REPORTABLE

IN THE NORTH GAUTENG HIGH COURT. PRETORIA /ES

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 45407/2011

DATE:30/03/2012

IN THE MATTER BETWEEN

FEDBOND PARTICIPATION MORTGAGE

BOND MANAGERS (PTY) LTD 1st APPLICANT

FEDBOND NOMINEES (PTY) LTD 2nd APPLICANT

AND

THE STEVE TSHWETE LOCAL MUNICIPALITY RESPONDENT

JUDGMENT

PRINSLOO. J

[1] This application involves, inter alia, an interpretation of the interplay between certain provisions of the Local Government: Municipal Systems Act 32 of 2000 ("the Act") and certain provisions of the Insolvency Act, Act 24 of 1936 ("the Insolvency Act").

[2] Before me, Mr Pincus appeared for the applicants and Mr Erasmus SC appeared for the respondent.

Introduction and Background

[3] A close corporation known as TNT Trading 23 CC (in liquidation) ("TNT") was the registered owner of four immovable properties, more fully described as the Remaining Extent of Portion 4 of Erf 143 Middelburg township ("the Remaining Extent of Portion 4"), section 1 Andron of Erf 5227 Middelburg township ("section 1"), section 3 Andron of Erf 5227 Middelburg township ("section 3") and section 4 Andron of Erf 5227 Middelburg township ("section 4").

[4] On 13 March 2008 the respondent municipality launched an application in this court under case no 13690/08 for the liquidation of TNT, the latter having been indebted to the respondent in the amount of some R616 000,00 in respect of arrear rates and taxes imposed and payable in respect of the Remaining Extent of Portion 4. It was alleged that TNT was unable to pay its debts and accordingly commercially insolvent.

[5] A provisional liquidation order of TNT was granted on 4 November 2008 and the final order on 3 December 2008.

[6] The second applicant is the major creditor in the liquidation of TNT and proved a claim against the insolvent estate of TNT in an amount in excess of R16 million. The claim arose from a loan granted by the second applicant to TNT in excess of R7 million in approximately 1999. The loan was secured by participation bonds registered over the aforesaid four properties. The second applicant and its associate company, the first applicant, operate a participation bond scheme in terms of which they give loans to commercial companies for monies they have received largely from pensioners and widows and which loans are secured by mortgage bonds registered over the commercial properties. The loans provide a regular

monthly income to the widows and the pensioners.

[7] The respondent also proved a claim against the estate of TNT in an amount exceeding R996 000,00.

[8] Three joint liquidators, named A W Freeman, PJMvan Staden and T Tylcoat were appointed by the Master of the High Court.

[9] On or about 14 May 2009 the joint liquidators were authorised at a second meeting of creditors to sell the aforesaid four properties by public auction.

[10] A public auction was conducted on 27 November 2009 when the four properties were sold to a certain Frederick Johannes Botha for R5,3 million. Botha bought the properties for and on behalf of a company to be formed ("the purchaser").

[11] The applicants' attorney ("Mr Shaw") was instructed by the joint liquidators to attend to the transfer of the four properties. For this purpose it was necessary to determine the amount that was due to the respondent for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties imposed by the respondent in respect of the aforesaid properties so that the respondent would issue the relevant rates clearance certificates, in which would be certified that the amounts for the aforesaid services which became due had in fact been fully paid.

[12] In this regard it is necessary to quote the first three subsections of section 118 of the Act:

"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. (1 A) A prescribed certificate issued by a municipality in terms of subsection (1) is valid for a period of 60 days from the date it has been issued.

(2) In the case of the transfer of property by a trustee of an insolvent estate, the provisions of this section are subject to section 89 of the Insolvency Act, 1936 (Act no 24 of 1936).

(3) An amount due for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties is a charge upon the property in connection with which the amount is owing and enjoys preference over any mortgage bond registered against the property."

[13] Mr Shaw applied for these clearance certificates on 1 December 2009 in respect of the Remaining Extent of Portion 4 and on 24 December 2009 in respect of sections 1, 3 and 4.

[14] The respondent furnished Mr Shaw with certain amounts it contended had to be paid in order for the respondent to issue the required rates clearance certificates ("clearance certificates") in respect of the four properties.

[15] Mr Shaw did not agree with the amounts proposed by the respondent and held the view that a lesser amount was payable.

[16] The insolvent estate of TNT did not have sufficient funds to make payment to the

respondent in order to obtain the clearance certificates before transfer could be effected. The applicants, as the major creditors in the insolvent estate, had an interest to ensure that the sale of the properties went through and that transfer was effected in the name of the purchaser. To this end, the applicants were prepared to make the funds available to obtain the clearance certificates.

[17] Because Mr Shaw, on behalf of the applicants, failed to resolve the dispute with the respondent as to the exact amount due, the parties agreed that the applicant would pay the amount contended for by the respondent and thereafter approach this court for a declarator as to the actual amount due, and a refund, if any, of any amounts paid in excess of what was legally due. This is the application which came before me.

[18] The higher amount required by the respondent, amounting to some R1.5 million, was duly paid by the applicants, and the clearance certificates were issued on 24 February 2011. The transfer was registered on 14 March 2011.

The essence of the dispute

[19] The applicants rely on the provisions of section 118(l)(b), supra, of the Act, which provides that "the clearance certificate must certify that all amounts that became due in connection with that particular 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" (emphasis added).

To this end, the applicants also calculated these amounts for the period November 2007 to December 2009 (the two year period leading up to the month during which the clearance

certificates were applied for) and tendered payment of such an amount which tender, as pointed out, was rejected by the respondent.

[20] The respondent, on the other hand, relies on the provisions of section 118(2) of the Act, supra, which stipulates that in the case of the transfer of property by a trustee of an insolvent estate, the provisions of section 118 are subject to section 89 of the Insolvency Act.

It was common cause before me, and rightly so, that the liquidators of the insolvent close corporation are in the same position, for present purposes, as a trustee of an insolvent estate. The Insolvency Act finds application in the event of the liquidation of a close corporation in terms of the provisions of section 66 of the Close Corporations Act, 69 of 1984, read with section 339 of the Companies Act, 61 of 1973.

[21] On the respondent's interpretation of section 89 of the Insolvency Act, the amount required for a clearance certificate to be issued must be calculated in respect of rates and taxes which fell due over a different period (and in this case a longer period) than the two year period preceding the application for the clearance certificate provided for in section 118(l)(b) of the Act.

[22] For illustrative purposes it is necessary to quote the provisions of section 89 of the Insolvency Act:

"89. Costs to which securities are subject. -

(1) The cost of maintaining, conserving, and realising any property shall be paid out of the proceeds of that property, if sufficient and if insufficient and that property is subject to a special mortgage, landlord's legal hypothec, pledge, or right of retention the deficiency shall

be paid by those creditors, pro rata, who have proved their claims and who would have been entitled, in priority to other persons, to payment of their claims out of those proceeds if they had been sufficient to cover the said cost and those claims. The trustee's remuneration in respect of any such property and a proportionate share of the costs incurred by the trustee in giving security for his proper administration of the estate, calculated on the proceeds of the sale of the property, a proportionate share of the Master's fees, and if the property is immovable, any tax as defined in subsection (5) which is or will become due thereon in respect of any period not exceeding two years immediately preceding the date of the sequestration of the estate in question and in respect of the period from that date to the date of the transfer of that property by the trustee of that estate, with any interest or penalty which may be due on the said tax in respect of any such period, shall form part of the costs of realisation.

(2) ...

(3) Any interest due on a secured claim in respect of any period not exceeding two years immediately preceding the date of sequestration shall be likewise secured as if it were part of the capital claim.

(4) Notwithstanding the provisions of any law which prohibits the transfer of any immovable property unless any tax as defined in subsection (5) due thereon has been paid, that law shall not debar the trustee of an insolvent estate from transferring any immovable property in that estate for the purpose of liquidating the estate, if he has paid the tax which may have been due on that property in respect of the periods mentioned in subsection (1) and no preference shall

be accorded to any claim for such a tax in respect of any other period.

(5) For the purposes of subsections (1) and (4) 'tax' in relation to immovable property means any amount payable periodically in respect of that property to the State or for the benefit of a

provincial administration or to a body established by or under the authority of any law in discharge of a liability to make such periodical payments, if that liability is an incident of the ownership of that property." (Emphasis added.)

[23] The essence of the dispute can therefore be summarised as follows: the applicants contend that, on a proper interpretation of section 118 of the Act and section 89 of the Insolvency Act, the period during which the relevant rates and taxes fell due to the respondent for purposes of calculating the amount payable in order to obtain a clearance certificate is the period stretching from two years preceding the date of application for the clearance certificate up to the date when the clearance certificate is applied for.

On the other hand, the respondent contends that the period reflected in section 118(1) of the Act is affected by the provisions of section 89(4) of the Insolvency Act and the relevant period for calculating the amount due in order to obtain a clearance certificate is therefore the period reflected in section 89(1) of the Insolvency Act, namely from two years immediately preceding the date of the liquidation of the estate in question and from that date to the date of transfer of the relevant property.

[24] It will be convenient to refer to the period contended for by the applicants as "the section 118 period" and the period contended for by the respondent as the "section 89 period".

Considering the essence of the dispute

[25] In deciding the issue, one needs perhaps look no further than the judgment in City of Johannesburg v Kaplan NO & Another 2006 5 SA 10 (SCA). In that case the main issue was the extent of the period over which the municipality (appellant) enjoys preference over any

mortgage bond registered against the property in respect of the municipality's claim for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties as stipulated in section 118(3) of the Act.

The estate of which the first respondent was the liquidator was indebted to the appellant municipality for these charges that had fallen due prior to the two year period preceding the date on which the first respondent applied for a municipal clearance certificate ("the section 118 period").

In the court below the appellant municipality applied for a declarator to the effect that its claim for the municipal taxes, property rates and other items as mentioned for the period prior to the section 118 period was also a charge upon the property as intended by the provisions of section 118(3) and enjoys preference over the mortgage bond registered against the property, in this case in favour of the second respondent.

[26] The application was dismissed by the learned judge a quo on the ground that the section 118 period applied also to municipal debts secured under section 118(3) and the appellant was therefore debarred from claiming any preference over the second respondent's bond beyond that period - at 13F.

[27] The Supreme Court of Appeal subsequently found (in a case that did not involve a liquidation or insolvency) that the ground on which the judge a quo relied, supra, was unsustainable. It was held in BOE Bank Ltd v City ofTshwane Metropolitan Municipality 2005 4 SA 336 (SCA) at 342A and 343F that the only plausible interpretation of section 118(3) is that it is an independent self-contained provision, not subject to the time limit contemplated in

section 118(1) - see Kaplan at 13G-H.

[28] It was under these circumstances that the second respondent, to defend the order of the court a quo, relied on the cross-reference in section 118(2), to section 89 and, more particularly, section 89(4) of the Insolvency Act. It was argued on behalf of the second respondent that the period of preference provided for in section 118(3) is limited to the period stipulated in section 89(4) of the Insolvency Act namely a period not exceeding two years immediately preceding the date of the sequestration or liquidation - Kaplan at 14G-H.

[29] It was this argument which appears to have prompted the learned judge of appeal to examine the origins of section 118 and section 89. He. held, at 15A-B, that the principal elements of section 118 are an embargo provision with a time limit [section 118(1)], a security provision without a time limit [section 118(3)], and a provision located between the two [section 118(2)] which subjects the provisions of section 118 as a whole to the terms of section 89.

[30] After analysing the origins of embargo provisions such as the one contained in section 118(1), and other related issues, the learned judge said the following at 17H-18I:
"[24] It will be noted that the two-year period in section 89(1) differs from that appearing in section 118(1): two years prior to the date of sequestration as against two years preceding the date of application for a clearance certificate. When a trustee makes application for a certificate, the two year period under section 118(1) will effectively be less than the two year period under section 89(1), because the date of application is necessarily later than the date of sequestration. The first part of section 89(4) means that, when an embargo period laid down in any other law is effectively shorter than the two year period in section 89(1), the first-

mentioned period continues to apply after sequestration. So, the operation of section 118(1) is not affected by section 89(4). When, however, the embargo provision in any other law is effectively longer than that in section 89(1), then, by reason of the provisions of section 89(4), the period in section 89(1) will override the period in the other law.

[25] Before proceeding, it may assist in providing a clearer appreciation of the conclusions at which I have thus far arrived if I summarise the operation of section 118(1) and (3) in situations where the municipal debtor is not subject to a sequestration or liquidation order and to compare that with the position after the making of such orders.

[26] When such a debtor is not subject to such an order-

(1) no property may be transferred unless a clearance certificate is produced to the Registrar of Deeds that certifies full payment of all municipal debts as described in section 118(1) which have become due during a period of two years before the date of application for the certificate;

(2) any amount due for municipal debts (ie not limited by the aforesaid period of two years) that have not prescribed is secured by the property and, if not paid and an appropriate order of court is obtained, the property may be sold in execution and the proceeds applied in payment of the debts. In such event, the proceeds will be applied to payment of the municipal debts in full. Only after satisfaction of such debts will the remainder, if any, be available for payment of the debt secured by a mortgage bond over the property.

[27] Once a debtor has been sequestrated or liquidated, the position is, to the extent that the municipal debts are 'taxes' within the meaning of section 89(5), (but not otherwise) the following-

(1) no property may be transferred unless the clearance certificate certifies full payment of municipal debts that have become due during a period of two years before the date of application for a certificate;
(2) the preference accorded by section 118(3) in favour of the municipality over that of a holder of a mortgage bond is limited to claims which fell due during the period laid down in section 89(1), ie two years prior to the date of sequestration or liquidation up to the date of transfer;
(3) interest charged on the secured claim of the municipality is secured as if it were part of the claim.

[28] After sequestration or liquidation those municipal debts that are not 'taxes' within the meaning of section 89(5) continue to attract the benefits of section 118(3) without being affected by section 89 of the Insolvency Act."

[31] In the present case, it is clear that the embargo period laid down in section 118(1) is considerably shorter than the two year period in section 89(1) so that "the first-mentioned period continues to apply after sequestration" and "the operation of section 118(1) is not affected by section 89(4)". In this case, the embargo period is only the two years preceding the date of application for the clearance certificate whereas the section 89(1) period would extend from 13 March 2006 (two years before the liquidation proceedings were launched, being the commencement of the liquidation proceedings in terms of section 348 of the Companies Act, 1973) until 14 March 2011 when the transfer of the properties was registered. This would be an effective period of five years as opposed to the two year section 118 period.

[32] Consequently, and in view of what was held in Kaplan, supra, the section 118 period

should apply to the present case and not the section 89 period as contended for by the respondent.

[33] I add that in Kaplan there was some debate and uncertainty as to whether the rates applicable in that case fell inside the ambit of "taxes" as intended by the provisions of section 89(5) of the Insolvency Act - see generally, Kaplan at 19B-G. Nothing turns on this for present purposes: once it is established that the section 118 period is shorter than the section 89 period, the first-mentioned period will be applicable for purposes of determining the amount payable in order to obtain a clearance certificate.

In any event, there was no debate before me about whether or not the applicable rates and taxes fall inside the ambit of the section 89(5) definition. It appeared to be common cause that the only items which were required to be paid by the applicants in order to obtain clearance certificates were assessment rates and these would, in my view, on the probabilities fall inside the ambit of "tax" as intended by section 89(5) of the Insolvency Act because they are generally "payable periodically in respect of that property" to the state or a provincial administration or another authority such as the respondent and "that liability is an incident of the ownership of that property".

[34] Returning to the finding by the learned Judge of Appeal in Kaplan, supra, that an embargo period shorter than the section 89(1) period (such as the section 118 period in the present case) will still apply after sequestration or liquidation for purposes of calculating the dues payable in order to obtain a clearance certificate, it seems, with respect, that this finding is fortified by the following consideration: there appears to be no logical or justifiable reason for expecting an insolvent company or close corporation or individual to pay more than a

flourishing company not under liquidation in order to obtain a clearance certificate. If that was so, in the present case, the liquidator would have had to pay rates which fell due over a five year period in order to obtain a clearance certificate whereas a successful counterpart, not under liquidation, would only have had to pay dues calculated over a two year period. In the present instance, the practical result of such a state of affairs is illustrated by the fact that the respondent, calculating over the longer period, insisted on payment of an amount of some Rl,5 million before the clearance certificates would be issued whereas Mr Shaw calculated an amount due of.only some R620 000,00 based on the section 118 period.

[35] In this regard, it can be observed that one of the rules of statutory interpretation is that statutes are presumed not to sanction discrimination or inequality. The nature of this presumption was stated as follows in Lister v Incorporated Law Society, Natal 1969 1 SA 431 (N) at 434A-B:

"The court will not lightly construe a statute in such a way that its effect is to achieve apparently purposeless, illogical and unfair discrimination between persons who might fall within its ambit. If the language of the statute is reasonably capable of an interpretation which avoids that result, that is the interpretation which the court will give it rather than one which would attribute to the Legislature a whimsical predilection for purposeless and unfair discrimination." - See J R de Ville Constitutional and Statutory Interpretation p202.

[36] In the result, I have come to the conclusion that the section 118 period is the one to be applied for purposes of deciding the dispute between the parties.

Was interest payable on the outstanding rates that had to be paid in order to obtain the clearance certificates?

[37] As I indicated earlier, the applicants paid the amount demanded by the respondent in order to urgently obtain clearance certificates on the understanding that the applicants would later approach this court, as it has now done, for declaratory relief and a refund in the event of it being found that an overpayment was made.

[38] The amount paid under these circumstances by the applicants to the respondent was Rl 554 240,73. This amount included interest.

[39] The applicants, through Mr Shaw, calculated that the amount that was legally due, calculated on the basis of the section 118 period, and not including interest, was R620 366.40.

[40] The difference, according to the applicants, between the two amounts, and representing the alleged over-payments made by the applicants, comes to R933 974,33 which forms the subject of the refund now claimed, with mora interest, in addition to the declaratory relief as to the correct calculation period to be applied.

[41] The applicants argue that, where the section 118 period is the applicable one. and where section 118 is silent on the question of interest being payable on the "municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties" during the particular two year period preceding the application for the certificate, there is no basis on which the respondent could have insisted on interest being paid on these arrear dues.

[42] In addition, the applicants argue that even though the section 89 period stipulates that

"any tax as defined in subsection (5) which is or will become due thereon in respect of any period not exceeding two years immediately preceding the date of the sequestration of the estate in question and in respect of the period from that date to the date of the transfer of that property by the trustee of that estate, with any interest or penalty which mav be due on the said tax in respect of any such period, shall form part of the costs of realisation" (emphasis added), this provision relating to interest or penalty does not apply because of the finding in Kaplan that the operation of section 118(1) is not affected by section 89(4).

[43] Finally, it was argued before me by counsel for the applicants that where section 89(1) of the Insolvency Act provides for interest or penalties (as quoted) on the said tax to be paid, it is simply referring to the fact that the tax together with interest or penalties forms part of the cost of realisation and does not affect section 118(1) of the Act which provides for what is to be paid in order to obtain the clearance certificates.

[44] Mr Erasmus, on behalf of the respondent, relied, firstly, on the provisions of section 89(3) of the Insolvency Act which stipulate "... any interest due on a secured claim in respect of any period not exceeding two years immediately-preceding the date of sequestration shall be likewise secured as if it were part of the capital sum".

[45] Counsel also argued, if I understood him correctly, that the rates and taxes applicable to this case which were payable in order to get clearance certificates formed part of the secured claim as intended by section 89(3) of the Insolvency Act. This much is clear from the provisions of section 118(3) of the Act.

[46] Where section 89(1) of the Insolvency Act provides that any municipal tax as defined in

section 89(5) of the Insolvency Act shall form part of the costs of realisation "with any interest or penalty which may be due on the said tax in respect of any such period", this amounts to an express stipulation by the legislature that interest or penalties are payable on municipal taxes (such as those applicable to the present case) which form part of the secured claim of the municipality and, for that matter, of the costs of realisation.

[47] In my view, the submissions made by Mr Erasmus are well-founded and correct.

[48] On the reasoning proposed on behalf of the applicants, it seems that one would have to find that no interest is payable on arrear taxes which became due over the (shorter) section 118 period, but interest and penalties are payable when the same taxes form part of the costs of realisation and calculated over the longer section 89 period. I consider this distinction to be artificial and, with respect, nonsensical.

[49] Quite apart from the aforegoing considerations and statutory provisions, it seems to me, as a general proposition, that interest ought to be claimable, in the form of mora interest, on debts (in this case municipal taxes) which have been outstanding for a number of years because of the property owner's failure to make payment on due date - see the brief discussion on the subject in Wille's Principles of South African Law 8'h ed p578 and the authorities there quoted.

[50] Through the diligence of both counsel, which is appreciated, the parties agreed on figures which will be payable in the form of a refund in the event of a finding on the one hand that interest was payable on the arrear dues to be settled in order to obtain clearance certificates and, on the other hand, that interest was not so payable. In the former case, with interest

payable, the refund would have to amount to R766 511,76 with interest thereon at the mora rate of 15,5% per annum from 25 February 2011 to date of payment and, in the latter case, the refund would amount to the larger figure of R933 874,33.

For the reasons mentioned, the first-mentioned figure will be reflected in the order which I propose making.

The respondent's counter-application

[51] The respondent launched a counter-application on the basis that the original payment of some R1,5 million represented an underpayment of some R206 000.00 because the section 89 period (two years before the date of liquidation) was calculated over too short a period. The calculation period should have commenced on 13 March 2006 in view of the presumption contained in section 348 of the Companies Act, 1973 relating to the date when the liquidation proceedings were launched. For purposes of the initial calculation, the liquidation date was only taken to be December 2008.

[52] Nevertheless, during the proceedings before me the counter-application was abandoned and Mr Erasmus, quite properly, conceded that the counter-application falls to be dismissed with costs.

Amendment of nra\cr 1 ofiho notice of motion

[53] During my debate with Mr Pincus for the applicants I pointed out to him that the first prayer of the notice of motion was not adequately crafted for purposes of obtaining the relief sought by the applicants. An appropriate amendment was applied for and granted by agreement.

The order

[54] I make the following order:

1. It is declared that the relevant period for which rates were payable in order to oblige the respondent to issue clearance certificates in respect of the properties referred to in paragraph 6.1 of the founding affidavit is the period referred to in section 118(1) of the Local Government: Municipal Systems Act 32 of 2000.

2. The respondent is ordered to pay the applicants the amount of R766 511,76 together with interest thereon at the rate of 15,5% per annum calculated from 25 February 2011 to date of payment.

3. The respondent is ordered to pay the costs of the application.

4. The counter-application is dismissed with costs.

W R C PRINSLOO

JUDGE OF THE NORTH GAUTENG HIGH COURT

45407-2011

HEARD ON: 17 FEBRUARY 2012

FOR THE APPLICANTS: S P PINCUS

INSTRUCTED BY: HILARY SHAW ATTORNEY

FOR THE RESPONDENT: M C ERASMUS SC

INSTRUCTED BY: VAN DEVENTER CAMPHER ATTORNEYS