Case Nr 45/94 IN THE SUPREME COIRT

OF SOUTH AFRICA (APPELLATE DIVISION) In the matter between:

BASIL BRIAN NEL NO Appellant

and

THE BODY CORPORATE OF

THE SEAWAYS BUILDING 1st Respondent

THE REGISTRAR OF DEEDS, CAPE TOWN 2nd Respondent

CORAM: E M GROSSKOPF, NESTADT, EKSTEEN, NIENABER,

OLIVIER, JJA DATE OF

HEARING: 25 May 1995 DATE DELIVERED: 25

AUGUST 1995

J U D G M E N T

E M GROSSKOPF . JA

2 The

appellant is the liquidator of General Transport and Warehousing (SA) (Pty) Ltd ("the company"). The company was placed in liquidation by a special resolution registered on 9 June 1992. It was at that time the owner of a number of units in a sectional title development in Mouille Point, Cape, named Seaways. These units were mortgaged in favour of Standard Bank of South Africa Limited ("the bank"). When application was brought in this matter the bank's claim was of the order of Rl,3 million.

On 26 September 1992 the appellant sold the units by public auction for Rl 050 000. However, he found himself unable to pass transfer to the purchaser because of a dispute concerning the interpretation of sec 15B(3)(a)(i)(aa) of the Sectional Titles Act, No 95 of 1986 ("the act"). The relevant portion of this provision ("the contested provision") reads as follows: "(3) The registrar shall not register a transfer

> of a unit ... unless there is produced to him -(a) a conveyancer's certificate confirming -(i)(aa) that, if a body corporate is deemed to be established in terms of section 36(1), that body corporate has certified that all moneys due to the body corporate by the transferor in respect of the said unit have been paid, or that provision has been made to the satisfaction of the body corporate for the payment thereof..."

The first respondent is the body corporate of Seaways ("the body corporate") and is deemed to have been established by section 36 (1) of the act. It has refused to furnish the certificate contemplated by the above provision. Its attitude is that there are unpaid contributions owing by the company in respect of the units. It contends that as at 1 May 1993 the company owed it R106 655,24.

The appellant launched an urgent application in the Cape Provincial Division. It is not necessary to set out the relief claimed in detail. Its aim was to

enable transfer to be given to the purchaser without

the body corporate being paid the outstanding contributions in so far as they accrued prior to liquidation. Any post-liquidation contributions were not in issue in this case. The court (Brand J) found in favour of the body corporate. His judgment is reported at 1995 (1) SA 130 (C). With the leave of the court a quo the matter now comes before us on appeal. The body corporate opposes the appeal but the second respondent, the Registrar of Deeds, abides the judgment of the court.

It will be convenient first to discuss the nature of the contested provision. Similar measures have been found in our law for many years. In Johannesburg Municipality v Cohen's Trustees 1909 TS 811, a full-bench decision, the court dealt with a provision that no transfer of rateable property should be passed before the Registrar until there was produced to him a

receipt or certificate signed by a duly authorised official of the municipality "for payment of the rates imposed on such property". The trustees in Cohen's insolvent estate wanted to transfer certain landed property from the estate. For this purpose they required a receipt or certificate from the Johannesburg municipality pursuant to the above mentioned provision. The dispute before the court was whether the word "rates" included interest on unpaid rates. This issue is, of course, not relevant for present purposes, but in the course of their judgments two members of the court considered the nature of the provision with which they were dealing. At p 817 Innes CJ said:

> "Now reading that section in connection with other provisions of the statute, the intention seems to have been to give to the local authority a right to veto the transfer of property until its claims in respect of rates should be satisfied. The result, of course, was to create, in effect, a very real and extensive preference over the proceeds of rateable property realised in insolvency; and to compel payment of the burden thus imposed before a sale of such property could

> be carried through, even in cases where insolvency had not supervened."

And at p 821 Solomon J said:

> "... the effect of applying the rule is to give the local authorities a hold upon all rateable property in respect of its rates, inasmuch as the owner cannot pass transer of his property until he has paid his rates. The consequence is that the council obtains a species of lien upon all rateable property, and in case of the insolvency of the owner secures a preference over other creditors."

The nature of these provisions was again considered in Rabie N O v Rand Townships Registrar 1926 TPD 286. There the question was whether the municipality's claim for rates, fortified as it was by the right to veto the transfer of a property until the rates were paid, was a "claim ranking in priority to that of the judgment creditor" within the meaning of sec 55(2) of the 1917 Magistrate's Court Act. The court (per Greenberg J) held that a number of anomalies would arise if the municipality's right could be so described, but that this would be unavoidable if the

words pointed clearly and unambiguously to that

construction. He then continued (at p 292):

> "But is it clear from the fact that the privilege of preventing transfer is given to municipal councils that this right constitutes a claim ranking in priority to other debts? These words ordinarily convey the idea of a right in the person holding such claim to have the property sold which is subject to the claim and to be paid first out of the proceeds, or a right, when the property is sold in execution by another creditor, to be so paid and not merely a right to resist any dealing with the property unless the claim is paid."

The court accordingly held that the municipality's

claim, although enjoying the benefits discussed in the

Cohen's Trustees case, nevertheless was not "a claim

ranking in priority to that of the judgment creditor".

See also the unreported judgment in S A Permanent

Building Society v Messenger of the Court, Pretoria to

which reference is made in the judgment of the court a

quo in the present matter at 133 D-F.

In argument before us it was accepted by both

sides, rightly in my view, that the juristic nature of

the contested provision is the same as that of the

measures considered in the above cases. The position then is that the contested provision, although it did not create a preference in the ordinary sense, nevertheless gave the body corporate a power to resist transfer of units until moneys due to it were paid. The question at issue was the exact ambit of this power.

In his heads of argument the appellant's main contention was that the contested provision did not apply at all to transfers from an insolvent estate or from a company in liquidation which was unable to pay its debts. On appeal this argument was rightly abandoned. There is nothing in the contested provision itself to indicate that its field of operation is so limited. Moreover, its legislative history indicates that there was a deliberate intention on the part of the legislature that the provision should apply also where the transferor is insolvent. In view of the

appellant's attitude I need not labour the point.

Briefly the position is as follows. In the first Sectional Titles Act, no 66 of 1971, sec 11(4) provided for the furnishing by a conveyancer of a certificate for the purposes of effecting the transfer of a unit in the Deeds Registry. The certificate was required to specify inter alia:

> "(b) that all moneys due to the body corporate by the transferor in respect of the said unit have been paid or that provision has been made to the satisfaction of the body corporate for the payment thereof;" and
>
> "(d) that according to a sworn declaration furnished by the transferor there are no interdicts, caveats or other notices applicable and the transferor is not insolvent".

This provision obviously created problems in relation to the transfer of units from an insolvent estate. With the introduction of the present act (Act 95 of 1986) an entirely new section 15 replaced the original sec 11 of the 1971 act. Sec 15(4) provided

inter alia as follows:

> "(4) The registrar shall not register a transfer of a unit or of an undivided share therein, unless there is produced to him a conveyancer's certificate in the prescribed form, certifying -
>
> (a) -
>
> (b) that all moneys due to the body corporate by the transferor in respect of the said unit have been paid, or that provision has been made to the satisfaction of the body corporate for the payment thereof;
>
> (c) that, except in so far as the transfer gives effect to an interdict, attachment, caveat or other such notice, according to a sworn declaration furnished by the transferor, there is no such interdict, attachment, caveat or notice applicable and that, unless the transfer is from an insolvent estate, the transferor is not insolvent;" (my emphasis).

The position then was that, whether or not the transfer was from an insolvent estate, a certificate had to be furnished that monies due to the body corporate had been paid or provision made therefor. Why it was still necessary to require proof that, where the transfer was not from an insolvent estate, the

transferor was not insolvent, is not clear. In fact this requirement was abandoned when Act 63 of 1991 replaced section 15 by three new sections (sections 15, 15A and 15B). These are the currently operative sections in which the contested provision is also found. These sections contain no reference to the transferor's insolvency. As a matter of language, and particularly also in the light of the legislative history of the provision, the conclusion is ineluctable that the legislature intended the provision to apply whether or not the transferor was insolvent. As I have said, this was expressly conceded in argument on behalf of the appellant.

Despite the acknowledgement that, in principle, the contested provision applied also where the transferor was insolvent, the appellant's argument in effect negated this concession. The argument was that, on a proper interpretation of the contested provision,

the body corporate's claim in the present case is not one covered by the provision, at least not to the full extent of the money owing on the pre-liquidation levies. It focused on the words "moneys due to the body corporate by the transferor" in the contested provision. Sec 342(1) of the Companies Act, no 61 of 1973, lays down the following:

> "In every winding-up of a company the assets shall be applied in payment of the costs, charges and expenses incurred in the winding-up and . . . the claims of creditors as nearly as possible as they would be applied in payment of the costs of sequestration and the claims of creditors under the law relating to insolvency ...".

In the present case it is common cause that the company is unable to pay its debts in full. There is nothing in the Companies Act or the Insolvency Act to suggest, so it is contended, that the body corporate's claim for payment of its arrear levies is anything but a concurrent claim. As a concurrent creditor the body corporate will therefore, if it proves a claim, obtain

only a dividend on its claim, and this will not happen

before the company's liquidation and distribution account has been confirmed. Indeed, it may well happen that no dividend whatever is paid to concurrent creditors. In these circumstances, it is contended, nothing was "due" to the body corporate by the transferor when the latter proposed passing transfer of the units to the purchaser. "Due", so the contention proceeds, means, in its ordinary and usual sense, "owing and already payable", or "immediately payable"; For this proposition reference is made to Lagerwey v Rich and Others 1973 (4) SA 340 (T) at 345G and cases there cited as well as The Master v I L Back and Co Ltd and Others 1983 (1) SA 986 (A) at 1004 F-H and cases there cited. When a company in liquidation is unable to pay its debts, it is further contended, a concurrent claim is not "due" because it is not immediately payable. Alternatively, if anything is due, it is only

the dividend on the claim. On neither construction, so the argument continues, can the body corporate in the present case require payment of the full pre-liquidation debt as a pre-requisite to the giving of transfer. The body corporate should accordingly have certified that nothing was due for purposes of the contested provision. On this interpretation the above cases, relating to rates, are to be distinguished from the present one. In those cases the municipality's claim clearly was one "for payment of the rates imposed" on the property, and this was not changed by the owner's insolvency. In the present case, it was contended, the unit holder's insolvency or liquidation did make a difference, since the debt was then no longer "due".

Although in the cases cited above the word "due" was construed in various contexts different from the present I accept that its ordinary meaning is as

contended by the appellant. However, we must ascertain its meaning in the context of the contested provision. In the authoritative Afrikaans text, the counterpart for "due" is "verskuldig". This is defined, in its relevant sense, in Odendal and others Verklarende Handwoordeboek van die Afrikaanse Taal (HAT) as "verplig, onbetaal". If the two texts are read together, it may well be that "due" bears the meaning of "owing and unpaid", a meaning of which it is admittedly susceptible. It seems to me that the answer to the appellant's argument can be found in the nature of the body corporate's claim and the effect on it of the company's inability to pay its debts.

To understand the body corporate's claim it is necessary to have regard to the general scheme of the act. In terms of sec 36 (1) a body corporate is deemed to be established for a sectional title scheme as soon as any person other than the developer becomes an owner

of a unit in the scheme. The developer and the owner of the unit are members of the body corporate, and thereafter every person who becomes an owner of a unit is a member of the body corporate. The developer may later fall away as a member (sec 36 (2)). The functions of bodies corporate are set out in sec 37. The first one mentioned, in sub-sec (l)(a), is -

> "to establish for administrative expenses a fund sufficient in the opinion of the body corporate for the repair, upkeep, control, management and administration of the common property (including reasonable provision for future maintenance and repairs), for the payment of rates and taxes and other local authority charges for the supply of electric current, gas, water, fuel and sanitary and other services to the building or buildings and land, and any premiums of insurance, and for the discharge of any duty or fulfilment of any other obligation of the body corporate."

The second function, set out in paragraph (b), is "to require the owners, whenever necessary, to make contributions to such fund for the purposes of satisfying any claims against the body corporate." The

body corporate is to determine from time to time the amounts to be raised for the above purposes (para (c)) and to raise the amounts so determined by levying contributions on the owners (para (d)). It is not necessary to set out the further functions. They are, for the most part, summed up in the words of paragraph (r), viz, "to control, manage and administer the common property for the benefit of all owners".

To sum up, the body corporate is a body consisting of owners of units. It levies contributions on its members to pay for the expenses of the scheme. As regards payment of the contributions, sec 37(2) provides:

> "Any contributions levied under any provision of subsection (1), shall be due and payable on the passing of a resolution to that effect by the trustees of the body corporate, and may be recovered by the body corporate by action in any court ... of competent jurisdiction from the persons who were owners of units at the time when such contributions became due."

In the present case it is accepted that the

contributions in question became "due and payable" in accordance with sec 37(2) prior to the company's liquidation. The appellant's argument is that the liquidation had the effect of altering this situation.

This argument makes it necessary to consider the effect of liquidation and sequestration on pre-existing debts. The general principle was stated as follows in the oft quoted words of Innes J:

"The object of the Insolvent Ordinance is to ensure a due distribution of assets among creditors in the order of their preference. And with this object all the debtor's rights are vested in the Master or the trustee from the moment insolvency commences. The sequestration order crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration.... The claim of each creditor must be dealt with as it existed at the issue of the order." (Walker v Syfret N 0 1911 AD 141 at 166)

The purpose of the insolvency law therefore is not to deprive creditors of their claims but merely to regulate the manner and extent of their payment. Thus, in the absence of express statutory provision to the

contrary, contracts are in general not automatically

terminated by the sequestration of the estate of one of the parties. (See Mars The Law of Insolvency in South Africa 8 ed 143 and authorities there cited.) The same would apply to the liquidation of a company. The respective obligations of the parties consequently continue during insolvency, but of course they cannot be enforced in so far as they are incompatible with the rights of other creditors.

If security has been given for a claim the security obviously remains in force - indeed, its main function is to protect the creditor against the debtor's insolvency. There can be no suggestion that the principal debt, for which it was given, is no longer due or owing, and that the security accordingly cannot be enforced. Of course, it may be argued that secured claims are in this respect different from concurrent claims, that secured claims remain due while

concurrent ones do not. What would then be the position of a debt which is not fully secured? Would it be due only to a limited extent, which is determined ex post facto by the amount which the security ultimately realises? And what about sureties? A surety for a concurrent debtor can hardly claim that the principal debt is no longer due, and that he should not be called upon to pay.

Moreover, both the Companies Act and the Insolvency Act recognize that a creditor's right to sue on his claim is, in principle, not extinguished by the debtor's liquidation or sequestration. Sec 359(2)(a) of the Companies Act lays down that notice is to be given by, inter alios, a person who intends to institute legal proceedings against a company in liquidation for the purpose of enforcing a claim which arose before the commencement of the winding-up. And sec 45(3) of the Insolvency Act provides that the disallowance or

reduction of a claim by the Master does not debar the claimant from establishing his claim by an action at law. Indeed, in respect of an unliquidated claim which is not compromised or admitted by the trustee, legal proceedings constitute the only method available to a creditor to prove his claim against an insolvent estate (sec 78 (3) of the Insolvency Act. See also Standard Bank of South Africa Ltd v Cato and Gunn NNO and Others 1981 (1) SA 647 (W) at 651H). Legal proceedings already instituted against an individual or a company may be continued after sequestration or liquidation once a trustee or liquidator has been appointed and provided proper notice is given (sec 20 (1) (b) read with sec 75 (1) of the Insolvency Act and sec 359 (1) (a) read with sec 359 (2) (a) of the Companies Act). After the confirmation by the Master of a trustee's account in an insolvent estate in terms of sec 112 of the Insolvency Act, no person may institute any legal proceedings

against the estate in respect of any liability which

arose before sequestration without special permission from the court (sec 75(2) of the Insolvency Act).

The above principles, and particularly the provisions relating to legal proceedings are, in my view, destructive of the appellant's arguments that after liquidation of a unit holder the contribution is no longer due to the body corporate, or, alternatively, that only the eventual dividend in insolvency is due. The right of a creditor successfully to prosecute proceedings for the recovery of his pre-insolvency claim necessarily presupposes that the whole debt to him is still owing, and, indeed, that it is still due. At the very least it is "verskuldig" within the meaning of the Afrikaans text of the contested provision, i e, owing and unpaid. Of course, the amount which the creditor will ultimately recover will depend on the nature of his claim and the amount available for

distribution among creditors (cf sec 78(3) of the

Insolvency Act) . But the mere fact that his claim will, in practice, probably not be paid in full, does not mean that the claim has been extinguished or that it has somehow changed its nature or content. And there may be cases where legislation has rendered a particular claim no longer exigible after liquidation or sequestration, but that is not the position here.

It seems to me, therefore, that the contributions owing to the body corporate remained due within the meaning of the contested provision when the company was placed in liquidation. Any other conclusion would have been anomalous in the light of the legislative history of the provision. As noted above, sec 15 (4) of the present act, as originally promulgated, required a certificate of payment (or provision for payment) of moneys "due" to the body corporate even in respect of transfers from insolvent

estates. In the light of these provisions the

legislature could hardly have thought that in practice nothing will ever be due by an insolvent estate. And it cannot be suggested, in my view, that the amendments of 1991 effected any change in this respect. Moreover, it can hardly be supposed that the legislature would have granted bodies corporate a remedy which is valueless when most needed, i e, when the unit holder is insolvent.

It was argued on behalf of the appellant that serious anomalies would arise from the interpretation I have suggested. Thus the protection granted to a body corporate would be considerably more extensive than that accorded, for instance, to municipalities for rates. Sec 89 (1) of the Insolvency Act provides a preference in respect of pre-sequestration taxes on immovable property only for a maximimum period of two years prior to sequestration. On the above

interpretation of the contested provision the body corporate will have a de facto preference for an unlimited period, subject only to the law of prescription. And the type of debt due by a transferor which is protected by the contested provision would be wider than that owing to a municipality for rates. Whether and to what extent this anomaly exists is arguable. Municipalities customarily enjoy protection in respect of rates and other claims similar to that afforded by the contested provision (see, e g, sec 50 of the Transvaal Rating Ordinance, no 11 of 1977 and sec 96 of the Cape Municipal Ordinance, no 20 of 1974). Indeed, it is in the context of claims for rates that the principles relating to such embargoes were settled by our courts, as I have shown. The rights of municipalities are recognized also by the Sectional Titles Act. Thus sec 15B(3)(b) requires for transfer:

> "if by any law provision has been made for the separate rating of units, a clearance certificate

> of the local authority to the effect that all rates and moneys due to the local authority under any law before any such proof can be issued, have been paid."

It is not feasible to consider all embargo provisions, to determine how, if at all, they can be reconciled with sec 89 of the Insolvency Act, and then to compare them with the protection afforded to bodies corporate by the contested provision. It is true that the protection given to municipalities in the above mentioned ordinances is narrower than that granted to bodies corporate. However, even if this formed part of a general trend that bodies corporate are treated more favourably than other institutions it would not, in my view, entitle us to depart from what I consider the true meaning of the provision. The legislature clearly considered that the nature and purpose of the contributions, as they appear from the above quoted sections of the act, were such that, on the insolvency of a unit holder, they should be paid by the holder's

estate rather than become the responsibility of other

unit holders.

The other suggested anomalies are less serious. I need not deal with them in detail. I do not think they cast doubt on the conclusion reached above.

In the court a quo there was much argument about where a right such as the present embargo would fit into the scheme of the Insolvency Act (see the judgment a quo at p 133 I to 136 G). Of course, if there were to be a clear and irreconcilable inconsistency between the Insolvency Act and the Sectional Titles Act, the latter, as a later statute, would normally prevail (unless it were to be held that the Insolvency Act is a special act and the Sectional Titles Act a general one, or there were some other ground for preferring the earlier statute). There is accordingly no imperative reason to reconcile the two statutes, although a court will always attempt to do so. In this regard the court

a quo held (at p 136 F):

> "... if [the contested provision] must be understood to create an effective preference in the event of insolvency in favour of the body corporate in respect of its claim for outstanding levies, such a preference can be accommodated in the scheme of insolvency created by the Insolvency Act as being part of 'the costs of realisation' envisaged in s 89 (1) of the Insolvency Act."

In so holding the court relied mainly on De Wet en Andere NNO v Stadsraad van Verwoerdburg 1978 (2) SA 86 (T). In argument before us the appellant's counsel accepted the correctness of this finding of the court a quo. I need accordingly say no more than that I agree.

The present judgment was submitted to Nienaber J A in a preliminary draft form before his departure on an extended overseas visit. He expressed his agreement with the conclusion and the general trend of the reasoning. He is at present absent and unable to consider the final draft. This judgment is accordingly the judgment of the court in terms of sec 12 (3) of the

Supreme Court Act, no 59 of 1959.

In the result the appeal is dismissed with costs, including the costs of the application for leave to appeal to the court a quo, and, where applicable, the costs of two counsel.

E M GROSSKOPF, JA

NESTADT, JA
EKSTEEN, JA
OLIVIER, JA
Concur