

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case No.: 2378/2016

Date Heard: 8 December 2016

Date Delivered: 15 December 2016

In the matter between:

**THE PORT ELIZABETH LAND RESTITUTION
AND HOUSING ASSOCIATION (PELRHA)**

First Applicant

**PORT ELIZABETH LAND AND COMMUNITY
RESTORATION ASSOCIATION (PELCRA)**

Second Applicant

and

NELSON MANDELA BAY MUNICIPALITY

First Respondent

**MINISTER OF RURAL DEVELOPMENT AND
LAND REFORM**

Second Respondent

**THE DEPARTMENT OF HOUSING AND
LOCAL GOVERNMENT, EASTERN CAPE**

Third Respondent

JUDGMENT

EKSTEEN J:

[1] The dispute in this matter concerns the interpretation of section 17(1)(b) of the Local Government: Municipal Property Rates Act, 6 of 2004 (the Act) and its application to certain properties situated in Fairview and Salisbury Park in Port Elizabeth.

[2] The applicant seeks essentially the following relief:

- "1. That a declaratory order be issued, declaring that the First Applicant herein constitutes a "land reform beneficiary" as contemplated in Section 17(1)(g) of the Municipal Property Rates Act, Act 6 of 2004.
2. ...
3. That the First Respondent be ordered to permit transfer of erven from the First Applicant to individual beneficiaries entitled to such erven in terms of Act 22 of 1994, without requiring any payment for outstanding rates purportedly due in respect of such properties.
4. That a further declaratory order be granted declaring that the individual beneficiaries referred to in paragraph 3 above, are entitled to enjoy the benefit of the ten year period reflected in Section 17(1)(g) of Act 6 of 2004, from the date of the original transfer of the relevant properties to the First Applicant.
5. That the First Respondent be ordered to repay to the Applicants all amounts due to the Applicants, and appropriated by the First Respondent, and purportedly set off against amounts allegedly due by the Applicant to the first respondent in respect of rates accruing in terms of the Local Government: Municipal Property Rates Act, Act 6 of 2004."

[3] In paragraph 2 of the Notice of Motion the applicant seeks certain relief in the alternative to paragraph 1. The alternative relief is not material for purposes of this judgment.

Background

[4] Fairview and Salisbury Park (jointly referred to herein as “the earmarked land”) are areas previously occupied by persons disenfranchised and dispossessed of their land by racially discriminatory laws under the pre-1994 dispensation.

[5] Section 25(7) of the Constitution provides:

“A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.”

[6] During or about 1993 the second applicant was formed as a voluntary association to assist with claims for restitution of land in Port Elizabeth. Large numbers of persons had been dispossessed of property on the earmarked land and all of their claims had similar features. It was accordingly deemed appropriate by the land claimants for the second applicant to be formed in order to facilitate such claims on behalf of deserving claimants.

[7] The Restitution of Land Rights Act, 22 of 1994 (herein referred to as the “Land Rights Act”) was enacted in order to give effect to the provisions of section 25(7) of the Constitution. The first applicant was incorporated as an entity with separate legal personality in terms of section 21 of Act 61 of 1973. It was established pursuant to the conclusion of an agreement (the framework agreement) in terms of section 42D(1) and (2) of the Land Rights Act. This agreement established a framework for the settlement of claims for restitution of land and for developing vacant property on

the earmarked land. It provided for land restitution on a collective or community basis for the benefit of claimants who are party to the framework agreement and the broader community, by subdividing the earmarked land into commercial or residential erven; by supplying bulk services; by building residential dwellings; and by constructing community facilities.

[8] The framework agreement stipulates that the monetary value of the development planned shall be the sum of the monetary value of all individual claims for land restitution. Each land claimant is listed in an annexure to the agreement and he is entitled to compensation averaging R30 000 or its equivalent in the form of a plot and a dwelling. The total cost of the development was to be funded by the National Treasury. In turn the claimants undertook neither to pursue individual claims for monetary compensation nor to insist on the restoration of their original portions of land in the two development areas.

[9] The second applicant negotiated and concluded the framework agreement with the Minister of Rural Development and Land Reform and other government role-players, including the Port Elizabeth Municipality, the predecessor to the first respondent, and the third respondent. The individual claimants authorised the second applicant to act for them in advancing their claims in relation to their original property on the earmarked land. The first applicant was established in terms of the framework agreement in order to act as the developer for the earmarked land and accordingly it took transfer of the earmarked land in Fairview and Salisbury Park during 2008 and 2011 respectively on behalf of the individual beneficiaries. The

earmarked land had been owned at the time by the National and Provincial Governments.

[10] At the time all parties accepted that the formation of the first applicant as “developer” would facilitate the transfer of land to deserving claimants in that the land made available for restitution required development in the sense set out earlier herein. All the administrative and legal work required in order to effect transfer of individual sites to deserving claimants would be facilitated through the first applicant. The first applicant contends that one of the main purposes for its formation and the transfer of the earmarked land to the first applicant was to ensure that individual deserving claimants received the transfer of individual erven. All the individual erven to be transferred to individual claimants have been identified as have the individual claimants all of whom have rights recognised under section 25 of the Constitution and the Land Rights Act.

[11] By virtue of the extent of the work and a number of difficulties which have been experienced in the development of the areas the execution of the function of the applicants has been slow. Many of the erven still vest in the first applicant while others have been transferred to individual beneficiaries. Many beneficiaries have sold the land to which they became entitled.

[12] Section 17(1)(g) of the Act (as it was at the time when the first applicant acquired the earmarked land) provided:

- “(1) A municipality may not levy a rate-
- (a) ...
 - (g) on a property belonging to a land reform beneficiary or his or her heirs, dependants or spouse, provided that this exclusion lapses-
 - (i) ten years from the date on which such beneficiary's title was registered in the office of the Registrar of Deeds.”

[13] Section 118 of the Local Government: Municipal Systems Act, 32 of 2000, (the Systems Act) requires that property may not be transferred other than on production of a certificate issued by the relevant municipality certifying that all amounts that became due in connection with that property for municipal service charges, surcharges on fees, property rates and other municipal taxes, levies and duties, during the two years preceding the date for application of the certificate have been fully paid.

[14] Initially the first respondent acknowledged that the first applicant is a land reform beneficiary by virtue of it holding the land on behalf of the individual beneficiaries and that no charges were to be raised in terms of section 118 of the Systems Act in respect of the alleged outstanding rates on properties to be transferred by the first applicant to such beneficiaries. More recently, it would appear that it occurred late in 2013, the first respondent had a change of heart and it adopted the stance as evidenced in correspondence that it was only individual claimants who qualify for the dispensation granted in section 17(1)(g). It accordingly contended that rates have accrued in respect of the properties still owned by the first applicant and awaiting transfer to individual beneficiaries. This would have a significant monetary impact on the land reform beneficiaries and for obvious reasons pose an obstacle to the transfer of the property to them. As alluded to earlier herein

the project on the earmarked land was to be funded by National Treasury. The first respondent had for some time been administering funds belonging to the applicants which were earmarked for community projects on the earmarked land as provided for in the framework agreement. By virtue of its change of heart the first respondent appropriated these funds in respect of alleged accrued rates. These events give rise to the application.

[15] The first respondent has opposed the application. The stance articulated in the answering affidavit differs from that set out above and which emerged from correspondence at the time. The gravamen of the first respondent's case lies in the fact that a number of the individual beneficiaries have sold their allocated plots, sometimes well in advance of taking transfer thereof, with the effect that it is perceived that the project is no longer of long-term benefit to most of the land reform beneficiaries listed in the annexure to the framework agreement. In many instances, in fact the vast majority of instances, where the land has been transferred from the first applicant to the individual beneficiary a subsequent transfer occurred virtually immediately thereafter, often on the same day. The deponent on behalf of the first respondent explains that the stance now adopted by the municipality is "on account of the stratagem ... where the erstwhile land reform beneficiary only acquires transfer of the property for an instant, ostensibly and purely to take advantage of the provisions of section 17(1)(g) of the Property Rates Act". The first respondent is therefore of the view that prior to the transfer of the land to an individual beneficiary "the land does not in reality belong to a land reform beneficiary; has in any event been alienated; and the provisions of section 17(1)(g) of the Property Rates Act are hence not of application in this instance".

Application of the facts to the legal principles

[16] Two issues need to be addressed at the outset. Firstly, it is not in dispute that many of the properties have been sold by the individual land reform beneficiaries prior to transfer into their names. There can, however, be no merit in the conclusion that the transfer into the name of the individual land reform beneficiaries for an instant only is a stratagem adopted purely to take advantage of the provisions of section 17(1)(g) of the Act. Section 14 to the Deeds Registries Act, 47 of 1937, stipulates that all transactions must be registered in the Deeds Office in accordance with the sequence in which they were concluded. Where a land reform beneficiary who is entitled to receive transfer of land sells the land to a third party in issue prior to the transfer to himself the Deeds Registries Act requires that the land must first be registered in the name of the beneficiary and thereafter it must be transferred to the third party. A transfer directly from the first applicant to the third party is thus prohibited. This accounts for the brief period of “ownership” evidenced by the Deeds Register. It is not a stratagem but a consequence of the provisions of the Deeds Registries Act.

[17] Secondly, it is not correct to suggest that the project is no longer to the long term benefit of the land reform beneficiaries listed in the annexure to the framework agreement. The land reform beneficiaries were previously dispossessed of their land which they would have been entitled to sell at any stage and to utilise the proceeds thereof to their benefit. Section 25(7) of the Constitution seeks to place them back in the position in which they would otherwise have been to the extent that that can be achieved. But for the difficulties which have delayed the progress in the

project to which I have referred earlier each land reform beneficiary would have received transfer of his property long ago. Each enjoys an entitlement to the land and I can conceive of no reason in law nor in logic why he should not be permitted to alienate his property and to utilise the proceeds thereof to his long-term benefit. The fact that such land reform beneficiaries have done so does not lead to the conclusion that the project is no longer to the long-term benefit of such beneficiaries.

[18] I turn to consider legal argument presented to me. At the outset it is to be recorded that the first respondent has, in its papers, acknowledged that it was not entitled to appropriate funds which it administered on behalf of the land reform beneficiaries as it has done and has tendered the return thereof. It is accordingly not necessary to deal further with this issue.

[19] Mr **Euijen SC**, who appears on behalf of the first respondent, argues that the dispensation provided for in the section 17(1)(g) applies only while the land in issue belongs to the individual land reform beneficiary. It is submitted that the legislator, in using the term “belongs” in section 17(1)(g), intended the section to have wide application. In these circumstances he acknowledges that it clearly does apply to all land reform beneficiaries who have an enforceable right of ownership to property, even though it may not be formally registered in their names. The consequence thereof, it appears to me, is that it is conceded that at the time that the first applicant took transfer of the earmarked land the exclusion contained in section 17(1)(g) became applicable to the said properties.

[20] It is argued, however, that the further implication of the use of the term “belong” is that once a legally enforceable obligation has been created in terms of which the property in question may no longer be disposed of by the land reform beneficiary as he/she pleases (as happens when a written agreement of sale is concluded) then a key feature of ownership is removed and it can no longer be said that the property “belongs” to the land reform beneficiary. In these circumstances, as I understand the argument, it is contended that the exclusion from rates liability set out in section 17(1)(g) lapses upon the conclusion of the agreement of sale because the land reform beneficiary has then disposed of the property.

[21] I have set out earlier the formulation of section 17(1)(g) of the Act as it was at the time when the first applicant acquired the earmarked land. The section has since been amended. The amendment came into force on 1 July 2015. Section 17(1)(g) of the Act now provides:

- “(1) A municipality may not levy a rate-
 - (a) ...
 - (g) on a property belonging to a land reform beneficiary or his or her heirs, dependents or spouse provided that this exclusion lapses-
 - (i) ten years from the date on which such beneficiary’s title was registered in the office of the Registrar of Deeds; or
 - (ii) upon alienation of the property by the land reform beneficiary or his or her heirs, dependants or spouse.”

[22] The issue is to be determined on an interpretation of the section as amended. In interpreting legislation a sensible “business-like” approach should be adopted which gives effect to the purpose of the legislation rather than over technical

interpretation which does not. (Compare **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA) at 603E-604D and 608E-F.) Section 39(2) of the Constitution further enjoins a court when interpreting legislation or developing the common law or customary law to promote the spirit, purport and objects of the bill of rights. Section 25(7) of the Constitution forms part of the bill of rights. (See **City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd and Others** 2015 (11) BCLR 1265 (CC) at 1296ff.)

[23] Section 118 of the Systems Act to which I have referred earlier limits an owner's power to transfer immovable property by providing that the Registrar of Deeds may not affect the transfer of property without a certificate issued by the municipality as set out earlier. Section 25(7) of the Constitution, as I have alluded to earlier, has as its object to place persons unfairly dispossessed of their property back into the position in which they would have been to the extent that it is now possible, had they not been dispossessed. Section 17(1)(g) of the Act provides relief to such land restitution beneficiaries which serves to assist them to take the best advantage of their properties. The dispensation takes effect immediately the property in issue "belongs" to such beneficiary. It is not in dispute in the present instance that the land began to "belong" to the individual beneficiaries when the first applicant acquired the earmarked land.

[24] Attributing the ordinary English meaning to the words of the amended section 17(1)(g) I think that the exclusion from rates liability will persist for a period of ten years from the date upon which the beneficiaries title was registered in the deeds office, or until the alienation of the land, whichever is the earlier. In the event that Mr

Euijen's interpretation of the section is accepted, as is set out earlier in para [20] above, namely that the property no longer "belongs" to the land restitution beneficiary once it is disposed of it by way of contract of sale then it seems to me that the amendment to the section could serve no purpose. Mr **Euijen**, during argument, was constrained to acknowledge that the introduction of section 17(1)(g)(ii) constitutes mere surplusage and he was unable to advance any logical reason for the amendment. This concession militates against the acceptance of such an interpretation.

[25] It is accordingly necessary to consider the meaning attributed to section 17(1)(g)(ii) and in particular to the word "alienation". In the interpretation of statutes words are generally afforded their ordinary English meaning. The New Shorter Oxford Dictionary (1993 ed) defines the term "alienate" as meaning "the transfer to the ownership of another". Mr **Buchanan** contends that the term alienate where it appears in section 17(1)(g)(ii) should bear a corresponding meaning and that the exclusion from rates liability should therefore persist until such time as transfer is effected from the land restitution beneficiary to a third party. Mr **Euijen**, on the other hand, argues that the term should be given a wider meaning in the context of the section so that the property is deemed to be alienated upon the conclusion of the agreement of sale which, as set out earlier, occurred in many instances long before the transfer of ownership occurred. For this he relied on three authorities. The first is ***Strauss v De Villiers en 'n ander*** 1981 (2) SA 163. The ***Strauss*** matter was concerned with a title deed containing a prohibition on alienation. Basson J considered a number of common law authorities relating specifically to a prohibition upon alienation. The position, it seems to me, is best summarised by *Huber*:

Jurisprudence of my Time (Gane's Translation) 2.54.1 quoted by Basson J which explains:

"But there still remains a chapter on prohibited alienations. In order to treat properly of these, I shall first say that alienation is simply the transfer of property, but that nevertheless the word alienation, when we are speaking of prohibition, has a wider signification, so that he who is forbidden to alienate anything may also not mortgage it, nor lay a servitude upon it, nor petition for partition, nor part with it, whether by way of renunciation or of agreement, nor yet by compromise or concession, much less can he exchange it or give it in payment; or do any other thing of that kind which will occur to us."

[26] As I understand the passage it confirms the ordinary meaning of the term alienation and sets out an exception in common law which applies where there is a prohibition on alienation.

[27] In the same judgment he considered the work of *Sande: A Treatise upon Restraints upon the Alienation of Things* (Webber's Translation) Part 1 Chapter 1 para 3 where it was stated:

"Now let us consider what acts are deemed to be forbidden when alienation is forbidden.

16. Alienation is any course of dealing by which dominium is transferred:

...

Seneca (lib 5 de benefic) defines alienation as the transfer of one's property and one's rights to another."

This passage too seems to me to confirm that at common law the term alienation bears its ordinary meaning, although it may be treated differently in law where we deal with a prohibition on alienation. This I do not think is authority for the proposition that the term may be given a different meaning when used in legislation.

[28] The second decision upon which Mr **Euijen** seeks to rely is **Cronje NO v Paul Els Investments (Pty) Ltd** 1982 (2) SA 179 (T) at 195-196. The facts of this matter were somewhat unique. The legislator in the Insolvency Act 24 of 1936 stipulated for various voidable dispositions. In section 34(1) of the Insolvency Act dealing with a voidable sale of a business the legislator used the Afrikaans word “vervreemding” in the Afrikaans text and the English word “alienation” in the English text. The dilemma which arose from this state of affairs was that the term “vervreem” was specifically defined in the Insolvency Act to bear a wide meaning which would include the transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor. The term alienate, however, was not defined in the Act. Ackermann J recognised that alienate carries the limited meaning of transfer of rights which did not include the wide definition given to the term “vervreem” and at 188A-B Ackermann J stated:

“Daar is, sover my kennis strek, geen pertinente beslissing van ons Howe oor die betekenis van die woorde 'vervreemding'/'alienation' soos hulle in art 34 (1) voorkom nie, en of die woorde die wye betekenis het wat ingevolge art 2 van die Wet, aan 'vervreemding' gegee word, dan wel die beperkte betekenis van 'alienation'.”

[29] After a lengthy analysis of legal principles Ackermann J concluded that the legislator had erred in the utilisation of the term “alienation” in the English version

and that it ought in those unique circumstances to be given the meaning of “disposition” as defined in the Act. The definition of the term “disposition” coincided with the definition of the term “vervreemding”. Section 34(1) of the Insolvency Act was amended thereafter. In these circumstances I do not consider that the **Cronje** matter is authority for the proposition that the term “alienation” may be given a wider meaning where it appears in legislation, save where a special definition is attributed to it in the Act. On the contrary, the reason for the dilemma in Cronje’s case was precisely because Ackerman J recognised the true meaning of the term “alienation”.

[30] In the present matter there is no ambiguity in the section and I do not consider that the Cronje case constitutes authority for me to attribute a different meaning to the term alienation.

[31] The third matter to which I have been referred is the matter of **Crous NO v Utilitas Beville** 1994 (3) SA 720 (C). On behalf of the first respondent it is submitted that in the **Crous** matter it was held that transfer was not a definitive feature of an “alienation”. Again I do not consider that the submission correctly reflects the content of the judgment. The **Crous** matter concerned a property which had been acquired by a testator subject to a right of pre-emption. The right of pre-emption provided:

“Die hierinvermelde eiendom is verder onderhewig aan ‘n uitdruklike voorkeepsreg wat opgelê is ten gunste van Utilitas Beville, of sy regsopvolgers, teen die transportnemer, sy erfgename, eksekuteurs, administrateurs of regsverkrygendes waarkragtens die eiendom nie vervreem sal word nie, tensy dit eers ten koop aangebied is aan Utilitas Beville of sy regsopvolgers teen dieselfde koopprys as wat die aanbieder daarvoor betaal het.”

[32] In due course the testator died and the property was transferred to his heirs nominated in his will. Van Deventer J was called upon to consider the meaning of the term “vervreem” (in English “alienate”). After considering a number of authorities and dictionaries he concluded that the term alienate bore the meaning of a voluntary transfer of ownership at the pleasure of the transferor.

[33] I do not think that the conclusion reached by Van Deventer J conflicts in any material respect with the ordinary English meaning of the term alienate which corresponds with the meaning adopted by the courts and the common writers referred to earlier.

[34] Reverting to the provisions of section 17(1)(g), viewed in its context and with due consideration to its purpose I conclude that it is clear and unambiguous. A property which belongs to a land restitution beneficiary, in the broad sense, is exempt from property rates for a period of ten years, or until such time as it is alienated in the sense that it is transferred to a third party, whichever is the earlier. By virtue of the broad meaning of the term “belongs” the ten year period would commence running from the date upon which the first applicant acquired the property. Where a land restitution beneficiary takes transfer of a property from the first applicant and retains the property the rates exclusion will lapse ten years after the date upon which it was registered in the name of first applicant on behalf of the beneficiary. In the event that the beneficiary disposes of the property before the lapse of then yeas the rates exclusion will cease on the date that the property is transferred to the third party

The relief sought

[35] During argument Mr **Buchanan** acknowledged that in view of the revised stance of the first respondent as set out in the papers, as opposed to the position adopted in the correspondence prior to the launching of the application, a declaratory order in terms of para 1 of the Notice of Motion is not necessary. The relief sought in para 5 of the Notice of Motion has been acknowledged and tendered.

[36] In the result, I make the following order:

1. The first respondent is ordered to permit a transfer of erven from the first applicant to individual beneficiaries entitled to such erven in terms of Act 22 of 1994 without requiring any payment for outstanding rates purportedly due in respect of such properties.
2. The individual beneficiaries referred to in para 1 above are declared to be entitled, from the date of the original transfer of the relevant properties to the first applicant, to the rates exclusion referred to in section 17(1)(g) of Act 6 of 2004 for a period of ten years, alternatively, until the property is transferred into the name of a third party.
3. The first respondent is ordered to repay to the applicants all amounts due to the applicants, and appropriated by the first respondent and purportedly set off against the amounts allegedly due by the first applicant to the first

respondent in respect of rates accruing in terms of the Local Government:
Municipal Property Rates Act, 6 of 2004.

4. The first respondent is ordered to pay the costs occasioned by the application.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Applicants: Adv Buchanan SC instructed by Lexicon Attorneys, Port
Elizabeth

For First Respondent: Adv Euijen SC instructed by Goldberg & De Villiers, Port
Elizabeth