IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG HIGH COURT, PRETORIA)

Case Number: 6715/2008

4/4/2014

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED. ✓

DATE SIGNATURE

In the matter between:

UNIQON WONINGS (PTY) LTD **PLAINTIFF**

And

CITY OF TSHWANE METROPOLITAN MUNICIPALITY **DEFENDANT**

JUDGMENT

Fabricius J,

1.

Plaintiff and the former Kungwini have different views about the legality of property rates for the 2004/2005 financial year on the hand, and on the other hand what the effective rate was for that period, if any. The Kungwini Local Municipality was "purportedly" (as Plaintiffs claim) disestablished in terms of Notice 1866 of 2010 and incorporated into the City of Tshwane Metropolitan Municipality. The Local Municipality was originally created in accordance with the ***Local Government Municipal Structures Act 117 of 1998***. It is alleged that the City of Tshwane is responsible for the repayment of certain amounts which, Plaintiff alleges, were paid to it whilst not owing and/or without any lawful cause. The summons that Plaintiff issued on 21 October 2013 sets out Plaintiff's main claim and two alternative claims and in paragraph 3 thereof pleaded the following: "On 3 June 2008, the above honourable Court gave judgment in case number 3908/2005, a copy of which is annexed hereto as annexure "A", in terms of which it was determined that the increase in property rates for the 2004/2005 financial year of the Defendant to

0,054 cents in the rand was invalid. The increased property rates were set aside and therefore no effective rate was payable for the 2004/2005 financial year." The appeal was heard the Supreme Court of Appeal which dismissed the appeal and the cross-appeal. The judgment is reported as ***Kungwini Local Municipality vs Silver Lakes Homeowner's Association and Another 2008 (6) SA 187***. To this paragraph Defendant pleaded as follows: "The Defendant pertinently denies that there was no effective rate payable for the 2004/2005 financial year and specifically pleads that the effective rate applicable was 0,02 cents in the rand for the 2004/2005 financial year."

2.

On 10 March 2014 Plaintiff filed an application in terms of the provisions of ***Rule 34 (3)*** of the Rules of this Court. It contended that for the sake of convenience the following issue should be determined first and separately from any other issues in dispute: "Whether the allegation made in paragraph 3 of Plaintiff's particulars of claim namely that no effective property rate was payable for the 2004/2005

financial year of Kungwini Local Authorities is correct or whether the property rate of 0,02 cent in the rand was applicable, as pleaded by the Defendant in paragraph 2.1 of the plea." Defendant filed an opposing affidavit but on the morning of the trial it was agreed that I ought to decide this issue first and separately. In Defendant's answering affidavit, its decision was put as follows:

2.1

The Defendant does not contend that "the property rates of the previous financial year" were applicable. It is the Defendant's case that;

2.2

In terms of the ***Local Government Transition Act, Act 209 of 1993*** property rates are not required to be levied for a specific financial year (i.e. 1 July of one year to 30 June of the following year);

2.3

Property rates did not lapse at the end of a financial year;

2.4

The resolution of the Kungwini Local Municipality dated 19 February 2003, that it would levy property rates based on an assessment rate tariff of R0,02 value from 1 April 2003 remain valid and enforceable until 30 June 2005."

3.

In the ***Silver Lakes*** case in the High Court the Applicants sought an order, amongst others, that the promulgation of the assessment rate tariff of R0.054 value for properties in the Bronberg area of the Municipality be declared null and void and be set aside. Also, that the Municipality be prohibited from further implementing the assessment rate tariff of R0.054 value for properties in the Bronberg area from the date of the Application and that it be declared that the Municipality was not lawfully entitled to have levied this assessment rate for the properties in the Bronberg area from 1 August 2004. As I have said, these orders were granted substantially in those terms, and the appeal was dismissed. The first prayer that had been sought was that the decision by the Municipality on 29 June 2004 to approve the

mentioned rate tariff be declared null and void, was refused. The cross-appeal against that decision was also dismissed by the Supreme Court of Appeal, and there is no such substantive application in those terms before me.

4.

Before dealing with the ***Silver Lakes*** decision and the parties' argument, I deem it appropriate to refer to the decision of ***CDA Boerdery (Edms) Bpk and Others vs Nelson Mandela Metropolitan Municipality and Others 2007 (4) SA 276 SCA***. It will be noted that the Bench of the Supreme Court of Appeal in the ***Silver Lakes*** decision was not referred to previous decision in the ***CDA Boerdery*** case. The majority judgment per Cameron JA dealt with the so-called "old-order subordination" of a Local Authority's power to levy rates. This was done in the context of the ***Cape Municipal Ordinance 20 of 1974*** which is substantially the same as the ***Local Authorities Rating Ordinance no. 11 of 1977*** for the Transvaal Province as it then was. In terms of the ***Cape Municipal Ordinance*** a Municipality was obliged to obtain the Premier's approval for new rates that it sought to impose on landowners.

Cameron JA dealt briefly with the history of the old-order, if I can call it that, and in the context of the new legislation, including Constitutional provisions and the provisions of the ***Local Government Transition Act,*** held the following (at par. 37):

"... the new Constitutional order conferred a radically enhanced status on municipalities. Under the interim Constitution, each level of Government (National, Provincial and Local) derived its powers directly from the Constitution (though Local Government's powers were subject to definition and regulation by either the National or Provincial Governments). The constitutional status of Local Government was therefore "materially different" from the pre-constitutional era. The advent of the final Constitution has taken us even further from the constitutional structure in which the ordinance was imbedded. The new Constitution has enhanced, rather than diminish, the status of Local Government. As under the interim Constitution, municipalities are no longer merely creatures of statute that they enjoy only the delegated or subordinate legislative power derived exclusively from ordinances or parliamentary legislation. The Constitution has moved away from a hierarchical division of governmental power in favour of a new vision, in which Local Government is inter-

dependant, and (subject to permissible constitutional constraints) inviolable and has latitude to define and express its unique character."

See also: ***City of Cape Town and Another vs Robertson and Another 2005 (2) SA 323 (CC) par. 58 - 60.***

In the context of s. 10 G (7), which empowers municipalities to levy and recover property rates, no allusion to "any other law" was made in contra-distinction to the provisions of s. 10 G (6) of the Transition Act which required that municipalities perform valuations of properties "subject to any other law". According to Cameron JA this suggested that s. 10 G (7) conferred a free standing rate-levying competence on municipalities. In his view the particular portion of the ***Cape Ordinance*** was impliedly repealed when the Constitution Order was established.

5.

The Constitutional Court dealt with the relevant history of legislation relating to the power of a municipality to impose levies and rates in ***Liebenberg N. O. vs Bergrivier Municipality and Minister for Local Government, Environmental Affairs***

and Development Planning Western Cape [2013] ZACC 16 (6 June 2013). It is clear that a municipality's authority to impose rates and levies is derived from ***s. 229 of the Constitution***. The purpose of a municipality's revenue-raising powers is to finance a municipality's performance of its constitutional and statutory objects and duties as set out in ***s. 152 (1) and 153 of the Constitution***. The statutory framework for the transition to Democratic Local Government envisaged a staggered process implemented over several years. The first step in this process was the adoption of the ***Local Government Transition Act 209 of 1993 ("the Transition Act").*** In 1996 a number of provisions were inserted into this Act by the ***Local Government Transition Act Second Amendment Act 97 of 1996.*** In particular ***s. 10 G (6) and (7)*** were introduced to regulate the powers of Local Government to impose rates and levies and according to the Constitutional Court "conferred a free standing rate-levying competence on municipalities". This finding is of course in line with the reasoning of Cameron JA that I have referred to. The ***Transition Act*** was due to lapse on 30 April 1999. However the life of its financial provisions was extended on at least two occasions. The first instance was in 1998, by means of a

Constitutional Amendment (Act 65 of 1998) which extended the life of the whole of the ***Transition Act*** for a limited period. The second was by an ***Amendment to the Local Government: Municipal Structures Act 33 of 2000***, which kept in place ***s. 10 G*** for an indefinite period. (See ***s. 93 (4)***). During this period, the Constitutional Court said, the old-order legislation in terms of which municipalities could levy rates on property remained in force. I must point out that this *dictum* does not accord with the conclusion of the Supreme Court of Appeal in the ***CDA*** decision that I referred to. In this context the old-order legislation would include the mentioned ***Local Authorities Rating Ordinance 11 of 1977***. Ultimately, the ***Local Government: Municipal Finance Management Act (The "Finance Act") 56 of 2003*** repealed ***s. 10 G (7)*** with effect from 1 July 2005.

6.

S. 10 (G) (7) of the Transition Act was therefore in force during the period relevant in this case namely the financial year 2004/2005. I must accept also that according to the Constitutional Court finding that I have referred to ***(par. 43)*** the old-

order legislation in terms of which municipalities could levy rates on property remained in force. Cameron JA in the mentioned ***CDA*** decision of the Supreme Court of Appeal in turn, had been of the view that this legislation had been impliedly repealed, as I have said. This decision of the Supreme Court of Appeal was not referred to by the Constitutional Court in the ***Liebenberg*** case. I must in this context of course accept the reasoning and conclusion of the Constitutional Court, and during argument it became clear that Counsel for Defendant, Mr T. Motepe, also based his argument on this conclusion.

7.

I may add that in the ***Liebenberg*** decision the Court found ***(at par. 74)*** that substantial compliance with the objects of the requirements in ***s. 10 G (7)*** was sufficient inasmuch as it was argued that the said ***Finance Act*** also had to be complied with when rates were determined. This would be in line with what was stated by the Supreme Court of Appeal in ***Nokeng Tsa Taemane Local Municipality vs Dinokeng Property Owners Association and Others [2011] 2 All***

SA 46 to be the following: ***"(at par. 14)*** It is important to mention that the mere failure to comply with one or other administrative provision does not mean that the whole procedure is necessarily void. It depends in the first instance on whether the Act contemplated that the relevant failure should be visited with nullity and in the second instance on its materiality... To nullify the revenue stream of the Local Authority merely because of an administrative hiccup appears to mean it to be so drastic a result that it is unlikely that the Legislature could have intended it." Also, in my view, one must keep in mind the relevant *dictum* in this context in ***African Christian Democratic Party vs Electoral Commission and Others 2006 (3) SA 305 (CC) par. 25*** where in the context of assessing a Local Authority's compliance with the Municipal Electoral Legislation, the Court held that a narrowly textual and legalistic approach is to be avoided. Rather, the question is whether the steps taken by the Local Authority are effective when measured against the object of the legislature, which is attained from the language, scope and purpose of the Act as a whole and the statutory requirement in particular. Therefore, a failure by a municipality to comply with relevant statutory provisions does not necessarily lead to

the actions under scrutiny being rendered invalid. The question is whether there has been substantial compliance, taking into account the relevant statutory provisions in particular, and the legislation as a whole.

8.

Before argument the parties handed up by agreement, a document titled 'Common Cause Background Facts'. These are the following:

8.1

The Kungwini Local Municipality was established with effect 5 December 2000 with its demarcated area including various previously peri-urban areas, commonly referred to as the Bronberg area;

8.2

The Bronberg area including Silver Lakes, Mooikloof and various agricultural smallholdings and farms were not included in formal valuation roll as part of the former Eastern Gauteng Services Council;

8.3

The Kungwini Local Municipality thus commenced with the preparation of a new valuation roll applicable from 1 July 2002 *inter alia* in terms of ***s. 10 G (6) of the Local Government Transition Act***;

8.4

After publication of the newly completed valuation roll, the final Valuation Appeal Board Hearings were disposed of the first week of February 2003;

8.5

The following finalisation of the process, the Kungwini Local Municipality resolved per Council resolution to implement assessment rate tariffs as published per notice 4/2003 (page 2 of the main evidence bundle);

8.6

The notice 4/2003 was not linked to a financial year and did not have any specified end timeframe of operation;

8.7

The notice 4/2003 was never challenged or set aside by any competent Court;

8.8

The Kungwini Local Municipality subsequently attempted to increase the assessment rate tariffs but was interdicted from doing so per Court orders of Bertelsmann J (main evidence bundle pages 154 to 156) [I may add that the interim interdict that was granted was made pending the institution of an action, which never took place, and in my view the interdict therefore had lapsed];

8.9

The Kungwini Local Municipality throughout raised 0,02 cent in the rand assessment rates, which ultimately culminated in a settlement agreement between Kungwini West Alliance and the Municipality (main evidence bundle pages 157 to 167);

8.10

It is recognised that the Plaintiff was not a party to such settlement agreement;

8.11

The Plaintiff does not admit publication of the notice 4/2003.

(Publication was however admitted during argument.)

9.

PLAINTIFF'S ARGUMENT:

Plaintiff relied on ***s. 10 (G) of the Transition Act***, which deals with financial matters. In particular it was contended that ***subsection 2 (d), (3) (a), (6) and (7) (a) (i)*** were of particular relevance. It was also contended that the mentioned ***Ordinance 11 of 1977*** remained applicable until the implementation of the ***Local Government: Municipal Property Rates Act 6 of 2000*** from 2 July 2005. ***S. 1*** of this Ordinance provided that "financial year" meant the period from 1 July in any year to 30 June in the succeeding year. ***S. 21*** provided that Local Authority may levy rates or rates on rate-able property recorded in the valuation of the roll for a financial year to which the roll is applicable. Certain regulations were promulgated in terms of this Ordinance per ***Administrator's Notice 446 and Schedule 17*** in particular referred to the notice that had to be given in respect of a fixed financial year namely 1 July to 30 June. ***S. 10 G of the Transition Act*** was still in force as I have said, and the submission was that insofar as it may not be clear from ***s. 10 G*** that property rates were or should only have been promulgated for one financial year, the period from 1

July in any year to 30 June in the succeeding year, ***Ordinance 11 of 1977*** still applied until the ***Property Rates Act*** came in to beING, which was after the 2004/2005 financial year. ***S. 21 of this Ordinance***, as I have said referred to a particular financial year. The submission was therefore that the intention of the Legislator at all relevant times was abundantly clear, namely that property rates and taxes would be promulgated and be applicable only for one financial year. There was therefore no basis upon which it could be argued that, in respect of the 2004/2005 financial year applicable to Kungwini, when the property rates and taxes were declared void and invalid, property rates and taxes applicable to the previous financial year, would have automatically become applicable and "would have risen from the dead". It was submitted by Mr R. Du Plessis SC on behalf of Plaintiff that the Local Authority understood this to have been so in any event. With reference to the "evidence bundle" the following submissions were then made:

9.1

The 2004/2005 financial year would normally commence on 1 July 2004 and terminate on 30 June 2005;

9.2

On 19 February 2003 a notice by Kungwini of the property rates and taxes applicable from 1 July 2002 to 30 June 2003 was published, determining that the Bromberg area would be taxed at a rate of 0,02 cents in the rand;

9.3

A further notice for the next financial year was published that a rate tariff of 0,0876 cents in the rand would apply from 1 August 2003;

9.4

On 8 September 2003 another notice was published in the Beeld, in terms of which it was stated that the assessment rates tariff increase of 0,0876 cents in the Bronberg area would be phased in over a three year period for 2003/2004, 2004/2005 and 2005/2006. Rates would have been effective from 4 October 2003;

9.5

This publication also appeared in the Provincial Gazette of 24 September 2003;

9.6

However, on 29 October 2003 another advertisement appeared indicating that such rates and taxes would be effective as from 14 November 2003 as published in that Provincial Gazette. The contents do not appear to differ from the publication of 24 September 2003;

9.7

On 7 June 2004 a notice appeared pertaining to the budget of the 2004/2005 financial year, with no reference in there pertaining to the property rates and taxes;

9.8

A special Council meeting was held on 29 June 2004. As part of that budget, property rates and taxes were discussed. It was recorded that assessment rates for the Bronberg area would increase from R0,022 to R0,054. This was contrary to the foregoing promulgations. The minutes however refer to the previous "financial year";

9.9

An official notice was published on 28 July 2004 in terms of which it was stated that the assessment rates tariff of R0,054 per rand value for properties in the Bronberg area would be approved. This was set aside by the Court;

9.10

In a letter of Kungwini to National Treasury dated 29 November 2004, it was stated that the assessment rates for 2003/2004 for the whole of Kungwini, except the Bronberg area, were R0,0876 cents in the rand. In the Bronberg area for 2003/2004 the amount that was charged was R0,020. That had been increased in the 2004/2005 financial year to R0,054. This appeared to be contrary to the publications referred to above;

9.11

On 20 July 2005 Local Authority Notice of the new financial year namely 2005/2006 was published recording the increase at the time;

9.12

It was important to note that the last mentioned Notice referred to ***s. 10 G of the Transition Act,*** read with certain other statutory provisions, and read with Ordinance 11 of 1977. That was therefore a recognition that the Ordinance 11 of 1977 was still applicable at the time. The same was applicable to all the other Local Authority Notices already referred to;

9.13

From the abovementioned analysis it therefore appeared that there was an attempt by Kungwini itself at all relevant times to determine property rates and taxes for each separate financial year. Therefore the applicable property rates and taxes would automatically terminate and not be applicable anymore, as at 30 June each relevant year;

9.14

It therefore followed that whatever property rates and taxes were applicable from 1 July 2003 to 30 June 2004, terminated as at 30 June 2004;

9.15

It was therefore clear, after the mentioned decision of the Supreme Court of Appeal, no valid property rates and taxes were applicable from 1 July 2004 to 30 June 2005.

10.

As far as Defendant's argument was concerned, it was submitted by Plaintiff that the property rates of R0,02 per rand may have been the factual position, but not the legal position inasmuch as Defendant was not entitled to have levied even R0,02 per rand for 2004/2005 financial year, as there had simply been no compliance with any of the statutory provisions in terms of which the property rates and taxes could have been promulgated. The conclusion therefore was that no property rates and taxes were applicable to Plaintiff in respect of Plaintiff's properties, in the Bronberg area, over the period 2004/2005. Plaintiff's allegations in paragraph 3 of the particulars of claim should therefore be determined as being correct.

DEFENDANT'S ARGUMENT:

It was submitted that Defendant's mentioned first resolution for the 2002/2003 year was clearly a resolution taken in terms of ***s. 10 G (7) (a) (i)*** of the ***Transition Act*** and not a resolution in terms of ***s. 21 (1)*** of the Ordinance. Reliance was placed on the mentioned ***Liebenberg*** judgment and the finding that ***s. 10 G (6) and (7)*** of the ***Transition Act*** conferred a free-standing rate-levying competence on municipalities. The old-order legislation in terms of which municipalities could levy rates on property, remained in force (until 2 July 2005), and accordingly during the period 22 November 1996, when ***s. 10 G*** of the ***Transition Act*** commenced, until 2 July 2005, Local Authorities could levy property rates in terms of either the ***Ordinance or s. 10 G (7)*** of the ***Transition Act***. It was therefore not correct, as Plaintiff's case seems to be, that the ***Ordinance*** and the ***Transition Act*** must be read together. It was accordingly submitted that ***s. 10 G (7)*** of the ***Transition Act*** does not require a Local Authority to resolve to levy property rates for only one financial year and that such property rates do not automatically terminate at the end of a particular financial year. In contrast to the ***Ordinance and s. 12 (1) of the***

Municipal Property Rates Act, s. 10 G (7) of the ***Transition Act*** does not contain any such limitations. ***S. 10 G (7) (c) and (d)*** introduced for the first time a public participation process in respect of the levying of property rates in terms of which objections could be lodged which the Local Authority was obliged to consider. The ***Transition Act*** in this regard made provision for an initial and amended date on which the determination would come into operation, depending on whether or not the objections were upheld. If it was the intention of the legislature the property rates would only be levied "for a financial year", there would be no need for such different dates of commencement. On Plaintiff's argument the initial date could moreover never have been before 1 July, which implies that if objections were upheld and the determination amended, the Municipality would not be entitled to levy any property rates during the periods from 1 July until the amended date of commencement of the determination. It is inconceivable to suggest that this could ever have been the intention of the legislature, keeping in mind the broader legislative scheme, the duties and powers of their Municipality and the purpose for which rates were levied. Mr Motepe also submitted that the High Court decision of Legodi J which was

upheld by the Supreme Court of Appeal ***(the Silver Lakes*** Appeal*)* by necessary implication held that there was a valid property rate determination as at 31 July 2004 inasmuch as the decision by the Municipality on 29 June 2004 was not declared null and void by the High Court, which decision was confirmed by the Supreme Court of Appeal. The decision therefore stood, and the judgment of Van Heerden JA on appeal clearly indicated that valid property rates existed on 31 July 2004. The crux of the matter only concerned the increase in assessment rate and not whether the decision of 29 June had been lawfully made. It is therefore Defendant's case that it was entitled to levy and recover property rates in the Bronberg area during the period 2 August 2004 to 30 June 2005 calculated at an assessment rate tariff of R0,02 per rand value. The remaining issues in the action ought to be postponed *sine die* .

11.

With reference to the ***CDA Boerdery*** decision, the Constitutional Court in ***Minister of Local Government, WC vs Lagoonbay Lifestyle Estate 2014 (1) SA 521 at 532*** said that as a matter of general principle, old-order legislation remains in force until the necessary steps are taken to have it set aside.

See also: ***S vs Thunzi and Another (Minister of Justice and Constitutional Development joint) 2011 (3) BCLR 281, par. 25 and 55.***

It however also added that the statutory provision requiring the Premier's assent in the CDA case was an isolated and excisable requirement. I am of the view therefore that the CDA Boerdery decision is not authority for the proposition that the relevant Municipal Ordinance had been impliedly repealed. The two mentioned decisions of the Constitutional Court do not support that conclusion.

12.

In ***Rates Action Group vs City of Cape Town supra*** the whole question of an applied repeal of legislation is discussed in some detail. For present purposes however the finding in paragraphs 47 to 50 are of more importance. The submission of Mr Motepe that in the present instance their Municipality had a choice which legislative provision it could follow, is not that novel. The provisions of ***s. 229 of the Constitution*** grants municipalities an original power to levy rates on properties while the ***Transition Act*** sets out in detail the mechanism and processes through which municipalities were required to value properties and levy rates. In ***Liebenberg supra***, as I have said, it was held that ***s. 10 G (6) and (7)*** of the ***Transition Act*** confer a free standing rate-levying competence on municipalities. It is in my view therefore clear that if a municipality complies with the relevant provisions of the ***Transition Act***, one cannot be heard to say that its action is unlawful or invalid if at the same time it does not also comply with every prescript of the Rating Ordinance. Having regard to the duties of the Municipality and the purpose of the levying of rates, would wholly artificial to hold that because of certain non-material non-

compliance with one or other statutory document, no rates at all would be enforced for a particular year. I am therefore in agreement with Mr Motepe's submission that ***s. 10 G (7)*** or the ***Transition Act*** read as a whole, does not require Local Authority to resolve to levy property rates for only one financial year, and that such property rates do not automatically terminate at the end of a financial year. I am of the view further that both the judgment of Legodi J and that of the Supreme Court of Appeal in the ***Silver Lakes*** decision make it clear that only increases in rates were dealt with, and not the question whether or not valid property rates existed. In fact, under my view, both decisions say exactly the opposite.

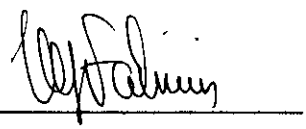
13.

In the premises the following order is made:

1. **It is declared that the Defendant was entitled to levy and recover property rates in the Bronberg area during the period 1 August 2004 to 30 June 2005 calculated at an assessment rate tariff of R0,02 per rand value;**

2. **The remaining issues in the action are postponed sine die;**

3. **Plaintiff is ordered to pay the costs of the hearing of the separated issue, including the cost of 2 Counsel where so employed.**



JUDGE H.J FABRICIUS

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA DIVISION

Case no.: 6715/2008

Counsel for the Plaintiff: Adv R. Du Plessis SC

Instructed by: Len Dekker & Associates, Pretoria

Counsel for the Defendant: Adv J. Motepe

Instructed by: De Swardt Vogel Mayambo, Pretoria

Heard on: 12/03/2014

Date of Judgment: 04/04/2014 at 10:00