IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) NOT REPORTABLE
(2) NOT OF INTEREST TO OTHER JUDGES
(3) REVISED

CASE NO:95508/2015

12/2/2018

In the matter between:

COSMO RETAIL PARK (PTY) LTD **APPLICANT**

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY **RESPONDENT**

JUDGMENT

RANCHOD J:

[1] The applicant seeks the following declaratory relief as set out in the notice of motion:

1. That it be declared that the applicant is not indebted to the respondent in respect of property rates for the period prior to May 2011;

2. That the respondent be ordered to immediately rectify the applicant's monthly account (account number [….]), to give effect to the order in 1 above;

3. That the respondent be ordered to pay the applicant's costs on an attorney and client scale.

[2] The applicant became the registered owner of certain immovable properties on 17 July 2006 comprising of seven erven which were consolidated into one erf on 27 May 2008 situated at 449, Pretorius Street, Silverton, Pretoria. The respondent says the street number is 447 but it's not relevant for present purposes as the identity of the property in question is not in dispute.

[3] In terms of the Provincial Gazette dated 18 August 2004, the seven erven, which had until then been zoned 'residential', were re-zoned 'General Business' and accordingly attracted higher property rates than when they were zoned residential properties.

[4] The applicant says since about September 2010 it had repeatedly informed the respondent municipality that it disputed the property rates levied against the several properties prior to their consolidation and also after they were consolidated but the matter remained unresolved. The details are not relevant for present purposes.

[5] On 3 May 2011 the applicant delivered two separate letters to the respondent enclosing cheques for payment of R350,000.00 for property rates and R6,541.67 for water consumption respectively. A cashier at the respondent's offices acknowledged receipt of the cheque on the same day.

[6] It is only the payment of R350,000.00 for the rates that is in issue. The applicant contends that it had tendered the cheque in full and final settlement of any outstanding amounts in respect of the property rates up to 30 April 2011. The respondent is adamant that payment of the R350,000.00 did not extinguish the balance of the amount allegedly owing which, as at 20 September 2010 was R564,871.31.

[7] The crisp issue to be determined is whether the payment 'in full and final settlement' extinguished the balance of the debt alleged to be owing to the respondent. The respondent denies it, hence the application for a declarator in the notice of motion.

[8] It is necessary to quote the contents of the letter written by the applicant-

> 'Hiermee aangeheg tjek, ender tjeknommer 00000037 in die bedrag van R350,000.00 (Orie Honderd en *Vyftig* Duisend Rand) as volle en finale

vereffening van enige uitstaande bedrae socs verskuldig soos beweer deur u kantore.

Ons tjek ten bedrae van R350,000.00 (Orie Honderd en Vyftig Duisend Rand) gaan hierby aangeheg in volle en finale vereffening van al u eise ten aansien van die eiendomsbelasting met betrekking tot die voormelde eiendom tot en insluitende 30 April 2011.

Ons ontken aanspreeklikheid vir betaling van enige verdere eiendomsbelasting ten aansien van die eiendom tot 30 April 2011.

Aanbieding en ontmoeting van die tjek sal tot gevolg h dat al u eise ten aansien van eiendomsbelasting met betrekking tot die eiendom tot op 30 April 2011 uitgewis sal word.'

[9] The letter was marked for the attention of 'Munisipale Kasiere, Tshwane Stadsraad . . . (Municipal Cashiers, City Council).'

[10] Freely translated, the letter reads as follows-

"Herewith attached is a cheque ... in the amount of R350,000.00 ... as payment in full and final settlement of any amounts outstanding as alleged by your offices.

Our cheque for R350,000.00 . . . will be attached in full and final settlement of all your claims for property rates regarding the abovementioned property up to and including 30 April 2010.

We deny responsibility for payment of any further property rates in respect of the property up to 30 April 2011.

Presentment and meeting [payment) of the cheque will have the consequence that all your claims for the property rates in respect of the property up to 30 April 2011 will be extinguished."

[11] It is common cause that the cheque was indeed presented for payment by the respondent and it was paid. The respondent relies on its Credit Control and Debt Collection By-Laws (published by Local Authority Notice 226 in the Provincial Gazette Extraordinary No. 44 of 27 February 2002 which provides as follows in sub-section 2.3 -

'(a) The City Treasurer shall be at liberty to appropriate monies received in respect of any of its municipal services as it deems fit.

(b) Where the exact amount due and payable to the Council has not been paid in full, any lesser amount tendered to and accepted by any Council employee, except the Treasurer and/or his/her fully authorised delegate, shalt not be deemed to be in final settlement of such an amount.

(c) The provisions in (a) above shalt prevail notwithstanding the fact that such lesser payment was tendered and/or accepted in full settlement.

(d) The Treasurer and/or his/her delegate shall consent to the acceptance of such a lesser amount in writing.'

[12] The respondent says its treasurer did not consent to the acceptance of the lesser amount tendered by the applicant and the full amount remained outstanding in accordance with sub-section 2.3 of the stated by-law.

[13] The respondent's arguments, as I understood them to be from the answering affidavit and oral submissions during the hearing are firstly, that it was expressly stated that the payment was conditional upon it being accepted in full and final settlement hence sub-section 2.3(b) was not applicable because there it is stated that a payment which is less than the outstanding total will not be 'deemed to be in final settlement' of the total outstanding amount. The deeming provision was not applicable because here the payment was expressly conditional. The argument is not understood. In my view the provisions of sub-section 2.3 are clear, and hardly need to be elaborated upon. Any lesser amount tendered in full and final settlement be it expressly stated to be so will not be regarded ('deemed') to be in final settlement.

[14] However, it was also argued that once a cashier at the respondent's offices accepted the cheque by acknowledging receipt meant that the cheque was accepted on behalf of the treasurer as the cashier was the authorised delegate of the treasurer. The submission is without merit in the face of the clear wording of sub-section 2(3)(b). The respondent denies that the cashier was the treasurer's 'fully authorised delegate' as provided for in sub-section 2(3)(b). No proof has been tendered by the applicant that the cashier is the authorised delegate of the treasurer within the meaning of sub-section 2.3

[15] Furthermore, sub-section 2.3(d) expressly provides that the treasurer

and/or his/her delegate shall consent to the acceptance of such a lesser amount in writing. No proof has been provided of acceptance in writing by the treasurer or the treasurer's delegate of the lesser amount. Apart from an acknowledgement of the copy of the letter by the cashier that he or she received the letter and the attached cheque there is no evidence that the cahier had authority from the treasurer to enter into a compromise with the applicant and accept the cheque in full and final settlement.

[16] The applicant also says in the replying affidavit that even if it is disputed that the cashier was an authorised delegate of the treasurer, such an employee will have ostensible authority and the respondent will therefore also be estopped from denying the authority of the employee. Again, in my view, the submission cannot pass muster as one cannot circumvent the clear provisions of the by-law in this manner.

[17] It is also to be noted that correspondence was exchanged between the applicant's attorneys and the respondent's attorneys regarding the disputed account and, at some stage, also between the debt collecting agent of the respondent and the applicant. However, the applicant did not send the cheque to the respondent's attorneys, through its own attorneys, as would be expected in the normal cause of events. Instead it addressed a letter itself to the cashiers who had no part in the discussions between the parties. In my view this was clearly a contrived attempt to make the payment in 'full and final settlement' binding on the respondent.

[18] The applicant applies for a declaratory order. It bears the onus to prove that it is entitled to the relief claimed. In my view, the applicant has failed to discharge the onus upon it to prove that it is entitled to the declaratory relief it seeks hence the application must fail.

[19] The application is dismissed with costs.

RANCHOD J

JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Applicant	: Adv. A.P.J Els
Instructed by	: JW Botes Inc.
Counsel on behalf of Respondent	: Adv. A Vorster
Instructed by	: Hugo & Ngwenya Inc.
Date heard	: 31 January 2018
Date delivered	: 12 February 2018