



OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MIDDELBURG (LOCAL SEAT)**

CASE NUMBER: 2607/2019

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

13 January 2021

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

JUDGMENT

BARNARDT AJ:

[1] This application concerns the constitutionality, validity and enforceability of some sections of Municipal By-laws relating to the restriction of transfer and registration of immovable properties on the basis that:

- 1.1 the provisions infringe Section 25(1) of the Constitution in that they constitute an arbitrary deprivation of the right to alienate property;

1.2 the provisions fall outside the legislative competence of municipalities as contemplated in Section 156 of the Constitution; and

1.3 the provisions conflict with national legislation, namely Section 118 of the Local Government: Municipal Systems Act, 32 of 2000 (the “MSA”) or with the Spatial Planning and Land Use Management Act, 16 of 2013 (“SPLUMA”).

[2] The First, Second, Third and Fifth Applicants are mining companies and the Fourth Applicant is a property holding company, all who intend to transfer or take transfer of the ownership of certain immovable properties located within the municipal areas of the First, Second and Third Respondents.

[3] The First Respondent is STEVE TSHWETE LOCAL MUNICIPALITY; the Second Respondent is GOVAN MBEKI LOCAL MUNICIPALITY and the Third Respondent is EMALALHENI LOCAL MUNICIPALITY. The Fourth Respondent is THE REGISTRAR OF DEEDS, MPUMALANGA and the Fifth to Eighth Respondents, who have been cited on account of their executive responsibilities for the functional areas covered by this application, are not opposing the application. No relief is claimed against the Fifth to Eighth Respondents.

- [4] The Second and Third Respondents oppose the relief and have filed answering affidavits in opposition. The relief sought against the Fourth Respondent (the Registrar) is consequential upon the application being successful against the municipalities. The Registrar has not filed any opposing papers. The First Respondent, who initially opposed this matter, has withdrawn its opposition.
- [5] Notices to abide by the decision of the Court were filed on behalf of the Fifth, Sixth and Eighth Respondents.
- [6] The Applicants claim that virtually insurmountable obstacles are placed by certain sections of the Municipal Planning By-laws of the First to Third Respondents to the registration of transfer of the properties, which lead to long delays. The Sections each prohibit a person from applying to the Registrar to register the transfer of a land unit unless the municipality has issued a certificate in terms of that Section to the effect that its wide-ranging prerequisites for transfer have been met.
- [7] The Registrar requires that certificate to be lodged with the application for the transfer documents, failing which the transfer is rejected. There is no statutory provision that prescribes this action by the Registrar. It is based on a policy decision to accommodate the municipalities.

RELIEF SOUGHT

- [8] The Applicants seek five classes of relief against the three Respondent municipalities. The fifth prayer is an alternative in lieu of the first four.
- [9] As against the Registrar, the Applicants seek to review his decision to enforce the impugned provisions of the municipal by-laws. In addition, a mandatory order is sought to compel the Registrar to receive and process the Applicants' applications for the transfer of titles to the properties in question without requiring compliance with certain sections of the by-laws.
- [10] The impugned sections of the by-laws of the three municipalities are virtually identically worded in their relevant subsections. These are:
- 10.1 Section 82 of the Steve Tshwete By-law;
 - 10.2 Section 76 of the Govan Mbeki By-law; and
 - 10.3 Section 86 of the Emalahleni By-law.
- [11] The declaratory orders sought by the Applicants are to the effect that the Applicants' various properties are not subject to the requirements of certain sections of the impugned By-laws.

- [12] The Applicants further seek a legality review of the impugned By-laws on the grounds that these provisions are not authorised by any empowering provision. They also seek an administrative justice review of the interpretation and implementation of certain subsections of the impugned By-laws.
- [13] In the alternative, the Applicants apply for a mandatory order directing the municipalities to receive, consider and respond to all applications by the Applicants for the SPLUMA certificates, in respect of the transfers of the properties relevant to this application without insistence on compliance with certain subsections of the impugned By-laws.
- [14] The Applicants further seek an administrative justice review of the decisions of the Registrar of Deeds to give effect to certain subsections of the impugned By-laws by requiring the certificates from those municipalities certifying that those sections have been complied with as a prerequisite for the registration of transfer of immovable property in that municipality.
- [15] The Applicants further pray for a mandatory order directing the Registrar to receive and process the applications for registration of transfer of the

relevant properties without requiring the certificates mentioned in the impugned By-laws and costs against any opposing Respondent.

OPPOSITION TO THE APPLICATION

FIRST RESPONDENT

[16] The First Respondent has withdrawn its opposition to the application.

SECOND RESPONDENT

[17] The Second Respondent, in its heads of argument argued that:

17.1 A local municipality in the position of the Second Respondent is empowered by the Constitution of the Republic of South Africa, 1996 ("the Constitution"), the Local Government: Municipal Systems Act, 2000 ("the Systems Act") and the Spatial Planning and Land Use Management Act, 2013 ("SPLUMA") to promulgate by-laws to regulate and control municipal planning, enforce municipal planning and enforce an adopted land use scheme;

17.2 A local municipality in the position of the Second Respondent is entitled to place a restriction on property owners within its area as a means of enforcing of municipal planning;

17.3 The restrictions that a local municipality is entitled to place on property owners include a restriction that prohibits the property owner or its agents to apply to the Registrar of Deeds for passing and registration of transfer of ownership of the immovable property within the local municipality's jurisdiction unless the local municipality certifies in writing that all the provisions of the local municipality's land use scheme have been complied with.

[18] The Second Respondent further conceded that certain aspects of the Govan Mbeki By-laws require clarification, which, it is submitted, can be rectified by means of an amendment to the By-law after following due process. It does not seek to protect the wording of the Govan Mbeki By-laws as it stands and submits that the wording will be amended and rectified after due process was followed.

[19] The Second Respondent, however, requests the Court to exercise its discretion in terms of Section 172(1)(b) of the Constitution to order that the declaration of invalidity is suspended for a period to allow the Second Respondent to correct the defects, if the Court finds that the specific wording of the By-law is constitutionally invalid.

[20] However, the Second Respondent further submits that the extent of the deprivation is no more onerous than the obligation resting on the Applicants that their use of the properties must conduce to the public good. Put differently, property owners are already limited by the common law, spatial planning legislation, environmental legislation and mining legislation to use their property in accordance with the prescripts of the law. The By-law, so it is submitted, does not cast an additional burden on property owners in this respect.

[21] The Second Respondent further submits that the Applicants rely on hypothetical situations to explain why it is impossible to comply with the Second Respondent's By-laws. In support of this, the Applicants rely on legal contentions as well as factual allegations pertaining to the Applicants' interaction with the employees of the First Respondent. The Applicants do not refer to any interaction with the employees of the Second Respondent.

[22] The Second Respondent further tendered the required SPLUMA-certificates in respect of the Applicants' properties in its area of jurisdiction conditional upon:

- 22.1 the current registered owner of the properties providing proof of the registration of the existing mining and/or mineral rights on the properties;
- 22.2 the owner produces details of any buildings which are occupied for residential purposes;
- 22.3 the Applicants paying the prescribed administration charges.

THIRD RESPONDENT:

- [23] The Third Respondent aligns itself with the Second Respondent's submissions and submits that the relief sought by the Applicants is hypothetical or not ripe and is accordingly academic and that those portions of the relief sought should be dismissed on that basis.
- [24] The Emalahleni Land Use Management Scheme has not been impugned and remains valid and applicable in this matter, which is important because the Applicants seek to aver that the ELUMS does not apply to their properties.
- [25] That the provisions of Section 86 of the Emalahleni By-laws are constitutionally valid and requests that the application be dismissed with costs.

ISSUES FOR DETERMINATION

[26] The following issues must be determined:

26.1 whether the impugned provisions are unconstitutional and in connection therewith:

26.1.2 whether they constitute an arbitrary deprivation of property as envisaged in Section 25(1) of the Constitution;

26.1.3 whether they conflict with Section 118 of the Local Government Municipal Systems Act, 32 of 2000; and

26.1.4 whether they exceed the functional area of "*municipal planning*" in that they regulate transfer of property.

26.2 Whether the impugned provisions are lawful and in connection therewith:

26.2.1 whether they are authorised by SPLUMA;

26.2.2 whether the impugned provisions are an incidental power as envisaged in Section 156(5) of the Constitution;

26.2.3 whether the interpretation and application of the impugned provisions by the municipalities and the Registrar are correct and in connection therewith:

26.2.3.1 whether that interpretation conflicts with Section 18 and 21 of the Town Planning and Townships Ordinance No 15 of 1986;

26.2.3.2 whether subsection (2)(c) of the impugned provisions requires approved building plans and occupancy certificates;

26.2.3.3 whether the impugned provisions apply to the categories of the Applicants' relevant properties.

THE IMPUGNED PROVISIONS

[27] Sections 80 and 82 of the Steve Tshwete By-law read as follows:

"80. Restriction on Transfer and Registration

(1) Notwithstanding the provisions contained in this by-law or any conditions imposed in the approval of any

land development application, the owner shall, at his or her cost and to the satisfaction of the municipality, survey and register all servitudes required to protect the engineering services provided, constructed and installed as contemplated in Chapter 7.

- (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;*
 - (c) all engineering services have been or will be protected to the satisfaction of the municipality by means of servitudes; and*
 - (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) that all the properties have either been transferred or shall be transferred simultaneously with the first transfer or registration of a newly created property or sectional title scheme."*

"82. 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; and*
- (e) *proof that the conditions of approval that must be complied with before the transfer or even have been complied with."*

[28] Sections 74 and 76 of the Govan Mbeki By-law read as follows:

"74. Restriction on Transfer and Registration

- (1) *Notwithstanding the provisions contained in this by-law or any conditions imposed in the approval of any land development application, the owner shall, at his or her cost and to the satisfaction of the municipality, survey and register all servitudes required to protect the engineering services provided, constructed and installed as contemplated in Chapter 7.*

- (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;
 - (c) all engineering services have been or will be protected to the satisfaction of the municipality by means of servitudes; and
 - (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) *that all the properties have either been transferred or shall be transferred simultaneously with the first transfer or registration of a newly created property or sectional title scheme."*

"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; and*
- (e) *proof that the conditions of approval that must be complied with before the transfer or erven have been complied with;*
- (f) *proof that all engineering services have been installed or arrangements have been made to the satisfaction of the municipality."*

[29] Sections 84 and 86 of the Emalahleni By-law read as follows:

"84. Restriction on Transfer and Registration

- (1) *Notwithstanding the provisions contained in this by-law or any conditions imposed in the approval of any land development application, the owner shall, at his or her cost and to the satisfaction of the municipality, survey and register all servitudes required to protect the engineering services provided, constructed and installed as contemplated in Chapter 7.*
- (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;*
- (c) all engineering services have been or will be protected to the satisfaction of the municipality by means of servitudes; and*
- (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) that all the properties have either been transferred or shall be transferred*

simultaneously with the first transfer or registration of a newly created property or sectional title scheme."

"86. 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; and*

- (e) *proof that the conditions of approval that must be complied with before the transfer or even have been complied with."*

[30] The requirements of Section 82 of the Steve Tshwete By-law; Section 76 of the Govan Mbeki By-law and Section 86 of the Emalahleni By-law are in addition to the requirements set by the national legislator in Section 118 of the Systems Act which provides as follows:

"118. Restraint on Transfer of Property

- (1) *A Registrar of Deeds may not register the transfer of property except on production to that Registrar of Deeds of a prescribed certificate –*
 - (a) *issued by the municipality or municipalities in which that property is situated; and*
 - (b) *which certifies that all amounts that became due in connection with that property for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties during the two years preceding the date of application for the certificate have been fully paid.*
- (1A) *A Prescribed certificate issued by a municipality in terms of subsection (1) is valid for*

a period of sixty days from the date it has been issued."

[31] These by-laws have the practical effect that in order to apply for a SPLUMA certificate, the Applicant must obtain a rates clearance certificate and a certificate of occupancy issued in terms of the Building Standards Act in addition to proof of compliance with the other requirements of the by-laws. This implies that:

31.1 Rates clearance amounts must first be obtained from the municipality and then be paid by the Applicant in order to secure a rates clearance certificate in terms of Section 118 of the Systems Act.

31.2 The rates clearance certificate must be lodged in the Deeds Registry with each transfer and must also be lodged with the municipality to obtain a SPLUMA certificate. The rates clearance certificate is only valid for a period of sixty days from date of issue.

31.3 In order to obtain a certificate of occupancy, a separate application must be made to the municipality. This application is followed by an inspection of the properties by the building inspector.

31.4 In order to secure the occupancy certificate, approved building plans are required, as well as a zoning certificate. An occupancy certificate is valid for three months.

[32] In the case of the Govan Mbeki Municipality, it is further required of an applicant to depose to a supporting affidavit in which the applicant must declare that all *“development charges due on the property/ies have been paid”*; that all *“contravention penalties have been paid”*; and that he/she understands *“the requirements of Section 26 of the Spatial Planning and Land Use Management Act, 16 of 2013 read with the Govan Mbeki By-law on Spatial Planning and Land Use Management and the applicable land use scheme with regard to the permitted land use of property and lawful existing buildings on the property mentioned above”*; that the *“use of the land and buildings erected on the abovementioned property complies with the provisions of the Spatial Planning and Land Use Management Act, 16 of 2013 and the Govan Mbeki By-law on Spatial Planning and Land Use Management and the applicable land use scheme.”*

[33] The Applicants complain that these requirements are insurmountable and make it virtually impossible to obtain SPLUMA certificates in order to effect transfer of their properties.

[34] The Applicants' problems to obtain SPLUMA certificates arise from the following:

34.1 The Applicants' properties were not within a municipal area, they were not within the ambit of a town planning scheme or a similar instrument at the time they were first occupied and/or buildings constructed thereon. A zoning certificate could not have existed in respect of those properties because they were not zoned. They were and are farm portions in areas that are still rural. Building plans were not required before.

34.2 Occupancy certificates in terms of the Building Standards Act were neither required nor issued for the Applicants' properties at the time of their occupation; and

34.3 as a consequence of the above, the virtual impossibility to now secure zoning and occupancy certificates in respect of the Applicants' properties result in the inability to satisfy the

requirements for a SPLUMA certificate in terms of the impugned by-laws.

[35] As a result, the Applicants have been unable to lodge applications for registration of the transfers of some properties and applications in respect of other properties were rejected by the Registrar due to the omission of a SPLUMA certificate.

[36] The Applicants allege that the legislative competence of the municipalities with regard to "*municipal planning*" does not extend to regulating transfer of properties and allege that a restriction such as those imposed by the impugned provisions can only be imposed by national legislation like, for example, Section 118 of the Systems Act and Section 53 of the SPLUMA which can be described as the inter-face between deeds registration, municipal financial management and municipal spatial planning.

[37] The Applicants further allege that the impugned provisions of the by-laws are vague and arbitrary because they impose an unconstitutional

burden on the Applicants in respect of the intended transfer of their properties in violation of Section 25 of the Constitution which results in an arbitrary deprivation of an incidence of ownership, namely the right to alienate property.

[38] The Applicants further allege that the impugned provisions are contrary to the constitutional requirement that a desired result should be achieved by the means least damaging to the constitutional right in question and submit that the impugned provisions should be declared invalid on the principle of legality because they are not authorised by SPLUMA and are in conflict with Section 118 of the Systems Act. The Applicants submit that on a proper interpretation the impugned provisions do not apply to a category of their properties because their wording does not support the interpretation of the municipalities which require occupancy certificates, approved building plans and zoning certificates. The interpretation of the municipalities ascribes retrospective operation to the impugned provisions.

DO THE BY-LAWS INFRINGE SECTION 25(1) OF THE CONSTITUTION?

[39] Section 25(1) of the Constitution provides as follows:

“Property

25. (1) *No-one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.”*

[40] The impugned by-laws place an embargo on the registration of transfer of immovable property until the requirements of the by-laws are met.

[41] In ***Mkontwana v Nelson Mandela Metropolitan Municipality & Another*** 2005(1) SA 531 (CC), the Constitutional Court dealt with Section 118 of the Local Government: Municipal Systems Act, 3 of 2000. That Section in effect requires payment of municipal debts before a transferring-owner can register transfer of ownership of immovable property by the Registrar of Deeds.

[42] In paragraph [33] the Court found as follows:

“[33] *Alienation of immovable property is ordinarily completed by transfer to the new owner in the office of the Registrar of Deeds. The right to alienate property is an important incident of its use and enjoyment. The effect of Section 118(1) and Section 50(1)(a) of the Ordinance is that*

transfer can take place only if all outstanding consumption charges have been paid. It follows that owners cannot transfer their properties unless consumption charges due by people other than themselves and for which they are not liable have been paid. It was correctly pointed out that these laws do not literally require the owner to pay outstanding consumption charges. The reality is, however, that if the person liable for the debt does not or cannot pay, the owner who wants to effect transfer must, unless the relevant agreement provides for a party other than the owner to effect payment, pay all outstanding consumption charges. The payment must be made regardless of whether the owner is liable to pay. The provisions are not merely procedural. They are a substantive obstacle to alienation and constitute a deprivation of property within the meaning of Section 25(1). Indeed, it is distinctly possible that all consumption charges for the two or three year period might be so high as to exceed the market value and render a sale uneconomical. It follows that I agree with the High Courts and with the Geyser-judgment that Section 118(1) does give rise to deprivation of property."

[43] In the present matter, the impugned by-laws, like Section 118, in effect create an embargo during which the Registrar cannot register the transfer of the property. The impugned by-laws go much further in its requirements for the embargo to be lifted than Section 118.

[44] An intending transferor of property, like the Applicants, must satisfy the requirements of Section 82(2) of the Steve Tshwete By-law, Section 76(2) of the Govan Mbeki By-law, or Section 86(2) of the Emalahleni By-law in order to obtain the certificate prescribed by sub-section (1) of the said Sections. The three municipalities further impose an embargo on the Registrar not to accept an application to register the transfer of a land unit unless the municipality has issued a certificate in terms of that Section.

[45] The preconditions required for the municipal certification for registration of property are contained in Section 82(2) of the Steve Tshwete By-law, Section 76(2) of the Govan Mbeki By-law and Section 86(2) of the Emalahleni By-law. 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:

- 45.1 a certificate of a conveyancer confirming that funds due by the transferor in respect of land, have been paid;
- 45.2 proof of payment of any contravention penalty or proof of compliance with a directive contemplated in the chapter of the By-laws on compliance and enforcement;
- 45.3 proof that the land use and buildings constructed on the land unit comply with the requirements of the land use scheme;
- 45.4 proof that all common property including private roads and private places originating from the subdivision, have been transferred;
- 45.5 proof that the conditions of approval, that must be complied with before the transfer of erven, have been complied with.

[46] The opening lines of Section 82(2) of the Steve Tshwete By-law and Section 76(2) of the Govan Mbeki By-law, contain a prohibition namely that the *“municipality may not issue certificates”*. Section 86(2) of the Emalahleni By-law is couched in peremptory terms that the *“municipality must not issue”*.

[47] The certification required by these municipalities places additional restrictions on the embargos imposed by Section 118(1) of the Systems Act. The effect is that unless the transferor first satisfies the requirements of the municipal By-laws, both the Section 118 and the SPLUMA-certificates may not be issued.

[48] Section 118 of the Systems Act clearly identifies the requirements for a rates clearance certificate as the payment of all the amounts due in respect of:

48.1 municipal service fees;

48.2 surcharges on fees;

48.3 property rates, and

48.4 other municipal taxes, levies and duties

48.5 incurred during the preceding two years.

[49] The impugned provisions depart from Section 118(1) of the Systems Act in material respects:

49.1 a certificate of a conveyancer in respect of funds due to the municipality is required;

49.2 no time limit is imposed in respect of the funds owing to the municipalities;

49.3 additional requirements are imposed.

[50] The impugned provisions require proof of the payment of any contravention penalty.

[51] In the premises I am *prima facie* of the view that the impugned provisions of the municipal by-laws constitute a substantial obstacle to alienation and a deprivation of property within the meaning of Section 25(1) of the Constitution.

IS THE DEPRIVATION ARBITRARY?

DO THE IMPUGNED BY-LAWS PROVIDE 'SUFFICIENT REASON' FOR THE DEPRIVATION OR ARE THEY PROCEDURALLY UNFAIR

[52] The Constitutional Court in the **Mkontwana**-case at para [34] stated the following in this regard:

“[34] The meaning of arbitrary in Section 25 of the Constitution was determined in the FNB-case. After a thorough analysis Ackerman J concluded that deprivation of property is arbitrary within the meaning of Section 25 of the Constitution if the law in issue either fails to provide ‘sufficient reason’ for the deprivation or is procedurally unfair. To determine whether there is sufficient reason for a permitted deprivation, it is necessary to evaluate the relationship between the purpose of the law and the deprivation effected by that law. A complexity of relationships must be considered in this assessment including that between the purpose of the provision on the one side, and the owner of the property as well as the property itself on the other. If the purpose of the law bears no relation to the property and its owner, the provision is arbitrary. ...

[35] The FNB-judgment also sets out the approach to be adopted if there is a connection between the purpose of

the deprivation and the property or its owner. In these circumstances, there must be sufficient reason for the deprivation otherwise the deprivation is arbitrary. The nature of the relationship between means and ends that must exist to satisfy the Section 25(1) rationality requirement depends on the nature of the affected property and the extent of the deprivation. A mere rational connection between means and ends could be sufficient reason for a minimal deprivation. However, the greater the extent of the deprivation, the more compelling the purpose and the closer the relationship between the means and ends must be.”

[53] After an analysis of the relationship between the means and ends of the deprivation brought about by Section 118(1) as well as various other matters of concern, the Court came to the conclusion that the deprivation was not arbitrary and stated the following at paragraph [73]:

“[73] This judgment holds that the owner of property is, in effect, obliged to ensure that certain consumption charges owing to the municipality in connection with a property are paid before that property can be validly transferred. The fact of the cases before us show that there is the

possibility of a whole range of disputes that might arise in the process of the application of both Section 118(1) and Section 50(1)(a). Some of the disputes that may arise in connection with the consumption charges alleged by the municipality to remain owing in connection with the property may concern the accuracy of the amount, whether the sum relates to consumption charges as contemplated by each of the provisions and whether the amount alleged is limited to the relevant period of two or three years. In the nature of things, the resolution of these disputes can take time. The passage of more than a reasonable time between the sale of the property and its transfer can be unduly onerous to both the parties to the sale. The delay could be considerable if the dispute between the parties cannot be resolved without resorting to Court proceedings. If municipalities keep accurate and full records and supply information to owners, the time taken to resolve any disputes that may arise would be minimal in most cases. It must be pointed out, however, that the owner who wishes to effect transfer of property reasonably quickly in circumstances where it is not possible to resolve a dispute in connection with the amount of consumption charges required to be paid to facilitate transfer is not necessarily an impossible position.

It may be possible, in appropriate cases, for an owner to demonstrate that she has a clear right to transfer, that there is a dispute about this and that the balance of convenience justifies the grant of an order compelling a municipality to issue a certificate subject to appropriate conditions pending the final determination of Court proceedings aimed at resolving the dispute. A municipality or owner if found, at the end of the day, to have been wrong in the attitude taken at the time of transfer will have to face the appropriate consequences. It is therefore appropriate for all owners and municipalities to negotiate meaningfully and in good faith when disputes around the application of Section 118(1) or Section 50(1)(a) arise."

[54] The owner of a building which is, or is to be, erected on mining property and which is, or is to be, used exclusively for the operation of a mine or any works or machinery is exempted in terms of subsections (6) and (7) of Section 2 of the provisions of the Building Standard Act, 103 of 1977.

[55] These Sections provide as follows:

- “(6) Subject to the provisions of subsection (7), the owner of any building which is, or is to be erected on mining property and which is, or is to be used exclusively for the operation of a mine or any works or machinery, as defined in the Mines and Works Act, 1956 (Act No 27 of 1956), and which is in terms of Section 2 of that Act subject to the supervision of the Chief Inspector as contemplated in the Mine Health and Safety Act, 1996, shall be exempted from the provisions of this Act.
- (7) An owner shall in respect of the erection or proposed erection of a building with regard to which an exemption contemplated in subsections (4), (5) or (6) applies and in connection with –
- (a) connections to electricity supply, water supply, sewer and stormwater drainage systems;
 - (b) provision on the relevant site for parking of more than 100 vehicles;
 - (c) service by local authorities' fire brigade in place of or in addition to any fire protection service provided by the owner,
- supply the local authority concerned with sufficient details to enable such local authority to –
- (i) provide any connection, road traffic control and fire brigade service which may be required; or

(ii) *give notice in writing to such owner that it cannot so provide any such service."*

[56] Regarding the exclusion of mining land from town planning schemes, the Court stated in ***Aquila Steel SA (Pty) Ltd v South African Steel Company (Pty) Ltd*** 2019 (3) SA 621 (CC) at paragraphs [59] – [62];

"[59] Section 21(1) of the Ordinance provides that, subject to the provisions of subsection 21(3) and Section 22 of the Ordinance, a local authority shall not prepare a town planning scheme in respect of land which is proclaimed land or land on which prospecting, digging or mining operations are being carried out, unless such land is situated within an approved township or within a township in respect of which a notice as contemplated in Section 111 of the Ordinance was published.

[60] Section 21(3)(b) of the Ordinance provides that, notwithstanding the provisions of subsection (1) of Section 21, a local authority may prepare a town planning scheme in respect of proclaimed land not used for mining purposes or purposes incidental thereto, excluding residential purposes, if the owner thereof with the written

consent of the Director General: Mineral and Energy Affairs and the holder of any mining title, so requests.

[61] *It is, in my view, clear from the aforesaid provisions of the Ordinance that certain land within the area of jurisdiction of a local municipality that is governed by the Ordinance falls outside of the town-planning scheme and it would accordingly not be within a zoning scheme.*

[62] *The approval by a local authority governed by the Ordinance, for the exercise of a prospecting right, is thus not required in respect of land that falls outside of a town-planning scheme and not within a zoning scheme. The properties in the present matter fall outside of a town-planning scheme and not within a zoning scheme."*

[57] Occupancy certificates in terms of the Building Standard Act were neither required nor could it have been issued for the Applicants' properties being mining properties. The requirement of an occupancy certificate therefore cannot be objectively met by the Applicants.

[58] In the circumstances, Section 82(2)(c) of the Steve Tshwete By-law; Section 76(2)(c) of the Govan Mbeki By-law; and Section 86(2)(c) of the

Emalahleni By-law do not apply to buildings as envisaged in Section 2(6) of the Building Standards Act which fall outside or within the boundaries of the scheme, but which are situated on mining property and which are used or to be used exclusively for the operation of a mine.

[59] Sub-sections (2)(a) of all three impugned provisions require a certificate that “*funds*” have been paid. This is a certificate in addition to the certificate required by Section 118 of the Systems Act. The purpose of the additional certificate in Section (2)(a) is not legitimate. The Section 118 certificate is issued by the municipality. The certificate in sub-section (2)(a) is required to be issued by a conveyancer. It concerns information that is or should be peculiarly within the knowledge of the municipality.

[60] In the premises, I am of the view that the deprivation is arbitrary in so far as the municipalities interpret the provisions of subparagraph (c) of their respective impugned provisions to authorise the municipalities' demand for an occupancy certificate, a zoning certificate and approved building plans in respect of the Applicants' aforementioned properties.

**DOES THE MUNICIPALITIES' LEGISLATIVE COMPETENCE EXTEND TO REGULATING
TRANSFER OF PROPERTIES**

[61] The Constitution allocates legislative power between national and provincial governments on the basis of the subject matter of the legislation. Schedules 4 and 5 of the Constitution contain lists of subjects known as a “*functional area*”. The nine provincial legislatures are entitled to legislate, *inter alia*, on the subjects listed in schedules 4 and 5.

[62] Both schedules 4 and 5 are made up of two parts: Part A and Part B. Executive and administrative power of functional areas mentioned in the B parts of the two schedules are reserved for municipalities.

[63] Section 156(1)(a) of the Constitution provides that a municipality has executive authority in respect of, and has the right to administer the local government matters listed in Part B of schedule 4 and Part B of schedule 5.

[64] Section 156 of the Constitution provides as follows:

“156. POWERS AND FUNCTIONS OF MUNICIPALITIES

- (1) A municipality has executive authority in respect of, and has the right to administer –
 - (a) the local government matters listed in Part B of schedule 4 and Part B of schedule 5; and
 - (b) any other matter assigned to it by national or provincial legislation.
- (2) A municipality may make and administer By-laws for the effective administration of the matters which it has the right to administer.
- (3) Subject to Section 151(4), a By-law that conflicts with national or provincial legislation is invalid. If there is a conflict between a By-law and national or provincial legislation that is inoperative because of a conflict referred to in Section 149, the By-law must be regarded as valid for as long as that legislation is inoperative.
- (4) The national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of schedule

4 or Part A of schedule 5 which necessarily relates to local government, if –

- (a) the matter would most effectively be administered locally; and*
- (b) the municipality has the capacity to administer it.*

(5) A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions."

[65] The legislative competence of the national and provincial government in respect of local government matters in Part B is limited to the passing of so-called framework legislation. The legislative power of the municipalities is subject to the framework legislation and a conflicting By-law is invalid as provided in Section 156(3) of the Constitution.

[66] Before the enactment of the Spatial Planning and Land Use Management Act, 16 of 2013 (SPLUMA) municipalities exercised their constitutional powers over municipal planning in terms of provincial laws and to a limited extent in accordance with certain national laws. The

legislative authority of the local sphere of government which is vested in the municipal councils by the Constitution as regulated by SPLUMA now enables the enactment of municipal planning By-laws, but only in so far as it is authorised by SPLUMA.

[67] In ***Ex parte Western Cape Provincial Government & Others: In re DVB Behuising (Pty) Ltd v Northwest Provincial Government & Another*** 2001 (1) SA 500 CC at paragraphs [38] and [39], the Court observed that:

“The process of land registration is already a matter unequivocally dealt with in national legislation, namely the Deeds Registries Act (the Deeds Act). the regulation of land tenure and registration, including land reform, are matters which require uniform regulation across the Republic and which therefor cannot be effectively regulated by provinces as contemplated by Section 126(3)(a) – (e) of the Interim Constitution.

In the premises, 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.”

[68] ‘*Property transfer fees*’ are contained in Part A of schedule 4 and is therefore a functional area of concurrent national and provincial legislative competence.

[69] The impugned provisions may in the result, be authorised only if they are reasonably necessary for or incidental to the effective performance of a municipality's planning function.

[70] I am of the view that the impugned provisions are neither original powers of the municipalities, nor are they assigned in terms of applicable national or provincial legislation.

[71] In this regard, the Court, in **AAA Investments (Pty) Ltd v Micro Finance Regulatory Council & Another** 2006(11) BCLR 1255 (CC) at paragraph [82] held that:

“... powers could only be justified if it is ‘reasonably necessary’ or, to put it differently, ‘if effect cannot be given to the statute as it

stands unless the provisions sought to be implied is read into the statute'."

[72] Since SPLUMA does not authorise detailed municipal planning 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 and Section 118 of SPLUMA. There is no room for an implied municipal power to regulate the Registrar's statutory power to register transfer of properties.

[73] The certificate to "*transfer*" a land unit "*in terms of any law*" referred to in the impugned provisions clearly refers to Section 118 of the Systems Act. The impugned provisions therefore seek to build on Section 118(1) by imposing further requirements for the registration of properties. In so doing, they undoubtedly undermine, and place an additional burden on the capacity of the Applicants to satisfy Section 118(1). In effect, the additional requirements constitute an amendment of Section 118. They are not a separate set of requirements applying parallel to Section 118. The transferor cannot comply with Section 118 separately. The transferor

cannot submit the Section 118 certificate to the Registrar of Deeds without a municipal certificate in terms of the impugned By-laws.

[74] I am of the view that the impugned provisions of the municipal By-laws are further contrary to the constitutional requirement that a desired result should be achieved by means least damaging to the constitutional right in question. See ***Mistry v The Interim National Medical and Dental Council of South Africa*** 1998(4) SA 1127 CC at paragraph [29].

[75] Section 118(1) and (3) of the Municipal Systems Act and Section 53 of SPLUMA offer sufficient safeguards to ensure compliance with the transferor's obligations in respect of municipal debts before transfer of property is registered.

[76] In the premises, I am of the view that the impugned By-laws are invalid on the principle of legality in so far as it prescribes prerequisites for the

transfer and registration of immovable property, because it is not authorised by any empowering provision and are in conflict with Section 118 of the Systems Act.

[77] However regard must be had to the provisions of Section 172 of the Constitution, which provides as follows:

“172. Powers of courts in constitutional matters.—(1) *When deciding a constitutional matter within its power, a court—*

- (a) *must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and*
- (b) *may make any order that is just and equitable, including—*
 - (i) *an order limiting the retrospective effect of the declaration of invalidity; and*
 - (ii) *an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.*

(2) (a) *The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.*

(b) *A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.*

(c) *National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.*

(d) *Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.”*

[78] In light of the view that I take it is not necessary to consider the Respondent's defences that the Applicants rely on hypothetical

situations to explain why it is impossible to comply with the Respondent's By-laws.

COSTS

[79] The Applicant prayed for costs of suit against the Respondents that oppose the application.

[80] The Second and Third Respondents invited me not to award costs against them in the event of the Applicant being successful and referred me to the decision of the Constitutional Court in ***Trustees for the time being of the Biowatch Trust v Registrar, Genetic Resources & others*** [2009] JOL 23693 (CC) in support of this invitation.

[81] I am of the view that the principles laid down in the Biowatch matter do not support the Respondents' contentions. At paragraph [21] and [22] the Court, with reference to the judgement of **Ngcobo J** in ***Affordable Medicines Trust and Others v Minister of Health and Another*** [2005] ZACC

3; 2005 (6) BCLR 529 (CC); 2006 (3) SA 247 (CC), stated the following regarding the award of cost in Constitutional litigation:

“[21] The award of costs is a matter which is within the discretion of the Court considering the issue of costs. It is a discretion that must be exercised judicially having regard to all the relevant considerations. One such consideration is the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs. The rationale for this rule is that an award of costs might have a chilling effect on the litigants who might wish to vindicate their constitutional rights. But this is not an inflexible rule. There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs. The ultimate goal is to do that which is just having regard to the facts and the circumstances of the case.....”

*“[22] In litigation between the government and a private party seeking to assert a constitutional right, **Affordable Medicines** established the principle that ordinarily, if the government loses, it should pay the costs of the other side, and if the government wins, each party should bear its own costs....”*

ORDER

[82] I have been presented with a Draft Order by the Applicants in which all the relief claimed, apart from the prayer for the declaration of Constitutional invalidity of the impugned provisions are only to be awarded in the alternative to the declaration of invalidity of the impugned provisions.

[83] In the result I make the following Order:

[1] **First Respondent**

Section 82 of the Steve Tshwete Local Municipality Spatial Planning and Land Use management By-laws, 2016 is declared to be:

1.1 Inconsistent with Section 25 and Section 156 read with Part B of Schedule 4 of the Constitution of the Republic of South Africa, 1996 (the "*Constitution*") and invalid; and

1.2 Invalid in terms of Section 156(3) of the Constitution because it conflicts with Section 118 of the Local Government: Municipal Systems Act, 32 of 2000;

in so far as it requires the Applicants to provide occupancy certificates, approved building plans, zoning certificates and a certificate that “*funds*” have been paid, for purposes of the registration of transfer of the Applicants’ properties set out in annexure FA2(1) to the founding affidavit.

1.3 The Declaration of Invalidity is not retrospective.

[2] **Second Respondent**

Section 76 of the Govan Mbeki Local Municipality Spatial Planning and Land Use Management By-law, 2016 is declared to be:

2.1 Inconsistent with Section 25 and Section 156 read with Part B of Schedule 4 of the Constitution of the Republic of South Africa, 1996 and invalid; and

2.2 Invalid in terms of Section 156(3) of the Constitution because it conflicts with Section 118 of the Local Government: Municipal Systems Act, 32 of 2000;

in so far as it requires the Applicants to provide occupancy certificates, approved building plans, zoning certificates and a certificate that “*funds*” have been paid, for purposes of the registration of transfer of the Applicants’ properties set out in annexure FA2(2) to the founding affidavit.

2.3 The Declaration of Invalidity is not retrospective.

[3] **Third Respondent**

Section 86 of the Emalahleni Municipal By-law on Spatial Planning and Land Use Management, 2016 is declared to be:

3.1 Inconsistent with Section 25 and Section 156 read with Part B of Schedule 4 of the Constitution of the Republic of South Africa, 1996 and invalid; and

3.2 Invalid in terms of Section 156(3) of the Constitution because it conflicts with Section 118 of the Local Government: Municipal Systems Act, 32 of 2000;

in so far as it requires the Applicants to provide occupancy certificates, approved building plans, zoning certificates and a certificate that “*funds*” have been paid, for purposes of the registration of transfer of the Applicants’ properties set out in annexure FA2(3) to the founding affidavit.

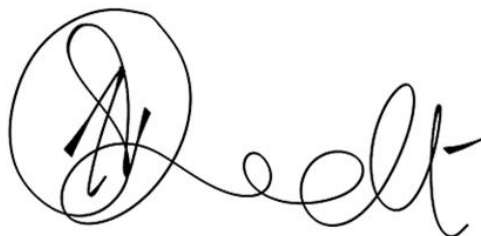
3.3 The Declaration of Invalidity is not retrospective.

[4] **Suspension**

The declaration of invalidity of the Respondents' aforementioned By-laws is suspended for a period of six (6) months to allow the competent authority to correct the defect.

[5] **Costs**

The Second and Third Respondents are ordered to pay the costs of the Applicant jointly and severally.

A handwritten signature in black ink, appearing to read 'Barnardt', is written above a horizontal line.

BARNARDT AJ

ACTING JUDGE OF THE HIGH COURT

DATE: 18 JANUARY 2021

Judgment delivered and order granted electronically in accordance with the Directives regarding special arrangements during the National State of Disaster.