THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 77/09

THE CITY OF CAPE TOWN — Appellant

and

REAL PEOPLE HOUSING (PTY) LTD — Respondent

Neutral citation: *City of Cape Town v Real People Housing* (77/09) [2009] ZASCA 159 (30 November 2009)

Coram: HARMS DP, NUGENT, MALAN JJA, HURT and TSHIQI AJJA

Heard: 19 NOVEMBER 2009

Delivered: 30 NOVEMBER 2009

Summary: Clearance certificate required by s 118(1) of the Local Government Municipal Systems Act 32 of 2000 - whether municipality entitled to withhold certificate until all debts are paid.

ORDER

On appeal from: High Court, Cape Town (Yekiso J sitting as court of first instance).

The appeal is dismissed with costs.

JUDGMENT

NUGENT JA (HARMS DP, MALAN, HURT and TSHIQI AJJA concurring)

[1] Municipalities are obliged by the Local Government Municipal Systems Act 32 of 2000 to collect monies that become payable to them for property rates and taxes and for the provision of municipal services.[1] For that purpose municipalities are required to adopt, maintain and implement a credit control and debt collection policy complying with various criteria,[2] and to adopt by-laws that give effect to the policy and its implementation and enforcement.[3]

[2] They are assisted to fulfil that obligation, so far as debts relate to fixed property, in two ways. First, they are given security for repayment of the

[1] Section 96.
[2] Sections 96 and 97.
[3] Section 98.

debt in that it is a charge upon the property concerned.[4] And secondly, municipalities are given the capacity to block the transfer of ownership of the property until debts have been paid in certain circumstances. That is the effect of the provisions of s 118(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 the 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] The City of Cape Town Metropolitan Municipality has adopted a credit control and debt collection policy as it is required to do. One of the principles that it has incorporated in its policy is the following:

'Payment of any undisputed debt…will first be allocated to the oldest debt…progressing to the latest debt.'

It has also adopted by-laws giving effect to its policy. Section 15(1)(c) of the by-laws provides that the City Manager may 'implement any of the measures provided for in…the policy' in relation to any arrears on an account of a debtor. Read together with the policy it is plain that the City is authorised to allocate payments made by a debtor to the oldest undisputed debt and its computerized accounting system has been designed to produce that effect.

[4] Section 118(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.'

[4] But while the by-laws and policy are informative as to how the problem arose in this case I do not think they are material to this appeal. The question before us is not what is authorised by the by-laws but what is demanded by the statute. If the statute by implication entitles an owner to insist that moneys must be allocated to debts incurred in the immediately preceding two years then the authority conferred by the by-laws must necessarily give way to that entitlement.

[5] The respondent in this appeal – Real People Housing (Pty) Ltd – owns and has sold various properties in Cape Town, including Erf 23548 Khayelitsha, and it wishes to transfer ownership of the properties to the purchasers. But the City alleges that debts have been incurred for the provision of municipal services to the properties, some of which have been outstanding for more than two years. The respondent disputes that it is liable to pay the debts, because they were incurred by occupiers of the property and not by itself, but that is a matter that need not concern us. Clearly all the debts fall within the terms of s 118(1).

[6] Notwithstanding that it disputes liability for the debts the respondent is willing to pay them so as to obtain the certificates (colloquially called ‘clearance certificates’) that are required for transfer to take place – but only if they were incurred not more than two years preceding the request for the certificate. The City refuses to issue certificates on those terms. It insists that any moneys that are paid by the respondent will be allocated to the oldest debts according to its policy. The effect of adopting that approach is that it will not issue clearance certificates until all debts have been paid irrespective of when or by whom they were incurred. The City goes so far as to refuse

even to provide the respondent with the amounts that were incurred in the preceding two years, and the manner in which those amounts are arrived at, saying that the information is not relevant if all payments fall to be allocated to the oldest debts.

[7] That impasse came before the High Court at Cape Town when the respondent applied for orders in the following terms:

'1. Declaring that the respondent is obliged, upon receipt of a request from the applicant, to furnish the applicant with full and itemised particulars of the amounts which became due for payment in respect of municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties (and which remain unpaid) for a period of two years prior to the date of the request in respect of any property owned by the applicant;

2. `Declaring that the respondent is obliged, on receipt of payment of such sum tendered specifically for the purpose of discharging that indebtedness, to issue to the applicant a certificate as contemplated by s 118(1) of the Local Government Municipal Systems Act 32 of 2000;

3. Declaring, more specifically, the respondent's refusal to issue such a certificate to the applicant in respect of Erf 23548 Khayelitsha, to be unlawful.'

The relief was granted by Yekiso J and the City now appeals with the leave of that court.

[8] It is useful at the outset to be reminded of the findings of the Constitutional Court when the constitutional validity of s 118(1) was unsuccessfully challenged in *Mkontwana v Nelson Mandela Metropolitan Municipality* et al.[5] The impetus for the challenge was that the section has the effect of forcing owners to pay debts that were incurred not by them but

[5] *Mkontwana v Nelson Mandela Metropolitan Muncipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng* 2005 (1) SA 530 (CC).

by occupiers of their properties (as in the present case). The owners said that the section deprived them of one of the rights of ownership – the right to alienate the property – and that to deprive them of that right until debts that were incurred by others had been expunged was arbitrary and thus constitutionally offensive.[6]

[9] Although the issue that is before us was not pertinently considered there are two features of the decision in that case that are instructive. The first is the recognition by that court (it was hardly in dispute) that the section has the effect of depriving owners of one of the incidents of ownership. It has for long been a principle of our law that statutes that intrude upon established rights ought to be strictly construed. Innes CJ expressed that as follows in *Dadoo Ltd v Krugersdorp Municipal Council*,[7] and it has been repeated in many subsequent cases:

'It is a wholesome rule of our law which requires a strict construction to be placed upon statutory provisions which interfere with elementary rights. And it should be applied not only in interpreting a doubtful phrase, but in ascertaining the intent of the law as a whole.'

It hardly needs saying that under the present constitutional order there is no warrant for choosing a wide construction of a statute that intrudes upon protected rights if the section opens itself to a construction that intrudes upon those rights more narrowly.

[10] The second instructive feature emerges from the considerations that were taken into account in assessing whether the deprivation was arbitrary.

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[6] Section 25 of the Constitution provides that 'no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.'

[7] 1920 AD 530 at 552.

One consideration that was taken into account was the period for which the deprivation would endure. In response to a submission that the deprivation was capable of enduring indefinitely Yacoob J, writing for the majority, observed that the deprivation 'lasts for two years only' and he explained that as follows:[8]

'It is correct that if there are substantial arrears for consumption charges and all payments over an extended period are for current consumption only and are credited to the amount first owing, the substantial sum may remain outstanding indefinitely and thereby constitute an obstacle to transfer. If, however, no further obligations are incurred to increase the existing indebtedness of the same occupier the limit on the power of the owner to transfer the property will last no more than two years.'[9]

[11] It is apparent that the section was construed by the majority to mean that a municipality must issue a clearance certificate if no debts were incurred during the preceding two years, notwithstanding that earlier debts exist, because otherwise there would have been no basis for finding that the deprivation is capable of being restricted to no more than two years. If an owner is entitled to a clearance certificate when debts have not been incurred for two years, albeit that earlier debts have not been paid, it must follow that an owner is also entitled to a certificate if debts incurred in that period have been expunged. Although the court did not pertinently express how it reached its conclusion on that issue I think that was because it is self-evident from the section itself.

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[8] Para 45.

[9] The effect of the section in that regard was considered in the minority judgment of O'Regan J (Mokgoro J concurring) at para 96. I do not think what was said in that paragraph lends credence to the construction advanced by the City. The learned judge did no more than postulate what would occur if payments were allocated to earlier debts without suggesting that a municipality is entitled to insist upon that allocation.

[12] The case that was advanced before us for the City was founded on the premise that the section 'imposes no obligations of any kind on municipalities' in express terms (taken from the heads of argument). It follows that the respondent could succeed, so the submission went, only if the obligation that it relies upon was to be read into the section by implication. Expressed in those terms the submission is unexceptionable. But the same cannot be said of the further submission that no such obligation is to be implied.

[13] The submission that a municipality has no implied obligation at all to issue a clearance certificate was advanced for only a brief while in argument before counsel correctly accepted that that was not so. Clearly a municipality has no discretion to grant or withhold a clearance certificate at will and thereby frustrate the exercise of the ordinary rights of ownership – such a discretion would be absurd and I have no doubt that it would not survive constitutional challenge. Once it was accepted that a municipality indeed has an obligation to issue a clearance certificate in appropriate certain circumstances then all that remains is to determine what those circumstances are.

[14] Those circumstances, on the face of it, appear from the express terms of the section: the obligation arises when 'all amounts that became due in connection with that property…during the two years preceding the date of application for the certificate have been fully paid.' Most of the remaining submissions made by counsel for the City were directed towards persuading us to read into the section an implied qualification to that express provision. I do not think it is necessary to detail the terms in which suggested provisos

were framed. It is sufficient to say that all of them – indeed, any proviso that would have the effect of entitling the City to withhold a certificate until all debts were paid – would nullify the express language of the section and it might just as well not be there. 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. Had it been intended not to limit the period to two years then the words would not have appeared at all.

[15] The dilemma in which the City finds itself is that it has left debts outstanding for more than two years albeit that the statute contemplates prompt collection. No doubt there are understandable reasons why that is so but the City cannot resolve its dilemma by subjugating the statute to a policy that would frustrate its terms. As Yacoob J observed in *Mkontwana*:

'The applicants emphasise that a municipality cannot sit by and allow consumption charges to escalate regardless and in the knowledge that recovery will be possible whenever the property falls to be transferred. They are right. The municipality must comply with its duties and take reasonable steps to collect amounts that are due'.

[16] In my view the court below cannot be faulted for granting the relief sought in prayer 2. The respondent paid to the City an amount that it estimated had become due in relation to Erf 23548 Khayelitsha during the period of two years preceding its request for a certificate and there is no evidence to suggest that any further amounts are due. In those circumstances the court below also cannot be faulted for granting prayer 3. There remains the relief that was sought in prayer 1.

[17] Once more counsel for the City relied upon the absence of an express provision in the statute to support his submission that the City was not obliged to supply details of the amounts outstanding for debts incurred in the preceding two years. But an owner cannot be expected to tender payment if he or she has no knowledge of what is due, particularly if all or portion of the debt was incurred by an occupier and not by the owner. If that obligation is not to be implied in the section itself it seems to me that it finds sufficient support from s 95(e) of the Act.[10] We were told that the computerized accounts system is not designed to provide that information. But that is because the computer has been programmed to allocate payments to the earliest debts. No doubt the computer is capable of being programmed to produce the relevant information once the City accepts that the provisions of the statute do not yield to practical considerations of that kind.

[18] There is no merit in this appeal and it is dismissed with costs.

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R.W. NUGENT
JUDGE OF APPEAL

[10] 'In relation to the levying of rates and other taxes by a municipality and the charging of fees for municipal services, a municipality must, within its financial and administrative capacity ... ensure that persons liable for payments, receive regular and accurate accounts that indicate the basis for calculating the amounts due.'

APPEARANCES:

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