THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 9/08

CITY OF JOHANNESBURG Appellant

and

EVEN GRAND 6 CC Respondent

Neutral citation: *City of Johannesburg v Even Grand* (9/08) [2008] ZASCA 146 (27 November 2008)

Coram: STREICHER, BRAND, LEWIS, MAYA JJA and BORUCHOWITZ AJA

Heard: 18 NOVEMBER 2008
Delivered: 27 NOVEMBER 2008

Summary: Properties sold in terms of s 34(2) of Administration of Estates Act 66 of 1965 – s 118(2) of Local Government: Municipal Systems Act 32 of 2000 not applicable – interpreting s 118(1) according to plain meaning does not lead to result not intended by legislature.

ORDER

On appeal from: High Court, Johannesburg (Khampepe J sitting as court of first instance)

The appeal is upheld with costs and the order of the court a quo is set aside and replaced with the following order:

'The application is dismissed with costs.'

JUDGMENT

STREICHER JA (BRAND, LEWIS, MAYA JJA and BORUCHOWITZ AJA concurring)

[1] The issue to be decided in this appeal is whether a municipality is obliged, against payment by an insolvent of the proceeds of the sale of its immovable property, to issue a certificate that the property rates and other fees payable to it in connection with the property have been paid despite the proceeds being less than the amount owed to the municipality.

[2] Mr Manfred Hamburger, acting on behalf of a close corporation to be formed (the respondent being that close corporation) purchased four immovable properties (Erven 2394 and 2537, Jeppestown, Erf 64, Malvern and Erf 152, Jeppestown South, Johannesburg) at a public auction for a purchase price of R17 000. The auction was held at the instance of the executor in the Estate Late M E Ramos, acting in terms of s 34 of the Administration of Estates Act 66 of 1965. The amount owed to the appellant in respect of the four properties was some R80 000.

[3] In terms of s 34(1) of the Administration of Estates Act the

executor of a deceased estate shall on the expiry of the period allowed for the lodging of claims against the estate, satisfy himself as to the solvency of the estate and if he finds the estate to be insolvent, he shall report the position of the estate to the creditors, informing them that unless the majority in number and value of all the creditors instruct him to surrender the estate under the Insolvency Act 24 of 1936, he will proceed to realise the assets in the estate in accordance with the provisions of s 34(2). Section 34(2) provides that if the executor has not been directed to surrender the estate, he shall sell the assets in the estate.

[4] Having sold the assets in the estate, the executor has to submit to the master an account of the liquidation and distribution of the estate (see s 34(7)(a)). In terms of s 34(7)(b) such account 'shall provide for the distribution of the proceeds in the order of preference prescribed under the Insolvency Act, 1936, in the case of a sequestrated estate'. Section 34(13) stipulates that the provisions of the section shall not prevent the sequestration of any estate in terms of the Insolvency Act.

[5] In terms of s 118(1) of the Local Government: Municipal Systems Act 32 of 2000 ('the Systems Act'), the registrar of deeds may not register the transfer of a property except on production of a prescribed certificate ('a clearance certificate') that the municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties ('municipal debts') that became due in connection with the property during the two years preceding the date of application for the certificate, have been fully paid. However, the respondent contended that, in terms of s 89 of the Insolvency Act, the appellant was obliged, against payment of the proceeds of the sale of the properties, to issue a certificate

that all municipal debts in respect of the properties had been paid. As the municipal debts that had become due during the two years preceding the date of application for the certificate were substantially more than R17 000 (some R80 000, as indicated above) the appellant refused to issue a clearance certificate. The respondent thereupon applied for, amongst others, an order:

'1.1 That the respondent (the appellant in the appeal) issue and provide to the applicant (the respondent in the appeal) clearance certificates, as envisaged in Section 92(1) of the Deeds Registries Act No. 47 of 1937, valid for a period of no less than two months in respect of the following erven: 64 Malvern Township, 152 Jeppestown South Township, 2394 and 2537 Jeppestown Township, against payment of R17 000,00.'

[6] Section 92(1) of the Deeds Registries Act referred to in the order relates to certificates in respect of the payment of taxes and other amounts to the Government and provincial administrations and not to the payment of amounts due to local authorities. By the time of the hearing of the matter in the court a quo the respondent had come to realise that s 118(1) of the Systems Act was the applicable section and not s 92(1) of the Deeds Registries Act. The matter was then argued on the basis that, in terms of s 118(1) and (2) of the Systems Act, read with s 89 of the Insolvency Act, the appellant was obliged, against payment of the proceeds of the sale of the properties, to issue certificates that all municipal debts had been paid.

[7] Section 118(2) of the Systems Act provides that, in the case of the

transfer of property by a trustee of an insolvent estate, the provisions of s 118 are subject to s 89 of the Insolvency Act. In terms of s 89(1) of the Insolvency Act any tax as defined in s 89(5) in relation to immovable property 'which is or will become due thereon in respect of any period not exceeding two years immediately preceding the date of 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, . . . shall form part of the costs of realization' of that property. It provides further that such costs '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'.

[8] Relying on the provisions of s 118(2) of the Systems Act the court a quo held that s 118 was subject to the provisions of s 89 of the Insolvency Act when applied to the transfer of the properties. Proceeding from this premise the court a quo reasoned as follows: In terms of s 89(1) the amount claimed by the appellant constituted costs of realizing the properties, which had to be paid out of the proceeds of the properties if sufficient, and, if not sufficient, by creditors who had 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 cost of realizing the properties and these claims. There were no such creditors with the result that the cost of realizing the properties could only be paid out of the proceeds of the properties. If the legislature

intended that, in these circumstances, the purchaser of property should make payment of the balance required in order to procure a certificate in terms of s 118 it would have expressed itself in no uncertain terms. Stating that 'it is a truism that you cannot bleed a stone' the court a quo concluded that 'upon a proper construction of the relevant provisions of the Systems Act read with s 89 of the Insolvency Act, the respondent (the appellant in the appeal) is obliged to accept in fulfilment of all its claims against the insolvent estate, the proceeds of the properties in the sum of R17 000,00.'

[9] The court a quo nevertheless made an order in the terms prayed for, ie it ordered the appellant to issue clearance certificates 'as envisaged in Section 92(1) of the Deeds Registries Act', but granted the appellant leave to appeal to this court. In the light of the argument presented in the court a quo, and also the court a quo's reasoning, it probably intended to order that clearance certificates be issued in terms of s 118(1) of the Systems Act to the effect that the municipal debts that had become due in respect of the properties have been paid in full. The appeal was argued on this basis.

[10] The premise on which the court a quo based its reasoning is wrong. Section 118(2) of the Systems Act provides that in the case of the transfer of property by a trustee of an insolvent estate the provisions of s 118 are subject to s 89 of the Insolvency Act. In the present case we are not concerned with the transfer of property by a trustee of an insolvent estate, we are concerned with the transfer of property by an executor of an estate that is insolvent. Moreover, 'insolvent estate' is defined in s 2 of the Insolvency Act as an estate that is under sequestration and s 89 of the

Insolvency Act deals with such estates. The estate late Ramos has not been sequestrated. As stated above the creditors did not instruct the executor to surrender the estate. As a result the properties were sold in terms of s 34(2) of the Administration of Estates Act. It follows that transfer of the properties in question is not, in terms of s 118(2), subject to the provisions of s 89.

[11] In a letter written after the hearing of the appeal the respondent's attorney objected to the matter being decided on this basis, on the ground that it was not contended in the court a quo, in the application for leave to appeal, in the notice of appeal or in the appellant's heads of argument in this court, that the transfer of the properties is not subject to the provisions of s 89. There is no merit in this objection. The relevant facts are known and are common cause. It is specifically stated in the respondent's founding affidavit, and admitted in the appellant's answering affidavit, that sections 34(1) and (2) of the Insolvency Act had been complied with, that the creditors in the estate did not require the estate to be surrendered under the Insolvency Act and that the properties were sold in terms of s 34(2). The reference to sections 34(1) and (2) of the Insolvency Act was clearly erroneous and intended to be a reference to sections 34(1) and (2) of the Administration of Estates Act. Sections 34(1) and (2) of the Insolvency Act deal with the disposal of a business by a trader. Moreover, powers of attorney by the executor annexed to the founding affidavit bear a stamp by the Master to the effect that the estate is being administered in terms of s 34 of the Administration of Estates Act. In the circumstances it is of no consequence that the appellant did not, until the matter was argued in this court, advance the submission that the case does not concern the transfer of property by a trustee from an

insolvent estate and that s 118(2) of the Systems Act is for that reason not applicable. Unrestricted leave to appeal was granted to the appellant and the appellant was free to advance any legal argument based on these common cause facts.[1] Had the argument not been advanced by the appellant the members of the bench would in any event have questioned the applicability of s 118(2).

[12] Before us the respondent, relying on the provisions of the Insolvency Act read with s 34(7)(b) of the Administration of Estates Act, submitted that unless the amount payable in terms of s 118(1) in order to obtain the required certificate, is limited to the proceeds of the sale of the particular property, the municipality is in effect given a preference over other assets of the insolvent estate and that to do so was impermissible.

[13] As stated above s 34(7)(b) provides that the distribution account which the executor has to submit to the Master has to provide for the distribution of the proceeds of the sale of the properties 'in the order of preference prescribed under the Insolvency Act, 36 of 1936, in the case of a sequestrated estate'. In terms of s 118(3) of the Systems Act an amount due in respect of municipal debts 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. Section 89(4) of the Insolvency Act qualifies these provisions by providing that 'notwithstanding the provisions of any law which prohibits the transfer of any immovable property unless any tax as defined subsection (5) due thereon has been paid, that law shall not debar the trustee of an insolvent

[1] *Van Rensburg v Van Rensburg and others* 1963 (1) SA 505 (A) at 510A; and *Cabinet for the Territory of South West Africa v Chikane and another* 1989 (1) SA 349 (A) at 360F-G.

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'.

[14] Section 118(1) of the Systems Act gives the appellant the right to veto the transfer of property until such time as the rates and other amounts due in respect of the period of two years preceding the date of application for the certificate have been fully paid. In the result the appellant's claim is indeed, in effect, given a preference over other creditors. However, the section does not create any preference in favour of a municipality when it comes to the distribution of the assets or the proceeds of the assets in the estate.[2] It provides a municipality with a different remedy to the one provided by s 118(3).[3] Section 118(1) is therefore not affected by the provisions of s 34(7)(a), which deals with the order of preference applicable upon the distribution of an estate being administered in terms of s 34(2). It follows that, in so far as the claim of the appellant is given preferential treatment in terms of s 118(1), neither s 118(2) nor s 34(7)(a) contains any indication that, in the case of an insolvent estate being administered in terms of s 34(2), the legislature had a different intention.

[15] The only other argument advanced for interpreting s 118(1) so as to oblige a municipality to issue a clearance certificate in respect of an

[2] See *Rabie NO v Rand Townships Registrar* 1926 TPD 286; *South African Permanent Building Society v Messenger of the Court, Pretoria, and others* 1996 (1) SA 401 (T); and *Nel NO v Body Corporate of the Seaways Building and another* 1996 (1) SA 131 (A) at 134B-135D.

[3] *BOE Bank Ltd v Tshwane Metropolitan Municipality* 2005 (4) SA 336 (SCA) para 7.

immovable property against payment of the proceeds of the sale of that property is that it would be absurd to interpret the section otherwise, because such an interpretation may result in it being impossible to dispose of a property where the municipal debts due in terms of the section, during the two years preceding the date of application for the certificate, exceed the amount for which the property can be disposed of.

[16] In *Venter v Rex*[4] Innes CJ said that when to give the plain words of a statute their ordinary meaning would lead to absurdity so glaring that it could never have been contemplated by the legislature, or where it would lead to a result contrary to the intention of the legislature, as shown by the context or by such other considerations as the Court is justified in taking into account, the Court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and to give effect to the true intention of the legislature. However, 'the absurdity must be utterly glaring and the intention of the legislature must be clear, and not a mere matter of surmise or probability.'[5]

[17] In order to be of assistance to the respondent one would have to interpret the section so as to contain a proviso that, in the event of the proceeds of the sale of the property to be transferred being less than the municipal debts due in respect of the property in respect of the two years preceding the date of application for the certificate, and in the event of the transferor not having any funds to pay such municipal debts, a certificate should be issued by the municipality, against payment of the proceeds of the purchase price, certifying that such municipal debts have

[4] 1907 TS 910 at 914-915.
[5] *Shenker v The Master and another* 1936 AD 136 at 143.

been fully paid.

[18] In my view there is no basis on which it can be held that the legislature intended s 118(1) to be read subject to the aforesaid proviso. Although, upon payment of the municipal debts due in connection with a property, a municipality is obliged to issue a clearance certificate to that effect, the section deals with a function of the registrar of deeds and not with the discharge of the obligation to pay such municipal debts. Put differently, although a registrar of deeds may not register the transfer of property except on production of a clearance certificate for the required period the section does not purport to prescribe to a municipality what amounts it may or may not accept in settlement of the municipal debts due to it. This is a matter dealt with elsewhere in the Systems Act. In terms of s 109(2) of the Act a municipality may compromise or compound any claim. It follows that a municipality may agree to accept the purchase price of property or a lesser amount in payment of the municipal debts payable in respect of a property. If such purchase price is indeed the best price that can be achieved for the property, if no more can be recovered from the property owner, and if there is no prospect that the municipality may in the future be able to recover such municipal debts from the property owner, a local authority will probably be prepared to accept a lesser sum in payment thereof. By doing so it would enable the property to be transferred to a new owner who would upon transfer become liable to pay the rates and other municipal fees and charges payable in respect of the property. For these reasons I am not persuaded that to interpret s 118 according to the plain meaning of the section would lead to a result that could not have been intended by the legislature.

[19] In the result the appeal is upheld with costs and the order of the court a quo is set aside and replaced with the following order:
'The application is dismissed with costs.'

P E STREICHER
JUDGE OF APPEAL

APPEARANCES:

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