

SOUTH AFRICA / JUDGMENT

Koster, Berdy Swartruggens Tax Payers Association v Kgetleng Rivier Local Municipality (CIVAPP5/2016) [2016] ZANWHC 38 (17 June 2016) [2016] ZANWHC 38

COURT

North West High Court, Mafikeng

BEFORE

Landman, Gura, Gutta

CASE / FILE NUMBER

CIV APP 5/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION, MAHIKENG

CASE

NO: CIV APP 5/2016

In

the matter between:

KOSTER,
DERBY, SWARTRUGGENS
TAX
PAYERS ASSOCIATION
APPELLANT
and
KGETLENG RIVIER LOCAL
MUNICIPALITY RESPONDENT
LANDMAN J; GURA J &
GUTTA J

JUDGMENT

Landman J:

Introduction

[1] The appellant, the Koster, Derby and Swartruggens Taxpayers Association, appeals against the whole judgment and order delivered

on 2 July 2015 by Hendricks J in terms of which the court dismissed an application to declare that the property rates and taxes levied for certain years by the Kgetleng River Local Municipality (the respondent) were levied unlawfully. The appeal is with leave of the court a quo.

[2] The court a quo:

- (a) rejected the appellant's objection to the locus standi and authority of the acting municipal manager to depose to an affidavit or act on the half of the respondent;
- (b) held that the appellant was obliged to comply with the provisions of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 and had not done so;
- (c) upheld a point of non-joinder of the Member of the Executive Council of the North-West province for Local Government;
- (d) held that the Promotion of Administrative Justice Act 3 of 2000 (PAJA) was also applicable and that the application was launched out of time; and
- (e) dismissed the application without hearing the merits of the application.

The appellant challenges these rulings and then seeks to have this court decide the merits of the application and make the declaration that it seeks. We declined to hear the merits of the application. The appellant was entitled to appeal the decision of the court a quo because, after ruling on the points in limine, the court dismissed the application.

Mootness

[3] Mr Snyman, who appeared for the respondent, submitted that the appeal should be dismissed because the appeal was moot. He submitted that there was no allegation that the respondent had implemented the rates and taxes for the years in question. This overlooks the averment in para 4 of the founding affidavit that the respondent has been levying rates and taxes for these years. In its answering affidavit the respondents noted these allegations. The matter is not moot for notionally the members of the appellant and other residents in the area may seek to recover any rates and taxes levied and paid if the declaratory is granted.

The authority of the acting municipal manager

- [4] In its replying affidavit, the appellant's disputed the locus standi and authority of the acting municipal manager to depose to the answering affidavit or to act in any way on behalf of the respondent. The appellant alleged that the acting municipal manager's appointment was in conflict with the provisions of section 54A of the Local Government: Municipal Systems Act 32 of 2000. The appellant alleged that the acting municipal manager had not been lawfully appointed at the time he deposed to the answering affidavit so that he did not have authority to oppose the application on behalf of the respondent.
- [5] It is common cause that the respondent did not seek leave to file a further affidavit in order to deal with this challenge. Nevertheless, the point was taken that the appellant was obliged to make this challenge in terms of Rule 7 of the Uniform Rules of Court. The court a quo upheld the objection.
- [6] Mr Du Preez SC, with him Mr Greef, who appeared for the appellant, submitted that the court a quo erred in holding that the appellant should have raised the point in terms of Rule 7 because this Rule specifically provides for a party to challenge the authority of an attorney acting for a party and therefore the Rule is not applicable to the point raised by the respondent.
- [7] Rule 7(1) of the Uniform Rules of Court provides as follows:
- '(1) Subject to the provisions of sub-Rules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfies the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.'
- [8] There is no merit in this ground of appeal. First no authority is needed to depose to an affidavit. Secondly, the purpose of Rule 7 is to capture and deal with challenges such as the one raised by the respondent. I can do no better than cite a passage by Opperman AJ in *Firststrand Bank Limited v Michael Gary Hazan and Another* (unreported judgment under case number 2013/47366, Gauteng South High Court) at para 26, where he said:
- 'In determining the question whether a person has been authorised to institute and prosecute motion proceedings, it is irrelevant whether such person was authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof that must be authorised. The remedy of a respondent who wishes to challenge the authority of a person allegedly acting on behalf of the purported applicant is not to challenge the authority in the answering affidavit but instead to make use of Rule 7(1) of the Uniform Rules of Court. See *Unlawful Occupiers, School Site v City of Johannesburg* 2005
- (4) SA 199 (SCA) para [14]-[16]; *Eskom v Soweto City Council* 1992

- (2) SA 703 (W) at 705C-J; *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) para [18]-[19]; *ANC Umvoti Council Caucus and Others v Umvoti Municipality* 2010 (3) SA 31 (KZP) para [27]-[28] and *FirstRand Bank Ltd v Fillis* 2010
- (6) SA 565 (ECP) para [12] - [13].

The respondents did not avail themselves of the procedure provided for in Rule 7(1), and it is thus not open to the respondents to challenge the authority of the deponent to FNB's founding affidavit either in regard to deposing to the affidavits or in regard to instituting the applications.'

- [9] It follows that the ruling of the court a quo regarding the obligation to launch the challenges to the authority of the acting manager in terms of Rule 7 was the correct one.

Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002

- [10] Section 3(1) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 (the Institution Act) provides that no legal proceedings for recovery of a debt may be instituted against an organ of state unless

- (a) the creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal

proceedings in question; or (b) the organ of state in question has consented in writing to the institution of those legal proceedings in certain circumstances. It is common cause that no such notice was given. The question is whether the court a quo was correct in holding that it should have done so.

- [11] A debt as defined in section 1 of the Institution Act means:

'any debt arising from any cause of action-

- (a) which arises from delict, contractual or any other liability, including a cause of action which relates to or arises from any-
- (i) act performed under or in terms of any law;
- (ii) omission to do anything which should have been done under or in terms of any law; and ...'

- [12] The court a quo held with reference to section 1 of the Institution Act that a declaratory order amounted to a debt in terms of the Institution Act. However, it is clear that a declaratory order, even if it is preparatory to a claim for the repayment of rates and taxes, does not constitute a debt as defined. A debt for the purposes of this definition is confined to a claim for damages. See *Vhembe District Municipality v Stewarts and Lloyds* (397/2013) [2014] ZASCA 93 (26 June 2014) at paras-14 and 15. The rational for the obligation to give prior notice is found in the paragraph 16 of Vhembe's case as follows:

'As correctly observed by Rall AJ in *Thabani Zulu*, 5 the evidence in damages cases is more likely to depend on the memory of people than on documents, and it is accordingly desirable that the defendant be given timeous notice of the proceedings in order for it to be able to investigate the

contemplated claim, and to secure the necessary evidence. By contrast as Lever AJ put it in Nicor Consulting (para 26) ‘a claim for payment in terms of a contract is more likely to rely on documentary evidence, such as contracts, delivery notes and correspondence, as well as possible legal issues, such as whether or not the relevant functionary had the necessary authority to enter into the contract or not’. 6 I accordingly hold, as the high court did, that as the first respondent’s claim is not a damages claim the Act does not apply to it. It was therefore unnecessary for the first respondent to have complied with s 3 of the Act.’

Non-joinder of the MEC

[13] The appellant challenges the ruling by the court a quo that the MEC for Local Government should have been joined. The respondent no longer relies upon this point. The result is that it is unnecessary to consider whether the court a quo was correct in this regard. But two points need to be made.

[14] First, non-joinder is a dilatory plea and does not lead to the dismissal of the application. *Collin v Toffie* 1944 AD 456 at 564. The application should have been postponed to enable the appellant to apply for the joinder of the MEC. Secondly, there is the possibility that if the declaratory were to be granted and respondent Municipality were consequently to be no longer financially

sustainable, the North West Provincial Government would need to step in and take over the burden. See section 139(b) of the Constitution

of the Republic of South Africa of 1996 and *Cf Liebenberg NO and Others v Bergrivier Municipality* (737/2011) [2012] ZASCA 153; [2012] 4 All SA 626 (SCA) (1 October 2012). The appellant should, at least, serve a copy of the application on the MEC for Local Government.

Promotion of Administrative Justice Act 3 of 2000

[15] The court a quo took the view that the application for a declaratory order was tantamount to a review application and that PAJA applied and therefore the period within which the applicant should have applied for a review of the heads had lapsed and no application for condonation for the late institution of the review had been made. The court a quo decided that this point in limine was decisive of the application.

[16] The appellant submits that the power of the respondent is an original power and not an administrative act and therefore PAJA does not apply.

[17] The imposition of rates and taxes is an original power vested in a local authority by section 229 of the Constitution of the Republic of South Africa of 1996. It is a legislative power and does not constitute administrative action. It can be reviewed on the grounds of the principle of legality. See *Fedsure Life Insurance v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17; 1999 (1) SA 374 (CC) at par 45; *Kungwini Local Municipality v Silver Lakes Home Owners Association*

[2008] ZASCA 83; 2008 (6) SA 187 (SCA); City of Tshwane v Marius Blom and G C Germishuisen 2014

(1) SA 341 (SCA).

[18] Mr Snyman, relying on Goosen J's judgment in Gillyfrost 54 (Pty) Ltd v Nelson Mandela Bay Metropolitan Municipality, unreported judgment of the Eastern Cape Local Division, Port Elizabeth, case no 1099/2013), submitted that the actual imposition

of rates and taxes, as distinct from the power to do so, is a complex activity which also includes many other acts; some of which

constitute administrative action.

[19] The appellant seeks a declaratory order based on the principle of legality and it is also entitled to review an act on the basis of the doctrine of legality. It is unnecessary to decide whether a challenge to the imposition and process of levying rates by the respondent for the years in question involves a challenge to any administrative acts. The appellant is content to rely on the principle of legality and it may do so. Should the court hearing the merits decide that the challenge to the imposition of rates also requires it to consider and review administrative action, then the appellant may be faced with a predicament. But I am unable to say that the appellant was compelled to found its application in terms of PAJA.

Summary

[20] To summarise:

- (a) The court a quo correctly rejected the appellant's objection to the locus standi and authority of the acting municipal manager to depose to an affidavit or act on behalf of the respondent on account of its failure to employ Rule 7.
- (b) The court a quo's ruling that the appellant was obliged to comply with the provisions of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 is set aside.
- (c) The respondent has abandoned any reliance on the non-joinder of the Member of the Executive Council of the North West Province for Local Government. But in any event, the court a quo should have postponed the application for this purpose and not have dismissed the application. The application should be served on the MEC concerned.
- (d) The court a quo's ruling that the Promotion of Administrative Justice Act 3 of 2000 (PAJA) was also applicable and that the application was launched out of time is set aside. The appellant is entitled to frame its case solely on the principle of legality and cannot be compelled to bring it in terms of PAJA.

The relief and costs

[21] It follows that the appeal should be upheld and the dismissal of the application with costs by the court a quo must be set aside and replaced by an order granting a postponement coupled with a suitable order for costs.

[22] The appellant has been successful and therefore costs should follow the result.

Order

[23] In the result I make the following order:

1. The appeal is upheld

2. The order of the court a quo is set aside and replaced by the following:

‘(1) The appellant’s objection to the locus standi and authority of the acting municipal manager to depose to an affidavit or act on behalf of the respondent is dismissed.

(2) The respondent’s objection that the applicant was obliged to comply with the provisions of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 is dismissed.

(3) The respondent has abandoned any reliance on the non-joinder of the Member of the Executive Council of the North West Province for Local Government.

(4) The respondent’s objection that the application is not brought in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) is dismissed.

(5) The application is postponed to a date to be arranged with the registrar for hearing on the merits of the application.

(6) The applicant is directed to serve a copy of its application on the Member of the Executive Council of the North West Province for Local Government.

(7) The respondent is to pay the costs incurred by the postponement.’

3. The respondent is to pay the costs of the appeal.

A A Landman

Judge of the High Court

I agree

Samkelo Gura

Nadia Gutta

Appearances

Date of hearing:

3 June 2016

Date of Judgment:

17 June 2016

For the Appellant:

Adv Du Preez SC and Adv Greef instructed by Nienaber & Wissing Attorneys

For the Respondent:

Adv Snyman instructed by Motshabi & Modiboa Attorneys

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