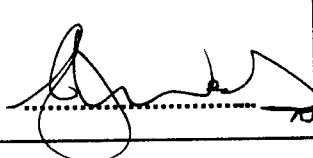


IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

29/7/2016

CASE NO.: 73670/2015

(1)	REPORTABLE: YES NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED.
29/07/2016	
	

In the matter between:

STEPHANUS JOHANNES PAULUS KRUGER
SMIT

First applicant

THE BODY CORPORATE OF ELJO GEBOU

Second applicant

and

THE MBOMBELA LOCAL MUNICIPALITY

Respondent

JUDGMENT

VAN DER WESTHUIZEN, A J

1. The applicants seek declaratory orders that are premised upon the interpretation of the respondent's Refuse (Solid Wastes) and Sanitary By-Laws together with an order for repayment of monies paid by the first applicant to the respondent in respect of services rendered by the respondent and other relief.
2. The first applicant is Stephanus Johannes Paulus Kruger Smit. He is the titleholder of all the units in registered in the Sectional Title Scheme in respect of the ELJO Building.

3. The second applicant is the Body Corporate of the ELJO Building.
4. The respondent, the Mbombela Local Municipality, opposes the application.
5. The application and the relief sought were premised upon the provisions of the Refuse By-Law that was published by the then Administrator as meant in section 2 of the Local Government Ordinance, 17 of 1939 in the Provincial Gazette by way of Administrator's Notice No. 1171 on 16 August 1978.
6. The opposition to the application was similarly premised upon *inter alia* that Administrator's Notice and other legislation.
7. Heads of argument were filed on behalf of the applicants and the respondent. In the respondent's heads of argument, the reliance on the said Administrator's Notice in the application and the opposition was challenged. It was submitted in the respondent's heads of argument that the said Administrator's Notice had been superseded by the publication of the Mbombela Local Municipality Solid Waste Management Bylaw gazetted in the Provincial Gazette Extraordinary on 25 April 2006 under Local Authority Notice 1054 (the current Solid Waste Bylaw).
8. When the matter was called, Mr Mýburgh, who appeared on behalf of the applicants conceded the point in respect of the repeal of the said Administrator's Notice and the applicability of the current Solid Waste Bylaw. A copy thereof was handed into court. The current Solid Waste Bylaw is the applicable legislation to be considered in respect of the relevant period to which this application relates.
9. The relevant facts are common cause between the parties and the only bone of contention relates to the interpretation that is to be accorded to the applicable provisions of the current Solid Waste

Bylaw. This is to be read against the provisions of the applicable Tariff Schedule.

10. Before dealing with the arguments presented by both counsel, it will be prudent to set out the relevant provisions of the current Solid Waste Bylaw.

11. The term "owner" is defined in the current Solid Waste Bylaw as

"'owner' includes any person that has the title to any premises or land or any person receiving the rent or profits of any land or premises from any tenant or occupier thereof, or who would receive such rent or profits if such land or premises were let, whether for his own account or as an agent for any person entitled thereto or interested therein: Provided that the 'owner' in respect of the premises on the Sectional Title Register opened in terms of Section 12 of the Sectional Titles Act, 1986 (Act 95 of 1986), means the body corporate as defined in that Act, in relation to such premises;"

12. The current Solid Waste Bylaw defines the term "premises" to be

"'premises' means an erf or any other portion of land, including any building thereon or any other structure utilised for business, industrial or residential purposes;"

13. The term "council services" is defined the current Solid Waste Bylaw as

"'council services' means a municipal service relating to the collection of waste, including domestic waste and business waste provided exclusively by the council or service providers in accordance with the provisions of the Systems Act;"

14. Section 12(2) of the current Solid Waste Bylaw stipulates *inter alia* that the council may determine the quantities of waste that will be collected, which residential or commercial premises require council services more frequently than the regular collection service and the maximum amount of waste that may be placed for collection without the provision of an additional service or the imposition of an additional tariff.
15. The current Solid Waste Bylaw, in section 14 thereof, enables the council to either levy rates on property and/or determine tariffs for the provision of council services.
16. The liability to pay for council services is determined in section 15(1) of the current Solid Waste Bylaw which provides:

“The owner of premises is liable to the council to pay the prescribed fee for the provision of council services, and is not entitled to exemption from the liability to pay the prescribed fee by reason of his not making use, or of making a partial or limited use, of council services regardless of whether the council provides such services directly or through a service provider.”
17. In my view, section 15(1) of the current Solid Waste Bylaw clearly stipulates that the owner of the premises, as defined, is the party who is liable for the council services rendered to those premises.
18. It follows that in the present instance the Body Corporate of ELJO Building, i.e. the second applicant, is the “owner” of the relevant premises.
19. Accordingly, the second applicant is the party that is liable for payment of council services rendered to the relevant premises.

20. It follows that the applicants are entitled to the declaratory orders sought in prayers 1 and 3 of the notice of motion.
21. There is a further issue that requires consideration. That issue relates to the tariff that should apply. However, this issue was resolved between the parties during the tea adjournment and an agreement was reached in respect of the wording of prayer 4 of the notice of motion should the applicants be successful in obtaining the requested declaratory orders. Accordingly it does not require further attention.
22. The first applicant seeks repayment of the amounts paid to the respondent, amounting to R65 223.25, in respect of the levying of tariffs for the rendering of council services to the relevant premises. The first applicant alleges that he had paid those monies in the *bona fide* belief that he was the party liable to pay. The respondent had issued invoices for the council services rendered in respect of each of the units in the Sectional Title Scheme ELJO Building to the first applicant as owner of those units. The respondent had issued those invoices to the first applicant in view of the respondent's interpretation of the Bylaw relating thereto.
23. The first applicant states that on the proper interpretation of the relevant Bylaw, he was not the party liable for payment thereof and is thus entitled to repayment as the respondent was unjustifiably enriched at his expense, his estate accordingly being impoverished thereby. The relevant Bylaw is the current Solid Waste Bylaw having been published during April 2006, i.e. prior to the issuing of the said invoices to the first applicant in respect of the council services rendered to the premises.
24. Mr van Wyk, who appeared on behalf of the respondent, faintly submitted that in the present instance the first applicant was for all practical reasons the Body Corporate of ELJO Building as he was the registered owner of all the units in the Sectional Title Scheme of ELJO

Building. In that regard, the Body Corporate of ELJO Building would in all probability recoup the payment of the said tariffs from its members and hence the monies would in the present instance be paid from the same "purse". Thus it would make no difference in the end and repayment was not required.

25. However, Mr van Wyk conceded, and correctly so, that the Body Corporate of ELJO Building was a separate legal *persona*.
26. Having found that the applicants are entitled to the declaratory orders sought, it follows that the first applicant is entitled to repayment of the amount of R65 223.25 in respect of the monies levied for the council services rendered.
27. In view thereof that the applicants are successful in obtaining the relief sought, costs should follow the event. Mr. van Wyk did not contend otherwise.
28. I grant the following order:
 - (a) It is declared that the first applicant is not liable for the respondent's service charges relating to the removal of business refuse from the premises situated at Erf 174, 15 Bell Street, Nelspruit;
 - (b) It is declared that the second applicant is liable for the respondent's service charges relating to the removal of the business refuse from the premises situated at Erf 174, 15 Bell Street, Nelspruit;
 - (c) It is declared that in terms of the respondent's By-Laws read with its Tariff Schedule for the relevant financial year, the respondent may only charge a single monthly minimum refuse removal fee for each of the five structures in the sectional title

complex, ELJO Building, subject to the second applicant not exceeding the maximum prescribed amount of waste for the selected service, to the second applicant;

- (d) The respondent is directed to repay the amount of R65 223.25 to the first applicant;
- (e) The respondent is to pay the costs of the application.


C J VAN DER WESTHUIZEN^{A-1}
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION

On behalf of Applicants:
Instructed by:

JL Mýburgh
Du Toit-Smuts & Mathews Phosa Attorneys

On behalf of Respondents:
Instructed by:

P van Wyk
Madonsela Mthunzi Attorneys