THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case number : 240/2003

In the matter between :

B O E BANK LIMITED **APPELLANT**

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY **RESPONDENT**

CORAM : **SCOTT, MTHIYANE, BRAND,**

CONRADIE, PONNAN JJA

HEARD : **8 MARCH 2005**

DELIVERED : **29 MARCH 2005**

Summary: Charge upon property in favour of municipality imposed by s 118(3) of Act 32 of 2000 – does not exclude debts older than two years – preference enjoyed under section also over mortgage bonds registered prior to commencement of the Act – does not amount to affording section retrospective effect.

JUDGMENT

BRAND JA/

BRAND JA:

[1] This appeal arose from competing claims by the appellant ('the bank') and the respondent ('the municipality') to the proceeds realised from a sale in execution of immovable property situated at Wonderboom, Pretoria ('the property'). The bank's claim is based on mortgage bonds over the property while the municipality's claim is for municipal rates and for services rendered in connection with the property. The outcome of the dispute turns on the interpretation of s 118(3) of the Local Government : Municipal Systems Act 32 of 2000 ('the Act'), read with subsection 118(1) of the Act. These two subsections provide:

'118(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.

(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.'

[2] The facts of the matter are relatively straightforward. The previous owners of the property were Mr and Mrs Van Heerden. Between 1994 and 1996, the bank's predecessor-in-title, NBS Bank Limited, registered three mortgage bonds over the property securing loans in a total amount of more than R2,3m. During the period 1994 to 2001 the previous owners also became indebted to the municipality for property rates, municipal services and other charges contemplated in ss 118(1) and 118(3).

[3] In June 2001 NBS Bank took judgment against the Van Heerdens for money lent and advanced under the mortgage bonds. In terms of the judgment the property was declared executable. Towards the end of October 2001, the attorneys appointed to attend to the transfer of the property pursuant to the sale in execution, applied to the municipality for the clearance certificate contemplated by s 118(1) of the Act. The certificate issued by the municipality showed an amount of R287 900,29 owing in respect of municipal rates and services for the two years preceding the date of application for the certificate, ie since October 1999. The same certificate, however, also reflected a further amount of R655 273,83 outstanding in respect of municipal debts that became due

prior to October 1999. In argument, the latter indebtedness was referred to as 'the historical debt'. For ease of reference, I shall adopt the same nomenclature.

[4] At the sale in execution, which was held in December 2001, the property was sold for R725 000. In terms of the conditions of sale the purchaser also undertook to pay various amounts apart from the purchase price, including 'any charges necessary to effect transfer' of the property. It is common cause that the purchaser thus became liable to pay the amount of R287 900,29 certified to be owing in respect of the two year period since October 1999. Consequently there is no dispute about this amount. It has been paid by the purchaser. The dispute concerns the historical debt.

[5] Initially the construction of s 118(3) contended for by the municipality was that in terms of the section, the purchaser, as the new owner of the property, became liable for the historical debt. That gave rise to an application in the court *a quo* by the purchaser, as first applicant, and the bank, as second applicant, for an order declaring that s 118(3) did not render the new owner liable for the historical debt. In its answering affidavit the municipality conceded that its initial interpretation of s 118(3) could not be sustained. Its revised contention was that, on a proper interpretation of s 118(3), the historical debt enjoyed a preference

over the bank's claim under the mortgage bonds to the proceeds of the sale in execution. The bank did not agree with this contention. In the event, the municipality brought a counter application essentially for an order declaring that its interpretation of s 118(3) be confirmed. In the court *a quo* the municipality's contentions were upheld by Du Plessis J who granted the counter application with costs. The appeal against that judgment is with his leave.

[6] In the court *a quo*, the bank's case was exclusively based on the premise that s 118(3) of the Act did not apply to mortgage bonds that were registered prior to the commencement of the Act on 1 March 2001. The application of the section to existing bonds, so the bank argued, would amount to affording it retrospective effect which is not warranted by the wording of the section. Confining its judgment to the only issue before it, the court *a quo* held that although s 118(3) does not have retrospective effect, it nevertheless applies to mortgage bonds that were registered before its commencement on 1 March 2001. The present appeal is inter alia against that finding. In addition, the bank sought and obtained leave to appeal on the further basis, not argued in the court *a quo*, namely that s 118(3) must be read to incorporate the time limit stipulated in s 118(1) and that the 'charge' contemplated in subsection

(3) is therefore limited to debts that became due during the immediately preceding two years. I propose to deal with the latter contention first.

[7] In considering whether the time limit stipulated in s 118(1) should be read into s 118(3), it must be borne in mind that the two sections provide the municipality with two different remedies. Although the purpose of both is to ensure payment of the municipal claims that fall within the stipulated category, the mechanisms employed to achieve that purpose are different. Provisions such as those contained in s 118(1), sometimes referred to as 'embargo' or 'veto' provisions, can be traced back to provincial ordinances concerning local authorities passed many years ago (see eg *Pretoria Stadsraad v Geregsbode, Landdrosdistrik van Pretoria* 1959 (1) SA 609 (T) 613E-F; *Stadsraad van Pretoria v Letabakop Farming Operations (Pty) Ltd* 1981 (4) SA 911 (T) 917C-H). While the effect of these embargo provisions is to afford the municipality a right to veto the transfer of property until its stipulated claims are met, they do not render the municipality's claim preferent to existing mortgagees in the case of a sale in execution. That much was held in *Rabie NO v Rand Townships Registrar* 1926 TPD 286 (see also *Nel NO v Body Corporate of the Seaways Building and another* 1996 (1) SA 131 (A) 134B-135C; *First Rand Bank Ltd v Body Corporate of Geovy Villa* 2004 (3) SA 362 (SCA) 369F-370E). If the legislature intended to create

such a preference, so Greenberg J held in *Rabie NO* (at 290), it must do so in specific language and 'not leave such charge to be inferred from the mere existence of an embargo on transfer'. The Transvaal legislature's response to this decision was to create such a 'charge' in specific language, as suggested by Greenberg J, in s 50(2) (later s 50(3)) of Ordinance 17 of 1939 (T). Whereas s 50(1) of the ordinance contained an embargo or veto provision, similar to s 118(1), s 50(2) provided for a 'charge' similar to s 118(3), which has since been described as amounting to a tacit statutory hypothec (see eg *Stadsraad, Pretoria v Letabakop Farming Operations (Pty) Ltd* supra 918C-G; *First Rand Bank Ltd v Body Corporate of Geovy Villa* supra 368J-369A; C G van der Merwe 1996 (59) *THRHR* 378. Like s 118(3), s 50(2) specifically declared its purpose to be to afford the municipality a preference over any mortgage bonds registered against the property. Unlike s 118(3), however, s 50(2) expressly limited such preference to debts referred to in s 50(1), which applied only to debts that became due during the preceding three years. Consequently, both the veto and the hypothec provided for in ss 50(1) and 50(2) were expressly limited to municipal claims not older than three years. The inference to be drawn from this is clear. The veto in s 118(1) and the charge in s 118(3) are two different entities. They may be subject to the same time limit, but this need not be so.

[8] Moreover, s 118(3) is on its own wording an independent, self-contained provision. It does not require the incorporation of the time limit in s 118(1) to make it comprehensible or workable. It was therefore rightly conceded by the bank that the introduction of such time limit into s 118(3) is not a necessary implication. Accordingly, the bank's contention was not that the interpretation suggested by it constituted the only – or even the most – plausible reading of s 118(3). What it contended was that its interpretation was a plausible one which was rendered most likely by reason of other considerations. Included amongst these, was the consideration that this narrower reading of s 118(3) would be more in conformity with the guarantee of property rights in s 25(1) of the Constitution (cf *Mkontwana v Nelson Mandela Metropolitan Municipality and another* 2005 (1) SA 530 (CC) para 45). It would also be the reading, so it was contended, that avoids the total negation of bondholders' rights that may result from the more expansive interpretation of the section, as aptly demonstrated by the facts of this case. It is clear, however, that these considerations will only come into play if the construction of s 118(3) contended for by the bank is indeed a plausible one. This flows from the settled principle that considerations outside the wording of a statutory provision, including considerations of constitutional validity, do not permit an interpretation which is unduly

strained (see eg *National Director of Public Prosecutions and another v Mohamed NO and others* 2003 (5) BCLR 476 (CC) para 35).

[9] The vital issue is therefore whether a construction of s 118(3) which allows for the introduction of the s 118(1) time limit would or would not be unduly strained. The bank's proposal was that the opening for such introduction is to be found in the expression 'an amount due' in s 118(3), as opposed to 'all amounts due' in s 118(1). As the starting point to its argument the bank referred to the fact that exactly the same words are used to describe the debts involved in s 118(1) and s 118(3), that is, 'municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties' and that the debts concerned in the two sections are therefore exactly the same. Shorn of unhelpful references to the numerous dictionary meanings of 'an' and to various rules of interpretation stated in the abstract, the bank's argument then proceeded along the following lines. The phrase 'all amounts due' in s 118(1), so it was said, refers inclusively to a certain class or type of amounts – that is municipal debts of the specified kind, restricted by the two year time limit. The effect of using the indefinite article 'an' later in the same section, that is, in subsection (3), is to include the latter amount due in the same class or type as the first. Conversely, it was argued, the use of the word 'all' instead of 'an' in subsection (3) would

have been the linguistically feasible way of either extending the class or including other types of amounts due.

[10] I am not convinced that the difference between 'an' and 'all' can support the weighty superstructure of the bank's argument. I think there is a much simpler explanation for this difference. In subsection (1) 'all amounts' – plural – refers to a number of different debts that became due at different times. The purpose of 'all' is to indicate that, despite their different ages, everyone of these debts falls within the purview of the section, provided that it became due within the preceding two year period. Subsection (3), on the other hand, does not refer to a category or class of debts but to the aggregate of different debts secured by a single charge or hypothec. For purposes of s 118(3) it therefore does not matter when the component parts of the secured debt became due. The amounts of all debts arising from the stipulated causes are added up to become one composite amount secured by a single hypothec which ranks above all mortgage bonds over the property.

[11] Conversely, if the legislature really intended to render s 118(3) subject to the same two year time limit contemplated in s 118(1), it could have done so in a number of ways. It could, for instance, have repeated the wording of s 118(1). Or, it could have followed the precedent of the 1939 Transvaal ordinance by simply referring to 'any amounts due in

terms of s 118(1)'. This would have the added advantage of avoiding repetition of the cumbersome language enumerating the different causes from which the debts concerned may arise. The inference is clear. If the legislature intended to introduce a time limit into s 118(3), it would not have done so in the convoluted way suggested by the bank. In the result, the only plausible interpretation of s 118(3), in my view, is that it is not subject to the time limit contemplated in s 118(1).

[12] This brings me to the bank's alternative argument based on what it contended to be an unwarranted retroactive application of s 118(3). The starting point of this argument was a reference to s 50(3) of Ordinance 17 of 1939 (T), which was, as I have said, the predecessor of s 118(3) in the Province of Gauteng. In terms of this previous enactment the charge upon the property was limited to debts that became due during the preceding three years. On the day before the Act came into operation, that is, on 28 February 2001, the preference enjoyed by the municipality in terms of its statutory hypothec was therefore limited to debts not older than three years. If the unlimited preference imposed by s 118(3) were held to apply to bonds that existed on 28 February 2001, so the bank's argument proceeded, it would afford s 118(3) retrospective effect. In the absence of any indication of retrospectivity in the enactment itself, the

argument concluded, such retrospective application could not be sustained.

[13] It is true that if s 118(3) is applied to bonds existing before 1 March 2001, it would reduce the security enjoyed by mortgagees under those bonds and in that sense interfere with existing rights. However, that in itself would not mean that the section is afforded retrospective effect. As was pointed out by Buckley LJ in *West v Gwynne* [1911] 2 Ch1 at 11-12:

'Retrospective operation is one matter. Interference with existing rights is another.'

In the same case Buckley LJ formulated the following test to determine the difference between the two:

'If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective. That is not this case. The question here is whether a certain provision as to the contents of leases is addressed to the case of all leases or only of some, namely leases executed after the passing of the Act. The question is as to the ambit and scope of the Act, and not as to the date as from which the new law, as enacted by the Act, is to be taken to have been the law.'

The test thus formulated has been approved and applied by our courts on various occasions (see eg *Parow Municipality v Joyce and McGregor (Pty) Ltd* 1974 (1) SA 161 (C) 164E-165A; *Adampol (Pty) Ltd v Administrator, Transvaal* 1989 (3) SA 800 (A) 811B-813C; *Transnet Ltd*

(Autonet Division) v Chairman, National Transport Commission 1999 (4) SA 1 (SCA) 7A-D).

[14] It follows that an enactment can only be described as retrospective in the true sense if it requires the law to be taken as amended prior to its date of amendment. Applying this formula, I find myself in agreement with the court *a quo* that on the interpretation of s 118(3) contended for by the municipality, the section requires no such thing. It does not expressly or impliedly purport to state that before 1 March 2001, the law in Gauteng was in any way different from what it was under the 1939 Transvaal Ordinance. The extended security contended for by the municipality is only effective from 1 March 2001. The bank's contention was that s 118(3) should only be applied to bonds registered after 1 March 2001. This contention cannot find any basis in the presumption against retrospectivity. What it would amount to in effect is a limitation of the ambit and scope of the section for which, as I read it, there is no warrant.

[15] For these reasons, the appeal is dismissed with costs.

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F D J BRAND
JUDGE OF APPEAL

Concur:

Scott JA
Mthiyane JA
Conradie JA
Ponnan JA