

SUMMARY OF THE JUDGMENT

SELLING SUBDIVIDED LAND: RATES CLEARANCE REQUIRED ON MOTHER ERF?

EM And EM Engineering (Pty) Limited v KwaDukuza Municipality and Others (9349/2014) [2015] ZAKZDHC 55 (26 June 2015)

After a general plan was registered in respect of a developer's land on which it intended establishing a new residential township, it applied for a municipal clearance to effect transfer of two subdivided properties that were subsequently sold. The municipality argued that as there has been no change in ownership when the general plan was registered, a clearance certificate can only be issued if the rates and taxes for the whole mother erf have been paid. The developer successfully approached the court for an order that a clearance certificate in respect of only the two subdivided erven was required. The Judgment can be viewed [here](#).

FACTS

Em and Em Engineering (Pty) Ltd (the developer) was a property developer and the registered owner of an immovable property in Salt Rock, KwaZulu-Natal, some 40,7195 hectares in extent (the mother property).

The mother property had been divided into 91 subdivisions in terms of a general plan and formed the basis of a residential township development called The Mount Richmore Village Estate.

The subdivision of the mother property was registered in the KwaZulu-Natal deeds office in terms of section 46 of the Deeds Registries Act 47 of 1937 (the DRA) and the establishment of the estate had been approved in terms of the Development Facilitation Act.

A dispute arose between the developer and the local authority after the developer sold two of the subdivided properties. In order to effect registration of transfer of the subdivisions into the name of the purchaser, the developer applied to the local authority for clearance certificates as required in terms of section 118(1) of the Local Government: Municipal Systems Act 32 of 2000 (the MSA). The section reads:

*“(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 ... during the two years preceding the date of application for the certificate have been fully paid”*

The developer was of the opinion that that the references in section 118(1) to “the transfer of property” and “that property” should be construed as a reference to the particular property which is to be the subject of the intended registration of transfer, in this instance a subdivision of the mother property. Hence rates, at present, was only payable in respect of the two subdivided properties to be transferred.

The local authority however took the view that the references in section 118(1) to “the property” was in law a reference to the entire mother property, as opposed to the individual erven or subdivision. This was because:

- (i) the subdivision (to be transferred) still formed part of the mother property and the rates and charges payable before a clearance certificate can be issued, are those relevant to the mother property as a whole;
- (ii) the subdivided properties sought to be transferred were not individual erven (yet) as they remained part of the mother property up until the time they are transferred;
- (iii) the certificate of registered title of the mother property reflecting it as comprising 91 smaller properties as per the plan approved by the Surveyor General (SG), meant that the SG had approved various sub-divisions, but that the land which is owned is the mother property. Ownership of the sub-divisions had not been registered.

HELD:

What is the legal status of a subdivision in respect of land so subdivided?

- Section 46 of the DRA sets out the requirements for the subdivision of land and provides that, upon registration of a general plan of subdivided land, ownership thereof remains unaffected.
- What is envisaged by section 46(1) is that future registerable transactions relevant to and affecting the various sub-divisions, would be recorded and registered in a dedicated register as opened by the registrar of deeds.
- The owner of the land in respect of which a general plan was registered in terms of section 46(1), remains the owner of each sub-division or erf thus registered.
- As such, the local authority was right to argue that under section 46(1) of the DRA, no transfer of ownership was conferred. However, ownership did not thereafter only come to pass when a certificate of registered title was issued to the property owner (developer); such a certificate was also not necessary to enable the developer to pass registered title to purchasers of sub-divisions in the estate. (When section 46(1) is read with the provisions of section 46(7) and 43(5)(a) of the DRA, it is clear that any sub-division, if alienated as a whole, may be registered into the name of its new owner without the need first to obtain a certificate of registered title in respect of such sub-division.)

- It followed that the developer was the registered owner of the mother property prior to the registration of the general plan and the owner of the sub-divisions making up the mother property following registration on the general plan. Thereafter it was entitled to have transferred ownership in any of the sub-divisions to third parties without the need first to have applied for and obtained certificates of registered title in respect of such sub-divisions.

The provisions of section 118(1) of the Municipal Systems Act

- Section 118(1) prohibits the registration of transfer of property without the production of a certificate of clearance with regard to “that property”.
- The only property in respect of which the registration of the transfer of ownership is in contemplation when the issue of a clearance certificate is requested, is the sub-division concerned and not the mother property which has, by virtue of the registration of the general plan, been sub-divided into multiple erven.

The court therefore confirmed that the amounts payable in order to obtain the rates clearance certificate related only to the specific sub-divisions

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