

SOUTH AFRICA / JUDGMENT

JFM v Mogale City Local Municipality (30195/2020) [2021] ZAGPJHC 570 (15 October 2021) [2021] ZAGPJHC 570

COURT

South Gauteng High Court, Johannesburg

BEFORE

Senyatsi ML

CASE / FILE NUMBER

30195/2020

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 30195/2020

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED:

NO

15/10/2021

In

the matter between: J[....]
F[....]
M[....]
Applicant
and
MOGALE
CITY LOCAL
MUNICIPALITY
Respondent

JUDGMENT

Delivered: By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered. The date for hand-down

is deemed to be 15 October 2021

- [1] This is an opposed application in terms of which the Applicant seeks an order directing the Respondent to provide her with the correct clearance figures in terms of section 113(1) of the Local Government Municipality Systems Act 32 of 2000 (“the Act”). The figures relate to the municipal property rates and other levies payable in respect of the immovable property described as Erf [....] Lindley Township Registration Division JQ, Gauteng (“the Property”). The Respondent provides services such as electricity, water and refuse removal to the property located at an estate.
- [2] The Applicant and her former husband, Mr A[....] R[....] M[....] (“Mr M[....]”), whom she was married in community of property are indicated as joint owners of the Property on the Lexis Convey Deeds Search.
- [3] The Applicant and Mr M[....] were divorced in this Court and concluded a settlement agreement which was made an order of Court on 6 March 2012. In terms of the provisions of paragraph 4 of the settlement agreement, the applicant retained as her sole and exclusive property, the Property which is the subject of this application.
- [4] The Applicant instructed conveyancers to lodge an application in terms of Section 45 (bis) (1) (a) of the Deeds Registries Act, 47 of 1937 (“the Deeds Registries Act”) for the endorsement of the title deed to confirm that she has lawfully acquired Mr M[....]’s half share in the property and that she is entitled to deal therewith as is she has taken formal transfer of such half share in her name.
- [5] The application for endorsement is a formal process in the Deeds Office and is lodged simultaneously with the transfer of the Property to the intended purchaser.
- [6] The property was sold by the applicant in terms of the sale agreement dated 9 October

2019. The property was sold for R1750000 of which a deposit of R525000 was paid and the balance of the purchase price R1225000 was payable on the registration of transfer of ownership of the property to the purchaser would be given on the date of transfer

of the property to the purchaser. The transfer and registration thereof would be effected by the Applicant's conveyancer within a reasonable time after the purchaser has complied with the payment of the deposit, transfer and mortgage bond cost.

[7] The purchaser paid the deposit on 8 November 2019 as required by the sale agreement to the Applicants conveyancer. The deposit has been invested in an interest-bearing account, which interest accrues to the benefit of the purchaser.

[8] Once payment of the deposit was made by the purchaser, the Applicants conveyancers were instructed to prepare and lodge the transfer documentation in the Deeds Office, the attorneys attending to the registration of the bond received instruction from the lender to register the mortgage bond for the balance of the purchase price on 25 November

2019. The attorneys attending to the registration of mortgage bond informed the conveyancers on 13 December 2019 that the instructions had to be amended as the purchaser's information was incorrect. There was a delay due to the Christmas holidays during December 2019.

[9] The conveyancers applied for a clearance certificate on 6 January 2020 in terms of section 118(1) of the Act with the Respondent. The conveyancer's clerk attended at the Respondent's offices on numerous of occasions after the application for clearance certificate was lodged to check if the clearance figures were available. The clerk was advised on 12 March 2020 by the Respondent's officials that the rates clearance application could not be located and the duplicate application was requested by the Respondent.

[10] The amended application for clearance certificate figures was lodged on 13 March 2020 at the request of the Respondent. The events of national lockdown due to the Covid-19 pandemic overtook the process in that a lockdown was announced on 26 March 2020 before the clearance figures were provided.

[11] The offices of the Respondent were re-opened early during July 2020 and on 6 July 2020, the clearance figures which reflected an amount of R998 900.23 were provided for the clearance certificate to be issued. This figure was disputed by the applicant on the ground that the figures were inclusive of the historical debt in violation of the two-year period imposed by section 118(1) of the Act.

[12] The Applicant contends furthermore that the monthly rates payable in respect of the property is the sum of R418 1.35. Consequently, so goes the argument the Respondent is not entitled to claim any amount beyond the two-year period prescribed by the Act. She estimates that the correct figure should be approximately R100 000 premised on the monthly average of R4181.35. The Respondent is adamant that it is entitled to provide the figures as it did because of the court order which gave effect to the settlement agreement concluded

between the Blair Homeowners Association which acted on behalf of all residents including the Applicant.

- [13] A letter of demand was sent to the Respondent demanding the amended figures. This was not attended to which led to this litigation.
- [14] The Respondent furthermore contends that the relief sought is untenable due to the following: -
- (a) the Applicants relief is an intertwined review application coupled with a declaratory order and a mandatory interdict;
 - (b) the provisions of Uniform Rule 53 have not been complied with which would have given the Respondent an opportunity to file the record, for possible consideration of any review; application
 - (c) the court cannot declare a decision unlawful, null and void without proper review application;
 - (d) the Applicant concedes in her founding affidavit that the Respondent has made a decision of issuing the clearance certificate figures, yet she persists with a prayer that the respondent be directed to issue a clearance certificate;
 - (e) the fact that the Applicant does not agree with the clearance figures does not render the figures null and void;
 - (f) the relief sought, so contains the Respondent stands to be dismissed because it is unattainable;
 - (g) the respondent furthermore contains that the application violates the separation of powers doctrine in our Constitutional democracy.
- [15] The Respondent furthermore and more importantly, contends that the court is being asked to overreach and act beyond the scope of its jurisdiction.
- [16] The Respondent contends that Blair Athol Homeowners Association, which had authority to act on behalf of its members including the Applicant, concluded a settlement agreement with the Respondent. one of the important terms of the settlement agreement was that the owners of properties in Lindley and Lindley Extension would be liable to pay R500.00 per month per Erf from the date of the court order until the disputes about rates and taxes have been resolved. this court order was made on 3 September 2013.
- [17] It was furthermore agreed, so read the order that should the court rule in favour of the residents, the Respondents would be liable to refund the residents. Alternatively, the residents will be liable to pay the Respondent for outstanding amounts retrospectively should the court found in favour of the Respondent.

- [18] The Respondent contends that the dispute was resolved favourable for the respondent and the residents of Lindley including the Applicant became liable for the rates retrospectively from the date of the settlement agreement on 16 September
2013. as the respondent is not supplying any services to the estate and its residents, including the Applicant, the residents including the applicant are liable to the respondent for property rates only. The Respondent submits that Section 118(1)(a) and (b) does not find application in the instant case.
- [19] The Respondent denies that the correct clearance figures should be about R 100000.
- [20] In answer to the Respondent's defences, the Applicant states that she does not need to specify the Rule under which an application is brought. She contends that she can make use of Rule 6 or Rule 53 of the Uniform Rules of Court. She further contends that this choice is made pursuant to the Administrative Review Rules, made by the Rule Board for Courts of law under section 7 of Administrative Justice Act 3 of 2000 ("PAJA").
- [21] The Applicant contends that for review applications of administrative action in terms of PAJA the following principles are applicable:
- (a) The applicant did not specify the section under which the review of the administrative action is brought, provided that both facts on which the cause of action is based and the legal basis of such cause of action is set out. She avers that she has done so in her founding affidavit, that is factually being the certificate that is sought in terms of section 118(1) is limited to the preceding two years and does not include historical debt as envisaged in section 118(3) of the Act.
- [22] In terms of rule 2(3) of the Administrative Review rules where an application has been brought in terms of Rule 6 of the Uniform Rules:
- (a) the applicant shall make any portion of the record of the proceedings with which it may previously have been furnished by the administrator available to every respondent who opposes the application within 10 days of receipt of notice of opposition from such respondent. The applicant furthermore advanced that the time allowed by Rule 6 of the uniform Court rules for a respondent to deliver an answering affidavit shall be reckoned from the date on which the record of proceedings is provided to such respondent.
- [23] The Applicant contends that the only record in her possession is the previously issued certificate in terms of Section 118(1) of the Act which is objected to. The Applicant contends that in the answering affidavit, the Respondents annexed the court order dated 3 September 2013 and an account enquiry which appears to be the only documents relied upon for the calculation of the clearance certificate figures. The Applicant indicated in her replying affidavit that she would amend and seek a further order declaring the current section 118(1) certificate null and void.

[24] The issue to be determined is whether the respondent is entitled to issue the clearance certificate figures based on charges beyond the two years imposed by Section 118 (1) of the Act.

THE LAW

[25] Section 118 (1) (a) and (b) and (3) of the Act provides as follows:

"(1) A registrar of deeds may not register the transfer of property except on production to that registrar of deeds of a prescribed certificate: -

- (a) issued by the municipality or municipalities in which that property is situated; and
- (b) which certifies that all amounts that became due in connection with that property for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties during 2 years preceding the date of application for the certificate have been fully paid.
- (3) An amount due for municipal service fees, surcharges on fees, property rates and other municipal service fees, Surcharge fees, Property rate 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 the mortgage Bond registered against the property."

[26] Our courts have in the past considered the provisions of Section 118(1) and (3) of the Act and made pronouncements in respect thereof.

[27] In *City of Johannesburg v Kaplan NO and Another*[1], the City of Johannesburg had sought from the court an order declaring that the amount due to it by the liquidator of an insolvent estate on behalf of the present registered owner of the property known as Erf 406 Wynberg for municipal service fees, surcharges on fees, property rates, levies and duties on the property for a period prior to the two years preceding the date of application for the certificate referred to in section 118(1) of the Act is a charge upon the property enjoys preference in the distribution of the proceeds of sale of the property over the money lenders mortgage and registered against the property. The court held that the principal elements of section 118 are an embargo provision with a time limit in section 118(1), a security provision without a time limit in section 118(3) and a provision located between the two sections 118(2) which subjects the provisions of section 118 as a whole to the terms of section 89.

[28] The Court in the *City of Johannesburg v Kaplan*[2] held further that when a debtor is not sequestrated, no property may be transferred unless a clearance certificate is produced to the Registrar of deeds that certifies full payment of all municipal debts as described in section 118 (1) which have become due during a period of two years before the date of application for the certificate. Any amount due for municipal debts (i.e. not limited by the aforesaid of two years) that have not prescribed is secured by the property and if not paid and an appropriate order of court is obtained, the property may be sold in execution and the proceeds applied in payment of the debts. In such event, the proceeds will be

applied to the payment of the municipal debts in full. Only after the satisfaction of such debts will the remainder, if any, be available for payment to the debt secured by a mortgage bond over the property.

[29] In *City of Cape Town v Real People Housing (Pty) Ltd*[3], the City of Cape Town refused to issue the clearance certificate and insisted on payment of debts incurred more than two years prior to the request for the certificate. The effect adopted with such refusal as in the instant case was that the clearance certificate will not be issued until all debts have been paid irrespective of when or by whom they were incurred. The court held that a municipality has no discretion to grant or withhold the clearance certificate at will and thereby frustrating the exercise of the ordinary rights of ownership- “such a discretion would be absurd and I have no doubt that it would not survive Constitutional challenge”[4]. The court in *City of Cape Town* case furthermore stated that once it was accepted that a municipality indeed has an obligation to issue a clearance certificate in certain appropriate circumstances then all that remains is to determine what those circumstances are.

[30] The circumstances, on the face of section 118 (1) appear from its express thereof:

“the obligation arises when all amounts that became due in convention with the property during the two years preceding the date of application for the certificate have been fully paid.”[5]

[31] In *City of Tshwane Metropolitan Municipality v Mathabathe*[6] after clearance certificate figures were issued showing historical amounts, the court a quo granted relief forcing the City of Tshwane to issue figures not preceding two years as provided for in section 118 (1). On appeal, it was held that the principal element of section 118(1) are:

- (a) a veto or embargo provision within a time limit in section 118(1);
- (b) a security provision without a time limit in section 118(3);
- (c) under section 118(1) a municipality has the capacity to block the transfer of ownership of immovable property until debts and owing to it have been paid in certain circumstances section 118(3), unlike Section 118(1) is on its own wording and independent, self-contained security provision without a time limit.[7]

[32] In *Jordaan v Tshwane Metropolitan Municipality*[8], the court declined to confirm the order of constitutional invalidity made in the court a quo. It was held that section 118(3) could properly and reasonably be interpreted, without constitutional objection, to mean that the

'charge upon on the property' it provides for does not survive transfer of the property to a new owner. In other words, the municipality will still have recourse against the previous owner for the unpaid amounts that have not prescribed.

REASONS FOR THE

JUDGMENT

[33] I now deal with the defence is raised by the respondents. It has been contended on behalf of the respondent that the application is a review coupled with a declaratory order and mandatory interdict. It is furthermore contended that the provisions of Rule 53 of Uniform Rules of Court should have been followed which would have allowed the respondent to file the record. The respondent has also contended that the court cannot declare a decision unlawful without a proper review application.

[34] The submission made on behalf of the respondent has no legal and factual basis, in my view, the applicants need not specify the section under which the review of the administrative action is brought, provided that the facts on which the cause of action is based and the legal basis of such cause of action is set out. In this case, the applicant factually requires the clearance figures to be issued that the reflective of the provisions of Section 118(1) of the Act where those figures should be limited to a period of 2 years preceding the application for a clearance certificate. The legal basis is a limitation of two years preceding the application for the clearance certificate imposed by the section.

[35] It follows therefore that the application for clearance figures and the issuing thereof by the Respondent to the applicant and the review of those figures, fall within the purview of section 6 of PAJA in terms of which Section 6(2) provides as follows:

“(2) A court or tribunal has the power to judicially review an administrative action if

- (a) A mandatory and material procedure or condition prescribed
- (b) by an empowering provision was not complied with;
- (c) the action was procedurally unfair;
- (d) the action was materially influenced by an error of law;
- (e) the action was taken: -
 - (i) for a reason not authorised by the empowering provision;
 - (ii) because irrelevant considerations were taken into account or relevant considerations were not considered;
- (f) the action itself: -
 - (i) contravenes a law or is not authorised by the empowering provision;
 - (ii) is not rationally connected to the purpose of the empowering provision

[36] The applicant for a review, may in my view, choose whether to bring such application in terms of either Rule 6 or Rule 53 of the Uniform Rules of Court. This choice finds support in terms of the Administrative Review Rules, made by the rules of Boards of Court Under section seven of PAJA, which came into operation on 4 November 2019.[9]

- [37] Rule 2(3) of the Administrative Review Rules, where an application has been brought in terms of rule of the uniform rules of Court, provides as follows:
- (a) The applicant shall make any portion of the record of the proceedings with which it may previously have been furnished by the administrator available to every respondent who opposes the application within 10 days of receipt of a notice of opposition from such respondent, and the time allowed to deliver an answering affidavit.
- [38] When the application was launched, it is evident from the papers that the only recording possession of the applicant was the clearance figures which are the subject of this litigation and it was annexed to the founding affidavit. In answer to the applicant's case, the respondent filed a court order and an account enquiry. These are evidently the documents upon whose basis the Respondent relied on when it issued the schedule of the clearance certificate figures. It is also not disputed that the figures showing the amount also go beyond the two-year embargo imposed by Section 118(1) of the Act. It is highly unlikely that the respondent had any other document forming the record upon which its decision to issue the clearance figures relied.
- [39] As a consequence of the account enquiry documents, the Applicant amended her notice of motion and sought a further order directing the Respondent to provide a revised schedule and to provide a certificate upon payment of the amount stated in the schedule and declaring the current schedule null and void in so far as it may be required. The defence on violation of the principles of review as contended by the Respondent is in my respectful view and unsustainable.
- [40] On the defence that the application offends the doctrine of separation of powers in that, amongst others, courts recognise the proper role of the executive and do not attribute to themselves superior wisdom in relation to matters and entrusted to other branches of the State, it is without doubt that the procedures set out in PAJA are aimed at judicial review of administrative action. It follows therefore that the judicial review permissible by law does not amount to the violation of the separation of powers doctrine.
- [41] The court is asked to declare that the current figures issued for the period beyond the two years preceding the application for clearance certificate is in violation of Section 118(1). This is not an overreach and the defence must also fail.
- [42] The Respondent furthermore relied on the settlement agreement between the Blair Athol Homeowners Association and the Respondent in another litigation. It contends that because of the existence of the order which has never been challenged, it is entitled to issue a schedule clearance figures going beyond the two years. What this argument fails to appreciate is the fact that the debt outstanding relates to municipal taxes which hardly prescribes and the personal claim the Respondent has will continue even after the clearance certificate figures not going beyond the two-year limit by Section 118(1) are issued. The court order created a preference to the respondent in respect of historical debt due in terms of section 118(3) of the Act. In my view, it can only apply as envisaged in section 118(1)

wherein in the case of the latter, the respondent has no discretion to exercise regarding the time embargo imposed by the section.

- [43] It follows therefore that the historical debt cannot be sought and payment been forced as a prerequisite to issue the correct clearance certificate figures upon payment of which the clearance certificate would be issued.
- [44] Based on the estimated monthly rates and taxes it is evident in my view that and inference can be drawn that if the calculation of the clearance figures is limited to a period imposed by Section 118(3) the figures will be significantly lower than the current schedule suggested. I hold the view that the Applicant has made out a case.

ORDER

[45] The following order is made:

- (a) The schedule issued by the Respondent to the Applicant, Annexure FA8 to the founding affidavit is hereby reviewed and set aside insofar as it goes beyond the two-year period preceding the application for clearance certificate;
- (b) The Respondent is hereby ordered to issue to the Applicant a written statement in terms of the provisions of section 118(1) of the Local Government Municipal Systems Act the 2 of 2000 that it is limited to amounts that become due in connection with Erf [...] Lindley Township, Registration Division JQ, Province of Gauteng for municipal property taxes, levies and duties preceding the date of application for the certificate applied for in terms of the provisions of section 118(1) of the Local Government Municipal Systems Act 32 of 2000 as well as a detailed calculation of the said amount;
- (c) The Respondent is ordered to issue a certificate in terms of section 118(1) of the Local Government Municipal Systems Act 32 of 2000 Upon payment of the amount due to it that is old in respect of Erf [...] Lindley Township, Registration Division JQ, Province of Gauteng with regard to Municipal property taxes, other municipal taxes, levies and

duties during the two years only preceding the date of application will the certificate applied for in terms of the provisions of section 118(1) of the Local Government Municipal Systems Act 32 of 2000;

- (d) The Respondent is ordered to pay the costs of the application.

SENYATSI ML

Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

REPRESENTATION

Date of hearing: 07 June 2021

Date of Judgment: 15 October 2021

Applicants Counsel: Adv M Reineke

Instructed by: Deon Rens Attorneys

Respondents Counsel: Adv G Mothibi

Instructed by: Leepile Attorneys Inc.

[1] 2006

(5) SA 10 (SCA)

[2] Above

[3] 2010

(5) SA 196 (SCA)

[4] See para [13] of the City of Cape Town

[5] See para [14] of the City of Cape Town

[6] [2013] ZASCA 60

[7] See para [9]

[8] 2017

(6) SA 287 (CC)

[9] See Erasmus Superior Court Practice Commentary Rule 53, R513, 2020. D1-706

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