IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 29978/2022

REPORTABLE: YES
OF INTEREST TO OTHER JUDGES: NO
REVISED: NO
24 October 2022

In the matter between:

ROBIN ERNEST TAPUCH	APPLICANT
and	
THE TRUSTEES FOR THE TIME BEING OF S[....] H[....] BODY CORPORATE 3	FIRST RESPONDENT
MIDCITY PROPERTY SERVICES (PTY) LTD	SECOND RESPONDENT
CITY OF TSHWANE	THIRD RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

[1] The applicant is the owner of Unit [….] in the Sectional Title Scheme known as S[....] H[....] W[....] E[....]. The first respondent is the body corporate of the said Sectional Title Scheme. The second respondent is the managing agent of the first respondent.

[2] The applicant sold his property during July 2022 to Mr. and Mrs. Botes. It is common cause that the applicant has paid all monies due to the body corporate in respect of the said unit. The first and second respondents, however, refused to issue a levy clearance certificate and the applicant had to revert to the urgent court to obtain an order directing them to issue such a levy clearance certificate. The respondents issued a levy clearance certificate after the application was issued ('the first clearance certificate'). The applicant accordingly removed the matter from the urgent court roll and subsequently required the first respondent to tender the wasted costs on a party-and-party scale.

[3] Due to a lapse of time, and events that cannot be attributed to the applicant, an extended clearance certificate is now required before registration of transfer of the property can be effected. The first respondent refuses to issue the extended clearance certificate. The second respondent initially opposed the application but later filed a notice to abide. It is this refusal to issue an extended levy clearance certificate that lies at the heart of this urgent application. The issue of urgency is addressed below. It is necessary to have regard to the events preceding, and leading to this application.

[4] On 23 September 2022 the respondents' attorney of record wrote the following to the applicant's attorney of record:

> ‘As recorded in the paragraph on page 2 of our letter of 14 September 2022, our client will withdraw the previous levy Clearance Certificate that was issued by them **should your client fail to withdraw the urgent application which they have not done yet**. Your client is hereby afforded his last opportunity to withdraw the urgent application against our client which notice of withdrawal of the application should be filed by no later than Monday 26 September 2022 at 12:00, failing which the levy clearance certificate will be formally withdrawn …’ (My emphasis.)

[5] A second letter, dated 26 September 2022, directed to the applicant’s attorney followed. The applicant quoted a passage from the letter:

> ‘Our client previously indicated that they will not tender your client’s wasted costs and **should your client persist with such prayer** our client will proceed to withdraw the previous levy clearance certificate that was issued, and, it goes without saying, not issue an extended certificate.’ (My emphasis.)

[6] The first respondent contends that the applicant failed to submit approved as-built building plans, and that it is justified to withhold the levy clearance certificate until the applicant complies by submitting such plan. The first respondent wrote on 31 August 2022 to the unit owners in the scheme:

> ‘Based on the article published by Paddocks, titled: Withholding a levy clearance certificate until plans are approved … The Trustees of Body Corporate 3 resolved to request approved Building Plans before the release of a Clearance certificate.’

[7] The first and second respondent’s initial refusal to issue the levy clearance certificate was also premised on the supposition that the applicant failed to provide ‘approved as-built building plans’ to the first respondent in respect of a roof that he erected during 2016. They contended that the third respondent should have approved the applicant’s as-built building plans pertaining to the roof structure.

[8] The applicant denied that it was necessary to obtain building plans for the minor building works done,[1] but provided an undertaking by the purchasers of the unit, Mr. and Mrs. Botha, in terms whereof they declared themselves willing to pay all and any costs related to the submission of the as-built building plans, should it be required. The first levy clearance certificate was subsequently issued.

[9] The applicant was not intimidated by the first respondent's threat to withdraw the first clearance certificate and issued this urgent court application. The first respondent opposes the application and issued a counter-application to have the first levy clearance certificate set aside. The first respondent contends that it is obliged to refuse to issue a clearance certificate in circumstances where it is of the view that the applicant failed to adhere to any law relating to the common property or to any improvement of land comprised in the common property.

Discussion

[10] Section 15B(3)(a)(i)(aa) of the Sectional Titles Act 95 of 1986 ("STA") provides as follows:

> 'The registrar [of deeds] shall not register a transfer of a unit or an undivided share therein unless there is produced to him ─
>
> (a) a conveyancer's certificate confirming that as at date of registration ─
>
> (i)(aa) if a Body Corporate is deemed to be established in terms of section 36(1), that **Body Corporate has certified that all moneys due to the Body Corporate by the transferor in respect of the said unit have been paid**, or that provision has been made to the satisfaction of the Body Corporate for the payment thereof;' (my emphasis)

[1] The applicant states that he erected the roof structure in 2016 after having obtained the approval of both the Body Corporate and the Home Owners Association of the first respondent. He claims that he has not altered or extended the footprint of his property. He erected a roof structure over an existing patio which formed part of the initial building plans. The roof structure constitutes minor building works that do not require approved building plans from the third respondent.

[11] Section 15B(3)(a)(i)(aa) of the STA is described as an embargo or restraint provision.[2] The Supreme Court of Appeal in *Willow Waters Homeowners Association (Pty) Ltd v Koka N.O. and Others,*[3] dealing with certain conditions included in a Deed of Transfer, stated the following regarding s15B(3(a)(i)(aa):

> '[24] The effect of the embargo [a condition incorporated in a title deed] is akin to that of the embargos contained in s 118 of the Local Government: Municipal Systems Act 32 of 2000 (the Municipal Systems Act) and s 15B(3)(*a*)(i)(*aa*) of the Sectional Titles Act 95 of 1986. These provisions respectively prohibit the Registrar from registering the transfer of immovable property except on production of a certificate issued by the municipality or a conveyancer confirming that all moneys due to the municipality or a body corporate have been fully paid.
>
> [25] It is accepted that these statutory embargoes serve a vital and legitimate purpose as effective security for debt recovery in respect of municipal service fees and contributions to bodies corporate for water, electricity, rates and taxes etc. Thus, they ensure the continued supply of such services and the economic viability and sustainability of municipalities and bodies corporate in the interest of all the inhabitants in the country. And this is particularly so in the circumstances of insolvency, when an effective legal remedy against an insolvent is most needed.' (Footnotes omitted)

[12] In *Willows* the SCA categorised s 15B(3)(a)(i)(aa) as effective security for debt recovery. This is consonant with the ordinary wording of the section. It is not necessary for purposes of this judgment to analyse the meaning of the phrase 'all monies due to the Body Corporate… in respect of the said unit.' The applicant relies on s 15B(3)(a)(i)(aa) of the STA.

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[2] G J Pienaar and JG Horn *Sectional Titles and other fragmented property schemes, 2nd ed.,*2020, JUTA, 224.

[3] 2015 (5) SA 304 (SCA) paras [24], [25].

[13] The first respondent relies on s 3(1)(p) of the *Sectional Title Schemes Management Act* 8 of 2011 ('STSMA'). The section provides as follows:

> '(1) A body corporate must perform the functions entrusted to it by or under this Act or the rules, and such functions include:
> ….
> (p) to ensure compliance with any law relating to the common property or to any improvement of land comprised in the common property.'

[14] The first respondent submits that because the trustees are obliged to ensure that the buildings in the scheme are properly approved, they are obligated to enforce compliance. On this premise the first respondent contends that the necessary steps it can take to enforce compliance include but are not limited to refusing to issue a levy clearance certificate. Counsel for the first respondent submits that s 15B(3)(a)(i)(aa) does not oblige a body corporate to issue a levy clearance certificate when all the monies due to it is paid.

[15] The question that arises in this case is whether a body corporate may withhold a levy clearance certificate where all the monies due to it has been paid because the owner of the unit who wants to sell the unit has allegedly transgressed the rules of the scheme or allegedly failed to comply with any law relating to the common property or to any improvement of land comprised in the common property.

[16] Although neither of the counsel referred thereto, it is apposite to have regard to the decision of the Supreme Court of Appeal in *City of Cape Town v Real People Housing (Pty) Ltd,*[4] dealing with the question as to whether a municipality is entitled to use a rates clearance certificate provided for in terms of s 118(1) of the Local Government: Municipal Systems Act 32 of 2000 ('LGMSA') as leverage to compel the payment of debts incurred more than two years prior to the request for the certificate, or, to re-phrase the question for the context of the current application, for a purpose not stated in the section. The municipality's stance was that the clearance

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[4] 2010 (5) SA 196 (SCA).

certificate would not be issued until all debts have been paid irrespective of when or by whom it was incurred.

[17] Section 118(1) of the LGMSA provides as follows:

> '(1) A registrar of deeds may not register the transfer of property except on production to that registrar of deeds of a prescribed certificate-
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> (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, surcharge fees, property rates, and other municipal taxes, levies and duties during the two years preceding the date of application for the certificate have been paid fully.'

[18] Nugent JA explained that municipalities are obliged by the LGMSA to collect monies that become payable to them for property rates and taxes for the provision of municipal services. For that purpose, municipalities are required to adopt, maintain and implement a credit-control and debt-collection policy complying with various criteria, and to adopt bylaws that give effect to the policy and its implementation and enforcement.[5] To assist in the fulfilment of that obligation, the effect of s 118(1) of the LGMSA is to provide municipalities with the capacity to block the transfer of ownership of the property until the debts have been repaid in certain circumstances.[6]

[19] Nugent JA referred to the judgment of the Constitutional Court in *Mkontwana v Nelson Mandela Metropolitan Municipality et al,*[7] where it was recognised that s 118(1) of the LGMSA has the effect of depriving owners of one of the incidents of

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[5] At para [1].

[6] At para [2].

[7] *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC).

ownership. He explained that it is a trite 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 and Others v Krugersdorp Municipal Council*, 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.''[8]

[20] Nugent JA found that municipalities are obliged to issue a clearance certificate when all the amounts that became due in connection with the concerned property during the two years preceding the date of application for a clearance certificate have been paid fully.[9]

[21] The similarity between s 118(1) of the LGMSA and s 15B(3)(a)(i)(aa) of the STA is obvious, and was recognised by the Supreme Court of Appeal in *Willows*, *supra*. It is trite that when interpreting a statute, the language in the legislation should be read in its ordinary sense. The words must be given their ordinary meaning in accordance with the context in which they are used.[10] The context within which the provision appears, the apparent purpose to which it is directed and the material known to those responsible for its production must also be considered.[11]

[22] The purpose of s 15B(3)(a)(i)(aa) has been held by the Supreme Court of Appeal in *Willows* to be the assurance of the economic viability and sustainability of bodies corporate. The ordinary meaning of the words in the context that they are used indicates that the sole purpose of a levy clearance certificate is to ensure that the monies due to a body corporate are paid before the property is transferred to a

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[8] *Real People* at par [9].

[9] At par [16].

[10] *Bellevue Motors CC v Johannesburg City Council* 1994 (4) SA 339 (W) 342F-G; *The Body Corporate Marsh Rose v Steinmuller and Others* (A5002/2020) [2021] ZAGPJHC 440 (23 September 2021) at par [16].

[11] *Body Corporate of Marsh Rose, supra,* at par [16].

new owner, or that provision has been made to the satisfaction of the body corporate for the payment thereof. To use the levy clearance certificate as leverage to enforce, compliance with rules or any applicable law, would be to unilaterally extend the purpose for which s 15B(3)(a)(i)(aa) was promulgated by the legislature. It would nullify the express language of the section, and does not accord with a strict construal of the section.

[23] If the legislature intended the clearance certificate to be used as a mechanism to ensure compliance with all the rules of a sectional titles scheme, or any applicable law, it would not have limited the scope of the clearance certificate to 'all monies due' to a body corporate. The legislature would have required that a clearance certificate from the body corporate, confirming that the rules of the scheme and every applicable law had been adhered to, be submitted before the transfer of the property could ensue.

[24] The submission that the body corporate is entitled to withhold a levy clearance certificate to compel compliance with amongst others, zoning requirements in terms of the City of Tshwane Town Planning Scheme,[12] because the body corporate must ensure compliance with any law relating to the common property or to any improvement of land comprised in the common property, indicates, amongst others, a misconception of the body corporate's responsibility and fiduciary obligations.

[25] A body corporate cannot, if it is convinced that a specific rule or law was contravened, sit back and wait for the day that the recalcitrant unit owner wants to sell the unit, and then use the levy clearance certificate as a mechanism to compel compliance. Yacoob J's observation in *Mkontwana* applies to the factual context of this application:[13]

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[12] Pienaar and Horn, *Sectional Titles and other fragmented property schemes* at 109 explain that the only functions of local authorities in relation to sectional title schemes are to approve building plans and condone irregularities in the scheme. Any irregularities can be condoned by the local authority by issuing a certificate of condonation, provided that no condonation may be given for non-compliance with a national building regulation regarding the strength and stability of a building.

[13] *Mkontwana, supra,* at par [49].

> ‘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'. (My emphasis.)

[26] The body corporate cannot sit idle. It must demand that any transgression of the rules or applicable law, be remedied as soon as it occurs. When the transgression relates to buildings that are not compliant with applicable statutory provisions, the body corporate must demand that an owner rectifies the position and do whatever is required to make the property compliant with the law. When the issue relates to outstanding building plans, the owner must be ordered to submit and arrange for the approval of its building plans. Where an owner threatens legal action or refuses to start the process of legalising the buildings, and a dispute arises, the matter can be referred to the Community Schemes Ombud Service.[14] In this context it is found that a body corporate is obligated to issue a levy clearance certificate if all the monies due to it is paid.

[27] In the current matter, the first respondent was provided with an undertaking by the purchasers of the property that they would ensure compliance with any law, that was not complied with regarding the building plans of the unit. This prompted the body corporate to issue the first levy clearance certificate. From the correspondence between the parties’ attorneys of record, it is evident that the risk of having to pay the costs of the first urgent court application prompted the first respondent to attempt to avoid any possible future liability by using the extended clearance certificate, and the threat to withdraw the first levy clearance certificate, as leverage. This conduct is frowned upon and was the deciding factor in considering to deal with this application in the urgent court. It is unbecoming of a legal practitioner, albeit that the legal practitioner acts on instructions, to resort to what can be described as extortion, in an

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[14] See Pienaar and Horn *Sectional Titles and other fragmented property schemes* at 268, where they refer to *Mineur v Baydunes Body Corporate and Others* 2019 (5) SA 260 (WCC). In this case the court heard an appeal from the Ombud Service regarding the question as to whether the change of the use of a garage into living quarters was valid or not.

attempt to prevent a possible future dispute regarding the liability of costs wherein its client may be involved.

[28] This then, leaves the counter-application wherein the first respondent seeks an order for the clearance certificate dated 31 August 2022 (the first clearance certificate) to be set aside. For the same reasons as alluded to above, this application stands to be dismissed.

[29] As for costs, the attempt to avoid the possible future liability for costs by informing the applicant that an extended levy clearance certificate would not be provided if the applicant persists with the request that the first respondent tenders the wasted costs of the first urgent court application and that the respondent would proceed to withdraw the first levy clearance certificate, compels a punitive costs order to be granted in the applicant's urgent application.

[30] As for the costs relating to the counter-application, I accept that the respondent's counter-application may have been informed by the article published by Paddock. The manner in which the first respondent approached this matter is, however, as stated above, to be frowned upon and such future conduct is to be discouraged. The applicant does, however, not seek that a punitive costs order be granted in relation to the counter-application. As a result, I will not grant a punitive costs order in relation to the counter-application. Since the second respondent could not issue a levy clearance certificate in defiance of the first respondent's instructions, it cannot be held liable for any costs, not even the costs incurred prior to the date of the notice to abide.

ORDER

In the result, the following order is granted:

1. The application is regarded as urgent and any non-compliance with the Uniform Rules of court is condoned;

2. The first respondent is directed and compelled to immediately authorise the second respondent to issue an extended clearance certificate in respect of the applicant's immovable property, i.e. Unit [….] in the Sectional Title Scheme known as S[....] H[....] Body Corporate 3 ('the applicant's property');

3. The second respondent is directed and compelled to immediately issue an extended clearance certificate in respect of the applicant's property and provide such clearance certificate to the applicant or the conveyancer attending to the transfer of the property, after it has obtained the first respondent's authorisation;

4. The first respondent is to pay the costs of the applicant's application on an attorney-and-client scale;

5. The first respondent's counter-application is dismissed with costs.

E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

For the applicant:	Adv. JA du Plessis
Instructed by:	Gouse van Aarde Inc.
For the respondent:	Adv. M Van Vuren
Instructed by:	Weavind and Weavind Inc.
Date of the hearing:	18 October 2022
Date of judgment:	24 October 2022