IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

13/3/14

Case No: 22726/2013

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHERS JUDGES: YES/~~NO~~
(3) REVISED ✓

12/5/2014

DATE SIGNATURE

In the matter between

UNIQON WONINGS (PTY) LIMITED Applicant

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY Respondent

CORAM EBERSOHN AJ

DATE HEARD 25 June 2013

DATE JUDGMENT HANDED DOWN 13 MARCH 2014

JUDGMENT

EBERSOHN AJ

[1] The applicant is a company which develops properties.

[2] The respondent is a metropolitan municipality.

[3] The matter was argued on 27 June 2013 as an urgent application and after argument judgment was reserved and as the matter was argued on an urgent basis without heads of argument being submitted by any of the parties, the court called upon counsel on behalf of the parties to submit full written heads of argument. Apart from aspects dealt with in verbal argument, the court also allowed the parties the opportunity to, in the written heads of argument, raise further arguments.

[4] The applicant brought the application to compel the respondent to furnish it with property rates certificates for transfer purposes and ancillary relief pertaining to its development named Six Fountains Estate.

[5] The applicant commenced the particular township development 2003. In respect of the proclaimed township it sold certain stands which have already been transferred *"out of the remainder of the development to respective purchasers" and m*ost of the erven in the township have been transferred to purchasers and have been registered in the Deeds Office.

[6] The remaining unregistered erven have however not been *"born"* and remain registered on the main Title Deed of the development. For ease of reference the unregistered erven in the development which are still part of the main title deed, will hereinafter be referred to as *"the remainder"* to distinguish same from erven already registered in the names of purchasers.

[7] The respondent's predecessor, the Kungwini Local Municipality (*"Kungwini"*) apparently unlawfully levied property rates and taxes on separate stands as if they had been sold to separate purchasers. It is common cause that such conduct was incorrect and unlawful by virtue of section 2(1) of the Local Government: Municipal Property Rates Act 6 of 2004 (*"the Rates Act"*) which provides that *"a Metropolitan or Local Municipality may levy a rate on property in its area", "property"* being defined in such act as *"immovable property*

registered in the name of a person, including, in the case of a sectional title scheme, a sectional title unit registered in the name of a person". (See : Rynfield Township Ltd v Benoni Town Council and Another 1950 (4) SA 717 (T); *Florida Hills Township Ltd v Roodepoort Maraisburg Town Council 1961 (2) SA 386 (T)* where this principle was laid down already before the Rates Act was promulgated.)

[8] The respondent however did not, until very recently, concede that the legal position was as set out in the previous paragraph and paragraphs [16] and [17] of the judgment of Prinsloo J in Mooikloof Estates (Edms) Bpk. v Die Stadsraad van Tshwane, case no. 29998/2013 handed down in June 2013 (not yet reported).

[9] Kungwini was incorporated as part of the respondent on 1 July 2011. Notwithstanding the incorrect rating system applied by Kungwini, the respondent continued to send out accounts on the basis as imported from Kungwini, until such time as ratepayers complained of the incorrectness, whereafter corrective measures were allegedly taken.

[10] Notwithstanding the incorrect levying system the respondent also went further and instituted action against the applicant in the Regional Court for payment of alleged outstanding property rates and taxes. The claims in such summons *"claims 1 - 21 of the particulars of claim"* are based on one Title Deed, T21949/2003, i.e. the main title deed in respect of the remainder of Six Fountains Estate. The claims are erroneously based on separate accounts on the basis of rates and taxes being levied in respect of 21 unregistered stands/erven. It is incomprehensible how such an action could have been instituted in the first instance.

[11] Such erven have not yet been *"born"* as explained above, and were therefore not rateable as they were not registered. This is admitted in the answering affidavit. Why the matter was opposed in this court is not understood.

[12] As appears from paragraph 8.2 of the answering affidavit, the summons was alleged to have been issued *"to ensure continuity in collections of Kungwini accounts" how non-sensical that may be,* and was apparently issued in respect of amounts alleged to be owing in respect of rates and taxes levied during the period before Kungwini was taken over by the respondent on 1 July 2011.

[13] Respondent since 1 July 2011 (erroneously) continued to present the applicant with separate accounts pertaining to property rates and taxes levied by the respondent on each and every separate remaining stand. Included in these accounts were, however, also globular amounts which reflected outstanding property rates that were allegedly owing to Kungwini before 1 July 2011. This was not denied in the answering affidavit.

[14] Applicant explains in paragraph 19 of its founding affidavit (which explanation is also not denied) that notwithstanding numerous requests to the respondent, respondent has failed and refused to provide applicant with detailed explanations and justification for the amounts allegedly due and owing on each account of each stand before 1 July 2011, the period during which Kungwini controlled the properties. Furthermore, no information has been forthcoming pertaining to the applicable valuation rolls for that period, nor of the calculation of the property rates and taxes promulgated over the period for Kungwini. Applicant has not received accounts for such property rates and taxes up to the date of the bringing of this application, except for the aforesaid globular amounts.

[15] The applicant has been making payments of all property rates and taxes determined and levied by the respondent on the basis of each separate stand, since 1 July 2011, even though such property rates and taxes have not been correctly levied. Such payments were made under protest. The averments that such payments were made were not denied.

[16] The amounts that were paid to the respondent after 1 July 2011, levied on the basis of individual erven, are reflected in a summary of payments set out in annexure "A6" to the founding affidavit. In the answering affidavit it is not disputed that the summary of payments in annexure "A6" is correct, and that the amounts reflected therein were paid (R365 652.53).

[17] In respect of one stand (stand 163) a further amount of R165 044,57 was paid after 1 July 2011 being an amount which was alleged by the respondent to have been payable as the total amount outstanding in respect of all the stands that have not been transferred by the applicant to purchasers. The applicant explained that such payment was done simply for purposes of obtaining a clearance certificate in respect of stand 163. Such payment was

made on approximately 4 May 2012, under protest. Again it is not disputed that such payment was made.

[18] Approximately two months before the application was issued (i.e. approximately February 2013) the respondent consolidated all the outstanding property rates and taxes in respect of all the unregistered remaining erven forming part of Six Fountains Estate, into one account.

[19] In paragraph 27 (p12) of the founding affidavit the deponent on behalf of the applicant stated that the respondent refuses to provide clearance certificates because the respondent avers that approximately R3,2 million is outstanding for property rates and taxes for the period before 1 July 2011, therefore for the period during which the property fell under the jurisdiction of Kungwini. It is further stated in paragraph 28 (p12) that the respondent has failed and refused to provide any justification for this amount, nor was an explanation provided of how the amount has been made up and calculated, and respondent has provided no supporting documents or evidence pertaining to why and how this amount is outstanding, when it became due and payable and how it was calculated.

2013 (two years after Kungwini became part of the respondent) applicant have made all outstanding payments that allegedly became due in connection with all the unsold stands and that it only needed to make payment of small amounts in respect of the three stands that were sold (stands 163, 165 and 172) to bring all payments up to date by 1 July 2013). This was not disputed by the respondent.

[23] In summary, it remained the respondent's stance in it's answering affidavit that *"all rates and taxes in respect of the township property"* must be *"paid in full for the two year period preceding the date of application"* before the applicant will be provided with a clearance certificate. The amount was however not set out, nor a calculation thereof.

[24] As stated a clearance certificate was necessary as the transfers to the purchasers could not be registered in the Deeds Office without it.

[25] The notice of motion, founding affidavit and annexures thereto were served on 17 April 2013. Respondent's answering affidavit was only received on 18 June 2013 notwithstanding the fact that the

respondent was called upon to serve same already on 27 May 2013. A replying affidavit was also filed and is p289 to 309 of the court's papers.

[26] In it's replying affidavit the applicant's deponent explained that, pursuant to the unreported judgment of Prinsloo J on 14 June 2013, in the Mooikloof Estates matter, *supra,* (a matter in which the legal questions are mostly identical to the aspects to be decided in the present application, which judgment was handed down after this application was instituted) the applicant came to the conclusion that it need not subject itself to any order compelling it to make any further payments of property rates and taxes in respect of any of its erven to be registered in the Six Fountains Estate of which it is the owner, before it would be entitled to clearance certificates. The notice of motion was therefore amended and the amendment is to be found on pages 298-301 of the record. (As appear from the amended notice of motion a new prayer 1A was inserted on the basis of the aforesaid judgment of Prinsloo J.

[27] A draft order was compiled by applicant's counsel which was handed up in court. It reads as follows:

1. That the respondent be ordered to issue clearance certificates within 3 (three) days from date hereof to the applicant in respect of Stands No 163, 165 and 172 in the Six Fountains Estate upon payment by the applicant of the application fee of R50,40 (fifty rand and forty cents) per erf.

2. A declaratory order that respondent has not been and is not entitled to levy property rates and taxes on stands not having been sold by the applicant in the Six Fountains Estate to any purchasers, and not having been transferred to any separate individual purchases, but is entitled only to levy property rates and taxes on all remaining stands in the Six Fountains Estate, still registered under the main Title Deed No. T21949/2003, as one property, in terms of the Property Rates Act, No. 6 of 2004.

3. The respondent be ordered to provide applicant with all documents, accounts, valuation rolls and documentation pertaining to promulgation of property rates and taxes, for the period before 1 July 2011, in respect of all property rates and taxes allegedly outstanding and due and owing by the applicant to

respondent, regarding the whole of the property making up the Six Fountains Estate.

4. That all the information and documents referred to in prayer 3 above shall be provided to applicant within 60 (sixty) days from date of this order.

5. An order that should the amount of property rates and taxes that is alleged to be outstanding by applicant to respondent, still be in dispute after respondent's compliance prayers 5 and 6 referred to above, respondent shall take the necessary steps should it still wish to institute legal proceedings, within 90 (ninety) days of this order, for payment of any amount that respondent alleges is due and owing by the applicant to the respondent.

6. An order that respondent must recalculate all alleged outstanding property rates and taxes, allegedly due and owing to respondent, with reference to the Six Fountains Estate, and remaining stands as one property, with reference to each and every valuation roll relied on, each and every property rate that was applicable and each and every payment that has been

made by applicant to respondent in respect of property rates and taxes in the said development.

7. **The respondent shall present applicant with such a calculation within 60 (sixty) days from date of this order.**

8. **That pending finalisation of any remaining dispute regarding outstanding property rates and taxes, as referred to in prayers 7, 8 and 9 above, respondent is ordered to issue clearance certificates within 7(seven) days after any application for such certificate is made, in respect of any stand to be transferred to any purchaser in the Six Fountains Estate, if payment is made of the application fee applicable in respect of the issuing of a clearance certificate, which is presently R50,40 per application.**

9. **Costs of this application on a scale as between attorney and client.**

[28] During the hearing counsel indicated to the court that prayer 5 therein was not proceeded with, that prayers 2, 3, 4, 6 and 7 were not disputed by the respondent and that an order could accordingly be made in terms thereof.

[29] What, however, remained in contention was whether the court should make an order as per prayers 1, 8 and 9 of such draft order, or whether alternative relief as per prayers 2 and 3 of the amended notice of motion, or other alternative relief, should be granted to the applicant.

[30] Applicant's counsel indicated that the applicant, apart from prayers 2, 3, 4, 6 and 7 which were not opposed, primarily seeks the relief as set out in prayer 1 of the draft order and then also relief in terms of prayers 8 and 9.

[31] In the alternative to the relief in prayer 1 the applicant counsel indicated that it will seek relief as set out in prayers 2 and 3 of the original notice of motion or, as further and/or alternative relief, an alternative order as explained below.

[32] The court now deals with the applicants main contention namely that the applicant is not obliged to pay to the respondent any amount in respect of rates and taxes for the purpose of obtaining

clearance certificates in respect of new stands to be registered except for an application fee of R50,40 per erf.

[33] The applicant relied on the judgment of Prinsloo J. in Mooikloof Estates, *supra*.

[34] It is clear that, as the applicant's counsel submitted, the matter can be decided on one crisp issue, as was done by Prinsloo J in Mooikloof Estates, *supra,* which essentially amounts to a proper interpretation of the provisions of section 118(1) of the Local Government: Municipal Property Rates Act 6 of 2004.

[35] In argument counsel on behalf of the respondent agreed that Mooikloof Estates, *supra,* was, as to the legal principles to be decided, exactly the same as the present matter. Indeed, except for some factual differences, the essential facts and issues in this matter are essentially the same and the judgment of Prinsloo J is therefore highly comparable and a strong precedent in the present application.

[36] The crisp issue is the question whether the respondent, who was also the respondent in the Mooikloof Estates case can withhold

clearance certificates in respect of new unregistered stands until levies in respect of the whole ("*remainder*") of the Six Fountain Estates have been paid.

[37] On a proper interpretation of section 118(1) of the Local Government: Municipal Systems Act 32 of 2000 ("*the Systems Act*") it is clear that the respondent cannot insist on such payment before a clearance certificate is provided.

[38] In paragraph 18 of his judgment Prinsloo J explains that a clearance certificate originates from the provisions of section 118(1) of the Systems Act.

[39] Section 118(1) and 118(1A) provide as follows:

> ***"118 Restraint on Transfer of Property***
>
> ***(1) A Registrar of Deeds <u>may not register the transfer of property</u> except on production to the Registrar of Deeds of a prescribed certificate –***

> ***(a) issued by the Municipality or Municipalities in which <u>that property</u> is situated; and***
>
> ***(b) which certifies that all amounts that became due <u>in connection with that property</u> for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties during the <u>two years preceding the date of application</u> for the certificate have been fully paid.***
>
> ***1A A prescribed certificate issued by a Municipality in terms of subsection (1) is valid for a period of <u>60 days</u> from the date it has been issued."*** (own emphasis)

[40] In interpreting these provisions, it is evident from section 118(1) that reference is made to a particular property i.e. <u>the property to be registered</u>. This is evident from the words *"may not register the transfer of property"* in section 118(1) and the further reference in subsections 118(1)(a) and (b) to *"that property"* and *"in connection with that property"*.

[41] There is no basis for a contention that the reference to *"property"* or *"that property"* was meant to be a reference to the remainder or whole of the development. It is not the development that is to be transferred, but the specific stand in question. As section 118(1) clearly refers to a prohibition to register a transfer of property the words *"that property"* can only be interpreted to be a reference to the property to be transferred, and not the remainder, which is not transferred if a specific stand is registered for the first time.

[42] Prinsloo J was correct, with respect, when he came to the following conclusion in par[26] of Mooikloof Estates, supra:"

> *Mnr Pretorius, tereg na my mening, het betoog dat die verwysing na 'in verband met daardie eiendom' slegs kan slaan op die erf en nie op die restant nie. Die erf is die eiendom wat oorgedra word soos gepostuleer in subartikel (1) wat bepaal dat die Registrateur nie 'die oordrag van eiendom registreer nie' behalwe by voorlegging van die sertifikaat. Dit is nie die restant wat oorgedra word nie maar die erf."*

[43] The word *"property"* should also be understood with reference to the definition thereof in section 1 of the Rates Act 6 of 2004 where *"property"* is defined as:

> ***"(a) immovable property <u>registered</u> in the name of a person, including in the case of a sectional title scheme, a sectional title unit registered in the name of a person;***
>
> ***(b) <u>a right registered</u> against immovable property in the name of a person, excluding a mortgage bond registered against the property."***

It therefore also refers to the fact that registration is required before it will be regarded as *"property"*. (Compare also the definition of "owner" in the lastmentioned act, which equally refers to a person in whose name property or property rights are registered.)

[44] It was apparently contended by the respondent, as appears from paragraph [26] of the judgment of Prinsloo J, that a different interpretation had to be followed (i.e. that reference to *"daardie eiendom"* should be understood as a reference to the remainder) because *"anders kan individuele erwe (waarop daar nou ooreengekom is geen belasting betaalbaar is nie) straffeloos die een*

na die ander oorgedra word sonder dat daar enige belasting daarop betaal word".(See Mooikloof Estates (supra) at par[26], p16).

[45] The answer to this contention, is firstly, as was also decided by Prinsloo J, that the municipality is not without remedy as it would be entitled to value and charge rates and taxes on the newly registered property immediately after registration and from date of registration. Such rates and taxes would also typically be levied at a higher rate as registered property will typically convert to developed property.

[46] A further strong consideration in favour of the interpretation propounded by the applicant, (which was not considered by Prinsloo J.), is the fact that section 118(3) of the Systems Act also provides a remedy to Municipalities to collect monies that become payable to them for property rates and taxes and for the provision of municipal services. Section 118(3) of the Systems Act provides:

> ***"(3) An amount due for municipal service fees, surcharges and fees, property rates and other municipal taxes, levies and duties is a charge upon the property in connection with which the amount is owing and enjoys***

preference over any mortgage bond registered against the property."

[47] In City of Tshwane Metropolitan Municipality v Mathabathe & Another 2013 (JDR) 1039 (SCA), the Supreme Court of Appeal at in [9] decided as follows:

> ***"Municipalities are obliged to collect monies that become payable to them for property rates and taxes and for the provision of municipal services (s96). They are assisted to fulfil that obligation in two ways: First, they are given a security for repayment of the debt, in that it is a charge upon the property concerned (s118(3)); and, second they are given the capacity to block the transfer of ownership of the property until debts have been paid in certain circumstances*** [i.e. after the properties have been "born"] ***(s118(1)) (per Nugent JA, City of Cape Town v Real People Housing (Pty) Ltd 2010 (5) SA 196 (SCA) para2). The principal elements of s118 are accordingly a veto or embargo provision with a time limit (s118(1)) and a security provision without a time limit (s118(3))*** *(City of Johannesburg v Kaplan N.O. & Another 2006 (5) SA 10 (SCA)*

para[13]. The two subsections does provide the municipality with two different remedies." (own accentuation).

(See: City of Tshwane Metropolitan Municipality v Mathabate (supra), par10 – 12 ; City of Johannesburg v Kaplan N.O. & Another 2006 (5) SA 10 (SCA)).

[48] Therefore, registration of a stand will still leave a municipality with security in respect of the remainder of the property which should typically, if not in all cases, be much more than outstanding rates and taxes. Even if the registration of a new stand has the result that the remainder of the development is diminished the municipality would still be left with security in terms of section 118(3). If a municipality acts diligently, as it should, to collect rates and taxes, it will have sufficient remedies and security for it's claims.

[49] Whatever the consequences may be of an interpretation of section 118(1) of the Systems Act, such as was followed by Prinsloo J., and even if the transfer of a stand may have the result that properties may be transferred in circumstances where developers still owe rates and taxes, this cannot be a basis for an interpretation such as

tendered by the respondent, which would clearly be at variance with the clear wording of section 118(1). This would be contrary to the principle of statutory interpretation that clear wording of a statute should be given effect to.

[50] The principle that individual stands do not come into existence before a specific transfer of a specific stand is registered in the Deeds Office, is a principle that has already been established prior to the promulgation of the Systems Act. (See: Kosmos Ridge Home Owners Association (unreported decision: case no: 24537/2002, Transvaal Provincial Division, a judgment of Hartzenberg J dated 06/12/2002); Rynfield Township Limited v Benoni Town Council & Another, 1950 (4) SA 717 (T); Florida Hills Township Limited v Roodepoort Maraisburg Town Council, 1961 (2) SA 386 (T))).

[51] In Kosmos Ridge Home Owners Association v Kosmos Ridge (Pty) Ltd (supra), Hartzenberg J specifically held (par7) that in respect of stands that are not yet transferred forming part of a township development, *"...die dorpseienaar nie uitklaringsertifikate benodig voordat hy oordrag gee aan kopers van die restant van die erwe nie"*.

[52] The decision of Prinsloo J's was correct, with respect, and that the court in the present application cannot come to the conclusion that his decision and the aforesaid judgment of Hartzenberg J in Kosmos Ridge, *supra*, was clearly wrong. As such Prinsloo J's interpretation of section 118(1) should be followed. It is the end of the matter and the only monies that would then be payable to obtain a clearance certificate is the application fee of R50,40 referred to in the Mooikloof Estates matter (see para [27] thereof).

[53] The applicant would be entitled to the relief set out in prayer 1 of the draft order handed up, with regard to the stands which have already been sold that already need to be transferred.

[54] In view of the conclusion of Prinsloo J, and the interpretation of section 118(1) of the Systems Act, as propounded herein, the position would indeed be the same in respect of all future stands to be registered. An order should therefore be made in respect of all future stands to be registered. This would also prevent unnecessary litigation in respect of stands that are presently not yet sold, which will be registered in future. In the premises the relief set out in prayer 8 of the draft order should also be granted in respect of the transfer of all future stands.

[55] Under the circumstances it is not necessary for the court to deal with the applicant's alternative argument.

[56] The necessary order will be made. Costs will follow the event. The respondent acted grossly unreasonably, in the face of the clear judgment of Prinsloo J and other authorities. Before Prinsloo J. the respondent's counsel conceded (paragraph 17 of that judgment) that the legal position is as is set out in this judgment. In this court the counsel of the respondent also had problems to convince the court that the position was different. The respondent failed to properly read the applicable legislation and authorities and for some unexplained reason subjected land owners to considerable financial abuse. Prinsloo J. regarded the matter as some new aspect of the law and did not grant punitive costs, but when the matter came before this court it no longer was something new but the respondent had the clear judgment of Prinsloo J and other authorities before them. This court have therefore no hesitation in granting attorney and client costs.

[57] The following order is made:

"1. That the matter be treated as an urgent application and that the respondent be ordered to issue clearance certificates within 7 (seven) days from the date of handing down this judgment, to the applicant in respect of Stands No 163, 165 and 172 in the Six Fountains Estate upon payment by the applicant of the application fee of R50,40 (fifty rand and forty cents) per stand.

2. A declaratory order is issued that respondent has not been and is not entitled to levy property rates and taxes on stands not having been sold by the applicant in the Six Fountains Estate to any purchasers and not having been transferred to any separate individual purchases, but is entitled only to levy property rates and taxes on all remaining stands in the Six Fountains Estate, still registered under the main Title Deed No. T21949/2003, as one property, in terms of the Property Rates Act, No. 6 of 2004.

3. The respondent be ordered to provide applicant with all documents, accounts, valuation rolls and documentation pertaining to the promulgation of property rates and taxes, for the period before 1 July 2011, in respect of all property rates and taxes

allegedly outstanding and due and owing by the applicant to respondent, regarding the whole of the property making up the Six Fountains Estate.

4. That all the information and documents referred to in paragraph 3 above shall be provided to applicant within 60 (sixty) days from date of this order.

5. An order is issued that respondent must recalculate all alleged outstanding property rates and taxes, allegedly due and owing to respondent , with reference to the Six Fountains Estate, and remaining stands as one property, with reference to each and every valuation roll relied on, each and every property rate that was applicable and each and every payment that has been made by applicant to respondent in respect of property rates and taxes in the said development.

6. The respondent shall present applicant with the calculation referred to in paragraph 5 of this order within 60 (sixty) days from date of this order.

7. That pending finalisation of any remaining dispute regarding outstanding property rates and taxes, as referred to in the paragraphs of this order, respondent is ordered to issue clearance certificates within

7(seven) days after any application for such certificate is made, in respect of any stand to be transferred to any purchaser in the Six Fountains Estate if payment is made of the application fee applicable in respect of the issuing of a clearance certificate, which is presently R50,40 per application.

9. **The costs of this application shall be paid by the respondent on the scale of attorney and client which costs shall include the costs of two counsel and the heads drawn by counsel.**

P.Z. EBERSOHN

ACTING JUDGE OF THE HIGH COURT

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