



LIABILITIES RATES AND TAXES

SECTION 118(1) and 118(3) OF THE LOCAL GOVERNMENT: MUNICIPAL SYSTEMS ACT 32 OF 2000

Over the last number of years there have been three primary contentious issues raised in our courts regarding the liability for rates, taxes and service charges on immovable property and the issuing of rates clearance certificates by local authorities in terms of the above-mentioned sections

1. Liability of owners for the arrears of tenants

On 6 Oct 2006 our constitutional court in the final instance ruled in three cases concerning the constitutionality of section 118(1) of the Local Government: Municipal Systems Act 32 of 2000, that the provisions of section 118 do not fall short of our constitution and that the section does not result in an arbitrary deprivation of property that infringes on section 25(1) of the constitution

Therefore owners are at risk and will be required to settle tenants arrears in order to get a rates clearance certificate in terms of section 118(1) of the Local Government Municipal Systems Act

2. Liability for debts to the council beyond the 2 year period provided for in section 118(3) of the Municipal Systems Act

Whereas sec 118(1) effectively places an embargo on the transfer of immovable property until the council has obtained payment of all amounts owed to it for a period of two years prior the application for rates clearance, section 118(3) determines that 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 a mortgage bond registered against the property.

Therefore rates clearance certificates, required to pass transfer, only indicate that the property is free of outstanding municipal service debts for two years prior to the application, but this does not mean that the property is without debt before that period. The right to claim overrides all other financial entitlements in terms of priority, including that of the bondholder.

3. Refusal by council to issue rates clearance certificates despite owner tendering payment relating to the two year period provided for in section 118 (1)

- a. On 19 September 2008 Judge Percy Blieden in the Johannesburg High Court ruled that the council had no right to withhold clearance certificates on the basis that the full outstanding arrears be settled first and stated that the council can claim two years arrears and six months in advance, (this period has since been reduced to 60 days in advance by amendment of section 118 by section 19 of the Local Government Laws Amendment Act, 2008 which came into operation on 13 October 2008) but not payment of all the outstanding arrears in order to get a rates clearance certificate.
- b. In this latest judgment handed down on 30 November 2009 by the Supreme Court of Appeal [The City of Cape Town v Real People Housing (Pty) Ltd] on appeal from the High Court Cape Town, the question was again asked whether the municipality is entitled to withhold a clearance certificate until all the debts are paid

In the exercise of the council's obligation to collect monies due to them for rates and taxes and municipal services, they are assisted in two ways:

- the debt is a charge upon the property
- municipalities are given the capacity to block transfer of ownership of property until debts have been paid in certain circumstances

The City of Cape Town adopted a credit control policy where payments made by a debtor will be allocated first to the oldest undisputed debts and their payment receipting system had been programmed to process payments accordingly.

Real People Housing (Pty) Ltd was willing to pay for debts in order to get a clearance certificate, as long as they were incurred not more than two years preceding the request for the certificate as laid out in section 118(1) of the Municipal Systems Act 32 of 2000.

As the City refused, Real People Housing (Pty) Ltd applied for the following relief in the High Court at Cape Town:

- full itemised particulars of the amounts that became due for the period two years prior to the date of the request
- declaring the City obliged on receipt of payment of that sum to issue clearance certificate in terms of section 118(1) of MSA
- declaring respondents refusal unlawful

The relief was granted in the High Court at Cape Town and the City appeals.

The Supreme Court of Appeal (SCA) rejected the arguments advanced by counsel on behalf of the City that an implied qualification should be read into section 118(1) as such a proviso will have the effect of nullifying the express language of the section and a term cannot be read into a statute if it would contradict the express terms of the statute. Had it not been the intention to limit the period to two years then the words would not have appeared at all.

The SCA states that the City cannot resolve its obligation to promptly collect debts by subjugating the statute to a policy that would frustrate the terms of the statute. Finally, regarding the City's argument that there is no express provision in the statute obligating the council to supply details of the amounts outstanding for debts incurred in the preceding two years, the court refers to section 95(e) of the Act.

"in relation to the levying of rates and other taxes by the municipality and the charging of fees for municipal services, a municipality must, within its financial and administrative capacity... ensure that the persons liable for payments, receive regular and accurate accounts that indicate the basis for calculating the amounts due".

In regards the City's contention that its computers have been programmed to allocate payments to the earlier debts the court remarks that there should be no doubt that the computer is capable of being programmed to produce the relevant information once the City accepts that the provisions of statute do not yield to practical consideration of that kind. The appeal is dismissed with costs.

- c. Therefore our Supreme Court of Appeal has upheld the decision of the High Court at Cape Town and specifically declared the City obligated to issue a clearance certificate contemplated by section 118(1) of the Local Government: Municipal Systems Act 32 of 2000 on receipt of payment the sums tendered in terms of that section.
- d. In May 2013 our Supreme Court of Appeal ruled in the matter of city of Tshwane Municipality Metropolitan Municipality v Mathabane and Another that the council may not refuse to issue a rates clearance certificate until all amounts owing in connection with the property have been paid or security has been given for payment of same. It found that the council may only refuse to issue rates clearance certificate where all amounts incurred in connection with the property for the two year period prior to the application had not been paid or secured.

The court remarked that the municipality does not lose its rights under section 118(3) upon registration of transfer

Section 118(3) provides as follows -

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 an mortgage bond registered against the property

Some councils have interpreted this remark to mean that they retain the right, after transfer of the property to the purchaser, to rely on the property as security for the debts of the seller and therefore hold the purchaser liable for the sellers municipal debts beyond the two year period covered by the rates clearance certificate issued in terms of section 118(1)

Despite the prevailing opinion that this interpretation of the remark by the Supreme Court of Appeal is incorrect and flies in the face of common law principals of property law and the constitutional rights of the purchaser, it is nevertheless recommended that purchasers protect themselves by ensuring that the agreement by virtue whereof they purchase immovable property contains a provision that the seller will be liable for and settle all amounts due to the local authority in respect of section 118(1) and 118(3) of the Local Government: Municipal Systems Act prior to the purchaser taking transfer.

Although care has been taken to ensure the accuracy of the above information, FN Inc and its members, employees, agents and representatives cannot be held liable for any loss suffered, as a result of the use of this information.

Updated May 2014