BY-LAW REQUIRING SPLUMA CERTIFICATE FOR A TRANSFER

Govan Mbeki Local Municipality and Another v Glencore Operations South Africa (Pty) Ltd and Others (334/2021;338/2021) [2022] ZASCA 93 (17 June 2022)

Recently there were talks that municipalities across the country were in the process of making it a requirement for transfer, that the owner must obtain a SPLUMA certificate to confirm that all applicable planning and land use regulations were complied with. The threat of this additional burden on land owners' rights to dispose of their property raised valid concerns. This judgment deals with a successful challenge to the by-laws issued by two municipalities requiring such certificates and prohibiting the Registrar of Deeds of passing transfer if this was not complied with. The Court found that in doing so, the municipalities overstepped their constitutionally-delineated powers, and that the provisions were invalid. (Note that a SPLUMA certificate remains a requirement for transfers in new developments, in accordance with section 53 of the Act.)

The Judgment can be viewed here.

FACTS

This matter deals with identical appeals against orders of the Mpumalanga High Court. That court had ordered that certain (similar) provisions in the by-laws passed in terms of the Spatial Planning and Land Use Management By-laws of certain municipalities within that court's jurisdiction (i.e., the Govan Mbeki and Emalahleni municipalities) were invalid and unconstitutional.

The by-laws under discussion placed restraints on the transfer of land in these jurisdictions: They contained provisions that made it obligatory for a transferor (i.e. the land owner giving transfer of ownership rights) to first obtain a certificate from the municipality certifying, amongst other things, that all spatial planning, land-use management, and building regulation conditions or approvals in connection with the relevant land had been obtained and complied with. Additionally, the provisions impose a duty on the Registrar of Deeds not to register transfer of land unless such certificate is in place. Essentially, the impugned provisions place an embargo on the registration of transfer of immovable property until the requirements of the by-laws are met, because until such time the certificate is issued, the Registrar cannot register the transfer of the property.

The application was launched by Glencore Operations South Africa (Pty) Ltd, Duiker Mining (Pty) Ltd, Tavistock Collieries (Pty) Ltd, Umcebo Properties (Pty) Ltd and Izimbiwa Coal (Pty) Ltd ("the private companies"), all 3 having the intention to transfer a number of immovable properties situated within the relevant municipal areas.

The High Court held that the by-laws were unconstitutional (and thus invalid) because they purported to legislate on matters which fall outside the scope of powers assigned to local government by the Constitution. It also held that the by-laws conflicted with section 118 of the Municipal Systems Act. (Section 118(1) of that Act provides that no transfer of property can take place in the deeds office until a clearance certificate is issued by the municipality stating that all debts incurred in the two year period prior to application for the clearance certificate, have been paid.) The High Court then suspended the declaration of invalidity for a period of six months to allow the relevant municipality to correct the defect.

The municipalities appealed to the Supreme Court of Appeal and the private companies cross-appealed against the High Court's 6 month suspension of the declaration of invalidity.

The appeal:

The central issue in this appeal was the validity of the by-laws. The answer to this question requires consideration of whether the by-laws were enacted within the legislative competence of municipalities (as contemplated in section 156

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of the Constitution).

A finding that the municipalities do not have the power to cause restraint on the registration of transfer of property, on the facts hereof, would be dispositive of the issues. Despite this, the High Court determined that, in addition to this conflict with section 156 of the Constitution, the by-laws were also invalid because they conflicted with section 118 of the Systems Act and amounted to an arbitrary deprivation of property in terms of section 25(1) of the Constitution.

Accordingly, the issues on appeal were whether the impugned by-laws:

- are unconstitutional and invalid, because they legislate on matters which fall outside the scope of powers assigned to local government in terms of s 156 read with Part B of Schedule 4 and Part B of Schedule 5 of the Constitution;
- exceed the functional area of 'municipal planning', in that they regulate the transfer of property; and
- are an incidental power as envisaged in section 156(5) of the Constitution.

HELD

The by-laws

- The private companies argued that the legislative competence of the municipalities with regard to 'municipal planning' (as provided for in the Constitution) does not extend to regulating the transfer of properties. The restriction imposed by the impugned by-laws can only be imposed by national legislation, such as section 118 of the Systems Act and section 53 of the SPLUMA. (The Spatial Planning and Land Use Management Act (SPLUMA) provides for a section 53 certificate which stipulates that the registration of any property resulting from a land development application may not be performed unless the municipality certifies that all requirements and conditions for approval have been met.)

The powers of local government

- The Constitution allocates legislative power between national and provincial governments on the basis of the subject matter of the legislation, the breakdown of which are listed in Schedules 4 and 5 of the Constitution.
- Section 156(1)(a) of the Constitution further delineates in respect of which matters a municipality has executive authority and in respect of which it may pass by-laws.
- Amongst others, the Constitution affords a municipality the right to 'govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution', and to 'exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions'.
- This means that there might be matters that fall outside the local government's core powers and competencies, but are nevertheless necessary for, or incidental to, an existing constitutional power. The provisions do not serve the purpose of creating new categories of functions. Thus, the impugned provisions may be authorised only if that is reasonably necessary for, or incidental to, the effective performance of a municipality's land-use planning function.
- The Constitution also requires co-operative government between national, provincial and municipal legislation. This is effectively implemented through the framework legislation of national and provincial government.

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Accordingly, where framework legislation at the national and provincial level has been promulgated, particularly where there is necessary overlap between the spheres of government due to the nature of the subject-matter to which the legislation pertains, it is necessary for municipal law to be exercised within the scope of the guidelines in order to ensure cooperation, consistency and rationality.

- A local municipality is empowered by the Constitution, the Systems Act and the SPLUMA to promulgate by-laws to regulate, control and enforce municipal planning and enforce an adopted land-use scheme. However, this power is to be exercised within the parameters so prescribed.

- In the present matter, even though the impugned provisions in the by-laws deal, on their face with municipal planning, the impugned provisions themselves restrict the transfer and registration of ownership in immovable property and constitute an embargo on transfer unless their requirements have been fulfilled. Taking into account the statutory and constitutional provisions mentioned, the question was whether municipalities' legislative competence extend to regulating the transfer of properties.

- The answer is no. The embargo on transfers strays beyond municipal planning. It prescribes to the registrar of deeds under what circumstances a transfer can take place. It precludes a transferring owner from complying with their obligations under an agreement of sale. It prevents a transferee from receiving ownership as they are entitled to under the agreement of sale.

- The restriction on transfer of land is not a necessary power incidental to land-use management, as enforcement mechanisms of its land-use scheme are already provided for in Chapter 9 of the by-laws. The registration of transfer of property is expressly regulated by the Deeds Registries Act and s 118 of the Systems Act. There is thus no room for an implied municipal power to regulate the Registrar's statutory power to register the transfer of properties. The embargo therefore cannot be incidental to the effective enforcement of a land-use scheme and the impugned by-laws are invalid insofar as they impose a mechanism which impermissibly regulates the transfer of property. They exceed the legislative competence of the respective municipalities, and thus offend the principle of legality.

- The High Court found that the impugned by-laws were also in conflict with section 118 of the Systems Act, because they sought to impose on sellers of property liabilities in addition to those contemplated by that section. In reaching this conclusion, the High Court held that the by-laws sought in effect to 'amend' section 118 by adding to its terms. The High Court was correct.

- However, the suspension for 6 months of the declaration of invalidity 'to allow the competent authority to correct the defect' was not warranted in the circumstances. There was no reason to keep the invalid by-laws in operation.

CONCLUSION

For these reasons, the appeals were dismissed and the cross-appeal against the suspension of the declaration of invalidity was upheld.

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