

CITY OF TSHWANE NOT OBLIGED TO RESTORE POWER TO A COMMERCIAL SCHEME WITH MASSIVE DEBT

City of Tshwane Metropolitan Municipality v Vresthena (Pty) Ltd and Others (1346/2022) [2024] ZASCA 51 (18 April 2024)

Vresthena, the owner of six of the nine sections in a sectional title scheme on which a shopping centre is erected, leases its units to blue chip retailers. It alleged that, due to a dysfunctional body corporate, the scheme's municipal account for electricity supply has remained unpaid since 2017. In 2022, by which time the debt had ballooned, the municipality cut the electrical supply to the scheme. Vresthena approached the High Court for relief, including an order that the electricity had to be restored immediately. The application was successful in the High Court, but overturned in the Supreme Court of Appeal. That Court emphasised that, although municipalities were "constitutionally and statutorily obliged to provide their residents with electricity," there is a reciprocal duty on citizens to settle the municipal account. And, "as a form of credit control, any municipality has a statutory right to terminate such services on notice". From a sectional title point of view, it is instructive that the Court also warned that sectional title owners cannot "expect the municipality to regulate the Body Corporate's affairs. A municipality has no right to interfere in the affairs of the Sectional Titles Scheme."

The details are set out in the [judgment](#) and judgment summary below.

FACTS

The Zambezi Retail Park Centre ('the Retail Park') is a large sectional title development comprising of nine sections. Vresthena (Pty) Ltd ('Vresthena') is the owner of sections 1 to 4, 7 and 8, and leases them to various blue chip businesses.

The administration and management of the scheme vests in the body corporate's trustees, elected as provided for in section 7(1) of the Sectional Titles Schemes Management Act ('the STSMA').

Through a single supply point, electricity is provided to the scheme by the City of Tshwane ('CoT') and the body corporate is billed accordingly. The body corporate however fell into arrears and has not paid for electricity since 2017. According to Vresthena, this was because the body corporate was in disarray.

There is a history of non-payment for electricity services. The previous owner of Vresthena's properties was liquidated, but prior to that, were in arrears with some R2.7 million. In a matter brought before the courts during 2015, the CoT was ordered to reconnect the supply and the previous owner ordered to pay the arrears in tranches. In 2016, a tenant that operated the Super Spar and Tops in the scheme, applied for a separate electricity account. The CoT declined because no separate connection could be given in circumstances where there is an existing agreement for the supply of electricity with the body corporate. In October 2017, the body corporate had applied for and was granted a new account with the CoT. But in February 2018, the CoT again disconnected electricity due to non-payment. In June 2018 new trustees were elected and given the mandate to address the electricity issue. According to Vresthena they did nothing. Later (2019) Vresthena also applied for a prepaid meter, but this was declined, the CoT maintaining that owners of the sections must sort out the governance with its body corporate, it being the party to the contract with the CoT. By January 2022 the Retail Park owed the CoT an amount in excess of R24 million. The CoT again cut the electricity supply.

Vresthena disputed that the CoT had the right to do so and filed an urgent application in the Pretoria High Court seeking an order (i) obliging the CoT to restore the electricity supply to the Retail Park; (ii) compelling the CoT to

The Big Small Firm

stbb.co.za

Commercial Law | Conveyancing | Development Law | Labour Law | Estates | Family Law | Litigation | Personal Injuries & Third Party Claims

Cape Town
Claremont
Fish Hoek
Helderberg

T: 021 406 9100
T: 021 673 4700
T: 021 784 1580
T: 021 850 6400

Blouberg
Tyger Valley
Illovo
Fourwavs

T: 021 521 4000
T: 021 943 3800
T: 011 219 6200
T: 010 001 2632

Centurion
Bedfordview
East London

T: 012 001 1546
T: 011 453 0577
T: 043 721 1234

accept and reconsider its application for a separate electricity connection for its sections; and (iii) an order that, should the application for a separate electricity connection be rejected by the CoT, the rejection must be reviewed.

Vresthena did not give reasons why the body corporate has failed to make payment, or averred that the owners of the various sections have made payments to the body corporate; nor that they had used the remedies provided for in the STSMA to compel the body corporate to perform its mandate.

The High Court handed down an interim order in Vresthena's favour, and the CoT appealed to the Supreme Court of Appeal. (The appeal essentially dealt only with Vresthena's claim in (i) above, as that was dispositive of the matter.)

HELD

(The first part of the judgment dealt with the appealability of the interim order and the conundrum arising from the High Court's order which, although an interim order, failed to stipulate time periods within which Vresthena had to address the application for separate meters, failing which payment of the substantial debt had to be dealt with. These technical aspects are not included in the summary below.)

The law and the power-without-payment 'anomaly'

- The effect of the High Court judgment was to order the restoration of electricity without making provision for the payment of arrears. This was anomalous: The CoT is ordered to provide electricity to users who are in arrears and have a history of non-payment for the foreseeable future, and at the same time is denied the right to exercise their statutory power to terminate services without having to approach a court to obtain leave to do so. In this way, the High Court's order impermissibly interfered with the constitutional obligation on the CoT to ensure the collection of revenue for the services it provides.
- The Constitutional Court has held that electricity is a component of basic services and that municipalities are constitutionally and statutorily obliged to provide their residents with electricity. The provision of electricity is a local government competency. Amongst the general duties of a municipality set out in the Local Government Municipal Systems Act ('the Systems Act'), is the requirement that a municipality 'must ensure that all members of the local community have access to at least the minimum level of basic services'.
- Section 73(2)(c) of the Systems Act also requires a municipality to be financially sustainable. To realise that goal, Chapter 9 of the Systems Act regulates credit control and debt collection measures for services rendered by a municipality, and section 96 of the Systems Act places the debt collection responsibility on the municipality. As a result, in terms of section 98 of the Systems Act, a municipal council must adopt By-laws to give effect to its credit control and debt collection policy, its implementation and enforcement.
- In *Joseph and Others v City of Johannesburg and Others* the Constitutional Court confirmed that 'it is important for unpaid municipal debt to be reduced by all legitimate means' and also that '[t]here can be no doubt that municipalities bear an important constitutional obligation and a statutory responsibility to take appropriate steps to ensure the efficient recovery of debt'.
- The relevant provisions of the CoT's Standard Electricity Supply By-laws (2013)) provide, amongst other things, that a user or owner must apply to the CoT for the provision of electricity; that the agreement, together with the By-laws, govern all aspects of the supply and consumption of electricity to and by the relevant person; that accounts in respect of such services are deemed payable on the due date reflected on the account and, on the consumer's failure to pay, the CoT must notify the consumer and eventually disconnect the electricity supply to the premises of the consumer.

On the merits

The Big Small Firm

stbb.co.za

Commercial Law | Conveyancing | Development Law | Labour Law | Estates | Family Law | Litigation | Personal Injuries & Third Party Claims

Cape Town
Claremont
Fish Hoek
Helderberg

T: 021 406 9100
T: 021 673 4700
T: 021 784 1580
T: 021 850 6400

Blouberg
Tyger Valley
Illovo
Fourwavs

T: 021 521 4000
T: 021 943 3800
T: 011 219 6200
T: 010 001 2632

Centurion
Bedfordview
East London

T: 012 001 1546
T: 011 453 0577
T: 043 721 1234

| SUMMARY OF JUDGMENT |

- Vresthena does not have a contract with the CoT. The contract is between the CoT and the body corporate and the responsibility for the payment of electricity rested squarely on the body corporate. (Although the body corporate was cited as the second respondent, it did not oppose the application nor did it file any supplementary affidavits in support of the application by Vresthena.)
- The owners of the various sections of the scheme are, in terms of the STSMA, obliged to pay their levies to the body corporate, which in turn must pay the CoT.
- The STSMA further provides the owners with recourse against a body corporate when the functions and duties are not performed. It is therefore not enough for them to say that the body corporate is dysfunctional and that they therefore cannot take steps to rectify the situation. Sectional title owners cannot hide behind a dysfunctional body corporate to compel the CoT to provide services that sectional title owners are not ordinarily entitled to receive.
- Where the High Court erred was that it assumed that Vresthena and the other owners had a right to receive electricity. Vresthena and the other owners of the sections had no right to continue to receive electricity without payment for those services. It would otherwise mean that the CoT is financing Vresthena and other sectional title owners in their business interests

CONCLUSION

The appeal is upheld.