THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1273/2023

In the matter between:

KWADUKUZA MUNICIPALITY	**APPELLANT**

and

CONSOLIDATED AONE TRADE AND INVEST 6 (PTY) LTD [IN LIQUIDATION]	**FIRST RESPONDENT**
VAN DEN HEEVER, THEODOR WILHELM N O	**SECOND RESPONDENT**
NEL, EUGENE N O	**THIRD RESPONDENT**
NKOMO, MDUDUZI CHRISTOPHER N O	**FOURTH RESPONDENT**

Neutral citation: *Kwadukuza Municipality v Consolidated Aone Trade and Invest 6 (Pty) Ltd [in Liquidation] and Others* (1273/2023) [2025] ZASCA 86 (11 June 2025)

Coram: MBATHA, HUGHES and BAARTMAN JJA and VALLY and MOLITSOANE AJJA

Heard: 13 March 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 11 June 2025.

Summary: Local Government: Municipal Systems Act 32 of 2000 (Municipal Systems Act) – whether the high court correctly found that payment made under protest was recoverable – whether the municipality was entitled to retain funds paid under protest

in terms of s 10(3) of the Prescription Act 68 of 1969 – whether it is permissible for the municipality to demand payment for rates beyond the period set out in s 118(1) of Municipal Systems Act – municipality failed to establish right to entitlement of funds paid under protest.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban (Chili J, sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel, where so employed.

JUDGMENT

Hughes JA (Mbatha and Baartman JJA and Vally and Molitsoane AJJA concurring):

Introduction

[1] The crisp issue in this appeal is whether payments made under protest, of historical rates and service charges, owed to the appellant, KwaDukuza Municipality (municipality) for issuing a rates clearance certificate for transferring property sold is recoverable, if such falls beyond the two-year period in terms of s 118(1) of the Local Government: Municipal Systems Act 32 of 2000 (MSA). And whether the payments made to the municipality fall within the purview of s 10(3) of the Prescription Act 68 of 1969 (the Prescription Act), where payment of a prescribed debt is considered to be settlement of a debt and irrecoverable.

Background

[2] The facts giving rise to the dispute are common cause. The first respondent, Consolidated Aone Trade and Invest 6 (Pty) Ltd (in liquidation), which I will refer to as CATI 6, was the owner of Ballito Bay Mall in KwaZulu Natal, which comprised three immovable properties. On 19 September 2013, CATI 6 was placed under provisional liquidation and finally wound up on 20 March 2015. The second to fourth respondents were appointed as liquidators of CATI 6 (the liquidators). On 17 May 2017, the liquidators sold the properties of CATI 6, for an amount of R135 million, to Cyber Savvy Merchants (Pty) Ltd (Cyber Savvy). To affect the transfer of the properties to Cyber

Savvy, the liquidators had to apply for the prescribed certificate in terms of s 118 of the MSA (commonly known as a rates clearance certificate).

[3] The rates clearance certificate in terms of s 118 is issued by the municipality to confirm that the municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties charged upon the property for a period of two years before the application has been paid in full. Thus, the properties cannot be transferred by the Deeds Registrar's office without the production of the rates clearance certificate.

[4] On 23 June 2017, the municipality launched pre- and post-liquidation claims against the liquidators in the winding up proceedings of CATI 6, claiming all charges incurred before and after the commencement of the winding up. In motion court proceedings on 23 August 2017, the municipality claimed against CATI 6 and the liquidators, an amount of approximately R13,9 million as constituting that which was due and payable as at 14 August 2017.The municipality provided the liquidators with various rates clearance figures, which were disputed by the liquidators. Various court applications were pursued by the liquidators and this culminated in issuing rates clearance figures by the municipality on 13 July 2017, in the amount of over R15,6 million. The municipality demanded payment of the full amount by 31 October 2017, failing which no rates clearance certificate would be issued by the municipality.

[5] The municipality gave notice of its intention to disconnect the services of CATI 6 on 13 November 2017, when the liquidators disputed that it was entitled to the amount allegedly owed. Subsequently, on 10 November 2017, the representative of the liquidators wrote to the attorneys who represented the municipality, whereby CATI 6 reminded the attorney that they had confirmed that there were unresolved queries with the municipality and, as such, any disconnection of services on 13 November 2017 would be illegal. On 28 November 2017, CATI 6 and the liquidators tendered a payment in total of R3 902 583.15 without prejudice and under protest to facilitate the issuing of the rates clearance certificate.

[6] Caber Savvy, the purchaser, launched an urgent application in the high court against the municipality and other parties and secured an order by consent. In this order by Pillay J (the consent order) the following was agreed upon:

'1.1 The First Respondent is directed to issue to the Seventh Respondent a statement immediately upon the grant of this order (and by no later than close of business on 17 November 2017), setting out the computation of the municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties payable to the First Respondent for the issue of the prescribed certificate envisaged in section 118(1) of the Local Government: Municipal Systems Act 32 of 2000 . . .commonly referred to as a rates clearance certificate, to effect the transfer of the immovable property situated at […] L[…] Road, Ballito, KwaZulu-Natal on which the "Ballito Bay Mall" is situated . . .from the Second Respondent to the Applicant, for the two (2) year period preceding the date of this Order for the issue of the prescribed certificate envisaged in section 118(1) of the Act, commonly referred to as a rates clearance certificate.

1.2 That the Sixth Respondent be and is hereby authorised and directed to make payment to the First Respondent of the alleged amount due to the First Respondent in terms of paragraph 1.1 hereof, within five (5) days of receipt of the statement referred to in paragraph 1.1 hereof.

1.3 The payment made by the Sixth Respondent in terms of paragraph 1.2 hereof shall be without prejudice to the Second Respondent's rights to approach this Court for a declarator as to the actual amount due, and a refund, if any, of any amounts paid in excess of what was legally due.

1.4 Upon payment of the amount referred to in paragraph 1.1 and 1.2 of this Order, the First Respondent is directed to forthwith provide the Second Respondent with the prescribed certificate envisaged in section 118(1) of the Act, commonly referred to as a rates clearance certificate in order for the immovable property to be transferred from the Second Respondent to the Applicant.'

Amongst others, the municipality was ordered to issue the prescribed certificate to effect the transfer of the properties, Ballito Bay Mall, to the attorneys Norton Rose Fulbright South Africa Inc. (Norton Rose), of Caber Savvy, in terms of s 118(1) of the MSA 'for the two (2) year period preceding the date of this Order for the issue of the prescribed certificate envisaged…commonly referred to as a rates clearance certificate'.

[7] Despite the consent order, the municipality failed to co-operate. Finally, on 19 April 2018, the attorneys representing CATI 6 and the liquidators advised they would

make payment under protest and reserved their rights, of the amount persisted upon by the municipality. They placed it on record that this was done 'solely for the purpose of obtaining a rates clearance certificate contemplated in section 118(1)…for the registration of transfer of ownership of Ballito Bay Mall to Cyber Savvy…which [was] to overcome [the municipality's] refusal to issue a rates clearance certificate unless the sum of R21 165 901.22 [was] paid'. Clearly, the preceding order had not assisted. The outstanding amount of R21 165 901.22 was paid on 26 April 2018. The correspondence also spelt out that the payment was made on a without prejudice basis and reserved the right to raise prescription in respect of such amounts.

[8] On 30 April 2018, the municipality in correspondence confirmed that the calculation it had conducted in terms of paragraph 1.1 of the consent order was not correct and amended figures were to be provided. However, this was after payment had been made. It confirmed that the amount for issuing the rates certificate was only R17 423 354.82, that an amount of R21 165 901.22 had been paid and as such, a refund of R3 742 546.40 was due. In fact, the attorney wrote as follows, in paragraph 5.1 of the correspondence dated 30 April 2018:

'Given that payment has been made, our client will comply with the [issuance of the rates clearance certificate] in terms of paragraph 1.4 of the Order.'

[9] In the high court, the CATI 6 and the liquidators sought to recover funds paid under protest and were granted an order for a refund of all amounts overpaid to the municipality. The amount claimed was considerably more than the R3 742 546.40 that the municipality tendered to refund. Chili J in granting the order of 14 July 2023, concluded that the municipalities reliance on s 118(1) to resist the refund payment sought was misplaced. It is against this order that the municipality appeals, with leave to appeal having been granted to this Court by the high court.

The law

[10] This Court in *Nelson Mandela Bay Municipality v Amber Mountain Investments 3 (Pty) Ltd* (*Nelson Mandela Bay Municipality*),[1] eloquently sets out the following:

[1] *Nelson Mandela Bay Municipality v Amber Mountain Investments 3 (Pty) Ltd (Nelson Mandela Bay*) [2017] ZASCA 36; 2017 (4) SA 272 (SCA) para 5.

'Municipalities are vested with original constitutional power to levy rates on property. In terms of s 229(1)*(a)* of the Constitution a municipality has authority to impose "rates on property and surcharges on fees for services provided by or on behalf of the municipality". The original power to levy rates is regulated by national legislation in the form of the Rates Act.'

[11] This case centres around the application and interpretation of s 118(1) of the MSA in the provision of the rates clearance certificate by the municipality, and to the extent relevant, the subsection provides:

'(1) A registrar of deeds may not register the transfer of property except on production to that registrar of deeds of a prescribed certificate -

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

(b) which certifies that all amounts that became 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.' (Emphasis added.)

[12] In interpreting the aforesaid section the questions which arise are: first, whether CATI 6 has a right to recover payments made under duress and protest, in circumstances where the municipality demanded payment of historic debt beyond the two-year period as stated therein; and second, whether the payments fall within the realm of s 10(3) of the Prescription Act 68 of 1969 where payment of a prescribed debt constitutes settlement of that debt.

Section 118 (1) and (3)

[13] The municipality contends that on its interpretation of s 118(1) nothing prevents it from pursuing a claim for the balance of the full amount outstanding from a property owner. Their view is that s 118(1) invokes the municipalities' right to withhold a rates clearance certificate until the full outstanding amount is paid. Until then, transfer of property cannot be affected. It asserts that it can pursue municipal debts, which arose prior to the two-year period stipulated in the section. In essence, the municipality claims that s 118(1) does not extinguish earlier debts.

[14] CATI 6's argument was simply this: a literal reading of s 118(1) plainly states that the municipality was limited to seek or claim payment of unpaid amounts which

accrued within a two-year period preceding the date of the request for a rates clearance certificate. In that regard, the municipality had no right to seek payment of amounts which fell outside the two-year period. These include amounts which had also prescribed in terms of the Prescription Act.

[15] The view expressed by the municipality is contrary to what this Court stated in *Nelson Mandela Municipality* that s 118(1) 'clearly applies to municipal debts which have become due in the two years preceding the date of the application for the certificate and does not apply to future municipal debts'.[2] In that case it followed the dicta in *City of Johannesburg v Kaplan NO & Another*,[3] explaining that the express terms in s 118(1) intended to limit the scope of the debt in terms of s 118(1), this Court stated:

'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 s 118(1) *which have become due during a period of two years before the date of application for the certificate*.'[4] (Emphasis added.)

[16] In addition, the wording of s 118(1) is clear and unambiguous. In my view, the purpose of s 118(1) is to secure payment of all consumption charges 'in connection with that property', due for the period of two years before the application for a rates certificate. As such, transfer can only take place once all outstanding consumption charges within the two-year period have been paid. The demand for payment beyond the two-year period, as a requirement for the issuing of a rates clearance certificate, is 'a substantive obstacle to alienation', as stated by the Constitutional Court in *Mkontwana v Nelson Mandela Metropolitan Municipality*.[5]

[17] What is peculiar to the facts of this case is the existence of the consent order of 16 November 2017 whereby the municipality undertook to provide a statement 'for the two (2) year period preceding the date of this Order' for the issuing of the s 118(1) rates clearance certificate. The municipality is bound by this consent order and as rightfully

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[2] *Nelson Mandela Municipality* para 27.
[3] *City of Johannesburg* v *Kaplan NO & Another* [2006] ZASCA 39; 2006 (5) SA 10 (SCA); 68 SATC 286.
[4] Ibid para 26. See also *Nelson Mandela Municipality* para 23.
[5] *Mkontwana v Nelson Mandela Metropolitan Municipality* [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) para 33.

pointed out by CATI 6 that it was 'directed to provide the applicants' attorneys with a breakdown of charges payable for the 24-month period…upon payment of that amount, to provide a certificate'. It failed to do so.

[18] This Court stated in *City of Cape Town v Real People Housing (Pty) Ltd*[6] that '[h]ad it been intended not to limit the period to two years then the words would not have appeared at all'.[7] This was said in a case where the municipality sought to recover a debt which extended way over the period of the two years preceding the application for a rate clearance certificate. Thus, the assertion by the municipality that it is not precluded from recovering charges due in the preceding period, beyond the two years from the date of the application for a rate clearance certificate, cannot be correct.

[19] In addition, CATI 6 contends that the amounts paid, which did not fall within the prescript of s 118(1) had in any event prescribed as these historical debt amounts fell within the prescript of s 118(3) where prescription period is three years. Section 118(3) provides a further protection to the municipality in the following way:

'An amount due for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties 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.'

This entails that the municipality enjoys preference above other claims when lodging its claim with the liquidators.

[20] In *City of Tshwane Metropolitan Municipality v Mitchell*,[8] this Court described the principal elements of s 118 as an embargo provision with a time limit in terms of s 118(1), being the two-year period and s 118(3) being a security provision, creating security for payment of historical outstanding municipal debts in favour of the municipality, without a time limit.[9] Further, that liability for the historical debt of the previous owner was not extinguished and the municipality could still perfect this

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[6] *City of Cape Town v Real People Housing (Pty) Ltd* [2009] ZASCA 159; [2010] 2 All SA 305 (SCA); 2010 (5) SA 196 (SCA).
[7] Ibid para 14.
[8] *City of Tshwane Metropolitan Municipality v Mitchell* [2016] ZASCA 1; [2016] 2 All SA 1 (SCA); 2016 (3) SA 231 (SCA).
[9] Ibid para 9.

security over the property to secure payment of the historical debt.[10] This historical debt, was declared, '. . . upon transfer of a property, a new owner is not liable for debts arising before transfer from the charge upon the property under s 118(3)', as held in *Jordaan and Others v City of Tshwane Metropolitan Municipality and Others*.[11]

[21] To sum up: s 118(1) is a powerful tool for the municipality to assist in the collection of debts charged upon the property, limited to a statutory period of two years. It imposes an embargo over the power to transfer the property in exchange for the issuance of a rates clearance certificate. Any payment demanded under the rubric of s 118(1) for historical debts charged on the property predating the two-year period would not be lawful. The section accords protection also to the consumer, as the Constitutional Court in *Jordaan* has declared that a new owner is not liable for such debts charged upon the transfer of the property.

Payments made under duress and protests

[22] CATI 6 sought to recover the amount it deems was overpaid to the municipality, that is, the historical debts demanded beyond the two-year period in terms of s 118(1). These payments, which CATI 6 contends were made under duress to attain the rates clearance certificate to affect the transfer, were also paid under protest. It would be remiss of me not to point out the legal basis upon which CATI 6 sought the recovery of the amounts overpaid to the municipality. The consent order at paragraph 1.3 reads: '[t]he payment made. . . shall be without prejudice to the [respondents'] rights to approach [the court] for a declarator as to the actual amount due, *and a refund, if any, of any amounts paid in excess of what was legally due*'. (Emphasis added.) Further, CATI 6 notified the municipality on 19 April 2018, that it did not admit liability for the amount sought by the municipality and that payment was to be made 'under protest and solely for the purpose of obtaining a rates clearance certificate contemplated in section 118(1). . . which is to overcome [the municipality's] refusal to issue a rates clearance certificate. . . ' The municipality was further notified that CATI 6 reserved its rights to raise prescription of such amounts paid.

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[10] Ibid paras 22-23.

[11] *Jordaan and Others v City of Tshwane Metropolitan Municipality and Others; City of Tshwane Metropolitan Municipality v New Ventures Consulting and Services (Pty) Limited and Others; Ekurhuleni Metropolitan Municipality v Livanos and Others* [2017] ZACC 31; 2017 (6) SA 287 (CC); 2017 (11) BCLR 1370 (CC) at the order of the court para 3.

[23] I point out that as far back as 1915 in *Union Government (Minister of Finance) v Gowar*[12] where the minority stated:

'But if he pays under protest he is entitled to recover, for the protest is inconsistent either with the idea of a gift or of a compromise between the parties. The other party was not bound to accept money so paid, but if he accepts it he must be considered to have agreed that it should be recoverable if not due; in the language of the *Digest*, the *negotium* between the parties is a *contractus* (*Donellus* lib. 14, c 14, 3). As the payment in the present case was made under protest, and the defendant had no right under the Act to exact it, I agree that the appeal must be dismissed with costs.'

[24] This was further enunciated in *Commissioner for Inland Revenue v First National Industrial Bank Ltd*,[13] which explained what a payment under protest constituted:

'The addition of the words 'under protest' when a payment is tendered can, so it seems, fulfil one or more of several functions: (i) The phrase can serve as confirmation that, in the broad sense, the payment was not a voluntary one or, in the narrower sense, that it was due to duress. The failure so to stipulate could support an inference that the payment was voluntary or that in truth there was no duress. (ii) It can serve to anticipate or negate an inference of acquiescence, lest it be thought that, by paying without protest, the *solvens* conceded the validity or the legality of the debt, or his liability to pay it, or the correctness of the amount claimed. The object is to reserve the right to seek to reverse the payment. The effect is not to create a new cause of action but to preserve and protect an existing one - namely, that the payment was an *indebitum solutum* which is recoverable in law, eg by means of the *condictio indebiti* or in terms of s 32(1)*(a)* of the Stamp Duties Act, 1968. (iii) It could serve as the basis for an agreement between the parties on what should happen if the contested issue is tested and resolved in favour of the *solvens*. Such an agreement would indeed create a new and independent cause of action.'

[25] The municipality contends that in a case where a payment is made under protest it is for CATI 6 to make out a case that the amount paid was not actually owing and that it should be repaid. In this case, CATI 6 demonstrated in their correspondence of 19 April 2018 that it made payment under protest solely to obtain the rates clearance

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[12] *Union Government (Minister of Finance) v Gowar* 1915 AD 426 at 446.
[13] *Commissioner for Inland Revenue v First National Industrial Bank Ltd* [1990] ZASCA 49; 1990 (3) SA 641 AD; [1990] 2 All SA 327 (A) at 649G-J.

certificate, which was needed for the transfer of the properties. CATI 6's attorney correspondence categorically stated that '[p]ayment is made without prejudice to our clients' rights to claim repayment of all amounts which are *not legally due and payable* to your client'. (Emphasis added.)

[26] The authorities cited above make clear that the recipient of a payment made under protest is not bound to receive such payment. However, if the recipient does, the payer retains the right to seek recovery. Hence, CATI 6's claim for the amount it paid under protest.

Is the Municipality protected by s 10(3) of the Prescription Act?

[27] The municipality contended that the payments were valid and sought the protection of s 10(3) of the Prescription Act 68 of 1969. Simply put the section states that payments of a prescribed debt constitute settlement of such debt. For easy reference s 10(3) of the Prescription Act reads as follows:

'Notwithstanding the provisions of subsections (1) and (2), payment by the debtor of a debt after it has been extinguished by prescription in terms of either of the said subsections, shall be regarded as payment of a debt.'

[28] It is common cause that the prescription period is three years, but the municipality contends that where payments of prescribed amounts have been made, in terms of s 10(3) that payment is deemed to have been discharged and thus is irrecoverable. I will deal with that which I regard as sound in law and important in this case, these are twofold: first, the consent order created an agreement between the municipality and CATI 6, the municipality waived its rights under s 10 (3); second, when the payment was made CATI 6 was in liquidation. A *concursus creditorium* was in operation as a result, the payment for historic debt preferred the municipality above other creditors. This occurred despite the fact that the municipality had a preferent claim in CATI 6, in terms of s 118(3). The liquidators have a valid right to claim for the unlawful payment and cannot be deprived a valid defence to claim. See *Walker v Syfret NO*:[14]

[14] *Walker v Syfret NO* 1911 AD 141 at 166. See also *Commissioner for the South African Revenue Service v Pieters and Others* [2018] ZASCA 128; 2020 (1) SA 22 (SCA); 82 SATC 12 para 10.

‘. . . The object of the Insolvent Ordinance is to ensure a due distribution of assets among creditors in the order of their preference. And with this object all the debtor a rights are vested in the Master or the trustee from the moment insolvency commences. The sequestration order crystallises the insolvent’s position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order. Now, to deprive the estate of a valid defence to a claim against it is as prejudicial to the creditors as to take from it the most tangible asset of corresponding amount.’

[29] Last, as advanced by CATI 6, in respect of the mora interest to be paid from the date of 26 April 2018, being the date of payment made under duress, I do not agree with this submission. First, no such interest was claimed in the notice of motion and, second, the order of the high court did not grant interest, as no interest was claimed. For the reasons set out above, it follows that I find no reason to interfere with the order of Chili J in the high court.

[30] In the result, I make the following order:
The appeal is dismissed with costs, including the costs consequent to the employment of two counsel, where so employed.

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W HUGHES

JUDGE OF APPEAL

Appearances

For the appellant:	S R Mullins SC
Instructed by:	Anand-Nepaul Attorneys, Durban
	Honey & Partners Incorporated, Bloemfontein
For the respondent:	J R Peter SC
Instructed by:	KG Tserkezis Incorporated, Sandton
	Claude Reid Attorneys, Bloemfontein.