

SOUTH AFRICA / JUDGMENT

Nelson Mandela Bay Municipality v Amber Mountain Investments 3 (Pty) Ltd (576/2016) [2017] ZASCA 36; 2017 (4) SA 272 (SCA) (29 March 2017) [2017] ZASCA 36

COURT

Supreme Court of Appeal

BEFORE

Cachalia, Theron, Dambuza, Mocumie, Molemela

CASE / FILE NUMBER

576/2016

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 576/2016

In the matter between:

NELSON MANDELA BAY MUNICIPALITY APPELLANT

and

AMBER MOUNTAIN INVESTMENTS 3 (PTY) LTD RESPONDENT

Neutral citation: Nelson Mandela Bay Municipality v Amber Mountain Investments (576/2016)

[2017] ZASCA 36 (29 March 2017)

Coram: Cachalia, Theron, Dambuza and Mocumie JJA and Molemela AJA

Heard: 7 March 2017

Delivered: 29 March 2017

Summary: Local authority : Rates : Property rates levied for a financial year : levying of rates an integral part of budget process.

Interpretation : Acts to be read together as they form part of current system of local government : Local Government: Municipal Property Rates Act 32 of 2000 : s 13(1) : words and phrases : ‘as from’ : interpreted to mean that the rate is payable within the period of the financial year : s 13(1) read with ss 12, 26, 27 and 28 : obligation to pay property rates arises at the start of the financial year : obligation to make payment arises once the municipality has determined the date of payment and amount due : Local Government: Municipal Finance Management Act 56 of 2003 : ss 15 to 19 : municipality’s duties to approve annual budget for each financial year, budget including projected revenue for current year based on collection levels to date : budget to be finalised before start of financial year : Local Government: Municipal Systems Act 32 of 2000 (the Systems Act) : certificate is issued in terms of s 118(1) in respect of municipal debts which have become due, not future debts : municipality’s rates policy to the contrary is ultra vires the Act and invalid.

ORDER

On appeal from: Eastern Cape Local Division of the High Court, Port Elizabeth (Tshiki J sitting as court of first instance):

1 The appeal is dismissed with costs.

Theron JA (Cachalia, Dambuza and Mocumie JJA and Molemela concurring):

- [1] This court is called upon to determine whether, following upon the sale of immovable property, the property owner is liable to pay the total rates on the property determined for the financial year or only the rates calculated until the property is transferred. The outcome of this appeal turns on the interpretation of various provisions of the Local Government: Municipal Property Rates Act 6 of 2004 (the Rates Act), the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act) and the Local Government: Municipal Finance Management Act 56 of 2003 (the Finance Act). These Acts must be read together as they form the basis for the current system of local government.[1]
- [2] The facts giving rise to the dispute between the parties are largely common cause. The respondent, Amber Mountain Investments 3 (Pty) Ltd, was the previous owner of immovable property described as remainder of Erf 8757, Walmer, Port Elizabeth (the property). The respondent sold the property to Joburg Skyscraper (Pty) Limited. Before transfer of the property, the respondent required a rates clearance certificate, in terms of s 118 of the Systems Act, from the appellant, the Nelson Mandela Bay Municipality, (the municipality). The municipality’s financial year commences on 1 July in a year and ends on 30 June the following year. The municipality required payment of rates until the end of its financial year, being 30 June 2010, as a condition for furnishing the certificate. The municipality presented the respondent with an account for the sum of R2 281 014,68. The respondent paid the amount, under protest, in order to obtain the certificate. At the time of payment, the respondent’s actual indebtedness to the municipality was for the sum of R1 214 482,68. The respondent says that this constituted an overpayment of its obligations to the municipality of R1 066 532, for which it was entitled to be reimbursed.

[3] The respondent instituted action against the municipality in the Eastern Cape Division of the High Court, Port Elizabeth. The matter proceeded on the basis of the agreed facts set out in para [2] above. At the request of the parties, the court directed that the issues be separated and that the sole issue for determination was:

‘whether the [appellant] is obliged to refund a portion of the rates in respect of the remainder erf 8757, Walmer, for the period from the date of transfer of the property to Joburg Skyscraper (Pty) Ltd on 25 February 2010 until the end of the [appellant’s] financial year terminating on 30 June 2010. . . due regard being had to the manner in which this issue has been pleaded by the parties, and in particular the validity of the second sentence in Clause 31 of the [appellant’s] Property Rates Policy for the 2009/2010 financial year’.

[4] In the court a quo, as in this court, the municipality contended that in light of the relevant provisions in Chapters 2 and 3 of the Rates Act, the respondent was obliged, when it sought a rates clearance certificate, to pay the full property rate on the property for the financial year commencing 1 July 2009. The court a quo found that the respondent was only obliged to pay rates on the property until the date of transfer of the property to Joburg Skyscraper, ie 25 February

2010. It found that ‘it would be unjust for the [appellant] to claim rates from the [respondent] when it was no longer the owner of the property. The [respondent] can only be obliged to pay rates for property that is registered in its own name’. The court ordered that the municipality repay the amount of R1 066 532, including interest, to the respondent. It is against this judgment that the appellant appeals, with the leave of the court a quo.

[5] Municipalities are vested with original constitutional power to levy rates on property.[2] In terms of s 229(1)(a) of the Constitution a municipality has authority to impose ‘rates on property and surcharges on fees for services provided by or on behalf of the municipality’. The original power to levy rates is regulated by national legislation in the form of the Rates Act.[3]

[6] Section 2(1) of the Rates Act empowers a metropolitan or local municipality to ‘levy a rate on property in its area’.

Section 24(1) of the Rates Act provides that a ‘rate levied by a municipality on a property must be paid by the owner of the property’. Section 2(1) of the Rates Act, read with s 24(1) expressly empowers a municipality to levy and determine rates on property.

[7] Of particular relevance to this dispute are ss 12 and 13(1) of the Rates Act. Section 12 reads:

‘12(1) When levying rates, a municipality must levy the rate for a financial year. A rate lapses at the end of the financial year for which it was levied.

- (2) The levying of rates must form part of a municipality's annual budget process as set out in Chapter 4 of the Municipal Finance Management Act. A municipality must annually at the time of its budget process review the amount in the Rand of its current rates in line with its annual budget for the next financial year.

Section 13(1) reads:

‘(1) A rate becomes payable-

- (a) as from the start of a financial year; or
- (b) if the municipality's annual budget is not approved by the start of the financial year, as from such later date when the municipality's

annual budget, including a resolution levying rates, is approved by the provincial executive in terms of s 26 of the Municipal Finance Management Act’.

- [8] It was argued on behalf of the municipality that ss 12 and 13 make plain that an owner's obligation was to pay one annual property rate and that such liability arose, and was fixed, on the first day of the municipality's financial year, namely 1 July. The use of the singular noun, ‘a rate’, so the argument went, in these sections and other sections of the Rates Act, is indicative that a single rate, for the entire financial year, is payable at the start of such financial year. Accordingly, when the respondent sought a rates clearance certificate on 25 February 2010, its liability to pay a single rate for the entire financial year had already, by operation of law, been fixed as at 1 June 2009 and the municipality was entitled to require payment of the property rate for the entire financial year, before issuing a rates clearance certificate.
- [9] The nub of the municipality's case is this. Once its financial year commenced, the respondent became liable to pay the rates fixed for that financial year and it was entitled to withhold the rates clearance certificate until it had received payment of rates for that financial year. There are pertinent questions which arise in the determination of the municipality's contentions. Why does the legislation stipulate that a municipality must levy the property rate for a financial year (s 12(1))? Why does the levying of rates form part of a municipality's annual budget process (s12(2))? The answer to these questions will assist in determining whether the municipality's contentions should be upheld.
- [10] As mentioned, the outcome of this appeal turns on the interpretation of various provisions of the Rates Act, the Systems Act and the Finance Act. In relation to the Finance Act, ss 15 to 19 are relevant. In terms of s 15, a municipality may incur expenditure only in terms of an approved budget. The council of a municipality must approve an annual budget for the municipality for each financial year, before the start of that financial year (s16(1)). The mayor of the municipality must table the annual budget at a council meeting at least 90 days before the start of the budget year (s16(2)). The annual budget must realistically set out the anticipated revenue for the budget year from each revenue source (s17(1)(a)). Section 17(3) of the Finance Act details various documents that are to be tabled with the annual budget,

including draft resolutions approving the budget and imposing any municipal tax, and a projection of cash flow for the budget year by revenue source. An annual budget may only be funded from realistically anticipated revenues to be collected, cash-backed accumulated funds from previous years' surpluses not committed for other purposes and borrowed funds (s18(1)). Revenue projections in the budget must be realistic, taking into account projected revenue for the current year, based on collection levels to date and actual revenue collected in previous financial years (s18(2)). A municipality may only spend money on a capital project if the money for the project has been appropriated in the capital budget (s19(1)(a)).

It is clear from these provisions, that the collection of rates forms part of a municipality's budget – which must be

determined before the financial year commences.

[11] In regard to the Rates Act, its main objective is to regulate the power of a municipality to impose rates on property. The preamble of the Rates Act recognises that 'there is a need to provide local government with access to a sufficient and buoyant source of revenue necessary to fulfil its developmental responsibilities'. It also recognises that income derived from property rates is a critical source of revenue for municipalities to achieve their constitutional objectives.[4] This was confirmed in *Kalil NO & others v Mangaung Metropolitan Municipality & others*,[5] where Leach JA explained:

'Sections 152(1)(b) and

(2) of the Constitution oblige municipalities to provide services to their communities in a sustainable manner. In order to do so, a municipality is empowered by s 229 of the Constitution to raise funds by imposing rates on property in a process regulated by national legislation — the applicable legislation being the Systems Act, the Finance Act and the Rates Act'.[6]

[12] Two conclusions follow: First, it is clear from the relevant provisions of the Rates Act and the Finance Act that the levying of rates is an integral part of a municipality's annual budgetary process.[7] Second, the approval of the budget must go hand in hand with the determination of rates, as the revenue from rates is essential to fund the budgeted expenditure.[8] It is for this reason that the property rate is determined for each financial year. It is only once the rate is determined that a municipality can estimate its income for the financial year and prepare its budget in accordance with that projected income.

[13] To return to the main issue in this case, when is the property rate payable? In terms of s 13(1) (a) of the Rates Act, a rate becomes payable 'as from the start of a financial year'. (Emphasis added.) In my view, the use of the phrase 'as from' as opposed to the word 'on' is significant. The phrase 'as from' denotes the commencement of a period while the word 'on'

specifies a particular date. If the word 'on' had been used by the legislature, the rate would have been payable on 1 July, the start of the municipality's financial year. Support for this view can be found in *Kleynhans v Yorkshire Insurance Co Ltd*[9] where Schreiner ACJ said:

'It seems to me that the important words are those that fix the commencement of the period, which here are 'as from'

('vanaf') the date on which the claim arose. Those words are the typical words of commencement that bring the ordinary civil method of computation into operation'.[10]

[14] In attributing a meaning to the phrase 'as from', regard must be had to the ordinary meaning of the words, which must be determined in the context of the statute, read as a whole, with reference to the scope and purpose of the statute.[11] The Rates Act defines a 'financial year' as the period starting from 1 July in a year to 30 June the next year. Section 13 falls under Chapter 2 of the Act which is titled 'rating' and is preceded by s 12(1), which provides that a municipality must levy the rate for a financial year and that a rate lapses at the end of the financial year for which it was levied.

[15] There are other provisions in this chapter of the Rates Act that provide assistance in the enquiry as to when a property rate is payable. Sections 26, 27 and 28 deal with the method and time of payment of rates, the furnishing of accounts and the recovery of arrear rates from tenants and occupiers. These sections read, in relevant part:

'26(1) A municipality may recover a rate-

- (a) on a monthly basis or less often as may be prescribed in terms of the Municipal Finance Management Act; or
- (b) annually, as may be agreed to with the owner of the property.

(2)(a) If a rate is payable in a single amount annually it must be paid on or before a date determined by the municipality.

- (b) If a rate is payable in instalments it must be paid on or before a date in each period determined by the municipality

....

27(1) A municipality must furnish each person liable for the payment of a rate with a written account specifying-

- (a) the amount due for rates payable;
- (b) the date on or before which the amount is payable;

28(1) If an amount due for rates levied in respect of a property is unpaid by the owner of the property after the date determined in terms of section 26 (2), the municipality may recover the amount in whole or in part from a tenant or occupier of the property'.

[16] The import of these sections is that the rate may be recovered on a monthly basis or annually, subject to an election by the owner. In respect of both payment options, it is the municipality that determines the date by which payment must be made. It is the responsibility of the municipality to produce a statement reflecting the amount due in respect of rates and the date on which the amount is payable. Section 28(1) is of particular significance. Once the municipality has determined the amount due and the date on which such amount is payable, and the owner fails to make payment on the due date, the municipality may recover the 'amount due' from the tenant or occupier of the property. Section 28(1) does not entitle a municipality to recover the rate levied for the financial year from the tenant or occupier.

[17] Importantly the Act distinguishes between what is 'due' and what is 'due and payable'. In terms of s 13, the rate becomes payable (in the sense of the obligation to pay arising at that stage) 'as from the start of a financial year'. Section 26 empowers a municipality to determine when the rate is due. If a rate is payable in instalments then the municipality is required, by way of written accounts, to advise the payee of the date on which the rate is due.

[18] In the context of prescription and the distinction between what may be claimed and what is payable this Court said the following in *Union Share Agency & Investment Ltd v Spain*: [12]

'The distinction between the indebtedness being subject to the happening of an event and the payment being so subject is a vital one, and should not be overlooked.'

This passage was quoted with approval in *Trinity Asset Management (Pty) Ltd v Grindstone Investments (Pty) Ltd* [13] by Willis JA who went on to say:

'The very phrase "due and payable", ie both "claimable" and "payable" as at a point in time, indicates that "due" and "payable" are not coextensive with one another'. [14]

This court has held that the phrase 'prescription shall commence to run as soon as the debt is due' as used in s 12(1) of the Prescription Act 68 of 1969, means that:

'[T]here has to be a debt immediately claimable by the creditor or, stated in another way, that there has to be a debt in respect of which the debtor is under an obligation to perform immediately. [15]

[19] In terms of s 27 of the Rates Act, payment of the rate is subject to the happening of an event, namely, the municipality's

determination of the amount to be paid and the date by which payment must be made. A property owner's obligation in respect of property rates arises at the start of the financial year when the municipality determines the rate. If the rate is payable in

instalments, an owner's obligation to make payment arises once the municipality has determined the date of payment and amount due. Put differently, a portion of the debt in respect of rates becomes due from time to time. For these reasons, the argument advanced on behalf of the municipality, that the determination of an annual property rate is indicative of an intention that a single rate for the entire year is payable at the start of each financial year cannot be sustained.

[20] Adopting the tools of interpretation already referred to, and having regard to the definition of 'financial year' and the provisions of ss 12(1), 26, 27 and 28, the words 'payable as from' in s 13(1)(a)', must be interpreted to mean that the rate is payable within the period of the financial year and not on 1 July as contended by the municipality. Counsel for the municipality conceded that the legislature could have inserted the words 'due and' payable in s 13(1)(a), without offending the scheme of the Act if it was the intention that the rates should be due and payable on 1 July of each year.

[21] It is rule of statutory construction that provisions which interfere with protected rights should be narrowly interpreted. It is clear that the municipality's requirement for rates to be paid for a full year, as a condition for the issue of a clearance certificate in terms of s 118 of the Systems Act, adversely affects the rights of property holders to alienate their property. In my view s 13 (1)(a) of the Rates Act should therefore be interpreted narrowly to mean that the word 'payable' only fixes the rate for the

financial year, but does not mean that rate is also due at the same time.[16]

[22] The final question to determine is whether a municipality can, prior to issuing a rates clearance certificate, insist on payment of all rates, fees and charges in respect of the property for the current financial year, even if this period extends beyond the date of the certificate.

Section 118 of the Systems Act reads:

'(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 the two years preceding the date of application for the certificate have been fully paid.' (Emphasis added.)

[23] In my view the section is clear and unambiguous. The certificate is issued in respect of municipal debts which have become due in the two years preceding the date of application for the certificate and does not apply to future municipal debts. In *City of Johannesburg v Kaplan NO & another*, [17] this court said:

‘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 s 118(1) which have become due during a period of two years before the date of application for the certificate’.[18] (Emphasis added.)

[24] Clause 31 of the municipality’s rates policy provides:

‘In the case of an application for a certificate in terms of s 118 of [the Systems Act], the full amount which remains unpaid, inclusive of all instalments, for the remaining financial year shall be payable’.

This could include debts incurred after the date of application for a clearance certificate. Section 3 of the Rates Act empowers a municipality to make policy not inconsistent with the Act. In any event, policy cannot override, amend or be in conflict with laws and legislative instruments, otherwise the separation between legislature and executive will disappear.[19]

[25] This court in *City of Cape Town v Real People Housing (Pty) Ltd*[20] was faced with a policy in terms of which the municipality sought to ensure payment of debts for more than two years preceding the date of application for clearance certificate. Nugent JA said that:[21]

‘... any proviso that would have the effect of entitling the City to withhold a certificate until all debts were paid – would nullify the express language of the section and it might just as well not be there. I do not think it is necessary to cite authority for the trite proposition that a term cannot be implied in a statute if it would contradict its express terms. Had it been intended not to limit the period to two years then the words would not have appeared at all.

The dilemma in which the City finds itself is that it has left debts outstanding for more than two years albeit that the statute

contemplates prompt collection. No doubt there are understandable reasons why that is so but the City cannot resolve its dilemma by subjugating the statute to a policy that would frustrate its terms’.

[26] The clear intention of the legislature was to limit the period in s 118(1) to two years preceding the date of application for the certificate. The municipality’s policy contradicts the express terms of the statute and ‘would frustrate its terms’. To the extent that the municipality’s policy is inconsistent with s 118(1), it is ultra vires and void.

[27] To sum up: the relevant provisions of the Rates Act, the Finance Act and the Systems Act read together, buttress the contention of the respondent that the municipality was not entitled to withhold the property rates clearance certificate until it had received payment of the property rates for the entire financial year. Such property rates became payable (but not due) from the start of the financial year. Further, s 118(1) clearly applies to municipal debts which have become due in the two years preceding the date of application for the certificate and does not apply to future municipal debts. The question posed in para [3] above must therefore be answered in favour of the respondent.

[28] The appeal is dismissed with costs.

LV Theron

Judge of Appeal

APPEARANCES:

For the Appellant: SC Rorke SC

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Webbers, Bloemfontein

For the Respondent: LA Schubart SC

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[1] The preamble of the Systems Act reads: 'Whereas this Act is an integral part of a suite of legislation that gives effect to the new system of local government'. South African Property Owners Association v Johannesburg Metropolitan Municipality & others

[2012] ZASCA 157; 2013 (1) SA 420 (SCA) para 8.

[2] Fedsure Life Assurance & others v Greater Johannesburg Transitional Metropolitan Council & others

[1998] ZACC 17; 1999 (1) SA 374 (CC) paras 44 and 45; Gerber & others v Member of the Executive Council for Development Planning and Local Government, Gauteng & another 2003

(2) SA 344 (SCA) para 23.

[3] Body Corporate Croftdene Mall v Ethekwini Municipality [2011] ZASCA 188; [2012] 1 All SA 1 (SCA) para 14.

[4] A report issued by STATS SA (last updated September 2016) entitled, the 'Quarterly financial statistics of municipalities September 2016', sets out the income of municipalities. The total income of South Africa's municipalities for the quarter ending September 2016 was about R54 million, of which the income from property rates was over R15 million. See

<http://www.statssa.gov.za/publications/P9110/P9110September2016.pdf> accessed on 15 March 2017.

[5] Kalil NO & others v Mangaung Metropolitan Municipality & others

[2014] ZASCA 90; 2014 (5) SA 123 (SCA).

[6] Ibid, para 6.

- [7] South African Property Owners Association fn 6 above, para 32.
- [8] Ibid.
- [9] Kleynhans v Yorkshire Insurance Co Ltd 1957 (3) SA 544 (A).
- [10] Ibid, at 550F-H.
- [11] Consolidated Mines of South West Africa Ltd v Administrator, SWA & another 1958 (4) SA 572 (A) at 599A-C; South African Property Owners Association v Johannesburg Metropolitan Municipality & others [2012] ZASCA 157; 2013 (1) SA 420 (SCA) para 55; Liebenberg NO & others v Bergrivier Municipality
- [2013] ZACC 16; 2013 (5) SA 246 (CC); 2013 (8) BCLR 863 (CC) para 39.
- [12] Union Share Agency & Investment Ltd v Spain 1928 AD 74 at 80-81.
- [13] Trinity Asset Management (Pty) Ltd v Grindstone Investments (Pty) Ltd (1040/15) [2016] ZASCA 135 (29 September 2016).
- [14] Ibid, para 14.
- [15] Deloitte Haskins & Sells Consultants (Pty) Ltd. v Bowthorpe Hellerman Deutsch (Pty) Ltd [1990] ZASCA 136; 1991
- (1) SA 525 (A) at 532H-I.
- [16] City of Cape Town v Real People Housing (Pty) Ltd 2010
- (5) SA 196 (SCA) para 9.
- [17] City of Johannesburg v Kaplan NO & another 2006 (5) SA 10 (SCA).
- [18] Ibid, para 26.
- [19] Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd 2001 (4) SA 501 (SCA) para 7. See also Clinch v Lieb 1939 TPD 118 at 125.
- [20] City of Cape Town v Real People Housing (Pty) Ltd
- [2009] ZASCA 159; 2010 (5) SA 196 (SCA).
- [21] Paras 14 and 15.

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