IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 02181/2016

1. Reportable: ~~Yes~~/No
2. Of interest to other judges: ~~Yes~~/No
3. Revised: Yes/~~No~~

23 November 2017

(Signature)

SMIT, MIGNON **Applicant**

and

THE CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY **Respondent**

Heard on: 16 November 2017

Delivered on: 28 November 2017

JUDGMENT

DE VILLIERS AJ:

[1] The applicant seeks an order reversing property rates levied against her immovable property and ancillary relief. The respondent applied the tariff applicable to properties where the use is categorised as '*illegal use*' in levying the rates in issue.

[2] The facts are largely common cause:

[2.1] The applicant in at the latest 2011, commenced to use an immovable property, zoned as '*residential 1*' in terms of the respondent's townplanning scheme, as student accommodation (a commune or a boarding house). This was in fact illegal use of the property as it required zoning in terms of the townplanning scheme as '*residential 4*' to be used as such. Her illegal use was confirmed in argument;

[2.2] The applicant's immovable property is categorised on the 2013 valuation roll, the current roll, as falling in the residential category. The correct category, the applicant contends, should have been illegal use;

[2.3] The respondent commenced only in June 2014 to levy rates against the property on the basis that its use was illegal use. This basis for calculation appears from the invoices supplied to the applicant;

[2.4] The applicant by the beginning of 2017 had her immovable property rezoned as '*residential 4*' in terms of the townplanning scheme. Her illegal use of the property was then legitimised;

[3] The applicant's case, stripped to its essence, is that the respondent was obliged to apply the category on the valuation roll in calculating the property rates it charged the applicant. Her case was that the respondent had to prepare a supplementary valuation roll before it could levy rates against the

property on the basis that its use was illegal. She did not plead a statutory basis for this conclusion.

[4] It is trite that the affidavits in an opposed motion contain the pleadings and the evidence. I have to look at the applicant's founding affidavit to see what her case is. In the main her case was:

[4.1] The applicant alleges that she was being charged R1 564.80 per month since June 2014 in property taxes instead of R293.40, as she was being billed on an illegal use tariff instead of a residential tariff. She makes this statement knowing and accepting that her actual use of the property was illegal;

[4.2] '*My property has been zoned as residential, however, the City has been charging me for rates based on the illegal use tariff . . .* '. This contention is wrong, I was told in argument by both parties that zoning in terms of the townplanning scheme and the categories used for determining property rates differ;

[4.3] '*I have not been given the opportunity to object to these inflated property rates, as my property has not been included on a supplementary valuation roll since the General Valuation of 2013.*' In reply the applicant clarifies her position, the valuation had been kept at the same amount, which she admits to be R800 000. This purported lack of an opportunity to object to an admitted use categorisation seems to me to be a litigation strategy, intended to give an appearance of legitimacy to the application. An honest person could not have objected to such a change to the valuation roll. In the end it was not necessary to make a finding in this judgment whether the applicant has a right to be heard (resulting in a delay the implementation of the valuation roll) to reflect the category she admits should be applied;

[4.4] The applicant relies on sections 8, 48, 78 and 79 the **Local Government: Municipal Property Rates Act** 6 of 2004 (**the**

Rates Act). Section 8 makes provision for categories of properties that might be established. None of the sections states that once the respondent becomes aware of the illegal use of a property, that it must issue a supplementary valuation roll before it may apply an illegal use tariff to a property's valuation, the essence of the applicant's case;

[4.5] The applicant expressly relies upon **City of Tshwane v Marius Blom & GC Germishuizen Inc and Another** 2014 (1) SA 341 (SCA) as authority for her proposition that once the respondent becomes aware of the illegal use of a property, that it must issue a supplementary valuation roll before it may apply an illegal use tariff to a property's valuation. **Blom** did not make such a finding. **Blom** dealt with a case where the municipality in that case categorised a rateable property on the valuation roll as falling in the '*non-permitted*' category, the illegal use category. The court held that such categorisation was permissible. It did not deal with the grounds upon which the applicant has approached the court;

[4.6] Attorney and client costs are sought due to the respondent's '*egregious behaviour*'. On her version, the respondent '*disregarded its constitutional obligations*'. This demand is made by a litigant who admits that the use of her immovable property was illegal since 2011, who admits that the respondent could levy higher rates on her property as a result of its illegal use, but who denies that the respondent had taken the administrative steps required to levy such rates.

[5] Attached to the founding affidavit is a letter of demand dated 1 October 2015 by the applicant's attorneys addressed to the respondent. Attached to the founding affidavit is the respondent's response to the letter of demand. It is dated 6 October 2015. In that letter the applicant is advised that in fact the property has been used illegally since at least June 2014 as a commune, that this was the reason for the imposition of the higher tariff, and that entries would reversed upon proof to the contrary.

[6] The answering affidavit deals with the following main issues:

[6.1] The deponent confirms that the property rates on the respondent's property is being calculated by applying an illegal use tariff as it was being used in contravention of the townplanning scheme at least since 2011. The property is zoned as '*residential 1*' permitting it to be used as a '*dwelling house'*. A boarding house or commune would require zoning as '*residential 4*' hence the illegal use billing;

[6.2] In fact, the respondent was given the opportunity to object to the application of the illegal use tariff. She has that right in terms of section 102(2) of the **Local Government: Municipal Systems Act** 32 of 2000 and the respondent's **Credit Control and Debt Collection By-Laws** 2004. This is what has happened in this case when the letter of demand was considered and responded to;

[6.3] It would be impractical to issue a new valuation roll every time that a contravention in the permitted use takes place;

[6.4] The valuation of the applicant's property was R800 000, based on its permitted use as a '*dwelling house*'. That is still its valuation. Once rezoned to '*residential 4'*, this valuation is likely to increase due to the income generating nature of the property;

[6.5] The respondent did comply with sections 8, 48, 78, and 79 of the **Rates Act**. The argument with regard to compliance with section 78(1)(g), in my understanding, was that it was not yet necessary to effect an amendment. The section reads- **Rates Act** reads-

> '*A municipality must, whenever necessary, cause a supplementary valuation to be made in respect of any rateable property- of which the category has changed*';

[6.6] The **Blom** case is distinguishable. It did not find that that a municipality must issue a supplementary valuation roll before it may apply an illegal use tariff to a property's valuation. I agree;

[6.7] Attached to the answering affidavit were the respondent's **Property Rates Policy** for 2014/2015 and for 2015/2016. The affidavit did not refer the applicant or me to any particular part of the policies to consider. I assume that the respondent would have brought changes to the 2016/2017 policy to my attention.

[7] A replying affidavit was delivered:

[7.1] The applicant persists with the case made out in the founding affidavit: The respondent was obliged to issue a supplementary valuation roll to reflect the change from a residential category to an illegal use category before it could recover property rates on this basis. The statutory basis for this view still was not pleaded;

[7.2] The replying affidavit contains proof that the property had been rezoned as '*residential 4*', such notice was given on 16 November 2016, and took effect 56 days after publication;

[7.3] The applicant refers the court to clauses 5 and 6.1 of the respondent's **Property Rates Policy**. The respondent concludes that the two clauses reflect that the respondent was in breach of its policies by not issuing a supplementary valuation roll to reflect the change from a residential category to an illegal use category before levying the increased rates. The legal effect of a breach of such a policy was not addressed. The relevant clause in the **Property Rates Policy** is (emphasis added)-

> '5. *CATEGORIES OF PROPERTIES FOR LEVYING DIFFERENTIAL RATES*
>
> *The Council levies different rates for different categories of rateable property in terms of S8 of the Act. <u>All rateable property will be classified in a category and will be rated on the category of the property from the valuation roll</u> which is based*

on the primary permitted use of the property unless otherwise stated.'

[8] The clause in the rates policies quoted above indeed reflects that rates would be levied on the categories set out in the valuation roll. It is common cause that this did not take place. It was clear at the end of the exchange of the affidavits that the respondent had acted in breach of its **Property Rates Policy**. The difficulty I had was the legal effect of non-compliance with the respondent's **Property Rates Policies**.

[9] The starting point is the **Constitution**. In terms of section 229(1)(a), a municipality may impose rates on property. That power may be regulated by national legislation in terms of section 229(2)(b). The national legislation in issue in this case is the **Rates Act**.

[10] The **Rates Act** defines 'rate' in section 1 of the act to mean '*a municipal rate on property envisaged in section 229 (1) (a) of the Constitution*'. The Constitution uses the word 'rates' in that section:

'*Subject to subsections (2), (3) and (4), a municipality may impose-*

(a) rates on property and surcharges on fees for services provided by or on behalf of the municipality; and

(b) . . .'.

[11] The **Rates Act** sets out the municipality's powers to levy '*rates*' in section 2. That section, not referred to by either party, provides the answer:

'***Power to levy rates***

(1) A metropolitan or local municipality may levy a rate on property in its area.

(2) . . .

(3) A municipality must exercise its power to levy a rate on property subject to-

*(a) section 229 and any other applicable provisions of the **Constitution**;*

(b) the provisions of this Act; and

(c) the rates policy it must adopt in terms of section 3.'

[12] Although it was not argued before me, subsection 3 seems to be determinative of the matter (had it been raised in the founding affidavit). The respondent levied rates in breach of its rates policy. This it cannot do and such a finding would entitle the applicant to seek relief where rates were levied illegally.

[13] A difficulty remained: This case arose in reply. The applicant deserved to be treated in a legalistic manner by limiting her to the case made out in her founding papers, but such an approach would not resolve the real issue. It seems to me that the respondent would not be prejudiced if the real issue were to be decided. It was the respondent that produced the rates policies in the answering affidavit. The respondent did not object to argument based on the policies. The respondent did not allege that the replying affidavit constituted new matter in reply. The policies do not raise factual issues. In my view, a legalistic approach is not called for. I have a discretion to allow new matter in reply, and in this case there would be no prejudice in allowing such matter. It does mean that most of the founding papers are irrelevant and that the applicant's failure to identify the real issues before embarking on the litigation, caused wasted costs. I have dealt in some detail with the case made out to illustrate the wasted costs caused by the applicant.

[14] This finding brings an end to the matter on the main issue. In the end, it is not necessary to embark in this judgment on (a) a discussion of whether the conduct of the respondent in breach of its **Property Rates Policy** was illegal at a level of principle, (b) what rights would flow from such illegality, (c) the applicant's right to be heard before her property could be categorised as being in illegal use, as it was, or (d) to express any views on the structure, meaning and impact of the **Rates Act** on the levying of rates in cases such as the one under consideration.

[15] This brings me to the relief to be granted.

[16] The applicant seeks instructions to the respondent on how the account should be rectified, in my view this falls outside the purview of this court.

The relief that I grant below instructs the respondent to address the wrong billing.

[17] The applicant also seeks an interdict against the disconnection of electricity and water supplies to the property without a court order. In reply, it transpires that her attorney advised her to claim such relief. No case has been made out in respect thereof.

[18] Costs remain to be decided. I have a judicial discretion, to exercise in fairness to the parties. The normal rule is that costs follow the result. I must not easily depart form this principle. I have shown that until the replying affidavit was produced, the applicant did not make out a case based on a contravention of the **Property Rates Policy**. The larger part of the exchange of affidavits turned out to be irrelevant on the basis that I decided the matter. On the papers before me, the applicant acted illegally for five years (and will now benefit financially by not paying the rates that she ought to have paid as a result). I am alive to the fact that my views on the morality of the application on their own should not deprive the applicant of her costs where her conduct did not impact on the litigation (**Van der Merwe v Strydom** 1967 (3) SA 460 at 469H). In the exercise of my discretion on costs, taking into account the above factors cumulatively, the fair order should be that that the respondent should not be burdened with the full costs that the applicant incurred.

I accordingly grant the following order:

1. The respondent is ordered to apply the residential category reflected on its valuation roll 2013 in levying property rates against Erf 865 Westdene Township for the period 1 June 2014 to date of implementation of a replacement valuation roll pertaining to the property;

2. The respondent is ordered to rectify within 30 days from date of this order municipal account 404238168 to reflect that property rates levied against Erf 865 Westdene Township based on an illegal use category in the period 1

June 2014 have been replaced with property rates based on the residential category;

3. The respondent is ordered issue a statement within 30 days from date of this order to the applicant with regard to account 404238168 to reflect the aforesaid rectification;

4. The respondent is to pay the applicant's costs on the party and party scale, save for fifty percent of the costs of preparing the founding affidavit in respect of which percentage the applicant shall bear her own costs.

DP de Villiers AJ