THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 433/2012
Reportable

In the matter between:

CITY OF TSHWANE **APPELLANT**

and

MARIUS BLOM & GC GERMISHUIZEN INCORPORATED **FIRST RESPONDENT**

KAWARI BELEGGINGS CC **SECOND RESPONDENT**

Neutral citation: *City of Tshwane v Blom* 433/2012 [433/12] 88 ZASCA (31 May 2013)

Coram: **MTHIYANE DP, LEWIS, SHONGWE, PETSE JJA et ZONDI AJA**

Heard: **22 MAY 2013**
Delivered:

Summary: Local authority – interpretation of sections 8(1) and 8 (2) of the Local Government: Municipal Property Rates Act 6 of 2004 ─ criteria according to which different categories are determined set out in s 8(2) ─list of categories of rateable property not intended to be exhaustive ─ competent for municipality to add a category of 'non-permitted use' to the list.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Hiemstra AJ sitting as court of first instance):

1 The appeal is upheld with costs including the costs of two counsel.

2 The order of the court a quo is set aside and replaced with the following:

'The application is dismissed with costs.'

JUDGMENT

ZONDI AJA (Mthiyane DP, Lewis, Shongwe et Petse JJA concurring)

Introduction

[1] The central issue in this matter involves the interpretation and application of sub-sections 8(1) and (2) of the Local Government: Municipal Property Rates Act 6 of 2004 (the Rates Act) and in particular whether it confers authority on the appellant to add to the list of categories of rateable property by creating in

its rates policy a category called 'non-permitted use' or 'illegal use', and to levy a rate accordingly. This issue arises because the appellant has categorised the second respondent's property as 'non permitted use' and levied a higher rate on the property than it levied on properties used for the purpose permitted.

[2] When the respondents received an invoice for some R171 000 for rates they brought an application in the court a quo seeking the following relief:

'1. A declaratory order that Act 6 of /2004, does not provide for a rating category of "illegal use" but only the categories provided for in Section 8 of the said Act;

2. A declaratory order that all levies levied by the Respondent against Portion 1 of Erf 91, Brooklyn, which is higher than the levies levied in respect of all other residential properties of a similar zoning, in Brooklyn, should be repaid to the Applicant;

3. That the Applicant be given leave to re-enrol this matter on the same papers, supplemented by an affidavit, for an order for the debating of the account, should the Applicant not be satisfied that the correct adjustment has been made by the Respondent pursuant to the above;

4. Costs.'

[3] In the court a quo the respondents contended that the appellant does not have authority in terms of s 8 of the Rates Act to add to the list of categories of rateable property by creating a category called 'illegal use' or 'non-permitted

use', and argued that on a proper interpretation of s 8 it was clear that the list of categories of rateable property is exhaustive. The court a quo rejected the respondents' contention and held that it was competent for the appellant to add to the list of categories of rateable properties. However, it found that the addition of 'illegal use' or 'non-permitted use' category was not competent and proceeded to make an order in the following terms:

'1. It is hereby declared that it is not permissible for the respondent to include a category of "illegal use" or "non-permitted use" for the rating of properties in its Rating Policy;

2. The respondent is ordered to rate Portion 1 of Erf 91, Brooklyn, for as long as it is used for business purposes according to the rates applicable to business properties in Brooklyn.

3. The respondent is ordered to adjust the levies imposed on Portion 1 of Erf 91, Brooklyn, to that applicable to properties for business use from the time that it imposed a rate for "illegal use" or "non-permitted use" to the date of adjustment.

4. The applicant is granted leave to re-enrol this matter on the same papers, supplemented by an affidavit, for an order for the debating of the account, should the applicant not be satisfied with the adjustment of the rates as ordered.

5. The respondent is ordered to pay the costs of this application.'

[4] The court a quo's order was predicated on its finding that the appellant's power to create additional categories of rateable property is not unfettered. In its

view additional categories have to be 'of a similar nature or of the same genus as those listed' in s 8(2). It reasoned that since all the categories listed in s 8(2) are lawful uses of the properties, the appellant may add only lawful uses. It held that the appellant may not add a category 'illegal use' to the list as to do so would make illegal use lawful. The court a quo concluded by holding that to levy 'a higher rate than the normal rate' on a property because it is used for non-permitted purposes amounts to an imposition of a penalty without due process. The present appeal, with the leave of the court a quo, is directed against the judgment and the findings underlying the order of the court a quo.

Background

[5] The facts in light of which the issues in this matter are to be determined are largely common cause. The second respondent is the registered owner of Portion 1 of erf 91, Brooklyn, also known as 835 Duncan Street, Brooklyn, Pretoria (the property) which is the subject of these proceedings. The property is situated within the area of jurisdiction of the appellant and is zoned for residential purposes in terms of the appellant's applicable Town Planning Scheme. The first respondent, a firm of attorneys, occupied the property in terms of a lease with the second respondent and used the property for business purposes, namely as attorneys' offices. In terms of the lease, the first respondent was responsible for the payment of rates and taxes, which is why it took issue

with the appellant. The first respondent's use of the property, which is zoned for use as 'residential', was contrary to the provisions of the appellant's Town Planning Scheme. By allowing the first respondent to use the property as it did, the second respondent was committing an offence.

[6] Section 2 of the Rates Act empowers a metropolitan or local municipality to levy rates on properties within its area. In terms of s 8(1) it may levy different rates for different categories of rateable property according to specified criteria. Section 8(2) sets out the different categories of rateable property that may be determined in terms of s 8(1). Acting in terms of s 3 of the Act, the appellant adopted rates policies from time to time and the relevant rates policy is the one that came into operation on 1 July 2008. In this rates policy the appellant introduced a 'non-permitted use' category of rateable property for the purposes of creating differential rates and categorised the property as 'non-permitted use'. The effect of this categorisation was that not only did the second respondent lose the benefit of a rebate, but also had to pay a higher rate.

Legal Framework

[7] Section 156(2) of the Constitution empowers municipalities to make and administer by-laws in order to give effect to the functional areas in which they

are authorised to govern. Section 156(5) affords a municipality 'incidental powers', that is to say, it has the right to exercise any power concerning a matter reasonably necessary for, or incidental to the effective performance of its functions. In particular s 229(1)*(a)* of the Constitution expressly authorises a municipality to impose 'rates on property and surcharges on fees for services provided by or on behalf of the municipality'. But the exercise of this power is subject to the provisions of the Constitution, the Rates Act and the rates policy which the municipality may have adopted.

[8] Section 3 of the Rates Act, which deals with the adoption and contents of rates policies, enjoins the council of a municipality to adopt a policy for the levying of rates on rateable property which is consistent with the Act. Subsection (3) provides that the rates policy must inter alia determine the criteria to be applied by the municipality if it levies different rates for different categories of properties, and determine or provide for the criteria for the determination of categories of properties for the purpose of levying rates and categories of owners of properties or categories of properties.

[9] Section 8(1) of the Rates Act provides for the determination of differential rates in respect of different categories of rateable property listed in s 8(2). To the extent here relevant those subsections provide:

'8 (1) Subject to section 19, a municipality may in terms of the criteria set out in its rates policy levy different rates for different categories of rateable property, which may include categories determined according to the –

(a) use of the property;

(b) permitted use of the property; or

(c) geographical area in which the property is situated.

(2) Categories of rateable property that may be determined in terms of subsection (1) include the following:

(a) Residential properties;

(b) industrial properties;

(c) business and commercial properties;'

. . ."

[10] The rates policy which finds application in this matter is the one adopted by the appellant on 1 July 2008. Clause 3.1 of the appellant's property rates policy provides as follows:

'3.1 Different Categories and Rates of Properties

- Categories of rateable property for purposes of levying differential rates are determined as follows:
  - Residential properties
  - Business and commercial properties
  - Industrial properties
  - Municipal property [rateable]
  - Municipal property [not rateable]
  - State-owned properties
  - Public Service Infrastructure
  - Agricultural
  - Agricultural vacant
  - *Non-permitted use* (my emphasis)
  - Multiple use properties
  - Vacant land
  - State Trust Land'

[11] The appellant's rates policy makes it clear that the criteria for levying different rates for different categories of rateable property are determined according to the actual use of the property, permitted use of the property or the geographical area in which the relevant property is located. And as required by s 6 of the Rates Act, the appellant adopted the Property Rates By-Law to give effect to the implementation of its rates policy.

Interpretation of section 8 of the Act

[12] Counsel for the appellant submitted in the heads of argument that s 8, properly interpreted, affords the appellant a discretion to determine categories of rateable property. Counsel argued that although s 8(1) refers to certain factors that may be considered in determining categories of rateable property, it is not a *numerus clausus*, and does not restrict or limit the appellant's discretion in any manner. The use of the word 'include' in conjunction with 'may' in the section, he argued, signifies that the legislature intended to enlarge or extend the specific guidelines and that the categories of properties referred to in s 8(2) are merely guidelines. Counsel pointed out that even if only the factors referred to in s 8(1) must be considered, it is clear from the context in which the word 'include' is used that non-permitted use was intended to be included in such categories. In advancing these arguments reliance was placed on the following dictum in *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, & others:*[1]

'[18] The correct sense of "includes" in a statute must be ascertained from the context in which it is used. *Debele* [1956 (4) SA 570 (A)] provides useful guidelines for this determination. If the primary meaning of the term is well known and not in need of definition and the items in the list introduced by "includes" go beyond that primary

[1] *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, & others* 2004 (1) SA 406 (CC) para 18.

meaning, the purpose of that list is then usually taken to be to add to the primary meaning so that "includes" is non-exhaustive. If, as in this case, the primary meaning already encompasses all the items in the list, then the purpose of the list is to make the definition more precise. In such a case "includes" is used exhaustively. Between these two situations there is a third, where the drafters have for convenience grouped together several things in the definition of one term, whose primary meaning – if it is a word in ordinary, non-legal usage – fits some of them better than others. Such a list may also be intended as exhaustive, if only to avoid what was referred to in *Debele* as "'n moeras van onsekerheid" (a quagmire of uncertainty) in the application of the term.'

[13] Counsel for the respondents correctly pointed out in his heads of argument that s 8(1) authorises the municipality, in terms of the criteria set out in its rates policy, to levy different rates for different categories of rateable property listed in s 8(2), and which authority has to be exercised in accordance with the provisions of s 229 of the Constitution and the Rates Act. Counsel argued that s 8(1) does not, however, empower the municipality to create further categories not listed in s 8(2) as the list of different categories of rateable property is exhaustive. The basis for his argument is that the terms 'property', 'category' and 'rates' contained in the Rates Act are not infinitely elastic terms but are specifically limited by the Act's definition. And using the 'golden rule' of interpretation,[2] which, counsel submitted, finds application in the construction of the provision of s 8 in the

[2]25 *LAWSA*, 2 ed para 314.

instant matter, he argued that the Act's definitions make it clear that the municipality's power to levy different rates for different categories of rateable property does not include the power to create a 'non-permitted use' or 'illegal use' category. He submitted that the creation by the appellant of a category in its rates policy of non-permitted use was contrary to the provisions of s 8(1) and (2) of the Rates Act, and that it was unfair to levy a punitive rate on the property.

[14] The proper approach to the interpretation of statutes was recently repeated by this court in *Natal Joint Municipal Pension Fund v Endumeni Municipality.*[3] Wallis JA writing for the court explained:[4]

'[18] The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible

[3] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) paras 17-26.
[4] Para 18.

meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

[15] Thus the appropriate starting point in interpreting a statute is the language of the provision itself (*South African Airways (Pty) Ltd v Aviation Union of South Africa & others;*[5] *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School*[6]) read in the context and having regard to the purpose of the provision and the background to the preparation and enactment of the statute.

[16] Turning to the present matter, in my view the court a quo correctly held that the list of categories of rateable property is not exhaustive and that it is competent for the appellant to add categories to that list. The use of the word 'include' in s 8(2) signifies that the list extends the meaning of

[5]*South African Airways (Pty) Ltd v Aviation Union of South Africa & others* 2011 (3) SA 148 (SCA) paras 25-30.
[6]*Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Priamry School* 2008 (5) SA 1 (SCA).

categories of rateable property that may be determined in terms of s 8(1). (*De Reuck supra; Ndlovu v Ngcobo; Bekker & another v Jika*[7]*).* This means that other grounds of differentiation besides those mentioned in s 8(1) may be used.

[17] In my view, when consideration is given to the words 'use of the property' and 'permitted use of the property' appearing in s 8 in the light of the ordinary rules of grammar and syntax, the context in which they appear and the apparent purpose to which they are directed, it is clear that 'use' is wide enough to include 'non-permitted use'. If this were not the case no purpose would be served in having a separate category for 'use'. Non-permitted use is a form of 'use' contrasted with permitted use. It is therefore competent for the municipality to include in its rates policy a 'non-permitted use' category for the purposes of determining applicable rates.

[18] The term 'permitted use' is defined in the Rates Act as 'the limited purposes for which the property may be used in terms of . . . any restrictions imposed by . . . a condition of title, a provision of a town planning or land use scheme; or any legislation applicable to any specific property; or any alleviation of such restrictions'. Section 8(2) lists a number of categories of

[7] *Ndlovu v Ngcobo; Bekker & another v Jika* 2003 (1) SA 113 (SCA) para 20.

rateable property that may attract different rates. These categories are optional.[8] The municipality may adopt all of them, drop some or include new categories depending on the nature of the objectives its rates policy seeks to achieve. The municipality has a choice. Rates policies entail, by definition, policy choices which lie at the core of municipal autonomy, and as long as the rates policy treats ratepayers equitably and is consistent with the provisions of the Constitution and the Rates Act, there can be no basis for questioning the choices it makes with regard to properties that may be differentially rated with respect to different categories of property. The court a quo therefore erred in finding that the creation of a 'non-permitted use' category was improper.

[19] I reject the respondents' contention that the appellant breached the *audi alteram partem* principle when it determined that the property's use falls under a 'non permitted use' category without any prior reference to the respondents. There was no obligation on the appellant to do so other than through the process described below. The municipality's power to impose taxes is an original power which stems from the Constitution in terms of s 229(1)*(a)*.[9] It is a legislative act. As such, it is not an administrative action subject to administrative law. That being the case, the setting of rates and

[8]Professor N Steytler and Dr J de Visser, *Local Government Law of South Africa* (2012) at 13-35.
[9]*City of Cape Town and another v Robertson & another* 2005 (2) SA 323 (CC) para 57; *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC).

determination of categories of rateable property under s 8 of the Rates Act cannot be challenged, as counsel for the respondent seemed to suggest in his argument, simply on the ground that it is unfair.

[20] The court a quo also found that a punitive rate imposed on the property as a result of its being categorised as non-permitted use amounts to the imposition of a penalty without due process. This finding is incorrect. The Rates Act contains built-in mechanisms in terms of which the disputes about the propriety of rates levies can be resolved. The property owner who is aggrieved by a rate that has been levied on his or her property is not without a remedy.

[21] Once the determination of different categories of rateable property in terms of s 8 is completed the valuation process begins. The valuation is done by a municipal valuer who is designated by the municipality in terms of s 33 of the Rates Act. The valuer must inter alia value all the properties and prepare a valuation roll of all the properties in the municipality. After the compilation of the valuation roll, it is open for objections by the public and the municipality. A property owner may then object, within a stipulated period, to the valuation or categorisation. If his or her objection is not dealt

with to his or her satisfaction he or she may then appeal to a valuation appeal board whose decision is final and binding on the municipality.

[22] It is not suggested by the respondents that they were not aware that, in the valuation roll, the use of the property was termed 'illegal' for the purposes of determining the applicable rate. (It should have been termed 'non-permitted use'). It is therefore not open to the respondents to now contend that the categorisation of the property and the resultant rate is unreasonable on the basis that it constitutes a penalty without due process. The respondents should have used the legal mechanisms provided for in the Act if they wished to challenge the correctness of the property categorisation and the rate determined. This they failed to do.

[23] To conclude, the court a quo erred in finding that it is not competent for the appellant to add to the list of categories in s 8(2) by creation of a category called 'non permitted use' in the rates policy and that to levy a 'higher rate than the normal rate on a property' on the basis of such categorisation is to impose a penalty without due process.

[24] With regard to costs counsel for the appellant submitted on authority of *City of Tshwane Metropolitan Municipality v Grobler & other* that, should the appeal succeed, the respondents should be ordered to pay costs on the scale as between attorney and client on the basis that when they brought the application they knew that their use of the property was in contravention of the appellant's town-planning scheme. They were using it for commercial purposes for which they had not been granted permission by the appellant. It was presumptuous of the respondents, his argument proceeded, to contend that the property should be rated as residential property. He argued that the respondents' conduct was in flagrant disregard of the provisions of the Act.

[25] In my view the punitive costs order is not appropriate in the instant matter. While I accept that the respondents were aware that their use of the property was in contravention of the appellant's town-planning scheme, I do not agree that that knowledge in itself constitutes a sufficient basis for this court to order them to pay costs on a punitive scale. The dispute between the parties is essentially about the interpretation and application of s 8 of the Rates Act, the provisions of which are far from clear and thus susceptible to different interpretations. The respondents were entitled to come to court and

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City of Tshwane Metropolitan Municipality v Grobler & others 2005 (6) SA 61 (T) para 12.

challenge the correctness of the construction of the section contended for by the appellant. In these circumstances there can be no basis for the contention that their conduct was vexatious such as to warrant the special order of costs. In my view costs should be ordered on a normal scale.

[26] In the result the following order is made:

1 The appeal is upheld with costs including the costs of two counsel.

2 The order of the court a quo is set aside and replaced with the following:

'The application is dismissed with costs.'

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D H ZONDI
Acting Judge of Appeal

APPEARANCES

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