THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 20771/2014

In the matter between:

CITY OF TSHWANE METROPOLITAN MUNICIPALITY **APPELLANT**

and

UNIQON WONINGS (PTY) LTD **RESPONDENT**

Neutral Citation: *City of Tshwane v Uniqon Wonings* (20771/2014) [2015] ZASCA 162 (20 November 2015)

Coram: Lewis, Cachalia, Theron, Wallis and Saldulker JJA

Heard: 2 November 2015

Delivered: 20 November 2015

Summary: Municipal property rates: s 118(1) of the Local Government: Municipal Systems Act 32 of 2000: rates are payable by a township owner over the remaining extent of the township as a single entity, and not all the unsold erven separately. Where a township owner sells an erf in the township, and applies for a clearance certificate in respect of municipal rates and charges, required before transfer can be effected, the municipality must determine the rates and charges payable over the preceding two years in connection with that erf and issue the certificate against payment of that amount.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Ebersohn AJ sitting as court of first instance).

1 The appeal against the first order of the court a quo is upheld and that order is set aside.

2 The appeal against the second order is dismissed, but the wording is replaced with:

'(a) It is declared that the respondent is obliged to value and enter onto its valuation roll the entire remaining Township property of Six Fountains Estate and not the individual erven constituting that property in terms of the provisions of the Local Government: Municipal Property Rates Act 6 of 2004, and to levy property rates and taxes in terms of the Act calculated on the value of that property for rating purposes.

(b) It is declared that the respondent is obliged to issue clearance certificates in terms of s 118(1) of the Local Government: Municipal Systems Act 32 of 2000 in respect of any erf to be transferred to a purchaser by the applicant once the rates and other municipal charges incurred in connection with that erf have been determined and paid.'

3 The appeal against the seventh order is upheld and that order is set aside.

4 The appeal against the eighth order is upheld and is replaced with:

'The costs of the application are to be paid by the respondent.'

JUDGMENT

Lewis JA (Cachalia, Theron, Wallis and Saldulker concurring)

[1] In 2003 Uniqon Wonings (Pty) Ltd (Uniqon), the respondent in this appeal, a property developer, bought farmland (a portion of a farm in Gauteng) in the area of jurisdiction of the Kungwini Local Municipality (Kungwini) for the purpose of township development. On Uniqon's application to Kungwini, the farm was converted to a township of 200 erven in accordance with a general plan approved by the Surveyor-General on 14 January 2003. On 8 April 2003 Kungwini declared that a township, to be named the Six Fountains Estate, was approved in terms of s 103 of the Town Planning and Township Ordinance 15 of 1986 (T). Six Fountains Estate now falls within the jurisdiction of the appellant, the City of Tshwane Metropolitan Municipality (the City), under which Kungwini, which was disestablished in 2011, has been subsumed.

[2] Since the inception of the township, Uniqon has encountered difficulties in respect of the rates levied against the township property. In June 2012 the City instituted action against it for payment of arrear rates. In 2013 Uniqon sought three clearance certificates from the City, required by s 118(1) of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act), before transfer of erven to purchasers can take place. The City refused to issue the certificates on the basis that Uniqon had first to pay the arrear rates on the entire township property. That was the reason for Uniqon instituting an urgent application in the Gauteng Division of the High Court, Pretoria, for an order (amongst others) that the City issue the clearance certificates against tender of payment of the rates it considered due in connection with each erf.

[3] The dispute hinges on an interpretation of s 118(1): the section (which I shall discuss more fully later) provides that before the Registrar of Deeds may register the transfer of immovable property, the transferor must produce a certificate (known as a clearance certificate) from the municipality in which the property is situated, certifying that all amounts due to the municipality in respect of services, rates and taxes on that property have been paid. Section 118(1), in so far as relevant here, reads:

'**Restraint on transfer of property**

(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 . . . 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.

. . .

(3) An amount due for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties is a charge *upon the property in connection with* which the amount is owing and enjoys preference over any mortgage bond registered against the property.' (My emphasis.)

[4] Accordingly, where a township owner sells an erf and wishes to transfer it to the purchaser, it must pay debts owing in connection with the erf to the municipality in order to implement the transfer. But how does the municipality determine what is owed in connection with an erf that has been rated until then as part of the township? That is the question upon which this appeal turns.

[5] Uniqon's application was based in the first instance on the principle that only outstanding rates in connection with each erf were payable before it could obtain a clearance certificate. But before the answering affidavit of the City was filed, a decision in the same Division was handed down by Prinsloo J (*Mooikloof Estates*

(Edms) Bpk v Die Stadsraad van Tshwane & another (GP), unreported case no 29998/2013, handed down on 14 June 2013). In that matter the court held that until an erf is transferred to a purchaser by the township owner it does not come into existence as a separate entity and is thus not rateable: the township owner was thus obliged to pay only an administration fee to the City in order to obtain a clearance certificate, and not the arrear rates which the township owner considered to be payable in connection with the erf.

[6] Jumping at the opportunity the decision offered, in its replying affidavit, Uniqon asserted that it was liable to pay only an administration fee to the City in order to get the clearance certificate required to enable the Registrar of Deeds to register transfer of an erf to a purchaser. Ebersohn AJ found for Uniqon, granting some prayers by agreement and several others against which the City appeals, with the leave of this court.

[7] The orders made by the court a quo, and against which the appeal is directed, are:

‘1 That the matter be treated as an urgent application and that the respondent be ordered to issue clearance certificates within 7 (seven) days from the date of handing down this judgment, to the applicant in respect of Stands No 163, 165 and 172 in the Six Fountains Estate upon payment by the applicant of the application fee of R50,40 (fifty rand and forty cents) per stand.

2 A declaratory order is issued that respondent has not been and is not entitled to levy property rates and taxes on stands not having been sold by the applicant in the Six Fountains Estate to any purchasers and not having been transferred to any separate individual purchasers, but is entitled only to levy property rates and taxes on all remaining stands in the Six Fountains Estate, still registered under the main Title Deed No. T21949/2003, as one property, in terms of the Property Rates Act, No. 6 of 2004.

. . .

7 That pending finalisation of any remaining dispute regarding outstanding property rates and taxes, as referred to in the paragraphs of this order, respondent is ordered to issue clearance certificates within 7(seven) days after any application for such certificate is made, in respect of any stand to be transferred to any purchaser in the Six Fountains Estate if payment is made of the application fee applicable in respect of the issuing of a clearance certificate, which is presently R50,40 per application.

8 The costs of this application shall be paid by the respondent on the scale of attorney and client which costs shall include the costs of two counsel and the heads drawn by counsel.'

[8] As I have said, Ebersohn AJ found that until erven had been sold and transferred they did not come into existence. I shall deal with that finding and its relevance shortly. But first I shall discuss the statutory framework that governs the rating of immovable property. And it is important to consider the legal principles applicable to township rating, before discussing the interpretation of s 118(1) of the Systems Act, read with ss 46 and 47 of the Deeds Registries Act 47 of 1937. And of course the Local Government: Municipal Property Rates Act 6 of 2004 (the Rates Act), that governs the rating of all immovable property, must also be taken into account.

The rating of township property before all erven are sold and transferred

[9] The general principles applicable to the rating of erven in newly created townships have been established for many years. The liability to pay rates is that of the registered owner of the property, but once a township has been laid out and a township register opened the question may arise whether that refers to the owner of the township or the owner of the individual lots (who may of course, until lots are sold, be the same person). In *Estate Breet v Peri-Urban Areas Health Board* 1955 (3) SA 534 (T) at 537G-539H, Ramsbottom J, in a decision of a full court on appeal, said that the question who is the township owner depends on who is registered as such in the Deeds Registry. Before erven in a township are sold and transferred, the

township is registered in the name of the owner whose name appears on the register, which is a question of fact. Evidence was led in that court that after a township is proclaimed, and in accordance with the requirements of ss 46 and 47 of the Deeds Registries Act, the Deeds Office opens a register of the township which is contained in a separate volume. On the flyleaf of the volume the fact of proclamation is recorded, as is the name of the applicant for proclamation. There is a folio for each lot as shown in the general plan of the township. But the register of the township does not supersede the registration of the land on which the township is laid out in the Register. The person who is the owner of the township is reflected as the original owner of what was the land on which the township was proclaimed. (Of course the procedure is now done electronically but the principles remain the same.)

[10] As and when an individual erf is sold, and is transferred to the purchaser, the transfer is registered on the individual folio bearing the number of the erf. And the township register is amended accordingly. The township owner remains the owner of the remaining extent of the township, and its name still appears on the register. This is the basis on which townships are rated: it is the township as a whole or what remains that is valued and in respect of which rates and other charges are payable to a municipality. Erven are rated individually only after they are sold by the township owner and transferred to purchasers.

[11] The methods of valuation of the remaining extent of a township after some erven have been sold and transferred were discussed by Kuper J, also in a full court appeal, in *Florida Hills Township Ltd v Roodepoort-Maraisburg Town Council* 1961 (2) SA 386 (T). The court, relying on the judgment of Ramsbottom J in *Breet*, said (at 391H in fine) that: 'When the area of the remainder is reduced from time to time by the sale of individual erven the unit of the remainder retains its own identity and continues to appear as the "remainder" in the Deeds Registry.' The court went on to determine the different ways in which a valuer may approach the valuation of the remaining extent of a township.

[12] These principles have been applied consistently for decades. However, in *Heritage Hill Home Owners Association v Heritage Hill Devco (Pty) Ltd* 2013 (3) SA 447 (GNP) Kollapen J sought to distinguish *Florida Hills* and an earlier decision to the same effect (*Rynfield Townships Ltd v Benoni Town Council & another* 1950 (4) SA 717 (T)) on the basis that the decisions related only to municipal valuation, whereas the court in *Heritage Hill* was faced with the question whether the township owner, as owner of all unsold erven, was liable to pay levies to the homeowners' association. In that matter, said the court, the liability of the township owner to pay levies to the association was regulated by contract between all owners in the township.

[13] The City in this matter relies now on *Heritage Hill* to argue that Uniqon is owner not of the remaining extent, as a single unit, but of all the individual erven comprising the remaining extent, and is thus liable to pay rates in respect of each erf. The court in *Heritage Hill* also considered that the decision in *Kosmos Ridge Homeowners' Association v Cosmos Ridge (Pty) Ltd* [2003] JOL 11481 (T), which had relied on the principles set out in *Breet* and *Florida Hills*, was wrongly decided. Much the same issue had been before the court – whether the township owner was obliged to pay levies to a homeowners' association – and Hartzenberg J, relying on *Florida Hills* and *Rynfield Townships*, held that an erf did not come into existence until it was sold and transferred to a purchaser: '[I]ndividuele erwe nie ontstaan voordat daar 'n spesifieke oordrag van 'n spesifieke erf in die Akteskantoor geregistreer is nie' (para 6).

[14] Kollapen J's decision in *Heritage Hill* was confirmed on appeal to a full court (*Heritage Hill Devco (Pty) Ltd v Heritage Hill Homeowners Association* [2015] ZAGPPHC 310 (24 April 2015)) and was approved by Kruger J in *Prospect SA Investments 42 (Pty) Ltd v Lanarco Home Owner Association* [ZAKZPHC] 2014 39. I do not think it necessary to consider the correctness of the principles set out in *Heritage Hill*. The matter before us does indeed deal with rating and not with homeowners' associations and their rights to levy township owners as owners of individual erven. And so the distinction sought to be drawn in *Heritage Hill* between

that and the rating cases is not relevant to this decision. The City's reliance on it does not assist with the interpretation of s 118(1) of the Systems Act.

The way rates were levied on the Six Fountains Estate

[15] Some history of the way in which Kungwini, and the City subsequently, rated the township shows the practice of the City in determining the rates for the remaining extent. Initially Kungwini valued and placed on the valuation roll all unsold erven, and did not rate the township property. Individual municipal accounts were opened for the unsold erven and not for the remaining extent of the township. Rates were levied against the individual erven, and not on the remaining extent, despite the fact that it remained as such on the register. This was plainly incorrect.

[16] When the City gained jurisdiction in respect of the area formerly under Kungwini, and following complaints by Uniqon and other developers, it attempted to remedy the situation and deal with the township property as required by the Rates Act and the principles of the common law. It averred in the answering affidavit that all rates and tax accounts in respect of unregistered erven were being closed, and payments in respect of them would be credited to Uniqon. A proper valuation of the township property, as commercial property, was commissioned by the City, which determined the value of the remaining extent, subject to a developer's rebate. The new valuation was published in the City's supplementary valuation roll for the period 1 July 2010 to 30 June 2013. It opened a new rates and services account in respect of the township property.

[17] But, said the City, clearance certificates in respect of individual erven would be issued only when all municipal debts in respect of the entire township property were up to date. That, of course, covered only the two-year period before a certificate was applied for. The City's officials calculated the amount payable on the value of the township property as reflected in the supplementary valuation roll, and that was required to be paid before any clearance certificate could be issued. Its

stance in opposing the application originally was thus that all debts to the City in respect of the entire township, including the erven to be sold, were payable before a clearance certifcate would be issued.

Section 118(1) of the Systems Act

[18] The argument of the City now, relying on *Heritage Hill*, that each demarcated erf can be rated and levied before sale and transfer by the township owner, does not take into account the wording of s 118(1)*(b)* of the Systems Act. So too, the decision of Prinsloo J in *Mooikloof,* which informed the decision of Ebersohn AJ on appeal before us, that an erf does not come into existence until sold and transferred, such that it is not rateable as a separate entity before it is sold and transferred, also does not take into account the clear meaning of s 118(1)*(b)* of the Systems Act. That provides that the clearance certificate must certify 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 preceeding the date of application for the certificate have been fully paid (my emphasis). '

[19] In *City of Cape Town v Real People Housing (Pty) Ltd* [2009] ZASCA 159; 2010 (5) SA 196 (SCA) Nugent JA pointed out (paras 1 and 2) that municipalities are obliged by the Systems Act (ss 96 and 97) to collect moneys payable to them for services and property rates. They are required, to that end, to implement a credit-control and debt-collection policy and to adopt bylaws to give effect to the policy and its implementation and enforcement. The purpose of ss 118(1) and (3), he said, is to assist municipalities 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 secondly, municipalities are given the capacity to block the transfer of ownership of property until debts have been paid in certain circumstances. That is the effect of the provisions of s118(1): . . .' That capacity to block arises because a registrar of deeds cannot register a transfer until the municipality issues the clearance certificate applied for.

[20] The City argued on appeal that the court a quo wrongly held that an erf was not 'born' until it was transferred and that each erf in the township should be separately rated, even when still owned by the township owner. It relied, as I have said, on *Heritage Hill*, which does not deal with the same issue. And I fail to understand why the principles in *Breet* and *Florida Hills* (which underlay the way in which the City sought to remedy Kungwini's defective rating system) should be ignored. But Uniqon's contention that no rates are payable at all in connection with erven not yet transferred is equally untenable. The township owner is registered as such in the Deeds Registry and is liable for all municipal charges including property rates in respect of the entire property comprising the township.

[21] The question that arises, and which the court a quo did not sufficiently consider, is what meaning is to be ascribed to 'in connection with *that* property' in s 118(1) of the Systems Act. It seems to me to be self-evident that amounts that became due *in connection with that property* refer to the property that is to be transferred. The phrase cannot refer to the remaining extent which is not to be transferred. 'In connection with' means 'concerning' (see the Concise Oxford English Dictionary (2011) or 'in respect of'. The inevitable conclusion is that only that portion of the debt due by Uniqon in connection with, concerning or in respect of the erf to be transferred, owing in respect of the period of two years before the date of application for a clearance certificate, is payable to the City so that it can issue the certificate in terms of s 118(1), as it is obliged to do. This means that it is necessary to determine the share of outstanding rates and other charges due in connection with the erf to be transferred, and that must be paid before a clearance certificare can be issued.

[22] Uniqon argued, however, that 'property' is defined in the Systems Act, as well as in the Rates Act and the other statutes regulating local government, as 'immovable property registered in the name of a person'. Until transfer of an erf takes place, the argument goes, it is not property because it is not itself registered in the name of a person.

[23] However, the definitions do not circumscribe what is meant by 'that property' in s 118(1): the subsection can mean only the property to be transferred by the owner of the remaining extent of the township to a purchaser of an erf designated as such on the township plan, whether or not it appears on the valuation roll, or is registered as a separate entity. Significantly, the Deeds Registries Act defines an erf (s 102) as '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 recognised, approved or proclaimed as such'.

[24] The City has, in effect, argued that we must broaden the meaning of 'that property' so as to read it as referring to remaining extent of the township. That is contrary to the general principles of construction of statutes that interfere with rights. Nugent JA, in *City of Cape Town* (above) said in para 9, referring to *Mkontwana v Nelson Mandela Metropolitan Municipality & others* 2005 (1) SA 530 (CC), that 'statutes that intrude upon established rights ought to be strictly construed'. He referred in this regard to *Dadoo Ltd & others v Krugersdorp Municipal Council* 1920 AD 530 at 552, where Innes CJ said: 'It is a wholesome rule of our law which requires a strict construction to be placed on statutory provisions which interfere with elementary rights.' In *Mkontwana* the Constitutional Court endorsed this principle in finding that s 118(1), while intruding on property rights, passed constitutional muster. In my view, the broad interpretation advanced by the City is contrary to this fundamental principle.

[25] As I see it, the question to be asked, in interpreting s 118(1) of the Systems Act, is not whether an erf has been separated out and has an independent existence for the purpose of obtaining a clearance certificate. It is rather whether or not the outstanding rates and other charges in connection with that erf can be determined before transfer. Although only that which is on the valuation roll can be rated, Uniqon was able to determine what proportion of the total rates for the township could be ascribed to each erf separately. That is why it tendered to pay to the City a different amount in respect of each erf that it had sold. I see no reason why the City cannot do

the same. It has the plan of the township and is able to calculate what is outstanding in connection with a particular erf before issuing a clearance certificate for each erf, based on the valuation roll for the remaining extent.

[26] That is also the only fair and equitable construction. If it were otherwise a township owner could be prevented from developing the township by the imposition of charges in respect of the entire township each time it sold an erf and wished to pass transfer. It would be equally unfair to deprive the City of the revenue it needs to run the municipality by holding that only an administrative fee is payable for a certificate. The practical and equitable way to determine rates for an erf before transfer is to allocate a pro rata share of the rates due in respect of the township as a whole, and for the township owner to make payment of that amount in order to comply with the requirements for obtaining a clearance certificate. In regard to municipal charges, unless they are capable of allocation to specific erven, they should be apportioned in the same way.

[27] In this matter, in any event, Uniqon has averred that it has paid all charges in respect of the remaining extent in the two-year period before applying for the clearance certificates. Disputed amounts allegedly owed to Kungwini prior to 1 July 2011 are not in issue for the purpose of obtaining any of the clearance certificates. And we were advised that the clearance certificates demanded by Uniqon have by now been issued.

[28] The interpretation of s 118(1) remains in dispute, however, and it is important that it be settled. The correct construction, on the clear wording of s 118(1), is that a clearance certificate must be applied for in connection with the property (the designated erf) that the owner wishes to transfer. The City must certify that all amounts that became due in connection with that property have been fully paid. The township owner is not obliged to pay all amounts due in respect of the entire township when applying for a clearance certficate in respect of an erf sold and to be transferred.

[29] It is the City's obligation to determine the rates attributable to each erf. There is, of course, nothing to preclude township developers, when applying for clearance certificates, from presenting their own calculations to expedite the process. The equitable and practical way of assessing what is due in connection with a particular erf would be that described in para 26.

[30] In the circumstances, the City's appeal against the first order made must be upheld. The appeal against the second order, that the City is not entitled to levy rates in respect of individual erven that have not yet been sold, must be dismissed, but the order will be replaced to reflect the findings of this court. The appeal against the seventh order, that pending the finalization of remaining disputes between Uniqon and the City, the City must issue clearance certificates against payment of R50.40, must also be upheld.

[31] And, finally, costs. Ebersohn AJ in the court a quo ordered costs to be paid by the City on the scale of attorney and client. The court considered that the City acted unreasonably in opposing the relief sought in the face of the judgment of Prinsloo J in *Mooikloof*. I do not consider that a punitive costs order was warranted. The City was entitled to proceed on the basis that *Mooikloof*, which flew in the face of settled law over decades, was wrongly decided and to oppose on that basis alone. Other criticisms of the City leveled by Uniqon about tardiness in filing papers and being obstructive do not warrant a punitive costs order in the court below.

[32] As to costs in this court, each party has achieved partial success. In the circumstances each should bear its own costs. Accordingly:

1 The appeal against the first order of the court a quo is upheld and that order is set aside.

2 The appeal against the second order is dismissed, but the wording is replaced with:

'(a) It is declared that the respondent is obliged to value and enter onto its valuation roll the entire remaining township property of Six Fountains Estate and not the individual erven constituting that property in terms of the provisions of the Local Government: Municipal Property Rates Act 6 of 2004, and to levy property rates and taxes in terms of the Act calculated on the value of that property for rating purposes.

(b) It is declared that the respondent is obliged to issue clearance certificates in terms of s 118(1) of the Local Government: Municipal Systems Act 32 of 2000 in respect of any erf to be transferred to a purchaser by the applicant once the rates and other municipal charges incurred in connection with that erf have been determined and paid.'

3 The appeal against the seventh order is upheld and that order is set aside.

4 The appeal against the eighth order is upheld and is replaced with:

'The costs of the application are to be paid by the respondent.'

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C H Lewis

Judge of Appeal

APPEARANCES

For Appellant:	T Strydom SC (with him A Vorster)
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