



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 887/13
Reportable

In the matter between:

**MEC LOCAL GOVERNMENT AND TRADITIONAL AFFAIRS,
KWAZULU-NATAL**

APPELLANT

and

**JOACHIM HENDRIK BOTHA NO
PHILLIP DAVID BERMAN NO
OLIVIER MICHAEL POWELL NO
MUNICIPALITY OF ETHEKWINI**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT**

Neutral citation: *MEC Local Government and Traditional Affairs v Botha NO*
(887/13) [2014] ZASCA 211 (1 December 2014)

Coram: Navsa ADP, Shongwe, Theron and Swain JJA and Fourie AJA

Heard: 18 November 2014

Delivered: 1 December 2014

Summary: Valuation of immovable property by municipality for purpose of levying rates in terms of Local Government: Municipal Property Rates Act 6 of 2004 – variation to valuation roll occurs in terms of s 55 as a result of objections lodged or by means of a supplementary valuation in terms of s 78 – In present circumstances s 80 of the Act in terms of which MEC may grant condonation and extension of time periods, inapplicable.

ORDER

On appeal from: KwaZulu-Natal High Court, Pietermaritzburg (Tonjeni AJ sitting as court of first instance)

- 1 The appeal is upheld with costs.
- 2 The cross-appeal is dismissed with costs.
- 3 The order in the court below is set aside and substituted as follows:

‘The application is dismissed.’

JUDGMENT

Fourie AJA (Navsa ADP, Shongwe, Theron and Swain JJA concurring):

[1] This appeal concerns the valuation of immovable property situated within the jurisdictional area of a municipality, for the purpose of levying rates on such property in terms of the provisions of the Local Government: Municipal Property Rates Act 6 of 2004 (the MPRA). In particular, it deals with the question whether in the prevailing circumstances a late objection to a valuation roll may be lodged by invoking s 80 of the MPRA.

[2] Erf 324, Suburb Assagay (the property) is situated within the jurisdictional area of the fourth respondent, the municipality of Ethekewini (the municipality). In 2008 the property was entered in the municipality’s valuation roll maintained in terms of s 23 of the MPRA, reflecting its municipal valuation as R23 million.

[3] The property was owned by Universal Retail Portfolio (Pty) Limited (URP). On 31 March 2010 URP was finally wound up by an order of the North Gauteng High Court, Pretoria, and on 18 June 2010 the first to third respondents were duly appointed by the Master of the high court as the liquidators of URP (the liquidators).

On 8 September 2011 and in the execution of their duty to liquidate the assets of URP, the liquidators sold the property to a third party for a purchase consideration of R4,35 million. Pursuant to the sale, the liquidators requested a clearance certificate reflecting the amount payable to the municipality in respect of rates to enable transfer of the property to be registered in the name of the purchaser.

[4] The municipality provided the liquidators with a clearance certificate indicating that an amount of R2 708 900 was owed to the municipality by URP as at 12 October 2011. This included assessed and arrear rates of R2 707 200 levied in respect of the property, calculated on the 2008 municipal valuation of R23 million.

[5] The liquidators took the view that the 2008 municipal valuation of the property was substantially incorrect and sought to persuade the municipality that the fair market value of the property as at 24 March 2011, did not exceed R4,5 million. In this regard the liquidators relied on the valuation of a professional valuer. However, the municipality refused to reconsider its 2008 valuation of the property. In fact, it took the view that the 2008 valuation of R23 million was not subject to change as no objection had been lodged against it and 'no value adjustments can be done going back in time'.

[6] To fully appreciate the background to the litigation that followed, it is necessary to have regard to the legislative framework within which rates are imposed on immovable property situated in the jurisdictional area of a municipality. The starting point is s 229 of the Constitution which provides that a municipality may impose rates on property and that such power may be regulated by national legislation. The MPRA is the national legislation envisaged by s 229 of the Constitution.

[7] Section 30 of the MPRA provides that a municipality intending to levy rates on properties within its jurisdictional area, has to value such properties and prepare a valuation roll reflecting the valuations. In terms of s 31 a valuation must reflect the market value of the relevant property, while s 32 provides that a valuation roll remains valid for the financial year in which it takes effect, but may be extended by

the municipality for a maximum period of four financial years. A financial year is defined in s 1 to mean the period from 1 July in a year to 30 June the next year.

[8] Section 50 of the MPRA, read with s 49(1)(a), provides for the inspection of, and objections to, valuation rolls. In terms thereof any person may lodge an objection with the municipal manager against any matter reflected in, or omitted from, the valuation roll. An objection has to be lodged within 30 days from the date of the publication of a notice by the municipality inviting the public to inspect the valuation roll and to lodge objections thereto. Sections 51 to 53 prescribe the procedure to be followed in the event of objections being lodged, while s 54 provides for an internal right of appeal to an appeal board by a person who has lodged an objection and who is not satisfied with the decision of the municipal valuer in regard thereto. Section 55 deals with adjustments or additions to valuation rolls necessitated by successful objections raised against the valuation of specific individual properties. Section 78 provides for the publication of supplementary valuation rolls in cases where properties were, inter alia, substantially incorrectly valued during the last general valuation.

[9] Section 80 of the MPRA reads as follows:

‘Condonation of non-compliance with time periods

(1) The MEC for local government in a province may, on good cause shown, and on such conditions as the MEC may impose, condone any non-compliance with a provision of this Act requiring any act to be done within a specified period or permitting any act to be done only within a specified period.

(2) Non-compliance with section 21, 31, or 32 may not be condoned in terms of subsection (1).

(3) The powers conferred in terms of this section on an MEC for local government may only be exercised within a framework as may be prescribed.’

[10] It is common cause that no objection had been lodged against the 2008 valuation of the property or during any subsequent fiscal period until the appointment of the liquidators. When the liquidators sold the property during September 2011, the 2008 valuation was still in force. However, the liquidators had no knowledge thereof and it was only when registration of transfer had to take place that they were made

aware of the 2008 valuation of R23 million and the amount of some R2,7 million payable to the municipality in respect of assessed and arrear rates, calculated on the 2008 valuation of the property.

[11] Absent an objection against the 2008 valuation of the property, the internal appeal procedure provided for in s 54 of the MPRA, was not available to the liquidators. For the same reason the liquidators were unable to seek an adjustment in terms of s 55 of the MPRA, while the passage of time precluded them from obtaining any meaningful relief in terms of s 78. It will be recalled, as set out in para 8 above, that s 78 provides for the publication of supplementary valuation rolls. In the event, the liquidators resorted to s 80 of the MPRA by lodging an application with the appellant (the MEC) for condonation and leave to lodge a late objection against the 2008 valuation of the property. The MEC was allowed seven days to respond thereto, but when no response was received, the liquidators approached the court *a quo*, citing the municipality and the MEC as respondents, for, *inter alia*, the following relief:

- (a) An order setting aside the 2008 municipal valuation of the property.
- (b) Alternatively, an order granting the liquidators condonation for the late filing of an objection against the 2008 municipal valuation of the property, which condonation is to be deemed to be granted in terms of s 80 of the MPRA.
- (c) Further alternatively, an order directing that the MEC consider the liquidators' application for condonation in terms of s 80 of the MPRA within a period of 14 days from the date of the court's order.

[12] The municipality and the MEC opposed the application and filed opposing papers. The matter was heard by Tonjeni AJ, who made an order whereby:

- (a) The application for the setting aside of the 2008 municipal valuation of the property was dismissed.
- (b) The liquidators' application for condonation in terms of s 80(1) of the MPRA was referred back to the MEC for her consideration and decision within 30 days of the date of the court order; and
- (c) The parties are to bear their own costs.

[13] The MEC appeals, with the leave of the court a quo, only against the order referring the application for condonation back for her consideration and decision. The MEC contends that this order be varied to read:

‘In all other respects the application is dismissed.’

[14] The liquidators have, also with the leave of the court a quo, filed a cross-appeal against the same order, which they contend should be substituted with an order in the following terms:

‘That condonation be granted to the applicants [the liquidators] in terms of s 80(1) of Act 6 of 2004 and that the applicants be permitted to file with the first respondent [the MEC] an objection against the 2008 municipal valuation of the immovable property in terms of s 50(1)(c) of Act 6 of 2004 within a period of 30 days from the date of the order.’

I should add that the municipality abides the decision of this court.

[15] With regard to the invocation of s 80 of the MPRA by the liquidators, the MEC submitted that it finds no application as the framework of the MPRA reveals a design that has the effect of completing all disputes about valuation within the strict time limits laid down by the MPRA. She further submitted that the ambit of s 80 does not extend to applications made by affected parties other than municipalities. The liquidators, on the other hand, submitted that, upon a proper interpretation of s 80 of the MPRA, it does extend to applications for condonation made by other affected parties, such as themselves.

[16] Before considering whether or not the condonation and extension of time provisions in s 80 of the MPRA find application, I first turn to the mystery surrounding the 2008 valuation of the property in an amount of R23 million. By all accounts this valuation is 500 per cent more than the true market value of the property. It appears from the liquidators’ papers filed that URP purchased the property on 17 August 2006 at a purchase price recorded as R24 million. This purchase consideration no doubt played a major role in the municipality arriving at a valuation of R23 million in 2008. Reflecting on this purchase price of R24 million, the deponent to the founding affidavit of the liquidators said the following at para 11.6:

‘The only conclusion I can make is that the previous purchase price was inflated by the members of [URP].’

[17] In this regard the deponent referred to a letter of the liquidators' attorneys and conveyancers, dated 6 February 2012, in which the following is said:

'As you may know, the property in question (Erf 324 Assegay) was purchased for the amount of R24 million in 2006. The purchase price is extremely excessive and we have little doubt that this purchase price was stipulated as R24 million in order to claim VAT from the Receiver of Revenue. The value of the property is and was never R24 million.'

[18] It is abundantly clear that the actual purchase price paid by URP in 2006, would not have been R24 million. The overwhelming probability is that this was a simulated purchase price which enabled URP to fraudulently claim an inflated amount as VAT from the Receiver of Revenue. I should add that it also appears from the papers that, at the time of the purchase of the property by URP in 2006, a mortgage bond in the sum of R24 million was registered over the property in favour of a financial institution. The simulated purchase price would no doubt have served as justification for the financial institution to grant a loan of R24 million.

[19] URP not only misrepresented the 2006 purchase price of the property, but subsequently failed to take any steps to prevent the misrepresentation from materially influencing the 2008 municipal valuation of the property. URP lodged no objection against the valuation of R23 million; in fact, it acquiesced and allowed this hugely inflated valuation of the property to be reflected in the valuation roll for several fiscal periods thereafter. It is clear that URP did not take any steps during the subsequent years to cause a supplementary valuation to be made of the property in terms of s 78 of the MPRA, to rectify this substantially incorrect valuation. In these circumstances URP would not only be prevented from benefiting from its own fraudulent conduct, but also be precluded from having such conduct condoned by allowing it to lodge a late objection to the 2008 valuation. In any event, URP would certainly not be able to show 'good cause', entitling it to relief in terms of s 80 of the MPRA.

[20] The question then arises whether the liquidators, who have stepped into the shoes of URP, are entitled to enforce any rights under s 80 of the MPRA, to enable them to lodge a belated objection against the 2008 valuation of the property. To my

way of thinking, the liquidators are in no better position than URP. As explained by the authors M S Blackman, R D Jooste, G K Everingham, J L Yeats, F H I Cassim and R de la Harpe *Commentary on the Companies Act* vol 1 at 14-29, the general rule is that a liquidator must take the company's rights and obligations as he or she finds them. See also *Thomas Construction (Pty) Ltd v Grafton Furniture Manufacturers (Pty) Ltd* 1988 (2) SA 546 (A) at 568B. From this it follows that a liquidator's ability to enforce a company's rights is subject to any defence that was available against the company before its liquidation. See Blackman et al *Commentary on the Companies Act* at 14-289.

[21] In *Langham NO & another v Milne NO* 1962 (4) SA 574 (N) Caney J dealt with the situation where the trustees of an insolvent sought to enforce an illegal agreement concluded by the insolvent. The learned judge opined as follows at 580B-E:

'The answer to the problem lies in the fact that in a trustee are vested the assets, including rights of action, of the insolvent. The trustee can enforce such rights of action as the insolvent could enforce; there is a cession or assignment of them to him by force of law, but like any other cessionary he takes them subject to defences available against the insolvent in whose shoes he stands in so far as concerns enforcement of rights of action . . . Illegality is one such defence; if by reason of this the insolvent has no right of action, none passes to his trustee. . . . The trustee cannot enforce an illegal contract made by the insolvent.'

I agree with the reasoning of the learned judge and with his conclusion that the illegality of the agreement in question debarred the trustees from enforcing the illegal agreement for the benefit of the creditors of the insolvent estate.

[22] With regard to the application under s 80 of the MPRA, the liquidators have stepped into the shoes of URP, the registered owner of the property at the time of the 2008 valuation. As URP would, for the reasons mentioned, have no rights to enforce under s 80 of the MPRA, the liquidators similarly would have no rights. They can have no greater rights than URP could have had. I should add that the liquidators have not attempted to show that they have acquired any independent rights, which would afford them a separate ground upon which to attack the 2008 valuation of the property. Nor should this court speculate as to what other rights, if any, may be available to the liquidators.

[23] In terms of the MPRA, a variation of a municipality's valuation roll occurs in terms of s 55 as a result of objections lodged, or by means of a supplementary valuation in terms of s 78. There is no room, particularly in the present circumstances, for a variation of the 2008 valuation of the property by means of an application for condonation and late lodging of an objection in terms of s 80 of the MPRA.

[24] In terms of s 55 of the MPRA, an adjustment or addition to the valuation roll may be made in the following circumstances:

- (a) after the lodging of a successful objection within the time limit specified in s 49 of the MPRA.
- (b) upon the compulsory review of decisions of the municipal valuer where he or she has, as a consequence of the lodging of a valid objection, adjusted the valuation of a property by more than 10 per cent upwards or downwards;
- (c) upon a successful appeal to an appeal board against a decision of the municipal valuer subsequent to the lodging of a valid objection.

[25] Section 55(1) of the MPRA provides that any such adjustment or addition takes effect on the effective date of a valuation roll. In terms of s1 of the MPRA the effective date in relation to a valuation roll, means the date on which the valuation roll takes effect, ie from the start of the financial year upon which the valuation roll first takes effect. As mentioned earlier, the liquidators were not able to seek any relief under s 55 of the MPRA, as no objection had been lodged by URP against the 2008 valuation roll within the time period specified.

[26] Section 78 of the MPRA provides for the making of supplementary valuations, inter alia, where it appears that a property had been substantially incorrectly valued during the last general valuation. However, in terms of s 78(4)(a) the rates based on the valuation of a property in a supplementary valuation roll, only become payable with effect from the effective date of the supplementary roll. As I have also mentioned previously, no steps have to date been taken to cause a supplementary valuation to be made in respect of the property.

[27] It follows from the above that there is no remedy available to the liquidators under the MPRA which would entitle them to lodge an objection to the 2008 valuation at this stage. In particular, they have no remedy under s 80 of the MPRA. It is accordingly not necessary to decide whether or not the condonation and extension of time provisions of s 80 of the MPRA, extend to applications made by affected parties other than municipalities. However, as this has been the topic of much debate, I will deal with it succinctly and without elaboration.

[28] There is, in my view, no merit in the contention of the MEC that s 80 only extends to applications made by municipalities. In terms of s 80(1) the powers of the MEC to grant condonation are of wide import, authorising her to condone any non-compliance with a provision of the MPRA requiring any act to be done within a specified period or permitting any act to be done only within a specified period. (My emphasis.) There is no indication in the wording of the section of an intention on the part of the legislature to limit the MEC's power to grant condonation to a municipality only. Section 80(2) of the MPRA provides that non-compliance with ss 21, 31 or 32 (which do not apply in the instant case) may not be condoned in terms of subsection (1). Had the legislature intended to exclude affected parties other than municipalities, it could easily have been done in the same manner, by expressly excluding such other parties from the provisions of s 80(1).

[29] It also appears from the prescribed framework within which the MEC is to exercise her powers in terms of s 80, that she may condone non-compliance with a provision of the MPRA requiring any act to be done within a specified period or permitting any act to be done only within a specified period. (My emphasis.) Once again the wide import of the words is indicative of an intention to include all affected parties. I therefore have no hesitation in concluding that s 80 of the MPRA enures to the benefit of all affected parties and not to municipalities only. I may suggest that the correctness of this view is underscored by the fact (as we were informed from the Bar) that the MEC is in the process of seeking an amendment to s 80 of the MPRA to limit its application to municipalities only.

[30] In view of my conclusion that the liquidators are unable to rely on the provisions of s 80 of the MPRA in order to lodge an objection to the 2008 valuation at

this late stage, it follows that the court a quo erred in referring the liquidators' application in terms of s 80 to the MEC for her consideration and decision. In the result the appeal should succeed, while the liquidators' cross-appeal falls to be dismissed.

[31] The following order is made:

- 1 The appeal is upheld with costs.
- 2 The cross-appeal is dismissed with costs.
- 3 The order in the court below is set aside and substituted as follows:
'The application is dismissed.'

P B Fourie
Acting Judge of Appeal

APPEARANCES:

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