THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 104/2011
Reportable

In the matter between:

CITY OF CAPE TOWN **APPELLANT**

and

MARCEL MOUZAKIS STRÜMPHER **RESPONDENT**

Neutral citation: *City of Cape Town v Strümpher* (104/2011) [2012] ZASCA 54 (30 March 2012)

Coram: Mthiyane DP, Van Heerden, Bosielo, Majiedt JJA and Ndita AJA

Heard: **12 March 2012**
Delivered: **30 March 2012**

Summary: **Right to water ─ access to water supply cut off by water service authority ─ whether service founded solely on contract ─ whether spoliation order available to water user.**

ORDER

On appeal from: Western Cape High Court, Cape Town (Desai J and Gassner AJ sitting as court of appeal):

The appeal is dismissed with costs.

JUDGMENT

MTHIYANE DP (VAN HEERDEN, BOSIELO, MAJIEDT JJA and NDITA AJA CONCURRING)

[1] This is an appeal from a judgment of the full bench of the Western Cape High Court (Desai J and Gassner AJ) upholding a spoliation order granted by the Strand Magistrates' Court, in terms of which the City of Cape Town (the City) was directed to reconnect the water supply to a property in the Strand (the property) owned by the respondent. The respondent alleged that the disconnection of the water supply constituted interference with his statutory water rights in terms of the Water Services Act 108 of 1997 and constituted a spoliation. He argued that the water supply could not be disconnected unless the amount in arrears had been determined judicially in the City's favour. The City on the other hand contended that the summary disconnection of the water supply was authorised by the City's water by-law and its debt collection by-law. It maintained that water was supplied to the respondent in terms of a supply contract it had with him and that, on the authority of the decision of this court in *Telkom SA Ltd v Xsinet (Pty) Ltd*,[1] a mandament van spolie was

1 *Telkom SA Ltd v Xsinet (Pty) Ltd* 2003 (5) SA 309 (SCA).

not available to the respondent. On appeal to this court with the leave of the court below, the City advances the same argument.

[2] The common cause facts are succinctly summarised by Gassner AJ. For the past 37 years the respondent has operated a caravan park for permanent tenants at the property. Throughout that period the respondent had use of water supplied by the City. On 16 May 2007 the City notified the respondent that unless arrears of some R182 000, which had accumulated on the property's water account, were paid within two days, the water supply would be disconnected.

[3] On 28 May 2007, the respondent's attorneys addressed a letter to the City querying the water account and declaring a dispute[2] regarding the accumulated arrears. The dispute had been on the table for some time. Previous accounts showed that something was amiss because in certain months the recorded water usage was exceptionally high without good reason. It had been demonstrated to an employee of the City, who had visited the property, that the water meter was defective and kept running even when the main water connection was closed. After conducting an inspection on the property, the City had the old water meter and the main connection removed and replaced. However, a leakage was discovered where the old water meter and the main connection had been removed and this was reported to the City. After several pipes were replaced by the respondent, at the request of the City following the report, the recorded water usage dropped.

[4] On 17 August 2007 the City disconnected the water supply to the property without responding to the letter of 28 May 2007 from the

2 The meaning of 'dispute' is explained in clause 7(1) of the City's Credit Control and Debt Collection Policy which reads as follows:
'. . . "dispute" refers to the instance when a debtor questions the correctness of any account rendered by the Municipality.'

respondent's attorneys. In its answering affidavit the City did not deal with the merits of the dispute, set out in general terms in the founding affidavit, but merely focused on technical points. It contended that the mere existence of a dispute did not avail the respondent because, for example, the City's monthly statement to the respondent stipulated that, even in the case of a dispute, payments may not be withheld.[3]

[5] The above contentions did not carry much weight with the full bench which upheld the spoliation order. Desai J then granted the City leave to appeal to this court.

[6] The primary issue on appeal is whether the City was entitled to cut off the water supply to the property due to non-payment of arrears, notwithstanding the fact that the respondent disputed liability. The City advances two main grounds as justification for its summary disconnection of the water supply to the property. First, it argues that the respondent's right to the water supply is simply a personal right founded on a contract. Second, the City argues that its interference was authorised by its water by-law and the debt collection by-law.

[7] The above submissions will be considered in turn. As to the first, counsel for the City exhorted us to consider, as an appropriate starting point, to the nature of the relationship between the respondent and the City. He argued that if one had regard to ss 18 and 19(2) of the City's water by-law[4] and s 4 of the credit control and debt collection by-law,[5] the relationship between the respondent and the City was a contractual

3 The relevant portion of the account reads as follows:
'4. Selfs al is u in 'n dispuut betrokke met die Raad oor hierdie rekening mag u nie betaling weerhou nie.'
4 City of Cape Town Water By-law *Provincial Gazette (Western Cape)* 6378 of 1 September 2006.
5 City of Cape Town Credit Control and Debt Collection By-law *Provincial Gazette (Western Cape)* 6364 of 15 June 2006.

one. Referring to s 18 he argued that no person was permitted to use water without first concluding an agreement. That section reads as follows:

'No person may use water from the water supply system—

a) unless an agreement referred to in section 19 or 20 has been concluded. . . .'

The application for the supply of water is provided for in s 19. Subsection 2 thereof reads as follows:

'(2) An application for the supply of water approved by the Director: Water constitutes an agreement between the municipality and the owner and takes effect on the date referred to in the application.'

So too, in terms of the Water Services Act, the duty of the water service authority to provide water service is subject to the water user's obligation to pay reasonable charges. (See s 11(1) and s 11(2)(*d*). It is clear from the water by-laws that the supply of water is subject to the payment of fees in respect of the supply of water. (See ss 19(3), 19(4)(*b*) and 23(2)(*c*).

[8] Counsel argued that compelling the City to supply water to the respondent amounted to nothing more than the enforcement of contractual rights under an agreement which, on the authority of the *Xsinet* case, could not provide a basis for the granting of a spoliation order.

[9] The argument advanced on the City's behalf is misplaced. It is true that consumers, living within a municipal area, who wish to access water from a water service authority, such as the City, have to conclude a water supply contract with that authority. The fact that a contract must be concluded does not, however, relegate the consumer's right to water to a mere personal right flowing from that contractual relationship. It does not relieve the City of its constitutional and statutory obligation to supply

water to users, such as the respondent. The right to water is a basic right. Everyone has the right in terms of the Constitution to have access to sufficient water.[6] This constitutional provision is given effect to in s 3(1) of the Water Services Act which provides that:

'(1) Everyone has a right of access to basic water supply . . . .'

The City's duty to provide water supply services is provided for in s 27(2) of the Constitution which declares that:

'(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.'

Section 27(1)(*b*) of the Constitution is also given effect to by s 152(1)(*b*) of the Constitution which provides that:

'(1) The objects of local government are—

. . .

(*b*) to ensure the provision of services to communities in a sustainable manner.'

[10] It follows from the above statutory and constitutional provisions that the right to water, claimed by the respondent when he applied for a spoliation order, was not based solely on the contract which he concluded with the City, but was underpinned by the constitutional and statutory provisions discussed above. This view is fortified by the decision of this court in *Impala Water Users Association v Lourens NO & others*.[7] In that case a water user had obtained a spoliation order directing a water user association in terms of s 98(6)(*a*) of the National Water Act 36 of 1998[8] to remove locks, chains and welding works from certain sluices and to restore the flow of water from a dam to reservoirs on the water users'

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6 Section 27(1) of the Constitution reads as follows:
'(1) Everyone has the right to have access to—
a) . . .
sufficient . . . water. . . .'

7 *Impala Water Users Association v Lourens NO & others* 2008 (2) SA 495 (SCA).

8 That section provides:
'(6) If the Minister accepts the proposal, the Minister may by notice in the *Gazette*—
(a) declare the board [meaning the irrigation board] to be a water user association.'

farms. A dispute arose between the parties concerning the legality of water charges assessed by the water users association relating to the costs of financing the construction of a dam. Although proceedings to recover these charges were pending, the water users association decided to exercise its powers in terms of s 59(3)(*b*) of the National Water Act.[9] The crucial question which the court, on appeal, had to consider was whether the rights on which the water user relied were merely contractual rights. Farlam JA distinguished the *Xsinet* decision and came to the conclusion that the personal rights flowing from the water supply contract, which the water user in that case had concluded with the water users association, were replaced or subsumed into rights under the National Water Act, which was the act that was applicable in that case. In this regard the learned judge of appeal expressed himself in paras 18 and 19 as follows:

'[18] The first question to be considered, in my view, is whether the rights on which the respondents relied were merely contractual and whether the *Xsinet* decision can be applied. In my opinion, it is not correct to say that the rights in question were merely contractual. It will be recalled that the respondents or the entities they represent were all entitled to rights under the previous Water Act 54 of 1956, which rights were registered in terms of the schedule prepared under s 88 of that Act. These rights were clearly not merely personal rights arising from a contract. The individual respondents and the entities represented by the other respondents all automatically, in terms of para 7.2a of the appellant's constitution, became founding members of the appellant. It is clear therefore that the rights to water which belonged to the individual respondents and the entities represented by the other respondents, insofar as they were replaced by or, perhaps more accurately put, subsumed into rights under the Act, cannot be described as mere personal rights resulting from contracts with the appellant. It follows that, on that ground alone, the *Xsinet* decision, on which the appellant's counsel relied, is not applicable.

[19] The facts of this case also differ in another material respect from those in the

9 That section provides:
'(3) If a water use charge is not paid—
(b) the supply of water to the water user from a waterwork or the authorisation to use water may be restricted or suspended until the charges, together with interest, have been paid.'

Xsinet case. There is was held (at paras 12 and 13) that the respondent's use of the bandwidth and telephone services in question did not constitute an incident of its use of the premises which it occupied, with the result that the disconnection by Telkom of the telephone lines to Xsinet's telephone and bandwidth systems did not constitute interference with Xsinet's possession of its equipment. In the present case, however, the water rights interfered with were linked to and registered in respect of a certain portion of each farm used for the cultivation of sugar cane, which was dependent on the supply of the water forming the subject-matter of the right. The use of the water was accordingly an incident of possession of each farm which was, in my view, interfered with by the actions of the appellant's servants. Indeed in the *Xsinet* decision itself it was said at the end of para 12 (at 314C - D):

> "Xsinet happened to use the services at its premises, but this cannot be described as an incident of possession in the same way as the use of water or electricity installations may in certain circumstances be an incident of occupation of residential premises."

In my view, unless the *Bon Quelle* decision is to be overturned, the respondents have clearly established that the rights to water enjoyed by the individual respondents and the entities represented by the other respondents were capable of protection by the mandament van spolie.'

[11] The respondent in the present matter finds himself in a position similar to that of the water users in the *Impala* case. Water users have a statutory right to the supply of water in terms of s 11(1) of the Water Services Act which imposes a duty on a water services authority to ensure access to water services to consumers. It follows that the respondent's right to a water supply to the property could not be classified as purely contractual. As in the *Impala* case the respondent's right to a water supply was subsumed into rights under the Water Services Act and cannot be described as merely personal rights resulting from a contract as contended by counsel for the City.

[12] I turn to the second issue of whether the City's interference with

the respondent's water supply was authorised by the Water Services Act or the relevant water by-law and the City's debt collection by-laws, and is therefore lawful. As a justification for the City's conduct in shutting off the water supply, the City relied, in the first instance, on s 30(1) of the water by-law which provides as follows -

'(1) Subject to any other right the municipality may have, the City Manager may, if an owner has failed to pay a sum due in terms of the Tariff Policy By-law, by written notice inform him or her of the intention to restrict or cut off the supply of water on a specified date and to restrict or cut off such supply on or after that date.'

[13] The city also relied on s 11(2)(*d*) of the Water Services Act, which provides that the duty of a water services authority to ensure access to water services is subject to a duty of consumers to pay reasonable charges and s 11(*g*) which authorises the water services authority 'to limit or discontinue the provision of water services if there is a failure to comply with reasonable conditions set for the provision of such services'. In counsel's heads of argument reliance was also placed on s 9 of the debt collection by-law. It provides that the City Manager may restrict or disconnect the supply of any service to the premises of any user when such user inter alia fails to make payment on the due date. Reference was also made to s 6(5) of the Credit Control and Debt Collection Policy where it is provided that the City shall inter alia not provide any services to any persons who are in arrears with municipal accounts, except as provided for in the policy as determined by the City from time to time.

[14] Armed with this arsenal of statutory provisions, the City considered that immediate disconnection of the water supply to the respondent's property was authorised. In my view, the City appears to have overlooked the provisions of s 4(3)(*a*) of the Water Services Act,

which requires that 'the limitation or discontinuation of water services must be fair and equitable' and its own dispute resolution procedures provided for in the Credit Control and Debt Collection Policy. Section 7 of the policy lays down the procedure to be followed when the water user (debtor) has declared a dispute. Section 7(3)(a) thereof provides that all disputes must be concluded by the City Manager within 30 days. Section 7(3)(d) provides for an appeal where the water user is not satisfied with the outcome of the purported resolution of the dispute. The appeal is lodged in terms of s 62 of the Local Government: Municipal Systems Act 32 of 2000.

[15] In my view, the dispute resolution procedures provided for in s 7 of the City's policy were meant to meet the threshold requirements of 'fairness and equity' referred to in s 4(3)(*a*) of the Water Services Act. The notification in the statement of account sent to a consumer (debtor) suggesting that payment should be made even if the debtor is involved in a dispute with the City, appears to fly in the face of the provisions of fairness and equity referred to in s 4(3)(*a*) and the dispute resolution procedures referred to above. To expect the respondent to pay R182 000 while he is disputing the very amount erodes the principles of fairness contemplated in s 4(3)(*a*) and the dispute resolution procedures. The harshness of the demand for payment could, however, be ameliorated by the City insisting that the water user continue to pay his or her usual monthly average water charge while an attempt is being made to resolve the dispute. In my view that arrangement would be fair to both the water user and the water services authority. This would also satisfy the fairness and equity standard set in s 4(3)(*a*).

[16] There is no acceptable reason given by the City in this case as to

why the procedure prescribed in s 7 of the policy was not followed before the water supply was to the respondent's property was shut off. The City did not even provide to the respondent a written acknowledgment of receipt of the dispute, as required by s 7(2)(e) of the policy. The flimsy excuse given by the City, during argument, namely that the procedure was not followed because the account number of the respondent was not given in the letter declaring a dispute, appears to be an afterthought and falls to be rejected.

[17] Counsel for the City also attempted to place reliance on the judgment of this court in *Rademan v Moqhaka Municipality & others* 2012 (2) SA 387 (SCA) as a justification for the City's abrupt disconnection of the water supply to the property. Such reliance is however misplaced for two important reasons. First, the case dealt with discontinuance of electricity supply to defaulters. Second, the case is distinguishable on the facts in that in the *Rademan* case there was a deliberate withholding of payment by the defaulters 'who claimed to be unhappy with the municipal services rendered by the municipality'. (See para 2 of the judgment).

[18] It follows therefore that there was in my view no justification for the City to cut off the water supply to the property.

[19] Finally I turn to the question whether the spoliation order was the appropriate remedy in the circumstances. I consider that it was. A spoliation order is available where a person has been deprived of his or her possession of movable or immovable property or his or her quasi-possession of an incorporeal. A fundamental principle at issue here is that nobody may take the law into their own hands. In order to preserve order

and peace in society the court will summarily grant an order for restoration of the status quo where such deprivation has occurred and it will do so without going into the merits of the dispute. The evidence in the present matter shows that the respondent for the past 37 years received an uninterrupted supply of water from the City at the time when that service was summarily terminated. I have already alluded to the fact that the respondent's rights to water were not merely personal rights flowing from a contract but public law rights[10] to receive water, which exist independently of any contractual relationship the respondent had with the City. The respondent's use of the water was an incident of possession of the property. Clearly interference by the City with the respondent's access to the water supply was akin to deprivation of possession of property. There is therefore no reason in principle why a water user who is deprived of a water service summarily by a water service authority, without that authority complying with its procedural formalities for dispute resolution laid down in its own by-laws, should not be able to claim reconnection of the water supply by means of a spoliation order. It therefore follows that the mandament van spolie was available to the respondent and the courts below were correct in granting the relief claimed by the respondent.

[20] Accordingly the appeal is dismissed with costs.

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K K MTHIYANE
DEPUTY PRESIDENT

10 *Joseph & others v City of Johannesburg & others* 2010 (4) SA 55 (CC) para 34.

APPEARANCES

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