



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 249/2016

In the matter between:

LUCAS MOILA

(NOW SUBSTITUTED BY THE EXECUTRIX

OF HIS DECEASED ESTATE, DORKAS LETTIE SINCLAIR)

APPELLANT

and

THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY

RESPONDENT

Neutral citation: *Moila v City of Tshwane Metropolitan Municipality* (249/16)
[2017] ZASCA 15 (22 March 2017)

Coram: Cachalia, Willis, Zondi and Van der Merwe JJA and Mbatha AJA

Heard: 6 March 2017

Delivered: 22 March 2017

Summary: Claim for the rendering of a statement of account by a municipality for the supply of utility services and a debate thereof : ex facie the pleadings, no fiduciary relationship existed between the parties, no contractual agreement between them to this effect, no statutory provision creating this obligation : point *in limine* upheld : appeal dismissed with costs.

ORDER

On appeal from: The Gauteng Division of the High Court, Pretoria (Ranchod J sitting as the court of first instance).

The appeal is dismissed with costs.

JUDGMENT

Willis JA (Cachalia, Zondi and Van der Merwe JJA and Mbatha AJA concurring):

[1] Lucas Moila (the deceased) was the plaintiff in the court a quo. He had claimed the right to a statement of account for his electricity and water utility charges and a debate thereof from the respondent, which is The City of Tshwane Metropolitan Municipality (the municipality). The claim was dismissed with costs in the court a quo (Ranchod J). Leave to appeal to this court was granted by the court a quo.

[2] The deceased died on 24 August 2016. Dorkas Lettie Sinclair was duly appointed as executrix of the estate of the deceased in terms of a Letter of Executorship issued in terms of the Administration of Estates Act 66 of 1965 on 26 October 2016. In terms of Rule 15(3) of the Rules of the Superior Courts, the executrix has given notice to the municipality, as well as registrar of this court, that she wishes to be substituted in this appeal for the deceased. No one has objected thereto. In an attempt to avoid confusion, the name of the deceased has been retained in the rubric of the judgment.

[3] The deceased was a businessman. He was the registered owner of an immovable property in Mamelodi, which falls within the area of jurisdiction of the municipality. The registration of the deceased's ownership occurred in 1998. The deceased claimed that the municipality incorrectly charged him for amounts for utility services that were due and payable by the previous registered owner of the immovable property and that the municipality has, in addition, overcharged him. Owing to the deceased's substantial arrears with his payments for these services, the municipality terminated its supply thereof to him in August 2010.

[4] In consequence of the termination of these services, the deceased brought an urgent application before the high court (Kollapen AJ) for the restoration thereof. The court granted an interim order to this effect on 15 November 2010, making the order conditional upon the outcome of an action to be instituted by the plaintiff against the municipality, as well as the outcome of that action. The deceased instituted the action, which came before the court a quo.

[5] Set out fully, the extent of the relief sought by the deceased in that action reads as follows:

'That the defendant be ordered to render to the plaintiff within 30 days from [the] date of the order a true and proper statement of account together with substantiating documents reflecting the correct charges, levies and amounts levied against the plaintiff in respect of the property for the period August 1998 to date;

(b) That the defendant be ordered to debate the aforesaid account with the plaintiff within 30 days from the time it was rendered in terms of paragraph (a) above;

(c) That it be declared that the plaintiff is not indebted to the defendant in any sum whatsoever in respect of the property;

(d) That the defendant be ordered to pay the costs of this action;

(e) Further and/or alternative relief.'

There was no dispute between the parties that the deceased was entitled to receive regular accounts from the municipality.

[6] Shortly before the pre-trial conference, the deceased received a comprehensive statement of account. This occurred on 6 July 2015. The deceased

complained, however, that he had not received any 'source documents'. A pre-trial conference between the parties was held on 16 July 2015. At that conference, the deceased took the stance that the account had to be debated between the parties before the Court could be approached for a debate thereof. Accordingly, the deceased contended that the matter was not ripe for hearing, which had been set down for 30 July 2015, and that the trial would have to be postponed. The municipality took the contrary view that the trial should proceed. It relied, *inter alia*, on the fact that the matter had previously been set down for trial in June 2013 and that the municipality had made discovery of numerous documents relating to the account since 1998.

[7] With these points in contention, the matter came before the court *a quo* for a hearing on the date set down for trial. The deceased argued that the matter should be postponed. The municipality disagreed, however, contending that the matter should not be postponed and that the interim interdict should be discharged and the plaintiff's claim dismissed. With regard to the question of the plaintiff's right to debate the account, the municipality, in effect, took a point *in limine*.¹ The point was that, on the facts as pleaded, the plaintiff had no right, in law, to debate the account. The parties agreed that this point should be argued before any further steps were taken in the trial. No evidence was led, the court *a quo* upholding the municipality's point. Consequently, the court *a quo* refused the application for a postponement, discharged the interim interdict and dismissed the plaintiff's claim, with costs.

[8] Relying on *FPS Ltd v Trident Construction (Pty) Ltd*,² the appellant has submitted that the municipality's point *in limine* should not have been upheld as it had not been pleaded. This point cannot succeed. The municipality's point of law relates to the facts, as pleaded. In his particulars of claim, the deceased did not set out the basis upon which he would have been entitled to debate the account. The deceased did allege the existence of a fiduciary relationship between him and the

¹ Recognised for its convenience, a point *in limine* is, typically, a question of law, raised at the beginning of the hearing of a matter, before any evidence is led, which point may, if successful, dispose of the dispute or bring the proceedings instituted to a conclusion. See, for example, *Scheepers & Nolte v Pate* 1909 TS 353 at 360; *Allen & others NNO v Gibbs & others* 1977 (3) SA 212 (SE) at 214E and 216A.

² *FPF Ltd v Trident Construction (Pty) Ltd* 1989 (3) SA 537 (A) at 541J- 542D.

municipality but this was done with regard to the allegation that he was entitled to receive regular accounts. The allegation was not, however, made insofar as a debate of the account was concerned. In any event, no basis for the allegation of a fiduciary relationship subsisting between the parties was alleged and none is apparent from the facts, as pleaded.

[9] Besides, as Wessels J said as long ago as *Scheepers & Nolte v Pate*, a litigant has the duty to take the most expeditious course to bring litigation to a conclusion.³ In view of the history of the matter, especially the deceased's dilly-dallying over the final adjudication of the dispute between the parties, the municipality cannot, in my opinion, be criticised for raising the point as it did.

[10] The right to debate an account is not to be confused with the right to receive the same. The two are not coextensive. The rights of those who are liable for the payment of municipal services to receive accounts from the relevant municipality is made clear in sections 95 and 102 of the Local Government Municipal Systems Act 32 of 2000 (the LGMS). The relevant portions of s 95 read as follows:

‘Customer care and management

In relation to the levying of rates and other taxes by a municipality and the charging of fees for municipal services, a municipality must, within its financial and administrative capacity –

...

(e) ensure that persons liable for payments, receive regular and accurate accounts that indicate the basis for calculating the amounts due;

(f) provide accessible mechanisms for those persons to query or verify accounts and metered consumption, and appeal procedures which allow such persons to receive prompt redress for inaccurate accounts;

(g) provide accessible mechanisms for dealing with complaints from such persons, together with prompt replies and corrective action by the municipality;’

Section 102 (1) provides that a municipality may:

³*Scheepers (supra)* at 360. See also *Allen v Gibbs (supra)*.

- ‘(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.’

[11] In *ABSA Bank Bpk v Janse Van Rensburg*,⁴ this court made it clear that, in order to obtain an order to debate an account, the person seeking such an order must establish that a fiduciary relationship existed between that person and the other party; or that there was a contractual agreement between them that this would occur or that a statutory provision created such an obligation.⁵ Ex facie the pleadings – and, more especially, the deceased’s own particulars of claim – none of these requirements was met. During the hearing before this court, Mr Jacobs, who was counsel for the appellant, disavowed any reliance on a fiduciary relationship having existed between the deceased and the municipality. He submitted that, by reason of the provisions of ss 95(f) and (g) of the LGMS, set out above, the right to a debate of the account had, by necessary implication, been incorporated into the contract between the two relevant parties. I disagree. Section 95(f) provides for public law rights for a person liable for the payment of accounts for municipal services to receive ‘prompt redress for inaccurate accounts’, not for any ‘debate’ thereof; s 95(g) for a right to ‘prompt replies’ to complaints and to ‘corrective action’ but also no right to a debate of accounts.

[12] The court a quo usefully referred to those provisions of ss 95(f) and (g) of the LGMS, which provide for ‘accessible mechanisms’ respectively to ‘query or verify accounts’, ‘appeal procedures’ and the ‘dealing with complaints’, together with ‘corrective action’. Much that could be in dispute is governed by municipal by-laws. As that court noted, the deceased would not have been without equitable remedies if he had wished to resort to them. His remedy would have been to avail of his rights under s 95 of the LGMS.

⁴ *ABSA Bank Bpk v Janse Van Rensburg* 2002 (3) SA 701 (SCA).

⁵ Para 15. See also *Rectifier and Communications Systems (Pty) Ltd v Harrison* 1981 (2) SA 283 (C) at 289H, referred to with approval in *ABSA Bank v Janse Van Rensburg* (*supra*).

[13] The court a quo correctly relied on *ABSA Bank v Janse Van Rensburg* to dismiss the appellant's claim. The following order is made:

The appeal is dismissed with costs.

N P WILLIS
Judge of Appeal

APPEARANCES:**For Appellant:**

G Jacobs

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