

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 23503/2014

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE SIGNATURE

In the matter between:

STAND 278 STRYDOM PARK (PTY) LIMITED

Applicant

And

EKURHULENI METROPOLITAN MUNICIPALITY

Respondent

JUDGMENT

Strydom AJ

- [1] On 26 June 2014, the applicant, the owner of certain immovable property ("the property") falling within the boundaries of the respondent's municipality, launched an urgent application in terms of which in Part A of the Notice of Motion it sought an order interdicting the respondent from terminating the supply of municipal services to the property.

[2] The interim relief in Part A of the application was conceded and the agreement reached was made an order of court on 1 July 2014.

[3] In Part B of the Notice of Motion the applicant applied for an order that :

3.1 It is declared that the applicant is not liable to the respondent for arrears or charges on account held by previous owners of the property.

3.2 It is declared that the respondent is not entitled to terminate the supply of services to the applicant on the grounds that previous owners of the property are indebted to it.

3.3 The respondent shall pay the cost of this application.

[4] This relief was conceded in the heads of argument on behalf of the respondent on 4 December 2014 and the concession was confirmed at the hearing of this matter. The only outstanding issue as far as Part A and Part B of the applicant's Notice of Motion are concerned is the costs. The question relating to the costs concerning Part A of the urgent application was reserved.

[5] I will deal with this issue upfront. The respondent threatened to disconnect the electricity supply to the property which threat was in breach of a existing final order not to disconnect the electricity obtained as far back as 2 April 2014.

[6] I am of the view that the applicant was entitled to bring the application on an urgent basis and considering the concession of the relief sought, the

respondent should be held liable for the costs of the urgent application. As far as Part B of the application is concerned, the respondent on 4 December 2014 conceded the relief. Consequently the respondent should be liable for the costs of this application incurred up to and including 4 December 2014.

[7] Considering the concession the applicant will be entitled to an order in terms of paragraph 1 and 2 of Part B of the application and to a costs order as stated above.

[8] The respondent also brought a counterapplication and this application was the matter that was argued before me. I will refer to the parties as in convention.

[9] In this counterapplication the respondent sought the following declaratory relief:

9.1 That it is declared that –

9.1.1 The municipal debts for property rates and taxes and charges for the provision of municipal services of all prior and or current owners of erven 221, 222, 225, 226 and 900 Germiston South, constitute charges upon the said properties per section 118(3) of the Local Government Municipal Systems Act 32 of 2000.

9.1.2 Such charges upon the properties afford the applicant a *sui generis* lien having the effect of a tacit statutory hypothec, created by operation of law, over the properties.

9.1.3 The properties are, upon the granting of a monetary judgment against Prosco (Pty) Limited, Break Even 68 (Pty) Limited or Stand 278 (Pty) Limited, or any other person legally responsible for any such municipal debt owing to the applicant in respect of the properties and subject to the further order to such effect being granted, to be considered as executable for the sum of such judgment.

9.1.4 That the respondent pay the costs of this counter application in the event of opposition.

[10] The counter application was opposed and affidavits filed.

[11] In effect the respondent is applying for a declarator declaring that section 118(3) of the Local Government Municipal Systems Act 32 of 2000 (“the Systems Act”) should be interpreted to mean as set out in its Notice of Motion. First, the respondent requires from this court to interpret this section to mean that the municipal debt incurred in relation to property rates, taxes and charges for the provision of municipal services pertaining to all prior owners of the property (“the historical debt”) constitute charges upon the property in terms of section 118(3) of the Systems Act. Second, the respondent asked the court to label the statutory right involved “a *sui generis* lien having the effect of a tacit statutory hypothec, created by operation of law, over the property”. Thirdly, that these properties are, upon the granting of a monetary judgment against the historical owners, or any other person legally responsible for any such municipal debt, and subject to an order to such effect

being granted, to be considered executable for the sum of such judgment.

[12] What the respondent is now seeking is a declaratory that should it obtain a monetary judgment in future, which remains unpaid, then this court must now, at this stage, find that execution against the applicant's property can be effected.

[13] The effect of granting such an order would be that if a judgment is obtained against anybody for payment of the debt for arrear municipal fees, rates and taxes in relation to the properties of the applicant, and the judgment amount remains unpaid, the applicant's properties may be sold in execution if the applicant fails to pay the debt of the historical owners. Without a doubt such order will have far reaching consequences as the judgment will be used to declare other properties executable should there be unpaid historical debt owing to municipalities.

[14] At the outset of the matter, Mr Miltz representing the applicant, argued that considering that the respondent asks for declaratory relief, and considering that the court has a discretion in this regard, the court should not exercise its discretion in favour of the respondent and should refuse to grant the order. He argued that after the relief in Part B of the Notice of Motion of the applicant was conceded, there remained no actual dispute or *lis* between the parties. He argued that one of the recognised circumstances in which a court may decline to deal with a matter is where there is no actual dispute in existence between the parties. For this proposition I was referred to *Ex Parte Nel*¹,

¹ 1963 (1) SA 754 (A) at 760B

*Mohamed v Mohamed*² and to *Compagnie Interafricaine de Travaux v SA Transport Services*.³ It was argued that a court should decline to exercise its discretion where the questions raised is hypothetical, abstract and academic. It was pointed out that it would be unlikely for a court to exercise a discretion to make a declarator where not all the parties having an interest in the matter have been joined. For this proposition he relied on *Stadsraad van Randburg v Rudolph NO*⁴

[15] The affidavits do not record that the respondent has taken any steps yet to recover the historical debt from the parties liable therefor. Indeed, it does not appear from the affidavits whether the historical debt remains claimable or even if the respondent has a valid claim therefor. On the papers it is clear that the respondent has not obtained a judgment against any one of the previous owners regarding their alleged outstanding debt. In fact, the wording of paragraph 1.3 of the notice of motion in the counter application makes it clear that the relief is sought subject to the granting of a monetary judgment for payment of arrear municipal debt in relation to the properties of applicant.

[16] It was argued on behalf of the applicant that unless and until the respondent obtains a judgment or judgments against the parties liable for the municipal debts, and if same is not paid and the respondent attempts to execute its judgment against the property, only then if the applicant is still the owner of the property, will there be a *lis* between the current parties which can become

² 1976 (3) SA 151 (T) at 154 D-G

³ 1991 (4) SA 217 (A) at 230

⁴ 1984 (3) SA 469 (W)

the subject of further litigation.

[17] Considering that it is the respondent's view that it can foreclose on the property once a monetary judgment has been obtained, the court must consider whether the rights of other parties may be affected should such an order be made. In this regard the interests of the bond holders with registered bonds over the properties come into the equation. Bondholders may have an interest in the matter as the extent of their security may be diluted. A bondholder will have a direct and substantial interest in any litigation the outcome of which may have an effect on the value of its security.

[18] Considering that the respondent has not obtained judgment against the debtors, the debt may be disputed by the historical owners. They may do so as they may still have a monetary interest in the existence and extent of the debt as they might have indemnified subsequent purchasers against outstanding municipal fees. These debts might have prescribed. Currently the only indication pointing to the existence of historical debt is to be found in two documents annexed to the applicant's founding affidavit marked "FA12" and "FA13". These documents purport to be notices of intention to disconnect services issued by the respondent. In these notices, which were served on two previous owners, it is stated that the total arrear balance outstanding as at 6 June 2014 and 5 June 2014 amounted to R1 119 657,13 and R4 069 251,54 respectively. These notices would constitute no more than written demands which were made as further steps to apply for judgments.

[19] The reasons why the respondent is seeking declaratory relief from this Court

have been stated in the respondent's founding affidavit in the following terms:

"14. However, in light of recent judgments of the Supreme Court of Appeal the Municipality now intends to take steps to recover the debts owed to it by means of execution against the properties concerned.

15. Vis-à-vis the matter at hand, prior to taking such steps and specifically in light of the contents of the main application and the orders sought therein by Stand 278 (Pty) Limited, the municipality requires clarity in the form of the order sought in this counter application in order to proceed with claims against, inter alia, Prosko (Pty) Limited, Break Even 68 (Pty) Limited and/or Stand 278 (Pty) Limited for the charges against the properties concerned in this matter.

16. To this end and in this counter application the municipality seeks the declaratory orders as set out in the Notice of Motion in this counter application."

[20] As stated above, the relief in Part B of the Notice of Motion has been conceded. What the respondent also concedes in these quoted paragraphs is that it has not started to take steps against the previous owners that are responsible for the historical debts. It first wants this court to confirm the legal position and to declare the properties of the applicant executable. On the respondent's own version, the Supreme Court of Appeal delivered judgments to the effect that execution can be effected against the properties in relation to which the debts were incurred. If this is the respondent's contention, it remains unclear why it requires from this Court to re-state the law. I am of the view that to require from this Court to declare the properties of the applicant executable to recoup historical debt without any judgment that such debt is outstanding and payable is untenable.

[21] In the ordinary course the sequence of events before a property is declared executable will be to obtain a monetary judgment and thereafter to declare the property held in security executable. It has definitively been found in various cases that section 118(3) provides security for a municipal debt and do not give rise to a cause of action.⁵

[22] The order which the respondent is seeking is for a declaration declaring the properties executable should it in future obtain a monetary judgment. That it will obtain such a judgment in relation to the properties of the applicant is not a *fait accompli*. The possibility exist that the respondent can fail to obtain a judgment or even that if it obtains such a judgment the previous owners might pay outstanding the outstanding debt. The debt might have prescribed. In such circumstances the declaration in terms of which the properties of the applicant were declared to be executable would have been totally unnecessary and will have no practical effect.

[23] I am of the view that before a court can declare property executable, the principle obligation, i.e. the principal debt must be established and a judgment obtained. This will not necessarily be the position in liquidation proceedings but this is not what we are dealing with in this matter. Once a judgment is obtained relating to the principal debt, a party can proceed to obtain an order to declare the security in relation to that debt to be executable. Without the debt being determined, there is no dispute or *lis* that exists between the applicant and the respondent. The relief that the respondent conceded which

⁵ *State v Tshwane Metropolitan Municipality v Mathabathe & Another* 2013 (4) SA 319 (SCA) at paras [1] and [9] at 320I – 321C and 324B, C-D; *Mitchell v City of Tshwane* 2015 (1) SA 82 at [9] 86 B-F

the applicant sought in Part B of its application made it clear that the applicant is not liable to the respondent for arrears or charges on accounts held by previous owners of the properties. Whether the respondent can execute against the property of the applicant to obtain payment of historical debts is another matter.

[24] I am not convinced of the correctness of the argument advanced on behalf of the respondent to the effect that a municipality, pursuant to the terms of section 118(3), can execute against properties of a current owner in relation to previous owners' historical debt outside the ambit of a transfer of the property where a preference is provided over any mortgage bond registered against the property. I do not intend to decide this issue as it is my view that without a dispute or *lis* between the parties in this matter I should not exercise my discretion in favour of the respondent to grant declaratory relief. I am in agreement with the argument and cases referred to by counsel for the applicant that where no *lis* exist between litigation parties a court should not exercise its discretion in favour of ordering declaratory relief.⁶ The relief that the respondent is seeking is sought in a vacuum as there exists no judgment debt to be enforced against the applicant's property. Once such judgment is obtained and the extent of the liability is established, the respondent can approach a competent court for a declarator in terms of which the properties are to be declared executable. Whether such a court will grant such an order will depend on its interpretation of section 118(3) of the Act.

⁶ Nell *supra* at 760B; Dempa Investments v Body Corporate Los Angeles 2010 (2) SA 69 WLD at 76 A-C

[25] Accordingly the counter application should be dismissed.

[26] I make the following order:

- 26.1 It is declared that the applicant is not liable to the respondent for arrears or charges on accounts held by previous owners of the property situated at the corner of Webber and Angus Streets, Germiston ("the property").
- 26.2 It is declared that the respondent is not entitled to terminate the supply of services to the applicant on the ground that previous owners of the property are indebted to it.
- 26.3 The respondent is ordered to pay the reserved costs of the A part of the urgent application.
- 26.4 The respondent is ordered to pay the costs incurred up until 4 December 2012 in relation to the B part of the urgent application.
- 26.5 The counter application is dismissed with costs, including the costs of senior counsel.

Strydom AJ

Date of Hearing:	11 March 2015
Date of Judgment:	27 April 2015
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