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**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case No:20026/2019

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

NOT REVISED

31.08.23

In the matter between:

**STEWART SELEKA
RAISIBE STEPHINA SELEKA**

1st Applicant
2nd Applicant

and

**CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY
JOHANNESBURG DEEDS REGISTRAR**

1st Respondent
2nd Respondent

JUDGMENT

Coram NOKO J

Introduction

[1] The applicants purchased an immovable property, *to wit*, Erf [...] Berea, in 2009 from Mr Alan Wolf (seller), for R375 000.00. The parties agreed that the applicants would be liable for any of the charges due to the municipality as at the time of sale. In pursuance of the sale agreement the applicants applied for clearance certificate and the respondent stated that the amount due and payable is R148 559.42 before the clearance certificate can be issued. The applicants requested the respondent to write off the debt or discount the amount due since the said amount was beyond their means which request was rejected by respondent.

[2] The first respondent is the only party, participating in this proceeding, the second respondent having withdrawn its opposition, therefore reference to the respondent in this judgment refers to the first respondent.

Background

[3] The applicants having realised that the amount due for the clearance certificate is beyond their means, as stated above, requested that same should be written off in accordance with the Draft Property Rates Policy 2019/2020 (*Property Rates policy*) of the respondent and/or Local Government: Municipal Systems Act 117 of 1998 (Systems Act), and/or the Constitution Act 1996. The respondent rejected the request and the

applicants being aggrieved then approached the court contending that the respondent is, *inter alia*, failing its constitutional and legislative obligations to write off the historical debt.

Issues in dispute

[4] First, the court is invited to consider striking out the respondent's answering affidavit as same was served out of time. Secondly, whether the court can order the respondent to write off the historical debt of the seller and thirdly, whether a case has been made to grant an order that the first respondent should issue the rates clearance certificate in terms section 118 of the Systems Act.

[5] The other issue is whether the applicants are entitled to the discount on payments for rates and taxes in terms of the Property Rates policies of the respondent.

Submissions by the parties

Condonation

[6] The applicants contended that the respondent has filed its answering affidavit out of time and has failed to apply for the condonation for the late filing of the answering affidavit. The respondent was 29 days late in filing its answering affidavit. To this end the applicants contended that the answering affidavit by the respondent should be struck out and the application should proceed on the basis that it is unopposed.

[7] The respondent on the other hand retorted that the granting of condonation is purely a discretionary issue for the court, having regard to the conspectus of all facts at the court's disposal.

[8] The delay in filing the respondent's answering affidavit, so went the argument, was occasioned by the attempt by the respondent to resolve the matter between the parties without resorting to court. A debatement meeting was attended to with the applicants but could not bear any results. The counsel submitted that this would have minimised the prohibitive high court costs and further avoid clogging the court's roll with matters which could be settled between the parties.

[9] It must also be noted, so went the argument., that the applicants have also filed their replying affidavit more than four months late and have not applied for condonation. The applicants cannot therefore be heard to complain about respondent's non-compliance with the rules of court and at the same time paying lip service to the same rules.

[10] Notwithstanding the foregoing if the court is not inclined to grant condonation the respondent submitted that the dispute can be argued only on the applicants' founding papers since the replying affidavit would also have to be struck out.

[11] I have had regards to the contentions and submissions by both parties and noted that they were both lax in following the letter of the law when executing their respective instructions. The respondent has not applied for condonation and the applicants raised the issue of condonation in the replying affidavit which (affidavit) should have also been preceded by a condonation application as it was served late. It therefore meant that the

applicants' contention regarding late delivery by the respondent as raised in the replying affidavit can only be considered if condonation for late filing of the replying affidavit is granted. Now that the applicants have not applied for condonation then the question on the non-compliance by the respondent cannot be successfully raised.

[12] The applicants are individuals who are already in the afternoon of their age¹ and are also people of low means, their counsel having contended that the legal costs are unaffordable, one must have regard to this position and be flexible regarding application of the rules. The court held in *Melani v Sanlam Insurance Co Ltd*² that “*the basic principle is that a court considering condonation has a discretion, to be exercised judicially upon consideration of all facts, and it is a matter of fairness to both parties.*” To this end I have decided to allow both answering and replying affidavits to be considered in this *lis*.

Parties' submissions on Merits – Applicants

[13] The applicants raised several arguments in support of the application. First, the applicants contended that the respondent has unlawfully refused to change the particulars of the municipal accounts together with rates and taxes into their names. In this regard the respondent, so went the argument, has contravened the Municipal Systems Act. Counsel for the applicants referred to the provisions of section 118(3) of the Systems Act in terms of which the municipal fees are considered a charge to the property and enjoys preference upon any mortgage bond over the property. Further that all or any such fee or charge may also survive the registration of transfer of the property

¹ See para 17.3.1.4 of the Applicants' Replying Affidavit where it is stated that “[I] together with my wife are of ill health... [M]uch of that was caused by sever stress we suffer on this”. Caselines 005-17.

² 1962(4) SA 531 (A).

and are payable irrespective of who the owner is. The constitutional court judgement in *Jordaan and Others v City of Tshwane Metropolitan Municipality and Others* [2017] ZACC 31 (*Jordan's* judgment), had regards to the implication of section 118(3) and pronounced that debts of the owners of the property do not survive transfer of the property and the new owners will not be liable for the historical municipal debts. The applicants contended that the historical debts should therefore be written off and not be claimed against the applicants as new owners.

[14] Secondly, the applicants contended that the Property Rates policy of the respondent makes provision to consider exempting the poor and aged members of the public from paying exorbitant amount due for the municipal services. The applicants referred to Property Rates Policy³ in terms of which pensioners are entitled to rebates. To this end, so went the argument, the respondent failed in its obligations to provide the applicants with the necessary assistance with, *inter alia*, rebates.

[15] The conduct of the respondent, counsel for the applicants argued further, which persisted since 2013 offends the provisions of section 25 of the Constitution in that the “[A]pplicants are deprived of their property arbitrarily...”.⁴ The refusal to issue a certificate amount to the deprivation of the applicants of the right to property they acquired through sale and further through an order of Strydom J.

[16] The respondent must be considerate having regard to the fact that “... *Alan Woolf, was an accountant at the time the applicants’ purchased the property, they were and still are illiterate with no formal education, the applicants’ accepted (sic) that they*

³ See Applicants’ Heads of Argument at para 6.15 on CaseLines 006-28.

⁴ Ibid at para 6.12, CaseLines 006-27.

will be inheriting minimal municipal rates.”⁵ As at the time of this hearing and since the launch of the application the applicants have not been able to trace the seller. In addition, so the argument continued, that “[I]n no way does the Applicants’ suggest (sic) that they were misled by Alan Woolf. They understood that the accounts were lower at that time, and they had means at that time to pay for whatever debts on the property.”⁶

[17] That notwithstanding, counsel for the applicants conceded that ordinarily the person who must apply for the writing off of the historical debts is the title holder of the property. To this end there was no basis for the applicants to contend and request without specific authority and relevant motivation from the title holder that the applicants should seek for the writing off of the historical debt.

[18] Fourthly, the applicants’ counsel further contended that the respondent committed dereliction of duties since they failed to ensure that hijackers do not take over the property which do not belong to them. He contended further that the conduct of the officials of the respondent borders on fraud as hijackers, including BT Nxumalo, were assisted to open the accounts with the respondent. In this regard the seller had previously launched eviction proceedings and obtained an order from the Magistrate Court of the District of Johannesburg under case number 124522/2012 where hijackers were ordered to vacate the premises.

[19] Fifth, the applicants’ counsel contends further that the first respondent was in contempt of court as Strydom AJ made an order for the registration of the transfer of the property into the names of the applicants. The second respondent could not effect the

⁵ *ibid* at para 3.15, CaseLines 006-14.

⁶ *Ibid* CaseLines 006-14, at para 3.16.

registration of the transfer and the respondent refuses to issue the rates clearance certificate.

[20] The counsel for the applicants further confirmed, when asked by the court, that his understanding is that legally, the respondent is obliged to require payment for the rates and taxes for a period of two years preceding the date of the application of the clearance. In addition, that a party who is liable to pay for the clearance certificate is the title holder. The applicants' prayer in this regard is premised on the submission that the respondent is empowered to write off the amount due in terms of its property rates policy which stipulates that the aged are entitled a discount or grace.

[21] In view of the recalcitrant conduct on the part of the respondent, though having acknowledged that the owner is responsible for rates and taxes, the applicants contend that no blame should be attributed to the conduct of seller. The counsel for the applicants having asserted that "*... this matter is exceptional, in that in true since of the word, the previous owner cannot be faulted, as the status quo on the property was solely created by the First Respondent. The court should refuse to make any finding on the previous owner, as the First Respondent may wish to happen*".⁷

Respondent's Contentions

[22] Regarding the merits of the case the respondent contends that the applicants have indemnified the owner for any liabilities for services, rates and taxes levied by the respondent and their argument that they thought that the amount due to the respondent was minimal cannot be used against the respondent. The applicants should have first

⁷ See para 6.8 of the Applicants' Heads of Argument, CaseLines 006-26.

approached the respondent to verify the figures before agreeing to indemnify the seller. It is because of the indemnity granted to the seller by the applicants that the respondent demands the money which is due relative to the property.

[23] On the issue of the Mr Nxumalo, the respondent's counsel submitted that he had a lease contract with the owner hence the municipal account was opened for him. The applicants further seem to confuse the rates and taxes and the liability for water and electricity consumptions and the owner is liable for the former where transfer must take place.⁸ This position was changed during argument by the counsel for the respondent that in fact the amount payable by the title holder includes the municipal charges for services which are due within two years preceding the date of application for the clearance certificate.

[24] Regarding the court order, which was made by Strydom AJ, so went the argument, it was directed at the second respondent and was silent regarding the first respondent and to that end there are no bases for the applicants to contend that the first respondent could not have been in contempt of that order. The respondent was not ordered to do anything, and the respondent cannot therefore be blamed for not doing anything.

[25] The counsel contended that the papers of the applicants' case are confusing, do not reflect a proper draftmanship and further fails to be supported by the facts alluded to in the founding and or supporting papers. Further that it would be a toll order for the court to decipher the beginning and the end of the papers. That notwithstanding the application should fail primarily because the title holder must pay for the clearance

⁸ See para 31 of the First Respondent Answering Affidavit, CaseLines 004-40.

certificate figures which were duly given to the transferring attorneys and are annexed to the applicants' founding papers marked SS18⁹. In addition, the contentions predicated on the respondent's Property Rate Policies, Systems Act and the Constitution manifest a distorted understanding of the provisions thereof and find no application or lay a proper bases for the applicants' case. To this end, the counsel submitted, the application should be dismissed with costs.

[26] The respondent further contended that the sale agreement has been signed only with Alan Woolf and the applicants would still face an insurmountable challenge as Alan Woolf is not the only registered owner of the property. I asked the counsel with the object to establish the relevance of this argument before the court and none could be demonstrated as the relief sought is limited to the issuing of clearance certificate if the court find reason to order the writing off or reduction of the amount required to issue rates clearance certificate.

The applicable legal principles and analysis.

[27] Whilst it is not in dispute that the applicants are senior citizens and are entitled to rebates for the amount which may be due to the municipality for rates and taxes and services, this apply to instances where the senior citizens are the registered owners of the property and not just purchasers who have not as yet taken ownership of the property. To the extent that the applicants founded their claim on the basis that they are entitled to rebates based on the Draft Property Rates Policy 2019/2020 of the respondent such a claim must fail. The applicants are not registered owners of the property and therefore are not eligible candidates to derive benefits from the Property Rates Policy.

⁹ See CaseLines 001-58.

[28] The respondent's contention predicated on the Constitution is also bound to fail as nothing in the papers suggest that the conduct on the part of the respondent infringes on the applicants' property rights. At this juncture the applicants are not owners of the property and have rights arising from their sale agreement which rights can be realised once, *inter alia*, the seller has settled the municipal charges, rates and rates.

[29] The respondent has provided the conveyancing attorneys with the amount required to be paid by the owner prior the rates and clearance certificate is issued. It was also clearly explained during argument that the amount reflected in the statement is in compliance with section 118(3) of the Systems Act read with *Jordan's* judgment and to this end there is no basis to allege that the respondent has committed any misconduct akin to dereliction of duties. It would then imply that the respondent may on application issue fresh clearance figures reflecting the amount due within two years prior to the application for the clearance certificate. If the applicants have been paying for the services, the amount reflected on annexure SS18 for the clearance certificate may have been reduced.

[30] The applicants have attached to its founding papers clearance figures which were requested by the applicants' conveyancers and made available by the respondent. The said figures include the amount for municipal services. The respondent's answering affidavit stated the rates and taxes, and the municipal accounts refers to different issues and the clearance certificate will specifically exclude the amount meant for the services.¹⁰ During argument the respondent's counsel took a volte-face stance and

¹⁰ See para 31 of the Respondent's answering Affidavit where it is stated that "... a municipal service account is for water and electricity and has no bearing to rates and taxes payable by the owner of the property for rates clearance certificate to be issued."

contended that the amount for the services would be included. The question whether the amount due for clearance certificate should include amounts due for municipal services which may have been incurred by the owner or even a tenant was considered and settled by the constitutional court in *Mkontwana v Nelson Mandela Metropolitan Municipality & Others; Bisset & Others v Buffalo City Municipality & Others: Transfer Rights Action Campaign & Others v MEC for Local Government and Housing in the Province of Gauteng & Others*¹¹ that the owners are also liable to pay, in addition to rates and taxes, for the services which were consumed by the occupiers who may not have been the owners. It follows that the seller¹² is also therefore liable to pay for charges levied for consumption of municipal services by Mr Nxumalo and subsequently by the applicants before the respondent can issue rates clearance certificate provided that the said amounts were due within 2 years of the date of the application for clearance certificate.

Requirement for declarator have not been met.

[31] A party who seeking a declarator must satisfy the following requirements, namely, (a) Whether the applicant has a direct and substantial interest in the subject matter; (b) Whether the applicant has an existing, future or contingent right or obligation; (c) Whether the legal position is clearly defined by statute. It follows that the court will not be drawn in the adjudication of a dispute whether question is hypothetical, academic, or clearly defined in the statute.¹³ To the extent that there are no disputes or uncertainties with regards to issues raised by the applicants' prayers for declarators are unsustainable and must therefore be dismissed.

¹¹ 2005 (1) SA 530 (CC).

¹² Or possibly the applicants in terms of the indemnity provided in the sale agreement.

¹³ See *Ex parte Noriskin* 1962(1) SA 856 (D).

[32] There are other issues raised which need be dealt with, though may not impact on the outcome of the adjudication of this *lis*. First, the respondent's contention that the respondent is not in contempt of the order issued by Strydom J has merits and the applicants' contention must therefore fail. Secondly, contention regarding the ownership as raised by the respondent in relation to the fact that a co-owner (with Alan Woolf) has not signed the sale agreement would not serve as bar to the respondent issuing the rates clearance certificate. In any event, the order of Strydom J, to the extent that it has not been challenged, seem to have resolved that possible issue. Thirdly, the contention by the respondent that the respondent is entitled to demand payment from the applicants based on the indemnity entered into between the applicants and the seller has no basis in law. The indemnity agreement has not been entered into for the benefit of the third party (or respondent) and to that extent no rights can be exerted by the respondent as against the applicants. The indemnity agreement *in casu* is in general parlance akin to what is termed *res inter alios acta* in relation to the respondent. Fourthly, though not advanced from the papers, the respondent's counsel sought to contend that the applicants have not *locus standi* as they are not the owners of the property. This is a correct legal position regarding the historical debts but from the sale agreements flows some rights which would form the basis for the applicants to proceed to court as they did. In the premises they have *locus standi* to exert their rights which are created in the sale agreement including instructing conveyancer¹⁴ to register a transfer of the property.

Epilogue to the legal analysis.

¹⁴ It is trite that the seller traditionally has the right to appoint conveyancers, but it is not strange to have the seller waiving such right in favour of the purchasers.

[33] It is my conclusion from the analysis set out above that the applicants' challenge is still born. It has been conceptualised which lacks fidelity with the law and is unsustainable.

Costs

[34] As set out above the applicants' case appears to have been based on ill-conceived advice which bear no relationship with the correct legal position as was contended by the respondent and despite effort, there no semblance I could discern. The respondent has provided clearance figures which complied with the law and aligned to the constitutional court judgment in *Jordan's* case. To this end there is no basis to find the respondent wanting and the respondent should therefore be awarded costs.

Conclusion

[35] I grant the following order:

The claim is dismissed with costs.

MOKATE VICTOR NOKO
JUDGE OF THE HIGH COURT, JOHANNESBURG

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal

representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 31 August 2023.

Appearances

Counsel for the Applicants: Adv PA Mabilo, Pta.

Attorneys for the Applicants: Harris Marcus Mahlangu Attorneys, Atholl.

Counsel for the First Respondent: Adv Sithole, Johannesburg.

Attorneys for the First Respondent Madhlopa and Denga Inc, Parktown North.

Date of hearing: 14 August 2023

Date of judgment: 31 August 2023