

Is a municipal by-law prohibiting transfer of property without a “SPLUMA Certificate” constitutional and valid?

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In an unreported case^[1] of the High Court of South Africa, Mpumalanga Division, Middelburg (“Court”), a number of owners of farm portions in rural areas (collectively, “Applicants”) brought an application (“Court Application”) against a number of local municipalities and the Registrar of Deeds at Mpumalanga (“Registrar of Deeds”). The Applicants attacked the constitutionality and validity of certain sections of municipal planning by-laws which prohibit the transfer of immovable property without a “SPLUMA certificate” having been issued by the local municipality under whose jurisdiction the particular property falls and prohibit the Registrar of Deeds from transferring property unless the lodged transfer documents include a “SPLUMA certificate”.

At the outset it’s important for the reader to note that the municipal planning by-laws of a municipality are framed in terms of the Spatial Planning Land Use and Management Act 16 of 2013 (“SPLUMA”). SPLUMA is an act of parliament and thus is a law of national application. Municipal by-laws need to be within the parameters of what SPLUMA lays down and cannot exceed the functional area of “municipal planning”.

The municipal planning by-laws of the particular local municipalities who were respondents in the Court Application are all very similar to each other. For simplicity, in this article we’ve chosen to look at *Sections 74 and 76 of the Municipal Planning By-laws of the Govan Mbeki Local Municipality* as the point of departure. The Govan Mbeki Local Municipality (“Municipality”) opposed the Court Application.

The relevant parts of *Sections 74 and 76 of the Govan Mbeki Municipality By-law* (collectively referred to as “Specific By-laws”) read as follows: –

“74. Restriction on Transfer and Registration

1)

2) No erf/erven and/or units in a land development area, may be alienated or transferred into the name of a purchaser, nor shall a certificate or registered title be registered in the name of the owner, prior to the municipality certifying to the Registrar of Deeds that-

a) all engineering services have been designed and constructed to the satisfaction of the municipality, including guarantees for services having been provided to the satisfaction of the municipality as may be required; and

b) all engineering services and development charges have been paid; and

c)

d) all conditions of the approval of the land development application have been complied with or that arrangements have been made to the satisfaction of the municipality for the compliance thereof within three months of having certified to the Registrar in terms of this Section that registration may take place; and

e) that the municipality is in a position to consider a final building plan; and

f)”

“76. Certification by Municipality

1) A person may not apply to the Registrar of Deeds to register the transfer of a land unit, unless the municipality has issued a certificate in terms of this Section.

2) The municipality may not issue a certificate to transfer a land unit in terms of any law, or in terms of this by-law, unless the owner furnishes the municipality with –

a) a certificate of a conveyancer confirming that funds due by the transferor in respect of the land have been paid;

b) proof of payment of any contravention penalty or proof of compliance with a directive contemplated in Chapter 9;

c) proof that the land use and buildings constructed on the land unit comply with the requirements of the land use scheme;

d) proof that all common property, including private roads and private places originating from the subdivision, has been transferred;

e) proof that the conditions of approval that must be complied with before the transfer or erven have been complied with; and

f) proof that all engineering services have been installed or arrangements have been made to the satisfaction of the municipality.”

The cumulative effect of the Specific By-laws is that in order for the Applicant to apply to the Municipality for a SPLUMA certificate, the Applicant is required to obtain –

- a rates clearance certificate in terms of *Section 118 of the Local Government : Municipal Systems Act, 32 of 2000* (“Systems Act”) [3] which involves a lengthy period before the rates clearance certificate is issued. Once the rates clearance certificate has been issued it’s only valid for a period of sixty days from its issue date;[4]
- a zoning certificate in terms of the applicable land use scheme;
- an occupancy certificate in terms of the *National Building Regulations and Building Standards Act, 103 of 1977* which involves an inspection of the buildings on the property by a building inspector of the Municipality to ensure that the buildings have been erected in accordance with building plans approved by the Municipality and the zoning applicable to the particular property as reflected in the zoning certificate. An occupancy certificate is only valid for three months.

The Specific By-laws prohibit a person from applying to the Registrar of Deeds to register a transfer of a property unless the Municipality has issued a certificate in terms of *Section 76 (1)* thereof, commonly known as a “SPLUMA certificate”. In addition, the effect of *Section 76 (2)* is that the Municipality itself cannot issue any other type of certificate, including a *Section 118* Certificate, unless a SPLUMA certificate certifying compliance with all the elements in *Section 76* have been complied with by the owner of the particular property.

The Registrar of Deeds, independently of the Municipality, also requires a SPLUMA certificate to be lodged with the transfer documents, failing which the transfer is rejected by the Registrar of Deeds. There is no act of parliament that requires this action by the Registrar of Deeds, who seems to have adopted it purely on the basis of an internal policy to accommodate the particular municipalities.

SOME OF THE ISSUES REQUIRED TO BE DETERMINED BY THE COURT

Before coming to a decision, the Court had to consider whether the Specific By-laws are unconstitutional and in connection therewith whether they –

- constitute an arbitrary deprivation of property as envisioned in *Section 25(1) of the Constitution of the Republic of South Africa, 1996* ("Constitution");
- exceed the functional area of "municipal planning" of the Municipality in that the Specific By-laws regulate transfer of property.

Whether the Specific By-laws are lawful and in connection therewith whether they are –

- an "incidental power" as envisaged in *Section 156 (5) of the Constitution*;
- authorised by SPLUMA;
- conflict with *Section 118 of the Systems Act*.

SOME OF THE FINDINGS OF THE COURT

Do the Specific By-laws infringe *Section 25 (1) of the Constitution*?

Section 25 (1) of the Constitution states that "No-one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property".

In examining whether the effect of the Specific By-laws led to an arbitrary deprivation of property the Court quoted with approval the judgment given in *Mkontwana v Nelson Mandela Metropolitan Municipality & Another 2005 (1) SA 531 (C C)* where the Constitutional Court found that "the right to alienate property is an important incident of its use and enjoyment", but that "deprivation of property" within the meaning of *Section 25 (1) of the Constitution* only occurs if the particular law being challenged either fails to provide "sufficient reason" for the deprivation or is "procedurally unfair".

Given the rural locality of the farm portions which constituted the properties owned by the Applicants, the requirements of the Specific By-Laws make it virtually impossible for the Applicants to obtain SPLUMA certificates as at the time buildings were erected on those properties and the buildings were first occupied the properties : (a) were not within the jurisdiction of a municipal authority; (b) were not included in a town planning scheme; (c) were not required to be zoned and thus no zoning certificates could be obtained; and (d) building plans were not required.

The Court found that the Specific By-laws "constitute a substantial obstacle to alienation and a deprivation of property within the meaning of *Section 25 (1) of the Constitution*".

Are the specific By-laws unconstitutional because they exceed the functional area of "municipal planning" and if so, could they still be lawful because they are an "incidental power" as envisioned in *Section 156(5) of the Constitution*?

The power of the national and provincial governments to make law in respect of local municipality matters is limited to the passing of framework legislation. In turn, the power of local municipalities to make law is subject to the framework legislation. Any By-law which conflicts with the framework legislation (in this case SPLUMA) is invalid in terms of *Section 156 (3) of the Constitution*.

In its judgment, the Court quoted the following with approval from the judgment in *Ex parte Western Cape Provincial Government & Others: In re DVB Behuising (Pty) Ltd v Northwest Provincial Government & Another 2001 (1) SA 500* – "The process of land registration is already a matter unequivocally dealt with in national legislation, namely the Deeds Registries Act ...the national competence with regards to deeds registration (including registration of transfer of properties) is not a municipal function. In consequence a municipality may not regulate registration of transfer of properties. It is part of the plenary powers of the national legislature".

The Court went on to find that the Specific By-laws are neither original powers of the municipalities, nor are they assigned to local municipalities in terms of applicable national or provincial legislation.

Before the Court could conclude that the Specific By-laws were unconstitutional it had to consider whether they are reasonably "necessary for, or incidental to, the effective performance of a municipality's planning function" as envisaged in *Section 156 (5) of the Constitution*. The Court found that the specific By-laws were not reasonably necessary for nor incidental to the Municipality's effective performance.

Thus, the Court found that the Specific By-laws are unconstitutional because they are inconsistent with *Sections 25 and 156 of the Constitution*.

The Court also concluded that since the SPLUMA does not authorise the Specific By-laws, there is no statute into which a municipal power for municipalities to regulate transfer of property can be read. The registration of transfer of property has been expressly regulated by the *Deeds Registries Act, 47 of 1937*. There is no room for an implied municipal power to regulate the Registrar's statutory power to register transfer of properties.

Finally, the Court concluded that *Section 76 (2) of the Specific By-laws*, which has the effect that the Municipality itself cannot issue a *Section 118 of the Systems Act* Certificate without first having issued a SPLUMA certificate, is invalid as it conflicts with *Section 118 of the Systems Act*.

The judgment of the Court is being appealed by the Municipality.

Footnotes

[1] IN THE HIGH COURT OF SOUTH AFRICA MPUMALANGA DIVISION, MIDDELBURG (LOCAL SEAT) – CASE NUMBER: 2607/2019, In the matter between: GLENCORE OPERATIONS SOUTH AFRICA (PTY) LTD (First Applicant), DUIKER MINING (PTY) LTD (Second Applicant), TAVISTOCK COLLIERIES (PTY) LTD (Third Applicant), UMCEBO PROPERTIES (PTY) LTD (Fourth Applicant), IZIMBIWA COAL (PTY) LTD (Fifth Applicant) and STEVE TSHWETE LOCAL MUNICIPALITY (First Respondent) GOVAN MBEKI LOCAL MUNICIPALITY (Second Respondent), EMALAHLENI LOCAL MUNICIPALITY (Third Respondent), THE REGISTRAR OF DEEDS, MPUMALANGA (Fourth Respondent), THE MINISTER: RURAL DEVELOPMENT AND LAND REFORM (Fifth Respondent), THE MINISTER: CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS (Sixth Respondent), THE MEMBER OF THE EXECUTIVE COUNCIL FOR AGRICULTURE, RURAL DEVELOPMENT, LAND AND ENVIRONMENTAL AFFAIRS, MPUMALANGA (Seventh Respondent) THE MEMBER OF THE EXECUTIVE COUNCIL FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS, MPUMALANGA PROVINCE (Eighth Respondent)

[2] This is a certificate required in addition to a Section 118 of the Systems Act certificate. It concerns information peculiarly within the knowledge of the Municipality, not the Conveyancer.

[3] Section 118 of the Systems Act has the effect that a Registrar of Deeds may not register the transfer of property except on production to that Registrar of a prescribed certificate issued by the municipality in which that property is located certifying that all amounts due, in the two years preceding the date of application for the certificate for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties have been fully paid.

[4] The alignment of all the time frames required for compliance with each process set out above is mismatched (e.g. No sooner has the occupancy certificate been issued then the clearance certificate expires and vice versa) and practically makes it impossible for all the certificates to be issued and valid simultaneously.



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