the Policy"), on the basis that the regulatory framework created by these instruments entitles the respondent to invoice consumers whenever it it convenient to the respondent, and the consumer is never released from its obligation to pay

[1] In terms of Chapter 7 of the Constitution of the Republic of South Africa, 1996, in particular sections 151-156

when the respondent has not issued an invoice or otherwise informed the consumer of the charges which it has incurred.

[7] The basis on which it was argued that monthly payments constitute an acknowledgment of debt is Clause 5.1(d) of the Policy, which states that an amount due and payable by a consumer is a consolidated debt, and that any payment into the account will be allocated to that consolidated debt as determined by the respondent.

[8] Mr Nxumalo, who appeared for the respondent, also submitted that it was appropriate for the Court to show a measure of deference, to permit the respondent to carry out its functions and exercise its powers without inerference. He conceded that, if the respondent's behaviour was unreasonable, it would be open to the Court to intervene, but stopped short of conceding that the respondent's behaviour in this case was unreasonable. The respondent, he submitted, behaved exactly as it is entitled to do.

[9] Mr Nxumalo acknowledged that it is the respondent's duty to take reasonable steps to "ensure appropriate collection of its debt".[2] However, he contended that the obligation only arose after the debt was invoiced.

[10] The Prescription Act, 68 of 1969 ("the Prescription Act") provides that:

10.1. a debt is extinguished after the lapse of three years;[3]

10.2. prescription starts to run as soon as the debt is due;[4]

10.3. prescription does not commence to run until the creditor is aware of the existence of the debt, but only if the debtor has wilfully prevented the creditor from becoming aware of the debt;[5]

---

thereof, read with schedules 4 and 5.

[2] Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, local Government and Housing, Gauteng, and Others (KwaZulu-Natal law Society and Msunduzi Municipality as amici curiae) 2005 (1) SA 530 (CC) at, inter alia, [62]

[3] Section 10(1) read with ll(d)

[4] Section 12(1)

[5] Section 12(2)

10.4. a debt is only due when the creditor has knowledge of the identity of the debtor and the facts giving rise to the debt, but if a creditor could have acquired that knowledge by exercising reasonable care, the creditor is deemed to have that knowledge,[6] and

10.5. the running of prescription is interrupted by an acknowledgement of debt[7] or by the issue of process.[8]

[11] The respondent relies on section 12(3) of the Prescription Act for the contention that the debt only became due when the meter was read and the invoice issued, contending that it is only when the meter was read and the invoice issued that the respondent, the creditor, became aware of the facts giving rise to the debt.

[12] I disagree that the prescription could not start running until respondent had taken these steps. This would be inconsistent with the very reason why the law recognises the concept of prescription[9] It would also entitle the respondent to ignore its constitutional duties, which include debt collection, indefinitely. It is worth noting that the respondent's duty to take reasonable steps to collect what is due to it are for the benefit of both the respondent and the applicant.

[13] In any event, the respondent had knowledge of the relevant facts. At all times, the respondent was aware that it was supplying water to the applicant. It was aware of the applicant's identity. It was clear from the fact that the applicant was paying an estimate each month, if from nothing else, that the respondent had not read the meter on the applicant's property. These are the facts giving rise to the debt. The only "fact" of which the respondent did not have knowledge was the exact consumption of the applicant, and this was knowledge within the respondent's reach, had it simply fulfilled its functions.

[14] Even if, as the respondent contends, it did not have the necessary knowledge of the facts giving rise to the debt, it is in my view clear in this particular case that the respondent could have acquired by exercising reasonable care, that is, by reading

---

[6] Section 12(3)
[7] Section 14(1)
[8] Section 15(1)

the meter or meters on the property and issuing an invoice ·for consumption within a period less that that which did in fact elapse.

[15] It is not the applicant's duty to read meters, determine what its consumption is, and be ready to pay for that consumption whenever the respondent gets around to asking for payment, whenever in the future that may be. The respondent has a duty to rea the meters and invoice for consumption, at its convenenience, but at reasonF1ble intervals.

[16] The applicant submitted that reasonable interval at which a meter should be read is every 6 months. There is no reason, in the circumstances of the relief sought in this case, for me to make a determination in that regard. All that is necessary for me to find in the applicant's favour, is a conclusion that a delay beyond three years is unreasonable. Since there are no facts pleaded which support a conclusion that the delay beyond three years was reasonable, I am able to conclude with no doubt that the respondent's failure to read the meter or meters and invoice the applicant for consumption for any period longer than three years was unreasonable, and amounts to the respondent not having exercised reasonable care to ascertain the applicant's indebtedness.

[17] In these circumstances, to the extent that the respondent did not have the required knowledge of the applicant's indebtedness for the period more than three years before the date of the invoice, it is deemed to have had that knowledge.

[18] As far as the respondent's contention that the applicant's regular payments for estimated consumption amount to an acknowledgment of debt goes, there is no merit in that contention. The respondent cannot rely on the applicant's fulfilment of its obligations to make up for its own failures.

[19] Had the respondent read the meter and informed the applicant of the indebtedness, the applicant's regular payments from that date without raising a dispute would have constituted acknowledgments of debt. However, a debtor cannot

---

[9] Saner, JS "Prescription" I n LAWSA Vol 212"d ed, para 104, and the authorities listed in footnote 2.

be considered to have acknowledged a debt of which it knows nothing, when either the details of the debt are particularly within the knowledge of the creditor, or only the creditor has the ability to quantify the debt, and does not do so.

[20] As far as quantifying the debt for the three years before 13 March 2015 is concerned, the applicant conceded that, since it does not dispute that it did in fact consume all the water indicated by the meter reading on 13 March 2015, there is no need to use meter readings after that date to reach an indication of what consumption was between 13 March 2012 and 13 March 2015. It would be appropriate instead to average the consumption out over the number of months between the two readings, that is, almost 66 months, and then to use that average to fix the applicant's indebtedness for 36 months.

[21] For the reasons above, I make the following order:

1. The respondent is to
    1.1 reverse all charges for water consumption added to Municipal account number 2604227860 ("the applicant's account") on the invoice dated 24 March 2015, as a result of the reading of the meter on 13 March 2015;
    1.2 reverse all interest and legal fees charged to the applicant's account in respect of the charges for water consumption added to the applicant's account on 24 March 2015;
    1.3 calculate the applicant's average monthly consumption over the period 21 September 2009 and 13 March 2015, using the meter reading reflected on the invoice of the applicant's account dated 24 March 2015, and charge the applicant an amount based on that average for the period 13 March 2012 to 13 March 2015, and
    1.4 send the applicant a full statement of account reflecting the reversals, calculations and charges dealt with in this order, and an invoice reflecting the amoun that is due and payable, within 14 days of this order.
2. The respondent is not entitled to claim any payment from the applicant in respect of the applicant's account for any period before 13 March 2012.

3. The respondent may not terminate, restrict, or threaten to terminate or restrict services on the basis of the applicant not having paid the amounts added to the applicant's account in the invoice of 24 March 2015.
4. The respondent is to pay the costs of this application.

S YACOOB
Acting Judge of the South Gauteng
High Court, Johannesburg

Date of Hearing: 06 December 2016
Date of Judgement: 13th February 2017

APPEARANCES

APPLICANT:	M Oppenheimer Instructed by Schindlers Attorneys
RESPONDENT:	APS Nxumalo and PM Mahlatsi Instructed by Msikinya Attorneys & Associates