IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA
REPUBLIC OF SOUTH AFRICA

27/10/2016
CASE NO: 55891/2015
REVISED

In the matter between:

ELMO YORK STUART N.O. Applicant

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY Respondent

JUDGMENT

MOTHLE J

Introduction:

1. The Applicant is an attorney of this Court, practising as such under the name and style of E Y Stuart Incorporated in Waterkloof Gardens, Main Street, Brooklyn, Pretoria. He lodged this application in his capacity as executor in the Estate of the Late Daniel Rudolph Jansen Van Vuuren, having been duly appointed as such in terms of the letter of executorship attached to the papers.

2. The Respondent is the City of Tshwane Metropolitan Municipality in whose jurisdiction the property in issue in this application is situated.

3. In terms of Section 118(1) of the Local Government: Municipal Systems Act, 32 of 2000, the Registrar of Deeds may not register the transfer of property except on the production of a Clearance Certificate. The section describes a Clearance Certificate as a document which certifies that all amounts that became due in connection with the property for municipal service fees, surcharges, property rates and other municipal taxes, levy and duties during the 2-year period preceding the date of the application for certificate, have been duly paid.

4. The Applicant seeks relief in terms of which the Respondent is directed by this Court to extend the Clearance Certificate issued by the Respondent by virtue of the court orders of 3 September 2010 and 18 October 2011, in respect of Portion 290 (a Portion of Portion 98) of the farm Kameeldrift 298, Registration Division JR, Northern Province *("the property").*

5. The order is sought to facilitate the subdivision of the property as well as its transfer in the Deeds Office. Further, and in the alternative, the Applicant seeks an order directing the Respondent to issue a Clearance Certificate that should be valid for a period of 3 months from the date of the order, and that such order shall have no bearing on the litigation pending between the two parties under case number 52367/2007. There is also a further prayer for costs against the Respondents.

Background:

6. The property in issue in this application belongs to the estate of the deceased. The deceased in his lifetime applied for subdivision of the property into three portions, which subdivision was approved for subdivision only in two portions. The approved subdivision is not yet registered on the Title Deed.

7. The deceased's intent was to subdivide the property in three portions and to transfer the property to his family trust, being the Jansen Van Vuuren Family Trust which is duly registered in terms of the law.

8. This property fell under the jurisdiction of the Nokeng Tsa Taemane Local Municipality *("Nokeng Municipality").*

9. During or approximately May 2011, the Nokeng Municipality was dis-established and absorbed into the Tshwane Metropolitan Municipality (the Respondent) and consequently the property now falls under the jurisdiction of the Respondent. Prior to this dis-establishment of the Nokeng Municipality, a dispute had ensued between the owner of the property *("the* deceased") and the Nokeng Municipality, concerning the alleged non-payment of rates, taxes and other levies against the property, which dispute led to the Nokeng Municipality to issue summons against the deceased in this Court under case number 52367/2007.

10. Consequently, pending the adjudication of the dispute, the Nokeng Municipality failed to issue a Clearance Certificate to the deceased, which failure caused the deceased to launch an application in this Court under case number 70745/2009. This was the first application by the Applicant.

11. The Nokeng Municipality delivered its intention to oppose the application but failed to file any opposing papers. This application was enrolled for and heard on the 30 August 2010, where a settlement was reached between the parties, resulting in an order by the Court on 3 September 2010. This court order included the agreement made in 2009 through the Respondent's attorneys that the Applicant should pay a "without Prejudice" amount of R 200 000, 00 to the then municipality. Further, in terms of this Court order, the Nokeng Municipality consented to issue a Clearance Certificate, indicating that no outstanding levies are due and payable. This Clearance Certificate was valid up until the 31 October 2010.

12. The Applicant failed to effect registration of the transfer property prior to the - deadline of the 31 October 2010. The delay, according to Applicant, was caused by ABSA Bank being the first mortgage bond holder, by failing to timeously deliver consent to the cancellation of the bond registered on the property. A request to the Nokeng Municipality to issue a further Clearance Certificate was not granted. This led to a second application being launched in this Court under case number 12864/2011.

13. Following this second application, another settlement agreement was reached whereby the application was removed from the roll and the Nokeng Municipality agreed in writing through its attorneys, to issue the second Clearance Certificate. However, the Respondent advised that the power of attorney to effect transfer of the subdivided portion to and in favour of the Trust, could not be issued as the engineer's report was never circulated to all the departments within the offices of the Respondent and further that bulk service contributions have not been paid.

14. The refusal to issue this power of attorney again delayed the execution of the transfer until the date of validity the Clearance Certificate expired. Subsequent thereto, the engineer's report was circulated internally to all the departments of the Respondent. The documentation required to effect transfer was now with the Applicant who needed to proceed with the transfer. The Respondent persisted with its refusal to either extend the life of the second Clearance Certificate or issue a new Clearance Certificate to the Applicant.

15. On the 18 July 2014, a third application was made to court for an order directing the Respondent to issue a new Clearance Certificate. In August 2014 the Respondent alleged that the Applicant owed amounts of R147, 151.45 and R360, 017.29 with regard to the property. The Applicant disputed these amounts on the basis that the previous Clearance Certificates were issued consequent to agreements with the Nokeng Municipality that there is no amount due, which agreements were made order of court.

16. It further transpired that the Respondent on its own volition, subdivided the account of the property in line with the subdivision in to two portions, and levied different tariffs in respect of the subdivided portions. Two separate accounts were issued. The one is account No. […]53 in respect of the portion described as F001 and the other is account No. […]96 in respect of the portion described as F0002. A further account No: […]63 was opened in regard to water consumption.

17. The account of the property was divided into two separate accounts in line with the municipality approved subdivision, which however had not yet been registered by the Deeds Office. The Clearance Certificate sought was to amongst others, facilitate the

registration of the subdivision as approved, as well as simultaneous transfer of the property to the family trust.

18. Several enquiries by the Applicant, from 2 March 2015, requesting clarity from the Respondent concerning the two accounts and the extension or re-issue of the Clearance Certificate went unanswered. The Applicant has attached to the court papers a number of emails to the various officials of the Respondent requesting information in regard to the reasons for the separation of the property account as well as the refusal to issue a Clearance Certificate. There was no response to these enquiries.

19. The Applicant produced proof that he had paid the Respondent an amount of R200, 000.00 to the account in compliance with the 2010 Court order, which amount appears not to have been credited to any of the two accounts. For the record, neither the Nokeng Municipality nor the Respondent has taken any further action to proceed with the dispute under case number 52367/2007, instituted by the Nokeng Municipality.

20. The second Clearance Certificate issued has now also expired and the Applicant is unable to execute his duties as executor to effect transfer of the property and register the subdivisions. The led the Applicant to institute this third application which is the subject of the current proceedings.

The issue before Court

21. The Respondent claims that as at October 2015, prior to the institution of these proceedings the Applicant's accounts with the municipality were as follows:

21.1 Account No. […]53 had an amount of R211, 355.31 due and owing;

21.2 Account No. […]96 had an amount of R16, 008.56 due and owing; and

21.3 Account No. […]63 had an amount of R333, 055.50 due and owing.

22. The total amount owing, according to the Respondent, is R560, 419.37.

23. The Respondent further maintains that in terms of Section 2(1) of the Local Government: Municipal Property Rates Act, 6 of 2004, the municipality is entitled to levy the property rates on any property including the property in issue in this case. In addition thereto, the Respondent further contends that it is entitled to levy for various other municipal services such as water and electricity. These levies, according to the Respondent, amounted to R550 419, 37 as at October 2015.
24. In the replying affidavit, the Applicant in fact denies being indebted to the Respondent for the amounts stated. He further contends that the municipality erred in creating separate accounts on the approved subdivisions prior to the subdivisions themselves being registered in the Deeds Registry. The Applicant tenders payment of any amount that may be *"proved to be due and payable upon appropriate adjudication of the pending action."*

The first date of hearing: 10 August 2016

25. This application was set down for Tuesday 8 August 2016 in the opposed motion court and heard on the 10 August 2016. During argument, the Court pointed out that from the reading of the documents in the file and the submissions made in the heads of argument, it seems the issue is narrowed to two questions, namely:

25.1 Whether the municipality was correct in creating two separate accounts in line with the municipality approved subdivision, prior to the registration of the approved subdivision by the Deeds Registry; and

25.2 Whether the amounts due and owing as contended by the Respondent are substantiated and correct.

25.3 The Court then adjourned the matter on the basis that each party will be permitted to file supplementary affidavits to support their contention and in particular that:

(i) The matter be postponed to Wednesday of the last week of term being 21 September 2016; and

(ii) Each party be given 7 days to file affidavits, the Applicant must file an affidavit

attached to it the proof that it had made payment and had continue to make payment and the amount paid to date since the expiry of the certificate;

(iii)That the Respondent file an affidavit attaching thereto the relevant accounts showing how the amount they claim is due and owing have been arrived at starting from the day after the expiry of the last certificate.

27. The Applicant filed a supplementary affidavit on 1 September 2016, wherein he attached proof of payments, including payment of the R200 000, 00 ordered by the Court previously. On the attached evidence of the Applicant and in the absence of contrary evidence from the Respondent, the Applicant contends that the amount they have paid far exceeds the balance cited by the Respondent as due and owing.

28. On the morning of the return date of hearing, which was Friday 23 September 2016, a date confirmed by the Court at the request of the parties, the Respondent submitted its supplementary affidavit. In its supplementary affidavit, the Respondent claims that:

(1) the disputed amounts raises a genuine dispute which cannot be resolved in a motion court;

(2) the disputed amounts are a subject of litigation instituted in 2007, which is pending and which the Applicant failed to set down;

(3),the basis of the calculation of the Applicant is not correct; and

(4)Then followed this startling new allegation in paragraph 16 of the Respondent's supplementary affidavit:

" 16. I am advised that the affidavit Is way out of time and wish to state that the affidavit would not have been filed on time because of the following issues:

16.1 The amounts which were to be taken into consideration were the amounts that 1he applicant owed from the era of the Dinokeng-Tsa- Taemane Municipality.

16.2 Since the disestablishment of that municipality there is always a problem in accessing the accounts due to the licence of the software which is owned by third parties;
16.3 During this period of resolving this current dispute steps were taken by the respondent to pay for the software licence
16.4 Such licence was paid during August 2016 and access was allowed for the officials to access the records of the previous municipality and do reconciliation.
16.5 Unfortunately one of the key officials was incapacitated and was in hospital.
16.6 As soon as the said official was available to enable access to the previous records of Dinokeng-Tsa-Taemane Municipality reconciliation was made."

29. During argument, the Court established from the Respondent's legal representative that the alleged fee owing to the licence holder of the software has been due and owing since 2011 when the Nokeng Municipality was dis-established. It is still not clear at this stage when access to information will be gained. In essence, since 2011, the Respondent has not been able to access the data relating to the accounts from the dis-established municipality, due to its own failure to effect payment to the licence holder of the software.

Evaluation of evidence

30. The Respondent's contention that there is a dispute of fact which calls for the matter to be referred to trial has no merit. The dispute between the parties concerns the need for payment of levies as a condition to the issue of the Clearance Certificate. It can be easily ascertained with reference to source documents such as rates and taxes invoices issued by the municipality and statements of accounts reflecting payments made, if any. It is therefore incorrect for the Respondent to contend that the dispute in that regard is incapable of being resolved on the papers.

31. On the evidence before Court, the Applicant does not dispute, nor has he ever disputed the legal authority of the Respondent as a municipality to levy rates and taxes

and to subject the application for issue of a Clearance Certificate to the legal requirements. It is the amount alleged by the Respondent as due and owing which is in dispute. It makes no sense for the Respondent as part of its defence to invoke the authority of section 118.

32. In regard to proof of the alleged amount due and owing by the Applicant, the Respondent contends to this Court that for a period of 5 years, it has been unable to access information from the data of the Nokeng Municipality that will prove or disprove its claim that there are amounts due and owing. On the other hand, the Applicant through demonstration of documentary evidence shows that it has paid all levies due to the Respondent.

33. In both instances of the expired Clearance Certificates, 2010 and 2011, the Nokeng Municipality unequivocally declared that there are no levies due and owing in the last two years as required by section 118(1) of the Municipal Systems Act. The Applicant further contends that it is for this reason, that the Court was able to grant the two previous Court orders ordering the Respondent to issue the Clearance Certificates.

34. The Respondent fails to explain how it would expect the ratepayers whose properties are within the jurisdiction of the dis- established Nokeng Municipality, to wait indefinitely for access to data in the software, before Clearance Certificates are issued. The Respondent's new version as contained in paragraph 16 of its supplementary affidavit, submitted on the day of hearing without a single document to substantiate it, appears at best to be a desperate attempt to avoid issuing a Clearance Certificate to the Applicant.

35. The Applicant on the other hand remains prejudiced without any alternative remedy available to him. It is also a requirement of the law that the administration of the estate should be expeditiously attended to and finalised

The creation of separate accounts

36. On the return day of hearing, the question whether the Respondent was authorised to create separate accounts before the approved subdivision was registered, took a

different turn. The Respondent again presented new evidence by attaching to its supplementary affidavit, an evaluation report by valuer XP Shitlhangu, dated 8 September 2016. This report alleges that the property, which is mainly for agricultural and residential use, has a portion that is being used as a warehouse for commercial purposes.

37. According to this new version, The Respondent is thus authorised to levy different property rates on the same property in accordance with the alleged land use, as per the provisions of **the Property Rates Act 6 of 2004 and the municipal By-Laws.** However, there is no evidence placed before this Court to demonstrate that either of the portions of the property was approved for subdivision in line with the alleged land use in the form of a warehouse for commercial purposes.

38. For the record, the valuation in this new report allegedly took place on 7 September 2016, without the consultation and knowledge of the Applicant and during the period of adjournment for parties to file supplementary affidavits.

39. Apart from the fact that this report was submitted in Court on the day of the hearing of this application and thus not served on the Applicant, its purpose was, according to the Respondent, to explain or provide the reason for the separation of the property's account into three accounts.

40. It seems that the new allegations raised in the Respondent's supplementary affidavit are an attempt to mislead this Court. In the first instance the Respondent attempts to explain the separation of the single account of the property into three accounts which occurred from January 2014, on the basis of an evaluation conducted on 7 September 2016, more than two years later. Secondly, there is no explanation as to why the new version regarding difficulties experienced by the Respondent to access the software, was not averred and deposed to in the initial answering affidavit, or through counsel, raise it with the Court during the first date of hearing (on 10 August 2016). The Respondent, through the conduct of its officials, is being disingenuous to this Court.

41. This question of separated accounts was recently dealt with by the Supreme Court of Appeal in ***City of Tshwane v Uniquon Wonings (20771/2014) [2015] ZASCA 162***

(20 November 2015)[1]. However, the central issue in this case revolves around the question whether the Applicant is indebted to the Respondent for the alleged unpaid municipal levies. The Applicant, in the course of contesting the specific amounts stated by the Respondent as due and owing, objected to the levies as reflected in separate accounts instead of a single account. The logical question in this regard would be whether these amounts taken together, would have resulted in the same as the levies due and payable on the initial single account of the property prior to separation of accounts, or would appear inflated, to the prejudice of the Applicant.

42. Therefore in light of the evidence tendered or lack thereof concerning the disputed levies, and the finding of this Court as stated hereunder, nothing further turns on the question of the separation of accounts of the property. It will thus not be necessary to deal with the question of the creation of separate accounts over a property that is still one entity insofar as the Deeds Registry is concerned.

43. The provisions of section 118 of the Municipal Systems Act are that an applicant for a Clearance Certificate has to effect payment of any levies due to the municipality for the period of two years preceding that application.

44. The application for the issue of or extension of the Clearance Certificate for the third time was made at least from 2 March 2015. Two years preceding this date would be March 2013. The Respondent has not been able to prove that the levies due and owing as it contends, covers the period March 2013 to April 2015 or at the very least, and for the purposes of the relief sought and if granted, two years before the date of hearing on 10 August 2016, which would be August 2014. Its contention rests on levies which it claims were due and payable to the Nokeng Municipality as at 2007. The Respondent is however unable to prove these levies due, because it have not yet gained access to the data in the software whose licence belongs to a third party.

45. However, the 2010 Clearance Certificate which was issued on the 3 September 2010, was issued by the Nokeng Municipality. There is no explanation provided as to why the Nokeng Municipality would issue a Clearance Certificate in 2010 and again in

[1] See also *Mooikloof Estates (Edm) Bpk v Stadsraad van Tshwane* 2013 JDR 1333 (GNP).

2011, when, as alleged, there were levies due and payable by the Applicant at that time.

46. In addition, it was part of the Court order of 3 September 2010 that the Applicant is liable for payment of R 200 000, 00 to the Respondent, -which the Applicant has effected. The onus to prove any levies owing and due to the Respondent, rests with the Respondent, and such onus has not been discharged.

Conclusion

47. The Court is thus of the view that prior to its dis-establishment, and contrary to the Respondent's contention, the Nokeng Municipality had twice issued a Clearance Certificate to the Applicant, which certified that there were no levies due and owing. The last such Clearance Certificate is dated May 2011 which is the year when the Nokeng Municipality was dis- established. In addition, the Applicant has attached to its supplementary affidavit documentation in support of the contention that whatever was due has been paid.

48. Having regard to the documentation before me, I am of the view that the Respondent should be ordered to issue a new Clearance Certificate in terms of Section 118 of the Municipal Systems Act, 32 of 2000. This will be in respect of the property Portion 290 (Portion of Portion 98) of the farm Kameeldrift 298 JR.

49. In the premises I make the following order:

1. The Respondent is ordered, within 7 days from date of this order, to issue and deliver to the Applicant's attorneys, a Clearance Certificate in terms of Section 118 of the Municipal Systems Act, 32 of 2000 in respect of Portion 290 (Portion of Portion 98) of the farm Kameeldrift 298 JR, which Clearance Certificate shall be valid for a period of sixty (60) days from the date of delivery to the Applicant; and

2. The Respondent is ordered to pay the costs of this application.

S P MOTHLE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
PRETORIA

For the Applicant:	**Adv. A Granova**
Instructed by:	**E Y Stuart Incorporated Attorneys** **Applicant's attorneys** **Waterkloof Gardens Office Park** **Brooklyn, PRETORIA**
For the Respondent:	***Adv. M M Mojapelo***
Instructed by:	**D K Siwela Attorneys** **Attorneys for the Respondent** **Prudential Building** **Church Street** **PRETORIA**