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### **CITY OF TSHWANE METROPOLITAN MUNICIPALITY v PEREGRINE JOPSEPH MITCHELL**

The above case addresses the interpretation of Section 118(3) of the Local Government Municipal Systems Act, 32 of 2000 (the Act). More specially, whether the security provided for in Section 118(3) of the Act in favour of a municipality, for moneys owed to it for services rendered in respect of immovable property, is extinguished when the property is sold at a sale in execution and subsequently transferred to the purchaser.

Section 118 provide as follows:

*'(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.*

*(3) 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.'*

On 22 February 2013 the Purchaser, Mr Mitchell purchased immovable property at a sale of execution. In terms of the Conditions of Sale in Execution of Immovable Property, the Purchaser was liable for payment of all costs and charges necessary to effect transfer including conveyancing costs, rates, taxes and other charges necessary to procure a rates clearance certificate, transfer duty or VAT attracted by the sale and any Deeds registration office levies.

In terms of Section 118(1) of the Act, a Registrar of Deeds may not register the transfer of immovable property, without the production of a rates clearance certificate, confirming that all amounts due to the municipality in respect of that property for service fees, levies, rates and taxes for the two years preceding the date of application for the rates clearance certificate, have been paid in full (abridged certificate). When Mr Mitchell applied for a rates clearance certificate, the Municipality provided rates clearance figures reflecting an outstanding amount of R232 828.25 in respect of municipal service fees, levies and rates. That amount included debts older than two years preceding the date of the application for a clearance certificate (historical debt). Mr Mitchell disputed the correctness of the amount reflected in the issued rates clearance figures as being payable for purposes of obtaining a clearance certificate in terms of s 118(1) (abridged certificate). The dispute was, however, settled and the Municipality issued figures reflecting the outstanding amount due to it as R126 608.50, which represented only the debt due for the two years preceding the date of Mr Mitchell's application for issue of the rates clearance certificate. Mr Mitchell paid that amount, leaving the historical debt of R106 219.75 still outstanding, due and payable.

Mr Mitchell thereafter sold the property to Ms Prinsloo who, before taking transfer, applied to the Municipality for the supply of municipal services to the property. The Municipality refused to open an account in her name and informed her that she would be held liable for the historical debt. Ms Prinsloo proceeded to give instructions to the attorney who was to deal with the transfer not to proceed with it until the issue of the historical debt had been resolved.

Mr Mitchell then approached the Gauteng Division of the High Court, Pretoria, seeking, among others, an order declaring that he, 'or his assigns and successors in title of the Property', were not liable for the historical debt owed to the Municipality by previous owners.

On 8 September 2014, the High Court granted the following order in favour of the Mr Mitchell –

1. The security provided by Section 118(3) the Act, in favour of the Municipality with regard to the immovable property, was extinguished by the sale in execution and subsequent transfer of that property into the name of Mr Mitchell;

2. Mr Mitchell or his successor in title; are not liable for the payment of outstanding municipal debts older than 2 years which were incurred by his predecessors in title prior to the date of transfer of the said property into his name;
3. The Municipality has no right to refuse the supply of municipal services to Mr Mitchell with regard to the said property only because of outstanding municipal debts older than 2 years.

The Municipality now appealed against this order to the Supreme Court of Appeal.

The Supreme Court of Appeal (this court) described the principal elements of Section 118 as 'an embargo provision with a time limit - Section 118(1) and 'a security provision without a time limit - Section 118(3). It held that the effect of Section 118(3) is to create a security for payment of outstanding municipal debts in favour of the municipality.

As to the extent of the outstanding municipal debts, the following was said in BOE Bank Ltd v Tshwane Metropolitan Municipality:

*'For purposes of Section 118(3) it therefore does not matter when the component parts of the secured debt became due. The amounts of all debts arising from the stipulated causes are added up to become one composite amount secured by a single hypothec which ranks above all mortgage bonds over the property.'*

It follows that in the present matter the historical debt was a charge upon the property, as was the amount paid for purposes of obtaining the clearance certificate.

The High Court reasoned that it must be accepted that the Municipality was aware of the sale in execution prior to transfer, as it had been requested to issue a certificate in terms of s 118(1) of the Act and that, whilst holding a statutory hypothec, it kept silent by not exercising its right of preference over the proceeds of the sale of the property. In those circumstances, it should follow, so the court held, that the Municipality's statutory hypothec was extinguished by the sale in execution and subsequent transfer of the property into the name of Mr Mitchell.

In holding that the Municipality's security over the property (hypothec) had been extinguished by the sale in the execution and subsequent transfer of the property, the High Court distinguished the present matter from this court's decision in City of Tshwane Metropolitan Municipality v Mathabathe & another, on the basis that in that case the property was sold, 'not at a sale in execution, but by public auction on behalf of the mortgagor'. In Mathabathe, the property was sold by public auction at the request of the owner and by agreement between him, as mortgagor, and the mortgagee. The Municipality sought an undertaking from the owner, or transferring attorney, that the historical debt would be paid on the date of transfer or soon thereafter. The Municipality alleged that it needed the undertaking because its security over the land would be lost once transfer took place.

The Court in Mathabathe, stated the following on the issue of the undertaking sought by the municipality:

*'Unlike Section 118(1), Section 118(3) is not an embargo provision – it self-evidently is a security provision. The Municipality failed to draw that distinction and thus confused the two distinct remedies available to it. It, moreover, was plainly wrong in its contention that "upon registration [of transfer] . . . [it] loses its rights under Section 118(3) of the Act". It follows that in at least those two fundamental respects the Municipality has misconstrued the import of Section 118(3). Having misconstrued the section, it sought, in addition to the security that it enjoys for the historical debt to which no limit in duration exists, the postulated undertaking. In that it had to fail.'*

This court has therefore clearly held that a transfer of property from one owner to another does not extinguish the security created by Section 118(3). Counsel for Mr Mitchell did not argue that Mathabathe was wrongly decided, but submitted that at least in respect of sales in execution, the statutory hypothec created in terms of Section 118(3) 'is to be enforced against the proceeds of the sale of the property at a sale in execution'.

The court held that the distinction drawn by the High Court between the present matter and Mathabathe, and relied on by counsel for Mr Mitchell in this court, is not justified. The reliance on the exception is misplaced. The text relied upon appears under the main title: The contract of pledge and hypothec, and the agreements attached to it. The subheading reads: Immovables specially mortgaged pass with burden. And a hypothec is defined as 'a praetorian and discretionary agreement, by which a right in *re* is established for a creditor in security of his credit, without transference of the possession to that creditor'. This deals, therefore, with instances where the 'hypothec' was created by agreement, such as an agreement in terms of which a debt was secured by means of a mortgage bond registered over immovable property in favour of a creditor, or an agreement formalised by a praetor. The exception on which the High Court relied, does not apply to a hypothec created by a statute that places no limit to its duration. There is nothing in the Act that indicates that any exception to the application of the provisions of Section 118(3) was contemplated where property is purchased at a sale in execution. On the contrary, there are indications that the exception to the common law invoked by the High Court does not apply to the statutory hypothec created by Section 118(3) of the Act.

The provisions of Section 118, including Section 118(3), are made subject to Section 89 of the Insolvency Act 24 of 1936 in the case of the transfer of property by a trustee of an insolvent estate (s 118(2) of the Act). Section 118(5) provides that subsection (3) 'does not apply to any amount referred to in that subsection that became due before a transfer of a residential property or a conversion of land tenure rights into ownership contemplated in subsection (4) took place'. Clearly, then, if a limited duration of the hypothec created by Section 118(3) was ever contemplated in respect of property purchased at a sale in execution, the legislature would have made provision for it. It did not do so and no distinction can therefore be drawn between property sold either at a sale in execution or in a private sale when considering the question whether the hypothec created by Section 118(3) survives transfer. It follows that the High Court erred in concluding that the Municipality's statutory hypothec had been extinguished by the sale in execution and subsequent transfer of the property into the name of Mr Mitchell.

Counsel for Mr Mitchell, however, submitted that Section 118(3) of the Act must be interpreted in accordance with the common law, in terms of which, he contended, a hypothec 'is upon transfer of the property extinguished and the new owner obtains a clean title to the ownership of the property free of security' when mortgaged property has been sold at a sale in execution. In such a case, counsel argued, the price replaces the property and is shared by the hypothec creditors, in order of preference, with the rest of the creditors. In this regard, counsel relied on the judgment of this court in Land en Landboubank van Suid-Afrika v Absa Bank Bpk en andere. This matter deals with the interpretation and effect of s 55(2)(c) of the Land Bank Act 13 of 1944, as amended. The Land Bank Act authorised the Land Bank to obtain payment of a loan, which it had advanced and had been secured by mortgage bond, by selling the mortgaged property by public auction without following any judicial process and to apply the proceeds of the sale to settle the amount due to it. Section 55(2)(c) provided, in summary, that the board (of the Land Bank) could transfer the mortgaged property to the purchaser and give the latter a legally valid title, even though the property may have been hypothecated or had been subject to a right of retention or an encumbrance in favour of another. The court did not deal, in that matter, with the question whether a statutory hypothec survived transfer, but rather with the meaning of the words 'valid title'. The question it was called upon to answer was whether a purchaser of land at a public auction, authorised by s 55 of the Land Bank Act, received transfer of such land free of any encumbrance despite the fact that it (the land) may have been hypothecated. The reliance on Land en Landboubank v Absa for the proposition that Section 118(3) of the Act should be interpreted in accordance with the common law relating to the effect of a sale in execution on the rights of bondholders is, therefore, misplaced.

The High Court declared that Mr Mitchell, or his successor in title, was not liable for the historical debt, and further declared that the Municipality had no right to refuse the supply of municipal services with regard to the property only because of outstanding municipal debts older than two years. This Court held that it is not certain that Mr Mitchell was entitled to these orders.

The Municipality never stated that it was holding Mr Mitchell liable for the historical debt. It merely expressed a belief that it could proceed against the 'new owner' - which could be Ms Prinsloo who was expecting to take transfer of the property - for recovery of the historical debt. Mr Mitchell, therefore, acted prematurely in seeking the order granted by the High Court, where it was held that Mr Mitchell would not be liable for the payment of outstanding municipal debts older than 2 years which were incurred by his predecessor in title prior to the date of transfer of the property into his name. The real issue, at that stage, was the Municipality's refusal to conclude a contract with Ms Prinsloo for the provision of municipal services.

However, the High Court was entitled, in the exercise of its discretion, to deal with the issue of liability for the historical debt. Counsel for the Municipality did not argue otherwise - *'I agree with the High Court that . . . in the absence of an agreement to that effect, Mr Mitchell has not become a co-debtor with regard to the principal debt'*. But, as has been shown above, the sale in execution and subsequent transfer of the property into the name of Mr Mitchell did not extinguish the hypothec created by Section 118(3) of the Act in favour of the Municipality. This means that nothing would prevent the Municipality from perfecting its security over the property, should it wish to do so, to ensure payment of the historical debt. Perfecting its security would involve obtaining a court order, selling the property in execution and applying the proceeds to pay off the outstanding historical debt. In that event, Mr Mitchell might be forced to pay the debt in order to avoid losing his property. It is in that sense that Mr Mitchell, as owner of the property, could be said to be liable for the historical debt. It must be remembered, at this point, that the constitutionality of Section 118(3) of the Act is not in issue in this matter.

With regard to the High Court's findings that the Municipality has no right to refuse supply of municipal services with regard to the said property only because of outstanding municipal debts older than 2 years - it is unclear how, and on what basis, that order was granted. It appears, from the judgment of the High Court, that the submission of counsel for the Municipality was that 'the real issue [was] not the opening of a new account, but the question whether the Municipality is entitled to refuse the supply of municipal services as long as there is a debt outstanding with regard to this property'. In conclusion, and since the High Court made reference to certain by-laws when it considered the question whether the Municipality was entitled to refuse the supply of municipal services, the court wishes to make the following observations. By-law 18(1) of the Municipality's standard electricity by-laws provides that the consumer is liable for all electricity supplied to his or her premises. A 'consumer' is defined in the by-laws as:

*'The occupier of any premises to which the Municipality has agreed to supply or is actually supplying electricity, or if there is no occupier, the person who has entered into a current valid agreement with the Municipality for the supply of electricity to the premises, or, if such a person does not exist or cannot be traced or has absconded or for whatever reason is not able to pay, the owner of the premises.'*

Counsel for the Municipality conceded that before a municipality can look to an owner for payment, it has to comply with its own by-law: it has to show that (1) there is no occupier on the property concerned and (2) the person who had entered into the contract to receive the services cannot be traced or has absconded, is unable to pay, or does not exist. Assuming that historical debts include amounts due in respect of electricity consumption – a municipality may 'consolidate any separate accounts of persons liable for payments to the municipality' – the court agreed. To sum up, the High Court should not have made the orders it granted and the Municipality's application should have been dismissed for the reasons set out above. It follows that the appeal must succeed.\

In the result, the court made the following order -

1 The appeal is upheld.

2 The security provided by Section 118(3) the Act, in favour of the Municipality with regard to the immovable property, is not extinguished by the sale in execution and subsequent transfer of that property into the name of Mr Mitchell;

3 Mr Mitchell or his successor in title; are liable for the payment of outstanding municipal debts older than 2 years which were incurred by his predecessors in title prior to the date of transfer of the said property into his name;

4 The Municipality has the right to refuse the supply of municipal services to Mr Mitchell with regard to the said property only because of outstanding municipal debts older than 2 years.

5 No order is made as to the costs of the appeal.

In conclusion, the court's findings will most definitely have a negative impact on purchasers, as new owners of immovable property, they will not be in a position to establish for certain, when applying for rates clearance figures, that all historic debts will be included when such figures are issued by the Municipality for the sellers account. It is therefore of the utmost importance, that purchasers and financial institutions ensure that the full historic debt owing to the Municipality in respect of the property being purchased, has been settled and paid in full before the transfer of the property into the purchaser's name takes place. If at a later stage, the Municipality becomes aware of outstanding historic debt in respect of the property, the Municipality's tacit hypothec survives transfer and it can perfect its security over the property, in order to settle the debt, and the new owner would then be forced to pay the debt in order to avoid their property being sold to satisfy the debt. However, notwithstanding the rights granted to the Municipality, it would still bear the onus regarding the amount of debt claimed together with complying with its by-laws before seeking a court order to attach the property.

The consequence of this ruling is that there is no clean transfer of title, and the purchaser will have to now seek indemnities from the seller in relation to rates payments. Likewise, financial institutions may insist on an investigation of the rates and taxes in respect of the properties they finance. It is therefore suggested that the inclusion of a clause be inserted into the Agent's Offer to Purchase to protect the rights of the prospective purchaser against the effects of this ruling. Such clause shall include that the seller shall obtain the necessary clearance certificate in terms of Section 118(3) of the Act, and that full payment of the outstanding historic debt shall be made and shall not be limited to payment in terms of Section 118(1) of the Act. The seller is to indemnify the purchaser against any claims which may arise from the aforementioned.

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Updated May 2017