IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE – GRAHAMSTOWN)

CASE NO: 3460/09
DATE HEARD: 15/10/09
DATE DELIVERED: 5/11/09
REPORTABLE

In the matter between:

NELSON MANDELA BAY METROPOLITAN MUNICIPALITY	**APPLICANT**
and	
MR. NOBUMBA N.O.	**1ST RESPONDENT**
CHIEF MAGISTRATE, PORT ELIZABETH	**2ND RESPONDENT**
IAN GEORGE ROCKMAN	**3RD RESPONDENT**

The applicant, a municipality, had instituted an action against the third respondent for due but unpaid rates and municipal service charges. When it applied for summary judgment, the first respondent, the magistrate hearing the matter, struck the matter from the roll on the basis that the National Credit Act 34 of 2005 applied and had not been complied with by the municipality. It brought an application to review and set aside the decision. It was held that: the Act did not apply to the claim for rates as a rate was a tax and the obligation to pay rates did not arise from a credit agreement; the municipality had not established that its agreement with the third respondent on which the claim for service charges was based was exempted by s 4(6)(b) of the Act from being a credit facility; and the claim for interest arose from statute and not from a credit agreement. The magistrate's order was reviewed and set aside and replaced with an order granting summary judgment in respect of the claim for rates, dismissing the application for summary judgment in

respect of the claim for service charges and granting the third respondent leave to defend this claim.

JUDGMENT

PLASKET J

[1] This is an urgent application in which the applicant (the municipality) seeks an order reviewing and setting aside a decision of the first respondent (the magistrate) to strike an application for summary judgement against the third respondent from the roll. That application for summary judgement was for R28 708.45 for outstanding rates owed by the third respondent, R40 099.21 for outstanding service charges owed by him and interest. The magistrate removed the matter from the roll because he took the view that s 129 and s 130 of the National Credit Act 34 of 2005 (the NCA) applied to the debt and had not been complied with by the municipality.[1]

[2] In this judgment, I shall set out the background to this application, outline the relevant constitutional and statutory framework within which municipalities function, identify the provisions of the NCA that may be of application, determine, in turn, whether the NCA applies to proceedings to recover unpaid rates, unpaid services charges and interest, and determine what relief is appropriate in the circumstances.

[A] BACKGROUND

[3] It appears from the founding affidavit of Mr Mbuzeli Nogqala, who is the Director of Revenue Management and Customer Care in the Budget and Treasury Directorate of the municipality, that the issue of whether the NCA

[1] It would appear that the order to strike the matter from the roll was not a competent order. Section 130(4)(b) of the NCA provides that where in 'any proceedings contemplated in this section' the credit provider has not complied with, *inter alia*, s 129, a court must 'adjourn the matter before it' and 'make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed'.

applies to the municipality's debt collecting is of great importance to it. No doubt, it is of great importance too for every other municipality in the country.

[4] Mr Nogqala explained that the municipality runs its own debt collecting operation using a sophisticated computer program developed specifically for this purpose and that this program generates letters of demand, summonses and applications for default judgments automatically. He proceeded to say the following of the magnitude of the debt collecting operation:

> '17. Due to the fact that account holders do not settle their accounts on due dates, letters of demand are generated and the approximate number per month is 14 000.
>
> 18. The unpaid debts covered by these letters of demand is approximately R180 000 000.00. As the cost of posting a letter is R2.10 the applicant incurs postage costs on a monthly basis of approximately R29 400.00. The applicant's Debtor Management Department, which is responsible for the collection of unpaid debt, has the obligation to take steps to recover the total arrears due to the applicant which, as at 30 June 2009, totalled approximately R900 000 000.00.
>
> 19. According to the applicant's statistics, at any given time, approximately 49% of account holders do not settle their accounts on due date whereas the balance of account holders do. On a monthly basis the applicant sends out approximately 380 000 accounts which means that approximately 186 000 account holders do not settle their accounts on due date'.

[5] It was thus of concern for the municipality when the clerk of the Port Elizabeth Magistrate's Court refused to issue the municipality's summonses, on the basis, apparently, that he believed that the NCA applied but had not been complied with. After an exchange of correspondence and meetings with the chief magistrate, the clerk of the court began to issue the municipality's summonses again but then he refused to do so once more.[2] This led in due

[2] A clerk of a court has limited power to refuse to issue a summons. See Erasmus and Van Loggerenberg *Jones and Buckle: The Civil Practice of the Magistrates' Courts in South Africa* (9 ed) (Vol 2) Cape Town, Juta and Co: 1997, 4-1. None of those grounds were present in this matter.

course to the municipality bringing an application in the Magistrate's Court, in terms of s 13(2) of the Magistrates' Courts Act 32 of 1944, to review and set aside the clerk of the court's decision.[3]

[6] Surprisingly, given the blatantly unlawful conduct of the clerk of the court, the application was opposed. Unsurprisingly, the application was granted with costs. During the course of his judgment, however, the magistrate who heard the application ventured the view that the NCA was of application to the municipality's debt collecting procedures.

[7] The application for summary judgment was duly set down before the first respondent. He, having decided that the NCA was of application and had not been complied with, struck the application from the roll, apparently to allow the municipality the opportunity to rectify the defect.

[8] It is argued by the municipality that the magistrate's decision amounts to a gross irregularity in the proceedings in that he misinterpreted the NCA and thereby committed a material error of law. The making by a magistrate of a material error of law may be a 'gross irregularity in the proceedings' in terms of s 24(1)(c) of the Supreme Court Act 59 of 1959.[4]

[9] The magistrate's reasoning seems to amount to the assertion that because the majority of debtors in the Port Elizabeth Magistrate's Court are indebted to the municipality for services rendered by it, it would be a travesty of justice if they were not protected by the NCA and it should therefore be interpreted to include them.

[B] CONSTITUTIONAL AND STATUTORY FRAMEWORK

[3] Section 13(2) reads: 'A refusal by the clerk of the court to do any act which he is by any law empowered to do shall be subject to review by the court on application either *ex parte* or on notice, as the circumstances may require.'
[4] *Jordan and another v Penmill Investments CC and another* 1991 (2) SA 430 (E), 441B-C; *Qozoleni v Minister of Law and Order and another* 1994 (3) SA 625 (E), 638E-G.

[10] Section 40 of the Constitution provides that 'government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated'. In terms of s 151, the 'local sphere of government consists of municipalities …'. In terms of s 151(3) a municipality is empowered to govern 'the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution'.

[11] Section 152 sets out the objects of local government. It provides:

'(1) The objects of local government are –

(a) to provide democratic and accountable government for local communities;

(b) to ensure the provision of services to communities in a sustainable manner;

(c) to promote social and economic development;

(d) to promote a safe and healthy environment;

(e) to encourage the involvement of communities and community organisations in the matters of local government.

(2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).'

[12] Section 156 provides for the powers and functions of municipalities. In terms of s 156(1) a municipality has 'executive authority in respect of, and has the right to administer' those matters listed in Part B of Schedule 4 and Part B of Schedule 5, which include electricity and gas reticulation as well as 'water and sanitation services limited to potable water supply systems and domestic waste water and sewage disposal systems' and 'refuse removal, refuse dumps and solid waste disposal'.

[13] Municipalities are empowered by s 156(2) to make and administer by-laws in order to give effect to those functional areas in which they are authorised to govern. In addition, in terms of s 156(5), a municipality 'has the

right to exercise any power concerning a matter reasonably necessary for, or incidental too, the effective performance of its functions'.

[14] Section 160(2)(c) provides that a municipal council may not delegate the power to impose 'rates and other taxes, levies and duties'. Section 229(1)(a) expressly authorises a municipality to impose 'rates on property and surcharges on fees for services provided by or on behalf of the municipality'.

[15] These constitutional provisions are fleshed out by legislation. Two statutes are of importance for present purposes. They are the Local Government: Municipal Property Rates Act 6 of 2004 (the Rates Act) and the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act).

[16] The long title of the Rates Act states, *inter alia*, that it is designed to 'regulate the power of a municipality to impose rates on property'. It defines a rate as 'a municipal rate on property envisaged in section 229(1)(a) of the Constitution'. Section 2(1) provides that a 'metropolitan or local municipality may levy a rate on property in its area'.

[17] Section 12(1) states that a municipality must levy rates for a financial year. Section 26 concerns the method and time of payment of rates. It says:

> '(1) A municipality may recover a rate –
>
> (a) on a monthly basis or less often as may be prescribed in terms of the Municipal Finance Management Act; or
>
> (b) annually, as may be agreed to with the owner of the property.
>
> (2) (a) If a rate is payable in a single amount annually it must be paid on or before a date determined by the municipality.
>
> (b) If a rate is payable in instalments it must be paid on or before a date in each period determined by the municipality.
>
> (3) Payment of a rate may be deferred but only in special circumstances.'

[18] The long title of the Systems Act states, *inter alia*, that its purpose is to 'provide for the core principles, mechanism and processes that are necessary to enable municipalities to move progressively towards the social and economic upliftment of local communities, and ensure universal access to essential services that are affordable to all'.

[19] A municipal service is defined in s 1 as a 'service that a municipality in terms of its powers and functions provides or may provide to or for the benefit of the local community' irrespective of whether the municipality provides the service itself or out-sources its provision and irrespective of whether 'fees, charges or tariffs are levied in respect of such a service or not'.

[20] Section 4(1)(c) provides that a municipal council has the right to finance the operation of the municipality by 'charging fees for services' and 'imposing surcharges on fees, rates on property and, to the extent authorise by national legislation, other taxes, levies and duties'. The inverse of this 'right' is the duty imposed on members of the local community by s 5(2)(b) to 'pay promptly service fees, surcharges on fees, rates on property and other taxes, levies and duties imposed by the municipality'.

[21] Chapter 8 of the Systems Act deals with municipal services. Section 74 imposes a duty on municipalities to adopt and implement a tariff policy and dictates the core content of such a policy. Section 75 states that a by-law must be passed to give effect to a tariff policy and s 75A(1) empowers a municipality to 'levy and recover fees, charges or tariffs in respect of any function or service of the municipality' and to 'recover collection charges and interest on any outstanding amount'. Section 96 imposes obligations on a municipality to collect 'all money that is due and payable to it' and to 'adopt, maintain and implement a credit control and debt collection policy that is consistent with its rates policy and tariff policy'.

[C] THE PROVISIONS OF THE NCA

[22] The purpose of the NCA that is relevant to these proceedings is, according to its long title, to 'promote a fair and non-discriminatory market place for access to consumer credit and for that purpose to prove for the general regulation of consumer credit and improve standards of consumer information'. Section 3 of the NCA is entitled 'Purpose of the Act'. It says:

> 'The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by –
>
> (a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions;
>
> (b) ensuring consistent treatment of different credit products and different credit providers;
>
> (c) promoting responsibility in the credit market by –
>
> (i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and
>
> (ii) discouraging reckless credit granting by credit providers and contractual default by consumers;
>
> (d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;
>
> (e) addressing and correcting imbalances in negotiating power between consumers and credit providers by –
>
> (i) providing consumers with education about credit and consumer rights;
>
> (ii) providing consumers with adequate disclosure of standardised information in order to make informed choices; and
>
> (iii) providing consumers with protection from deception, and from unfair or fraudulent conduct by credit providers and credit bureaux;

(f) improving consumer credit information and reporting and regulation of credit bureaux;

(g) addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations;

(h) providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements; and

(i) providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.'

Although the purposes of the NCA appear to be focused on the regulation of what I would term commercial credit, its application is wider than that: while the State and organs of state, when they are consumers, are expressly excluded from its protection,[5] s 4(3)(b)(i) states that the application of the NCA extends to credit agreements entered into by organs of state as credit providers.

[23] Section 4 concerns the application of the NCA. It provides, subject to two provisos that are not relevant for present purposes, that it applies 'to every credit agreement between parties dealing at arms length and made within, or having an effect within, the Republic…'. Section 1 defines an agreement as including 'an arrangement or understanding between or among two or more parties, which purports to establish a relationship in law between those parties'.

[24] Section 8 is headed 'Credit Agreements'. Section 8(1) provides that, subject to two exceptions not relevant to this matter, an agreement is a credit agreement for purposes of the Act if it is:

'(a) a credit facility, as described in subsection (3);

(b) a credit transaction, as described in subsection (4);

[5] Section 4(1)(a)(ii) and (iii).

(c) a credit guarantee, as described in subsection (5); or

(d) any combination of the above.'

It appears to me that it is only a credit facility or an incidental credit agreement – one of the forms of a credit transaction listed in s 8(4) – that may be of application in this matter.

[25] A credit facility is defined by s 8(3) as follows:

'An agreement, irrespective of its form but not including an agreement contemplated in subsection (2) or section 4(6)(b), constitutes a credit facility if, in terms of that agreement –

(a) a credit provider undertakes –

(i) to supply goods or services or to pay an amount or amounts as determined by the consumer from time to time, to the consumer or on behalf of, or at the direction of, the consumer; and

(ii) either to –

(aa) defer the consumer's obligation to pay any part of the cost of goods or services, or to repay to the creditor provider any part of an amount contemplated in subparagraph (i); or

(bb) bill the consumer periodically for any part of the cost of goods or services or any part of an amount contemplated by subparagraph (i); and

(b) any charge, fee or interest is payable to the credit provider in respect of –

(i) any amount deferred as contemplated in paragraph (a)(ii)(aa); or

(ii) any amount billed as contemplated in paragraph (a)(ii)(bb) and not paid within the time provided in the agreement.'

[26] An incidental credit agreement is defined in s 1, the definitions section, as being:

> '…an agreement, irrespective of its form, in terms of which an account was tendered for good or services that have been provided to the consumer, or goods or services that are to be provided to a consumer over a period of time and either or both of the following conditions apply:
>
> (a) a fee, charge or interest became payable when payment of an amount charged in terms of that account was not made on or before a determined period or date; or
>
> (b) two prices were quoted for settlement of the account, the lower price being applicable if the account is paid on or before a determined date, and the higher price being applicable due to the account not being paid by that date.'

[27] If the NCA applies, then s 129 and s 130 must be complied with by the municipality. Section 129(1)(b) provides that a credit provider may not institute proceedings to recover a debt before giving notice to the consumer as provided for in s 129(1)(a). Section 130 provides that a credit provider may only enforce a credit agreement if certain conditions are met including that the consumer has not responded to the s 129(1) notice or has responded by rejecting the credit provider's proposals.

[D] THE ISSUES TO BE DECIDED

(1) Does the NCA Apply to Claims for Due but Unpaid Rates?

[28] It is evident from the provisions of s 4 and s 8 that the NCA only applies to agreements that fall within the definition of a credit agreement. The word 'agreement' is defined in s 1 of the Act to include 'an arrangement or understanding between or among two or more parties which purports to establish a relationship in law between those parties'. It consequently bears the ordinary meaning of the reaching of consensus by two or more people in such a way that a contract is formed.

[29] Rates are a tax that is imposed by a municipality. That this is so is hinted at – at least – by the Constitution itself; s 229(1)(a) empowers a municipality to impose 'rates on property and surcharges on fees for services' and s 229(1)(b) then adds that, if authorised by national legislation, a municipality is also empowered to impose 'other taxes, levies and duties …'.

[30] In *City Treasurer and Rates Collector, Newcastle Town Council v Shaikjee and others*[6] Kumleben J said the following:

> 'The crisp question to be decided is whether such "rates" are a form of "taxation imposed or levied" within the meaning of this phrase in the said subsections.
>
> I have no doubt they are. To furnish reasons for this conclusion is about as difficult as attempting to prove the truth of an axiom. The plain and unambiguous language of ss (a)(iii) tells one that a rate of this nature is encompassed by its provisions. In certain circumstances the context in which the word "tax" and "taxation" appear might require one to interpret them restrictively. … However, in this case there are no grounds for not giving "taxation" its ordinary and generally accepted meaning.'

In *Port Edward Health Committee v SA Polisie Rusoord*,[7] Millne J stated that when the term 'tax' is used it 'ordinarily does include rates since rates are merely taxes of a particular kind'.

[31] These cases were decided before the interim Constitution and the final Constitution re-aligned local government in relation to national and provincial government. There is no indication that this change affected the nature of a rate and how the term has been interpreted: a rate remains a form of taxation. In *Fedsure Life Assurance Limited and others v Greater Johannesburg Transitional Metropolitan Council and others*,[8] the court clearly considered a rate to be a tax. In dealing with the legislative (rather than administrative)

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[6] 1983 (1) SA 506 (N), 507F.
[7] 1975 (2) SA 720 (D), 723G-H.
[8] 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC).

power of a municipality to impose rates, Chaskalson P, Goldstone J and O'Regan J held:[9]

> 'The procedures according to which legislative decisions are to be taken are prescribed by the Constitution, the empowering legislation and the rules of the Council. While this legislative framework is subject to review for consistency with the Constitution, the making of by-laws and the imposition of taxes by a council in accordance with the prescribed legal framework cannot appropriately be made subject to challenge by "every person" effected by them on the grounds contemplated by s 24(b).'

[32] Section 2(1) of the Rates Act empowers a municipality to levy rates on property. The obligation on the part of a property owner to pay arises from this source, not from an agreement. As the NCA only concerns itself with credit agreements, it consequently does not apply to proceedings instituted by a municipality to recover due but unpaid rates.

(2) Does the NCA Apply to the Recovery of Due but Unpaid Service Charges?

[33] There are two principal parties to a credit agreement – a credit provider and a consumer. A credit provider, in relation to a credit agreement, means *inter alia* 'the party who supplies goods or services under a discounted transaction, incidental credit agreement or instalment agreement' or 'the party who extends credit under a credit facility'. A consumer is defined *inter alia* as 'the party to whom goods or services are sold under a discount transaction, incidental credit agreement or instalment agreement' or 'the party to whom credit is granted under a credit facility'.[10]

[34] The duty to supply municipal services and the corresponding obligation to pay for them, although statutory in origin,[11] is ultimately based on a service agreement entered into between the municipality and individual consumers of

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[9] At para 41.
[10] Both definitions are to be found in s 1 of the NCA.
[11] See s 4(2)(f), s 5(1)(g) and s 5(2)(b) of the Systems Act.

municipal services.[12] On the face of it, that agreement between a municipality and a consumer of services in terms of which the former supplies municipal services to the latter and the latter undertakes to pay when he or she is billed periodically for the consumption of those services may be a credit facility as contemplated by s 8(3) of the NCA. It cannot be an incidental credit agreement as contemplated by s 8(4)(b) because it concerns the payment of a periodic statement of account for services that have been consumed rather than 'a fee, charge or interest' which became payable when payment of the amount charged in the account was not made on or before the due date.

[35] Section 4(6)(b) of the NCA concerns the supply of a 'utility or other continuous service' and exempts credit providers who have structured their agreements with consumers from the most onerous aspects of the NCA. It provides:

> 'Despite any other provision of this Act –
>
> (a) …
>
> (b) if an agreement provides that a supplier of a utility or other continuous service –
>
> (i) will defer payment by the consumer until the supplier has provided a periodic statement of account for that utility or other continuous service; and
>
> (ii) will not impose any charge contemplated in section 103 in respect of any amount so differed, unless the consumer fails to pay the full amount due within at least 30 days after the date on which the periodic statement is delivered to the consumer,
>
> that agreement is not a credit facility within the meaning of section 8(3), but any overdue amount in terms of that agreement, as contemplated in sub-paragraph (ii), is incidental credit to which this Act applies to the extent set out in section 5.'

Section 103 is concerned only with interest.

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[12] See s 5(3) of the municipality's Customer Care and Revenue Management By-Laws, promulgated in Provincial Gazette 1087 of 21 October 2003, which are dealt with in more detail below.

[36] A utility is defined in s 1 as the 'supply to the public of an essential … commodity, such as electricity, water or gas' or 'a service such as waste removal, or access to sewage lines, telecommunications networks or any transportation infrastructure'.

[37] The exemption created by s 4(6)(b) appears, according to Scholtz, Otto, Van Zyl, Van Heerden and Campbell to be intended to 'apply to agreements between municipalities and consumers, although providers of other continuous services, such as security services, would also be able to structure their agreements to fall within this exemption'.[13]

[38] What does s 4(6)(b) apply to? In order to answer that question, it is necessary to interpret it. Steytler and De Visser interpret the section as follows:[14]

> 'It should be noted that the National Credit Act 34 of 2006 does not apply to the provision of municipal services on the agreement that payment will be effected after the consumption of the service. Section 4(6)(b) of the Act provides that an agreement that a supplier of a utility will defer payment by the consumer until the supplier has provided a periodic statement of account for that utility is not a "credit facility" to which the Act applies. … However, where a municipality reschedules debt repayment and fees, charges or interest become payable, it becomes "an incidental credit agreement" which attract some of the provisions of the Act … .'

[39] Scholtz et al take a different view. They say that the section applies to an 'agreement in terms of which the supplier of the utility or continuous service agrees to defer payment by the consumer until the supplier has provided a periodic statement of account, and not to impose any interest unless the consumer fails to pay the full amount due within the agreed period', provided the consumer is given at least 30 days after the date on which the periodic statement of account is delivered in which to day.[15]

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[13] *Guide to the National Credit Act* Durban, LexisNexis: 2008, para 4.3 (page 4-6).
[14] *Local Government Law of South Africa* Durban, LexisNexis; 2007, 9-48, footnote 406.
[15] *Guide to the National Credit Act* (note 13), para 4.3 (page 4-6).

[40] I am in agreement with this interpretation of the section, and I conclude that the interpretation of Steytler and De Visser is not correct. It is clear from the structure of the section, the fact that sub-paragraphs (i) and (ii) are joined by the word 'and' and by the reference back in sub-paragraph (ii) to the deferred payment referred to in sub-paragraph (ii) that the requirements for exemption created by s 4(6)(b) are cumulative: in order for a supplier of a utility to be exempted, the agreement in terms of which utilities are supplied must comply with both sub-paragraphs (i) – that payment by the consumer is deferred until periodical statements of account are rendered – and sub-paragraph (ii) – that no interest is charged on the deferred payment unless the consumer, having at least 30 days in which to pay, fails to do so. If these conditions are present, then the agreement is neither a credit facility nor an incidental credit agreement but interest charges in terms of subsection (ii) will be incidental credit.

[41] In order to determine whether the municipality is exempted in terms of s 4(6)(b), it is necessary to examine its system for providing services and for the payment of accounts by consumers. That system is set out in the municipality's Customer Care and Revenue Management By-laws published in Provincial Gazette number 1087 of 21 October 2003.

[42] Section 5(3) of the by-laws provides that services will only be supplied when the consumer has applied to the municipality for the provision of services, a 'service agreement in the format as prescribed by Council has been entered into' and a deposit has been paid. In terms of s 8(1), an account holder is required to pay 'all amounts due to Council as reflected in the municipal account' and in terms of s 8(3)(b) an account is rendered 'monthly in cycles of approximately 30 days'. Section 8(4) provides that payment 'must be received on or before the due date at close of business on the due date' and s 1 defines the due date to be 'the date specified as such on a municipal account despatched from the offices of the responsible officer for any charges payable and which is the last day allowed for the payment of such charges'.

[43] Section 14 deals with interest on overdue accounts. Section 14(1) allows for interest to be charged or recovered at a determined rate in respect of any amounts that are due and payable. In terms of s 14(2) interest accrues if an account is unpaid and, according to s 14(4) it is payable 'if payment is not received at an office of Council or to the credit of the bank account of Council at the close of business by the due date'.

[44] Whether s 4(6)(b) applies will depend ultimately on the terms of the standard form service agreement between the municipality and its consumers contemplated by s 5(3) of the Customer Care and Revenue Management By-laws. This agreement is not part of the papers. I can, however, assume on the basis of s 8(5) of the by-laws, which provides for the rendering of monthly accounts, that the standard form agreement provides for the deferment of payments by the consumer 'until the supplier has provided a periodic statement of account' as contemplated by s 4(6)(b)(i) of the NCA.

[45] It cannot, however, be assumed that the standard form service agreement provides that interest (as provided for by s 103) 'in respect of any amount so deferred' will not be charged 'unless the consumer fails to pay the full amount due within at least 30 days after the date on which the periodic statement is delivered to the consumer', as contemplated by s 4(6)(b)(ii). The by-laws are of no assistance in this regard because the definition of 'due date' merely refers to the date for payment stated on a municipal account, s 8(4) says that payment of an account must be made on or before the due date and s 14(4) provides that interest is payable 'if payment is not received … at the close of business by the due date'. In other words, on the municipality's papers it is not possible to say that the due date is at least 30 days 'after the date on which the periodic statement is delivered to the consumer', as required by s 4(6)(b)(ii), and in the particulars of claim before the magistrate, no allegation was made that its claim fell within the exemption.

[46] In the result, the municipality has not established that its standard form service agreement meets the requirement of s 4(6)(b)(ii) of the NCA. It consequently has not established that the agreement is exempted by s 4(6)(b)

from the definition of a credit facility. Therefore, on the papers before him, the magistrate was justified in concluding that the NCA applied insofar as the claim for due and unpaid service charges was concerned and that the provisions of s 129 and s 130 had not been complied with. He committed an irregularity, however, in striking the matter from the roll. He should have adjourned the matter in terms of s 130(4)(b) and made an order setting out the steps that the municipality had to take before the matter could continue.

(3) The Claims for Interest

[47] The municipality claimed interest in respect of both the claim for rates and for service charges *a tempora morae*. It is argued on behalf of the municipality that interest is not claimed in terms of any agreement but that its entitlement arises either from legislation or from the fact that the consumer is in *mora*.

[48] As the standard form service agreement between the municipality and its consumers is not part of the papers, it is not possible to deal with whether the NCA applies, and if so, to what extent, to interest claimed on due but unpaid service charges. I shall therefore only discuss whether the NCA applies to interest claimed on rates that are due and payable.

[49] It appears to me that, as with a rate itself, any right to claim interest on the part of the municipality does not arise from an agreement between it and a consumer: it arises from s 14 of the Customer Care and Revenue Management By-laws. In particular s 14(4), read with s 14(1), provides that interest is payable on any arrear amount owed to the municipality 'if payment is not received at an office of the Council or to the credit of the bank account of the Council at the close of business on the due date'.

[50] This means that a consumer is automatically in *mora* when the due date has come and gone and the obligation to pay interest arises as a matter of course.[16] Consequently, the NCA has no application in respect of the claim for

[16] *Mbanga v MEC for Welfare, Eastern Cape and another* 2002 (1) SA 359 (SE), 366D-E; *C and T Products (Pty) Ltd v MH Goldschmidt (Pty) Ltd* 1981 (3) SA 619 (C), 631G-H.

interest on the amount due for rates *a tempora morae* at the rate determined in terms of the Prescribed Rate of Interest Act 55 of 1975. Despite being entitled, in terms of s 2 of the Act, to interest from when the debt fell due,[17] the municipality now only seeks interest from the date the summons was served on the third respondent.

[E] RELIEF

[51] This judgment has made three principal findings. They are: first, that as the power of a municipality to levy rates is derived from s 2(1) of the Rates Act and the obligation on the part of a property owner to pay arises from this source and not from an agreement, the NCA, being concerned only with credit agreements, does not apply to proceedings instituted by a municipality to recover due but unpaid rates; secondly, as the entitlement of a municipality to claim interest on due but unpaid rates also arises from legislation, the NCA does not apply to the municipality's claim for interest *a tempora mora*; and thirdly, because the municipality has not established that its standard form service agreement meets the requirement of s 4(6)(b)(ii) of the NCA, it consequently did not establish that the agreement is exempted by s 4(6)(b) from the definition of a credit facility and that the NCA did not apply to claims for due but unpaid service charges.

[52] In striking the matter from the roll and not granting summary judgment for the claim of R28 708.45 in respect of due but unpaid rates, as well as interest on that amount, the magistrate committed a gross irregularity. He was, however, entitled to conclude as he did that, in respect of the claim for due but unpaid service charges and interest thereon, the municipality had not established that the NCA did not apply. He committed a gross irregularity in striking the matter from the roll rather than dismissing the application for summary judgment in relation to this claim.

[53] It is therefore necessary to review and set aside the magistrate's decision to strike the matter from the roll. No purpose would be served in remitting the

[17] *Administrateur, Transvaal v JD Van Niekerk en Genote BK* 1995 (2) SA 241 (A).

matter to him as the result is a foregone conclusion. The order that should have been made will be made by this court.

[54] The following order is made.

(a) The decision of the first respondent to strike the applicant's application for summary judgment against the third respondent from the roll is reviewed and set aside.

(b) In its place, the following order is made:

(i) Summary judgment is granted against the third respondent for payment of R28 708.45, interest on that amount calculated at 15.5 percent *per annum* from 9 July 2009, being the date of service of the summons, and costs of suit.

(ii) Summary judgment is refused in respect of the applicant's claim against the third respondent for R40 099.21 and the third respondent is granted leave to defend.

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C. PLASKET
JUDGE OF THE HIGH COURT

I agree.

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P.C. VAN DER BYL
ACTING JUDGE OF THE HIGH COURT

APPEARANCES

For the applicant: Mr A. Beyleveld S.C. and Ms A. Rawjee, instructed by Dold and Stone, Grahamstown

For the respondents: No appearance