IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED.

2022-10-21

DATE **SIGNATURE**

Case Number: 90433/2018

In the matter between:

MALVIGENIX NPC t/a WECANWIN	First Applicant
PIETER NICOLAAS GROBLER	Second Applicant
ANNA ELLISSABETH GROBLER	Third Applicant
ETHEL MARGARET COETZEE	Fourth Applicant
MARTHA MARGARETHA DU PLESIS	Fifth Applicant
JOHANNES JACOBUS LOMBARD	Sixth Applicant
RESEANE KAIZER HUMPHRY MAKOLE	Seventh Applicant
YVONNE GOOD	Eighth Applicant
LYNN EAST PROP (PTY) LTD	Ninth Applicant
DIANA EDIT GEORGIADES	Tenth Applicant
FREDIERIK JACKOBUS VAN DER SANDE	Eleventh Applicant
JEANNE LOUISE VAN DER SANDE	Twelfth Applicant
EDMOUR MARCHAND	Thirteenth Applicant
NADIA MARCHAND	Fourteenth Applicant
MARC RICHARD TRUMAN N.O.	Fifteenth Applicant

GREGORY JOHN BOUWER Sixteenth Applicant

CORNELIA JOHANNA BOUWER Seventeenth Applicant

CHARLES KGOMOTSO TSOKU Eighteenth Applicant

and

THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY Respondent

JUDGMENT

POTTERILL J

[1] The eighteen Applicants, for ease of reference referred to as "WeCanWin", sought a declaratory order that the Respondent's, the City of Tshwane Metropolitan Municipality's [the CTMM] refusal to comply with this Court's order under case number 40019/2013 [the Tuchten-Order] and the Supreme Court of Appeal order under case number 724/2017 [the SCA-order] in respect of all the affected properties is unlawful. A further declaration is sought that the affected properties are all properties that until January 2011 fell into the jurisdiction of the Kungwini Local Municipality and were categorised as "vacant" from "residential" in the Respondent's 2012 Supplementary Valuation roll. The amended notice of motion seeks further relief, but that relief is dependent on

whether the declarations are granted and will be discussed later on in the judgment.

[2] Although *locus standi* of WeCanWin was initially in issue, it fell away in oral argument.

[3] The crux of this matter is whether the Tuchten-order, as confirmed by the SCA-order, is applicable to the applicants before me as non-parties to the Tuchten-order and can be extended to WeCanWin.

The factual background

[4] I cannot aspire to summarise the facts before Tuchten J better than Ponnan J in the SCA matter:

> *"[4] The respondents are owners of vacant stands in Lombardy Estate and Health Spa, a privately owned housing development in the municipal area of the former Kungwini Local Municipality (Kungwini). With effect from 1 July 2011 Kugwini, together with the neighbouring Nokeng Tsa Taemane Local Municipality and Metsweding District Municipality (the City). Despite provision having been made in the policy of the Kungwini Municipality for a rateable category of 'vacant land', the municipality never applied the category. Whilst under the administration of Kungwini, the respondents' properties were categorised as 'residential'. For a*

year or more following the disestablishment of Kungwini, rates were levied on the respondents' properties at the rate charged by the City for 'residential" properties. The practical effect was that there were only marginal increases in the respondents' rates upon incorporation into the City.

[5] About a year later that changed when the respondents began to receive invoices from the City reflecting massive increases in their liability for rates. Moreover, those drastic increases were retrospectively imposed to July 2011 … That represented an increase of some 700 % over the amount previously charged. The experience of the Bezuidenhouts was not unique to them, but repeated throughout the Lombardy Estate development and, indeed the former Kungwini."

The relevant Tuchten-orders

[5] Pursuant to seeking clarification from the City, but receiving no clarification, the respondents approached the court and were successful in the amended application and the main application with Tuchten J making the following orders relevant to the matter before me:

"[2] The respondent's 2012 supplementary valuation roll is declared invalid and set aside to the extent that it re-categorises as "Vacant" properties situated in the municipal area of the former

Kungwini local municipality formerly categorised as "Residential" (The affected properties).

[3] The respondent's 2013 general valuation roll and all subsequent valuation rolls of the respondent are declared invalid and set aside to the extent that they categorise the affected properties as "Vacant" unless and until the affected properties are lawfully re-categorised as such. The imposition by the respondent of the assessment rate applicable to vacant land on those of the affected properties which belonged to the applicants on 28 June 2013, the date upon which this review application was instituted, is declared invalid and set aside.

[4] The imposition by the respondent of the assessment rate applicable to vacant land on those of the affected properties which belonged to the applicants on 28 June 2013, the date upon which this review application was instituted, is declared invalid and set aside."

[6] The Respondent, the CTMM before me, appealed all the Tuchten-orders with leave of the SCA, but the appeal was dismissed save for setting aside paragraphs 5 and 6 of the Tuchten-order.

[7] It is common cause that WeCanWin is factually in precisely the same position as the thirteen applicants before Tuchten J. They are present or past owners and have not been compensated for their overpayment of rates charged in

terms of the valuations still as vacant land. Their rates were also adjusted resulting in a 700 % increase due to a re-categorising from “vacant land” to ”residential land” when Kungwini was incorporated in the municipal area of the CTMM.

The argument of WeCanWIn

[8] Wecanwin submitted that the CTMM had to apply the Tuchten-order to them relying on par 15 of the SCA-order:

> *“The City says that there is no basis for the high court to have made a declaration of invalidity with general effect and that the judgment of the high court should have been confined to the respondents. It was the respondents’ case from the outset that the problems that they experienced were caused by a general failure by the City to comply with the MPRA and therefore with the principle of legality in respect of all vacant property in the former Kungwini. Thus, although they did not purport to represent the public at large, the relief sought and granted by the high court recognised that proceedings ‘against the state assume a public character which necessarily widens the reach of orders issued to cover persons who were not privy to a particular litigation.’ What is more, the City’s complaint misconstrues the nature and effect of the high court’s judgment. For, whilst a judgment in personam relates only to the rights inter se the parties before the court and binds only the parties to the litigation. A judgment in rem has effect against the whole world- inter*

omnes and not merely as between parties to the litigation before the court. As the judgment pronounced upon the status of the particular subject-matter of the litigation in this case, it is one in rem and is conclusive against all persons whether parties or strangers to the litigation."

The argument on behalf of CTMM

[9] The argument on behalf of the CTMM was that Tuchten J had only set aside the Valuation Rolls, which would have an effect *in rem*, but that WeCanWin would have to bring an application to set aside the imposition of "vacant" land rates as Tuchten's judgment made it clear that he did not set aside *"other affected parties who are not parties to the review."* .In support of its argument it relied on paragraphs 4 and 9 of the Tuchten order wherein it was specified.

[10] The CTMM feels itself bound to the *Oudekraal* principle that *"an unlawful act can produce legally effective consequences is constitutionally sustainable, and indeed necessary."*[1] The CTMM submitted that the imposition of the vacant land rates for WeCanWin stands with legal consequences up until it is successfully challenged in the right proceedings and set aside by a court of law.

[1] *Merafong City Local Municipality v Anglo Gold Ashanti Ltd* 2017 (2) SA 211 (CC) par [36]

Analysis

[11] It is common cause that the CTMM had imposed and collected from WeCanWin monies payable for the assessment rate applicable to" vacant" land pursuant to the Supplementary Valuation roll of 2012 [the 2012 SVR] and the 2013 General Valuation Roll [the 2013 GVR] of the CTMM.

[12] The SCA-order unequivocally stated that the order of Tuchten J was *in rem* pronouncing upon the status of the particular subject-matter of the litigation. The subject matter was the 2012 SVR and the 2013 GVR of the CTMM that had not complied with s49(1)(c) of the Municipal Property Rates Act 60 of 2004 [the MPRA]. *In rem*, all the Valuation Rolls were set aside on the principle of legality in respect of all vacant property in the former Kungwini. With the Valuation Rolls being set aside, the assessment of the rate applicable, as a natural consequence, has to be set aside. To argue that the CTMM can only in terms of the Tuchten-orders do so if the affected parties bring a review application is untenable. The CTMM knew that *in rem* the relevant Valuation Rolls were set aside and it should have taken initiative and placed all the affected persons in the position in which they would have been absent the unlawful administrative decision.[2]

[13] This is so, even if the argument of the CTTM is accepted, that the adjustment of the tariffs of the Tuchten order was only applicable to the parties before

[2] *Njongi v MEC Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC) par [16]

Tuchten J with the SCA-order not altering that position. The conduct of the CTMM is unacceptable in not acting as a responsible organ of local government and assessing the correct rates for the relevant affected period, but rather sitting back and requiring the residents to incur costs of a lawsuit for a result that has to flow naturally. The stance taken is obstructive and the CTMM simply has to put WeCanWin back in the position it would have been had the unlawful decision not been taken.

[14] The CTMM is clinging to the tailcoat of the *Oudekraal* principle as confirmed in the majority decision of *Merafong City Local Municipality and Anglo Gold Ashanti Ltd* 2017 (2) SA 211 (CC). It is submitting that the imposition of rates based on vacant land tariffs was an administrative act that produced legal consequences, not challenged by the right challenger in the right proceedings, and therefor has legal effect. If the Valuation Rolls had not been set aside this argument is correct, but where the Valuation Rolls were set aside a natural consequence is that the tariff payers must be placed back in the position they were. The CTMM's function is to serve the community falling under its jurisdiction and it should *"act lawfully and within the bounds of their authority."*[3] I cannot agree more with Jacoob J in the *Njongi*-matter, as did all 9 Justices of the Constitutional Court, where he found as follows:

> *"It is always open to the provincial government to admit without qualification that an administrative decision had been wrong or had been wrongly taken and consequently to expressly disavow that decision*

[3] *Kalil NO and Others v Mangaung Metropolitan Municipality and Others* 2014 (5) SA 123 (SCA) [par] 30

altogether. Indeed government at every level must be encouraged to re-evaluate administrative decisions that are subject to challenge and, if found to be wrong, to admit this without qualification and to disavow reliance thereon."

[15] In the matter before me the underlying administrative decision had been set aside, also pertaining to WeCanWin as an order *in rem*. One would expect the CTMM to take the initiative, but where in any event requested to do so, to place WeCanWin back in the position it should be pertaining to the incorrect tariff's being applied upon the setting aside of the administrative act. A court frowns upon an administrator that refuses to do so unreasonably. It matters not that this matter relates to tariffs versus social grants in the *Njongi*-matter, the principle stays the same; an administrator must act reasonably and rationally. I disagree that Jacoob J made *o*biter remarks, but even if he did, I make such finding in this matter.

[16] In this matter the administrator also defends the matter on form over substance. Its argument was that WeCanWin could not seek a declaratory order but must bring an application for review. It also raised the fact that WeCanWin cannot successfully raise a collateral challenge when not faced with coercive action or applicants who are not cited as a party to the proceedings instituted.

[17] I am satisfied that WeCanWin can seek an order that the consequential result of the Tuchten-order be applied to it for the simple reason that if the Valuations

Rolls were set aside, also for WeCanWin, then WeCanWin must be placed back in the position it should be pertaining to the incorrect tariffs being applied. The CTMM should have done so without any legal recourse taken against it. But, recourse had to be taken and a court must assist where the CTMM is simply holding out to place it in the correct position.

[18] I am satisfied that prayer 3 in the amended notice of motion must also be granted excluding prayer 3.5. I accordingly make the following order:

[18.1] It is declared, in as far as is it necessary, that the properties in this application until January 2011 fell into the jurisdiction of the Kungwini Local Municipality; and

[18.2] are re-categorised as “vacant” from “residential” in the respondent’s supplementary valuation roll.

[18.3] The respondent is directed to take the following steps in respect of all affected properties within 90 days of the date of this order:

18.3.1 Retrospectively reversing all invalid rates (i.e. vacant property rates) levied against the affected properties residential property rates for that period (“the adjustment”). When making the adjustment the respondent must also recalculate the interest charged against the affected properties, taking into account both the reversal of the vacant property rates and all amounts paid in respect of the affected properties during the period in question.

18.3.2 Where the adjustment results in the total amount paid in respect of an affected property exceeding the total amount actually payable for the period in question:

18.3.2.1 reimbursing the excess amount, together with interest thereon at the prescribed lending rate, to any prior owner of an affected property to the extent that such owner was responsible for making payment of the excess amount, where the prior owner has subsequently sold the affected property; or

18.3.2.2 crediting the excess amount, together with interest thereon at the prescribed lending rate, to the rates account of the affected property to the extent the current owner was responsible for making payment of the excess amount, subject thereto that any credit balance remaining will be reimbursed to the owner of a affected property upon the sale thereof.

18.3.3 Where the adjustment does not result in the total amount paid in respect of an affected property exceeding the total amount actually payable for the period in question, reducing the adjusted amount owing as a reduced debit balance on the rates account of the affected property.

18.3.4 Once having effected the adjustment, furnished every owner of an affected property with a written account in terms of section

27(1) of the Local Government: Municipal Property Rates Act 6 of 2004, which written account must specify the credit or debit balance for rates payable; the date on or before which any debit balance is payable; how the credit or debit balance was calculated; the market value of the property; and any other relevant information required to understand the basis upon which the credit or debit balance was calculated.

[18.4] The respondent is directed to pay the costs of the application, including the costs of two counsel.

S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 90433/2018

HEARD ON: 5 September 0222

FOR THE APPLICANTS: ADV. N. FERREIRA

ADV. A. MOLVER

INSTRUCTED BY: Adams & Adams

FOR THE RESPONDENT: ADV. T. STRYDOM SC

ADV. L. KOTZE

INSTRUCTED BY: Mothle Jooma Sabdia Incorporated

DATE OF JUDGMENT: 21 October 2022