THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

Case no: 671/2002

In the matter between:

FIRST RAND BANK LIMITED Appellant

and

THE BODY CORPORATE OF GEOVY VILLA Respondent

Coram: *Harms, Scott, Navsa, Cloete and Heher JJA*

Date of hearing: **4 November 2003**

Date of delivery: **28 November 2003**

Summary: Interaction between s 15B(3)(a)(i)(aa) of the Sectional Titles Act 95 of 1986 and s 66(2) of the Magistrates' Courts Act 32 of 1944 — a judgment creditor's claim for arrear levies and related costs in respect of a dwelling unit in a sectional title development not *preferent* to the claim of the holder of a mortgage bond.

J U D G M E N T

NAVSA JA:

[1] The appellant is a registered commercial bank. The respondent is a body corporate contemplated in s 36(1) of the Sectional Titles Act 95 of 1986 ('the ST Act'). This appeal concerns the interaction between s 15B(3)(a)(i)(aa) of the ST Act and s 66(2) of the Magistrates' Courts Act 32 of 1944 ('the MC Act') and considers whether the respondent's claim as judgment creditor in respect of arrear levies and related costs due by an owner of a dwelling unit in a sectional title development is *preferent* to the claim of the appellant as holder of a mortgage bond over the unit in question. I will for the sake of convenience refer to the appellant as 'the bank' and the respondent as 'the body corporate'.

[2] Section 15B (3)(a)(i)(aa) of the ST Act provides:

'The registrar [of deeds] shall not register a transfer of a unit or of an undivided share therein, unless there is produced to him —

(a) a conveyancer's certificate confirming that as at date of registration —

(i)(aa) if a body corporate is deemed to be established in terms of section 36(1), that body corporate has certified that all moneys due to the body corporate by the transferor in respect of the said unit have been paid, or that provision has been made to the satisfaction of the body corporate for the payment thereof;'

I will for the sake of convenience refer to this sub-section as 'the statute'.

[3] Section 66 (2) of the MC Act provides:

'No immovable property which is subject to any claim preferent to that of the judgment creditor shall be sold in execution unless —

(a) the judgment creditor has caused such notice in writing of the intended sale in execution to be served personally upon the preferent creditor as may be prescribed by the rules; or

(b) the magistrate or an additional or assistant magistrate of the district in which the property is situate has upon the application of the judgment creditor and after enquiry into the circumstances of the case, directed what steps shall be taken to bring the intended sale to the notice of the preferent creditor, and those steps have been carried out,

and unless

(c) the proceeds of the sale are sufficient to satisfy the claim of such preferent creditor, in full; or

(d) the preferent creditor confirms the sale in writing, in which event he shall be deemed to have agreed to accept such proceeds in full settlement of his claim.'

[4] The body corporate applied to the Transvaal Provincial Division for an order declaring that the bank, as bondholder over the unit in question, did not enjoy a claim preferent to its claim as judgment creditor in respect of arrear levies and related costs and that the

provisions of s 66(2) of the MC Act were inapplicable. In addition, it sought an order directing the sheriff to transfer to, and register the unit in the name of, the purchaser who had purchased it at a sale in execution on 12 February 2000. The respondent sought costs against the sheriff and the bank only in the event of opposition.

[5] The material facts on which the bank relied for the relief sought by it are common cause and are set out in the paragraphs that follow.

[6] Ms Thisinyana Augathe Radebe (Radebe) is the registered owner of the unit. The bank is the only mortgagee. At the time of the registration of the bond the amount owing by Radebe to the bank was R108 000-00. On 11 December 2000 the body corporate obtained judgment against her for outstanding levies and costs in an amount of R8 600-00. The execution debt remained unsatisfied and the unit was sold at a judicial sale in execution for an amount of R32 000-00. On 15 February 2002 the bank informed the body corporate in writing that it was not willing to accept the purchase price obtained at the sale. The body corporate's written response on 27 February 2002 was that it enjoyed a preference above that of the bank as bondholder and that it did not require the bank's approval for the sale in execution. This attitude was communicated to the sheriff. In adopting this view the body corporate relied on the statute and on the

judgment of this Court in *Nel NO v Body Corporate of the Seaways Building and Another* 1996 (1) SA 131 (A). The *Nel* case will be dealt with in due course.

[7] The sheriff responded and stated that it had been a long-standing practice in dealing with the provisions of section 66(2) of the MC Act to regard a mortgagee as having a claim preferent to that of a body corporate and suggested that in the event of the dispute remaining unresolved the body corporate should approach a court for a *mandamus*. The approach to the High Court referred to in para [4] followed soon thereafter, the sheriff and the bank being cited as the first and second respondents.

[8] The bank resisted the application contending that s 66(2) of the MC Act was protective of its rights as mortgagee and that the body corporate was not entitled to sell the unit without regard to the security it enjoyed in terms of the mortgage bond. It submitted that the effect of the order sought by the body corporate would be to render its security valueless and that all mortgagees in its position would be exposed to having their security sold without notice to them for amounts sufficient only to cover debts due to the bodies corporate. The bank contended further that the provisions of the

statute and the *ratio* in the *Nel* case were more limited in effect than contended by the body corporate.

[9] Hartzenberg J accepted the body corporate's interpretation of the statutory provisions and of the *Nel* case. He held in favour of the body corporate and made the following order:

'1. A declaratory order issues to the effect, that for the purposes of section 66(2) of Act 32 of 1944, the Magistrates' Courts Act, the first bond of the second respondent over Unit No. 8 in the sectional title scheme SS204/83 does not rank higher in order of preference than the applicant's claim for amounts provided for in section 15B(3)(a)(i)(aa) of Act 95 of 1986.

2. The first respondent is directed to transfer the said unit to the purchaser, who bought it at the sale in execution on 12 February 2002.

3. No order as to costs is made either in favour of or against the first respondent.

4. The second respondent is ordered to pay the applicant's costs of the application.'

[10] The bank appealed against the judgment and order of the Court below, leave to appeal having been granted by Hartzenberg J. The judgment of the Court below is reported as *Body Corporate of Geovy Villa v Sheriff, Pretoria Central Magistrate's Court, and Another* 2003 (1) SA 69 (T).

[11] It is the body corporate's case that since the provisions of the statute give it the power to resist the transfer of immovable property

until moneys due and owing to it have been paid or until arrangements to pay have been made to its satisfaction by the owner of a unit in a sectional title development, it enjoys an effective preference which translates into a right superior even to that of a secured creditor such as the bank. It submits therefore, that the provisions of s 66(2) of the MC Act, which are protective of the rights of a *preferent* creditor, do not operate in favour of the bank and that it has the power to dispose of the unit without reference to the bank as the Court below concluded.

[12] There is nothing in the provisions of the statute that expressly supports the far-reaching interpretation contended for by the body corporate. This is an aspect to which I will return later in this judgment.

[13] Hartzenberg J noted that provisions such as those contained in the statute are not unknown. Similar provisions have long existed in terms of which local authorities have the right to resist the transfer of immovable property until their claims for rates and other charges are satisfied. Such provisions have aptly been referred to as *embargo* or *veto* provisions.

[14] I turn to consider how our courts have interpreted such provisions and determined the rights flowing from them.

[15] In *Johannesburg Municipality v Cohen's Trustees* 1909 TS 811 the provision that stood to be interpreted was to the effect that no transfer of property could be registered without a certificate by the municipality that the rates on the property had been paid. Innes CJ said, at 817:

> 'Now reading that section in connection with other provisions of the statute, the intention seems to have been to give to the local authority a right to veto the transfer of property until its claims in respect of rates should be satisfied. The result, of course, was to create, in effect, a very real and extensive preference over the proceeds of rateable property realised in insolvency; and to compel payment of the burden thus imposed before a sale of such property could be carried through, even in cases where insolvency had not supervened. The hold over the property thus given to the local authority is entirely the creation of the statute; its object was to ensure payment of the liabilities due by ratepayers as such, and one would therefore think that it was intended to continue until all liabilities arising out of rates had been discharged. . .'

[16] Some years later in *Rabie, NO v Rand Townships Registrar* 1926 TPD 286 a similar provision was considered. It was contended that the local authority concerned was a preferent creditor in respect of rates due to it for the purposes of s 55(2) of the Magistrates' Courts Act 32 of 1917, which contained provisions similar to those of s 66(2) of the MC Act. Greenberg J, who delivered the judgment of the Full Bench, held that the effect of the provision was not to constitute the

local authority a preferent creditor for the purposes of s 55(2). In dealing with reliance by the applicant on the *Cohen* case *supra* Greenberg J said at 290:

'The extracts quoted, in terms, deal only with the practical result of the section and in my opinion do not show that the section creates a lien in the strict legal sense or, in the words of s 55(2) "a claim ranking in priority" to other claims'.

And, at 292:

'I do not think that one can go any further than to say that the result of the right is "in effect to create a preference" or "something not wholly in the nature of a lien or a hypothec but *sui generis.*" In my opinion the council's claim was not one ranking in priority to the mortgage within the meaning of the section.'

[17] Greenberg J described the 'extraordinary results' in the event of the applicant's contentions being upheld (at 290-291):

'It is a fair assumption that a large number of judgment debtors who come to such a pass that their immovable property is attached in execution will be in arrear with the payment of their rates. If an ordinary trade creditor or the holder of a mortgage bond wishes to execute on their immovable property, the existence of the unpaid rates will constitute a claim ranking in priority to the debts of these creditors and the property will not be liable to execution by the messenger. In all these cases therefore the benefit sought to be introduced by the Magistrates' Courts Act of providing an inexpensive form of execution will not be available. Thus the council would not only have the right to prevent transfer being passed but also to prevent execution being levied in the magistrate's court on

immovables in all these cases. No matter how small the claim for rates or how valuable the property as long as rates were unpaid there could be no execution under s 55(2). Moreover, the security afforded by mortgage investments would be materially decreased if bonded property is liable to be sold in execution for a trifling claim for rates without notice to the mortgagee: the rules of the magistrate's court do not prescribe the precautions afforded by the practice in the superior courts of requiring notice to the mortgagee.'

[18] As will be shown below the reasoning and conclusions in the *Rabie* case, *supra,* have stood the test of further judicial scrutiny over time.

[19] In *South African Permanent Building Society v Messenger of the Court, Pretoria, and Others* 1996 (1) SA 401 (T) at 403A-B, Curlewis J, in referring to the *Rabie* case, *supra,* said:

'The decision there is correctly put in the headnote and really puts the respondent out of Court:

"The right given to municipal councils by s 47(b) of Ord 9 of 1912 of preventing transfer of premises until arrear rates have been paid does not constitute a 'claim ranking in priority' to a mortgage over such premises within the meaning of s 55(2) of Act 32 of 1917." '

Dealing with the then s 15(4)(b) of the ST Act which was in terms similar to the provisions of the statute, Curlewis J said the following at

403C-D:

'I am not prepared to go an inch beyond what s 15(4)(b) sets out. The right may be "not wholly in the nature of a lien or a hypothec but *sui generis*", but it is nothing more. I am pleased that this is the conclusion since commercial undertakings (indeed the public generally) requires certainty from our law rather than doctrinal purity or juristic rightness, and mortgage bonds have enjoyed a certain and preferred existence for many years: this should not be likely disturbed. If Parliament wishes to bring about a change, then the intention to do so must be clearly expressed and the ambit of the change clearly defined.'

[20] There may of course be legislation that expressly provides for a form of statutory hypothec in favour of local authorities and other institutions in respect of charges owing to them and which expressly states that their claims enjoy preference above the claims of a bondholder. See in this regard *Stadsraad van Pretoria v Letabakop Farming Operations (Pty) Ltd* 1981 (4) SA 911 (T). In the present case we are not dealing with such a legislative provision.

[21] In the *Nel* case this Court considered the provisions of the statute. In that case the appellant was the liquidator of a company which at the time it was placed in liquidation was the owner of a number of units in a sectional title development. These units were mortgaged in favour of a bank. The liquidator sold the units by public auction but was unable to pass transfer to the purchaser because of

a dispute concerning the interpretation of the provisions of the statute. At 134B-135D EM Grosskopf JA considered the *Johannesburg Municipality*, *Rabie* and *South African Permanent Building Society* cases *supra* and said at 135C-D:

'In argument before us it was accepted by both sides, rightly in my view, that the juristic nature of the contested provision is the same as that of the measures considered in the above cases. The position then is that the contested provision, although it did not create a preference in the ordinary sense, nevertheless gave the body corporate a power to resist transfer of units until moneys due to it were paid. The question at issue was the exact ambit of this power.'

[22] In the *Nel* case this Court held that the provisions of the statute must be understood to create an effective preference in the event of insolvency in favour of the body corporate in respect of its claim for outstanding levies and that such a preference can be accommodated in the scheme of insolvency created by the Insolvency Act 24 of 1936 as being part of the costs of realisation envisaged in s 89(1) of that Act. It otherwise approved of the interpretation given to embargo provisions in the *Rabie* and *South African Permanent Building Society* cases. See 135B of the judgment.

[23] The effect of the judgments referred to in the preceding paragraphs is that the 'preference' created by virtue of an embargo or

veto provision is something less than and something different from the preference referred to in the MC Act. See in this regard CG van der Merwe ‘Does the restraint on transfer provision in the Sectional Titles Act accord sufficient preference to the body corporate for outstanding levies?’ 1996 (59) THRHR 367.

[24] In para [12] above I noted that there was nothing in the provisions of the statute that expressly elevated the embargo or veto right of a body corporate above the rights of a holder of a mortgage bond. If Parliament had intended them to have that effect, why should it not have said so in express terms? It is clear that in enacting the statute and s 15(4)(b), which was its predecessor, Parliament was aware of the decision in the *Rabie* case *supra* but nevertheless chose to use words typical of embargo provisions without more.

[25] Section 15B(3)(b) provides that the registrar of deeds shall not register a transfer of a unit or of an undivided share therein unless there is produced a clearance certificate from the local authority that all rates and moneys due to such local authority have been paid if provision is made by law for the separate rating of units or the transfer will result in the establishment of a body corporate in terms of s 36. This is a typical embargo provision as in the *Rabie* case. There is no specific provision elevating the embargo right above that of a

bondholder as was the case in the *Letabakop* judgment *supra* where the Legislature considered it necessary to protect the local authority in that manner. In the present case it did not in the provisions of the statute or of s 15B(3)(b) elevate the position of the body corporate or the local authority above that of a bondholder. The legislature must have been aware of the 'extraordinary results' referred to by Greenberg J of creating a preference such as that for which the body corporate contends in this case.

[26] The practical effect of the statute is that, assuming the availability of funds, a body corporate will be paid before transfer of immovable property is effected. A reasonable mortgagee and body corporate might arrive at an accommodation where there are insufficient funds available to cover the total of the debts owing to both parties — but neither is obliged in law to do so.

[27] If the owner of a unit in a sectional title development is sequestrated or liquidated the statute in effect creates as against the insolvent estate a preference in favour of a body corporate and the payment of outstanding levies is treated as being part of the 'cost of realisation' envisaged by s 89(1) of the Insolvency Act 24 of 1936. The fact that the debt to the body corporate is satisfied as part of the process of realisation produces the same result as if the rights

conferred by an embargo provision were preferent in the strict sense. See CG van der Merwe *supra* at 385.

[28] Radebe's estate was not sequestrated and the bank's claim as mortgagee is, for the reasons set out earlier in this judgment, preferent in terms of the provisions of s 66(2) of the MC Act. The body corporate consequently does not have the right to sell the unit in question in execution without reference to the security afforded to the bank by the mortgage bond. It follows that the Court below erred in making the order set out above and that the appeal should be upheld.

[29] I have already dealt with the extraordinary results that would follow and impact upon bondholders in the event of the body corporate's contentions being upheld. Hartzenberg J who heard the application in the Court below, in his judgment at 73D-74D, before interpreting the relevant statutory provisions, dealt with the reverse side of the coin and considered the difficulties experienced by bodies corporate who are faced with owners who default in their obligations to pay levies and related costs and the consequent socio-economic problems. These problems clearly weighed heavily with the learned judge when he interpreted the statutory provisions in question. In an unreported judgment in the Transvaal Provincial Division in

Regspersoon van Solitaire v Julian Candice Neeuwfan (20 May 2002-case no: 22118/2001), Swart J expressed similar concerns.

[30] In the article by CG van der Merwe, *supra*, the learned author considered whether a body corporate's claim for outstanding levies should not be converted into a form of statutory hypothec that would qualify as a true preferent right. In respect of insolvency he submitted that a body corporate's ability to recover arrears fully may be impeded by the existence of a pre-existing mortgage on a unit justifying the creation of a form of statutory hypothec in favour of a body corporate.

[31] The problems and suggested solutions referred to in the preceding paragraphs are issues beyond our jurisdiction. Bodies corporate have to be vigilant and take early steps to recover monies due to them so as to minimise possible negative effects on owners of other units within a development. In the main the problems raised are for consideration not by the courts but by the Legislature.

[32] I make the following order:

1. The appeal is upheld with costs including the costs of two counsel.

2. The order of the Court below is set aside and the following

order is substituted:

'The application is dismissed with costs including the costs of two counsel (to the extent employed)'.

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MS NAVSA
Judge of Appeal

CONCUR:

Harms JA
Scott JA
Cloete JA
Heher JA