REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A5033/2018

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES

15 MAY 2019 **RT SUTHERLAND**

In the matter between

WATERVAL ISLAMIC INSTITUTE	**1st APPELLANT**
WITWATERSRAND ESTATES LIMITED	**2nd APPELLANT**
IBRAHIM MIA N.O.	**3rd APPELLANT**
YAHYA MUHAMMAD AMEEN MIA N.O.	**4th APPELLANT**
IBRAHIM MIA N.O.	**5th APPELLANT**
ZAKARIYA MIA N.O.	**6th APPELLANT**
ABDUR-RAHMAAN MIA N.O.	**7th APPELLANT**
MUHAMMAD AHMED MIA N.O.	**8th APPELLANT**
SALEY MOHAMAD ISMAIL N.O.	**9th APPELLANT**

and

JOHANNESBURG CITY PARKS AND ZOO	**1st RESPONDENT**
THE CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	**2nd RESPONDENT**

JUDGMENT

SUTHERLAND J:

Introduction

[1] This appeal concerns the questions of whether or not the appellant (the appellants are treated as one in this judgment) validly cancelled a lease agreement with the first respondent, (City Parks) and whether or not City Parks is estopped from denying that it accepted the cancellation as valid. The court a quo held against the appellant on both issues. Few material facts are in dispute and the controversy is chiefly about the legal significance to be attached to the several happenings and the conduct of the parties. The case gives rise to an exceptional set of factual circumstances which has triggered the controversy.

The Agreement

[2] The appellant concluded a written agreement with City Parks on 17 September 2003. The City of Johannesburg (COJ) was a also party to the agreement. City Parks is a non-profit company which is a municipal owned entity of COJ and its function is to provide services which the COJ is statutorily required to render. Although a separate juristic entity, City Parks is *de facto* the creature of COJ.

[3] In terms of that agreement the appellant leased land to City Parks. The purpose for which the property was leased was to serve as a cemetery to be controlled by City Parks. The duration was for 49 years with an option to renew for another like period. Monthly rental was payable by City Parks to the appellant.

[4] The agreement addressed the issue of the property being subjected to rates or taxes by any organ of state and also the rendering of services such as sewerage, electricity and the like. The business model chosen was that all such impositions on the property would be borne by City Parks, *qua* lessee, who was required to discharge its liability in this regard directly to any such organ of state. In fact, only the COJ was involved in such costs.

[5] The critical provision of the agreement is clause 7:

" ADDITIONAL COSTS

7.1 The tenant shall during the lease period be liable for the payment of –

7.1.1 all assessment rates, sewerage and refuse removal charges and all other levies and charges that may be levied I respect of the property by any governmental, provincial, municipal or other local or statutory authority; and

7.1.2 all charges for the supply to the property of electricity, water, gas and any other services generally; and

7.1.3 any other tax or levy (other than income tax and/or capital gains tax) that may be
or become payable by the landlord by virtue of its ownership of the property;

and shall pay to the authority concerned such deposits (if any) as may be payable in respect thereof. If the tenant takes possession or occupation of the property before the commencement date the tenant shall be responsible for the

payment of all costs contemplated in this clause 7.1 with effect from the date on which it takes possession or occupation of the property.

7.2 The amounts referred to in 7.1 shall be paid by the tenant direct to the authority concerned.

7.3 If any amounts referred to in 7.1 are not paid by the tenant promptly on due date for payment thereof, the landlord shall be entitled (but not obliged) to effect payment of the amounts payable and to recover the amount thereof from the tenant forthwith on demand.

7.4 The tenant may on reasonable grounds request the landlord to object to any proposed revaluation of the property for rating purposes in which event –

7.4.1 the landlord shall give the tenant or its nominee such separate written authority as may be reasonably required by the tenant to enable the tenant to object to such valuation in the name and place of the landlord; and

7.4.2 the tenant indemnifies the landlord against any claim, loss or damage that may be suffered by the landlord arising from anything done or omitted to be done by the tenant in accordance with or pursuant to this clause 7.4; and

7.4.3 the tenant shall, if required thereto by the landlord, furnish the landlord such security as may be reasonably required by the landlord for the obligations of the tenant arising from 7.4.2."

The Critical Facts

[6] In regard to the facts, it must be borne in mind that the matter came before court as an application. The *Plascon Evans* rule applies.[1] Much of what City Parks and COJ provide by way of evidence is not only unrebutted but could not have been disputed by the appellant. The approach of the court a quo was, correctly, to evaluate the matter in this way.

[1] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (AD)at 634-635. A court evaluates evidence on affidavit by approaching the matter on the version of the respondent where it disputes the applicant's averments and the facts alleged by the applicant which the respondent admits.

[7] Between 2003 and 2008, according to the unrebutted evidence adduced by City Parks and COJ, no rates were levied on the property. It is unclear what the position was during this period about service charges, if any; no evidence was tendered about such charges and it would be inappropriate to speculate how that matter was dealt with. The appellant does not allege it was ever invoiced for services.

[8] In 2014, it is accepted, the appellant first became aware of rates being charged on the property being in arrears when it received from COJ an invoice, addressed to Waterfall East Three WUQF (Pty) Ltd, the registered owner,[2] reflecting a balance of some R5.4m. The invoice related solely to rates and did not include any service charges. The invoice further described the property as "public service infrastructure". There followed a series of exchanges between the appellant and City Parks, reflecting an utterly unedifying spectacle of bureaucratic sloth and incompetence. It is necessary to traverse these exchanges:

8.1 On 25 August 2014, the appellant wrote to City Parks to invoke clause 7.1.1 of the agreement, cited above, and demand that City Parks remedy an alleged breach by providing proof of payment of the arrears to COJ.

8.2 No response was forthcoming.

[2] The registered owner and the appellant are related entities and for the purposes of this dispute nothing turns on the actual ownership not being vested in the appellant.

8.3 On 8 October 2014, ie six weeks, later, the appellant sent a letter stating the breach had not been remedied and notifying City Parks that the lease was forthwith cancelled for that reason.

8.4 That prompted a reply on 14 October by the managing director of City Parks, Mr Bulumko Nelana. That letter says that the matter was referred to COJ in August and a response is awaited. In addition, Nelana writes:

> "To allow us time to expedite this matter with our principals, we request [the appellant] to afford [City Parks] time and further allow the entity to continue with burials as the effects of this action are far reaching than just shutting the facility down."

(It is this letter that appellant relies on heavily to contend an estoppel against a denial that the cancellation was accepted although it bases that contention on the further conduct of City Parks too.)

8.5 What happened next? In short – nothing – for two years.

8.6 Then, on 13 September 2016, the appellant wrote again. That letter recapitulated the alleged breach and failure to remedy and further demanded that City Parks vacate the property by 20 October 2016 or face eviction proceedings.

8.7 On 30 September 2016, attorneys Moodie and Robertson (M&R) on behalf of City Parks answered the letter. It is plain that M&R had not yet received substantive instructions. They asked for an indulgence to do so. On 3 October they reverted to say the allegations were noted and "not admitted".

8.8 On 12 October the appellant warned that failure to respond would result in proceedings being instituted. On 14 October M&R asked for a further indulgence as "...we are in the process of attempting to resolve it". On 25 October, an email from M&R to the appellant's attorneys stated that City Parks was liaising with COJ and CP was "....confident that it should be resolved". A further indulgence was requested. On 27 October the appellant's attorneys notified M&R that an application was being prepared and requested agreement to serve on it. On 24 November 2016, the eviction application was launched.

The Affidavits

[9] The appellant, in its founding affidavit, succinctly alleged a breach and failure to remedy and sought an eviction of City Parks.

[10] It took until 17 January 2017, for City Parks to present an answering affidavit. It was deposed to by Nelana. Several puerile points *in limine* were taken which can be ignored.

[11] The thesis advanced as a defence was that no debt was owing for property rates by the appellant or by City Parks. Why was this so? The reason given was that it was the policy of COJ not to levy rates on cemeteries. It was alleged the property had been wrongly classified as "Public Service Infrastructure" when it ought to have been classified as "municipal". Had this error not occurred no rates would have been levied. City Parks and COJ were "aware" of this "administrative error" and "have been engaging

each other to remedy the situation" The solution envisaged was a write off to achieve a "complete reversal" of the charges.

[12] There are several problems with this stance. First, there could never have been a classification of the property as "municipal" as the relevant categorisation of the property because, pursuant to the Local Government: Municipal Rating Act 5 of 2004 (Rates Act) such a classification can only apply to land *owned* by a municipality or another organ of state. The notion of a wrong classification is itself wrong. As is patently clear from the provisions of the Rates Act and the compulsory rates policy pursuant thereto, the correct classification is indeed "Public Service Infrastructure" and such property remains "rateable property" as defined. The statutory rating regime is addressed discretely elsewhere in this judgment.

[13] Accordingly, the notion that no debt existed is unsustainable on the grounds alleged by Nelana.

[14] Astonishingly, COJ at the time City Parks filed an answer, had not even opposed the application. Later it did so, ostensibly stung into action by the replying affidavit of the appellant which was well-laden with allusions to the significance of that lack of opposition.

[15] What did COJ have to say when, on 29 August 2017, it at last put up an answering affidavit? It was deposed to by Boitumelo Sago, a senior Legal Adviser of COJ.

15.1 The affidavit stresses the connection between City Parks and COJ. It points to the fact that COJ is a party to the agreement of lease.

15.2 It deals with the introduction of the regulatory regime under the Rates Act of 2004. Section 3 of the Rates Act prescribes an annual policy to set out by a municipality, to transparently publicise the rates regime applicable. This regime was implemented for the first time in July 2008, the beginning of the financial year 2008/2009..

15.3 Sago gives voice to a thesis which alleges that, under this regime, the COJ is authorised but not obliged to levy rates on public service infrastructure land. The contention draws on section 7(1) of the Rates Act. He reiterates the idea that the property should have been categorised as 'municipal'. He claims that if COJ leases property, the land may be categorised as 'municipal'. As such, no rates are levied. Having said all of this, which, as shall be addressed elsewhere is wrong, he goes on to say that where land is leased and not categorised as "municipal' a process of debiting and crediting takes place in the 'interdepartmental' accounts to *contra* out the debt between COJ and whoever is liable to pay. The effect would have been to 'write off' the amount debited to the lessor. The affidavit then conflates a write-off with a set -off. This terminological inexactitude is a source of mischief. There cannot be, in the context of the explanation already given, both a write-off and a set-off, though each is possible in accounting parlance. The remainder of the affidavit deals *in extenso* with the

fact of the administrative error and gives a frank explanation for the outrageous delay by alluding to the query being left to fester because no one knew what to do until, after two years of neglect, the matter was handed to Sago who took it seriously.

15.4 Sago composed a memorandum dated 26 October 2016 to propose a solution. Sago explains that the matter had to be escalated to the highest echelons of COJ, be subjected to a Council decision and in turn the passing of a resolution authorising the Mayor to sign off on a write-off. Ultimately, the contention is made that the cancellation was invalid. The rationale offered is the administrative error, now corrected by writing off the debt as a bad debt. The affidavit does not contend that no debt ever existed. Indeed, a write-off of a bad debt is an unequivocal admission of the existence of a debt.

The Regulatory Regime

[16] Given the prolix allusions to the classification of property for the purpose of rating, it is appropriate to dispose of several wrong understandings pertinent to this saga.

[17] At the time the agreement was concluded on 30 September 2003, the subject of rates was regulated by the Gauteng Local Authorities Rating Amendment Act 5 of 1997 which incorporated the Local Authorities Rating Ordinance 11 of 1977. The provisions stipulate, in circular fashion that rateable property is that in respect of which, in terms of

section 4, rates may be levied. Section 26 provides that the owner of rateable property must pay the levied sum. Owner is defined as the person in whose name the property is registered. Nothing about categorisation of property for the purposes of rating is mentioned in the statute.

[18] Subsequently, the Rates Act was enacted and came into force in 2005. The subject matter of cemeteries is addressed in this statute. In a virtuoso performance of labyrinthine draftsmanship the regulatory model can be divined by successively reading several provisions which are set out as follows:

> "Section 7: Rates to be levied on all rateable property
> (1) When levying rates, a municipality **must,** subject to subsection (2), levy rates on all rateable property in its area.
> (2) **Subsection (1) does not**
> ***(a)* oblige a municipality to levy rates on**
> (i) properties of which that municipality is the owner;
> (ii) **public service infrastructure;**
> (iii) properties referred to in paragraph *(b)* of the definition of 'property' in
> section 1; or
> (iv) properties in respect of which it is impossible or unreasonably difficult to establish a market value because of legally insecure tenure resulting from past racially discriminatory laws or practices; or
> *(b)* prevent a municipality from granting in terms of section 15 exemptions from rebates on or reductions in rates levied in terms of subsection (1).
> (emphasis supplied)
>
> **'public service infrastructure'** means **publicly controlled infrastructure** of the following kinds:
> *(a)* National, provincial or other public roads on which goods, services or labour
> move across a municipal boundary;

(b) water or sewer pipes, ducts or other conduits, dams, water supply reservoirs, water treatment plants or water pumps forming part of a water or sewer scheme serving the public;
(c) power stations, power substations or power lines forming part of an electricity scheme serving the public;
(d) gas or liquid fuel plants or refineries or pipelines for gas or liquid fuels, forming part of a scheme for transporting such fuels;
(e) railway lines forming part of a national railway system;
(f) communication towers, masts, exchanges or lines forming part of communications system serving the public;
(g) runways, aprons and the air traffic control unit at national or provincial airports, including the vacant land known as the obstacle free zone surrounding these, which must be vacant for air navigation purposes;
(h) breakwaters, sea walls, channels, basins, quay walls, jetties, roads, railway or infrastructure used for the provision of water, lights, power, sewerage or similar services of ports, or navigational aids comprising lighthouses, radio navigational aids, buoys, beacons or any other device or system used to assist the safe and efficient navigation of vessels;
(i) **any other publicly controlled infrastructure as may be prescribed;**

or

(j) a right registered against immovable property in connection with infrastructure mentioned in paragraphs *(a)* to *(i)*;"

(emphasis supplied)

[19] Pursuant to this Act a policy in terms of section 3 was formulated. The 2016/2017 policy is the one put before the court when it was heard *a quo.* The premise of the arguments was that these were the provisions applicable at all relevant times.

[20] The relevant portions about the classification of property is addressed thus:

20.1 The definition of "municipal property" means:

> "property owned, vested or under the control and management of the council or its service provider in terms of any applicable legislation".

It is doubtful that City Parks is a service provider in the sense contemplated here, but in any event its "control" over the leased property is not pursuant to any statute. Plainly, it is not helpful to the respondents' thesis.

20.2 Section 4 of the policy addresses the classifications of rateable property. Among the several categories are "municipal", "public service infrastructure" and "public service infrastructure-private". Only the last mention category is not defined in the rates Act itself.

20.3 Paragraph 4(2)(g) expands the meaning of "municipal" property. The text makes plain that such property is land owned by the municipality which may be leased to third parties. Plainly, this cannot apply to the appellants' land leased to City Parks.

20.4 Paragraph 4(2)(j) states as follows:

> "Public Service Infrastructure
> Property falling within this category shall be rated at a rate determined by applying the prevailing ratio as prescribed by Regulation. This will also include properties owned by the National Government and the Gauteng Government that are zoned:
>
> (i) **Properties zoned cemetery owned by National and Provincial Government**, community facility, parking, pedestrian mall, proposed new roads and widening, existing public roads reservoir, SAR, Spoornet and sewage farms.
> (ii) Any property not falling within the ambit of subparagraph (1) used for anything other than public service infrastructure shall be deemed to be business and commercial for the purposes of levying a rate.

(iii) This category of property qualifies for 30% value reduction as set out in Section 17(1)(a) of the Property Rates Act. (emphasis supplied)."

A plain reading reveals that only state owned cemeteries are included. A reference to the definition of public infrastructure in sub-paragraph (i) in the Rates Act, cited above, reveals that any addition to that list must be *prescribed.* Private land leased to COJ or City Parks, and used as a cemetery, is not included in the prescription in paragraph 4(2)(j).

20.5 Cemeteries are again addressed in the definition of "public service infrastructure – private" in paragraph 4(2)(r):

"Public Service Infrastructure-Private
Property falling within this category shall be rated at the rate applicable to Public Service Infrastructure. This includes:

(i) Privately owned land comprising a developed internal roadway network and access control that cannot be separately sold within a complex.

(ii) Storm-water control measures within a complex.

(iii) Property zoned and used as cemetery and privately owned.

(iv) This category of property does not qualify for the 30% value reduction as set out in Section 17(1)(a) of the Property Rates Act." (emphasis supplied)."

This provision does apply to the leased land and is, it is plain to see, the property is *rateable* property. The default position in terms of the policy is that such property is to be rated.

[21] Hence, it was incumbent on COJ to either levy a rate on the leased property or make a deliberate decision in terms of section 7(2) of the Rates Act not to levy a rate; justified, presumably, on the *sui generis* nature of the leased character of the property and its public use. It is plain that the mix-up is the result of no such decision having been made at any relevant time.

The Validity of the Cancellation

[22] The appellant has adopted the stance that it followed the letter of the agreement by putting City Parks on terms to remedy, and after the elapse of a reasonable time, City Parks did not remedy the breach relied upon; ie to pay COJ for the rates levied, and thus a cancellation was appropriate. As already addressed elsewhere there can be no doubt that COJ debited rates to the account of the appellant. Ultimately, in 2017, the appropriate accounting was performed to extinguish the debt debited to the account of the appellant. However, what was the position of the parties in 2014 when the purported cancellation was effected?

[23] The point of departure is to examine what the agreement required City Parks to do. The provisions of the Rates Act unequivocally makes the owner liable for the payment of the rates. The agreement in clause 7 recognises this to be the case. It was thus specified that City Parks shall be "liable for the payment" of all such charges, and "....shall pay to [COJ] such deposits (if any) as may be payable in respect thereof. Moreover "....the amounts ...shall be paid by the tenant direct to [COJ]."

[24] What did this agreement contemplate City Parks would do to discharge this liability towards the appellant? In my view, it is plain that what was not contemplated was that City Parks would actually dip into its bank account and extract money and thereupon hand it over to COJ. The tripartite nature of the agreement and the actual relationship between the COJ and City Parks, albeit separate juristic entities, are factors that weigh against such a scenario.

[25] It would be absurd to interpret this agreement other than City Parks would account to COJ for the debts raised on the property for the notional account of the appellant. It was self-evidently, by way of book entries in the accounts of both City Parks and COJ that these debts would be discharged.

[26] City Parks is *de facto* a mere cost centre for the COJ, clothed with corporate identity for administrative and logistical purposes. Ultimately, as described elsewhere, the costs were accounted for, however belatedly and clumsily. The reality which the court cannot be blind to, is that despite the ineptitude of the officials of both City Parks and COJ, with the signal exception of Sago, the appellant has never been at real risk of having to pay a single cent to COJ.

[27] Notionally, had any real attempt been made by COJ to oblige the appellant to pay any of the charges, two obvious avenues were open to the appellant to protect its interest. On one hand, to invoke clause 7.3 to elect to pay the sum and recover that sum for City Parks, and on the other hand to meet a summons with a Third Party notice to City Parks for any sum found due and payable to COJ. It is significant that no real

attempt was made to enforce the debt and the demand by COJ's attorney is explained as a truly mindless machine-reaction in a computerised system of credit control that had not been loaded with the appropriate data owing to the ignorance and ineptitude of officials of the COJ.

[28] The COJ and City Parks are organs of state. They manage public money. It would be unconscionable for a court to mechanically attribute to these institutions, the acts of its incompetent officials, on the basis of ostensible authority which would commit the sin of elevating form over substance, contrary to the public interest.

[29] The explanation for how this this mix–up originated is the *sui generis* nature of the acquisition of the property. Because the appellant sought to indulge itself in an eccentric whim which inhibited it from concluding a conventional sale, the lease arrangement was employed to circumvent the reality of the transaction. These circumstances, it must be emphasised, merely serve to explain the mix-up, not excuse the bungling by officials of City Parks and COJ.

[30] In our view, the judgment a quo correctly held that no valid cancellation could have occurred.

The Estoppel Case

[31] The appellant relied on certain correspondence and on certain conduct by the COJ or City Parks.

[32] It is necessary to identify one issue about which this court shall not make any pronouncement: the non-payment of rent by City Parks to the appellant. We were told that a separate legal proceeding about that issue is pending. This creates no complications because that ground for cancellation is a wholly self-standing issue, and although alluded to in these papers can be properly ignored and leave to another court to express itself on that issue.

[33] In our view the correspondence, which has been described above, does not constitute an acceptance of the validity of the cancellation. Again, despite the lack of insight shown by the scribes, the tone and content of the letters are, properly understood, merely a plea for patience while the matter is resolved. Holistically evaluated, there is no inference that can be drawn that City Parks or COJ prevaricated about the purported act of cancellation; their stance was always that the query would be resolved. Ultimately it was resolved.

[34] As to the conduct of City Parks, more especially the long delay in dealing with the point at issue, the overwhelming weight of the evidence is that the absence of action was not acquiescence to the cancellation but rather bureaucratic incompetence.

Conclusions

[35] Accordingly, the appeal must be dismissed.

[36] The question of costs must be evaluated in the light of the actual events and an assignment of culpability for the controversy. Plainly, the Managing Director of City Parks in 2014, Mr Bulumko Nelana has much explaining to do about how he dealt with this matter, as do any of his successors, if there are any, right up to the hearing *a quo*. Apart from Sago, who deposed to affidavits on behalf of COJ, and who appears, prima facie, to have been the only official who exhibited an appropriate degree of diligence, the other officials of COJ who were, during this period from 2014 onwards, responsible to attend to the problem have a lot of explaining to do.

[37] In our view, this case is one in which it is appropriate to enquire into the appropriateness of ordering the culpable officials in City Parks and in COJ to bear the costs incurred by the appellant up to the moment of the judgment *a quo* in their personal capacities. To this end special orders shall be made with regard to identifying the officials and the issuing of a *rule nisi* calling on them to show cause why they should not personally be ordered to pay the costs of the proceedings. The respondents' attorney of record shall be directed to take prescribed steps to facilitate such an enquiry.

[38] As to the costs of the appeal, the appellants shall bear that portion of the costs. The balance of the appellants' costs ought not to be borne by it, given that the culpability for the controversy rests on the side of City Parks and COJ. Even though the appellant's stance has been held to wrong, justice requires a special costs order. An order awarding these costs to the appellants from inception of the proceedings until judgment a quo, shall be deferred to determine whether they should be borne by City Parks and COJ or any of their employees, in whole or in part.

[39] **The Order**

(1) The appeal is dismissed.

(2) The appellant shall bear the costs of the appeal.

(3) The question of the costs of the proceedings from inception until judgment a quo, is deferred *sine die*.

(4) Attorneys Moodie and Robertson are directed to take the following steps, and the Managing director of City Parks and the City Manager, COJ, are directed to afford every assistance in taking the directed steps:

(i) a list shall be compiled of every official of managerial rank who was between 2014 and 2017 responsible for dealing with the query raised by the appellant and the subsequent litigation.

(ii) Each official shall depose to an affidavit in which that official describes what was done to address the query and to present reasons why that official ought not to bear all or part of the costs.

(iii) Such affidavits shall be collated and presented to the judges who sat in this appeal by not later than 30 June 2019.

(iv) Upon receipt further directives shall be issued.

(vii) If compliance with these directives are not timeously met, an order for the arrest of the Managing Director of City Parks and the City Manager of COJ shall be issued so that they be brought before the court to account for such failure.

(viii) The Attorneys of the appellant are directed to set the matter down, in consulting with the presiding Judge in the appeal hearing, to facilitate fulfilment of order (vii) should it become necessary.

SUTHERLAND J

I concur:

MUDAU J

I concur:

MATSEMELA AJ

Date of Hearing: 29 April 2019
Date of Judgment: 15 May 2019

For the Appellants:
Adv AO Cook SC,
with him and Adv H Vorster
Instructed by Brooks & Braatvedt Inc

For the Respondents:
Adv R Stockwell SC
Instructed by Moodie & Robertson