THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 463/19

In the matter between:

NATURE'S CHOICE FARMS (PTY) LTD **APPELLANT**

and

EKURHULENI METROPOLITAN MUNICIPALITY **RESPONDENT**

Neutral citation: *Nature's Choice Farms (Pty) Ltd v Ekurhuleni Metropolitan Municipality* (Case no 463/19) [2020] ZASCA 20 (25 March 2020)

Coram: PETSE DP, SWAIN, NICHOLLS and DLODLO JJA and EKSTEEN AJA

Heard: 3 March 2020

Delivered: 25 March 2020

Summary: Rule 33(4) of Uniform Rules of Court – separation of issues – issues not accurately circumscribed – dispute relating to issues to be decided – sections 74, 75, 75A and 95 of Local Government Municipal Systems Act 32 of 2000 – Municipal Water Tariffs – interpretation of bylaw – prescription – when debt falls due – rendering invoice does not interrupt prescription.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Vally J, Modiba and Unterhalter JJ concurring, sitting as a court of appeal):

1 The appeal succeeds and the order made by the full court is set aside.

2 The order of the trial court in the Gauteng Division of the High Court is set aside.

3 NCF's claim is dismissed.

4 Each party is to pay its own costs in respect of the proceedings before the high court, the full court and in this Court.

JUDGMENT

Eksteen AJA (Petse DP, Swain, Nicholls and Dlodlo JJA concurring)

[1] The dispute in this case relates to the alleged prescription of the claim by Ekurhuleni Metropolitan Municipality (Ekurhuleni) in respect of service charges raised for water usage by Nature's Choice Farms (Pty) Ltd (NCF). The issue of prescription was dealt with in the Gauteng High Court (the high court), and subsequently in an appeal before the full court of that division (the full court), under rule 33(4) of the Uniform Rules. The high court upheld NCF's contention that the debt had prescribed and it ordered Ekurhuleni to reverse the charge. The full court, however, came to the contrary conclusion

and set aside the order made by the high court. This appeal against the order of the full court is with the special leave granted by this Court.

[2] On 13 March 2014 NCF instituted action proceedings against Ekurhuleni seeking a declarator that it was not indebted to Ekurhuleni in the amount of R3 863 147.90 (the disputed amount) for water usage during the period 3 September 2007 to 7 July 2010 (the relevant period). NCF contended that the claim had become prescribed and unenforceable by the effluxion of time in terms of the relevant provisions of Ekurhuleni's schedule of tariffs for the supply of water (the schedule). Ekurhuleni denied the contention and filed a claim in reconvention in which it sought payment of the disputed amount. NCF, in turn, raised a special plea of prescription and Ekurhuleni replicated to raise a number of defences to the special plea.

[3] The issues which arise for decision before this Court are: Firstly, the scope of the issue separated in terms of rule 33(4); secondly, the construction to be placed on the relevant provisions of the schedule; and thirdly, the legal conclusions reached by the full court.

Background

[4] NCF is the producer of frozen vegetable products within the area of jurisdiction of Ekurhuleni. In the production process it uses a substantial quantity of water which is supplied by Ekurhuleni in the discharge of its statutory service delivery obligation.

[5] On 11 June 2010 Ekurhuleni caused an inspection and tests to be conducted on the water measuring assembly (the assembly) at the premises of

NCF. In the course thereof it was discovered that the water meter installed at the premises was a factor 10 meter whereas it was recorded in the financial accounting system of Ekurhuleni as a factor 1 meter. The factor of the meter relates to the units in which the water flow is measured, it has no impact on the accuracy of the measurement. The practical effect of the incorrect factor recorded in the financial accounting system was that NCF had consistently been billed for only 10 per cent of its actual water usage prior to the discovery of the error.

[6] A new assembly was installed at the premises of NCF as part of Ekurhuleni's water meter consolidation and improvement project. It was duly designed and finally approved on 31 August 2010. It was installed on 7 November 2010 and it is common cause that the water usage was accurately measured and recorded in Ekurhuleni's financial system thereafter.

[7] On 6 September 2010, prior to the installation of the new assembly Ekurhuleni's infrastructure department instructed Mr Ackerman, the area manager of the finance department (finance), to adjust the various usage readings with the factor 10 and to recover the amounts due in respect of the actual usage for the period of 36 months prior to the correction of the error in accordance with its understanding of para 12 of the schedule. (I shall revert to the provisions of para 12 of the schedule later.) Finance did not respond to the instruction until 18 September 2013 when it debited NCF with an amount R4 403 988. During February 2014, in the face of the looming dispute, Ekurhuleni abandoned a portion of its claim due to certain discrepancies in the reading of the meter at the time of the replacement of the assembly, which its engineer ascribed to backflow which occurred during the replacement of

the assembly. Ekurhuleni, however, persisted in its claim for the disputed amount based on the actual water usage for the relevant period, as recorded by the original meter.

[8] NCF resisted the demand and Ekurhuleni threatened to interrupt its water supply unless payment was made. This impasse prompted NCF to obtain an interim interdict to prevent the interruption of its water supply and the institution of the action for the declarator.

The separation of issues

[9] As alluded to earlier, the issue of the alleged prescription of Ekurhuleni's claim was dealt with in the high court in terms of rule 33(4) and an order in terms of the rule was granted at the commencement of the trial. Before us, however, the parties were not in agreement as to the scope of the separation. On behalf of Ekurhuleni it was argued that the issue relating to the prescription of its claim in reconvention and the defences thereto as contained in its replication were not before the court and remained to be adjudicated in due course. The issue of prescription of the claim for the disputed amount as it emerges from the pleadings in reconvention can therefore not be decided at this stage. NCF, on the other hand, contended that it was the intention of the parties that all issues relating to prescription of the disputed amount be decided. It argued that Ekurhuleni has had the opportunity to present any evidence which it may have wished to in respect of the prescription raised in the special plea in the proceedings in reconvention. It was contended that it was not open now to Ekurhuleni to allege that these issues remain alive.

[10] In order to elucidate the issue it is necessary to consider first the pleadings. It is the purpose of pleadings to define the issues both for the parties and the court and it is the duty of the court to adjudicate upon the disputes and those disputes alone.[1] In its particulars of claim NCF alleged that Ekurhuleni supplied services, including water, to it in terms of an agreement which required it to render accurate monthly statements to NCF in respect of charges levied. It then preceded to allege:

'6. In addition to the said agreement the supply of water by the Defendant to the Plaintiff was subject to the schedule of tariffs for the supply of water supply services, published as part of, alternatively, pursuant to the said bylaws which states:-

> "12. WATER: FACTOR AND COUPLING ERRORS:
>
> In the event a miscalculation was made and charged for by the Council of water services rendered due to a factor or coupling error, the rectified charges applicable shall be calculated as follows, upon approval by the Executive Director: Infrastructure Services.
>
> The Charges applicable shall be the levy Rand Water charges the Municipality (at that point in time, including the WRC levy), + 15% levy, for the duration that the incorrect charges [were] rendered, up to a maximum of 36 months backdated, based on the average monthly consumption registered over three succeeding metered periods after the factor error or incorrect coupling was rectified."

7. In material breach of the aforesaid agreement and in conflict with the aforesaid provisions of the Defendant's tariffs, on or about 18 September 2013 the Defendant debited the Plaintiff's account with an amount of R3 863 147.90 and R540 848,68 (a total of R4 403 996.58). The said amounts were debited to the Plaintiff's account ostensibly pursuant to the provisions of paragraph 12 of the Defendant's schedule of Tariffs as referred to in 6 above and in order to rectify as contemplated in the said Tariff, an alleged error on the billing system . . . .

[1] *Molusi and Others v Voges NO and Others* [2016] ZACC 6; 2016 (3) SA 370 (CC) para 28; *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA) para 13.

8. The aforesaid error would thus have entitled the Defendant to correct its error in respect of a maximum period of 36 (thirty six) months prior to the date of such correction, being 18 September 2013, and thus in respect of the period from 19 September 2010 to 18 September 2013.

9. The amount wrongfully debited to the Plaintiffs account and claimed by the Defendant was in respect of the period prior to 18 September 2010 and thus:

9.1 The Defendant's claim in respect thereof had prescribed, and

9.2 The Defendant was debarred by the provisions of paragraph 12 of its schedule of tariffs from claiming the same.'

[11] NCF accordingly prayed for orders:

1 Declaring that NCF is not indebted to Ekurhuleni in the amount of R3 863 147.90 as well as the amount of R540 848,68 debited to NCF's account in respect of VAT on the said amount; and

2 Directing and ordering Ekurhuleni to reverse the amount of R3 863 147.90 as well as the amount of R540 848,68 debited to NCF's account in respect of VAT on the said amount by crediting its account in the said sum.

[12] Ekurhuleni denied NCF's entitlement to the relief. It admitted the averments set out in para 6 of the particulars of claim and the debit passed on 18 September 2013. It alleged that it was entitled to correct the error 'up to a maximum of 36 months backdated', however, it denied the construction placed upon para 12 of the schedule in para 8 of NCF's particulars of claim. It accordingly put NCF to the proof of the conclusions set out in para 9 of the particulars of claim.

[13] Ekurhuleni's claim in reconvention is similarly based on the schedule. The claim in reconvention was met with a special plea as aforesaid. Ekurhuleni replicated to the special plea raising its defence to the alleged prescription. It alleged that NCF had operated a consolidated account with Ekurhuleni in respect of all costs, levies and charges incidental to electricity, refuse, water and sewerage services rendered by Ekurhuleni in respect of NCF's property as provided for in s 102 of the Local Government-Municipal Systems Act 32 of 2000 (the Systems Act), and Ekurhuleni's credit control and debt collection bylaws. It pleaded that payments made by NCF in respect of accounts and statements rendered by Ekurhuleni in respect of municipal services rendered were allocated to the oldest outstanding debts. Finally it asserted that the payments effected by NCF from time to time in respect of outstanding amounts relevant to NCF's account constituted express, alternatively, tacit acknowledgements of liability by NCF as provided under s 14(1) of the Prescription Act 68 of 1969 (the Prescription Act), resulting in any possible running of prescription in respect of the disputed amount having been interrupted. It accordingly denied that its claim had prescribed as contended for in the special plea.

[14] Thus the battle lines were drawn at the close of pleadings. At a pre-trial conference held thereafter the parties agreed 'that [NCF's] claim be dealt with as a separate issue'. Pursuant to the agreement NCF caused a document headed 'PLAINTIFF'S NOTICE I.T.O. RULE 33(4)' to be filed. The material portion of the notice relevant to the issue under consideration was contained in paras 1 to 3 of the notice and recorded as follows:

'The plaintiff hereby gives notice that it shall make application as follows:

1. The plaintiff and the defendant have agreed to separate the plaintiff's claim from the defendant's counterclaim in terms of rule 33(4).

2. The representatives of the parties are of the opinion that the plaintiff's claim may be determinative of the whole matter.

3. The court is requested to decide the plaintiff's separated claim before the defendant's counterclaim, which are to be set down for trial if necessary at a later date.'

At the commencement of the trial the transcript reflects the following exchange:

'Mr Kayser: As the court pleases M'Lord. M'Lord, I would like to refer you to . . . a notice of intention to make application for a separation in terms of rule 33(4), it is by agreement by the parties M'Lord.

Court: The application is granted.'

Pursuant to the order of separation Ekurhuleni's claim in reconvention was accordingly postponed sine die.

[15] Rule 33(4) provides:

'If, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately.'

[16] This Court has cautioned repeatedly against the inappropriate separation of ill-defined issues which do not serve the goal of enhancing the

convenient and expeditious disposal of litigation.[2] In *Denel*[3] the court foresaw the danger of disputes arising from imprecise articulation of orders made under rule 33(4). It set out guidelines which litigants would be well advised to heed when seeking a separation of issues under the rule and stated:

'Rule 33(4) of the Uniform Rules – which entitles a Court to try issues separately in appropriate circumstances – is aimed at facilitating the convenient and expeditious disposal of litigation. It should not be assumed that the result is always achieved by separating the issues. In many cases, once properly considered, the issues will be found to be inextricably linked, even though, at first sight, they might appear to be discreet. And even where the issues are discreet, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing particularly when there is more than one issue that might be readily dispositive of the matter. It is only after careful thought has been given to the anticipated course of litigation as a whole that it will be possible properly to determine whether it is convenient to try an issue separately. But, where the trial Court is satisfied that it is proper to make such an order – and, in all cases, it must be so satisfied before it does so, it is the duty of that court to ensure that the issues to be tried are clearly circumscribed in its order as to avoid confusion. The ambit of terms like the "merits" and the "*quantum*" is often thought by all the parties to be self-evident at the outset of the trial, but, in my experience, it is only in the simplest of cases that the initial *consensus* survives. Both when making rulings in terms of Rule 33(4) and when issuing its orders, the trial Court should ensure that the issues are circumscribed with clarity and precision.'[4]

[17] In the present instance neither the parties nor the high court appear to have had any regard to these salutary guidelines and the order of separation made no attempt to circumscribe the separated issue at all. The dispute relating

[2] *Private Employee Solutions (Pty) Ltd v Vital Distribution Solutions (Pty) Ltd* 2005 (5) SA 276 (SCA) para 26 and 27; *Consolidated News Agencies (Pty) Ltd (In Liquidation) v Mobile Telephone Networks (Pty) Ltd and Another* [2009] ZASCA 130; 2010 (3) SA 382 (SCA) para 89-90; *Absa Bank Ltd v Bernert* 2011 (3) SA 74 (SCA) para 21; and *Adlem and Another v Arlow* 2013 (3) SA 1 (SCA) para 5.
[3] *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA).
[4] Id at 484I-485E.

to the scope of the separated issue is precisely what was predicted in *Denel*.[5] Self-evidently the special plea in reconvention, if sound, would equally be dispositive of the matter. Moreover, much of the evidence necessary to establish NCF's claim would be equally material to the special plea. This is not a matter in which a separation of NCF's claim ought to have been granted.

[18] I turn to consider the interpretation of the order of separation. Whether a separation occurs at the instance of the court or an application by the parties it must be an issue which arises from the pleadings.[6] As alluded to earlier an agreement was reached at a pre-trial conference between the parties in respect of the extent of the separated issue. The definition of the separated issue as contained in the notice in terms of rule 33(4) is consonant with the agreement recorded at the pre-trial conference and it is to this formulation that the high court had regard when issuing its order. The separation which the high court envisaged was that articulated in paras 1 and 3 of the notice in terms of rule 33(4) which are quoted earlier. It provided for NCF's claim to be decided separately and before any evidence was heard in respect of the claim in reconvention. It is accordingly to the formulation of NCF's claim in its particulars of claim that we must look to determine the scope of the separated issue.

[19] The dissent arising from the order of separation is to be found in NCF's allegation in para 9 of its particulars of claim that Ekurhuleni's claim had become 'prescribed'. The use of the term in isolation is of little assistance. In

[5] See also *Absa Bank Ltd v Bernert* 2011 (3) SA 74 (SCA).
[6] *First Rand Bank Ltd v Clear Creek Trading 12 (Pty) Ltd and Another* [2015] ZASCA 6; 2018 (5) SA 300 (SCA).

its ordinary English usage it means no more than that the claim had become unenforceable by the effluxion of time. Various statutes contain their own provisions relating to prescription. The prescription provisions relied upon must be gleaned from the pleadings.

[20] The essential features of NCF's pleaded case have been quoted earlier. It is firmly anchored in the provisions of para 12 of the schedule. It records the terms of para 12 of the schedule and then alleges that the debiting of the disputed amount to NCF's account was 'ostensibly pursuant to the provisions of para 12' of the schedule in order to rectify an error in the billing system as envisaged in the schedule. In para 8 it asserts that the said error would 'thus' (ie by virtue of the provisions of para 12 of the schedule) have entitled Ekurhuleni to correct its error in respect of a maximum period of 36 months prior to the date of such correction, which it alleged occurred on 18 September 2013. This led it to the conclusion in para 9 that the claim in respect of the disputed amounts had 'thus' (ie therefore) become prescribed.

[21] Significantly there is no reference to the Prescription Act 68 of 1969 in NCF's particulars of claim nor is there an allegation that the disputed amount constituted a 'debt' as envisaged in the Prescription Act. It is not alleged when it is contended that the debt was due or when prescription is alleged to have begun to run[7]. The prescription contended for by NCF is based solely on the construction of para 12 of the schedule and the 36 month period referred to therein.

[7] Cf *Gericke v Sack* 1978 (1) SA 821 (A); *Lancelot Stellenbosch Mountain Retreat (Pty) Ltd v Gore NO and Others* [2015] ZASCA 37; and Amler's *Precedents of Pleadings* 9 ed (2019) at 306.

[22] At the commencement of the judgment in the high court, however, the trial judge summarised the events giving rise to the dispute as he perceived them. He recorded:

'11. When the plaintiff received an invoice in respect of the error billing for the amount of R4 403 996.58 dated 18 September 2013, this led to the action in this court for a declaratory order as set out in the pleadings after obtaining an order from this court interdicting the defendant from suspending the water services pending the determination of this dispute.

12. The plaintiff disputed the invoice on the grounds that the amount had prescribed in terms of the Prescription Act 68 of 1969.'

This led him to identify the issue for decision as being whether or not the water charge for the period of three years prior to 11 June 2010 and any debt arising out of the said water charges had become prescribed and therefore extinguished by the time the defendant billed for the same on 23 September 2013. He accordingly decided the matter on an application of the provisions of the Prescription Act. The full court did likewise. For reasons set out earlier herein this constituted a misdirection. NCF did not place any reliance on the provisions of the Prescription Act. It relied solely on the interpretation of the schedule for its contention that the claim had become prescribed before Ekurhuleni billed for the disputed amount.

[23] In the result the issue of prescription raised in the special plea in reconvention was not before the court. Neither the trial court nor the full court have considered the defence raised in the replication to meet the reliance on prescription. In the circumstances it is premature at this stage to rule on the issue of the prescription of Ekurhuleni's claim in reconvention. The effect is that the order of the high court cannot be sustained.

Construction of para 12 of the schedule of water tariffs

[24] I turn to consider NCF's case as pleaded and the interpretation to be placed on para 12 of the schedule. The schedule cannot be considered in isolation. It forms part of a broader legal framework. It has its foundation in s 74 of the Systems Act, which enjoins Ekurhuleni to adopt and implement a tariff policy on the levy of fees for municipal services which complies with the provisions of the said Act. In this regard s 74(2) sets out various principles which must be reflected in its tariff policy. Three of these principles are material to the present dispute. Firstly, s 74(2) provides that the policy must reflect the principle that users of municipal services should be treated equitably in the application of tariffs. Secondly, s 74(2)*(b)* requires that the amount which individual users are to pay for services should generally be in proportion to their use of that service; and thirdly, s 74(2)*(d)* requires that tariffs must reflect the cost reasonably associated with the rendering of the service, including capital, operating, maintenance, administration and replacement costs, and interest charges.

[25] Section 75 of the Systems Act proceeds to provide that:

'(1) A municipal council must adopt by-laws to give effect to the implementation and enforcement of its tariff policy.

(2) By-laws in terms of subsection (1) may differentiate between different categories of users, debtors, service providers, services, service standards and geographical areas as long as such differentiation does not amount to unfair discrimination.'

[26] On 27 May 2010 Ekurhuleni duly adopted a water and wastewater policy for the period 1 July 2010 to 30 June 2011 pursuant to s 74 of the

Systems Act. The policy commences by recording the provisions of s 74 of the Systems Act. It then records:

'Broad water pricing goals have been established by National Government. These goals have been directed at the pricing of raw water, however, they form an important context for the establishing of retail tariff goals.

. . .

The broad principle of use in the compilation of the tariffs to promote the attainment of the tariff setting goals mentioned above are:

- adequate services are provided fairly to all consumers of Ekurhuleni;
- . . .
- payment to be in proportion to the amount of water consumed. This will promote the more efficient use of water, compared to tariffs which have a large fixed cost component; and

. . . .'

[27] Pursuant to the principle enunciated in s 74(2)*(b)*, s 95*(d)* of the Systems Act enjoins Ekurhuleni, within its financial and administrative capacity, where the consumption of services has to be measured, to take reasonable steps to ensure that the consumption by individual users of services is measured through an accurate and verifiable metering system.

[28] Section 75A of the Systems Act further empowers the municipality to levy and recover fees, charges or tariffs in respect of any function or service of the municipality. Such fees, charges or tariffs are levied by a resolution taken by a majority vote in the city council. The schedule is the product of such a resolution. It accordingly has the force of a bylaw and is adopted to give effect to the implementation and enforcement of the water and wastewater policy.

[29] Paragraph 12 of the schedule (as it read in 2010-2011) was set out in para 6 of NCF's particulars of claim and quoted earlier. The paragraph cannot, however, be considered in isolation as if it has an existence of its own.[8]

[30] The law in respect of the interpretation of documents was summarised in *Natal Joint Municipal Pension Fund*[9] as follows:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.'

[31] In the present case para 12 of the schedule must be read in the context in which it appears, not only in the schedule, but also in the context of the legal framework which gave rise to its existence and the principles set out in s 74 and the Ekurhuleni water and wastewater policy.

[32] The purpose of para 12 is to enable Ekurhuleni to recover what is due to it in respect of water consumed by users in circumstances where a bona fide error in the calculation of charges has occurred due to a factor or coupling error. This accords with the principle that individual users should pay for

[8] See *Swart en 'n Ander v Cape Fabrix (Pty) Ltd* 1979 (1) SA 195 (A) at 202C.
[9] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at 603F-604B.

services in proportion to their use of that service. Paragraph 12 proceeds to set out a formula by which to calculate the rectified amount payable in respect of such usage during the period for which the incorrect charge was made. It gives effect to the principle that tariffs should reflect the costs reasonably associated with the rendering of the service. Often, however, where the error is only discovered long after the use occurred accurate measurements may not be available. The paragraph therefore provides for a formula by which to determine a deemed volume of water, same being the average monthly consumption registered over three succeeding metered periods after the factor or coupling error was rectified. This provision, in the context in which it appears, proceeds to limit the recovery of the rectified charge to '36 months backdated'. The provision limits the recovery of the rectified charge to the last 36 months, prior to the discovery of the error, during which the incorrect charge was levied. It accordingly relates to the calculation of the rectified charge and has no bearing on when an invoice is rendered or when a claim for payment of the rectified charge will become unenforceable. The relevant period in this case falls within the 36 months preceding the discovery of the error.

[33] In this regard s 16(1) of the Prescription Act provides:

'[T]he provisions of this chapter shall, save in so far as they are inconsistent with the provisions of any Act of Parliament which prescribes a specified period within which a claim is to be made or an action is to be instituted in respect of a debt or imposes conditions on the institution of an action for the recovery of a debt, apply to any debt arising after the commencement of this Act.'

The schedule is not an Act of Parliament and finds no application to the prescription of the claim. The issue of prescription must accordingly be

decided on the application of the provisions of the Prescription Act when the claim in reconvention is adjudicated. In the result NCF's assertion that Ekurhuleni's claim became unenforceable by virtue of the provisions of para 12 of the schedule, whether by 'prescription' or otherwise, cannot be sustained.

Conclusions of the full court

[34] The full court found, in the appeal before it, correctly, that the Prescription Act applies to the charge raised by Ekurhuleni. For the reasons set out earlier, however, that issue was not before it. It is nevertheless necessary to address two findings which the full court made. The first issue relates to when the debt became 'due' as envisaged in the Prescription Act. The second relates to the interruption of prescription.

[35] In considering the issue of when prescription began to run the full court accepted as a point of departure the date of the replacement of the assembly, 7 November 2010, and reasoned:

'13. . . . Since the debt comes about by virtue of the factor error tariff, it is to the tariff that we must look to ascertain what facts the municipality had to prove in order to pursue its claim.

14. The factor error tariff sets out the basis for the calculation of the rectified charge. That calculation provides for a price to be charged and a mechanism to determine the quantity for which the charge may be made. Under the factor error tariff, the price is the levy charged by Rand Water to the municipality (including the WRC levy) plus 15%. The quantity is determined by ascertaining the average monthly metered consumption for the three month period after the error is rectified, and then applying the average for the period of the error, up to a maximum backdated period of 36 months. The price multiplied by the quantity provides the permissible rectified charge.

15. When, then, did the municipality acquire a complete cause of action? The joint statement of common cause facts stipulates that on or about 6 or 7 November 2010, a new water meter assembly was installed on the property of NCF, following which the consumption of water at the property was correctly recorded on the municipality's accounting system. As from 6 or 7 November 2010, the municipality, in accordance with the factor error tariff, measured the recorded average monthly consumption on NCF's property in order to ascertain the quantity of water for which a rectified charge could be made. That could not have been done before the end of February 2011, it being the earliest date by which an average of three full months of rectified consumption could be measured and reflected in the accounts of the municipality.

16. . . .

17. Since the factor error tariff did not permit the municipality to calculate the rectified charge due by NCF before the end of February 2011, it follows that the charge raised by the municipality against NCF had not prescribed by 25 September 2013 because the three year period had not run its course.'

[36] I have considered the separated issue earlier. NCF's claim for a declarator was to resist a charge raised by Ekurhuleni on 18 September 2010. Ekurhuleni billed NCF for a rectified charge based on its actual water usage over the relevant period. It did not require the installation of any new assembly or meter to determine the volume of the water used. To the extent that the full court considered the rectified charge to have been based on the average usage of the subsequent three months it erred.

[37] The provisions of para 12 stipulate that the rectified charges may only be recovered upon the approval of the Executive Director: Infrastructures Services. It is not in dispute that the Department of Infrastructure Services requested Ackerman to rectify the error on 6 September 2011. The letter of request set out the provisions of para 12 (in respect of water usage) and 11.1

(in respect of wastewater usage – which read in identical terms to para 12) and then proceeded to request Ackerman to:

1. Reverse the amounts previously charged for water and wastewater based on the readings of meter no . . . for a period of three years prior to the date the factor error is rectified on the financial system.

2. Adjust the various consumption readings with a factor 10, calculate and levy the correct charges for water, wastewater in terms of para 12 and 11.1 as quoted above plus VAT for the period as stated in 1.'

[38] The instruction to finance was therefore to adjust the various consumption readings actually recorded with a factor 10 in order to calculate the rectified charges for water. Furthermore, Ackerman testified in respect of the manner of calculation of the rectified charge which was billed as follows:

'And how was the corrected, the incorrect billing that took place, how was that corrected? . . . With the journal that was, or the adjustment that was made, we took the readings of the period and we multiply that by 10 to give us the correct levy.'

And later:

'In determining and levying the amounts . . . on behalf of the defendant I used the best known and the only method or the most practical and available method in exercising my powers and functions in my aforesaid capacity on behalf of the defendant.

And what was that method that you used? . . . The method that we used is, we took the incorrect period, levies and we just multiply that by 10 in order to get the correct consumption per month and, did the adjustment on, based on that.'

[39] What emerges from this, on my understanding, is that Ekurhuleni had consistently used actual water meter readings where available, rather than the average of the consumption registered over the three succeeding metered periods, in order to calculate a rectified charge. That was in fact the method

adopted in calculating the disputed amount. It accords with the principles which the Systems Act prescribe, with the broad principles established by National Government for the fixing of water prices and with the water and wastewater policy adopted by Ekurhuleni. It is the Systems Act and the water and wastewater policy which empowers Ekurhuleni to adopt the schedule which, in turn, is required to give effect to the policy.[10] On the consideration of all these factors the correct interpretation to be placed on para 12, as it read at the time, is that the price formula should be applied to the actual water usage measured during the period that incorrect charges were levied where such figures are available. Where accurate measurements of the actual usage for the period over which the miscalculation occurred are not available the average of the next three metered periods may be adopted to reflect the deemed usage. This interpretation would accord with the authorising provisions in terms of which the schedule came into existence and with the actual conduct of Ekurhuleni.

[40] It is significant that the schedule of water tariffs adopted by Ekurhuleni in respect of the subsequent year (July 2011 to 2012) and every year thereafter, recognised this. The subsequent schedules of water tariffs adopted annually read:

'The charges applicable shall be the levy Rand Water charges the municipality (at that point in time, including the WRC levy), plus 15% levy, for the duration that the incorrect charges were rendered, up to a maximum of 36 months backdated. Should accurate readings not be available the charges would be based on the average monthly consumption registered over three succeeding metered periods after the factor error or incorrect coupling was rectified.'

[10] Section 75 of the Systems Act.

[41] The inquiry as to when a debt is 'due' as envisaged in s 12(1) of the Prescription Act has been frequently considered. The approach was restated by this Court in *Farocean Marine (Pty) Ltd*[11] as follows:

'Prescription commences to run "as soon as the debt is due" (s 12(1)). Although the "date on which a debt arises usually coincides with the date on which it becomes due" this need not always be the case. The question is thus when the debt the respondent seeks to recover arose and when it became due. A money debt is "due" when there is a "liquidated monetary obligation presently claimable by the creditor for which an action could presently be brought against the debtor. Stated differently, the debt must be one in respect of which the debtor is under an obligation to pay immediately".'[12] (Footnotes omitted.)

In the application of these principles and in the light of the interpretation which I have placed on para 12 the debt in respect of a rectified charge, in this instance the disputed amount, arises and is due, at least in instances where accurate water measurements for the relevant period are available, upon discovery of the factor error. At that stage all the facts from which the rectified charge arose were known, the amount of the claim was liquidated and the debt was immediately payable. Ekurhuleni would immediately have been entitled to demand payment based on the actual water measurements in respect of water usage that had already occurred. On this basis prescription began to run on 11 June 2010. In the circumstances the conclusion of the full court on this issue cannot be sustained.

[42] The second issue arising from the judgment of the full court which requires consideration relates to the interruption of prescription. In this regard the full court held:

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[11] *Farocean Marine (Pty) Ltd v Minister of Trade and Industry* [2006] ZASCA 137; 2007 (2) SA (SCA) 334para 12.

[12] See also *Singh v Commissioner, South African Revenue Service* 2003 (4) SA 520 (SCA) at 533C-E.

'The parties accepted that for purposes of this appeal prescription was interrupted on 25 September 2013 when NCF received a consolidated invoice from the municipality reflecting the rectified charge for the period 3 September 2007 to 1 February 2010. It was also conceded before us, correctly, that if prescription began to run from February 2011 or thereafter, the rectified charge by the municipality against NCF was a debt that had not been extinguished before it was claimed.'

[43] These comments by the full court should be considered in the context of the particular facts of the present case. It was NCF's claim which served before the full court. I have recorded earlier that it was NCF's case that Ekurhuleni's claim had prescribed prior to the rendering of an invoice. It is in this context that these comments should be viewed.

[44] To the extent that it may have been the intention to declare that the rendering of a consolidated invoice interrupted prescription the finding cannot be sustained. Prescription is interrupted by an acknowledgement of liability or by the service on the debtor of any process whereby the creditor claims payment of the debt.[13] Rendering of an invoice has no effect on the running of prescription. As the interruption of prescription is a matter of law prescribed by the Prescription Act an incorrect concession by counsel cannot bind the parties. In the circumstances, irrespective of the attitude of the parties before the full court, the rendering of an invoice on 18 September 2013 did not affect the running of prescription. Before us counsel for Ekurhuleni did not contend otherwise.

[13] Section 14 and 15 of the Prescription Act.

Costs

[45] The dispute between the parties has had an unfortunate history. The separation of issues agreed upon between the parties was clearly inappropriate. The evidence which has been tendered on behalf of Ekurhuleni would in all likelihood have to be duplicated in the event that Ekurhuleni should resolve to proceed with the claim in reconvention notwithstanding the findings set out earlier herein. The separation has accordingly not advanced the resolution of the dispute between the parties at all. Considerable costs have been incurred in consequence thereof and, irrespective of the result, the parties are equally culpable in respect thereof. In the circumstances it would be appropriate that each party bare its own costs in respect of the trial before the high court and in respect of the appeals before the full court and in this Court.

[46] In the result:

1 The appeal succeeds and the order made by the full court is set aside.

2 The order of the trial court in the Gauteng Division of the High Court is set aside.

3 NCF's claim is dismissed.

4 Each party is to pay its own costs in respect of the proceedings before the high court, the full court and in this Court.

J W EKSTEEN

ACTING JUDGE OF APPEAL

Appearances

For appellant:	A Bester SC (with him J Kayser)
Instructed by:	David C Feldman Attorneys, Johannesburg
	Lovius Block, Bloemfontein
For respondent:	J C Uys SC
Instructed by:	Klopper Jonker Inc, Alberton
	McIntyre Van Der Post, Bloemfontein