

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

Case no: 2017/29079

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES:
NO
3. REVISED: NO

_____ **24/11/2023**

In the matter between:

ISIBAYA HOUSE BODY CORPORATE SS 273/2007

First Applicant

ISIBAYA HOUSE BODY CORPORATE SS 67/2008

Second Applicant

and

CITY OF JOHANNESBURG

Respondent

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email and by upload to CaseLines. The date and time for hand-down is deemed to be 14h00 on 24 November 2023.

**APPLICATION FOR LEAVE TO APPEAL
JUDGMENT**

OLIVIER AJ:

INTRODUCTION

1. In the main application, the applicants had sought a mandamus to compel the respondent to rebill their municipal account and reverse certain charges, and an interdict prohibiting the respondent from instituting credit control measures, along with associated relief, including an order for costs on an attorney and client scale. The facts are rather extensive and there is no need to repeat them here. It suffices to say that the applicants have been in a dispute with the respondent for several years regarding the levelling of unspecified (non-itemised) charges and an Acknowledgment of Debt (AOD) in respect thereof, and the billing of water consumption at the incorrect tariff.

2. The Applicants sought the following specific relief, as formulated in the amended notice of motion:

1. Ordering the Respondent to take any/all measures necessary to comply with its constitutional and statutory obligations in relation to the Applicants within 14 (fourteen) days of the handing down of this Court Order, which measures expressly includes (but are not limited to):-

1.1. reversing the following charges levied on the Applicants' account:

1.1.1. "Land Transf" the sum of which is R240,470.50 levied for March 2008;

1.1.2. Utility Cre" the sum of which is R53,049.99 levied for April 2009; and

1.1.3. all unexplained charges narrated in numbers in the sum of R23,000.00 levied for October 2009.

1.2. reversing water charges from inception of the account to date of compliance herewith and billing same based on the tariff for mixed use taking into consideration that there are 118 units at the Property;

1.3. reversing all charges for water consumption that have prescribed as at the date of the court order handed down herein;

1.4. reversing any/all interest, VAT and ancillary charges on the account in respect of the abovementioned amounts that stand to be reversed/written off;

1.5. within 7 (Seven) days after the order is granted, furnishing the Applicants with an adjusted municipal account showing all reversals made in respect of the incorrect water charges and the prescribed charges;

1.6. in addition, the Applicants seek an order interdicting the City from disconnecting its services for non-payment of the disputed amounts, until the disputes herein have been finally resolved;

1.7. The Respondent to pay the costs of the Application on an attorney and own client scale.

3. They were only partially successful. I granted the following order on 25 November 2022:

1. The Respondent is ordered to rebill the Applicants at the mixed-use tariff in respect of all charges that fall within a period of 3 (three) years prior to the date of this order, and to make the necessary corrections on the Applicants' municipal account within 21 (twenty-one) days of this order.

2. The Respondent is ordered not to implement credit control measures in respect of the charges that are subject to rebilling, set out in paragraph 1 above, until such time that the Applicants have been rebilled at the mixed-use tariff, the corrections have been reflected on the municipal account, the Applicants have received their invoice reflecting the corrections, and have been afforded the opportunity to pay by the due date specified on the account.

3. The remainder of the relief sought in the notice of motion is dismissed.

4. *The Respondent is ordered to pay the costs of the main application on a party and party scale.*

4. The applicants seek leave to appeal to the Full Court of this division, alternatively to the Supreme Court of Appeal, against the judgment and paragraphs 1, 3 and 4 of the order in the main application. The respondent prays for dismissal of the application for leave to appeal, with costs.

THE APPLICANTS' GROUNDS OF APPEAL

First ground: non-itemised charges

5. The applicants argue that the non-itemised charges that were covered by the AOD were themselves subject to prescription, and because the applicants continued to dispute them, I ought to have found that the respondent's opportunity to claim these amounts had also prescribed, considering that the respondent had failed to claim these amounts within the three-year period. Furthermore, the applicants argue that even if the AOD constituted an acknowledgment of debt that interrupted prescription of the non-itemised charges, more than three years had passed since the AOD was signed and during that time the non-itemised charges were repeatedly disputed. According to the applicants, regardless of the approach adopted, the AOD, inclusive of the non-itemised charges, had "prescribed" and should have been "written off" and removed from their account. The applicants say that the non-itemised charges continue to attract interest.
6. The AOD was signed in 2013. The applicants submit that this would mean that the "amounts" would have prescribed in 2016, which was prior to the launching of the main application. According to the applicants, the AOD created a novation of the debt, but remained a "debt", being something payable,¹ and thus the normal periods for prescription were once again applicable. The respondent failed to

¹ *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) at paras [85] – [93].

institute action in respect of these amounts. The applicants submit that the regular payments for estimated consumption did not interrupt the running of prescription.²

7. The respondent's reply is that since these non-itemised charges were subject to an AOD, it cannot be said that they were in dispute. The AOD removed any dispute about their correctness and/or indebtedness. Therefore, it is not available for the applicant to argue that it continued to dispute them.

Second ground: water consumption charges at the incorrect tariff

8. In respect of the charges at the incorrect tariff, I found that a prescribed debt is not subject to correction. Once a debt prescribes, any opportunity to claim a correction in respect of that debt is extinguished.
9. According to the applicants, my finding that any charges falling outside of the three-year period stand to be left out of any rebilling, was correct in principle. However, they contend that these amounts remain on their account and should be removed ("written off"). The amounts are no longer owing and should no longer appear on the account. They do not want the respondent to benefit from unlawfully billed amounts which payments were debited against.
10. The applicants argue that these amounts should be reversed to effectively "zero" the account, otherwise interest and the prescribed arrears continue to exist on the account.
11. The respondent's argument is that even if the right to claim a correction does not prescribe (because such a right is not a debt for purposes of the Prescription Act 68 of 1969), the right to repayment (whether in the way of being credited through a reversal or writing off) prescribes. This is because such credit or write-off constitutes a debt within the meaning of the Act.

² *Argent Industrial Investment (Pty) Ltd v Ekurhuleni Metropolitan Municipality* 2017 (3) SA 146 (GJ) at para [18].

Third ground: costs

12. The applicants submit that they should have been awarded costs on an attorney and client scale. They argue that a punitive costs order should have been made considering the time lapse since the inception of the dispute, the conduct and attitude of the respondent, and the time to completion of the matter.

THE TEST FOR A SUCCESSFUL LEAVE TO APPEAL APPLICATION

13. The old test was whether there was a reasonable prospect that another court 'might' come to a different conclusion to that of the court of first instance. Section 17(1)(a) of the Superior Courts Act now provides that leave to appeal may only be granted where the judge concerned is of the opinion that 'the appeal would have a reasonable prospect of success' (s 17(1)(a)(i)), or that there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration (s 17(1)(a)(ii)).

14. The Land Claims Court in *Mont Chevaux Trust* held *obiter* that the wording of this subsection raised the bar of the test that must be applied to the merits of the proposed appeal before leave should be granted.³ The Supreme Court of Appeal in *Notshokovu v S* confirmed this view:⁴

It is clear that the threshold for granting leave to appeal against the judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another Court might come to a different conclusion. The use of the word '*would*' in the new statute indicates a measure of certainty that another Court will differ from the Court whose judgment is sought to be appealed against. (Footnotes omitted.)

³ *The Mont Chevaux Trust v Tina Goosen* 2014 JDR 2325 (LCC).

⁴ *Notshokovu v S* [2016] ZASCA 112 (7 September 2016).

15. The Supreme Court of Appeal has explained that the prospects of success must not be remote, but there must exist a reasonable chance of success. An Applicant who applies for leave to appeal must show that there is a sound and rational basis for the conclusion that there are prospects of success.⁵ An Applicant must convince the Court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of success. More is required than a mere possibility of success, or that the case is arguable on appeal, or that the case cannot be categorised as hopeless.⁶ (My emphasis.)

SHOULD LEAVE BE GRANTED?

16. A court of first instance should not hesitate to grant leave to appeal should the test be satisfied. But, conversely, should the threshold not be met, a court should decline to grant leave to appeal.

17. I have considered the submissions. I am satisfied that sufficient grounds exist to grant leave to appeal. The required threshold has been met. I take the view that there are reasonable prospects of success in terms of s 17(1)(a)(i). It would be appropriate for the issues of prescription, rebilling, correction of charges and costs, to be considered by a higher court.

18. The next question is which court should hear the appeal. Section 17(6) of the Superior Courts Act provides:

(6)(a) If leave is granted under subsection (2)(a) or (b) to appeal against a decision of a Division as a court of first instance consisting of a single judge, the judge or judges granting leave must direct that the appeal be heard by a full court of that Division, unless they consider —

⁵ *Ramakatsa and Others v African National Congress and Another* [2021] ZASCA 31 (31 March 2021).

⁶ *S v Smith* 2012 (1) SACR 567 (SCA).

(i) that the decision to be appealed involves a question of law of importance, whether because of its general application or otherwise, or in respect of which a decision of the Supreme Court of Appeal is required to resolve differences of opinion; or

(ii) that the administration of justice, either generally or in the particular case, requires consideration by the Supreme Court of Appeal of the decision, in which case they must direct that the appeal be heard by the Supreme Court of Appeal.

19. It is peremptory for a court to direct that the appeal be heard by a full court of the Division, unless either of the two exceptions are present. The Supreme Court of Appeal should consider only those matters that are truly deserving of its attention.⁷ To my mind, a full court of this Division is adequately placed to consider the appeal.

I MAKE THE FOLLOWING ORDER:

1. Leave to appeal against the judgment and paragraphs 1, 3 and 4 of the order in the main application dated 25 November 2023, is granted to the Full Court of the Gauteng Division, Johannesburg.
2. The costs of this application are to be costs in the cause in the appeal.

M. Olivier
Judge of the High Court
(Acting)
Gauteng Division, Johannesburg

⁷ *Kruger v S* 2014 (1) SACR 647 (SCA) at para [3].

Hearing date: 22/08/2023

Date of judgment: 24 November 2023

On behalf of the Applicants: T. Paige-Green
Instructed by: Schindlers Attorneys

On behalf of Respondent: T. Manchu
Instructed by: Madhlopa & Thenga Inc