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## **SECTION 118 OF THE LOCAL GOVERNMENT: MUNICIPAL SYSTEMS ACT 32 OF 2000**

### 118(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.

### 118(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.'

## **HISTORICAL CASE LAW**

### CITY OF TSHWANE METROPOLITAN MUNICIPALITY V PEREGRINE JOSEPH 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.

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. This court held that a transfer of property from one owner to another does not extinguish the security created by Section 118(3). Therefore, no distinction can 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.

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.

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'. 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.

## **CURRENT CASE LAW**

### JORDAAN AND OTHERS V CITY OF TSHWANE METROPOLITAN MUNICIPALITY AND OTHERS

On 29 August 2017 the Constitutional Court (CC) handed down a unanimous judgment, which affirms that new property owners are not responsible for settling municipal debt accumulated by previous owners.

In Jordaan and Others v City of Tshwane Metropolitan Municipality and Others (CC) the court handed down judgment on an order by the Gauteng Division of the High Court in Pretoria, that declared Section 118(3) is constitutionally invalid. The matter came before the High Court after the City of Tshwane and Ekurhuleni municipalities suspended, or refused to contract for the supply of municipal services to the applicants' properties.

This was on the basis that the applicants, who are relatively recent transferees of municipal properties, owed the municipalities for municipal services rendered to these properties before transfer. The High Court found Section 118(3) constitutionally invalid, to the extent only that it has the effect of transferring to new owners municipal debts incurred before transfer. The High Court found this to be an arbitrary deprivation of property in terms of Section 25 of the Constitution. It said that new owners of property are not liable for municipal debts incurred by previous owners. Therefore, municipalities may not sell the property in execution to recover the debt or refuse to supply municipal services on account of outstanding historical debts.

#### Section 25 of the Constitution states as follows –

1. No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
2. Property may be expropriated only in terms of law of general application—
  - (a) for a public purpose or in the public interest; and
  - (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
3. For the purposes of this section—
  - (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources.

In considering whether to confirm the High Court's declaration of constitutional invalidity, the CC had to determine whether the provision, when properly interpreted, in fact means that, when a new owner takes transfer of a property, the property remains burdened with the debts a previous owner incurred. If the provision was capable of an interpretation that did not impose constitutionally invalid consequences, the High Court's declaration of constitutional invalidity would be unnecessary.

The municipalities of Tshwane, Ekurhuleni and eThekweni, contended that a proper construction of Section 118(3) was that the charge survives transfer. They argued that for municipalities to properly fulfill their constitutional duties of service delivery, they needed extra-ordinary debt collecting measures. This meant burdening new owners with the responsibility for historical debts. The municipalities conceded that nothing prevented them from enforcing their claims for historical debts against those who incurred them, namely the previous owners. The municipalities conceded further that their powers included interdicting any impending transfer to a new owner by obtaining an interdict against the old, indebted owner, until the debts were paid.

The applicants in challenging the meaning the municipalities ascribed to Section 118(3) advanced further arguments including that Section 118(3) permitted arbitrary deprivation of not just the new owner's property rights, but of real security rights the new owner confers on any mortgagee / bank who extends a fresh loan on the security of the property post-transfer. The Johannesburg Attorneys Association focused on a conveyancer's duties and ethical position should the CC hold that Section 118(3) right survives transfer.

In a unanimous judgment, written by Cameron J, the court weighed the historical, linguistic and common law factors bearing on how the provision should be understood, plus the need to interpret it compatibly with the Bill of Rights. The court held that the provision is well capable of being interpreted so that the charge does not survive transfer. The court held that a mere statutory provision, without more, that a claim for a specified debt is a 'charge' on immovable property does not make that charge transmissible to successors in title of the property. Public formalisation of the charge is required (for example, registration in the Deeds Registry of an interdict against the property) so as to give notice of its creation.

Section 118 does not require this public formalisation process. The Bill of Rights prohibits arbitrary deprivation of property, which would happen if debts without historical limit are imposed on a new owner of municipal property. Therefore, to avoid unjustified arbitrariness in violation of 25(1) of the Bill of Rights, the court held that Section 118(3) must be interpreted so that the charge it imposes does not survive transfer to a new owner. As a result, the Court held that because Section 118(3) can properly and reasonably be interpreted without constitutional objection, it is not necessary to confirm the High Court's declaration of invalidity. The Court, however, granted the applicants a declaration that the charge does not survive transfer.

In conclusion, the Court's findings will most definitely have a positive consequence for purchasers, as new owners of immovable property, they will not need to be concerned when applying for rates clearance figures, to the extent that all historic debts will be included when such figures are issued by the Municipality for the seller's account. If at a later stage, the Municipality becomes aware of outstanding historic debt in respect of the property, the Municipality's tacit hypothec no longer survives transfer and it cannot perfect its security over the property, in order to settle the debt. The new owner would therefore not be liable but rather the Municipality would need to institute action against the seller / previous owner, in order to satisfy the debt. The consequence of this ruling is that there is now a clean transfer of title, and the purchaser will no longer have to seek indemnities from the seller in relation to rates payments, likewise financial institutions are protected in this regard. The purchaser is now protected by law.

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