IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 13270/2012

In the matter between:

P. A. PEARSON (PTY) LTD Applicant

and

eTHEKWINI MUNICIPALITY Respondent

NATIONAL MINISTER FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS Second Respondent

KZN MEC FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS Third Respondent

---

JUDGMENT

Delivered: 02 December 2015

MARKS, AJ

INTRODUCTION

[1] The applicant seeks from the first respondent the payment of R1 431 442.88 and interest from 12 March 2012 in respect of a payment made under protest on 12 March 2012, together with an order as to costs.

[2] No relief is sought against the second and third respondent as the challenge to the constitutional validity of the relevant legislation, which is pivotal to the proceedings and was sought in the amended notice of motion, was withdrawn on 5 November 2015 when the matter was argued before me on an opposed basis, and judgment was reserved.

[3] The central dispute between the parties is the interpretation of section 102(1)(b) of the Local Government: Municipal Systems Act No. 32 of 2000 ("the Systems Act") i.e. whether the section permits the re-allocation of payments made for electricity and utilities supplied, from one account to another account, of the same account holder.

[4] A summary of the facts which are not in dispute is as follows:

1. Andrew Mark Goodman ("Goodman"), the deponent to the Founding Affidavit, is a Director of the applicant (Pearson). He was also the Managing Director of the entity known as Microfinish Manufacturing (Pty) Ltd ("Microfinish"), and a director of an associate company Helio Microfinish South Africa (Pty) Ltd ("Helio").

2. The applicant (Pearson) owns a property situated at 5 Wareing Road, Pinetown. Microfinish occupied the premises in Wareing Road and Helio occupied the premises at Goodwood Road which property is owned by Cherokee Rose 164 CC ("Cherokee Rose").

3. Microfinish was the account holder for <u>both</u> these accounts with the respondent ("Municipality") for the supply of utilities and services such as

electricity and water to both properties. Therefore, Microfinish had two different accounts with the Municipality, for two different properties which were owned by two different owners (Pearson and Cherokee Rose).

4. On 6 September 2011, Ms Happiness Gama, (Gama) the deponent to the answering affidavit, and the Credit control Manager of the Municipality , advised Goodman that Microfinish was in arrears in excess of R2, 5 Million in respect of both accounts for the respective two properties. She also advised that she intended to notify the landlord Cherokee Rose.

5. On 13 October 2011. Goodman requested Gama to hold off on the notification to the landlord of Cherokee Rose regarding the arrear rental account as he was in the process of negotiating a new tenant for the Cherokee Rose owned premises.

6. On 14 October 2011, the total debt in respect of both the accounts held by Microfinish was in excess of R 3 Million. Gasa informed Goodman that the Municipality had no option but take the necessary steps to safeguard its position.

7. Microfinish was wound up by special resolution dated 3 November 2011. This was registered with the Companies and Intellectual Properties Commission on 18 November 2011.

8. As at 17 November 2011, Microfinish was indebted to the Municipality in the sum of R1 700 000.00 in respect of Pearson's property and R1 400 000.00 in respect of the property owned by Cherokee Rose. Goodman was advised by

Gama, that the Municipality intended to invoke section 102(1)(b) of the Systems Act.

9. On 19 November 2011 the Municipality credited the payments made by Microfinish in respect of the Pearson property to the indebtedness of Microfinish in respect of the property owned by Cherokee Rose, thereby extinguishing the indebtedness of Microfinish in respect of electricity services on the property owned by Cherokee Rose.

10. The Municipality, in attributing the payments of Microfinish from one account to another account held by Microfinish, contends that it acted in terms of section 102(1)(b) of the Systems Act which authorises such re-allocation.

11. The debt owed by Microfinish in respect of the Account for the Pearson property was still due and owing. However, Microfinish was unable to make payment due to the aforementioned liquidation. During this period, Pearson and the Municipality were involved in discussions regarding settlement of the outstanding debt. Being unable to resolve the issue, the Municipality cut off the services and utilities at the Pearson Property.

12. On 12 March 2012 Pearson being the owner of the property made payment to the Municipality in the sum of R2742191.02 which included the amount of R1431442.88 that had been previously transferred. It is this last mentioned amount that was paid under protest that Pearson is seeking payment together with interest and costs in the present matter.

13. Helios has since also been liquidated.

ISSUES

[5] The crisp issue between the parties in this matter is whether section 102(1)(b) of the Systems Act empowers the Municipality to credit payments made by an individual account holder to any other account of that account holder held by the Municipality.

Both counsel for the applicant, Mr G.D. Goddard and counsel for the respondent, Mr J.P. Broster, agree that there being no dispute of fact, the question of whether the Municipality is so authorised is a matter of law and may be determined on the papers. Moreover, it is incumbent upon this court to interpret the provisions of section 102(1)(b) of the Systems Act. Both counsel are in agreement that the Systems Act is a legislative measure intended to support and strengthen the capacity of municipalities to manage their own affairs, exercise their powers and perform their functions.

[6] Mr Goddard contended that the provisions of the Systems Act cannot properly be interpreted to authorise the Municipality to manipulate the accounts of a customer or account holder so that a charge on one property becomes payable by the owner of a different property. It was further argued that whilst section 118(3) of the Systems Act places a liability on the owner of the property to pay for an account on his property, there is no legal liability on Pearson to pay for services provided to Microfinish at the other property not owned by Pearson.

He further contended that the consequences of the Municipality's conduct has the result that Pearson has had to pay for utilities supplied to a property owned by

another party (Cherokee Rose) which amounts to an arbitrary deprivation of Pearson's property. Further that section 25(1) of the Constitution[1] prohibits any law from permitting arbitrary deprivation of the property. Further that section 39(2) of the Constitution requires that all legislation must be interpreted to promote the spirit, purport and objects of the Bill of Rights. Finally, he contended that section 102(1)(b) cannot correctly be interpreted to authorise the Municipality to act as it has, it is unconstitutional and should not be allowed.

[7] Mr Broster contended that section 102(1)(b) of the Systems Act, empowers the Municipality to credit payments of an account holder and re-allocate those funds to any account held by the person who is liable to make payment to the Municipality for services rendered.

He further contended that the Municipality's entitlement to credit a payment is not confined to a single transaction. The wording of the section is neutral as regards "re-allocation" of monies paid and there is nothing in the language of the section to prevent payments being re-allocated to another account so long as the account holder is the same. Further, the respondent did not rely or utilise the provisions of section 118(3) and thus section 118(3) of the Systems Act is irrelevant.

[8] To determine the issue, it is incumbent on the court to interpret the provision of the Systems Act. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument or contract.

---

[1] Constitution of the Republic of South Africa, 1996

The present state of the law in regard to interpretation was succinctly expressed by Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18, where it stated:

> ". . . The present state of the law can be expressed 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. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[9] <u>INTERPRETATION OF SECTION 102 OF THE MUNICIPAL SYSTEMS ACT</u>

9.1 In respect of the interpretation of section 102(1)(b) the section ought to be interpreted so as to have regard to the language of the provision itself, read in its context and having regard to the purpose of the provisions and the

background to the legislation. Furthermore, all legislation must be interpreted to promote the spirit, purport and objects of the Bill of Rights.[2]

Section 102 of the Municipality Systems Act states:

"(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."

9.2 Section 102 of the Act is located in chapter 9 of the Act which deals with credit control and debt collection. The provisions of section 102 of the Act have been held to present no controversy. Section 102 of the Act has been considered in both the judgments of *Rademan v Moqhaka Local Municipality* 2013 (4) SA 225 (CC); and *Body Corporate Croftdene Mall v Ethekwini Municipality* 2012 (4) SA 169 (SCA).

Neither of these judgments dealt with the effect of section 102(1)(b) of the Systems Act. Moreover, in the limited time allocated I have been unable to find any case law or precedent dealing with section 102(1)(b) of the Systems Act and neither did counsel refer me to any cases

[2] Section 39(2) of the Constitution of the Republic of South Africa, 1996

9.3 Having regard to the language of section 102 of the Act the following is clear from a plain linguistic interpretation: Section 102(1)(a) deals with the consolidation of any separate account of any persons liable to pay the municipality. The effect of consolidation is that the various accounts of an individual are consolidated into a single account. The account holder is then presented with an account which has various components such as electricity, water and rates. The account holder is not permitted to pay part of the account but is required to pay the whole account subject to section 102(2) of the Act.

In other words, the account holder cannot choose or opt to pay part of an account. See *Rademan v Moqhaka Local Municipality (supra)* para 20; 30 to 33

9.4 Section 102(1)(b) entitles the municipality to credit a payment by a person against any account of that person. The person referred to in this section, logically is a person who is liable to make payment to the municipality. For the reasons set out by the Constitutional Court in *Rademan*, consolidation is not necessary in order for the municipality to utilise section 102(1)(b) because, once consolidation has occurred the account holder receives a single account whereas section 102(1)(b) of the Act envisages a situation where a person has multiple accounts and the municipality takes a payment from one account and credits that payment to another account. The process envisaged under section 102(1)(b) would have no application in a consolidated account.

9.5 To my mind, the municipality's entitlement to credit a payment is not confined to a single transaction, and the wording of the section is neutral in regards to the question of "re-allocation" of monies paid. The power to credit payments must be construed to persist once amounts have been paid into a particular account, at the instance of the person making payment. There is nothing in the language of the section to prevent amounts being re-allocated to another account, in fact the language expressly gives the power to credit amounts which must be held to mean the power to re-allocate, with the proviso that both the accounts must be accounts of that one person or account holder.

[10] Therefore, section 102 read together with the other provisions of Chapter 9 of the Act undoubtedly gives powers to municipalities to enable them to collect all monies that are due and payable to them in the most cost-effective manner. There is a clear legislative need for the Municipality to efficiently collect monies due to it by means of the powers afforded to it. This point has been repeated in numerous judgments.[3]

[11] On a plain reading of the provisions of section 102(1) of the Act the Municipality has the power to consolidate separate accounts as envisaged by section 102(1)(a) of the Act and to credit a payment made a person to any other account held by that person as envisaged by section 102(1)(b) of the Act. The section is not ambiguous and the meaning of the words used is clear.

---

[3] Rademan v Moqhaka Municipality and Others 2012 (2) SA 387 (SCA)
Mkontwana v Nelson Mandela Metropolitan and Others; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Group and Others v MEC: Local Government and Housing Gauteng and Others 2005 (1) SA 530 (CC)

[12] The Municipality is entitled to credit payments made to any account held by a customer to another account of the customer. It is common cause that that is what occurred in respect of the accounts of Microfinish when the Municipality took funds paid in respect of one account and credited those funds to another account. On a plain reading of section 102(1)(b) the Municipality is entitled to credit payments in the manner in which it has in this matter.

[13] The argument that this could never have been the intention of the legislature especially if one has regard to section 118(3) of the Systems Act cannot be sustained. The purpose of the provisions of section 118(3) of the Systems Act was highlighted in the Constitutional Court judgment of *Mkontwana*[4] which determined that land owners were liable for the amounts due by tenants for services rendered to the owner's land and that such an imposition of liability did not amount to an arbitrary deprivation of property given the closeness of the relationship of the debt and reason for deprivation.[5] The judgment did not deal with the provisions of section 102 and how that would affect the liability of the owner of the property.

In *BOE Bank Ltd v Tshwane Metropolitan Municipality* 2005 (4) SA 336 (SCA) Brand JA (at para 8) observed that section 118(3) is on its own wording an independent, self-contained provision. The purpose of that section is to ensure payment of the municipal claims.

---

[4] Mkontwana v Nelson Mandela Metropolitan and Others *supra*
[5] Mkontwana *supra* para [40-43]

In any event, at no stage did the Municipality seek to rely on or utilise the provisions of section 118(3). To my mind section 118(3) is irrelevant to the interpretation of section 102.

[14] Mr Goddard argued that the power conferred upon the Municipality in terms of section 102(1)(b) could not have been intended that the Municipality could change credits as it chooses. If this is indeed so then it would amount to an unjust result which would not pass constitutional muster.

[15] It is settled principle that considerations outside the wording of a statutory provision including considerations of constitutional validity, do not permit an interpretation which is unduly strained.[6]

[16] The contention that the ordinary meaning of section 102(1)(b) does not authorise the Municipality to "re-allocate amounts or chop and change credits as it chooses", is directly contradicted by the provisions of section 102(1)(b) of the Act. If the Municipality is entitled to credit payments made that would by necessity involve the movement of a payment from one account to another account. That is precisely what the Municipality has done in this matter, and to my mind is entitled to do.

[17] The Systems Act gives the authority to the Municipality and not the customer to decide which account to credit. To my mind, the Municipality needed to safeguard its position and acted within the confines of the relevant provisions of the Systems Act.

---

[6] NDPP and Another v Mohammed NO and Others 2003 (4) SA 1 (CC); 2003 (5) BCLR 476 at para [35]

[18] In conclusion, Pearson has failed to discharge the onus upon it to prove that the Municipality had acted outside its authority in terms of section 102(1)(b) of the Systems Act and therefore the application falls to be dismissed.

COSTS

[19] The costs normally follow the result in that a successful litigant is entitled to costs. There is no reason in law to deviate from this principle that costs should follow the result.

ORDER

I accordingly make the following order:

1. The application is dismissed with costs.

MARKS, AJ

Date of Hearing: 05 November 2015

Date of Judgment: 02 December 2015

Appearances

Counsel for the Applicant: Mr G.D. Goddard

Instructed by: J. H. Nicholson Stiller & Geshen
2nd Floor, Clifton Place
19 Hurst Grove
Musgrave
DURBAN
Ref: T.E. Moon/P0907/1

Counsel for the First Respondent: Mr J.P. Broster

Instructed by: Ngidi & Company Inc
12th Floor, Durban Bay
333 Anton Lembede St
Durban
Ref:Mpumelelo/Dolly/E194