IN THE HIGH COURT OF SOUTH AFRICA /ES

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 9447/09

DATE: 31/3/2009

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

31.3.2009
DATE

SIGNATURE

IN THE MATTER BETWEEN

SOUTH AFRICAN NATIONAL ROADS AGENCY LTD	APPLICANT
AND	
THE CHIEF REGISTRAR OF DEEDS	1ST RESPONDENT
THE MINISTER OF AGRICULTURE AND LAND AFFAIRS	2ND RESPONDENT
THE MINISTER FOR PROVINCIAL AND LOCAL GOVERNMENT	3RD RESPONDENT

REASONS JUDGMENT

MAKGOBA, J

This matter came before me in the urgent court on 13 March 2009. After argument I gave an order on the following terms:

1. that the application be heard as an urgent application in terms of Rule 6(12) and that the applicant's non-compliance with the forms, time limits and forms of service prescribed by the Uniform Rules of Court be condoned;

2. that the first respondent, in his capacity as provided for in section 2(1)(a) of the Deeds Registries Act 47 of 1937 be and is hereby ordered to instruct all the Registrars of Deeds to continue with the execution of properly prepared deeds of transfer in terms of section 31(1) of the Deeds Registries Act 47 of 1937 in respect of properties which vested in and passed to the applicant by virtue of section 7(2) of the South African National Roads Agency Ltd and National Roads Act 7 of 1998, without insisting on the production of a certificate as contemplated by section 118 of the Local Government: Municipal Systems Act 32 of 2000;

3. that the order in prayer 2 *supra* will serve as an interim order pending the outcome of the decision of the application by the Minister of Transport to the third respondent to exempt the applicant from the provisions of section 2(1) of the Local Government: Municipal Property Rates Act 6 of 2004;

4. that the resolution adopted by the Registrars of Deeds of South Africa on 14 December 2008 requiring the production of a certificate contemplated by section 118 of the Local Government: Municipal Systems Act 32 of 2000 in respect of Deeds of Transfer in terms of section 31(1) of the Deeds Registries Act 47 of 1937 relating to the properties which vested in and passed to the applicant by virtue of section 7(2) of the South African

National Roads Agency Ltd and National Roads Act 7 of 1998 be and is hereby reviewed and set aside;

5. that the resolution adopted by the Registrars of Deeds during 2005 (under reference number RCR13/2005) and 2007 (under reference number RCR9/2007) in respect of properties expropriated by the Minister of Transport on behalf of the applicant by virtue of section 41 of the South African National Roads Agency and National Roads Act 7 of 1998 be and is hereby set aside;

6. that the first respondent shall pay the costs of this application, such costs to include the costs of two counsel.

I indicated to the parties that my reasons for judgment would follow in due course. The following are my reasons:

[1] The applicant launched this urgent application in which it seeks temporary interdictory relief as well as a review of certain decisions made by the first respondent. The second respondent is cited in these proceedings also by virtue of the provisions of section 2(1)(a) of the Deeds Registries Act 47 of 1937 in that the supervisory function of the first respondent is dependent upon the directions of the second respondent. However, no substantive relief is sought against the second and third respondents. They are joined in these proceedings as a result of

them having a direct and substantial interest in the subject matter of these proceedings.

3] The matter concerns the applicability or otherwise of section 118(1) of the Local Government: Municipal Systems Act 32 of 2000 ("the MSA") on the transfers of properties of which the applicant has become the owner through vesting (so-called "vesting transfers") and of which it has become owner through expropriation on its behalf (so-called "expropriation transfers") by the Registrars of Deeds in various deeds registries in South Africa.

2] The acquisition of ownership of the properties by the applicant through:

- vesting, occurred by virtue of section 7(2) of the South African National Road Agency and National Roads Act 7 of 1998 ("the SANRAL Act");
- expropriation, occurs by way of section 41 of the SANRAL Act read with sections 7 to 24 of the Expropriation Act, 63 of 1975 ("the Expropriation Act").

Section 118(1) of the Local Government: Municipal Systems Act 32 of 2000 ("the MSA") which came into operation on 1 March 2001, provides:

> "(1) A Registrar of Deeds may not register the transfer of property except on production to the 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."

[4] In order to answer the question as to the applicability of section 118(1) of MSA on the vesting transfers and/or expropriation transfers as well as to review certain decisions/resolutions made by the first respondent it is appropriate to set out the factual background leading to such decisions/resolutions made or adopted by the Registrars of Deeds in various deeds registries in the country.

[5] The applicant was established by virtue of section 2(1) of the South African National Roads Agency Ltd and National Roads Act ("the SANRAL Act"). It was incorporated on 19 May 1998 as a public company, the State being the sole member and shareholder. In terms of section 7(2) of the SANRAL Act ownership in all immovable property of the South African Roads Board consisting of land, and in the servitude on or over land, on which national roads are situated passed and vested in the SANRAL on the incorporation date. In terms of section 7(5) of the SANRAL Act, the immovable property which so passed and became vested in

SANRAL, that is the applicant, had to be registered in its name in terms of section 31 of the Deeds Registries Act 47 of 1937 ("the DR Act").

[6] SANRAL's predecessor, the South African Roads Board, was not subject to the payment of rates on its properties consisting of national roads. It was exempted from such payment by virtue of the provision of section 3(3)(c) of the Rating of State Property Act 79 of 1984. The latter Act was repealed in its entirety by the Local Government: Municipal Property Rates Act 6 of 2004 ("the MPRA") which commenced on 2 July 2005. SANRAL was also exempted from the payment of rates by virtue of the provisions of the Rating of State Property Act. Accordingly, SANRAL was not subject to the payment of rates to any municipality until the advent of the MPRA. In terms of MPRA, therefore, SANRAL *prima facie* became liable for payment of rates.

[7] Since 19 May 1998 registration of transfer of the land on which national roads are situated commenced in earnest and is still on-going. SANRAL has indeed embarked on a massive drive to ensure registration of these properties in its name. On 14 December 2008 the Registrars of Deeds of South Africa resolved that rates clearance certificates required by section 118(1) of the MSA had to be procured by SANRAL before the various Registrars will register transfer of the properties vested in SANRAL in terms of section 7(2) of the SANRAL Act. Those transfers had and still have to be effected in terms of section 31 of the Deeds Registry Act 47 of 1937. The resolution adopted by the Registrars is a direct consequence of

the provisions of the MPRA and its perceived application to national roads in particular.

[8] Since 19 May 1998 (the date upon which all assets of the South African Roads Board were transferred to SANRAL) until 2 January 2009 (being the date upon which the resolution by the Registrars of Deeds became effective) no rates clearance certificate as prescribed by section 118 of MSA was required to be submitted by SANRAL in respect of the registration of transfer of SANRAL's newly acquired ownership of the property of the South African Roads Board.

It stands to reason that registration of transfer of properties previously registered in the name of the South African Roads Board into the name of SANRAL is of critical importance. The resolution adopted by the Registrars of Deeds has thus put an abrupt end to those transfers. It is against this background that the applicant has resorted to the present court proceedings for the relief sought in the notice of motion and obtained the subsequent order in terms of prayer 2 of the order I granted on 13 March 2009.

[9] In terms of section 15 of the MPRA each municipality has a discretion to exempt certain categories of owners of properties from payment of rates. 0n 17 July 2008 and again on 17 February 2009 the Minister of Transport wrote letters to the third respondent requesting for such an exemption. As at the date of my order. that is

on 13 March 2009, no response had been received from the third respondent, hence I granted an order in terms of prayer 3.

[10] A uniform practice existed in deeds registries since about 2004 regarding the requirement to produce a certificate in terms of section 118(1) of the MSA with regard to expropriation transfers, which practice was adopted and confirmed by various registrars' resolutions namely 1/2004, 13/2005 and 9/2007 (the latter two resolutions having taken effect on 2 January 2006 and 2 January 2008 respectively). The effect of these resolutions was that the production of certificates in terms of section 118(1) of the MSA was required. No uniform practice used to apply to vesting transfers regarding the production of the certificates in terms of section 118(1) of the MSA – it was a requirement of some deeds registries but not others and also variously within a particular deeds registry. It was at the Registrars' conference on 14 December 2008 and by resolution 10/2008 which came into effect on 2 January 2009 that the registrars purported to effect uniformity. Since that resolution virtually all vesting transfers without the production of a certificate in terms of section 118(1) of the MSA have been refused. In these proceedings the applicant sought an order reviewing and setting aside the aforesaid resolutions, hence I granted an order in terms of prayers 4 and 5.

[11] At the start of the argument in this matter counsel for the respondents raised a point *in limine* regarding non-joinder. His argument is that the applicant merely

cited the first respondent when he ought to have cited all the individual Registrars of Deeds in various deeds registry offices in the country. The question is whether this merits the dismissal of the application. In my opinion, it does not.

In *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 3 SA 654 (AD) at p673 CORBETT, JA, as he then was, quoted with approval the view of SCHREINER, JA in *Trans-African Insurance Co Ltd v Maluleka* 1956 2 SA 273 (A) at 278G that-

> "... technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of their real merits."

[12] In my view there is no merit in the point *in limine* raised by counsel. In any event the first respondent, being the chief Registrar of Deeds in the country, has supervisory functions over all the individual Registrars of Deeds and that he, together with the other registrars, were parties to the adoption of the resolution sought to be reviewed and set aside.

[13] I have already made reference to section 7(2)(a) of the SANRAL Act which provides that on the incorporation date of the applicant (ie 19 May 1998) the immovable property of the South African Roads Board consisting of land and any servitude on or over land on which national roads are situated passed to and vested in the applicants. However, in order to register the applicant's newly

acquired ownership or entitlement to immovable property which has passed to and become vested in it, section 7(5) of the SANRAL Act provides that section 31 of the Deeds Registries Act ("the DR Act") applies. Section 31(1) of the DR Act provides:

> "... whenever the ownership of any land has by statute vested in ... any corporate body .... the registrar shall, upon lodgment with him of a deed of transfer in the prescribed form prepared by a conveyancer in favour of the transferee, execute the same."

[14] This brings me to a question whether in the process of registering transfer of ownership of its newly acquired immovable property the applicant is required to produce a rates clearance certificate as prescribed by section 118(1) of the MSA. It should be noted that section 118(1) of MSA prohibits the registration of the transfer of the property except on production to the Registrar of Deeds of a clearance certificate. The purpose of section 118(1) of the MSA, it seems, is to furnish a form of security to municipalities for the payment of amounts due in respect of rates or services rendered.

[15] The applicant argues that it could never have been the intention of the legislature that the provisions of section 118(1) of the MSA should be applicable to vesting transfers. The argument goes thus: a vesting transfer stands in contradistinction to a private sale. With vesting, such as the present, ownership passes immediately on incorporation of the applicant and the registration of transfer serves only one

purpose namely to confirm a historical fact, that is the transfer of ownership which has already occurred. With a private sale the purchaser has acquired no proprietary rights in the property which forms the subject thereof before registration of transfer of ownership of that property. It presupposes the transfer of ownership from one person to another by a deed of transfer. It could therefore not have been the intention of the legislature to regulate that an existing owner (being the applicant, who acquired ownership through vesting) is not in arrears with the payments of rates. In my view, the applicant's argument in this regard is laudable and I am inclined to accept same.

[16] The constitutional court in *Mkontwana v Nelson Mandela Metropolitan Municipality and Another (including other parties)* 2005 1 SA 530 (CC) explained the purpose behind section 118(1) of the MSA. The *ratio* behind section 118 is to ensure that a purchaser (transferee) does not take transfer of an immovable property from a seller (transferor) with an existing outstanding account with the relevant local authority or municipality. This does not only protect the purchaser but also assists the municipality in recovering an outstanding debt prior to the property being registered in the name of the purchaser.

[17] It should be noted that the applicant *in casu* had acquired ownership of the property on 19 May 1998, that is before the commencement of the two statutes, namely the MSA and the MPRA. In vesting transfers the deed of transfer referred

to in section 31 of the DR Act serves only one purpose, that is to say it confirms a historical fact ie the transfer of ownership which had already occurred on 19 May 1998. Therefore on the dates on which the MSA and MPRA became effective the applicant was already the owner of the properties which form the subject matter of the vesting transfers. On this supposition it follows that the provisions of section 118 of the MSA could never have been intended to be applicable to the registration of transfer of ownership. To echoe the words of applicant's counsel, the provisions of section 31 of the DR Act and section 118 of the MSA are not conterminous.

[18] The upshot of all the aforegoing is that the Registrars of Deeds erred in resolving that a rates clearance certificate in terms of section 118 of the MSA is required before registration of a vesting transfer may occur.

[19] I now deal with the applicability of section 118(1) of the MSA on expropriation transfers. In terms of section 41(1) of the SANRAL Act the Minister of Transport may, if satisfied on reasonable grounds that the applicant reasonably requires any land for a national road, expropriate that land for the applicant. Once such expropriation has been effected, the applicant becomes owner of the land so expropriated on the dates of the expropriation of the land concerned [see section 41(4) of the Act]. In terms of section 41(5) the provisions of section 7 to 24 of the Expropriation Act 63 of 1995 ("Expropriation Act") will apply with regard to any expropriation in accordance with subsection (1).

[20] In terms of section 8(1) of the Expropriation Act the ownership of property expropriated shall on the date of expropriation vest in the applicant. The date of expropriation is the date referred to in section 7(2)(b) of the Expropriation Act.

[21] The provisions of section 31 of the DR Act are applicable to expropriation transfers in the same manner as they do apply in respect of the vesting transfers. Therefore the same argument made by applicant's counsel in regard to vesting transfers applies to expropriation transfers. It would therefore mean that the deed of transfer referred to in section 31(1) of the DR Act does not in itself transfer ownership in the expropriated property. It merely confirms a historical fact which had already happened.

[22] For the same reasons already advanced when dealing with vesting transfers I accordingly find that the provisions of section 118 of the MSA cannot be applicable to the expropriation transfers.

[23] The resolutions adopted by the various Registrars of Deeds (ie resolution 10/2008 in respect of vesting transfers and resolutions 13/2005 and 9/2007 in respect of expropriation transfers) clearly fall within the ambit of the definition of an "administrative action" in the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). The action falls to be reviewed under the provisions of section 6(2)(d)

of PAJA. The Registrars of Deeds clearly erred in law in adopting the resolutions which they did.

[24] In *Hira & Another v Booysen and Another* 1992 4 SA 69 (AD) CORBETT, CJ said the following at page 93C-D in regard to the reviewability of a decision where the decision-maker committed an error of law:

> "(3) Where the complaint is that the tribunal has committed a material error of law, then the reviewability of the decision will depend, basically, upon whether or not the legislature intended the tribunal to have exclusive authority to decide the question of law concerned. This is a matter of construction of the statute conferring the power of decision."

In terms of section 6(2)(d) of PAJA this court has the power to judicially review an administrative action if the action was materially influenced by an error of law. It is my finding that the Registrars of Deeds *in casu* have committed an error of law.

[25] This application was brought on an urgent basis and the order was granted likewise. Since counsel for the respondents argued that the matter should be dismissed for lack of urgency, I deem it appropriate to decide on the issue of urgency.

[26] The gist of the applicant's contention that this application should be heard on an urgent basis is that it requires, over the next two years, approximately R25 billion to fund major constructions which are currently under way. It includes the Gauteng Freeway Improvement project as well as the Dube Trade Port Interchange, amongst others. It is common cause that South Africa hosts the 2010 Soccer World Cup. It is also common cause that the aforementioned projects saw the light with that international event in mind. These allegations are not disputed by the respondents. The first respondent merely noted the contents of those allegations. In the light of the decision in *Moosa and Another v Knox; Paruk v Knox* 1949 3 SA 327 (N) at 331 I shall, for purposes of this application, accept the applicant's allegations as correct.

[27] In order to be able to raise the aforementioned capital, the applicant's international credit rating is of critical importance. If the applicant's financial statements for the year ending 31 March 2009 are qualified by the Auditor-General, it will have a disastrous impact on the applicant's credit rating which in turn will affect its ability to fund construction of the aforementioned National Road System. This evidence is not denied by the first respondent. On the basis of the *Moosa* decision (*supra*) these allegations should therefore for purposes of this application be accepted as correct.

[28] The importance of this application cannot be over-emphasised. In order for the applicant to maintain its credit rating and to raise the funding (R25 billion) the

vesting transfers are of critical importance, the reason being that the vesting transfers and the properties affected thereby are put up as security. It therefore follows that if the vesting transfers cannot be effected speedily, it will lead to a qualification of the applicant's financial statements for the year ending 31 March 2009. Such qualification will directly impact on the applicant's international credit rating, which in turn will imply that the applicant will not be able to successfully raise the aforesaid amount or funding. This will have a direct impact on the projects embarked upon by the applicant. This will materially and unreasonably affect national economic policies, economic activities across municipal boundaries and national mobility of goods, services, capital and labour.

[29] The applicant's case on urgency appears to be based on commercial interests. In *Twentieth Century Fox Film Corporation v Anthony Black Films (Pty) Ltd* 1982 3 SA 582 (W) at 586G it was held that urgency of commercial interests may justify the invocation of Rule 6(12) no less than any other interests. See also *Bandle Investments (Pty) Ltd v Registrar of Deeds* 2001 2 SA 203 (SELD) at 213B-C and D-F.

[30] I therefore hold that the application is urgent and that the applicant's non-compliance with the rules should be condoned, hence the order was granted on 13 March 2009.

E M MAKGOBA
JUDGE OF THE NORTH GAUTENG HIGH COURT

9447-2009

HEARD ON: 13 MARCH 2009
FOR THE APPLICANT: A C FERREIRA SC AND I ELLIS
INSTRUCTED BY: VAN DER MERWE & VAN DER MERWE ATTORNEYS
FOR THE RESPONDENTS: J H DREYER SC
INSTRUCTED BY: THE STATE ATTORNEY