IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH

Case No.: 3472/2012

In the matter between:

NELSON MANDELA BAY METROPOLITAN MUNICIPALITY Plaintiff

and

DIMITRI COUTSOURIDES N.O. First Defendant

RAFAEL SEVILYA N.O. Second Defendant

(The Markman Venture Trust – TM3430)

JUDGMENT

REVELAS J:

1. This judgment concerns an application for absolution. The plaintiff, the local municipality, instituted an action against the trustees for the Markman Venture Trust ('the trust') claiming payment of R508 561.62 plus interest at the legal rate. Prior to the amendments of the plaintiff's first particulars of claim attached to the summons dated 19 October 2012, the plaintiff's claim was for the total amount of R 469 577.37. In March 2013 the claim was amended to R530 033,35. In respect of each amount claimed the plaintiff relied on a different certificate of balance as to the indebtedness of the trust to the plaintiff as at the date mentioned in the certificate. There were also other amendments.

2. According to the plaintiff, the amount claimed in its final particulars of claim, represents the balance owing by the defendants as at October 2012 in respect of rates and service charges, as well as interest thereon. In this regard the plaintiff relies solely on a certificate of balance (undated), the latest of the certificates of balance issued in relation to the property owned by the trust (Erf 451, Wells Estate, Nelson Mandela Bay). The plaintiff further relies on section 27 of the Customer Care and Revenue Management By-Laws which provides that a certificate under the hand of the municipal manager or duly authorised officer, is on

mere production *prima facie* evidence of the indebtedness in question.

3. The defendant unsuccessfully objected to the admissibility of the certificate as evidence and after the certificate was ruled admissible as evidence, the plaintiff closed its case and called no witnesses. It was stated on the plaintiff's behalf that it had closed its case in terms of Uniform Court Rule 39(13). The present application was then brought by the defendants who disavow any liability in respect of the amount claimed. It is common cause that the defendants have made monthly payments to the plaintiff since March 1999 until September 2015 of which the total amount is R424 185,97. The defendants deny that they are liable to the plaintiff for payment of any further amounts. Their case is that the plaintiff's reliance on the impugned certificate of balance is misconceived because it is an unreliable document premised on flawed calculations and computations and consequently it does not constitute *prima facie* evidence of any indebtedness.

4. It has been held in several cases that a certificate of balance is conclusive proof of indebtedness. In *Berlesell (Edms) Bpk v Lehaer Development Corporation BK en Andere* 1998 (3) SA 220 (CPD) the defendants' applications for absolution was dismissed in circumstances where the plaintiff relied solely on such a

certificate *prima facie* evidence. The court held that it was conclusive evidence of the indebtedness in question and that the defendant had to rebut such evidence. In reaching its conclusion the court deferred to the decision in *Bank of Lisbon International Limited v Venter en 'n Ander* 1990 (4) SA 463 (A). In that matter the court also had to consider whether evidence beyond the production of a certificate of balance was required from a bank to prove the indebtedness of a client. In the *Bank of Lisbon* case (at 478 G) the court however, pointed out that the reliance on a certificate of balance becomes problematic when other evidence emerges which casts doubt on the correctness of the contents of the certificate.

5. In the present matter the reliability of the certificate had always been in dispute and was challenged on several grounds. The defendant also filed a counterclaim.

6. The defendant pleaded that all amounts due to the plaintiff had been paid as set out in Annexure P1 attached to the defendants' plea and that incorrect allocations with regards to such payments had been made. The list of amounts claimed by the plaintiff were set out in a document attached to the plaintiff's particulars of claim as annexure "A". The defendants allege that these amounts do not reconcile with the tax invoices raised by the plaintiff. The

defendants contend that since there was no sewerage connection on the property and that the plaintiff was not entitled to charge for services the plaintiff did not render. Although the plaintiff disputes this allegation the defendant demonstrated during argument that at the plaintiff ceased invoicing the plaintiff for such services in June 1998. The invoicing for the service commenced in October 1993. The same applies to the Environmental rates charged.

7. The defendants also referred to instructions given by them in respect of each payment made by them. The payments reflected in the list attached to their plea (Annexure P1), were expressly allocated to specific tax invoices raised by the plaintiff. By ignoring these allocations and making its own allocations, unilaterally, the defendants argue that the plaintiff fell foul of section 102 of the Local Governments: Municipal Systems Act, 32 of 2000 which prohibits the unilateral appropriation of payments by a municipality. It must be appropriated first to the capital outstanding, where the debt is most burdensome to the debtor (where no instructions are given by the debtor). The plaintiff pleaded that it appropriated the payments to where the debt was most burdensome.

8. The defendant's counsel has illustrated with reference to the pleadings and the annexed invoices, how the amounts claimed were amended to claim more interest, and in doing so the plaintiff ignored the *in duplum* rule. Further flaws in the certificate were referred. They are set out below.

9. Annexure "B" to the plaintiff's declaration of 13 December 2012 states that the amount alleged to be owing in respect of a '*Security Deposit*' is R506.46, conflicts with the annexure "A" to the declaration, which records the alleged amount owing in respect of a deposit as R500.00.

10. The version of the certificate attached to the declaration also states that the amount owing was R530 033.35, including interest. This certificate conflicts with the latest version of the certificate and in conflict with the aforesaid declaration, the version of annexure "A" to the declaration dated 6 March 2013, records that amount of R530 033.35 as being allegedly owing on "*12.11.2012 (12 November 2012)* as opposed to being allegedly owing on 12 December 2012, as per the declaration itself.

11. Annexure "B" to the 6 March 2013 declaration allegedly represents "*a copy of a reconciliation of the Defendants' account with the plaintiff for the period October 1993 to the December 2012'*. The

annexure therefore included amounts for rates allegedly owing in respect of the months of November 2012 and December 2012. The original simple summons referred only to rates allegedly owing until 30 September 2012.

12. Presently the amount claimed is still R530 033.35, and the end date as still covered by the declaration is still 12 December 2012. There is now a new certificate dated 15 April 2013 which records the *'total balance due and payable as at 12.12.2012 (12 December 2012)'* and the amount is still R530 033.35.

13. On the 21st of January 2014 there was a further amendment. The amendment declaration avers *'for the sake of completion annexed thereto as annexure "B", are copies of the entire account upon which the annexure "B" is based and which documents are annexed to the certificate in terms of Act 25 of 2002.'* However the tax invoices for October 1993, December 1993, April 1995 and October 2007 do not form part of the annexure.

14. The defendants also maintain that the plaintiff is not entitled to rely on certificate of balance in respect of debts owed prior to October 2003, when the Customer Care By-Law came into operation. Prior thereto section 93(4) of the Municipal Ordinance 20 of 1974 a true copy of the plaintiff's council's rate book and

related notices must be produced, before it can be said to be *prima facie* proof of any rates due. A certificate of balance cannot be used retrospectively, only prospectively (See: *Raumix Aggregates (Pty) Ltd v Richter Sand CC and Another* 2020 (1) SA 623 (GJ) at para 9.

15. The plaintiff pleaded that it has claimed *mora* interest at the rate prescribed by the Prescribed Rate of Interest Act 55 of 1975. The interest claimed by the plaintiff in its amended declaration was at prime plus 1%. At the time interest amounted to 15,5%. The plaintiff avers that it is entitled to do so by virtue of the provisions of the Municipal Ordinance 20 of 1974 read with the applicable By-Laws relating to the supply of electricity, water and other services. Section 2 of the Municipal Ordinance describes 'standard rate' of interest as the rate of interest payable by a council to its bank in respect of an overdraft. Prior to October 2003 (when the By-Laws came into operation) the Prescribed Rate of Interest Act 55 of 1975 did not apply. The defendant also argued that the plaintiff was not entitled to charge '*mora* interest' since no due date was identified.

16. In the 6 March 2013 version of the declaration the plaintiff claimed R530 033.35 from the defendants, which amount included an amount of interest totaling R445 586.55. Currently it alleges an

"Interest Total" of R115 942.29. Certainly these interest computations are problematic for the plaintiff.

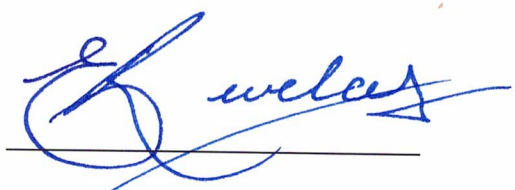
17. Given the nature of the challenge to the claim, it seems to me that the plaintiff is precluded from relying solely on its certificate of balance in this particular case. Certainly some of the problems referred to could only be addressed by the plaintiff through the presentation of evidence.

18. A certificate of balance is any event not absolute proof of indebtedness in every circumstance. The certificate is an evidentiary tool to facilitate proof of the quantum of indebtedness and by itself it does not establish liability. (See: *Thrupp Investments Holdings (Pty) Ltd v Goldrick* 2008 (2) SA 253 (w) at paragraph 6)

19. Having regard to the evidence presented, such as there was besides the certificate of balance, and having considered the arguments presented by counsel for both parties, I have concluded that there was no sufficient evidence presented upon which a reasonable person might find for the plaintiff. Consequently, the following orders do issue:

ORDER:

1. The defendants are granted absolution from the instance with costs including the costs incurred upon the employment of two counsel.



E REVELAS

Judge of the High Court

Appearances:

For the plaintiff: Adv Beyleveld SC instructed by McWilliams and Elliott Inc., 152 Cape Road, Mill Park, Port Elizabeth

For the defendants: Adv Ford SC and Adv Kroon SC instructed by RJM Attorneys, 81 2nd Avenue, Newton Park, Port Elizabeth

Date heard: 12 April 2021

Date delivered: 04 May 2021