

SOUTH AFRICA / JUDGMENT

YST Properties CC v Ethekekwini Municipality and Others (CC 1948/08) [2009] ZAKZDHC 23; 2010 (2) SA 98 (D) (19 March 2009) [2009] ZAKZDHC 23

COURT
Kwazulu-Natal High Court, Durban

BEFORE
Sishi

CASE / FILE NUMBER
CC 1948/08

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IN THE HIGH
COURT OF SOUTH AFRICA
DURBAN AND
COAST LOCAL DIVISION
CASE NO. CC 1948/08

In the matter between:

YST PROPERTIES
CC
APPLICANT
and
ETHEKEKWINI MUNICIPALITY
1ST RESPONDENT
NINSIX SHARE BLOCK (PTY) LTD
2ND RESPONDENT
(IN LIQUIDATION)
FEDBOND PARTICIPATION
MORTGAGE
3RD RESPONDENT
BOND MANAGERS (PTY) LTD
4TH RESPONDENT

JUDGMENT

SISHI J

1. In this urgent application, the applicant seeks the following order in terms of the Notice of Motion:
 - (a) That this application be heard as a matter of urgency, dispensing with the usual forms and service under Rule 6(12)(a);
 - (b) Ordering the 1st Respondent within 24 hours of the service of this order, to furnish the Applicant with the certificate in terms of Section 118(1) of the Local Government: Municipal Systems Act 32 of 2000, which certifies that all the amounts that became due in connection with the remaining extent of Portion 13 of Erf 793 Dunns Grant for municipal service's fees, surcharges on fees, property rates and other municipal taxes, levies and duties during the two years preceding the date of application for this certificate have been fully paid.
 - (c) That the 1st Respondent pay the costs of this application on a scale as between Attorney and client.
2. In terms of the order granted by this Court on the 9th February 2008, the matter was to be heard on the Opposed Roll on the 28th February 2008 by arrangement with the Senior Judge.

The 1st Respondent is the only party opposing the application. The 2nd, 3rd and 4th Respondents abided the decision of the Court.

Background

3. The following facts are either common cause between the parties or not disputed. The immovable property which is the subject of this application is the remaining extent of Portion 13 of Erf 793 Dunns Grant. This property is situated at 1295/1301 South Coast Road, Mobeni, Durban. The registered owner of the property in question is the 2nd Respondent, Ninsix Shareblock (Pty) Ltd, a company in Liquidation. The 2nd Respondent hold ownership under the title deed T37420/1997, which is annexure "D" to the Applicant's Founding Affidavit
 4. On 1st February 2005, the liquidators of the 2nd Respondent entered into a Deed of Abandonment with Fedbond Nominees (Pty) Ltd, the 3rd Respondent herein, in terms of which Fedbond Nominees was to receive transfer of the immovable property. The Deed of the Abandonment is annexure "E" to the Founding Affidavit.
- Transfer of the property has not yet been registered in the name of Fedbond Nominees or any person.

5. On 22nd November 2006, Fedbond and the Applicant entered into an Agreement of Sale of Letting Enterprise in terms of which Fedbond sold to the Applicant, inter alia, the property. In doing so, Fedbond acted as the principal, in its role as the manager of the Collective Investment Scheme of Fedbond Nominees. The Agreement

of Sale of Letting Enterprise is annexure “F” to the Founding Affidavit. The 4th Respondent (Fedbond) is the manager of the Participation Bond Scheme of Fedbond Nominees as contemplated in Section 55 of the Collective Investment Schemes Control Act 45 of 2002. In terms of clause 5.1 of the Agreement of Sale and Letting Enterprise, the transfer of the property into the name of the purchaser shall be given by an Attorney, Hillary Shaw, “the conveyancer”. In terms of clause 5.1.3 of the said agreement, the purchaser must have paid the transfer costs, arrear rates, and taxes (and obtained the clearance certificate), stamp duty and any costs incidental to the transfer of the property as has been requested by the seller’s conveyancer.

A further condition in terms of clause 5.1.4 is that the seller’s conveyancer is in possession of a valid and up to date rates clearance certificate from the relevant local authority. In terms of clause 6.1 of the same agreement, all benefits, risks of ownership and loss of profit on the property shall pass to the purchaser from the date of registration of the transfer, from which date, the purchaser shall be liable for all rates and taxes, insurance premiums and any other charges levied against the property.

6. On 17th May 2007, Fedbond, the 4th Respondent, and the Applicant entered into a Memorandum of Agreement constituting an Addendum to the Agreement of Sale. Clause 6 of this agreement provides that

clause 5 of the principal agreement is supplemented by including the following new paragraph:

“5.3 In the event that the conveyancer is not able to register the transfer of the property into the name of the purchaser within 180 days from the date of the purchaser signing this agreement, due to any act or omission that can be attributed to the purchaser, and the purchaser fails, refuses and or neglects to perform on 7 days written notice to take such action as is required to register the transfer of the property into its name, this agreement shall lapse and be of no further force and effect, in which event the purchaser shall have no further claim against the seller arising out of this or the 1st agreement ...”

7. The 180 days from 17th May 2007, expired on 13th November 2007. The Applicant has complied with all its obligations under the agreement save that it has not been able to effect the transfer of the property because it cannot obtain the clearance certificate from the 1st Respondent in respect of the property. It

appears common cause that a dispute exist as to the amount of rates and other charges which the 1st Respondent may be entitled to collect from whoever is the owner of the property.

8. Under the agreement referred to above, the 3rd Respondent undertook a contractual obligation to the liquidators of the 2nd Respondent to pay whatever was owed to the 1st Respondent. In turn, the Applicant undertook a contractual obligation to Fedbond to pay

whatever was owing to the 1st Respondent and to obtain the necessary rates clearance certificate. Fedbond was aware of the rates disputes and it agreed in writing on 11th October 2007 to allow the Applicant an extension of time until the end of November 2007 to obtain a rates clearance certificate. The dispute on the rates and services account could not be resolved by the end of November 2007. Fedbond verbally agreed to allow the Applicant further extension to obtain the rates clearance certificate.

9. The conveyancers attending to the transfers on behalf of the 2nd Respondent,

3rd Respondent and the Applicant, Mr Shaw of Livingston Leandy Incorporated, applied for the rates clearance certificate in December

2007. In response to such request, and on 17th January 2008, the 1st Respondent provided such clearance figures in its Attorney's report of that date. This report is annexure "K" to the Founding Affidavit, and the 1st Respondent claims the following amounts as a precondition to the issue of the clearance certificate for the property:

Application fee

R 136,80

Rates

R 400 81 958,06

Monthly rates

R 40 250,24

Electricity

R 67 931,00

Water

R 13 979,36

TOTAL

R 400 704 225,46

10. A letter dated 22nd January 2008, marked "paid under protest" from Attorneys Livingston Leandy Inc, to the 1st Respondent, enclosed a cheque in favour of the 1st Respondent in the amount of R400 704 225,46 being the amount claimed by the 1st Respondent, this letter is annexure "L" to the Founding Affidavit. This money was paid in order that the rates clearance certificate could be issued. The cheque was also marked "paid under protest". The cheque and the letter were received by the 1st Respondent and the cheque in question was banked by the 1st Respondent on 22nd January 2008. The cheque was honoured by the bank. The cheque was drawn by Attorneys Livingston Leandy Incorporated, after that firm had been placed in funds by the Applicant in order for it to meet the obligation to obtain the

rates clearance certificate under the Agreement of Sale and the Addendum thereto.

11. On 25th January 2008, Mr Paley of the 1st Respondent telephonically advised Reshma Kassie of Livingston Leandy Incorporated that it would not allow the issue of a rates clearance certificate unless the condition of payment, namely, its being under protest, was withdrawn. In a letter dated 28th of January 2008, Fedbond demanded that the 1st Respondent issue a rates clearance certificate, failing which proceedings will be instituted to compel same. The demand was rejected by the 1st Respondent in a letter dated 29th January 2008.
12. In a final attempt to have the Rates and Services Account adjusted, the Applicant sent a letter per e-mail to the 1st Respondent on 30th November 2007 (Annexure “H” to the Founding Affidavit). The letter summarized various disputes on the Rates and Services Account provides proof thereof, and makes a proposal for settlement of the account in an attempt to draw the on-going disputes to finality so that transfer of property could take place. These proposals were rejected by the 1st Respondent.
13. I may as well mention at this stage that the Applicant has indicated that it intends to issue summons against the 1st Respondent for payment of the overpaid amount. The Applicant has indicated that it has no intention of suing the 1st Respondent for any amount other than the payment which is the difference between the amount banked by the Municipality on 22nd January 2008 and the correct amount owed to the Municipality in order to obtain the rates clearance certificate.
14. The 1st Respondent contends that it is not obliged to issue a rates clearance certificate to the Applicant for the following reasons:
 - (a) The Applicant has no locus standi to compel the issue of such certificate.
 - (b) The Application is not urgent;
 - (c) The outstanding rates have not been “fully paid” because payment was made “under protest” by a company that was not liable for them in the 1st place.

I propose to deal with each of these contentions in the order referred to above.

Locus Standi

15. The 1st Respondent has contended that the Applicant has no locus standi to bring this application.
16. The chain of contracts between the parties which led to the present position have been referred to in paragraphs 4, 5 and 6 of this judgment.

The following facts are common cause: The 2nd Respondent, a company in liquidation is the registered owner of the property in question. It abandoned the property to the 3rd Respondent. Fedbond, the 4th Respondent, is the manager of Collective Investment Scheme in Participation Bonds of Fedbond Nominees – the 3rd Respondent. The 4th Respondent in turn sold the property to the Applicant.

17. In terms of the agreements, the 3rd Respondent undertook a contractual obligation to the Liquidators of the 2nd Respondent to pay whatever was owed to the 1st Respondent. In turn, the Applicant undertook a contractual obligation to the 4th Respondent to pay whatever was owed to the 1st Respondent and to obtain the necessary rates clearance certificate.
18. These agreements have not been challenged by the 1st Respondent, save to refer to the agreement of sale between the Applicant and the 4th Respondent as “an alleged agreement”. These agreements remain valid until set aside by a court of law.
19. The 1st Respondent has contended that because the applicant will, in terms of the Deed of Sale, only acquire ownership of the property at some time in future, it has no “direct and substantial interest in the matter and consequently has no locus standi to bring this application. In support of this contention, the 1st Respondent relied in the case of *Vandenhende Vs Minister of Agriculture and Tourism, Western Cape and Others* 2000(4) SA 681 (at 691/692).
20. The facts of the *Vandenhende* case, *supra*, are clearly distinguishable from the facts of the present case. This case dealt with the locus standi of a purchaser and prospective owner of property to apply for a review of the decision of the Minister responsible for Local Government to lodge an appeal against the Local Authority’s refusal of an application for the rezoning of the property. The property zoned for single residential use, was sold to the Applicant, in terms of a Deed of Sale that contained a suspensive condition to the effect that the agreement would lapse unless an application for rezoning of the property for commercial use was approved by the relevant authority. Such Application was made by the selling agent and refused by the local authority and the subsequent internal appeal was dismissed. The Applicant then initiated a review of that decision. The Court correctly held that he had no locus standi to do so for various reasons. One of the reasons was that Section 17(1) of the Land Use Planning Ordinance 15 of 1985 required only the owner of land to apply. Section 2 defined an “owner” as a person in whose name that land was registered. The Court also held that the Applicant might have acquired such interest only after his status as a purchaser.
21. In the present case, Section 118(1) of the Local Government: Municipal Systems Act No.32 of 2000 (MSA) does not specifically say who must apply and obtain a rates clearance certificate. Anyone who has a direct and substantial interest in the registration of a property can apply for a rates clearance certificate, for example, sellers, purchaser and third parties. There is no legislation which prescribe as to who should apply and obtain a rates clearance certificate.

22. The Applicant submitted correctly in my view, that in this case, the request for a rates clearance certificate was actually made by the conveyancers involved and there is no doubt that the 1st Respondent was informed that, they were dealing with the transfer from the 2nd Respondent which is the owner of the property.
23. The Applicant further submitted that there is no dispute that the Applicant's interest in the property is that the purchaser who has contractual obligation to pay what is owed to the 1st Respondent and to secure a rates clearance certificate and which has a contractual right to receive the registration of transfer. It further submitted that this is sufficient interest to entitle the Applicant to compel the 1st Respondent to issue the rates clearance certificate.
24. Section 118 of the Local Government Municipal System's Act 32 of 2000, imposes restraint on transfer of property. Section 118(1) of the Act provides as follows:

"The Registrar of Deeds may not register the transfer of the property except on production to that Registrar of Deeds of a prescribed

certificate;

- (a) issued by a Municipality or Municipalities in which that property is situated;

and

- (b) which certifies that all amounts that became due in connection with the property for Municipal services fees, surcharges on fees, property rates and other Municipal taxes, levies and duties during the two year preceding the date of application for the certificate had been fully paid"

As indicated above, there is no provision in this Act which provides that only the owner of the property can apply for the rates clearance certificate.

25. The 1st Respondent in paragraph 7 of the Answering Affidavit records that it is prepared to issue rates clearance certificate provided:

- (i) the payment of the sum of R400 704 224,77 is made without any qualification, namely, removal of the use of the words "under protest"

(ii) that the Applicant concedes that it is taking over the liability of the 2nd Respondent to pay the rates and wish to extinguish the claim under Section 89 of the Insolvency Act;

(iii) the outstanding rates for the amount of January 2008 in the sum of R40 250,24, is paid.

The Applicant submitted correctly in my view that one of the three conditions requires that the application for such certificate be made by the owner or its conveyancers.

26. It has been submitted on behalf of the 1st Respondent that it held the view that pursuant to the provisions of Section 89(4) of the Insolvency Act, there was no need for the issue of the rates clearance certificate to effect transfer from the 2nd Respondent in Liquidation to the 4th Respondent. In support of this contention the 1st Respondent has referred to the case of Greater Johannesburg Transitional Metro Council vs Galloway NO & Others 1997 (1) SA 348 at 360 B/C and 361 A.

27. Section 89(4) of the Insolvency Act 24 of 1936 provides as follows:

“Notwithstanding the provisions of any law which prohibits the transfer of any immovable property unless any “tax” as defined in Section 84(5) due thereon has been paid, that law shall not debar the trustee of an insolvent estate from transferring any immovable property into that estate for the purpose of liquidating the estate, if he has paid the tax which may have been due in 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”.

Section 89(5) of the same Act provides as follows:

“For the purpose 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 a periodically payments, if that liability is an incident of the ownership of the property”.

Section 89(4) of the Insolvency Act entitles a liquidator to transfer property without a rates clearance certificate provided that certain tax is paid. In terms of Section 89(5) of the same Act, such “tax” is restricted to liabilities which are, “an incident of the ownership of that property”.

28. In the case of Greater Johannesburg Transitional metro Council, *supra*, referred to by both parties, it was held that charges for matters such as water and electricity are not “tax”, as contemplated by Section 89(5) of the Act (at page 358B).

29. It was also submitted on behalf of the Applicant that it has been held that in respect of such charges like electricity and water, the local authority is entitled to embargo the transfer of property from an insolvent estate until such amounts are paid and a clearance certificate provided accordingly. See *City of Johannesburg vs Kaplan NO & Another* 2006 (5) SA 10 (SCA) at page 18. In this case Heher JA stated the following:

“Before proceeding it may assist in providing a clearer appreciation of the conclusions at which I have thus far arrived, if I summarise the operation of Sections 118(1) and (3) in situations where the Municipal debtor is not subject to a sequestration nor a liquidation

order and to compare that with the position after the making of such

orders.

When such a debtor is not subject to such an order:

1. No property may be transferred unless a clearance certificate is produced to the registrar of deeds that certifies full payment of all Municipal debts as described in Section 118(1) which have become due during a period of two years before the date of application for the certificate.
2. Any amount due for Municipal debts (i.e. not limited by the aforesaid period of two years) that have not prescribed is secured by the property and, if not paid and an appropriate order of Court is obtained, the property may be sold in execution and the proceeds applied in the payment of debts. In such event, the proceeds will be applied to the payment of the Municipal debt in full. Only after satisfaction of such debts will the remainder, if any, be available for payment of the debt secured by a mortgage bond other than the property.

Once a debtor has been sequestrated or liquidated, the position is, to the extent that the Municipal debts are “taxes” within the meaning of Section 89(5), (but not otherwise) the following:-

1. No property may be transferred unless the clearance certificates certifies full payment of Municipal debts that have become due during a period of two years before the date of application for the certificate.
2. The preference accorded by Section 118(3) in favour of the Municipality over that of a holder of a mortgage bond is limited to claims which fell due during the period laid down in Section 89(1) i.e. two years prior to the date of sequestration or liquidation up to the date of transfer.
3. Interests charged on the secured claim of the Municipality are secured as if it were a part of the claim.

After sequestration or liquidation, those Municipal debts that are not “taxes” with the meaning of Section 89(5) continue to attract benefits of Section 118(3) without being affected Section 89 of the Insolvency Act” (at paragraphs 25,26,27, and 28).

30. It was submitted correctly on behalf of the Applicant that it is clear from the Attorney’s report that the amount claimed by the 1st Respondent included charges for electricity and water. Accordingly even the liquidator would still have had to obtain rates clearance certificate under Section 118 in respect of these charges because they are not “tax” as contemplated in Section 89 of the Insolvency Act. It is also clear from the Kaplan’s case, *supra*, that a clearance certificate would still be required under the present circumstances. The contention by the 1st Respondent

that no such certificate is required by virtue of provisions of Section 89(4) cannot be correct.

31. The 1st Respondent further contended that the Deed of Abandonment in respect of the said immovable property in favour of Fedbond, (the 1st bond holder) is tantamount to a disposition in settlement of its liability to Fedbond (the 1st bond holder) which equates to an undue preference of one creditor over another, namely, the 1st Respondent.

The 1st Respondent has submitted that this amounts to a contravention of the provisions of Section 30 of the Insolvency Act of 1936. Section 30 of the Insolvency Act provides as follows:

“(1) If a debtor made a disposition of his property at a time when his liability exceeded his assets, with the intention of preferring one of his creditors above another, and his estate is thereafter sequestrated, the Court may set aside the disposition”.

32. The Applicant submitted correctly in my view that the section relied upon by the 1st Respondent has no bearing upon the Deed of Abandonment entered into between the liquidators and the Fedbond nominees after liquidation. The Section specifically refers to transactions entered into prior to sequestration or liquidation. The submissions by the 1st Respondent that the Deed of Abandonment is voidable, that it falls to be set aside and that the Sale Agreement of immovable property, is likewise struck by the provisions of Section 30 of the Insolvency Act have no merit. Both agreements are in place and will remain in place until set aside by a Court of law.
33. The 1st Respondent in paragraph 7 of the Answering Affidavit records that is is prepared to issue the rates clearance certificate provided:

(ii) that the Applicant concedes that it is taking over the liability of the 2nd Respondent to pay the rates and wish to extinguish the claim under Section 89 of the Insolvency Act;

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