IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No.: 9349/2014

In the matter between:

EM AND EM ENGINEERING (PTY) LIMITED	Applicant
and	
THE KWADUKUZA MUNICIPALITY	First Respondent
THE REGISTRAR OF DEEDS	Second Respondent
ASK Y DEVELOPMENT PROFESSIONALS CC	Third Respondent

J U D G M E N T

VAN ZŸL, J:

1. This application concerns the vexed issue of the extent of the applicant's liability to effect payment to the first respondent, in order

to obtain a clearance certificate as contemplated by section 118(1) of the Local Government: Municipal Systems Act 32 of 2000 and which would then permit the second respondent (the registrar of deeds) to register the transfer of ownership of certain immovable property from the name of the applicant into the name of a prospective purchaser.

2. The applicant is a property developer and at all material times was and remains the registered owner of an immovable property described as Portion 2 of Erf 923 Salt Rock, Registration Division FU, Province of KwaZulu-Natal, in extent 40,7195 Hectares and held by it in terms of a certificate of registered title number T24568/2010 dated 29 July 2010. In the affidavits the parties refer thereto as "the mother property". As a matter of convenience this reference is likewise adopted for purposes of this judgment.

3. It is not in dispute that the mother property has been divided into 91 subdivisions, respectively numbered 1002 to 1092, in terms of a general plan and a copy of which is annexed marked H to the application papers. Although the founding papers do not set out the background to the mother property in detail, it is nevertheless apparent that it forms the basis for a residential township development called The Mount Richmore Village Estate and to which the applicant refers as "the estate" in its application papers.

4. It is also apparent that the subdivision of the mother property was registered in the office of the Registrar of Deeds, KwaZulu-Natal in terms of the provisions of section 46 of the Deeds Registries Act 47 of 1937 and that the establishment of the estate had been approved in terms of the provisions of the Development Facilitation Act 67 of 1995. The applicant's certificate of registered title relevant to the mother property was also endorsed in terms of section 34(4) of the said Act.

5. The essential dispute between the parties arose from the sale by the applicant of two subdivisions, namely Erven 1037 and 1038, both forming part of the mother property, to the third respondent. In order to effect registration of transfer of these subdivisions into the name of the third respondent the applicant applied to the first respondent for clearance certificates in terms of section 118(1) of the Local Government: Municipal Systems Act 32 of 2000 (the Municipal Systems Act).

6. Section 118(1) of the Municipal Systems Act reads, as follows:-

> "*(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.*"

7. The applicant and the first respondent hold differing views as to how the provisions of section 118(1) should be interpreted and applied to the sale of subdivisions forming part of the mother property. Although these two subdivisions gave rise to the dispute, the dispute is of general application. It is common cause that since the litigation commenced, the sales to the third respondent have been cancelled, but the dispute remains alive because it would affect future sales of subdivisions in the estate.

8. The applicant contends that the references in section 118(1) to "*the transfer of property*" and "*that property*" should be construed as a reference to the particular property which is to be the subject of the intended registration of transfer, in this instance a subdivision of the mother property and the applicant stated that it has no objection to the payment of rates and charges relevant to any particular subdivision or erf.

9. The applicant complains, however, that the respondent has taken the view that the references in section 118(1) to the property, which is the subject of the intended transfer, is in law to the entire mother property. This is as opposed to the individual erf or subdivision which is the object of the intended transfer. It subscribes to this view on the basis that the subdivision to be transferred still forms part of the mother property and that the rates and charges therefore payable

before a clearance certificate can be issued, are those relevant to the mother property as a whole.

10. In paragraph 18 of the applicant's founding affidavits deposed to by one Van As, its estate manager, it is alleged that:-

> "What the First Respondent has done in the account is to insist that if individual erven, such as Erf 1037 and 1038 are transferred, all rates due in respect of the so-called "*mother property*" must be paid on each occasion before any transfer of any individual subdivision thereof is allowed."

11. The first respondent, in its answering affidavit through one Chetty, in his capacity as its Director: Revenue, admits the averments contained in paragraph 18 of the applicant's founding affidavit, but asserts that the applicant's references to Erven 1037 and 1038 as "individual erven" are misleading because;

> ".. those erven are presently (and) remain part of the mother property. Registration of their ownership will amount to the creation and first registration of separately owned property."

12. With reference to the applicant's certificate of registered title of the mother property (annexure H), reflecting it as comprising 91 smaller properties as per the plan approved by the Surveyor General, Mr Chetty on behalf of the first respondent averred that;

"What this means is that the Surveyor General has approved various sub-divisions, but that the land which is owned is the mother property. It does not mean that ownership of the sub-divisions has been registered"

13. This approach raises the question of what then the legal status of a subdivision in respect of land so subdivided may be. Section 46 of the Deeds Registries Act reads as follows:-

"*46 Requirements in the case of subdivision of land into lots or erven*

(1) If land has been sub-divided into lots or erven shown on a general plan, the owner of the land sub-divided shall furnish a copy of the general plan to the registrar, who shall, subject to compliance with the requirements of this section and of any other law, register the plan and open a register in which all registrable transactions affecting the respective lots or erven shown on the plan shall be registered.

(2) For the purposes of registration of such a general plan the title deed of the land which has been sub-divided shall be produced to the registrar together with the diagram thereof and any mortgage bond endorsed on the title deed and the mortgagee's consent to the endorsement of such bond to the effect that it attaches to the land described in the plan.

[Sub-s. (2) amended by s. 22 (a) of Act 43 of 1957.]

(3) If the land sub-divided as shown on the general plan forms the whole of any registered piece of land held by the title deed, the registrar shall make upon the title deed and the registry duplicate thereof an endorsement indicating that the land has been laid out as a township or settlement, as the case may be, in accordance with the plan, and that the lots or erven shown on the plan are to be registered in the relative register.

[Sub-s. (3) substituted by s. 6 of Act 92 of 1978.]

(4) If the land sub-divided as shown on the general plan forms a portion only of any registered piece of land held by the title deed the registrar shall, on written application by the owner of the land, issue a certificate of township or settlement title in his favour in respect of the said portion as nearly as practicable in the prescribed form and in accordance with a diagram thereof.

(5) If the land sub-divided as shown on the general plan comprises the whole or portions of two or more registered pieces of land, the registrar may require the owner to obtain a certificate of consolidated title of the land so sub-divided. The registrar shall

make on such certificate the endorsement mentioned in subsection (3).

[Sub-s. (5) amended by s. 22 (b) of Act 43 of 1957.]

(6) The provisions of section forty-three and of subsections (3) to (6) inclusive of section forty shall respectively and mutatis mutandis apply in respect of the certificates of township or settlement title mentioned in subsection (4), and the certificates of consolidated title mentioned in subsection (5).

[Sub-s. (6) amended by s. 22 (b) of Act 43 of 1957.]

(7) Where a general plan has been registered in terms of subsection (1), it shall not be necessary, where a whole erf is transferred, to produce a diagram thereof: Provided that where a diagram has not been produced, a reference shall be made to the general plan in the relevant deed of transfer: Provided further that the provisions of this subsection shall apply only with reference to general plans lodged for registration on or after the date of commencement of the Deeds Registries Amendment Act, 1965.

[Sub-s. (7) added by s. 17 of Act 87 of 1965.]"

14. It is apparent from annexure H that the general plan pertaining to the mother property has been registered by the registrar of deeds and that it was endorsed in compliance with the provisions of section 46(3) of the Deeds Registries Act. I did not understand any of the parties to dispute this state of affairs. Instead the disputes related to the consequences of such registration.

15. Counsel for the first respondent submitted that registration under section 46(1) of the Deeds Registries Act does not confer ownership, or put differently, "title" upon the owner of the mother property of the subdivisions thus envisaged, but merely registers a sub-divisional plan on which future transactions would be registered. By future transactions presumably was meant future transfers of the sub-divisions to new owners. Counsel further submitted that ownership ("title") of a sub-division may, inter alia, be acquired by registration of

a certificate of registered title ("CRT") in terms of section 43 of the Deeds Registries Act and that the applicant attempted to cure the difficulty that it did not own erven 1037 and 1038 at the time of bringing the application, by subsequently applying for and obtaining CRT's in respect of these two sub-divisions.

16. Section 43 of the Deeds Registries Act provides, as follows:-

> "*43 Certificate of registered title of portion of a piece of land*
>
> *(1) If a defined portion of a piece of land has been surveyed and a diagram thereof has been approved by the surveyor-general concerned, the registrar may on written application by the owner of the land accompanied by the diagram of such portion, the title deed of the land, any bond thereon and the written consent of the holder of any such bond, issue a certificate of registered title in respect of such portion, as nearly as practicable in the prescribed form.*
> *[Sub-s. (1) amended by s. 19 (a) of Act 43 of 1957.]*
>
> *(2) In registering the certificate the registrar shall endorse on the title deed that it has been superseded by the certificate in respect of the land described in the certificate, and on the certificate that the land described therein is mortgaged by the bond, and shall make such endorsements on the bond and such entries in the registers as shall clearly indicate that the land is now owned by virtue of the certificate and is subject to such bond.*
> *[Sub-s. (2) amended by s. 19 (b) of Act 43 of 1957.]*
>
> *(3) The provisions of this section shall also apply where two or more defined portions of a piece of land have been surveyed and the diagrams thereof approved: Provided that each of such portions shall be described in a separate paragraph in the certificate.*
>
> *(4) No defined portion of a piece of land shall be mortgaged until the owner thereof has obtained a certificate of registered title in respect of such portion in accordance with the provisions of this section.*
>
> *(5) (a) Save in the case of a transfer of a whole erf, no owner of a township or settlement in whose title deed the individual erven are not separately described, shall deal separately in any way with an individual erf in such township or settlement or any portion thereof*

> *or share therein until he has obtained a certificate of registered title of such erf in the prescribed form.*
> *(b) .....[Para. (b) deleted by s. 4 of Act 11 of 1996.] [Sub-s. (5) added by s. 19 (c) of Act 43 of 1957.]*"

17. It is apparent from the provisions of section 46(1) of the Deeds Registries Act that upon registration of the general plan of duly subdivided land, ownership thereof remains unaffected. Unlike in the case of section 16 of the Deeds Registries Act, there is no conveyance of ownership from one person to another involved because the existing registered owner of the sub-divided land retains her or his position as such (See: *Ex parte Menzies et Uxor,* 1993 (3) SA 799 (C), King J at page 819E, where the distinction is drawn between s16 which applies to the transfer of ownership from one person to another and the situation where an owner seeks to have a title deed endorsed to correctly reflect his rights of ownership).

18. What is, however, envisaged by section 46(1) is that future registerable transactions relevant to and affecting the various sub-divisions thus recognised, would be recorded and registered in a dedicated register as opened by the registrar of deeds.

19. It is also relevant to have regard to the definitions contained in section 102 of the Deeds Registries Act. These include, in alphabetical order, the following:-

> "*'erf' means every piece of land registered as an erf, lot, plot or stand in a deeds registry, and includes every defined portion, not intended to be*

a public place, of a piece of land laid out as a township, whether or not it has been formally recognized, approved or proclaimed as such;"

"*'general plan' means a plan which represents the relative positions and dimensions of two or more pieces of land and has been signed by a person recognized by law as a land surveyor, and which has been approved, provisionally approved or certified as a general plan by a surveyor-general or other officer empowered under any law so to approve, provisionally approve or certify a general plan, and includes a general plan or copy thereof prepared in a surveyor-general's office and approved, provisionally approved or certified as aforesaid, or a general plan which has at any time, prior to the commencement of this Act, been accepted for registration in a deeds registry or surveyor-general's office;*

[Definition of 'general plan' substituted by s. 32 of Act 113 of 1991.]"

"*'land' includes a share in land;*

[Definition of 'land' substituted by s. 22 (a) of Act 27 of 1982.]"

"*'owner' means, in relation to-*

(a) immovable property, subject to paragraph (b), the person registered as the owner or holder thereof and includes the trustee in an insolvent estate, a liquidator or trustee elected or appointed under the Agricultural Credit Act, 1966 (Act 28 of 1966), the liquidator of a company or a close corporation which is an owner and the executor of any owner who has died or the representative recognized by law of any owner who is a minor or of unsound mind or is otherwise under disability, provided such trustee, liquidator, executor or legal representative is acting within the authority conferred on him or her by law;

[Para. (a) substituted by s. 22 (d) of Act 14 of 1993 and by s. 9 (b) of Act 11 of 1996.]

(b) ……."

"'registered' means registered in a deeds registry;"

20. It must follow that the owner (as defined) of land in respect of which a general plan has been registered in terms of section 46(1) of the Deeds Registries Act, must also at the time of such registration continue to be the owner of each sub-division, or erf, thus registered. After all,

there is no suggestion that erven which come about by the registration of a general plan would be ownerless.

21. On the contrary, in terms of section 43(1) provision is made that the owner of a defined portion of land may request the issue of a certificate of registered title in respect of any such portion and section 43(2) provides for the certificate, once issued, to supersede the title deed, so that such portion is thereafter owned by virtue of the certificate of registered title.

22. By contrast, when section 46(1) is read with the provisions of section 46(7) and 43(5)(a) of the Deeds Registries Act it becomes clear that any sub-division, if alienated as a whole, may be registered into the name of its new owner without the need first to obtain a certificate of registered title in respect of such sub-division (*Pesic and Another v Wetdan W38 CC and Others* 2006 (5) SA 445 (W)).

23. In my view the submission made on behalf of the first respondent to the effect that registration under section 46(1) of the Deeds Registries Act does not confer ownership is correct to the extent that no transfer of ownership is involved. But it is incorrect insofar as the suggestion is made that ownership can only come about when a certificate of registered title is issued to the applicant. Such a certificate is not a prerequisite to enable the applicant to pass registered title to the third respondent or any other purchasers of sub-divisions in the estate.

24. It follows that in my judgment the applicant has been the registered owner of the mother property prior to the registration of the general plan and the owner of the sub-divisions making up the mother property following registration on the general plan. Thereafter it was entitled to have transferred ownership in any of the sub-divisions to third parties without the need first to have applied for and obtained certificates of registered title in respect of such sub-divisions.

25. In the light of the conclusion to which I have come regarding the ownership of the sub-divisions making up the mother property, it now becomes necessary to consider the provisions of section 118(1) of the Municipal Systems Act, already set out above.

26. The purpose and effect of section 118(1) was considered by the Supreme Court of Appeal in *City of Tshwane Metropolitan Municipality v Mathabathe* 2013 (4) SA 319 (SCA), where Ponnan JA remarked at page 324 C-E in para 9 that:-

> "*[9] Municipalities are obliged to collect moneys that become payable to them for property rates and taxes and for the provision of municipal services (s 96). They are assisted to fulfil that obligation in two ways: first, they are given security for repayment of the debt in that it is a charge upon the property concerned (s 118(3)); and, second, they are given the capacity to block the transfer of ownership of the property until debts have been paid in certain circumstances (s 118(1)) (per Nugent JA, City of Cape Town v Real People Housing (Pty) Ltd 2010 (5) SA 196 (SCA) para 2). The principal elements of s 118 are accordingly a veto or embargo provision with a time limit (s 118(1)) and a security provision without a time limit (s 118(3)) (City of Johannesburg v Kaplan NO and Another 2006 (5) SA 10 (SCA) para 13). The two subsections*

> *thus provide a municipality with two different remedies. Although the purpose of both is to ensure payment of the municipal claims that fall within the stipulated categories, the mechanisms employed to achieve that purpose are different (BOE Bank Ltd v Tshwane Metropolitan Municipality 2005 (4) SA 336 (SCA) para 7).*"

27. It is relevant to note that Ponnan JA referred to municipalities being given the capacity in terms of section 118(1) to block the transfer of ownership of "*the property*" until debts due to it have been paid. That suggests that such power is limited to the property intended to be the subject of the transfer of ownership and in respect of which a clearance certificate is sought.

28. Counsel for the first respondent submitted that rates are payable by the owner of the property concerned and premised his argument upon the approach that registration of the general plan in terms of section 46(1) of the Deeds Registries Act does not confer upon the resulting sub-divisions ownership separate from that of the mother property. Consequently, so the argument ran, separate ownership in a sub-division only came about when a sub-division is transferred to a new owner.

29. I remain unpersuaded by the argument. The fact that the first respondent has not taken steps to include the sub-divisions as separate entities in its valuation roll or to individually rate them cannot affect the legal ownership of the sub-divisions making up the mother property. It may be that the first respondent compromised its

position by virtue of the conclusion of the service agreement, but the whole agreement does not form part of the court papers before me and that is not an issue which I need to decide in these proceedings.

30. Counsel for the first respondent submitted that by reason of the transfer of a sub-division being the first transfer thereof, separating it from the mother property, the first respondent was entitled to apply the provisions of section 118(1) to the entire mother property, as it exists before separation and thus to "*..veto the transfer to secure rates.*" In *Cape Town v Real People Housing (Pty) Ltd* 2010 (5) SA 196 (SCA), Nugent JA at page 201E in para 14 remarked that "*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.*". Those words were spoken with regard to the provisions of section 118(3), but they apply with equal force also to section 118(1) of the Municipal Systems Act.

31. Counsel for the applicant urged me to interpret the provisions of section 118(1) as applying only to the sub-division sought to be transferred and in respect of which the clearance certificate is applied for. In so doing counsel relied upon the approach to interpretation as set out by the court of appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para graph 18. There Wallis JA in conclusion stated that:-

> "*The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.*"

32. What section 118(1) prohibits is the registration of transfer of property without the production of a certificate of clearance with regard to "*that property*". The only property in respect of which the registration of the transfer of ownership is in contemplation when the issue of a clearance certificate is requested, is the sub-division concerned and not the mother property which has, by virtue of the registration of the general plan, been sub-divided into multiple erven.

33. In my judgment the provisions of section 118(1) of the Municipal Systems Act could, in the present matter, only have been applied to the erven in respect of which the clearance certificates were sought at the time, namely erven 1037 and 1038. Since their sales have fallen through the relief in this regard must be limited to declaratory relief.

34. There was some mention in passing during the course of counsels' addresses of other issues between the parties, but the main thrust of the argument from both sides related to the interpretation and application of section 118(1) and whether to the mother property or to the sub-divisions intended for transfer. It seems to me that the main issue is encapsulated by the relief sought in prayer 2(b) of the notice of motion.

35. The only other live issue remaining is that of costs. Both counsel sought costs orders adverse to the opposing party. In the view I take of the matter the applicant has been substantially successful with regard to the main issue and I can see no reason why costs should not follow the result. However, in my view the costs occasioned by the applicant's supplementary replying affidavits and the interlocutory application seeking leave to deliver these are on a different footing. I am unpersuaded that these costs should be for the account of the first respondent.

36. In the result I make the following order:

    a. It is declared that the calculation of the amounts payable to the first respondent in order to secure the issue of a clearance certificate in terms of the provisions of section 118(1) of the Local Government: Municipal Systems Act 32 of 2000 in respect of the intended registration of transfer of property ownership of any of the sub-divisions forming part of the Mount Richmore Village Estate at Salt Rock, KwaZulu-Natal, shall be based upon the particular erf or sub-division in respect of which the application for such a clearance certificate is made.

b. The first respondent shall pay the costs of the application, save that there shall be no order as to the costs occasioned by the delivery by the applicant of its supplementary replying affidavits and the application in terms of rule 6(5)(e) for authority to do so.

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VAN ZÿL, J.

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No appearance for Second and Third Respondents

DATE ARGUED:	**12 December 2014**
DATE DELIVERED:	**26 June 2015**