REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT

DURBAN AND COAST LOCAL DIVISION

REPLUBLIC OF SOUTH AFRICA

Case No: **16977/2009**

In the matter between:

BODY CORPORATE CROFTDENE MALL **Applicant**

versus

THE ETHEKWINI MUNICIPALITY **Respondent**

Delivered:
May 2010

JUDGMENT

HUGHES-MADONDO AJ

The Applicant is the body corporate Croftdene Mall, a shopping mall divided into Sectional Title Units, in terms of the Section Titles Act 95 of 1986. The Respondent is EThekwini Municipality. The Applicant seeks an interdict prohibiting the Respondent from disconnecting or otherwise interrupting its supply of electricity and water.

On or about the 21 June 1995 the first transfer of the 37 units of Croftdene Mall took place.

It is common cause that in 1999 the Respondent had allocated two account numbers for Croftdene Mall. These account numbers were 832 6596 4691 and 696 0380 5285 the former was in the name of the Applicant whilst the later was in the name of Croftas Holdings (Pty) Ltd. During October 2006 the Respondent consolidated these two accounts, together with the rates account for the mall.

Croftas Holdings (Pty) Ltd was liquidated in 1999. During the cause of this liquidation, 27 units of their 37 units were sold in liquidation. At this stage the Applicant alleges that they were being controlled by the liquidators and the majority shareholders of the mall. This is when, according to the applicant, a dispute arose with the Respondent. The dispute centred on the payment of the rates and services, that is, electricity and water for the mall. The Applicant avers that "*it was unclear exactly who was liable and for what in respect of payments due to the Respondent".* The Applicant was of the view that a percentage of those accounts needed to be paid by the liquidators.

Now, the historical charges of arrear rates, interest thereon and penalties form the basis of this application and date back to as far as 31st January 1997. The non-payment of these charges which are the crux of this dispute have an impact on the

supply of electricity and water to the communal areas of the shopping mall. This makes up the salient facts of this application.

The Applicant's case is that the Respondent acted unlawfully when it terminated the supply of electricity and water to the mall. It contends that, in terms of Section 102 of the Local Government Municipal Systems Act 32 of 2000, ('the Act') the Respondent could not have consolidated its accounts since there had been a dispute between them. In October 2006 when this consolidation of the two accounts together with the rates took place, a dispute existed between them, as regards the amounts claimed by the Municipality. The Applicant further alleges that all outstanding amounts due for electricity and water services were paid in full by December 2009.

The Respondent contends that the Applicant, as the body corporation of the mall in 1995, is responsible for payments for services and rates of the mall. It was common cause that various meetings were held between the parties during the period 16 July 2008 to 4 September 2008, an attempt to resolve the issue of the arrear rates and charges. The Respondent contends that these meetings were certainly not for the purpose set out by the Applicant but were used by the Applicant to try and convince them to reduce the amounts owed on the various accounts.

The Respondent explains that consolidation took place in October 2006 and around June 2008 there was a change in their billing system. Each Sectional Title

Unit of the mall was billed separately for rates and the services. Individual meters were erected for each unit and their respective owners were now liable for payment. The communal areas of the mall were still the responsibility of the Applicant.

In October 2009 the Respondent terminated the electrical and water services to the communal areas of the mall for which the Applicant was liable. The Applicant then instituted legal proceedings and by agreement between the parties, the services of the Applicant were restored, pending the outcome of this application.

SECTION 102 OF ACT 32 OF 2000

Section 102 of the Local Government Municipal Systems Act 32 of 2000 reads as follows:-

'102 Accounts

(1) A municipality may -

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

(b) Credit a payment by such a 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.

(3) A municipality must provide an owner of a property in its jurisdiction with copies of accounts sent to the occupier of that property for municipal services supplied to such a property if the owner requests such accounts in writing from the municipality concerned.

(Subsection (3) added by s.17 of Act 19 of 2008)

For the Applicant to rely on Section 102, it must "*demonstrate that there was, at the time of the consolidation "a dispute"* and that the dispute *"was concerning any specific amount claimed by the municipality from that person"* (italics taken directly from Section 102(2)). The Applicant contends that there was a dispute between the parties whilst the Respondent say there was not.

I will first consider the meaning of the word "*dispute"*.

The Shorter Oxford English Dictionary Volume 1 prepared by William Little, H.W. Fowler and Jessie Coulson interpret dispute to mean:

"Dispute (1) the art of arguing against, controversy, debate;

(2) an argumentative contention, a controversy; also, in weakened sense, a difference of option; a heated contention, a quarrel, a logical argument;

(3) strife; a fight or struggle."

It is evident from the definition that put simplistically a dispute will be *a disagreement about something or when one queries something or when one opposes or struggles for something.*

Mr. Kemp SC, for the Applicant, referred to **Williams v Benoni Town Council 1949 (1) SA 501 (W) @ 507** where **ROPER J** said "A dispute exist when one party maintains one point of view and the other party the contrary or a different one. When that position has arisen the fact that one of the disputants, while disagreeing with his opponent, intimates that he is prepared to listen to further argument, does not make it any the less a *dispute*."

Mr. Marnewick SC, [spelling – is he not a silk?] for the Respondent, placed reliance on **Durban City Council v Minister of Labour 1953 (3) SA 708 N @ 712,** which had dealt with a labour dispute where **Selke J** said, "But whatever other notion the word *(dispute)* may comprehend, it seems to me that it must, as a minimum so speak, postulate the notion of the expression by the parties, opposing each other in controversy, of conflicting view, claims or contentions."

From a reading and understanding of both cases and the definition above its clear that a dispute is a debate or controversy between parties and is the act of arguing against.

As already set out above the case made out in the founding papers of the Applicant relies on Section 102 of Act 32 of 2000. There had been a dispute between the parties and therefore the Respondent could not have consolidated its accounts when it did. The applicant, in the founding affidavit deposed to on its behalf, states the following:

10.

'Right from the outset there was a dispute in respect of the rates and the service charges due to the Respondent in respect of Croftdene Mall. A certain percentage was payable by the Company and Close Corporation in liquidation and a certain portion was payable by the six individual owners who were basically left stranded during the liquidation process.

12.

During this period it was, as stated, unclear exactly who was liable and for what in respect of the payments due to the Respondent.

13.

Over the years there has been continuous discussions, telephone calls and correspondence between the Applicant and the Respondent to try and resolve the dispute and in particular to try and allocate and reconcile the two accounts and the respective liabilities of the parties.'

It is crucial to establish exactly who the parties were to the dispute alleged by the Applicant (in its founding papers). From the facts set out above, the dispute came into existence as a result of the liquidation of Croftas Holdings (Pty) Ltd and Croftlark CC in 1999. There was uncertainty between the company (Pty Ltd), the close corporation (CC), the liquidators and *"six individual owners"* (above, fourth line paragraph 10) as to *"exactly who was liable and for what in respect of the payments due to the Respondent"* (paragraph 12 above). Based on the aforesaid it's clear, that the dispute existed between the parties mentioned above and not between the Applicant and the Respondent as submitted by the Applicant in its argument before this court. It goes without saying in order to invoke Section 102 (2) the Respondent will need to be a party against whom the disputant is disputing.

The Respondent from the outset submitted that no dispute existed between the parties when they consolidated the bill in October 2006. It further, correctly in my view, submitted that they would have assumed their duties on formation of the sectional title scheme in 1977 when the first units were sold and therefore were the responsible party that the Respondent would have needed to account. Further, that it was the Applicant's duty as the body corporate of the mall to recover the amounts due to the Respondent. It's evident from the papers that the Applicant was actually the creator of the current situation that existed, due to its failure to recover the amount due to the municipality from the liquidators when the liquidation was taking place. The Applicant has failed on the papers to make

out a case to succeed in terms of Section 102 (2). There was clearly no dispute between the parties as at the consolidation so the Applicant case must fail.

The Applicant had attempted, in argument, to rely on the *in duplum* rule in that, they alleged that the amounts owed should not have exceeded the *duplum* amount. However there are no facts in the founding papers that support the Applicants legal argument in respect of the *in duplum* rule.

In motion proceedings, the parties are confined to what is contained in the affidavits filed. They must set out the evidence and issues between the parties so a party know the case it is required to meet. In **Swissborough Diamond mines Pty Ltd and Others v Government of the Republic of South Africa and Others 1999 (2) SA 279 T @ 323F-324D. Joffe J** said 'It is trite that in motion court proceedings the affidavits serve not only to place evidence before the Court but also to define the issues between the parties. In so doing the issues between the parties are identified. This is not only for the benefit of the Court but also, and primarily, for the parties. The parties must know the case that must be met and in respect of which they must adduce evidence in the affidavits …….. *An applicant must accordingly raise the issues upon which it would seek to rely in the founding affidavit.* ***(My emphasis)*** It must do so by defining the relevant issues and by setting out the evidence upon which it relies to discharge the onus of proof resting on its in respect thereof.'

Of relevance is the case of **Rensburg v Van Rensburg en Andere 1963 (1) SA 505 (A) at 509E-510B** where it was held that in motion proceedings one could only advance legal argument, even if such argument is not mentioned in the papers, provided that these arise from facts that have been alleged.

As regards the termination of services to the mall as at October/November 2009 the Applicant submitted that it had handed to the Respondent at a meeting held on the 4 September 2008 its representations headed Rates issues-Croftdene Mall. The Applicant was "*setting out certain difficulties that it had with the accounts,"* to the Respondent. (Line 2 of paragraph 14)

The Respondent acknowledged receipt of these representations on the 13 October 2008 and rejected the Applicants settlement proposal therein. By the 3 March 2009 the Respondent alleges it had addressed all the queries raised by the Applicant in its representation. Do the Applicants representations amount to the initiation of a dispute on its behalf? The answer in my view is in the positive when considering the definition and case law above. What is evident from its representations is that a difference of opinion existed between the parties, in respect of the various amounts claimed by the Respondent. The offer made by the Applicant does not detract from the fact that the parties had opposing views on what was due. There were also various queries made by the Applicant about how the amounts were calculated. Therefore a dispute existed between the parties as at 2008.

The Respondent argues that the Applicant should have disputed liability instead of putting up the representations. This argument must fail because, all that was necessary for a dispute to exist, is an opposing view or disagreement between the parties as set out in the cases above. The opposing view related to specific amounts in respect of specified categories. The Respondent was able to formulate a response indicating its view. There is no doubt in my mind that before the Respondent terminated the services to the common areas of the mall a dispute existed between the parties. I hasten to add that even though there was this dispute the Applicant still could not rely on the operation of Section 102 (2) because the accounts were already consolidated as far back as 2006. Effectively there was now only a single account with different class of charges and amounts.

The Applicant argued that Section 102 does not set down a specific time period for the dispute to be present when one seeks to invoke this section. This contention clearly would then fly in the face of how the legislature intended this section to apply. In **Schwartz v Schwartz 1984 (4) SA 467@ 4731-474D** it was said that "A statutory enactment conferring a power in permissive language may nevertheless have to be construed as *making it the duty of the person or authority in whom the power is reposed to exercise that power when the conditions prescribed as justifying its exercise have been satisfied*. Whether an enactment should be so construed depends on, *alia*, the language in which it is couched, the context in which is appears, the general scope and object of the person or persons for whose benefit the power is to be exercised….. As was point out in the **Nobel & Barbour (1922 AD 527 @ 539-40)** case ... It is a question whether the grant

of the permissive power also imports an obligation in certain circumstances to use the power."

On an interpretation of Section 102, the Respondent may exercise its powers in relation to sub-sections (1) (a), (b) and (c), if there is no dispute between the Respondent and the person it is claiming from (sub-section 2). It stands to reason that if a party places reliance on Section 102 (2) it would have to show *at the time when the municipality wished to exercise its powers in accordance with Section 102(1)* that at that specific time a dispute existed. In light of Section 36 of the Sectional Titles Act 95 of 1986 the Applicant cannot shy away from the fact that it came into existence in 1997 when the first units were purchased. The obligations towards the Respondent as regards the common areas of the shopping mall fell squarely into their lap from 1997. Any dispute would have had to be between the Applicant and the Respondent. As already explained above this was not so when the Respondent sought to exercise its powers in terms of Section 102 (1) when it consolidated the accounts in 2006. It's logical that after consolidation, a party cannot come and say that the dispute it raises in 2008 just because it covers or involves historical amounts that date as far back as 1996/7, the Respondent could not have consolidated their accounts when it did. The Applicant's arguments that there is no time frame for the dispute to exist must fail.

Having established that the Applicant cannot rely on Section 102, the next question to consider is whether the Respondent has the power to terminate its services for unpaid rates, when in fact, the accounts for the services terminated

were paid in full? The answer is yes! In terms of Section 68(h) of the Durban Extended Powers Ordinance 18 of 1976 as amended:

"Consolidation of accounts.

Section 68.

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-

(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 relates to the supply so cut off."

Section 68 must be read with Section 64(1) of the aforesaid ordinance.

"**Section 64(1)**

The council may establish any accounts which in its opinion are necessary to maintain a proper record of all matters relating to the financial transactions of the Council, including separate reserve and equalisation accounts for the purposes of providing for future transactions, whether of capital or a revenue nature, within or between any departments, accounts, funds and undertakings of the Council."

I am of the view that the aforesaid Ordinance allows the establishment of any accounts in order for the Respondent to regulate its finances. These accounts could be of revenue in nature and could expand between department and accounts in terms of Section 64 (1). In addition the Respondent has the power in terms of

Section 68 to include in a single account different classes of charges of amounts due to it whether or not these relate to more than one account. In accordance with Section 64(1) the Respondent may establish various accounts such as rates account, water account, electricity account, sewerage account and the like. These charges or amounts are reflected in these different accounts as amounts due to the Respondent and can be consolidated into a single account in terms of Section 68. Lastly, Section 68(h) empowers the Respondent to cut off the supply of water and electricity *if any amount reflected in the said account is not paid as if the aforesaid amount related to the supply so cut off.*

In the result I have come to the conclusion that the Respondent has the power to cut off the electricity and water services of the Applicant if the rates amount is not paid in its consolidated account.

The application is accordingly dismissed with costs which are to include those consequent to the employment of two Counsel.

HUGHES-MADONDO AJ

Applicant's Counsel: Adv. K. J KEMP SC

Applicant's Attorneys: BOOYSEN& CO.

Respondent's Counsel: Adv. C.G. MARNEWICK SC

Adv. A.V. VOORMOLEN

Respondent's Attorneys: LINDA MAZIBUKO & ASSOCIATES

Heard on: 5 MARCH 2010

Delivered on: MAY 2010