THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 241/2016

In the matter between:

P A PEARSON (PROPRIETARY) LIMITED **APPELLANT**

and

eTHEKWINI MUNICIPALITY **FIRST RESPONDENT**

NATIONAL MINISTER FOR COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS **SECOND RESPONDENT**

KZN MEC FOR COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS **THIRD RESPONDENT**

Neutral citation: *Pearson v eThekwini Municipality* (241/2016) [2017] ZASCA 63 (29 May 2017)

Coram: Lewis, Petse, Swain, Mbha JJA and Molemela AJA

Heard: 16 May 2017

Delivered: 29 May 2017

Summary: Municipal Systems Act 32 of 2000: Sections 102(1)*(b)* and 118(3): right of municipality to transfer credits between accounts: single account holder: properties with different owners: amounts outstanding on both properties by account holder for services supplied by municipality: transfer of credits by municipality from first account to second account: resultant liability of owner of first property increased and that of owner of second property decreased: municipality entitled to claim from owner of first property increased balance owed.

ORDER

On appeal from: KwaZulu-Natal Local Division, Durban (Marks AJ sitting as court of first instance).

The appeal is dismissed with costs.

JUDGMENT

Swain JA (Lewis, Petse and Mbha JJA and Molemela AJA concurring):

[1] This appeal examines whether the exercise by a municipality of two of its statutory powers in terms of the Municipal Systems Act 32 of 2000 results not only in unfair, but also unlawful treatment of a ratepayer. The first statutory power is the right of a municipality, in terms of s 102(1)*(b)* of the Act, to transfer credits between accounts held by a single account holder in respect of two properties, regardless of the fact that the properties have different owners. The second statutory power is the right of a municipality in terms of s 118(3) of the Act to claim from the owner of a property any outstanding amounts not paid by the account holder, based upon its right to hold the property as security for charges levied against it.

[2] The inevitable consequence of the exercise by the municipality of its right to transfer credits between two accounts held by a single account holder in respect of two properties, where the properties have different owners, is that the contingent liability of the first owner is increased, whereas that of the second owner is decreased. A subsequent claim for payment by the municipality against the owners

for payment of the amount outstanding on each of the respective accounts is unfair to the first owner, whose liability was increased by the conduct of the municipality, whereas the liability of the second owner is decreased. The possible unfairness to the first owner is exacerbated where the liability of the second owner is extinguished, as in the present case. Whether the conduct of the municipality is not only unfair, but also unlawful, is the issue to be decided in this appeal.

[3] The appellant, P A Pearson (Pty) Ltd, is the owner of an immovable property situated at Wareing Road, Pinetown, KwaZulu-Natal (the Pearson property), within the jurisdiction of the first respondent, the eThekwini Municipality. The National Minister for Cooperative Governance and Traditional Affairs is the second respondent and the KZN MEC for Cooperative Governance and Traditional Affairs is the third respondent. Alleging that the exercise by the first respondent of these statutory powers in the manner described was unlawful, the appellant launched an application before the KwaZulu-Natal Local Division, Durban, in which payment of the amount of R1 431 442.88, was claimed from the first respondent. A claim by the appellant that the provisions of s 102(1)*(b)* of the Act were inconsistent with the Constitution and therefore invalid was withdrawn, with the result that the second and third respondents were no longer required to participate in the proceedings. The court a quo (Marks AJ) dismissed the application with costs, finding that the appellant had failed to discharge the onus of proving that the first respondent had acted outside its authority in terms of s 102(1)*(b)* of the Act. The present appeal is with the leave of the court a quo.

[4] The facts which gave rise to the dispute are as follows:

(a) Microfinish Manufacturing (Pty) Ltd (Microfinish) was at all relevant times the occupier of the Pearson property.

(b) Cherokee Rose 164 CC was the owner of an immovable property situated at Goodwood Road (the Cherokee Rose property) within the jurisdiction of the first respondent. Helio Microfinish South Africa (Pty) Ltd (Helio), an associate company of Microfinish, was at all relevant times the occupier of the Cherokee Rose property.

(c) Microfinish opened accounts with the first respondent for the supply of utilities and municipal services, such as electricity and water to Microfinish at the Pearson property (the Pearson property account), as well as the Cherokee Rose property (the Cherokee Rose property account). Although Microfinish as the account holder was liable to make payment to the first respondent for the supply of services at both properties, it was unable to do so as it was placed in voluntary liquidation on 18 November 2011.

(d) Prior to its liquidation, Microfinish made a number of payments into its Pearson property account for the supply of services at this property in terms of ss 75A and 76 of the Act. However, as at the date when it was placed in liquidation approximately R1.7 million was still owed on this account. In addition, approximately R1.4 million was owed by Microfinish in respect of its Cherokee Rose property account, for the supply of services at this property.

(e) On 19 November 2011, and acting in terms of s 102(1)*(b)* of the Act, the first respondent credited payments made by Microfinish into its Pearson property account, to the Cherokee Rose property account. The result was that the amount owed by Microfinish in respect of the Cherokee Rose property account for services supplied by the first respondent to Microfinish at that property, was fully paid. However, the outstanding amount owed by Microfinish in respect of the Pearson property account, for services supplied by the first respondent to Microfinish at that property, was increased to approximately R3.1 million. This sum represented the total amount owed on the Pearson property account by Microfinish, for services supplied by the first respondent to it at this property.

(f) The appellant, as the owner of the Pearson property, failed to discharge its obligation to pay the outstanding amount owed by Microfinish on the Pearson property account. The first respondent therefore terminated the supply of services and utilities to this property. As the appellant urgently required their restoration, it paid amounts totalling R2 742 191.02 to the first respondent on 12 March 2012, without any admission of liability and under protest. Included in this payment was the amount claimed of R1 431 442.88, which the appellant contends was previously unlawfully credited by the first respondent from the Pearson property account to the Cherokee Rose property account.

[5] The relevant provisions of the Act are ss 102(1)*(b)* and 118(3). Section 102 provides that:

'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 the property for municipal services supplied to such a property if the owner requests such accounts in writing from the municipality concerned.'

[6] Section 118 of the Act provides that:

'118 Restraint on transfer of property

(1) A registrar of deeds may not register the transfer of property except on production to that registrar of deeds of a prescribed certificate –

(a) issued by the municipality or municipalities in which that property is situated; and

(b) which certifies that all amounts that became due in connection with that property for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties during the two years preceding the date of application for the certificate have been fully paid.

(1A) . . .

(2) . . .

(3) An amount due for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties is a charge upon the property in connection with which the amount is owing and enjoys preference over any mortgage bond registered against the property.'

[7] The first respondent submits that because it is common cause that the amount of R1 431 442.88 claimed by the appellant was the amount owed in respect of services and utilities supplied by the first respondent to Microfinish at the Cherokee Rose property, and because it is also common cause that the amount owed on the Pearson property account after the crediting of payments to the Cherokee Rose property account, was the amount owed in respect of municipal services supplied to the Pearson property, the transfer of credits did not result in the amount owed in respect of municipal services supplied to the Pearson property, being increased. All that was increased was the balance owing on the Pearson property account for services supplied by the first respondent to Microfinish at the Pearson property, which had not been paid. The appellant, however, submits that although this indebtedness was reflected as the indebtedness of Microfinish in the Pearson property account, this did not entitle the first respondent to require the appellant, as owner of the Pearson property, to discharge that portion of the liability of Microfinish which arose in connection with the Cherokee Rose property.

[8] Whether the first respondent acted lawfully requires a consideration of the provisions of s 102(1)*(b)* and s 118(3) of the Act. The court a quo concluded that the provisions of s 118(3) were irrelevant to an interpretation of s 102(1)*(b)*, and that the first respondent had acted within its authority in terms s 102(1)*(b)* of the Act. It reached this conclusion on the following basis:

'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. 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.'

[9] The first respondent submits that the court a quo was correct in dismissing the appellant's reliance on s 118(3) to interpret s 102 of the Act. The reason, according to the first respondent, is that s 118(3) of the Act is a self-contained security provision, which affords the first respondent a statutory legal hypothec over the property of the owner for debts incurred on the property in respect of municipal

services. In other words, the provisions of s 118(3) have an entirely different objective to that of s 102 of the Act.

[10] Although I agree with the conclusion of the court a quo that the provisions of s 118(3) of the Act are irrelevant to an interpretation of the provisions of s 102 of the Act, I disagree with its reasons for the conclusion. The finding by Brand JA in *BOE Bank Ltd*, that s 118(3) on its own wording was an independent and self-contained provision, was only directed at the status of this subsection within the context of s 118 and not the Act as a whole. In that case what had to be determined was whether the time limit stipulated in s 118(1) should be read into s 118(3). By virtue of the fact that subsection 118(3) was an independent and self-contained provision, it did not require the incorporation of the time limit in s 118(1) to make it comprehensible or workable. Furthermore, the first respondent, in demanding payment by the appellant, quite clearly relied upon its right in terms of s 118(3) of the Act to hold the Pearson property as security for payment of the amount owed on the Pearson property account.

[11] The appellant, however, submits that the conclusion of the court a quo that s 118(3) of the Act was irrelevant to the interpretation of s 102, demonstrates a misunderstanding of the crucial question that had to be determined. The appellant accepts that the first respondent was entitled, in terms of s 102 of the Act, to credit payments made by Microfinish into the Pearson property account, to the Cherokee Rose property account. According to the appellant, the first respondent was not entitled thereafter, in terms of s 118(3) of the Act or on any other basis, to require the appellant as owner of the Pearson property to discharge that portion of the liability which arose in connection with the Cherokee Rose property, albeit that such indebtedness was reflected as the indebtedness of Microfinish in the Pearson property account.

[12] In my view, the proper enquiry is whether the conduct of the first respondent, in seeking payment from the appellant of the outstanding balance on the Pearson property account was rendered unlawful by the prior exercise by the first respondent of its right in terms of s 102(1)*(b)* of the Act, to transfer credits between the Pearson

property account and the Cherokee Rose property account. In other words, whether the conduct of the first respondent which resulted in an increase in the balance owed on the Pearson property account, which increased balance nevertheless represented the correct amount owed by Microfinish for services supplied by the first respondent to the Pearson property, with a concomitant increase in the liability of the appellant, renders a subsequent claim by the first respondent against the appellant for payment of the outstanding balance on the Pearson property account, unlawful.

[13] Section 229 of the Constitution vests a local authority with the authority to impose 'rates on property and surcharges on fees for services provided by or on behalf of the municipality'. This power is regulated by national legislation in the form of the Act. Chapter 9 provides for municipal credit control and debt collection. Section 96 of the Act deals with the 'debt collection responsibility of municipalities' and enjoins a municipality to collect all money that is due and payable to it, subject to the Act and any other applicable legislation. For that purpose it has to adopt, maintain and implement a credit control and debt collection policy, which is consistent with its rates and tariff policies and complies with the provisions of the Act. Section 97 of the Act requires the credit control debt collection policy to provide, inter alia, for credit control debt collection procedures and mechanisms. (*Body Corporate Croftdene Mall v Ethekwini Municipality* [2011] ZASCA 188; 2012 (4) SA 169 (SCA) paras 14-15).

[14] The first respondent has adopted a credit control and debt collection policy as required by the Act, which provides under the heading 'Responsibility for Amounts Due', that:

'7.1 In terms of Section 118(3) of the Act an amount due for municipal service fees, surcharge on fees, property rates and other municipal taxes, levies and duties is a charge upon the property in connection with which the amount is owing and enjoys preference over any mortgage bond registered against the property.

7.1.1 Accordingly, all such Municipal debts shall be payable by the owner of such property without prejudice to any claim which the Municipality may have against any other person.

7.1.2 The Municipality reserves the right to cancel a contract with the customer in default and register the owner only for services on the property.

7.1.3 . . .

7.2 . . .

7.3 Except for property rates, owners shall be held jointly and severally liable, the one paying the other to be absolved, with their tenants who are registered as customers, for debts on their property.'

[15] Under the heading 'Cash Allocation' the credit control and debt collection policy of the first respondent provides that:

'10.1 For consolidated accounts the Municipality may in accordance with section 102 of the Act credit any payment by a customer against any account of that customer.

10.2 . . .

10.3 . . .

10.4 The Municipality's allocation of payment is not negotiable and the customer may not choose which services to pay.'

[16] In terms of the credit control and debt collection policy of the first respondent, which is in accordance with the Act, the first respondent is entitled to credit a payment made by a person who is liable to make payment to the first respondent, to any account of that person. In addition the liability of an owner for 'all such Municipal debts' is restricted to debts on 'the property in connection with which the amount is owing'. The conduct of the first respondent was in accordance with these provisions for the following reasons. When the first respondent credited the amounts previously paid by Microfinish into the Pearson property account to the Cherokee Rose property account, it simply credited those payments to the amount owed by Microfinish on the Cherokee Rose property account. When the appellant made payment of the balance outstanding on the Pearson property account for services supplied by the first respondent to the Pearson property, it made payment of the amount owing on the property of which it was the owner. The fact that the amount owed on the Pearson property account would have been reduced by the

amount claimed of R1 431 442.88, if the first respondent had not transferred payments made by Microfinish into the Pearson property account to the Cherokee Rose property account, can have no bearing upon the lawfulness of the first respondent's conduct in seeking payment of the increased balance owing on the Pearson property account from the appellant. The conduct of the first respondent was authorised in terms of s 102(1)*(b)* of the Act and can have no bearing upon the lawfulness of the first respondent's subsequent exercise of its rights against the appellant.

[17] The unfair result caused by the first respondent's conduct is, however, tempered by two important aspects of the evidence. First, the money transferred by the first respondent from the Pearson property account to the Cherokee Rose property account was the money of Microfinish and not that of the appellant. The first respondent therefore did not use the appellant's money to pay the balance outstanding on the Cherokee Rose property account. Second, the amount paid by the appellant into the Pearson property account represented the amount owed by Microfinish in respect of services supplied by the first respondent to Microfinish at the Pearson property owned by the appellant.

[18] The appeal accordingly fails and the following order is made:

The appeal is dismissed with costs.

K G B Swain
Judge of Appeal

Appearances:

For the Appellant:	V I Gajoo SC Instructed by: NSG Attorneys (JH Nicolson Stiller & Geshen), Durban Honey Attorneys, Bloemfontein
For the Respondent:	J P Broster Instructed by: Ngidi & Company Incorporated, Durban Strauss Daly Attorneys, Bloemfontein