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Municipalities and the "Pay Now Argue Later" Principle in Relation to Rate Charges

By **Chantelle Gladwin-Wood** (Partner),
Maike Gohl (Partner) and
S'negugu Dlamini (Associate)

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INTRODUCTION

The City of Johannesburg Metropolitan Municipality ("COJ") often threatens people with debt collection measures if they haven't paid all amounts that the invoices reflect are owed. Sadly, we know that in many cases, the invoices are incorrect and a portion or even the whole of the amounts demanded, are not lawfully due and payable to the municipality. In particular, we receive thousands of queries pertaining to what the legal obligation of the consumer is, in relation to amounts demanded for rates and taxes, where the consumer has lodged an objection, appeal or review disputing that the municipal valuation or categorisation (which gives rise to the rates charges) are incorrect, and that process has not yet been finalized.

THE LAW BEFORE DUNROSE

Section 50(6) of the Local Government: Municipal Property Rates Act 6 of 2004 ("**Rates Act**") provides that the lodging of an objection does not defer liability of payment of rates beyond the date determined for payment. Taken at face value this means that a person is required to pay the rates raised until the objection is resolved. Municipalities often bully people into paying based on this particular provision. However, this is not the only law that applies in this particular situation. There are other laws and policies in place that also, together with the Rates Act, regulate how a municipality should act when seeking to collect disputed amounts in these situations.

Section 102 of the Local Government: Municipal Systems Act 32 of 2000 ("**the Systems Act**") provides that no credit control action can be taken where there is a dispute in relation to a particular amount claimed by the municipality. Section 102 provides as follows:

"(1) A municipality may-

(a) Consolidate any separate account of person 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 and credit control measures provided for in this Chapter in relation to any arrears on any of the accounts of such a person.

Subsection (1) does not apply where there is a dispute between the municipality and a person referred to in that subsection concerning <u>any specific amount claimed</u> by the municipality from that person".

In the unreported case of *Eli & LA Sheepskin Products (Pty) Ltd v Lesedi Local Municipality*[1] the court recognised that section 102 prohibits the municipality from disconnecting services or taking other credit control measures where a dispute in relation to a specific amount has been declared. This issue was recently adjudicated by the Gauteng Local Division of the High Court in the reported case of *Dunrose Investments 224 (Pty) Ltd v City of Johannesburg Metropolitan Municipality*[2]. Before the facts and outcome of the case are discussed, it is necessary to understand what counts as a dispute with a municipality.

WHAT COUNTS AS A DISPUTE WITH A MUNICIPALITY?

This is a complicated question. The Systems Act which governs the relationship between municipalities and consumers does not define "dispute". Section 102(2) of the Systems Act, however, indicates that such a "dispute" must be "concerning any specific amount claimed". This means that the customer needs to point to the amount claimed in a specific invoice for the query to be "valid" for the purposes of section 102 of the Systems Act. However, our courts do not all feel the same about what it means to dispute a "specific amount". Consumers now don't need to lodge a dispute which sets out a rand and cents amount, however, the dispute needs to be specific enough for the municipality to be able to ascertain what the disputed amounts are. This will be discussed in detail below.

THE DUNROSE CASE

In this case, the Applicant argued that it has been overcharged for water and rates since 2013 due to an over valuation of the property for the period of 2013 to 2019.

The Applicant also contended that the rates charges and water charges were inordinately high and that it has been charged approximately R100 000 more per month in rates than it should be paying. The Court considered section 50(6) of the Rates Act which provides that the lodging of an objection does not defer liability for payment of rates beyond the date determined for payment. The Court found in this case and based on the facts of this case, that the Applicant's counsel had failed to show that the charges raised by the Respondent were incorrect. The Court held that (on the basis of the fact that the Applicant had failed to show that the charges were incorrect) there was no reason why the Applicant should not pay the amount owed to the COJ, until the objection is resolved.

The Court's decision in this case was based on the premise that the Applicants had not shown that the amounts charged were incorrect. Had this occurred, the Court may very well have decided differently. This case is being lauded by municipalities as meaning that they can demand payment of incorrect and inflated rates charges with impunity, whilst an objection, appeal and/or review is pending. This is not what this case sets a precedent for. People who dispute the amounts claimed by the Municipality should not be discouraged by this court's finding.

The Supreme Court of Appeal in *Croftdene Mall*[3] interpreted 1 section 102(2) as follows:

> *"[21] Neither the Systems Act nor the policy defines the term 'dispute'. Some of the definitions ascribed to it include 'controversy, disagreement, difference of opinion', etc. This court had occasion to interpret the word in Frank R Thorold (Pty) Ltd v Estate Late Beit and said that a mere claim by one party, that something is or ought to have been the position, does not amount to a dispute: there must exist two or more parties who are in controversy with each other in the sense that they are advancing irreconcilable contentions.*
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> *[22] It is, in my view, of importance that s 102(2) of the Systems Act requires that the dispute must relate to a 'specific amount' claimed by the municipality. Quite obviously, its objective must be to prevent a ratepayer from delaying payment of an account by raising a dispute in general terms. The ratepayer is required to furnish facts that would adequately enable the municipality to ascertain or identify the disputed item or items and the basis for the ratepayer's objection thereto. If an item is properly identified and a dispute properly raised, debt collection and credit control measures could not be implemented regarding that item because of the provisions of the subsection. But the measures could be implemented regarding the balance in arrears; and they could be implemented in respect of the entire amount if an item is not properly identified and a dispute in relation thereto is not properly raised.*
>
> *[23] Whether a dispute has been properly raised must be a factual enquiry requiring determination on a case – by – case basis."*

In Ackerman[4] the applicant disputed the accuracy of the invoice that was issued by the City. The applicant lodged numerous queries with the City. The City contended that the applicant's queries do not fall within the purview of section 102(2) on the basis that the applicant failed to make reference to "any specific amount", therefore the applicant has failed to satisfy the requirements in section 102(2).

The Court found that the present case was distinguishable from Croftdene since the applicants in that case failed to identify any specific amount which it contested with the municipality, instead, the applicant sought a general reduction or write-off of its debt. This is in contrast to the present case, where the applicant has raised queries and declared a dispute in writing with the City in relation to particular invoice. The applicant in the present case continued to make payment of the undisputed charges on the account, unlike in Croftdene where the applicant failed to make any payment on the account.

Accordingly, the Court held that the City's reliance in Croftdene was misplaced or ill conceived.

In Van Der Merwe Street[5] the Court summarised the requirements from Croftdene as follows:

> *"[27] Croftdene Mall thus imposes the following requirements before a consumer of municipal services may rely on the protection from disconnection afforded by section 102(2) of the Systems Act:*
>
> *27.1 there must be a dispute, in the sense of a consumer, on the one hand, and the municipality, on the other, advancing irreconcilable contentions;*
>
> *27.2 the dispute must be properly raised, which would require, at least, that it be properly communicated to the appropriate authorities at the municipality and that this be done in accordance with any mechanism and appeal procedure provided in terms of section 95(f) of the Systems Act for the querying of accounts;*
>
> *27.3 the dispute must relate to a specific amount or amounts or a specific item or items on an account or accounts, with the corollary that it is insufficient to raise a dispute in general terms;*

27.4 the consumer must put up enough facts to enable the municipality to identify the disputed item or items and the basis for the ratepayer's objection to them;

27.5 it must be apparent from the founding affidavit that the foregoing requirements have been satisfied."

In the recent case of Van Der Merwe the municipality contended that the Applicant has failed to show that is has a valid dispute in terms of section 102 of the Systems Act. The Applicant contended that the Municipality's reliance of section 102 of the Systems Act is misguided as the dispute only concerns the issue of the alleged illegal connection of the electricity at the property.

In deciding the matter the court held that the Applicant communicated the dispute in writing with the City, therefore it complied with the requirement that states that the dispute must be properly raised. Further the court said *"Assuming compliance with section 102(2), a customer of the City in these circumstances can perpetuate a dispute indefinitely by simply ensuring that it does not agree to any assertion by the City as to the extent of the customer's indebtedness in respect of particular amounts. On this basis, section 102(2) might become an indefinite shield against the exercise of a statutory power of disconnection, notwithstanding continuing non-payment."*[6]

Van Der Merwe Street appears to indicate a slight departure from the reasoning in Croftdene, in which the Court referred to a specific amount claimed by a municipality. This implied that there was reference to a single amount being disputed. In Ackerman, the Court found that this on a sensible interpretation cannot be what the Court in Croftdene intended. In arriving to this decision, the Court referenced paragraph 22 of Croftdene where that Court stated that "The ratepayer is required to furnish facts that would adequately enable the municipality to ascertain or identify the disputed item or items…". Against this backdrop, the Court in Ackerman held that the applicant's queries and demands constituted a dispute within the of section 102(2).

THE CITY'S OWN RATES BY-LAWS

The City's Rates Policy which came into operation 1 July 2024 provides for the City to utilize the provisions of its Credit Control and Debt Collection Policy ("**Credit Policy**") for the collection of amounts owed for rates in terms of the Local Government: Municipal Property Rates Act. This is very interesting because the City has expressly chosen to apply its Credit Policy to the enforcement of, including payment of rates charges owed in terms of the Rates Act.

The City's Credit Policy provides that a consumer who has a dispute with the municipality in terms of the amount owing, can log a query or complaint, and thereafter file an appeal, to dispute the charges. Once this dispute process is underway, the consumer is not required to make payment of all amounts charged by the City – the consumer is required to make payment only of the undisputed charges. For so long as the customer is waiting for the dispute/complaint/query to be resolved and/or dealt with in terms of the ordinary dispute resolution processes set out in the City's Credit Policy, the consumer ought to be immune or safe from disconnection or the issue of summons.

There is a requirement, however, that needs to be fulfilled by the customer in such an instance to preserve the customer's "immunity". The customer needs to continue to make payment of an average of the prior consumption charges for the services concerned (3 to 12 months) calculated according to actual readings which are correct. Any portion of the charge which is paid in this manner, is regarded as being undisputed. If undisputed charges are not paid, the customer's immunity from disconnection falls away and the customer can lawfully be disconnected for non-payment of any portion of any undisputed debt that is not paid in full, even whilst the dispute on the disputed portion of the debt is pending.

WHAT DOES IT MEAN TO MAKE PAYMENT OF UNDISPUTED CHARGES?

This can be a tricky question to answer because it is situation specific.

- In some cases the undisputed charges will include an on-going monthly payment towards charges that the customer is estimating its liability for (such as in the case where the customer disputes that it owes R 100,000.00 a month for water because there is a fault with the meter, the customer might estimate that its true liability is only R5,000.00a month and then it would have to keep making payment of that R5,000.00 per month in order to keep its query/complaint/dispute valid). In this particular example the customer's estimation of what its "true" monthly liability is, would be based on an average of the customer's prior 3 to 12 months actual (and correct) consumption charges. To the effect that the customer keeps paying the amount that it estimates is owed for the services concerned based on the average referred to above, instead of the actual charges, the customer should be safe from credit control action including disconnection or the issue of summons.

- In some cases the customer might be disputing that a certain charge is not owed. For instance, a customer who receives a bill for R25,000.00 on a once off basis for electricity to her property, when

that customer has a pre-paid meter, is disputing that any portion of that charge is correct. In this kind of situation there is no ongoing monthly charge for electricity of which any portion is disputed. Only the once-off charge is disputed. The customer therefore would not be under any obligation in this type of situation to make payment of any portion of the R 25,000.00 because even based on the customer's best estimate, the amount is not owing. Nor would the customer have any obligation to make payment of any amount on an ongoing monthly basis for electricity estimated or otherwise, to keep the customer's dispute pending and valid.

- In a third category of cases, the customer is aware that they are using services on an ongoing monthly basis but for whatever reason the customer is disputing that the charge, when it arrives on the invoice monthly, is wrong. This might occur where the customer disputes that its sewer charge is correct because the City has mistakenly recorded the size of the property as being much larger than it actually is registered as being at the Deeds Office. In such a case, the customer would be able to tell easily how much they are supposed to pay for sewer each month, and they would be able to continue to make payment of that portion of the sewer charge. The customer would not pay the portion of the charge that they dispute each month, but they ought to pay the portion of the charge each month that they do not dispute, until the dispute is resolved.

The most important take away from this discussion is that the right of a municipality to demand payment "upfront" in respect of rates and taxes, where those charges are disputed in terms of a pending objection/appeal/review, is affected by the customer's right to log a complaint/query/dispute in terms of the City's Credit Policy. The City's Rates By-laws expressly provide for this by making the enforcement mechanisms for the payment of rates subject to the provisions of the City's Credit Control Policy. The legal effect of this decision by the City is that it must treat the collections of rates in the same way as it treats the collection of all other types of charges – which is subject to the regulations contained in the Credit Policy. Accordingly, even rates owed in terms of the Rates Act are not liable to be paid – even if invoiced – if there is a dispute/objection/appeal/review pending in terms of the Credit Policy, because the City's own Credit Policy exempts customers from having to pay disputed amounts while the relevant dispute is pending.

THE ARGUMENT FOR AMOUNTS "DUE" VERSUS "PAYABLE"

A full discussion of this issue, however, is beyond the scope of this article. It is recommended that a customer disputing any particular charge should make payment of a reasonable amount for that charge – if appropriate calculated based on an average of prior periods – because not doing so could land the customer with a very large bill at the end of the day which he is liable to settle and might have difficulty doing so for cash flow purposes. This however is just a practical recommendation and not an endorsement by the authors that the amounts set out in section 11 of the by-laws are lawfully due and payable when a query or complaint (which actually constitutes a dispute) is logged. Please take legal advice from your attorney in this regard on the facts of each case.

ANALYSIS AND CONCLUSION

Pure refusal or failure to pay the amount owed to the municipality does not count as a dispute. In this context it makes sense because it would be unjust if a customer were able to avoid payment of a "disputed" amount or credit control action against him in relation to a "disputed" amount purely because the customer raised a query or dispute that is not connected to the amount owing.

In order to qualify as a dispute for the purposes of delaying payment, the customer must:

- raise his/her/its 'problem' with the municipality
- in the prescribed form
- by specifying which amount in which invoice is disputed,
- and for what bona fide reason.
- That reason must explain why the amount charged is wrong.
- Civil protest or general dissatisfaction or a claim that the charges are "too high" are inadequate.
- Payment of the 'average' in terms of section 11 of the COJ's by-laws might be payable in order to 'preserve' the effect of the dispute/query/complaint.
- A query logged telephonically with the COJ in terms of section 16 of its policy does not appear to suspend payment, because it is not a dispute. Only when a dispute is lodged, will the protection contained in section 102 of the Systems Act kick in.
- For safety's sake and to avoid the chance that COJ might argue that you have lodged a query or complaint rather than a dispute, specifically refer to a "dispute" in terms of the policy when raising same.

[1]*Unreported, available at http://www.saflii.org/za/cases/ZAGPPHC/2015/680.html, heard on 18 September 2015 by Legodi J (as he was then) in the North Gauteng High Court).*
[2]*2019 ZAGP JHC 220, a copy of which is available here: http://www.saflii.org/za/cases/ZAGPJHC/2019/220.html.*
[3]*Body Corporate Croftdene Mall v Ethekwini Municipality (603/2010) [2011] ZASCA 188; [2012] 1 All SA 1 (SCA); 2012 (4) SA 169 (SCA).*
[4]*Ackerman v City Of Johannesburg (20229392) [2024] ZAGPJHC 334*
[5]*Van der Merwe Street Hillbrow CC v City of Johannesburg Metropolitan Municipality and another (GJ) unreported case number 7784/2023 (24 March 2023) para 27.*
[6]*Supra at paragraph 23*

Chantelle Gladwin-Wood
(Partner)

Maike Gohl
(Partner)

S'negugu Dlamini
(Associate)