

## **PROPERTY OWNERS' LIABILITY FOR HISTORICAL MUNICIPAL DEBT**

### **Introduction**

Section 118 of The Local Government Municipal Structures Act protects the rights of the Municipality in respect of Municipal debts owed by property owners. This section created much uncertainty in matters where the municipal attempted to enforce its rights against property owners. Since 2012, the Supreme court of Appeal dealt with this issue in two separate cases in an effort to provide the correct interpretation of the Act.

### **Liability of Municipal Debt in terms of the Municipal Systems Act<sup>1</sup>**

Section 118 of the Municipal Systems Act (herein after referred to as "the Act") states in subsection:

*(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."*

Municipal debts include: debts up to 30 years old for rates, refuse and sewer charges; and debts up to 3 years old for electricity and water.

Section 118(1) refers to debts incurred within the "two years" prior to the application for a clearance certificate. Such debt must be paid in full, failing which the Municipality can exercise a restraint on the transfer of the property until the debt is settled. Such a provision is known as a veto or embargo provision.<sup>2</sup>

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<sup>1</sup> Local Government: Municipal Systems Act 32 of 2000

<sup>2</sup> City of Johannesburg v Kaplan N.O. & another (111/05) [2006] ZASCA 39

Section 118(3), creates a charges over the property in favour of the Municipality. The case of BOE Bank v City of Tshwane Metropolitan Municipality<sup>3</sup> held that the word charge created a statutory hypothec over the property which was described as being sui generis. In addition Section 118(3) gives the Municipality a ‘preferent’ right which ranks higher than that of the Bank in respect of mortgaged property. This section does not prescribe a time limit and is understood to be a security provision<sup>4</sup>.

### **The Application of the Act Pre-2013**

Before 2013, it was presumed that a rates clearance certificate guaranteed that no municipal debts were owing, or that if there were outstanding municipal debts then the municipality could not, after the transfer of a property on the strength of a rates clearance certificate issued by it, enforce any old municipal debts other than against the previous owners who themselves incurred the debt. However since 2013 two cases played an important role in changing this position.

### **The City of Tshwane v Mathabathe<sup>5</sup>**

In this case the Municipality issued a statement including all Municipal debt to the owner of fixed property. The owner then brought a High Court application for an order directing the municipality to issue a statement limited to the amounts due in respect of municipal services during the two years preceding the date of application of the clearance certificate, as in terms of section 118(1) of the Act. The High court found in favour of the Applicant. The Municipality then took the matter on appeal. The SCA held that S118(3) does not give the municipality a “veto” right to “block” transfer, but rather a right of security in the form of a hypothec over the property that is subject to the right. The court further held that the “right” given to the Municipality was a right to sell the property in a sale and execution (following a judgment granted for payment of the debt) to cover all amounts owed to it. Although this was obiter, it evidently provided the manner in which the Municipality could enforce S118(3).

### **PJ Mitchell v City of Tshwane Metropolitan Municipality<sup>6</sup>**

In 2014 the Case of PJ Mitchell v City of Tshwane Metropolitan Municipality dealt with the interpretation of S118. The Applicant (Mitchell) purchased fixed property at a sale in execution. The Applicant then sold the property to a private purchaser a Mrs Prinsloo, who was not party to this application, who applied to the Municipality for the supply of municipal services to the property which included electricity, water, sanitation and waste removal. The Municipality refused to enter into an agreement with Mrs Prinsloo until the historical debt was paid in full. As a result of this Mrs Prinsloo refused to take transfer of the property from the Applicant, until the issue of historical debt was

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<sup>3</sup> BOE Bank Ltd v Tshwane Metropolitan Municipality (240/2003) [2005] ZASCA 21

<sup>4</sup> City of Johannesburg v Kaplan N.O. & another (111/05) [2006] ZASCA 39

<sup>5</sup> City of Tshwane Metropolitan Municipality v Mathabathe & another (502/12) [2013] ZASCA 60

<sup>6</sup> City of Tshwane Metropolitan Municipality v PJ Mitchell (38/2015) [2016] ZASCA 1

resolved. The issue before the High Court was whether the Municipalities right of security was enforceable after the property was transferred into the new owner's name.

The High Court held that although S118(3) creates a charge over the property, the matter before it was completely different from that of the Mathabathe case, as in Mitchell's case the immovable property was being sold by sale in execution and not by private sale. The court went on further to state that even though the special hypothec passes subject to burden, certain exceptions exist where the creditor holding a hypothec has kept silent. The court held that in terms of common law when mortgaged property is sold and delivered by an order of court the hypothec is extinguish and the new owner will be granted a clean slate. It held further that the Municipality was aware of the sale prior to transfer, as a clearance certificate was requested. The Municipality provided the certificate to Mitchell, knowing they had a statutory hypothec but remained silent and failed to exercise its right of preference over the proceeds of the property, without any explanation. For these reasons the High court held that the statutory hypothec was extinguished by the sale and execution and the subsequent transfer of the property into the name of the Mitchell.

### **The Supreme court of Appeal Judgment - Tshwane Metropolitan Municipality v PJ Mitchell**

In 2015, the High Court Judgment was taken on appeal. The issue before the SCA was whether the security provided for in terms of Section 118(3) of the Municipal Systems Act 32 of 2000, in favour of the Municipality for moneys owed to it for services delivered in respect of fixed property, "is extinguish when the property is sold at a sale in execution and subsequently transferred to the purchaser."

Firstly the SCA looked at the exception applied in term of the statutory hypothec and held that the exception which was the municipalities silence and failure to act, was misplaced as the literature relied on applied the exception in circumstances where the hypothec was created by agreement. The hypothec in this matter was created by statute having no time limit (in other words it was not a veto provision), therefore the exception did not apply. The court stated that if a limited duration of the hypothec was contemplated then the legislature would have made provision for it. The court further said that no difference can be drawn between property sold in execution or by private sale when considering whether the hypothec survives transfer. Accordingly it was held that the court a quo erred in concluding that the statutory hypothec had been extinguished by the sale in execution and transfer of the property.

Secondly the SCA looked at the liability of the "historical debt". The SCA was in agreement with the court a quo in that owner or his successor were not co-debtors of the historical debt. But the court went on further to note that should the Municipality perfect its hypothec in respect of the historical debt by obtaining a court order to sell the property in execution and apply the proceeds to pay of the debt, then in such an event the owner or his successors might be forced to pay off the debt to avoid losing the property.

Thirdly the SCA looked at the opening of a new Account and held that the court a quo was not entitled to grant the order directing the municipality to open an account in the name of Mitchell or his successors as the Notice of Motion did not pray for an order on those terms.

### **Current position**

The SCA in the Mitchell's case set out the process that the Municipality must follow in its claim for historical municipal debts

#### ***Step 1<sup>7</sup>: To look to its own by-laws and in terms of the City of Tshwane by-laws if***

*1.1 There was no occupier of the property; and*

*1.2 The person who has entered into the contract to receive the services:*

*a) cannot be traced; or*

*b) has absconded; or*

*c) is unable to pay; or*

*d) does not exist.*

Then the Municipality had the right to proceed:

#### ***Step 2: Perfect its Hypothec in terms of S118(3) by***

*2.1 Obtaining a court order allowing it to attach the property;*

*2.2 Selling the property in execution; and*

*2.3 Applying the proceeds from the sale to settle any historical debt.*

### **The impact of the current position**

The Municipality can take legal action against the present owner of a property for any municipal debts owing by that owner and any previous owner of that property, provided the amounts have not prescribed and the all by-laws have been complied with. It can include debts up to 30 years old (for rates, refuse and sewer charges) and 3 years old (for electricity and water), including debts of more than one previous owner. Such legal action would entail suing the new owner for the old owners debt and attaching and selling the property itself, which stands as security in terms of S118(3).

The municipality's right to claim the proceeds of the sale of property trumps the banks right to claim what is owed in terms of the mortgage bond. Consequently the banks risk assessment of purchasers

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<sup>7</sup> Parbhoo N, Historical Debt and Clearance Certification are we all (Un)Clear?, Real Estate Alert, February 2016

of immovable property can never be accurately done, as it cannot realistically assess the risk that the purchaser may be called upon to settle the debts of previous owners.

**The Constitutionality S118(3)**

In the Mitchell's case the SCA Judge made the following comment:

"It must be remembered, at this point, that the constitutionality of s 118(3) of the Act is not in issue in this matter."

Although the SCA did not deal with the constitutionality of S118(3) it is clear that at some point the constitutional court will be left to decide on this issue.

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## **Bibliography**

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