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IN THE HIGH COURT OF SOUTH AFRICA
(NORTH AND SOUTH GAUTENG HIGH COURT, PRETORIA)

DATE: 15/05/2009
CASE NO: 16198/2008

UNREPORTABLE

In the matter between:

INITIATIVE SA
INVESTMENTS 163 (PTY) LTD

APPLICANT

And

CITY OF TSHWANE METROPOLITAN
MUNICIPALITY

1ST RESPONDENT

ABSA BANK LIMITED

2ND RESPONDENT

JUDGMENT

RAULINGA, J

The applicant seeks a declarator against the first respondent declaring that the applicant is entitled to the return of the guarantee furnished to the first respondent, dated 28 May 2004.

Further, that the first respondent be ordered to forthwith return to the applicant the guarantee annexed as “EM13”; and also:

- “ – *That a declaratory order be made whereby it is declared that the Applicant is not liable to pay any bulk contributions to the First Respondent for external electrical services in respect of Clubview X72 township;*
- *That an order be made that the First Respondent is not entitled to present the aforesaid guarantee, Annexure ‘EM13’ to the founding affidavit, to Absa Bank Ltd for payment;*
- *That an order be granted in terms of which it is declared that the guarantee, Annexure ‘EM13’ to the founding affidavit has lapsed in its entirety and is no longer of any force and/or effect;*
- *That Respondents be ordered to pay the costs of the application;”*

On 28 September 1993, the first respondent's predecessor, the Centurion Town Council passed a resolution in terms of which no financial contributions for external engineering services were required of developments taking place in the areas designated as priority arrears – the resolution is annexure “*EM6*”. Portion 528 (a portion of 526) of the farm Zwartkop 356 registration division JR, fell within the said priority areas.

The Centurion Town Council was disestablished in December 2000 and the City of Tshwane Metropolitan Municipality was established in terms of Notice 6770 of 2000 published in the provincial gazette extra ordinary of 1 October 2000 – annexure “*EM4*”.

On 6 December 2001 the council of the City of Tshwane passed a resolution in terms of which the tariffs of the disestablished municipalities (including Centurion Town Council) were purported to be withdrawn with effect from January 2002. From that day onwards the determination of charges payable to the council for the supply of electricity were purported to be determined in terms of the provisions of section 10G(7)(ii) of the

Local Government Transition Act, 1993 (Act 209 of 1993) annexure “*FC1*”. The resolution so passed dealing with the priority areas in the now disestablished Centurion Town Council is deemed to have been withdrawn.

The land upon which Clubview X72 (a portion of 526) is situated previously belonged to an entity known as Demef Properties Centurion (Pty) Ltd (“*DPC*”). DPC applied to the predecessor of the first respondent, the Centurion Town Council to establish three townships namely Clubview X72, X73 and X74. The application was made in terms of the provisions of section 96 of the Town-Planning and Townships Ordinance 15 of 1986. The application to establish the said townships was approved on 2 April 1998 – annexure “*EM2*”.

Subsequent to the aforesaid approvals DPC decided to consolidate the three townships into one which was approved by the first respondent in terms of section 98 of the Town-Planning and Townships Ordinance. The approval was granted on 20 September 2002. The proclamation appeared in the Provincial Gazette of August 2004 proclaiming Clubview X72 as a township

in terms of the provisions of section 103 of the Town-Planning and Townships Ordinance 1986 – annexure “*EM4*”.

The land was sold to the applicant by an entity known as Clubview Terraces (Pty) Ltd who in turn had bought it from DPC. The applicant bought the land in terms of a written agreement of sale. The applicant became the owner of the land by virtue of deed of transfer – annexure “*EM5*”.

A dispute arose when the first respondent wanted to require from the applicant to make a bulk contribution in respect of external electricity contributions. The first respondent insisted with its demand even after a legal opinion by its legal department went against its wishes – “*EM9*”. It is as a result of this dispute that in June 2004 the parties concluded an engineering services agreement in respect of the township Clubview X72 – annexure “*EM10*”. The parties inserted clause 73 which entails that the applicant undertook to provide a guarantee for the amount of R478 512.30 pending settlement of the aforesaid dispute either by agreement between the parties or by way of an order of a competent court. Applicant furnished security in order to continue

with the development of Clubview X72. The first respondent refuses to release the guarantee – annexure “*EM13*”.

Although a number of issues were raised by both the applicant and the first respondent, the matter may be decided based only on a few of these issues.

The establishment of Clubview Extension 72 – Township Portion 528 was approved in terms of the provisions of section 98(1) of the Town Planning and Townships Ordinance 1986 (Ordinance 15 of 1986). This was subject to conditions as reflected in the relevant schedule which appears on page 25 of the papers as part of annexure “*EM3*”. That was on 20 September 2002. This was done after consent was given to establish Clubview Extension 73 on 14 May 1998. It is common cause that approval of 2 April 1998 was given to DPC. On 6 December 2001 the first respondent passed a resolution whereby the tariffs of the disestablished municipalities were withdraw with effect from 1 January 2002. This was to the effect that the applicant was liable to pay bulk electricity charges to the first respondent. The Resolution is annexure “*FC1*”. However, the said resolution does not contain a clause that the exemption for

payment of bulk electricity charges for services priority areas is revoked. Moreover the first respondent passed the said resolution fully knowing that it had a duty to comply with the provisions of section 3 and/or 4 of the Promotion of Administrative Justice Act 3 of 2000.

The first respondent did not notify the applicant or any of its predecessors of the intent to grant the variation in terms of section 98 of the Ordinance.

No reasonable opportunity was granted to the applicant or any of its predecessors to make representation to the first respondent.

No opportunity was granted to the applicant or any of its predecessors to appear in person before the first respondent. In the contrary the first respondent argues that no rights arose from any agreement entered into between the applicant's predecessor and the first respondent. The first respondent further argues that the said resolution was revoked therefore the applicant must pay the bulk electricity charges.

It is my view that the disputed resolution was not withdrawn by the resolution of 6 December 2001. The disestablished Centurion Municipality passed a resolution which was inherited by its successor, the first respondent. When the township was approved in August 2004, the applicant was entitled to a right which flowed from its predecessor from whom it bought the property. It was not mentioned anywhere in the resolution of December 2002 that the applicant's rights were curtailed. The applicant was therefore not bound to pay for bulk external electricity charges. When the first respondent's predecessor introduced the incentive, the idea was to attract developers. Had it not been for the said incentive, the applicant's predecessor would not have bought the property. It can also be deduced that the applicant would not have bought the property without the incentive.

The averments of the first respondent are paralysed by the legal opinion of its own Legal Service Department – annexure “EM9”. The legal opinion on page 83 of the papers concludes as follows:

- “1. The policy of the disestablished Centurion Town Council was not withdrawn by the resolution of the Tshwane Council on 6 December 2001. Only the electricity tariffs of the said Council were withdrawn. It follows that the tariffs and formulas pertaining to the bulk service contributions as contained in Part II of the tariffs, are not applicable to the areas of the said Council.*
- 2. Although the resolution of 6 December 2001 of the Tshwane Council had withdrawn the tariffs of the disestablished Centurion Town Council the formulas that dealt with the calculation of the bulk services contributions is still in effect.*
- 3. The policy of the disestablished Centurion Town Council can only be withdrawn and substituted by Tshwane Council after a process of community participation has been followed ...”*

The first respondent submits that this opinion was not implemented because other legal opinions were sought. However,

the said legal opinions are not at hand nor can the first respondent make them available. First respondent also argues that the document containing the legal opinion is privileged. However, the applicant convincingly submitted that the said legal opinion was in a file which makes it a public document. The first respondent's argument can be rejected with the contempt it deserves.

In *Kungwimi Local Municipality v Silver Lakes Home Owners Association* 2008 6 SA 187 (SCA) [14]-[15] at 194F-195A and [31] at 200B-F, the court held:

“In a post-constitutional South Africa, the power of a municipality to impose a rate on property is derived from the Constitution itself: the Constitutional Court has described it as an ‘original power’ and has held that the exercise of this original constitutional power constitutes a legislative – rather than an administrative act. The principle of legality, an incident of the rule of law, dictates that in levying, recovering and increasing property rates, a municipality must follow the procedure prescribed by the applicable national or provincial legislation in this regard. Before us it was

common cause that s 10G(7) of the Local Government Transition Act 209 of 1993 applied at the relevant time to both the resolution and the subsequent notice.

To my mind, the object of these provisions is to ensure that residents in the municipal area concerned are 'properly and optimally informed' of what their obligations will be, should be published amendments (in this where, the rates increase) take effect, and precisely when such obligations will become enforceable. In the absence of such information, it would be well-nigh impossible for residents timeously to arrange their financial affairs such that they make allowances for any anticipated increased demand upon their purses ..."

This also sustains the submission by the applicant that the requirements of section 3 and/or 4 of Act 3 of 2000 were not met.

This was clarified by JAFTA AJ in *Walele v City of Cape Town and Others* 2008 6 SA 129 (CC) 28 at 144F-H:

“Regarding the procedural aspect of the right to fairness, the applicant’s case was based on the provisions of s 3 of PAJA. This section acknowledges in express terms that the required standard for procedural fairness differs from case to case. The facts and circumstances of a particular case determine the content of procedural fairness required. But the express precondition for the requirement to act fairly, in terms of the section is that the administrative action must materially and adversely affect the rights or legitimate expectations of the aggrieved person...

The audi principle evolved and its scope was expanded under the common law also to cover cases where the impugned decision did not affect rights ...”

The first respondent raised three new points which are not reflected in the answering affidavit; (i) That the Centurion Town Council when it passed the resolution of January 2001 it acted *ultra vires*; (ii) That the said resolution does not create any rights; and (iii) That the applicant as the second successor has no rights flowing from DPC. In raising these points at such a late stage of

the process, the first respondent was clutching on straws in desperation to find some solace.

I am convinced that the version of the first respondent cannot be sustained.

1. In the premises the application is granted.
2. The first respondent is ordered to pay the costs of the application.

T J RAULINGA
JUDGE OF THE NORTH GAUTENG HIGH COURT

16198/2008

Heard on:
For the Applicant: Adv
Instructed by: Messrs
For the Respondents: Adv
Instructed by: Messrs
Date of Judgment: