IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2021/36955

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

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DATE SIGNATURE

In the matter between:

JAMES GARETH DOUGLAS	First Applicant
LYALL JONATHAN DOUGLAS	Second Applicant
and	
CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	First Respondent
CITY POWER JOHANNESBURG (SOC) LIMITED	Second Respondent
JOHANNESBURG WATER (SOC) LIMITED	Second Respondent

JUDGMENT

STRYDOM, J

Introduction

[1] This is an application brought by the Applicants, James Gareth Douglas and Lyall Jonathan (Applicants), to recover payments made to the First Respondent, City of Johannesburg Metropolitan Municipality (First Respondent) for property rates and municipal charges, including electricity, refuse, water, and ancillary charges on the applicants' municipal accounts. In essence, the application is for the recovery of amounts paid in error of law.

The Dispute

[2] The applicants were co-owners of the three erven which collectively made up the property that is: Erf 2221 Jeppestown Township, Erf 2224 Jeppestown Township, and Erf 2225 Jeppestown Township (the Property) between July 2014 and September 2020. The Municipality opened municipal account numbers: 552771443, 552771468, and 552771450 (Municipal accounts), in respect of each of the three erven collectively making up the Property.

[3] Erven 2224 and 2225 were incorrectly categorised as "vacant land" on the 2013 General Valuation Roll, which caused these erven to be provided with a value, whilst these erven were notarially tied to Erf 2221. Municipal charges were accordingly calculated using these valuations. However, this situation was corrected when the General Valuation Roll for 2018 was published. Some mistakes allegedly continued to be reflected on the Municipal Accounts until the applicants sold the Property in 2020.

[4] The applicants impugn the basis, correctness and validity of the property rates and municipal charges for electricity, refuse, water, and ancillary charges on their three Municipal Accounts in respect of the Property. They seek the recalculation of the amounts reflected in their municipal accounts and refunding of certain amounts paid.

[5] In terms of the Notice of Motion, relief is sought relating to the account numbers as set out below. In prayer 1 an order is sought against the first respondent to take measures to comply with their constitutional and statutory obligations, in relation to applicants' accounts within 30 days from this court's order.

a. On Account 552771443:

i. To reverse electricity overcharges amounting to R125,682,30 for the period January 2015 and September 2020 (prayer 1.1).

ii. To reverse duplicate property rates charges in the amount of R16,493.70, reflected in the Applicants' March 2016 municipal invoice (prayer 1.2).

iii. To reverse property rates overcharges in the amount of R19,137.47, as the market value of the three erven making up the Property was consolidated from 1 July 2018 up to and including September 2020 (prayer 1.3).

iv. To refund the Applicants rates clearance figures in the amount of R24,944.76, which amount has never been reimbursed despite the sale of the Property (prayer 1.4).

b. On Account 552771468:

i. To reverse all property rates charges billed on the Vacant Land tariff for the period 04 August 2014 until 13 July 2018, as the Property was developed and recalculate these charges for the period 04 August 2014 until 13 July 2018 taking into account the rebate of the first R200,000.00 of market value, and thereafter credit the Applicants' account in the amount of R30, 670.53 (prayer 1.5).

ii. To reverse all duplicate refuse charges for the period 04 August 2014 until 13 July 2018 in the amount of R6,218.69 as these charges were billed to account number 552771443 (prayer 1.6).

iii. To reverse all water availability and sewer availability charges for the period 4 August 2014 until 9 September 2020 in the amount of R36,923.71, as the Property was not vacant and there was a water meter connection. Furthermore, water consumption was being charged on account number 5527711443 (prayer 1.7).

iv. Interest accrued in relation to the incorrect charges on reversed property rates, reversed duplicate refuse charges, reversed water

availability and sewer availability charges in respect of number 552771468, as well final pre-termination notice charges in the amount of R3,772.46 and R426,90.00 respectively must be reversed. (Prayer 1.8).

v. A refund of a deposit amount of R1,937.52 (prayer 1.9).

c. On Account 552771450:

i. To reverse all property rates charges billed on the Vacant Land tariff for the period 4 August 2014 until 13 July 2018, as the Property was developed and recalculate these charges for the period 4 August 2014 until 13 July 2018 taking into account the rebate of the first R200,000.00 of market value, and thereafter credit the Applicants' account in the amount of R30,670.53 (prayer 1.10).

ii. To reverse all duplicate refuse charges for the period 4 August 2014 until 13 July 2018 in the amount of R6,218.69 as these charges were billed to account number 552771443 (prayer 1.11).

iii. To reverse all water availability and sewer availability charges for the period 04 August 2014 until 09 September 2020 in the amount of R36,923.71, as the Property was not vacant and there was a water meter connection. Furthermore, water consumption was being charged on account number 5527711443 (Prayer 1.12).

iv. Interest accrued in relation to the incorrect charges on reversed property rates, reversed duplicate refuse charges, reversed water availability and sewer availability charges as well final pre-termination notice charges in the amount of R3,772.46 and R42,690.00 respectively must be reversed. (Prayer 1.13).

v. A refund of a deposit amount of R1,937.52 (prayer 1.14).

[6] In prayer 2 of the Notice of Motion, the applicants pray for a statement of account to be sent to the applicants showing the adjustments with notations

such that the accuracy of the adjustments can be verified within 30 (thirty) days form the granting of the court order.

[7] In prayer 3 of the Notice of Motion the applicants pray for an order that the first respondent must not institute legal proceedings or send any notices in respect of any purported arrears on the three municipal accounts until this dispute has been resolved. This prayer has been abandoned as the applicants have sold the Property and this issue became moot.

[8] The applicants also seek a cost order on the scale as between attorney and own client.

[9] The respondents seek the dismissal of the application.

[10] The parties filed a joint practice note which sets out the background to this matter, including common cause facts and disputed issues, a chronology and other relevant information.

Common cause facts

[11] The three erven 2221, 2224 and 2225 were all registered under the names of the applicants for the period July 2014 to September 2020.

[12] The duplicate charge, as alleged in prayers 1.2, 1.6 and 1.11, and the property rates overcharges, as alleged in prayers 1.3, are based on the first respondent's treatments of the three erven (2221, 2224 and 2225) as separate properties for the purpose of levying rates and the imposition of refuse charges.

[13] The water availability, sewer availability charges, and property rates charges, as alleged in prayers 1.2, 1.3, 1.5, 1.6, 1.7 and 1.8, 1.10, 1.11 and 1.12 are further based on:

a. The first respondent's 2013 valuation roll recording Erf 2221 as being in the "Residential Category" with a value of R700 000.

b. The first respondent's 2013 valuation roll recording Erf 2224 as being in the "Vacant Category" with a value of R320 000.

c. The first respondent's 2013 valuation roll recording Erf 2225 as being in the "Vacant Category" with a value of R320 000.

[14] On 17 July 2017 the applicants were served with a notice of land use contravention for illegal use of Erf 2221, operating an "accommodation establishment".

[15] On 11 September 2017 the first respondent imposed a "illegal land use of property" tariff on Account No. 552771443 for Erf 2221.

[16] On 13 May 2021 the applicants' attorney submits to the first respondents Legal Department a "written complaint" in terms of section 16.2 of first respondent's Credit Control and Debt Collection Policy. Applicants lodged a section 16.1 query in terms of the same Policy. No feedback was received within a specified timeframe.

[17] On 23 July 2021 the applicants' attorney submits an appeal to the City Manager in terms of section 16.5 of City's Credit Control and Debt Collection Policy.

The Applicants' Contentions

[18] The applicants are not proceeding with the point *in limine* wherein the authority of the deponent to the first respondent's affidavit was challenged.

[19] The applicants were the owners of three properties that were notarially tied with three municipal accounts existing with the first respondent in relation to the properties.

[20] The fact that the properties were notarially tied was not properly reflected on the 2013 General Valuation Roll and arising from this, the applicants were incorrectly charged rates on all three properties as well as utilities usage on all three properties where same should have been bound to the principal property only and not the tied properties.

[21] Because the properties were tied, only one account should be utilised for the rates and utilities of all three properties as they are to be seen as a single "unit"

for consumption and rates in terms of municipal billing. The tied properties are further rated on the incorrect rate as they were considered vacant where the properties were in fact occupied and a water meter was present at the properties.

[22] This subsequently led to a duplication of billing as well as interest being charged on amounts that are not owing. The applicants submit that when the properties were purchased, they were already notarially tied and as such, this should have been reflected on the first respondents' General Valuation Roll in 2013. That the first respondents unilaterally amended the General Valuation Roll in 2018 to reflect this points to the fact that this was incorrect.

[23] Arising from this incorrect rating system, the applicants were charged incorrect rates on the accounts of the tied properties as well as increased utilities bills where they are because the properties were considered vacant when they were not. Further to this, the applicants are double billed as utilities charges are charged across all three accounts where only the main account should have reflected the bulk of the charges.

[24] As for the first respondent's contention that various of the claims have prescribed as they date back to 2014, the applicants contend that they are seeking reversals of these amounts on the municipal accounts and not reversals of payments and as such prescription does not apply.

[25] The mechanisms to remedy the rates issues were unavailable to the applicants as the relief sought is impossible under the proposed provision, alternatively the error was solely on the respondents' side where the applicants are now being penalized due to the incompetence of the first respondent.

[26] The issues of the double billing and ancillary charges are simple reversals and are not debts as the first respondent makes out, in that they do not fall into the definition of a debt and as such, prescription does not apply.

[27] As to the first respondent's capacity to institute penalty charges, the first respondents are first required to prosecute the applicants before such charges being levied, which the first respondent has failed to do.

The Respondents' Contentions

[28] The 2013 Valuation Roll, based on section 46 of Municipal Property Rates Act[1] (Rates Act), allocated values to each of the three erven, which were lawfully identified as separate "property" forming the subject of each of the municipal accounts. Accordingly, each of municipal account numbers in respect of each of the three erven attends to separate "property" in terms of the Rates Act.

[29] Prayers 1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 1.8, 1.10, 1.11, 1.12, and 1.13 are based wholly or partly, on entries in the first respondent's 2013 General Valuation Roll.

[30] The remedy provided for in the Rates Act and available to the applicants, was to challenge the "values" or/and "category" of the property in question. The applicants did not at any material time challenge the categorization of their properties as "vacant" in the 2013 valuation roll.

[31] The first respondent's 2013 General Valuation Roll accordingly lapsed on 30 June 2018. The "values" or/and "category" of the properties in question are not matters to be dealt with in terms of the first respondent's Credit Control and Debt Collection Policy.

[32] The water availability and sewer availability charges are imposed in terms of the first respondent's annually approved tariffs. In this instance, the basis for the imposition of water availability and sewer availability charges is the designation of the appropriate property as "vacant".

[33] A notice of land use contravention was issued on 17 July 2017 against the applicants' property, erf 2221, with Municipal Account number 552771443. A penalty tariff was imposed on this erf 2221, with Municipal Account number 552771443. The application of the penalty tariff, or the authority of the first respondent to impose the penalty tariff has not been challenged in the current proceedings.

[34] Respondents oppose this application, and seek dismissal with costs on these grounds:

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[1] 6 of 2004.

a. The claims, alternatively portions of the claims, in prayers 1.1, 1.2, 1.4, 1.5, 1.6, 1.7, 1.8, 1.10, 1.11, 1.12, and 1.13 are prescribed in terms of section 11(d) of the Prescription Act 68 of 1969. The prescribed claims are for the period between January 2015 and July 2018. Notice of motion was served on the first respondent on 05 August 2021, which is more than three years after the date on which the claims arose.

b. The applicants claim that the mistake arises from the first respondent's side and that the 2013 General Valuation Roll was clearly incorrect confirms that the "correction" which they seek is not a billing issue but one of an entry or omission on the valuation roll. The applicants are obliged to lodge an objection against the entry or omission on the valuation roll as well as pursue an appeal as prescribed by the Rates Act. This route was not followed by applicants and, consequently, the non-exhaustion of the internal remedy is thus fatal.

c. There is no legal duty upon the first respondent to debate the account with the applicants. Further, the Court cannot order a debatement of account in respect of a prescribed debt.

d. Portions of the accounts that the applicants seek recovery relate to penalty charges imposed by the first respondent for land use contravention by the applicants. The first respondent has the power to implement penalty tariffs. The applicants' case failed to appreciate the nature and source of the first respondent's powers.

e. Prayer 2 is not competent as applicants are no longer the owners of the property which forms part of the subject of this court application.

f. The applicants have not made out a case for the debatement of account, and it is evident that that there is material dispute of facts on the accounts to be debated. Respondents seek the dismissal of the application in terms of Rule 6(5)(g).

Issues For Determination

[35] The applicants submitted the following issues for determination:

a. The correctness of the municipal accounts, 552771443, 552771468, & 552771450 insofar as they relate to:

i. Electricity charges for the period of January 2015 to September 2020.

ii. Incorrect property rates from 4 August 2014 to 13 July 2018.

iii. Duplicate Rates charges for March 2016.

iv. Duplicated refuse charges from 4 August 2014 to 13 July 2018.

v. Duplicated water and sewerage charges from 4 August 2014 to 9 September 2020.

vi. Rates clearance figures.

vii. Any interest on the abovementioned amounts.

viii. The deposit paid to the Respondents.

b. The aspect of costs and the scale thereof.

[36] The respondents submitted these issues for determination:

a. *First*, the claims in respect of various amounts have prescribed, as more than three years have elapsed before the applicants instituted legal action (**"***Prescription*").

b. *Secondly*, in terms of the 2013 General Valuation Roll, the applicants were the owners of three distinct properties and ought to have challenged the valuation thereof on the Valuation Roll ("*No objection or appeal in terms of the Rates Act/Non-exhaustion of internal remedy*").

c. *Thirdly*, the first respondent has the power to implement penalty tariffs. The applicants' case failed to appreciate the nature and source of the City's powers ("*City authorised to impose penalty tariff*").

d. *Fourthly*, the Notice of Motion fails to make out a cause of action and incompetence of Prayers 2. ("*No cause of action disclosed*").

e. *Fifthly*, the applicants rely on inadmissible evidence which falls to be rejected ("*Inadmissible evidence*").

f. *Sixthly*, no case made out for debatement of account. In any event, a prescribed account cannot be debated ("*Debatement of account*").

[37] The court will now consider this application with reference to the various disputed issues.

Statement and Debatement of Account

[38] The court will consider this issue up front as the nature of the relief and the claims made may have a bearing on whether the applicants' claims constitute "*debts*" as contemplated in section 11(d) of the Prescription Act[2].

[39] The applicants submitted that their claims, except three, are claims for statement and debatement of account and not claims for the refunding of monies.

[40] The applicants are seeking orders that the first respondent must take measures, to comply with constitutional and statutory obligations, relating to the relevant accounts which expressly include to correct the applicants' accounts by reversing of over-charges; reversing duplicate property rates; reversing property rates over-charged; refunding the applicants' rates clearance figures; reversing all duplicate refuse charges; reversing all water availability and sewer availability charges; reversing interest calculated in relation to the incorrect charges and refunding of deposits.

[41] The applicants calculated these amounts to the last cent and require from the first respondent to credit their accounts with these figures. What is sought in prayer 2 is a statement of account showing the adjustments with suitable notations such that the accuracy of the adjustments can be verified.

[2] 68 of 1969.

[42] However, what in fact is sought by the applicants is an adjustment in line with the figures which they claim should or should not have been included in the municipal accounts applicable. In my view, there is no room for arguing that this amounts to a statement and debatement of an account. The dispute relates to the legal basis for regarding the three properties as separate and categorising two of these properties as "vacant land". Further, to use this classification for purposes of valuations and for charges for rates and other services whilst these properties were in fact notarially tied.

[43] Prayer 2 is for the re-issue of statements of account showing the adjustments which the applicants seek this court to order. In this scenario, there is no room for debatement, but only a correction in terms of a court order. What is sought from the court is to adjudicate upon the legal basis, with reference to the alleged incorrect 2013 Valuation Roll, for determining what is due by the applicants. Once the legal basis has been established, there is nothing further to debate. The claim might be labelled as a "*statement of account*", but what it in fact amounts to is adjustments which are predicated on the claim for reversal of amounts allegedly, unlawfully, and/or incorrectly charged, and for refunds as stipulated in prayer 1 of the Notice of Motion.

[44] It is common cause that the applicants have been paying their accounts, including the amounts which the applicants now want to be reversed and refunded. It is further common cause that the applicants sold the property and that the new owners would have now opened new accounts. Any reversal which will then appear on the applicants' three accounts will stand to their credit.

[45] Even though the applicants, in their Notice of Motion in prayer 3, ask for a stay of legal proceedings in respect of any purported arrears "*until this dispute has been resolved"*, the applicants will ultimately be seeking repayment of credit balances. In my view, the "values" or/and "category" of the properties in question are not matters to be dealt with in terms of the first respondent's Credit Control and Debt Collection Policy.

No Objection or Appeal in terms of the Rates Act / Non-Exhaustion of Internal Remedy

[46] The charges for the erven directly relate to the first respondent's Valuation Rolls of 2013. On this roll, Erf 2221 was classified "residential" and the other two erven were classified as "vacant land" with a value attached to each Erf. This, the applicants claim to be wrong as these stands were notarially tied to Erf 2221. Because of the first respondent's failure to reflect the notarial tie, property rates were charged for Erf 2224 and Erf 2225 on the vacant land tariff for the period August 2014 to July 2018. Other charges were also made following this classification.

[47] The applicants deny that they should have objected to the 2013 General Valuation Roll because, had the first respondent correctly updated their system to reflect a notarial tie, there would have been no reason to object as Erf 2221 would have been the rateable property and Erf 2224 and Erf 2225 zero-rated. It was submitted that the first respondent cannot profit from this mistake and the applicants are entitled to come to court at this stage to have the situation remedied. Further, because of the first respondent's failure to reflect the notarial tie, water and sewerage availability charges were charged for these erven. Consequently, it was submitted that the applicants are entitled to the relief they seek in prayers 1.7 and 1.12 of the Notice of Motion. The same applied to refuse removal charges which, according to the applicants, entitle them to the relief they seek in 1.6 and 1.11 of the Notice of Motion.

[48] It was argued that the period for the applicants to have objected to the 2013 General Valuation Roll already lapsed by the time they bought the property in 2014. The applicants blame the first respondent for not reflecting the notarial tie in the General Valuation Roll corrected by the first respondent when the 2018 Valuation Roll was published.

[49] It was argued that given the error occurred on the side of the first respondent, before the applicant's took ownership of the property, it should not be beholden upon them to remedy a mistake that the first respondent was the sole cause of, and therefore should be, held responsible for.

[50] On behalf of the first respondent, it was argued that the corrections sought before 2018 relate to alleged mistakes contained in the 2013 General Valuation Roll and was accordingly not a billing issue but one of an entry or omission on the Valuation Roll. For that reason, the Rates Act becomes applicable. This Act provides a remedy for the applicants to have remedied the incorrect entries on the Valuation Roll.

[51] The Rates Act provides a procedure to be followed before the Valuation Roll becomes finalised. This includes a process of inspection of property, valuation, public notice of valuation rolls, objections, processing of objections, review processes, right of appeal and adjustments and additions.

[52] I do not intend to set out in detail the various sections of the Rates Act dealing with these issues. In terms of section 11 of the Rates Act, the market value of the property is used to determine the amount due for rates. That is the purpose of the Valuation Roll.

[53] The Valuation Roll will, among other things, reflect the category determined in terms of section 8 in which the property falls and the market value of the property if the property was valued.

[54] Important for a decision in this matter is that after the Valuation Roll has become effective in terms of section 78(1)(h) of the Rates Act, a supplementary valuation can take place in respect of any rateable property where such property was substantially incorrectly valued during the last general valuation. This may cause a supplementary valuation roll to be published containing the corrected valuation. Section 78(4) of the Rates Act provides that rates on a property based on the valuation of the property in a supplementary valuation become payable only from the date of the correction. It therefore does not operate retrospectively. A party dissatisfied with a supplementary valuation may review the decision of the municipal valuer.

[55] In this case, it was always an option for the applicants as soon as they learned that the notarial tie of the three erven was not reflected in the Valuation Roll to invoke section 78 to have the categorisation and valuation of the three erven to be corrected. It is common cause that no objection had been lodged against

the 2013 categorization and valuation of the properties and, accordingly, an internal remedy which was available was never utilised.[3]

[56] The relief which the applicants seek require that changes be made to the first respondent's lapsed 2013 General Valuation Roll by court, outside the terms of the Rates Act, which is not legally competent. In terms of the Rates Act, variation of a municipality's valuation roll occurs in terms of section 55 as a result of objections lodged, or by means of a supplementary valuation in terms of section 78.

[57] I am in agreement with the submission made on behalf of the first respondent that the "values" or "category" of the properties in question are not matters to be dealt with in terms of the first respondent's Credit Control and Debt Collecting Policies. The remedy, provided for in the Rates Act, available to the applicants, was to challenge the "values" or "category" of the properties in question. Consequently, under section 7 of the Promotion of Administrative Justice Act[4] (PAJA), the applicants had to exhaust their internal remedies before approaching this court. This court will have to accept the categorisation and values of the properties as stipulated in the 2013 Valuation Roll. This would mean that all claims underpinned by the alleged incorrectness of the 2013 Valuation Roll must fail.

[58] The relief sought in prayers 1.2, 1.3, 1.5, 1.6, 1.7, 1.8, 1.10, 1.11 and 1.12 require that the court must ignore the 2013 Valuation Roll and deal with the properties as if they were notarially tied. This would mean that the court must accept that Erf 2224 and Erf 2225 should have a nil value. What is then not clear is what value should be attached to Erf 2221, as this erf was valued at R700 000 standing alone.

[59] Water availability and sewer availability charges are imposed in terms of the first respondent's annual approved tariffs. This power does not depend on the valuation roll but the jurisdictional requirement for the position of water availability and sewer availability charges is the designation of the appropriate

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[3] See *MEC for Local Government and Traditional Affairs, KwaZulu-Natal v Botha NO and others* 2015 (2) SA 405 (SCA) at para 11.

[4] 3 of 2000.

property as “vacant”. This classification was not challenged in relation to the 2013 Valuation Roll. Thus, all claims made by the applicants in which the 2013 Valuation Roll is challenged on either the valuation of the properties or their categorisation should be dismissed because the available internal remedy to correct this issue was not followed.

Prescription Defence

[60] The Notice of Motion was served on the first respondent on 5 August 2021. The respondent argues that debts that arose more than three years before this date has prescribed. These would be debts which arose before 6 August 2018.

[61] The first issue to be decided, therefore, is whether these claims constitute “*debts*” as envisaged in section 11 of the Prescription Act[5]. If so classified, the court should consider which prescription period would apply in relation to the “*debt*”. In all instances where the applicants assert that amounts which never became due were paid, these amounts can be recovered from the first respondent based on the *condictio indebiti.* The applicants allege that the payments were made in the reasonable but mistaken belief that these amounts were owing to the first respondent.

[62] The applicants argue that they specifically seek that an overcharge be “*reversed*”. The applicants are not seeking a payment of money but seek to have incorrect charges reversed, which does not fall under any definition of a *“debt*” in regard to prescription and, as such, prescription cannot run against these charges. It is argued that what is claimed is a reversing of charges and not a refund of any amount (except for prayer 1.4, 1.9 and 1.14 which refer to refunds).

[63] In my view, this submission negates what the true purpose of this application and the relief sought wants to achieve. The applicants want these amounts reversed to reflect a credit balance, or if not previously paid, to reduce the debt, on these three accounts. The applicants do not want any credit balance to lie in the account for ever. Its repayment will be sought. Perhaps such claim for repayment, if not voluntarily made, would be made only in subsequent

[5] 68 of 1969.

proceedings but this does not change the nature of what is claimed: a refund of amounts allegedly overcharged, either by reducing a debt of by repayment.

[64] In my view, what is claimed amounts to a *debt* for purposes of section 11 of the Prescription Act. A reversal of an amount on an account here will either reduce the amount payable or extinguish the debt if the account was in arrears or, if fully paid up, would leave a credit. This, in my view, amounts to a claim for the payment of money.

[65] The applicants also submitted that even if prescription finds application, then the first respondent could not raise prescription against the property rates, sewer and refuse charges as these are taxes and only prescribe after 30 years under section 11(a)(iv) which provides that "*any debt in respect of any taxation imposed or levied by or under any law"* would only prescribe after 30 years.

[66] In my view, the 30-year prescription period does not apply in relation to the claims of the applicants. The levying of "property rates" is a form of taxation. Though doubtful, for purposes of this judgment I will accept that sewer and refuse charges levied on a vacant stand are also a form of taxation. The claim of the first respondents for any debt in respect of any taxation would not have prescribed before 30 years. As far as the applicants' claims are concerned the situation is different. The applicants' claim is for a reversal of property rates overcharged. The claim is not in relation to any debt in respect of any taxation imposed or levied. If a claim is made for a reversal of a tax raised or a portion of it, the claim is made for the reversal of tax imposed which would result in a refund if the net effect would be that the taxpayer has overpaid tax.

[67] In *Eskom v Bojanala District Municipality and Another*[6] the issue was a claim for refund of levies paid in error. The court was called on to determine whether the claim was regulated by section 11(a)(iii) or section 11(d) of the Prescription Act to render applicable either a 30-year prescription period or a 3-year prescription period. The court held that the 30-year prescription period in section 11(a)(iii) operates only in the tax collectors' favour and that a taxpayer's claim for refund is governed by the 3-year prescription period stipulated in section 11(d).

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[6] *Eskom v Bojanala District Municipality and Another* (2005) 3 All SA 108 (SCA); 2005 (4) SA 31 (SCA).

[68] Having found that a 3-year prescription period applies pertaining to debts which arose more than three years before the issue of this application, the only remaining question is whether section 12(3) comes to the assistance of the applicants. This section provides that a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and the facts from which the debt arises, as long as the creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.

[69] The applicants submitted that they could only have become reasonably aware of over-charging when they approached their attorneys during or about March 2021 and thus the prescription period could only have started to run then. If this is the date when the prescription started to run, then all the claims of the applicants were instituted within the 3-year prescribed period.

[70] The applicants as property owners received monthly municipal accounts from the first respondent which reflected the various items in respect of which charges were included in the accounts. For instance, the applicants must have seen, or should have seen if they exercised reasonable care, that rates were charged on account numbers 552771498 and 552771450.

[71] According to the version of the applicants, no charges should have been levied on these accounts but despite this, the applicants did nothing for years. In my view this oversight, if it was such, negates reasonable care expected to be taken by the owners of these properties. It is not the applicants' case that they did not receive the accounts. As far as prayer 1.1 is concerned the applicants made use of a business called Ideal Prepaid to measure consumption of tenants occupying units. According to "JDG 5" this was done since October 2014. If this is the situation then, if reasonable care was taken, the applicants would have learned of the overcharges monthly from date when these alleged overcharges started to reflect on the monthly accounts.

[72] In my view, the applicant's reliance on the Constitutional Court decision in *Makate v Vodacom (Pty) Ltd*[7] is misplaced. In *Makate* the claim was not to enforce a debt but to enforce a contractual undertaking to negotiate in good

[7] *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) at paras 83-94 and 186-199.

faith to establish what amount would have been paid to Mr Makate. As stated, the claim is for a reversal of amounts, as calculated by the applicants, included in municipal accounts, to ultimately create a credit on such account which the applicants would reclaim.

[73] The effect of the upholding of the prescription plea is that all the claims for the reversal of charges emanating from a period before July 2018 have prescribed. The further effect of this would be that a portion of the claim made in prayer 1.1 in the amount of R125,682.30 has prescribed; the claim made for the reversal of duplicate property rates charges in prayer 1.2 has prescribed; the claim to reverse all property rates charges according to prayer 1.5 has prescribed; the reversal of all duplicate refuse charges according to prayer 1.6 has prescribed; the claim for the reversal of all water availability and sewerage availability charges according to prayer 1.7 has partially prescribed; the interest claim according to prayer 1.8 has partially prescribed; the claim for the reversal of all property rates charges according to prayer 1.10 has prescribed; the claim for the reversal of all duplicate refuse charges according to prayer 1.11 has prescribed; the claim for the reversal of all water availability and sewerage availability charges according to prayer 1.12 has partially prescribed and the claim for interest according to prayer 1.13 has partially prescribed.

[74] The relief that the applicants seek from July 2018 onwards during the 2018 Valuation Roll is unrelated to the valuation or categorisation of the erven but are alleged straight billing errors and is on a different footing as this cannot be remedied by objecting to the roll. The prescription finding would also not apply as these debts arose within the three- year prescription period.

[75] The relief that the applicants seek in prayer 1.3 is to reverse property rates overcharged on account number 552771443 for the period July 2018 to September 2020, because the first respondent made an error in its calculations each month leading to a R19 137,46 overcharge for the 27-month period. This is not something that could be objected to on the valuation roll. This according to the applicants is a purely calculation and billing error.

[76] On behalf of the first respondent, it was asserted in its answering affidavit that the alleged duplication and overcharges of rates on the 552771443 account relates to penalty tariffs imposed for a contravention of the permitted usage of Erf 2221. This penalty tariff was applied based on the use of the stand for a “accommodation establishment” whilst it was zoned as “residential”. For current purposes i.e., a finding on the prescription issue, it would be sufficient to state that the claim referred to in prayer 1.3 has not prescribed.

[77] The same applies partially to the relief sought in prayers 1.7 and 1.12, in relation to claims for reversal of charges, again covering the period July 2018 to September 2020, for water and sewer availability charges on account numbers 552771468 and 552771450.

[78] Considering this court’s finding pertaining to the non-exhaustion of an availability remedy in relation to the 2013 Valuation Roll, it would be required from the first respondent to reverse or refund only those charges which have not prescribe and which is not affected by the finding relating to the non-exhaustion of available remedies and the respondent’s defence that there was not an over charge nor a duplication of rates charges as these charges related to penalty tariffs applied.

The Inadmissibility of Evidence Defence

[79] The first respondent argued that annexures “JGD5”, “JGD6”, “JGD8”, “JGD9” and “JGD10” to the founding affidavit constitute inadmissible documentary hearsay and inadmissible opinion evidence.

[80] If one is to consider “JGD5”, for instance, same is just a tabulated sheet of data drawn from the invoices provided by the first respondent to be captured in a single document for ease of use. The facts on which the information on this document was based is the invoices that the first respondent provided to the applicants.

[81] Annexure “JGD6” is a computer-generated spreadsheet of meter data with little to no margin for error or manipulation. It is therefore neither hearsay nor opinion evidence. Nowhere is an opinion expressed. It is just calculations using

figures and tariffs provided by the first respondent. The author of this document, Anna-Marie Thysse, deposed to a confirmatory affidavit attached to the applicants' replying affidavit.

[82] Annexure "JDG7" comprises of a number municipal account for account number 552771443. It covers a six-month period from October 2015 to March 2016. Certain manuscript is appearing on these documents but otherwise it could not be classified as hearsay evidence. These are accounts issued by the first respondent the contents of which was not disputed. It remains a different question what is proven by the documents.

[83] The situation as far as "JGD8" is concerned is different. It is not only a simple calculation based on the 2013 and 2018 General Valuations roll where mathematical calculations are done. These calculations cannot be done by any person unless that person knows how rates are calculated. The rates according to the municipal accounts are stated to be R 4 344, 57 per month. The applicants have not attached the municipal accounts for the period from July 2018 to September 2020. The court can thus not establish how the figure for July 2018 was calculated and arrived at. Then there is reference to a calculation what the figure supposedly had to be in the amount of R3 635, 78. The calculation is then made that the rates overcharged per month is R708,80 per month. What is not explained is where the figure of 0,04407 comes from, why was this used and when is this figure to be used. The court can only speculate that this is the figure obtained from the tariffs prescribed by the first respondent. Of course, all this, invites the question: why an apparent higher figure was used? Is this a penalty imposed because of the unlawful usage of the erf? This is the version of the first respondent. The author of JDG8 did not depose to a confirmatory affidavit confirming the figures used in the document. It leaves the court in the position that on the papers the version of the first respondent must be accepted. In my view, this document constitutes inadmissible hearsay evidence and should be struck out.

[84] The same applies to "JGD9" and "JGD10" which documents may tabulate invoices provided by the first respondent from its own records but again it is stated as a fact that there were overcharges and duplications. To come to such

a conclusion is not only a function of a tabulation of invoices. A calculation is made based on knowledge how amounts charged on a municipal account is calculated and arrived at, and importantly, what circumstances can alter the position. For instance, what effect the levying of a penalty tariff may have on charges. The author in my view should not only have confirmed the correctness of the schedules but explained the contents. “JDG10” for instance, refers to credits required. Such an entry requires is not derived from a mere tabulation of information contained in a monthly statement. The schedules “JGD9” and “JDG10” are inadmissible hearsay evidence and should be struck out.

The Penalty Tariffs Applied.

[85] In the applicants founding affidavit no evidence was provided that a penalty tariff was imposed. The applicants have referred to duplications and overcharges. This is also reflected in the notice of motion. The first respondent denied duplications and overcharges and alleged that a penalty tariff for using Erf 2221 in contravention of its zoning was imposed.

[86] On the version of the first respondent the court must in motion proceedings accept that these charges are not a duplication of overcharges but a penalty charge.

[87] I agree with the submission on behalf of the first respondent that the application of the penalty tariff, and or the authority of the first respondent to impose the penalty tariff has not been challenged in the current proceedings. The relief sought in the notice of motion makes no reference thereto. Only in a replying affidavit reference is made to penalties imposed. Considering that the entitlement to impose a penalty was raised at as a defence and could only be replied too in a replying affidavit the court will deal with the applicant’s contention that the first respondent is not lawfully entitled to raise a penalty, and if entitled, it can only be done through a process of some form of hearing and prosecution.

[88] The first respondent’s power to levy rates on properties is an original power conferred in terms of s229(1)(a) of the Constitution. The first respondent’s powers to impose a penalty rate stems from s156(5) of the Constitution which

provides that a municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.

[89] In terms of s151(3) of the Constitution a municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided in the Constitution.

[90] It has been decided by the SCA in *City of Johannesburg Metropolitan Municipality v Zibi and Another*[8] that in exercise of these original powers a municipality acts within its powers to impose a penalty in the instance of illegal or unauthorised use of property within its jurisdiction. Such action is not *ultra vires* if it is in terms of a validly adopted municipal property rates policy.

[91] The court in *Zibi* placed reliance on the decision of *Kungwini Local Municipality v Silver Lakes Homeowners Association and Another*[9] where it was held that the adoption of a rates policy and the levying, recovering and increasing of property rates is a legislative rather that an administrative act. The effect being that a municipality's action in this regard can only be challenged on the principle of legality, an incidence of the rule of law. The legislative imposition of a penalty tariff has not been impugned in this application. Consequently, the applicants must accept the legislative character of the tariff imposed for unauthorised use of the Property until set aside. The application of the penalty tariff does not require the first respondent to afford the applicants a right to challenge the tariff itself.

[92] Consequently, the court will accept the first respondent's right to impose a penalty.

Overcharging For Electricity on Account 552771443

[93] The applicants asserted that between January 2015 and September 2020 the applicants were charged 174,307.657kWh of electricity by the first respondent. The applicants have then shown through a report compiled by Ideal Prepaid

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8 (234\2020) [2021] ZASCA 97 (09 July, 2021) ("Zibi")

9 [2008] ZASCA 83; [2008]4 All SA314 (SCA); 2008 (6) SA187 (SCA) para 14

that the tenants of applicants consumed only 89,892,200kWh. The court accepted in evidence two schedules, “JDG5” and “JGD6” compiled by Ideal Prepaid. Apart from attacking the admissibility of the schedules the first respondent has not put up a version which contradicts the figures which appears of the schedules. The court will accept this uncontradicted evidence. The prescription defence, however, remains valid. The applicant will only be entitled to claim a reversal for the 3 years preceding 5 August 2021 when this application was filed.

[94] The effect of these findings on the claims of applicants are:

a. Prayer 1.1. The electricity overcharges as par “JDG5” relating to charges from 6 August 2018 to September 2020 on account number 552771443 should be reversed.

b. Prayer 1.2. This claim has prescribed and has not been proven as “JDG8” constitutes inadmissible hearsay evidence.

c. Prayer 1.3. This claim has not prescribed but reliance is placed on “JGD8” which the court found to be inadmissible hearsay evidence.

d. Prayer 1.4. This claim for a refund of applicants’ rates clearance was disputed by the first respondent in the answering affidavit based on the inadmissibility of “JDG9” and on prescription. The latter defence has no merit as the amount claimed relates to the balance on the account when the Property was sold during September 2020. The problem for applicants with this claim is, however, that there is no supporting documentation to explain how the amount claimed was calculated and arrive at. The September 2020 account was not attached. This amount was mentioned in “JDG9”, but the author failed to confirm the correctness of this amount. Accordingly, this claim must fail. The first respondent also asserted that the deposit of R1 439,03 which was paid on municipal account 552771443 was released and forms part of the balance of that account. All of this makes it impossible for the court to establish the veracity of the claim for R24 944,76.

e. The three inactive accounts of the applicants all have a credit balance. Account number 552771443 is in credit to the extent of R 21 504,12. The first respondent explained in detail the process to be followed how this amount could be reclaimed by the applicants. This was not done but this option is still available to be followed. The dismissal of the claim in prayer 4.1 does not affect the right to a refund of a credit balance on the account.

f. Prayer 1.5. This claim relates to account 552771468 and is for the reversal of all property rates charges billed on the “vacant land” tariff. This claim has prescribed but also should be dismissed based on the 2013 Valuation Roll which was not corrected in terms of s78(1) of the Rates Act.

g. Prayer 1.6. The same applies to this claim as in the claim made in prayer 1.5.

h. Prayer 1.7. This claim has partially prescribed but is dismissed because the 2013 Valuation Roll remained applicable until corrected. This remedy was not exhausted.

i. Prayer 1.8. This claim should be dismissed as the claims upon which interest is based are dismissed. Applicants have failed to prove their entitlement to interest. This claim has also partially prescribed.

j. Prayer 1.9. This claim relates to a refund of a deposit of R 1 937.52. The applicants failed to prove this claim and that the deposit on account number 552771468 amounted to the figure claimed. Reliance was placed on “JDG9”. The first respondent indicated that the deposit of R600 was credited to the account of the applicants. Account 552771468 has a credit balance of R 1 268,76 and can be reclaimed form the first respondent.

k. Prayer 1.10. This claim for the reversal of property rates on account number 552771450 has prescribed. In any event the defence relating to the 2013 Valuation Roll and the exhaustion of available remedies should be upheld. The calculation of the amount claimed was not proven. This claim is dismissed.

l. Prayer 1.11. This claim is dismissed for the same reasons as the claim made in prayer 1.10.

m. Prayer 1.12. This claim has partially prescribed but is dismissed as the applicants failed to prove the amount claimed and the 2013 Valuation Roll defence was upheld.

n. Prayer 1.13 for interest is dismissed for the same reason as prayer 1.8.

o. Prayer 1.14 is a claim for a refund of a deposit. First respondent's version that the deposit of R 600 was released and forms part of the balance of account number 552771450 must be accepted. This account has a balance of R1 268,76 and could be reclaimed by the applicants. This claim is dismissed.

Costs.

[95] The only claim which is partially proven is claim 1.1 for electricity overcharges after 6 August 2018 to 20 September 2020. In my view this is not substantial success. The defences raised to other claims were upheld. In my view, each party should be held responsible for their own costs. No cost order should be made.

[96] The following order is made:

Order

1. Prayer 1.1 is granted to the extent that the first respondent is ordered to reverse electricity overcharges under "JGD5" for the period after 6 August 2018 to 20 September 2020.

2. Apart from prayer 1.1 all other prayers are dismissed.

3. No order as to costs.

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R. STRYDOM, J

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

For the Applicants:	Mr. T. Paige-Green
Instructed by:	Burochowitz Attorneys
For the Respondents:	Mr. S. Ogunronbi
Instructed by:	Magagula Attorneys
Date of Hearing:	31 July 2023
Date of Judgment:	6 November 2023