Case number 334/98

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter of

THE EASTERN METROPOLITAN SUBSTRUCTURE OF THE GREATER JOHANNESBURG TRANSITIONAL METROPOLITAN COUNCIL
Appellant

and

GERT HENDRIK JOHAN VENTER N O Respondent

CORAM: NIENABER, ZULMAN, STREICHER JJA, MELUNSKY *et* FARLAM AJJA.

DATE OF HEARING: 1 September 2000

DATE OF JUDGMENT: 29 September 2000

Insolvency - payment to obtain clearance certificate under section 50 of Local Government Ordinance 1939 (Transvaal).

J U D G M E N T

/FARLAM AJA:

FARLAM AJA

[1] This is an appeal with the leave of the Court *a quo* from a

judgment of the Witwatersrand Local Division in terms of which the appellant, the Eastern Metropolitan Substructure of the Greater Johannesburg Transitional Council, was ordered to pay R131 311-72, with interest at 15.5% per annum from 15 November 1996 and costs, to the respondent who is the liquidator of a close corporation, Etruscan Development Corporation CC (in Liquidation). (In what follows I shall refer to the close corporation in liquidation as "the corporation".) The corporation was placed in liquidation pursuant to a special resolution registered on 21 September 1995 and the respondent was appointed as liquidator on 2 October of that year.

[2] The judgment of the Court *a quo,* which was delivered by Flemming DJP, has been reported: see *Venter N O v Eastern Metropolitan Substructure of the Greater Johannesburg Transitional Council*, 1998 (3) SA 1076 (W).

[3] The main issue argued before the Court *a quo* and on appeal was whether the appellant was entitled to demand from the respondent payment of certain outstanding charges, including basic water and sewerage charges, water consumption charges and a re-zoning fee, prior to, or as a pre-condition to the issue by it to the respondent of a clearance certificate without which the transfer of certain immovable properties, which belonged to the corporation and which were situated within the area of jurisdiction of the appellant, was not permitted.

[4] The main facts which gave rise to the application are not in dispute and may be summarised shortly.

Sixty stands situate at remaining extent of Erf 383 Magaliesig, Ext 33, Sandton, Gauteng (to which I shall refer in what follows as "the properties"), which belonged to the corporation, were sold by the respondent on 16 April 1996 to a close corporation known as Magaliesig Ext 33 CC for R3.8 million.

The conveyancer instructed by the respondent to attend to the transfer of the properties sought clearance certificates from the appellant in terms of section 50 (1) of the Local Government Ordinance

17 of 1939 (Transvaal).

Before it was prepared to issue the clearance certificates the appellant required payment of an amount of R353 616-74, being the total of the amounts alleged to be owing to it by the corporation in respect of the properties. This amount was made up as follows:

(i) assessment rates for the period November 1994 to end October 1996 R196 674-36

(ii) re-zoning fee (payable in terms of sec 63(6), read with secs 48(6)(a) of the Town Planning and Townships Ordinance 15 of 1986 (Transvaal) 86 237-92

(iii) basic water and sewerage charges (in terms of sec 50(1)(a) of the Local Government Ordinance) 20 520-99

(iv) water consumption charges for the period after October 1994 in respect of unimproved stands (in terms of sec 50(1)(a) of the Local Government Ordinance) 20 727-82

(v) sundries 1 191-35

(vi) interest 28 264-30

R353 616-74

The respondent paid the amount of R353 595-47 to the appellant on 14 November 1996, on which date the clearance certificates were issued and transfer of the properties were registered at the Deeds Registry in Pretoria.

The respondent did not contend that he was not obliged to pay an amount of R222 305-02 to the appellant to obtain the clearance

certificates: this amount comprised the amounts claimed in respect of assessment rates (R196 674-36) and interest (R28 284-30) less a credit as at October 1994 of R2 633-64. The amount which Flemming DJP ordered the appellant to repay to the respondent, *viz* R131 311-72, is the difference between the total claimed by the appellant, R353 616-74 less the amount not disputed by respondent, *viz* R222 305-02.

The amounts set out above were agreed between the parties in terms of a memorandum prepared by their counsel at the request of Flemming DJP.

[5] In their heads of argument counsel for the appellant conceded that the appellant was not entitled to have demanded payment of the amount of R1 191-35, being the amount claimed in respect of "sundries", prior to or as a precondition to the issue of a clearance certificate. It was contended, however, that the appellant was entitled so to demand the balance of the amount which Flemming DJP ordered it to repay to the respondent, *viz* R130 120-37 (R131 311-72 less R1 191-35) and that the respondent was accordingly not entitled to an order for the repayment thereof.

[6] The respondent alleged in the court *a quo* that it paid the amount demanded from it by the appellant under protest. This was disputed by the appellant, which now concedes that, regardless of whether the respondent paid under protest or not, if the amount paid or part thereof was not due and payable, the respondent is entitled to recover it by way of a *condictio*.

[7] The basis for what I may call the respondent's main claim

for repayment is set out in paragraphs 23 and 24 of his founding affidavit which read as follows:

> "23.1 The corporation was liquidated because it could not pay its debts;
>
> 23.2 In terms of Section 66 of the Close Corporation Act No 69 of 1984, read with Section 339 of the Companies Act no 61 of 1973, Section 89 of the Insolvency Act is applicable;
>
> 23.3 It is accordingly submitted therefore that the amounts paid to [the appellant] are not 'a tax' and that therefore the Corporation is not liable to make payment of such sums as contemplated by Section 89(5) of the said Insolvency Act.
>
> 24 It will be submitted to this Honourable Court that:
>
> 24.1 the above amounts received by [the appellant] do not refer to taxes as contemplated by Section 89 (5) of the Insolvency Act No 24 of 1936 as amended;
>
> 24.2 [the appellant's] claim for such amounts was not secured as contended for by [the appellant];
>
> 24.3 payment of such sums should not have been procured by [the appellant] in the manner in which it achieved such object;
>
> 24.4 [the appellant's] claim for such sums is a concurrent creditor's claim against the Corporation;
>
> 24.5 the overpayment is not due or payable on [the appellant's] own version."

[8] Simply put, the basis for the respondent's main claim was that the appellant was only entitled to withhold a clearance certificate from the respondent because of the non-payment of "taxes", as defined in sec 89(5) of the Insolvency Act 24 of 1936. Since the amount in question was not paid in respect of such taxes it was not due and payable to the appellant when the clearance certificates were withheld. In the result the appellant was obliged to repay it to the respondent, after which, if so advised, it could prove a claim therefor in terms of sec 44 of

the Insolvency Act, which would not be a secured claim but only a concurrent one.

[9] The respondent sought orders declaring that the amounts due in respect of water supplied, sundries, rezoning and sewerage in respect of the properties did not constitute "taxes" as contemplated in terms of sec 89(1), read with sec 89(5), of the Insolvency Act; and that he had not been obliged to pay such amounts to the appellant in order to obtain a clearance certificate in terms of sec 50 of the Local Government Ordinance for the purpose of transferring the properties. (The statutory provisions referred to are quoted below.)

[10] He also sought orders for the repayment of the amounts paid in respect of water supplied, sundries, rezoning and sewerage, interest thereon and costs.

[11] Holding that there was no need to decide the issues raised by the prayers for declaratory orders, Flemming DJP, as has been said above, ordered the appellant to repay to the respondent the sum of R131 311-72, the computation of which is set out above.

[12] Flemming DJP held that the fact that the said amounts were in relation to debts which arose between the appellant as local government authority and a township owner was a *prima facie* indication that they had not been paid by the respondent liquidator to maintain property, to conserve property or as a cost of realising property (see the reported judgment at 1081 B-C).

[13] He held further that when a company is liquidated because it cannot pay its debts the nature of the claim of each of its creditors undergoes a change in that the claim to payment of a certain amount of money becomes a claim to payment of the appropriate dividend on the proved part of the claim, proof of the claim being a prerequisite. He also said that a secured creditor is normally not entitled to have money out of what he called "the liquidator's general kitty" and that payment

may be enforced only when the distribution account is finalised, which in most cases will be after the transfer of movable property (see 1081 D - E).

[14] He proceeded to decide that the appellant had not been entitled to payment at the time when payment was received. This was because the respondent was not obliged to pay an amount otherwise than in accordance with his finalised distribution account. He had, however, made payment in this matter because if he had not yielded to the appellant's insistence on payment, the liquidation process would have been stultified and the statutory duty to liquidate could not have been complied with (see 1081 G - I). He held that the payment made by the respondent in the present case did not constitute a cost of "realising any property" in terms of sec 89 (1) of the Insolvency Act because in making the payment the respondent had not extinguished a debt but had handed over money which he claimed the appellant had no right to be paid and which he proposed reclaiming in Court (see 1082 A - B). On this basis the Court *a quo* purported to distinguish the decision of Botha J in *De Wet en Andere NNO v Stadsraad van Verwoerdburg* 1978 (2) SA 86 (T) (to which I shall refer more fully in what follows). He also held that the appellant had succeeded in forcing payment out of funds to which it had no claim and which the respondent was not entitled in a distribution account to allocate to the appellant's claim (see 1082 H - J).

[15] He concluded that sec 50 of the Local Government

Ordinance, which he assumed to be valid, did not affect the position (see 1083 A - 1085 A).

[16] It will be observed from the summary I have given of Flemming DJP's judgment that he found in favour of the respondent, not on the basis contended for in the founding affidavit (*viz* that amounts which are not "taxes", as defined in sec 89 (5) of the Insolvency Act, cannot form the basis for a refusal by a local authority to give a clearance certificate in terms of sec 50 of the Local Government Ordinance of the Transvaal) but on the basis that, where a company (or a close corporation) is put into liquidation because it cannot pay its debts, the nature of its creditors' monetary claims changes and they become claims to payment of the appropriate dividend after the claims have been proved and the distribution account finalised.

[17] Before the legal questions arising for decision on appeal are considered it is advisable to set out the relevant statutory provisions to which reference was made during the argument.

[18] Sec 50 of the Local Government Ordinance 17 of 1939 (Transvaal), as amended, reads (as far as is material) as follows:

> "50. (1) No transfer of any land or of any right in land as defined in section 1 of the Local Authorities Rating Ordinance, 1977, within a municipality shall be registered before any registration officer until a written statement in the form set out in the Third Schedule to this Ordinance and signed and certified by the town clerk or other officer authorised thereto by the council, shall

be produced to such registration officer, and unless such statement shows –

(a) that all amounts for a period of three years immediately preceding the date of such registration due in respect of such land or right in land for sanitary services or so due as basic charges for water or as other costs for water where any water-closet system on the ground concerned has been installed or so due as basic charges for electricity in terms of the provisions of this Ordinance or any by-law or regulation:

(a) that all amounts, if any, due for any expenses incurred or advances made by the council to the owner of such land or right in land in terms of the provisions of section 81 (4), 83 (4) or 142 (1) of this Ordinance; and`

(b) that all amounts, if any, due for any expenses incurred or advances made by the council to the owner of such land or right in land in terms of the provisions of section 81 (4), 83 (4) or 142 (1 of this Ordinance; . . .

have been paid to the council: Provided that in the case of transfer of immovable property by a trustee of an insolvent estate, the provisions of this section shall be applied subject to the provisions of section 89 of the Insolvency Act, 1936 (Act 24 of 1936). . .

(2) The town clerk or other officer authorized by the council shall furnish the statement referred to in subsection (1) to the owner of the land or right in land or his attorney or agent upon demand and upon payment by him of a charge to be fixed by resolution of the council but not exceeding two rand for each such statement.

(5) Any amount due in terms of paragraph (a), (b), (c) or (d) of subsection (1) shall be a charge upon the land or right in land in respect of which such amount is owing and shall, subject to the provisions of section 142 (6), be preferent to any mortgage bond registered against such land or right in land subsequent to the coming into operation of this Ordinance."

[19] Sections 48(6) and 63(1) and (6) of the Town Planning and Townships Ordinance 15 of 1986 (Transvaal) read (as far as is material) as follows:

"48 (6) . . . [A] contribution contemplated in subsection (1) payable in respect of any particular land shall be paid to the local authority before –

(a) a written statement contemplated in section 50 (1) of the Local Government Ordinance, 1939, is furnished in respect of the land . . ."

"63 (1) Where an amendment scheme which is an approved scheme came into operation in terms of section 58 (1), the authorized local authority may, within a period of 30 days from the date of the commencement of the scheme, by registered letter direct the owner of land to which the scheme relates to pay a contribution to it in respect of the provision of –

(a) the engineering services contemplated in Chapter V where it will be necessary to enhance or improve such services as a result of the commencement of the amendment scheme;

(a) open spaces or parks where the commencement of the amendment scheme will bring about a higher residential density,

and it shall state in that letter –

(i) the amount of the contribution;

(ii) particulars of the manner in which the amount of the contribution was determined; and

(iii) the purpose for which the contribution is required.

. . .

(6) The provisions of section 48 (6) . . . shall apply *mutatis mutandis* to the payment of a contribution contemplated in subsection (1)."

[20] Section 89 (1), (4) and (5) of the Insolvency Act read as follows:

"(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.

. . .

(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 sub section (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."

[21] Provisions similar to section 50 (1) of the Local Government Ordinance 17 of 1939 (Transvaal) have been found in our law for many years: see *Nel N O v Body Corporate of the Seaways Building and Another* 1996 (1) SA 131 (A) at 134 B. In the *Nel* case,

at 140 E, they are called “embargo provisions” and most of the leading cases in which what were called “the principles relating to such embargoes” are referred to are discussed.

[22] Before the legal questions argued on appeal are considered it is appropriate to say something about the original contention raised by the respondent in his founding affidavit quoted in para [8] above.

[23] This contention is clearly based on an erroneous assumption,

(one which was common cause between the parties in *Greater Johannesburg Transitional Metropolitan Council v Galloway NO and Others* 1997 (1) SA 348 (W) at 356 A) *viz* that if any of the items prescribed by sec 50 (1) of the Local Government Ordinance was not a “tax”, as defined in sec 89 (5) of the Insolvency Act, the effect of sec 89 (4) was to relieve a trustee or liquidator from payment thereof as a prerequisite for obtaining a clearance certificate.

[24] This broad assumption was clearly erroneous in my view because it was based on an incorrect interpretation of sec 89 (4) of the Insolvency Act. Sec 89 (4), read with section 89 (1), does not relieve a trustee from paying debts mentioned in sec 50 (1) of the Ordinance unless they are taxes due on the property in question in respect of any period not exceeding two years before the sequestration or liquidation. On its plain meaning it limits the quasi-lien created by the embargo provision where the debt in question is a tax as defined to the two year

period mentioned. It imposes no limitation at all on the periods over which other debts mentioned in such embargo provisions have become due: in fact it does not deal with such debts.

[25] If one assumes, as Flemming DJP did and as I do (counsel for the respondent having conceded that it was not open to him to contend otherwise), that sec 50 is valid, then there is no basis on which it can be contended that amounts not constituting "taxes" listed in sec 50 (1) did not have to be paid by the respondent in order to obtain a clearance certificate. See in this regard *De Wet en Andere v Stadsraad van Verwoerdburg*, *supra*. Thus, although the amounts which the respondent sought to have repaid were not taxes, as he correctly alleged, the appellant was still entitled in terms of section 50 to withhold a clearance certificate until they were paid.

[26] Counsel for the appellant contended that the court *a quo* erred in holding that the nature of the claim of every creditor undergoes a fundamental change upon liquidation or sequestration and that what was due and owing beforehand was not due and owing after liquidation or sequestration. Counsel relied on the *Nel* decision, *supra*, in which it was held (at 139 E - F) that after sequestration or liquidation the whole of a pre-insolvency debt remained due and owing. It followed that the amount paid by the respondent to the appellant was (except for the sundries) due and owing when paid and accordingly could not be reclaimed.

[27] I agree. Once it is accepted, as it must, that the amounts paid (save for the sundries) were due and owing and that the appellant was entitled in terms of section 50 to require payment thereof as a prerequisite to its issuing a clearance certificate there is no legal basis for a claim that it be repaid. It is true that because of the *concursus creditorum* created by the liquidation of the corporation the appellant could not have taken the initiative in compelling the respondent to pay the amounts in question unless it proved a claim and then only after the finalisation of the liquidation and distribution account and to the extent of

the preference created by section 50 (3) of the Local Government Ordinance. The respondent could have decided not to realize the properties immediately and to file a first liquidation account which was not a final account (see section 92 (4) of the Insolvency Act). If the appellant had wished to benefit from the distribution of the other assets belonging to the corporation which were already realized, it would have had to prove a claim for the amounts owing to it so as to qualify for the payment of a dividend from the proceeds of those assets.

[28] If the respondent, however, wished to transfer the properties to the purchaser he had to pay the amounts due in respect of the rezoning fee, the basic water and sewerage charges and the water consumption charges in order to have the embargo created by section 50 of the Local Government Ordinance lifted, if necessary taking a loan in order to do so.

[29] A point analogous to the one presently under consideration was considered and decided in favour of a creditor entitled to avail itself of an embargo provision in *Bosman's Trustee v Land and Agricultural Bank of SA and Registrar of Deeds, Vryburg*, 1916 CPD 47. The embargo provision considered in that case was section 3 (4) of the Dipping Tanks (Advances) Act 20 of 1911 (as modified by the Land Bank Act 18 of 1912) which prohibited the transfer of a holding in respect of which the Registrar of Deeds had made a note that an advance had been made for the erection of a dipping tank, unless a receipt or certificate issued by the Land Bank had been produced to the Registrar for the interest or instalments payable in respect of the holding.

[30] Gardiner J, who gave the judgment in the matter, said (at 56-7):

> "If the Bank comes into Court as an applicant seeking to

> make the trustee in insolvency do something, it must show that it has a *locus standi* as a proved creditor. But the fact that it has not proved does not prevent it from maintaining its hold upon the landed property."

[31] An application brought by the trustee of the insolvent estate of the owner of the holding for an order authorising the Registrar of Deeds to pass transfer without the receipt or certificate required by section 3 (4) of Act 20 of 1911 having been lodged with him was accordingly, in my view correctly, refused.

[32] An amount paid in order to enable property sold by a trustee or liquidator to be transferred to the buyer is included in the cost "of maintaining, conserving and realising" property to which reference is made in sec 89(1) of the Insolvency Act: see *De Wet en Andere NNO v Stadsraad van Verwoerdburg*, *supra* , approved by this Court in the *Nel* decision, *supra* at 141 A.

[33] I cannot, with respect, agree that the *De Wet* case can be distinguished as Flemming DJP attempted to do. It concerned a payment of endowment moneys which were demanded by a local authority in terms of sec 50(1)(d) of the Local Government Ordinance before the issue of a clearance certificate. In holding that the payment of the endowment moneys constituted part of the costs of realising property, Botha J said (at 100 H - 101 C):

> "Wat is die gewone betekenis van 'die koste van tegeldemaking van goed'? Daaroor kan daar na my mening geen moeilikheid wees nie. Die 'tegeldemaking van goed' beteken klaarblyklik die omskepping van daardie

goed in geld; in die huidige verband, is dit die verkoping en oordrag van grond vir kontantgeld. Die 'koste' van die tegeldemaking beteken ewe klaarblyklik die uitgawes wat aangegaan word om die proses van tegeldemaking te bewerkstellig en te voltooi. Indien die bepaling ten opsigte van die betaalbaarheid van belasting alvorens transport van grond gegee kan word, soos vervat in art 50 (1) (b) van die Plaaslike Bestuursordonnansie, bestaan het sonder enige verwysing na art 89 van die Insolvensiewet in art 50(1), en art 89 nie verwys het na belasting nie, dan sou dit na my mening nie te betwyfel gewees het nie dat die belasting sou geval het binne die bestek van die uitdrukking 'die koste van tegeldemaking' van grond. Dit is so omdat die tegeldemaking, bestaande uit die verkoping en oordrag van die grond, nie sou kon geskied sonder die betaling van die belasting nie; dit is dus `n uitgawe wat noodsaaklik is om die tegeldemaking te bewerkstellig en te voltooi. Presies dieselfde benadering is van toepassing op die skenkingsgelde van art 50 (1) (d) van die Plaaslike Bestuursordonnansie: dit word betaalbaar by die verkoping van die grond en moet betaal word voordat oordrag gegee kan word; dit is dus `n noodsaaklike uitgawe in die proses van tegeldemaking van die grond."

[34] In this case also the liquidator paid the amounts in question in order to be able to transfer the properties, in other words, as a necessary expense in the process of realising the properties. The fact that he hoped to be able to recover the amounts paid does not detract from the fact that they were paid in order to enable him to transfer the properties.

[35] In the circumstances I am satisfied that the reasons given by Flemming DJP for his decision that the appellant had to repay to the respondent the amounts paid over by him in respect of the rezoning fee, the basic water and sewerage charges and the water consumption charges before the clearance certificate was issued cannot be supported.

[36] Counsel for the respondent did not endeavour to defend the reasoning in the judgment of the court *a quo*. He argued that the respondent was obliged to pay the amounts in question before obtaining the clearance certificate but that he was entitled to claim repayment of them immediately thereafter. For the reasons I have given the amounts in question were due when they were paid and no basis can exist for ordering the appellant to repay them to the respondent.

[37] I am accordingly of the opinion that the appeal in this matter should (save in respect of the sundries) succeed with costs, including those occasioned by the employment of two counsel.

[38] As far as the order made in the Court *a quo* is concerned it is clear that the only amount which the appellant should have been ordered to repay was the sum of R1191-35 in respect of the sundries. The success achieved by the respondent is very small in relation to the total amount claimed and the main contentions advanced on behalf of the respondent have been rejected. In my view it would have been appropriate for the Court *a quo*, despite the respondent's insignificant success in obtaining an order for repayment of the sundries, to order the respondent to pay the costs of the application.

[39] The following order is made:

C. The appeal is upheld with costs, including those occasioned by the employment of two counsel.

D. The order of the Court *a quo* is set aside and substituted

therefor is the following:

"1. The respondent is ordered to pay to the applicant:

(a) an amount of R1 191-35; and
(b) interest at the rate of 15.5% per year on that amount from 15 November 1996 to date of payment.

1. The applicant is ordered to pay the respondent's costs."

I G FARLAM

NIENABER JA)
ZULMAN JA)

CONCUR

STREICHER JA)
MELUNSKY AJA)