THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 409/12
Reportable

In the matter between:

THE STEVE TSHWETE LOCAL MUNICIPALITY **APPELLANT**

and

FEDBOND PARTICIPATION MORTGAGE BOND MANAGERS (PTY) LTD **FIRST RESPONDENT**
FEDBOND NOMINEES (PTY) LTD **SECOND RESPONDENT**

Neutral citation: *The Steve Tshwete Local Municipality v Fedbond Participation Mortgage Bond Managers (Pty) Ltd* (409/12) [2013] ZASCA 15 (20 March 2013)

Coram: Malan and Shongwe JJA and Van der Merwe, Saldulker and Mbha AJJA

Heard: **26 February 2013**

Delivered: **20 March 2013**

Summary: Local authority ─ municipal charges payable by trustee or liquidator to obtain certificate in terms of s 118(1) of Local Government: Municipal Systems Act 32 of 2000 ─ period laid down in s 118(1) applicable and not period in s 89 of Insolvency Act 24 of 1936 ─ *stare decisis* ─ court bound by earlier decision.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Prinsloo J sitting as court of first instance):
The appeal is dismissed with costs.

JUDGMENT

VAN DER MERWE AJA (MALAN AND SHONGWE JJA AND SALDULKER AND MBHA AJJA CONCURRING):

[1] This is an appeal against a declaratory order and ancillary relief granted in favour of the respondents by Prinsloo J in the North Gauteng High Court, Pretoria. He granted leave to appeal to this court.

[2] The appeal concerns the interrelation between the provisions of s 118(1) of the Local Government: Municipal Systems Act 32 of 2000 and s 89 of the Insolvency Act 24 of 1936. In *City of Johannesburg v Kaplan NO & another*[1] this court held that, notwithstanding the longer period referred to in s 89, liability for payment of a tax as defined in s 89(5) to a municipality in order to obtain a certificate in terms of s 118(1) in respect of immovable property falling in an insolvent or liquidated estate, is limited to the period mentioned in s 118(1). The judgment of the court a quo is essentially based on the decision in *Kaplan* and the real issue raised by the appellant's challenge thereto is whether the decision in *Kaplan* can be departed from.

[3] The factual background is uncomplicated and common cause. The appellant (the Municipality) is a duly established local municipality. The respondents, collectively referred to as Fedbond, operate a participation bond scheme in terms of which they make loans to commercial companies based

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[1] 2006 (5) SA 10 (SCA).

on funds they have received mostly from pensioners and widows and which are secured by mortgage bonds registered over commercial properties. A close corporation named TNT Trading 23 CC (TNT) was the registered owner of four immovable properties (the properties). The second respondent granted a loan to TNT which was secured by participation mortgage bonds registered over the properties in favour of Fedbond.

[4] On 3 December 2008, however, TNT was placed in final liquidation. The second respondent was the major creditor of TNT. It proved a claim in respect of the said loan in the amount of R16 125 136.18. With the authorisation of creditors, the liquidators of TNT sold the properties at a public auction for the total purchase price of R5,3 million. The liquidators then instructed Fedbond's attorney to attend to the transfer of the properties to the purchaser.

[5] For this purpose the attorney had to obtain a certificate in terms of s 118(1) (clearance certificate) in respect of each of the properties from the Municipality, certifying that all the amounts mentioned in s 118(1) have been fully paid. It is common cause that the amounts payable to obtain clearance certificates in respect of the properties related only to property rates and interest thereon (rates). As TNT did not have sufficient funds to obtain clearance certificates, Fedbond accepted that responsibility. Applications for clearance certificates were made during December 2009.

[6] A dispute arose between the Municipality and Fedbond in respect of the amount payable to obtain clearance certificates. The Municipality maintained that the amount should be calculated from the date two years immediately preceding the date of liquidation of TNT, in terms of s 89. The contention of Fedbond was that the amount should be calculated over the period of two years preceding the dates of application for clearance certificates, in terms of s 118(1). In the result the Municipality required payment of rates for a period of more than a year longer than the period for which Fedbond was prepared to pay rates to obtain the clearance certificates.

[7] The parties reached an agreement to the effect that Fedbond would pay the amount claimed by the Municipality, the Municipality would issue clearance certificates to enable the liquidators of TNT to transfer the properties to the purchaser and Fedbond would apply to the court for an order declaring that the period in respect of which rates were payable to oblige the Municipality to issue clearance certificates in respect of the properties is the period mentioned in s 118(1), and for repayment by the Municipality of the amount overpaid in the event of the declaratory order being granted. All of this was done, and once agreement was reached in respect of the amounts involved, the court below granted the order sought by Fedbond, with costs.

[8] Section 118(1), (2) and (3) provide as follows (subsecs (3) and (4) are not applicable):

'(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 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 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.'

[9] As explained in *Kaplan*, the principal elements of s 118 are an embargo provision with a time limit (s 118(1)), a security provision without a time limit (s 118(3)), and a provision located between the two (s 118(2)) which subjects the provisions of s 118 as a whole to the terms of s 89.

[10] Section 89 provides:

‘(1) The cost of maintaining, conserving and realizing 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 realization.

(2) If a secured creditor (other than a secured creditor upon whose petition the estate in question was sequestrated) states in his affidavit submitted in support of his claim against the estate that he relies for the satisfaction of his claim solely on the proceeds of the property which constitutes his security, he shall not be liable for any costs of sequestration other than the costs specified in subsection (1), and other than costs for which he may be liable under paragraph (*a*) or (*b*) of the proviso to section *one hundred and six*.

(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 sum.

(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.'

[11] In terms of s 66(1) of the Close Corporations Act 69 of 1984 read with s 339 of the Companies Act 61 of 1973, s 89 is applicable to the liquidation of a close corporation. Section 118(2) applies also to the transfer of property by a liquidator of a company or a close corporation.[2] In terms of s 229(1) of the Constitution a municipality is empowered to impose rates on property. It is common cause that property rates are taxes as defined in s 89(1).[3]

[12] In *BOE Bank Ltd v Tshwane Metropolitan Municipality*[4] Brand JA held that the veto (embargo) in s 118(1) and the charge in s 118(3) are two separate entities and that s 118(3) is an independent, self-contained provision. He accordingly held that the only plausible interpretation of s 118(3) is that it is not subject to the time limit contemplated in s 118(1).[5]

[13] In *Kaplan*, Heher JA set out the historical context of s 89 and continued:

'21. In this context, the logic of s 89(4) is plain: it was necessary to inform creditors and trustees of the rights and obligations attaching to the realisation of immovable property in an estate so that there would be no doubt as to what the trustee must pay before being permitted to transfer the property and what statutory restraints and claims would attach to the proceeds after transfer. In this way, the limits of the costs of realisation of such property (in the context of s 89(1)) are also determined. The Legislature had, in s 89(3), laid down that interest on a secured claim would be secured as if it were part of the capital sum for two years prior to the date of sequestration. The Legislature, having provided in the first part of s 89(4) for a limitation on the effective duration of an embargo provision, saw the section as an appropriate vehicle to similarly limit the duration of preferences which arose from the quasi-liens and charges which were the vogue. Thus construed both s 89(3) and 89(4) serve a consistent purpose in providing a uniform duration (two years prior to the date of sequestration and from that date until the date of transfer) for interest on

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[2] See *Kaplan* supra para 17.
[3] See *Kaplan* supra at 19F-G.
[4] 2005 (4) SA 336 (SCA) at 341I-342B.
[5] At 343F.

securities and on embargoes and claims for a tax (as defined in s 89(5)). See also *De Wet en Andere NNO v Stadsraad van Verwoerdburg* 1978 (2) SA 86 (T) at 101D.

. . .

24. It will be noted that the two-year period in s 89(1) differs from that appearing in s 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 s 118(1) will effectively be less than the two-year period under s 89(1), because the date of application is necessarily later than the date of sequestration. The first part of s 89(4) means that, when an embargo period laid down in any other law is effectively shorter than the two-year period in s 89(1), the first-mentioned period continues to apply after sequestration. So, the operation of s 118(1) is not affected by s 89(4). When, however, the embargo provision in any other law is effectively longer than that in s 89(1), then, by reason of the provisions of s 89(4), the period in s 89(1) will override the period in the other law.

. . .

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 s 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 the certificate.

2. The preference accorded by s 118(3) in favour of the municipality over that of a holder of a mortgage bond is limited to claims which fell during the period laid down in s 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.'

[14] In 1937 Stratford JA said the following in *Bloemfontein Town Council v Richter*:[6]

'The ordinary rule is that this Court is bound by its own decisions and unless a decision has been arrived at on some manifest oversight or misunderstanding, that is there has been something in the nature of a palpable mistake, a subsequently constituted Court has no right to prefer its own reasoning to that of its predecessors ─ such preference, if allowed, would produce endless uncertainty and confusion. The

[6] 1938 AD 195 at 232.

maxim "*stare decisis*" should, therefore, be more rigidly applied in this the highest Court in the land, than in all others.'

And in 1989 Corbett CJ in *Catholic Bishops Publishing Co v State President & another*[7] stated:

'The reluctance of this Court to depart from a previous decision of its own is well-known. Where the decision represents part of the *ratio decidendi* and is a considered one (as is the position in this case) then it should be followed unless, at the very least, we are satisfied that it is clearly wrong.'

Today it is recognised that the principle that finds application in the maxim of *stare decisis* is a manifestation of the rule of law itself, which in turn is a founding value of the Constitution.[8]

[15] This rule applies only to the *ratio decidendi* of the previous decision. The *ratio decidendi* means the reasons for the order that was made,[9] excluding merely factual or incidental reasoning.[10]

[16] In *Kaplan* an order was granted on the basis that the municipality's charge under s 118(3) enjoyed preference over the security attached to the mortgage bond over the property in question. It is clear from para 21 of the judgment that an essential part of the line of reasoning that led to that order was the finding that the legislature provided in the first part of s 89(4) for a limitation of an embargo provision and therefore, in subsequently adding the second part of s 89(4), intended to similarly limit the preferences arising from security provisions such as s 118(3). The finding that s 89(4) provides for a limitation of embargo provisions therefore forms part of the *ratio decidendi* of the judgment in *Kaplan*. From this finding it necessarily follows, as was said in para 24 (and summarised in para 27.1) of *Kaplan*, that when an embargo period laid down in any other law is effectively shorter than the two year period in s 89(1), the shorter period continues to apply after sequestration. Because s 89(4) is intended to limit (and not to extend) embargo provisions,

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[7] 1990 (1) SA 849 (A) at 866H.

[8] See *Camps Bay Ratepayers' and Residents' Association & another v Harrison & another* 2011 (4) SA 42 (CC) at 56A-B and *True Motives 84 (Pty) Ltd v Mahdi & another* 2009 (4) SA 153 (SCA) para 100.

[9] *Fellner v Minister of the Interior* 1954 (4) SA 523 (A) at 537A-F.

[10] *Pretoria City Council v Levinson* 1949 (3) SA 305 (A) at 317.

its effect cannot be to extend the embargo period in terms of s 118(1) to a period longer than the period of two years preceding the date of application for a certificate. It follows that the submission of the Municipality that in terms of s 89(4) the period of the embargo is extended beyond the period mentioned in s 118(1) is not consistent with the *ratio decidendi* in *Kaplan*.[11]

[17] In the result counsel for the Municipality was constrained to argue that the decision in *Kaplan* was clearly wrong on these points. For the reasons that follow, I am not persuaded by this argument.

[18] The words of s 89(4), namely that a law which prohibits transfer of immovable property unless any tax due thereon has been paid shall not debar a trustee from transferring the property if the trustee has paid the tax for the period mentioned in s 89(1), lend themselves to the interpretation that the object of s 89 was to provide a remedy to a trustee by limiting the impediment created by embargo provisions. This was decided in *Greater Johannesburg Transitional Metropolitan Council v Galloway NO & others*.[12] In *Eastern Metropolitan Substructure of the Greater Johannesburg Transitional Council v Venter NO*[13] this finding in *Galloway* was not criticised by this court but effectively confirmed. In *Venter* the court dealt with the effect of s 89 on s 50(1) of the Local Government Ordinance 17 of 1939 (Transvaal), which also contained an embargo provision in respect of municipal charges. Farlam AJA made it clear that s 89 limits the embargo provision only where the debt is a tax as defined therein and that it imposes no limitation at all on the periods over which other debts mentioned in such embargo provisions have become due.[14]

[19] The expression 'subject to' has no *a priori* meaning.[15] While it is often used in a statutory context to establish what is dominant and what is subservient, its meaning in a statutory context is not confined thereto and it

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[11] See *Pretoria City Council v Levinson* supra at 318.
[12] 1997 (1) SA 348 (W) at 357H and 359F.
[13] 2001 (1) SA 360 (SCA).
[14] *Venter* supra at 369C-D.
[15] See *Pangbourne Properties Ltd v Gill & Ramsdan (Pty) Ltd* 1996 (1) SA 1182 (A) at 1187I.

frequently means no more than that a qualification or limitation is introduced so that it can be read as meaning 'except as curtailed by'.[16] It is the last mentioned meaning that was ascribed to the expression 'subject to' in s 118(2) by the judgment in *Kaplan*.

[20] In addition, the Municipality's argument leads to a peculiar result. As I have pointed out, no limit is placed on the duration of the security of a municipality in terms of s 118(3) except in case of sequestration or liquidation. In that case the security is limited, only in respect of taxes as defined, to a period not exceeding two years before date of sequestration or liquidation.[17] It follows that taxes due in respect of the limited period remain a preferent charge upon the property in terms of s 118(3). On the Municipality's argument, in order to obtain a clearance certificate, a trustee or liquidator would be obliged to pay all debts referred to in s 118(1) and, in addition, taxes as defined for the period from a date two years prior to date of sequestration or liquidation to date of application for the clearance certificate, despite the fact that the additional amount is a preferent secured charge upon the property. No reason suggests itself for this differentiation.

[21] I am therefore not convinced that the decision in *Kaplan* was clearly wrong. On the contrary, I agree with the judgment and the reasoning leading to its conclusion.

[22] In the result the appeal is dismissed with costs.

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C H G VAN DER MERWE

ACTING JUDGE OF APPEAL

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[16] *Premier, Eastern Cape & another v Sekeleni* 2003 (4) SA 369 (SCA) para 14. See also *Standard General Insurance Co Ltd v Verdun Estates (Pty) Ltd & another* 1988 (4) SA 779 (C) at 783I-784B.

[17] See *Kaplan* supra paras 26-28.

APPEARANCES:

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