IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE: 17 September 2014
CASE NO:63280/2011

In the matter between:

BLAIR ATHOL HOMEOWNERS ASSOCIATION

(an association incorporated under Section 21) First Applicant

WRAYPEX (PTY) LTD Second Applicant

ROBERT SEAN WRAY Third Applicant

DELETE WHICHEVER IS NOT APPLICABLE

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

....

DATE SIGNATURE

and

THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY Respondent

JUDGMENT ON LEAVE TO APPEAL

MURPHY, J

1. I am of the opinion that leave to appeal to the Supreme Court of Appeal should be granted in this case, but because the amplified application for leave to appeal reveals a measure of misunderstanding in relation to certain findings in my judgment it might be best to make one or two observations in relation to the grounds of appeal.

2. My finding that the principle of legality had not been violated in this case is predicated essentially on the finding that the municipality in approving the township reserved to itself the right to levy rates, that there was an agreement between the parties to that effect and thus by implication the municipality did not legally constrain its ordinary powers and was at large to set the amount of the rates. Consequently, the questions of the nature of the services provided and the geographical location of the estate have limited relevance. The applicant in its reliance upon the principles of legality, rationality and equity seeks to impose additional contractual terms that were not part of the initial bargain. As regards the quantum of the rates, that is a political question best reserved to the municipal council.

3. I agree though that another court might reasonably reach the conclusion that the agreement between the council and the developer can be overridden by the considerations set out in paragraph 2 of the applicant's application for leave, and leave to appeal should be granted for that reason. However, I note in passing that the case to be presented on appeal may have developed somewhat from that set out in the application which served before me, in which the grounds of review were somewhat vague and confusing.

4. Paragraph 5 of the application for leave also misstates the nature of my reference to the *Commonwealth Edison* case. I place no reliance upon the case. I drew on it merely to make an observation about the legal and constitutional nature of a tax. The facts of that case have no bearing upon my reasoning. I rely on it merely to state the general principle that a tax is not an assessment of benefits.

5. The grounds stated in paragraph 6 and 7 of the application again reveal some misunderstanding of my actual finding. The contractual arrangements upon which the estate were established reserved to the municipality its power to levy rates. As for the incidence and amount of rates that is a political question for the council and the courts should observe restraint and deference. The particular context is one in which the parties agreed that despite the undertaking by the residents of the estate to fund services the power to levy rates remained reserved without limitation. The claim for a preferential rate is the essence of the applicants' grievance and they want the court to assume the power to impose rates on the basis of fairness, while ignoring the legitimate assumption or pre-supposition upon which the council approved the establishment of the estate. In my view that would inappropriately violate the principle of the separation of powers.

6. The ground set out in paragraph 9 of the application reflects a misunderstanding of paragraph 44 of my judgment. I made no finding that the applicants ought to have demonstrated an infringement of the rights to equality and property in the bill of rights. I merely point out that no such case was made out on the papers. The review brought by the applicants is founded upon grounds that were difficult to discern in the notice of motion and affidavits. A bill of rights review may or may not have had better success in the sense that it could have been argued that the rates constituted confiscation or a so-called creeping expropriation. The point that I make, and which the applicants appear to misunderstand, is that no such case was made before me.

7. The ground stated in paragraph 10 of the application for leave is accordingly equally unsubstantiated. The comment made regarding the question of an undue penalty or an unconscionable financial burden relate to the standard applicable had the applicants attempted to bring a bill of rights challenge. The comment bears no relation to the challenge based on rationality or equitability. Thus the grounds raised in paragraphs 10.1-10.3 are unfounded and are a misrepresentation of what is in fact held in the judgment.

8. The point of paragraph 43 of the judgment, as evident from its opening sentence, is merely to state what this case is not about, a point necessitated by the poorly formulated grounds of review in the application. No finding is made there which can serve as a ground of appeal in relation to the issue of rationality. Consequently, the ground raised in paragraph 11 of the application for leave is equally misplaced. There is no obligation in law to demonstrate an infringement of the equality clause. The applicants made no effort to bring such a case. But the point made in para 44 of the judgment, which the applicants fail to understand, is that a power reserved to and exercised as part of the legislative function might have been vulnerable to an attack based on equality or property rights had such a challenge been made. A challenge based solely on rationality faces a lower standard of judicial scrutiny - the so-called rational basis test - which the municipality’s conduct survives in this instance, at least in my opinion.

9. That said, and the applicants’ evident misunderstandings put aside, as I stated at the outset I am persuaded that another court might reasonably conclude that the

requirements of equitable treatment in the local authority legislation, in the light of its objectives, could require the respondents to determine a discrete rate taking account of the contribution to services made by the residents and their association.

10. Given the implications of any such finding and its significance to similar estates throughout the country, I agree with the parties that leave ought rightly to be granted to the SCA.

11. In the premises the following order is granted:

i. The applicant is granted leave to appeal to the SCA.

ii. Costs of the application will be costs in the appeal.

JR MURPHY

JUDGE OF THE NORTH GAUTENG HIGH COURT

Heard on:	16 July 2014
For the Applicants :	Adv S van Nieuwenhuizen SC
	Adv LGF Putter
Instructed by:	Schwartz-North Incorporated
For the Defendant:	Adv T Strydom SC
	Adv T Mkhwanazi
Instructed by:	Hugo & Ngwenya
Date of Judgment:	17 September 2014