THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 603/2010

In the matter between:

BODY CORPORATE CROFTDENE MALL **APPELLANT**

and

ETHEKWINI MUNICIPALITY **RESPONDENT**

Neutral citation: *Body Corporate Croftdene Mall v Ethekwini Municipality* (603/2010) [2011] ZASCA 188 (10 October 2011)

Coram: Cloete**,** Heher**,** Maya, Cachalia JJA and Plasket AJA

Heard: **8 September 2011**
Delivered: **10 October 2011**

Summary: Local authority – s 102 of the Local Government: Municipal Systems Act 32 of 2000 – whether a local authority may disconnect a ratepayer's water and electricity services because of an outstanding debt for municipal property rates.

ORDER

On appeal from: KwaZulu-Natal High Court, Durban (Hughes-Madondo AJ sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

MAYA JA (CLOETE, HEHER, CACHALIA JJA and PLASKET AJA concurring):

[1] The crisp issue in this appeal is whether s 102 of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act) empowers a local authority to disconnect a ratepayer's water and electricity supply because of an outstanding debt for municipal rates. The appeal is against a decision of the KwaZulu-Natal High Court, Durban (Hughes-Madondo AJ) in which the court dismissed the appellant's application for an interdict barring the respondent from disconnecting water and electricity services to a property managed by the appellant. The appeal is brought with leave granted by the court below.

[2] Most of the relevant background facts may be gleaned from the respondent's answering affidavit and its annexures as the appellant's founding affidavits were cursory at best. The appellant is the Body Corporate of Croftdene Mall (the property), a shopping complex situated on immovable property within the respondent's area of jurisdiction. The property was developed in 1994 by Croftas Holdings (Pty) Ltd which co-owned it with a subsidiary close corporation, Croftlark CC. It was

initially operated as a shareblock scheme but was converted, in the same year (the precise date is not entirely clear on the papers), into a sectional title scheme in terms of the provisions of the Sectional Titles Act 95 of 1986. The appellant would, pursuant to s 36(1) of this Act, have come into being at the time of the conversion.[1]

[3] In 1999, the Croftas entities went into liquidation and their sectional title units in the property were sold to third parties during the liquidation process and thereafter. At that stage the respondent had two accounts in its books in respect of the property, one in the name of the appellant and the other in that of the Croftas company. However, even during the liquidation process, the body corporate received statements for both accounts from the respondent, periodically engaged the latter with regard to such accounts and made some payments.

[4] In October 2006, the respondent consolidated the appellant's rates account with its water, electricity and refuse removal accounts. There does not seem to have been any objection from the appellant to this step as the first recorded meeting between the parties to discuss the appellant's account, at which no complaint was raised about the consolidation, took place only on 16 July 2008. The appellant was represented by Mr Samasivan Pillay, its chairman, and its other members, including an attorney, Mr Zain Fakrooden, who ran a legal practice at the centre and also owned two units in the appellant. The respondent was represented by Mr Shawn Powdrell and Mr Andre Grundler of AG Body Corporate Solutions CC, a partner of Voyager Property Management (Pty) Ltd

[1] Section 36(1) of the Sectional Titles Act 95 of 1986 provides that '[w]ith effect from the date on which any person other than the developer becomes an owner of a unit in a [sectional title] scheme, there shall be deemed to be established for that scheme a body corporate of which the developer and such person are members, and every person who thereafter becomes owner of a unit in that scheme shall be a member of that body corporate.'

which was mandated by the respondent to deal with and collect outstanding municipal debts.

[5] The proceedings at that meeting are recorded in Grundler's email to Powdrell written after the meeting, on 18 July 2008, which reads:

'I refer to our joint meeting with owners/trustees of Croftdene Mall held on 16 July 2008 at the building. In summary we record the following pertaining to this meeting:

1. An updated arrears analysis will be prepared by Council for the body corporate;
2. Once the body corporate receives this arrears analysis, they will submit their requests to Council, in writing, for Council consideration;
3. The S46 application which had already been submitted to [the Council's] attorneys will be pended until the body corporate's submission has been concluded;
4. Council can expect a submission in terms of which the body corporate requests a write-off of arrears, their indication being down to R1 million compared to the total due of some R2 million;
5. The body corporate has indicated their concern that the interest and or penalties on their arrears may exceed the capital amount, and that the IN DUPLUM rule may apply. We propose that this be considered by Council;
6. The body corporate currently has no cash and levy arrears of only some R60 000. Clearly NO provision has been made for any amounts owing to Council;
7. The body corporate failed to respond to the letter of demand submitted to them on 22 April 2008, other than their recent approach to Council;
8. The meeting confirmed that the body corporate does not have historical accounting records or financial statements and that levy determinations have been made in terms of a crisis management basis.

In our opinion there are no grounds, other than possibly the in duplum consideration, to write off this body corporate's arrears. This is a commercial venture, and the meeting itself indicated that these units were purchased for nominal amounts of between R1 000 and R2 000 per square meter. This body corporate has failed to follow procedures prescribed by the Sectional Titles Act and further in the meeting with them made it clear that their intention is not to

recover the arrears from owners on a participation quota basis, but on some determination biased against the majority owner. This will only exacerbate future problems associated with levy collections and therefore recovery of the arrears due to Council.'

[6] Pillay's response to the respondent's updated arrears analysis report (a full and detailed breakdown of rates, interest and penalties thereon levied, commencing with a nil balance in the 1996/1997 year and showing an outstanding amount of R2 271 336,49 as at 30 June 2008) sent to him by Grundler on 21 July 2008, came after quite a few prompts from the latter and several promises by Pillay to revert with representations. This was at a meeting held on 4 September 2008. A write-off of the outstanding balance was sought by Pillay from the respondent. Two documents were submitted to the respondent's agents in support of this request. One [2] explained how the arrears arose and generally attributed this to inexperience on the appellant's part. The other document, a direct response to Grundler's analysis, was titled 'PROBLEMS WITH RECONCILIATION OF AMOUNT OWING BY BODY CORPORATE CROFTDENE MALL I.R.O. RATES'. The relevant part reads:

'...

Total rates bill as per schedule excluding penalties and costs for period:

1996/97 to 2005 = R 956, 999

to 2006 = R 165,000

to 2007 = R 204,000

R 1,329,999

Payments: Capensis[3] up to 04/2007 = R912,000

Body Corp = [about] R 245,000

R 1,157,000

Balance outstanding on rates portion as at 30/04/08 = R172,999

[2] Quoted below at para 29.

[3] An owner of seven units in the sectional title scheme.

Rest of debt [about] R1,825,000 is penalty/interest for the period.'

[7] Thereafter, the respondent duly considered the appellant's submissions. On 13 October 2008, the respondent's answer rejecting the appellant's settlement offer and demanding payment of the full debt owing, was sent to the appellant by email. This missive elicited no response from the appellant for several months. On 30 March 2009, Grundler sent another email to Pillay and Fakrooden registering his concerns, inter alia, 'that the debt owing to the municipality continues to escalate without any apparent attempt by the body corporate either to pay the debt or to enter into a payment arrangement acceptable to the municipality'. Grundler advised that the matter had been referred to the respondent's attorneys for the appointment of an administrator in terms of s 46 of the Sectional Titles Act and attached a further analysis and comments on the debt owing.

[8] Once more, the appellant ignored this communication. The respondent continued to issue it with statements of account and it sporadically made payments which were insufficient to meet even the charges for electricity, water and refuse removal services. In October 2009, a councillor, Mr V. Reddy, approached the respondent's City Treasurer, Mr Krish Kumar, on the appellant's behalf. He requested, by email, an urgent update on the appellant's account stating that Pillay had telephoned him and indicated that 'they have R1 million which they can pay now on a bill that's about 2. something million'.

[9] The respondent was willing to consider the new offer. Towards that end, a meeting was arranged with Pillay with a view to accepting the R1 million offered and demanding payment of the rest of the debt, standing

at R2,7 million, over a period of six months. However, it became clear at the meeting that the appellant did not have R1 million and further had no intention of imposing appropriate levies on its members to meet the outstanding debt. Instead, Pillay again requested a write-off of the debt, which he did not dispute, arguing merely that the interest charged thereon may have exceeded the amount claimed as capital. He requested a summary of the debt and a division of the outstanding amount among the individual owners of the sectional title units.

[10] On 9 November 2009, the respondent sent Pillay a summary of the total capital debt in the sum of R1 571 903, 03 and interest and penalties of R1 129 458 as requested. The rest of the requests, including the one for a write-off, were turned down. In mid-October 2009, the property's electricity supply had been cut off and sometime during November its water supply was disconnected. On 1 December 2009, Pillay called at the respondent's offices and requested it to write off the debt 'out of sympathy for the [appellant] and its members'. This plea was refused. Two days later the appellant's attorneys addressed a letter to the respondent making certain offers and making some vague reference, for the first time, to a dispute. On 11 December 2009, the appellant launched the present proceedings on an urgent basis. At that stage, the scheme comprised 37 sectional title holders and 35 individual business outlets.

[11] In the court below, as here, the appellant contended mainly that the respondent was barred from disconnecting the electricity and water services to the property because of an alleged dispute between the parties which the appellant claimed fell within the ambit of s 102(2) of the Systems Act. Among various contentions, it disputed the respondent's power to consolidate its municipal accounts and to allocate the payments

made towards its water and electricity charges to the 'undifferentiated consolidated historical debt'. It argued also that the respondent had contravened the *in duplum* rule by charging interest and penalties which exceeded the capital amount claimed. (An allegation in the founding affidavit in challenge to the constitutionality of the provisions of s 102 in so far as it allows for the interpretation that water and electricity, which are essential services, can be disconnected if rates are allegedly owing, was not pursued.)

[12] Section 102 of the Systems Act provides:

'**Accounts**

(1) A municipality may–

(a) consolidate any separate accounts of persons liable for payments to the municipality;

(b) credit a payment by such person against any account of that person; and

(c) implement any of the debt collection and credit control measures provided for in this Chapter in relation to any arrears on any of the accounts of such a person.

(2) Subsection (1) does not apply where there is a dispute between the municipality and a person referred to in that subsection concerning any specific amount claimed by the municipality from that person.'

[13] The core findings made by the court below were that: (a) no facts were alleged in the appellant's papers to support its reliance on the *in duplum* rule; (b) although a dispute of the nature contemplated in s 102(2) of the Systems Act existed between the parties, it arose only after the appellant's accounts had been consolidated, which disentitled it from relying on those provisions; and (c) s 68 of the Durban Extended Powers

Ordinance 18 of 1976[4] (the Ordinance) empowered the respondent to consolidate the appellant's accounts and disconnect the property's water and electricity supply as it had done.

[14] The relevant statutory framework is extensive but common cause. Section 229 of the Constitution[5] vests a local authority with the authority to impose 'rates on property and surcharges on fees for services provided by or on behalf of the municipality'. This power is regulated by national legislation in the form of the Local Government: Municipal Property Rates Act 6 of 2004 (the Municipal Property Rates Act) s 2(1) of which empowers 'a metropolitan or local municipality ... [to] levy a rate on property in its area' and s 3(1) of which obliges 'a council of a municipality… [to] adopt a policy consistent with [the] Act on the levying of rates on rateable property in the municipality'.[6]

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[4] The section reads:

'**68. Consolidation of accounts** – The Council may include in a single account different classes of charges or amounts due to it whether or not such charges or amounts relate to more than one fund or account and may –

(a) render to the person concerned a statement of account in respect of all or any number of the said charges and charge debtor balances to any one fund or account;
(b) deem any deposits payable to the Council in respect of or as security for charges to be levied by or amount payable to the Council, to be a consolidated deposit;
(c) accept a single consolidated deposit in lieu of the separate deposits payable in respect of charges affecting two or more funds;
(d) utilise such consolidated deposits as security for any or all of the charges and amounts included in the said statement of account;
(e) credit the whole or any portion of all or any of the said deposits to any fund or account to which outstanding debtor balances relating to such different funds or accounts are charged;
(f) debit such fund or account temporarily with any interest payable on such deposits;
(g) make reasonable apportionments before the books for the financial year are closed between such fund or account and the different funds or accounts to which such debtors balances, deposits and interest would have been respectively credited and debited but for the provisions of this subsection;
(h) in accordance with section 255 of Ordinance No. 25 of 1974, cut off the supply of electricity or water or both if any amount reflected in the said account is not paid as if the said amount related to the supply so cut off. '

[5] Constitution of the Republic of South Africa, 1996.

[6] Sections 2 and 3 of the Municipality Property Rates Act.

[15] Chapter 9 of the Systems Act provides for municipal credit control and debt collection. Section 96 deals with the 'debt collection responsibility of municipalities' and enjoins a municipality to (a) collect all money that is due and payable to it, subject to the Act and any other applicable legislation; and (b) for that purpose, to adopt, maintain and implement a credit control and debt collection policy which is consistent with its rates and tariff policies and complies with the provisions of the Act. Section 97 requires the credit control and debt collection policy to provide, inter alia, for credit control and debt collection procedures and mechanisms, interest on arrears where appropriate and the termination of services or the restriction of the provision of services where payments are in arrears. Section 98(1) obliges it to adopt by-laws to give effect to such policy, its implementation and enforcement. Section 102(1) empowers a municipality to consolidate any separate accounts of persons liable for payments to the municipality, to credit payment by such a person against any account of that person, and to implement any of the debt collection and credit control measures provided for in chapter 9 in relation to any arrears on any account of such a person.

[16] In compliance with these statutory requirements, the respondent, on 28 October 2009, compiled the Credit Control and Debt Collection Policy of 2009/2010 (the Policy) which 'is designed to provide for credit control and debt collection procedures and mechanisms … and to ensure that the Municipality's approach to debt recovery is sensitive, transparent and is equitably applied throughout the Municipality's geographic area'. The respondent further adopted by-laws, the eThekwini Municipality Credit Control and Debt Collection By-Laws (the By-Laws).[7] Both the

[7] Published in the Provincial Gazette of KwaZulu-Natal, Municipal Notices No. 47 on 11 December 2008.

Policy and the By-Laws were available in the proceedings below and it is in terms of the above provisions that the respondent claims to have acted when it consolidated the appellant's accounts and subsequently disconnected the property's water and electricity supply.

[17] The Policy defines a 'consolidated account' as 'a monthly account reflecting municipal service fees, charges, surcharges on fees, property rates and other municipal taxes, levies and duties'. By-Law 2.1 authorises a municipality, 'in accordance with its Credit Control and Debt Collection Policy, [to] include in a single account for a debtor different amounts due and owing to the Municipality by that debtor regardless of whether such charges relate to any one of the accounts or fund without prejudice to its right to render separate statements of account for any one or more than one item for which the same debtor is liable'.

[18] By-Law 5 provides:

'Termination of Services:-

5.1 The Municipality may, in accordance with its Credit Control and Debt Collection Policy, these bylaws and the principles of administrative justice, unilaterally cut off:-

(1) the supply of electricity to any premises used for residential purposes; or

(2) the supply of water, electricity or both to any premises used for any purposes other than residential purposes, where:-

(a) any amount on the consolidated bill or any other account for a liquid or liquidated amount remains outstanding for a period longer than that specified in the Credit Control and Debt Collection Policy of the Municipality'.

The Policy in turn provides that in the case of monthly accounts, the due date is 'the monthly date on which all customers' accounts become due and payable, which date shall be 21 days from date of the account.'

[19] A municipality's prerogative to consolidate a ratepayer's accounts where appropriate and unilaterally to cut off the supply of electricity or water services if the amount reflected in such account for rates is not paid, is abundantly clear from these provisions. The court below misdirected itself by relying on the provisions of both the Systems Act and the Ordinance in its reasoning. There is no conflict between the two statutory regimes but the provisions of the Systems Act with regard to a municipality's credit control and debt collection measures are nevertheless self-sufficient. It was therefore unnecessary to invoke those set out in s 68 of the Ordinance to supplement s 102 of the Systems Act. And as its counsel pointed out during argument before us, the respondent did not rely on them in any event and defended the case on the sole basis of the Systems Act.

[20] Section 102(1) of the Systems Act presents no controversy. The question for determination is whether the respondent was entitled in the circumstances of this case, to terminate the services to the property in order to enforce payment of arrear rates in view of the provisions of s 102(2). The provisions of this section exclude the application of subsec (1) 'where there is a dispute between the municipality and a person referred to in that subsection concerning any specific amount claimed by the municipality from that person'. Clause 22 of the Policy makes provision for dispute resolution. Clause 22.1 thereof requires a customer who disputes a municipal account to submit it in writing to the Chief Financial Officer stating the reasons therefor and any relevant facts, information or representation which the Chief Financial Officer should consider to resolve it. But in terms of clause 22.3, the submission of a dispute 'shall not stop or defer the continuation of any legal procedure

already instituted for the recovery of arrear payment relating to such dispute'.

[21] Neither the Systems Act nor the Policy defines the term 'dispute'. Some of the definitions ascribed to it include 'controversy, disagreement, difference of opinion' etc.[8] This court had occasion to interpret the word in *Frank R Thorold (Pty) Ltd v Estate Late Beit*[9] and said that a mere claim by one party that something is or ought to have been the position does not amount to a dispute: there must exist two or more parties who are in controversy with each other in the sense that they are advancing irreconcilable contentions.

[22] It is, in my view, of importance that subsec 102(2) of the Systems Act requires that the dispute must relate to a 'specific amount' claimed by the municipality. Quite obviously, its objective must be to prevent a ratepayer from delaying payment of an account by raising a dispute in general terms. The ratepayer is required to furnish facts that would adequately enable the municipality to ascertain or identify the disputed item or items and the basis for the ratepayer's objection thereto. If an item is properly identified and a dispute properly raised, debt collection and credit control measures could not be implemented in regard to that item because of the provisions of the subsection. But the measures could be implemented in regard to the balance in arrears; and they could be implemented in respect of the entire amount if an item is not properly identified and a dispute in relation thereto is not properly raised.

[8] The Shorter Oxford English Dictionary 3ed.
[9] *Frank R Thorold (Pty) Ltd v Estate Late Beit* 1996 (4) SA 705 (A) at 708I-709A.

[23] Whether a dispute has been properly raised must be a factual enquiry requiring determination on a case-by-case basis. It is clear from clause 22.3 of the Policy referred to above that the dispute must be raised before the municipality has implemented the enforcement measures at its disposal.

[24] It was not in dispute that no part of the amounts in issue are payable by any of the appellant's members as they do not relate to rates levied on individual title holders after the middle of 2008. This is so because from 1 July 2008, with aid of the provisions of s 10 read with s 92 of the Municipality Property Rates Act,[10] the respondent allocated rates to individual sectional title units and not on the body corporate.

[25] Further undisputed was the fact that a consequence of the conversion of the share block scheme to a sectional title scheme was that no indebtedness for rates on the part of the body corporate was carried over because it is standard conveyancing procedure and the respondent's fixed policy to recover any outstanding rates up to the date of transfer when a property is transferred from one party to another including in the case of conversions of share block to sectional title schemes. Thus the appellant started with a clean slate and all rates outstanding were accumulated during its watch.

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[10] Section 10 of the Municipality Property Rates Act governs the levying of rates on property in sectional title schemes as well and provides:
'(1) A rate on property which is subject to a sectional title scheme must be levied on the individual sectional title units in the scheme and not on the property as a whole.
(2) Subsection (1) must be read subject to section 92.'
Section 92 deals with the liability of bodies corporate of sectional title schemes and reads:
'(1) Section 10 does not apply in respect of rates levied against a valuation roll or supplementary valuation roll prepared before the effective date of the first valuation roll prepared in terms of this Act.
(2) Section 25 does not affect the liability of a body corporate of a sectional title scheme to a municipality, nor of the owner of a sectional title unit to the body corporate, for property rates levied against a valuation roll or supplementary valuation roll prepared before the effective date of the first valuation roll prepared in terms of this Act.'

[26] The detailed exposition of the background facts set out above establishes beyond doubt that the appellant, over a long period, did not challenge the debt reconciliation relating to its rates arrears furnished to it by the respondent or deny its liability for such arrears. In all its communications with the respondent's agents, even after the property's services had been terminated, it merely sought to have the arrears written off and no more. In fact, Pillay states in the founding affidavit that 'the [appellant] has always acknowledged that some payment is due to the [respondent]'. His further recordal of an outstanding balance on the rates portion in the sum of R172 999 in August 2008, which was not paid, puts the appellant's indebtedness for rates to the respondent beyond any doubt.

[27] I agree with the finding of the court below that the appellant cannot rely on the *in duplum* rule. There was no attempt in its papers to show that interest overtook the capital amount owing at any stage. The rule was not relied upon at all in the founding affidavits. All that appears from the record (and that only reflected in an annexure to the respondent's answering affidavit) is that breach of the rule was raised only as a possibility during the 2008 negotiations for a write-off of the arrears.

[28] The only discernible complaint in the appellant's founding affidavits is that its account had been impermissibly consolidated with that of the Croftas entities which no longer existed and for which it could not be held liable. But even this complaint is misguided. The first difficulty is that the appellant did not prove this allegation in its papers as it made no attempt to identify the portion of the debt that it alleged had been incurred by the Croftas entities. Second, as stated above, until 30 June 2008, liability for payment of rates levied upon the property rested solely on it. The respondent had no legal relationship with the developer,

the liquidators or the individual sectional title holders and it behoved the appellant to collect the requisite funds from these parties and make the necessary payments itself to the respondent.

[29] The simple fact is that the appellant failed to carry out its legal obligation 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.[11] This view is confirmed in terms in the document referred to above which Pillay submitted to the respondent on 4 September 2008 as part of the appellant's representations in support for its plea for a write-off (yet another document surprisingly furnished to the court below not by its author, the appellant, but by the respondent) which reads:

'**RATES ISSUES – CROFTDENE MALL**

BACKGROUND TO PROBLEMS

…

The Centre was expanded and modernized [and] … [t]his was completed in 1989/90… All existing shareblock owners had committed themselves to purchasing their expanded premises and to take transfer on sectional title once the Sectional Title register was opened.

Then came February 1990 – the ANC was unbanned and Nelson Mandela was released. Rumours of impending disaster and a picture of doom and gloom was painted by certain political parties. This uncertainty resulted in most shareblock owners reneging on their commitments and not meeting their levy obligations. Even tenants did the same by not paying rental. The combination of all of the above led to the arrear rates, rentals and bond payments. As a result, the banks foreclosed and liquidated the company.

The situation did not improve with the new owners and the new inexperienced Body Corporate…

[11] Section 37 of the Sectional Titles Act 95 of 1986 obliges a body corporate, inter alia, to establish an administrative expenses fund for the payment of rates and taxes and other local authority 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.

Croftas Shareblock was liquidated in about October 2000 – cannot understand why the debt was not recovered from liquidators. Our view is that the entire debt between 96/97 to Oct. 2000 be written off.'

(Emphasis added.)

[30] There clearly exists no dispute between the parties as contemplated by s 102(2) of the Systems Act and the court below misdirected itself in this regard. The so-called 'dispute' belatedly relied on by the appellant is merely a delaying tactic contrived to avoid paying the respondent what is due to it. The requirements for the grant of a final interdict are trite. The appellant did not meet them. That is the end of its case and the appeal must therefore fail.

[31] In the result the following order issues:

The appeal is dismissed with costs, including the costs of two counsel.

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MML Maya

Judge of Appeal

APPEARANCES

For Appellant: KJ Kemp SC
Instructed by:
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For Respondents: CG Marnewick SC (with him V Voormolen)
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