



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Reportable: No
Of interest to other judges: No
20 October 2022 Strijdom/AJ

CASE NO: 32188/2021

In the matter between:

CHURCHILL HOUSE (PTY) LTD (IN LIQUIDATION)
IVOR LANCELOT VAN DIGGELEN N.O.
THEODOR WILHELM VAN DEN HEEVER N.O.
REHANA MOOLLAJIE N.O.

First Applicant
 Second Applicant
 Third Applicant
 Fourth Applicant

And

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

Respondent

Judgment

Strijdom AJ

Introduction

- [1] The Applicant has brought an application seeking a declaratory order that the Respondent is obligated to furnish the Applicant within five days of granting the

order sought in the notice of motion with full and itemized particulars of the amounts which may have become due for payment in terms of section 118(1) of the Local Government Municipal Systems Act 32 of 2000 (hereinafter the act) in respect of any municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties for a period of two years prior to the granting of the order sought in respect of the units listed in the notice of motion.

[2] The Applicant is further seeking costs against the Respondent on attorney and client scale. The Respondent is opposing the application on the basis that the Applicant is not entitled to the order sought.

[3] The Respondent has raised a *point in limine* of lack of *locus standi* to bring this application.

Lack of *locus standi*

[4] It was submitted by the Respondent that the application ought to have been brought by the appointed liquidators on behalf of the Applicant and that the Applicants' attorneys have no *locus standi* to launch this application.

[5] An application of this nature need not be brought in the name of the liquidators. It has been held that the distinction between the citation of a company "in liquidation" or in the name of the liquidators, and the apparent distinction between the two forms of citing is pedantic.¹

¹ Gainsford and Others NNO v Tanzer Transport (Pty) Ltd 2014 (3) SA 468 (SCA).

- [6] The deponent to the founding affidavit states that he is a director of the Applicants' attorneys, that he is authorised to bring the proceedings, that he is authorised to depose to the affidavit in support of the application and that he has the requisite personal knowledge.²
- [7] If the Respondent sought to dispute the authority of the Applicants' attorney, such cannot be raised in an affidavit or heads of argument. The manner to raise the point on authority is to serve a Rule 7 notice. The Respondent did not avail itself of the procedure so provided.³
- [8] In its answering affidavit the Respondent contends that there had to be consent from the Master or a resolution by the creditors, authorizing, the applicant / liquidators / applicants' attorney, to institute proceedings.
- [9] The liquidators were appointed as final liquidators by the Master on 23 September 2021.⁴
- [10] Our courts have held that if a liquidator litigates without the prescribed authority, the litigation is not a nullity, it merely has potential adverse costs implications for the liquidator.⁵
- [11] It was submitted by the Applicant that, even if one were to accept the assumption of lack of authority, and ignore the doctrine of *stare decisis*, confirming that the

² Caselines: 001 – 6 paras 2-5.

³ *Ganes and Another v Telkom Namibia Ltd* 2004 (3) SA 615 (SCA).

⁴ *Vide*: (Annexure "RA 1") to the reply (p008-12).

⁵ *Lynn NO and Another v Coreejees and Another* 2011 (6) SA 507 (SCA).

Respondent cannot raise this point, such authority can retrospectively be obtained in terms of Section 386 (3) of the old Act or Section 386 (5). I agree with this submission.

Background

[12] The Applicant was placed in liquidation. The Applicant has disposed of the immovable property owned by it. The transfer of the property cannot be effected as the Respondent must first issue a clearance certificate as contemplated in Section 118 (1) of the Municipal Systems Act 32 of 2000 ("the MSA") enabling transfer of the Applicant's property.

[13] The Applicant through its attorneys of record, requested from the Respondent the statement charges referred to in Section 118 (1) of the MSA.

[14] The Respondent has issued the statement of clearance to the Applicant in respect of the property. Subsequent to the issuing of the clearance certificate, the Applicant addressed a letter to the Respondent disputing the amount reflected on the clearance certificate.

[15] The Respondent advised the Applicant that the rates clearance figures issued was issued in terms of Section 89 of the Insolvency Act.⁶

⁶ Act 24 of 1936.

Common Cause Facts

[16] The following facts are common cause between the parties:

- 16.1 The Applicant is the owner of the property consisting of the units listed in paragraph 9 of the founding affidavit;
- 16.2 The Applicant was placed in final liquidation on 31 July 2020;
- 16.3 The Respondent issued the clearance figures appended as Annexure "B" to the founding affidavit, which include amounts outside the two-year period catered for in Section 118 (1), being two-years prior to the application for clearance figures;
- 16.4 The clearance figures issued, include historic charges, outside the aforesaid two-year prescribed period, as the Respondent also claim charges accruing two years prior to the liquidation of the Applicant under the auspices of Section 89 of the Insolvency Act;
- 16.5 The Applicant dispatched a letter of demand on 31 May 2021, calling upon the Respondent to issue clearance figures in terms of Section 118 (1) without the addition of alleged inflated and unlawful charges. The demand is appended as Annexure "C" to the founding affidavit.

The Clearance Figures

[17] Section 118 (2) of the MSA provides that:

“A registrar of deeds or other registration officer of immovable property may not register the transfer of property except on production to that registration officer of a prescribed certificate –

(a) issued by the municipality in which that property is situated; and

(b) which certifies that all amounts 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.”

[18] Section 118(2) of the Act provides that in the case of the transfer of immovable property by a trustee of an insolvent estate the provisions of this Section are subject to Section 89 of the Insolvency Act, (Act no 24 of 1936).

[19] It was submitted by the Respondent that a liquidator of a company or close corporation are equally as liable to pay the charges referred to in Section 118 (1) of the Act as a natural person are.

[20] It was further submitted that there is no rational in applying Section 89 of the Insolvency Act to Section 118 (1) of the MSA in the context of the sequestration of an individual, but excluding it for the liquidation of a juristic person.

- [21] The Respondent argued that the two year period provided for in Section 89 (1) of the Insolvency Act differs from that provided for in Section 118 of the MSA in that Section 89 of the Insolvency Act relates to the Respondents ' secure claim for the payment of taxes for a period of two years prior to the date of liquidation and Section 118 of the MSA relates to the payment of municipal charges for a period of two years prior to the substitution of an application for a certificate required to be lodged in the deeds office as part of conveyancing properties. The Respondent is therefore obligated to issue rates clearance figures for two years preceding the date of liquidation, as well as figures from date of liquidation to the date of transfer including interest on the month payable.
- [22] It was submitted by the Applicant that only Section 118 (1) charges are claimable by the Respondent, before issuing a clearance certificate, notwithstanding other older charges allegedly owing, irrespective of the provisions of Section 89 of the Insolvency Act.
- [23] In this matter a dispute arose between the Applicant and the Respondent in respect of the amount payable to obtain clearance certificates. The Applicant maintained that the amount should be calculated over a period of two years preceding the dates of application for clearance certificates, in terms of Section 118 (1). The contention of the Respondent was that the amount should be calculated over a period of two years preceding the date of liquidation.

- [24] In the correspondence from the Respondent, it was conceded that the charges reflected in the clearance figures were only Section 89 taxes as it was contended that Section 118 (1) found no application.⁷
- [25] In the answer, dated 13 October, the Respondent contends that the clearance figures are to include Section 118 (1) charges and the Section 89 taxes, as it claims amounts owing two years prior to liquidation (8 November 2017- 8 November 2019 (as the provisional liquidation order was granted on 8 November 2019), and the municipal charges after liquidation up to transfer (being charges accruing from 9 November 2019 to date of transfer).⁸
- [26] The factual matrix in this matter is uncomplicated and mostly common cause.
- [27] This court is bound by the doctrine of *stare decisis*.
- [28] In the matter of Steve Tshwete Local Municipality v Fedbond Participation Mortgage Bond Managers (Pty) Ltd and Another⁹ it was decided that “notwithstanding the longer period referred to in s89, liability for payment of a tax as defined in s89 (5) to a municipality in order to obtain a certificate in terms of s118 (1) in respect of immovable property falling in an insolvent or liquidated estate is limited to the period mentioned in s118 (1).

⁷ Caselines p008-15 to 008-16.

⁸ Caselines p005-9 to 005-10.

⁹ 2013 (3) SA 611 (SCA). See also *Boe Bank Ltd v Tswane Metropolitan Municipality* 2005 (4) SA 336 (SCA) and *Real People Housing (Pty) Ltd v City of Cape Town* 2010 (1) SA 411 CC).

[29] In BOE Bank Ltd v Tshwane Metropolitan Municipality Brand JA held that the veto (embargo) in s118(1) and the charge in s118(3) are two separate entities and that s118(3) is an independent, self-contained provision. He accordingly held that the only plausible interpretation of s118(3) is that it is not subject to the time limit contemplated in s118(1).

[30] It was further decided "that when an embargo period laid down in any other law is effectively shorter than the two-year period in s89(1) the shorter period continues to apply after sequestration. Because s89(4), is intended to limit (and not to extend) embargo provisions, its effect cannot be to extend the embargo period in terms of s118(1) to a period longer than the period of two years preceding the date of application for a certificate. It allows that the submission of the municipality, that in terms of s89(4) the period of the embargo is extended beyond the period mentioned in s118(1) is not consistent with the *ratio decidendi* in Kaplan...."

[31] In my view only Section 118(1) charges are claimable by the Respondent, before issuing a clearance certificate notwithstanding other older charges allegedly owing, irrespective of the provisions of s89.

Alternative remedy

[32] A dispute about the amount of the consumption charge that must be settled before a s118(1) certificate can be issued is a justifiable issue. There is nothing

to prevent any owner or purchaser of property, including the applicant in this case, from accessing a court to have the justifiable issue resolved.

- [33] A demand was served by the Applicant calling upon the Respondent to rectify the charges in the clearance figures provided to the Applicant, which elicited no response.

Conclusion

- [34] The Respondent must explain the charges raised in the clearance figures with sufficient particularity and the liquidators must be able to assess the new figures provided, which requires a detailed breakdown of the computation of the s118(1) figures.

- [35] A proper case has been made out for the relief sought in the notice of motion.

Costs

- [36] The Respondent was properly advised by the Applicant that its interpretation of Section 89 of the Insolvency Act was flawed and that it was in fact obliged to issue clearance figures consisting only of the amounts claimable in terms of Section 118 (1). The Respondent was also referred to the relevant case law.

- [37] It is well established that organs of state, are required to uphold the rule of law and not act in contravention of same.

[38] It was submitted by the Applicant that there is no reason why the *concursum creditorum* should foot the bill for any costs occasioned by the application.

[39] I am of the view that a punitive cost order is warranted as the opposition to this application is unfounded.

[40] In the result the draft order marked X is made an order of court.



J.J. STRIJDOM
Acting Judge of the High Court of
South Africa, Gauteng Division

Heard on: 30 August 2022
Date of Judgment: 20 October 2022

Appearances

For the Applicant: Advocate A.P. Ellis
Instructed by: K G Tserkezis Inc.

For the Respondent: Advocate U.B. Makuya
Instructed by: Leepile Attorneys

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

20 October 2022

On this the 30th day of August 2022.

Before the Honourable Justice Strijdom AJ:

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CHURCHILL HOUSE (PTY) LTD (IN LIQUIDATION)

First Applicant

IVOR LANCELOT VAN DIGGELEN N.O.

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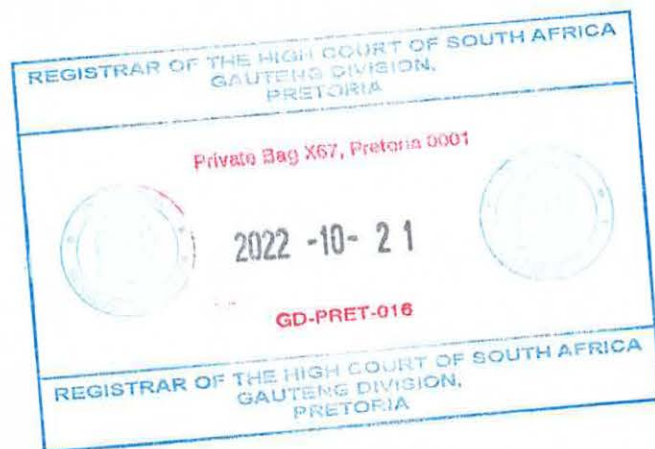
DRAFT ORDER

HAVING READ THE DOCUMENTS FILED AND HAVING HEARD COUNSEL FOR THE PARTIES, THE FOLLOWING ORDER IS GRANTED:

1. Declaring that the Respondent is obliged to furnish the Applicants within 5 days of the granting of this order with full and itemised particulars of the amounts which may have become due for payment in terms of section 118(1) of the Local Government: Municipal Systems Act 32 of 2000 ("the Act") in respect of any municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties for a period of two years prior to the granting of this order in respect of Units S0000, S0001, S0002, S0004, S0005, S0006, S0007, S0008, S0009 of Churchill House Sectional Scheme with Sectional Deed Title Numbers ST122160/2006, ST122161/2006, ST122159/2006, ST50891/2006, ST69701/2005 AND ST80825/2006 in the suburb of Pretoria;
2. That the Respondent is ordered to pay the costs of this application on the scale as between attorney and client.

BY ORDER


REGISTRAR



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2022