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ATTORNEYS AND CONVEYANCERS

SUPREME COURT OF APPEAL RULING: *City of Tshwane Metropolitan Municipality v Mitchell*

The ruling contained in the Supreme Court of Appeal ("SCA") case of *City of Tshwane Metropolitan Municipality v Mitchell* confirms the position that a municipality can perfect its security over a property in order to settle the debt owed by previous owners of the property as long as it has complied with its own by-laws.

There have been two preceding cases to the latest SCA case of *City of Tshwane Metropolitan Municipality v Mitchell*, namely *City of Tshwane v Mathabathe* and *Mitchell v City of Tshwane*. In the *Mathabathe* case, it was commented by the Court that in terms of section 118 (3) of the Local Government Municipal Systems Act (the "Act"), that the municipality would not lose its claim for debts owed to the municipality upon transfer of the property to a third party and that the property would remain security for the amount owing.

The decision was incorrectly interpreted by local municipalities in that they demanded payment from the new owners for amounts owing on the property as incurred by previous owners, based on the fact that municipalities had a lien over the property in terms of the Act. This issue was clarified in the High Court decision of *Mitchell v City of Tshwane*. Although the property remains as security for the municipality in respect of the debts of previous owners, the new owner of the property does not become liable for any outstanding debts owed to the municipality which have been incurred by the previous owner or any other parties prior to the date of transfer of the property. Any debts which were not collected at the time of issuing the clearance certificate remain a debt of the previous owner and the municipality would have recourse to claim such debt from the previous owners who had incurred the debt. However, if such debt remained unsatisfied the municipality could perfect its security against the property. The Court also held that a distinction had to be made between a property sold in execution and one sold in a private sale. If the property was sold in execution, the local municipalities' security would be extinguished in terms of section 118 (3) of the Act. In other words, it was held that the lien a municipality has over the property does not survive where the sale was one in execution.

Recently the issues raised in both preceding court cases were again brought before the Supreme Court of Appeal. The recent decision taken by the SCA in the case of *City of Tshwane Metropolitan Municipality v Mitchell* held that no distinction is to be made between properties sold in execution and those sold in a private sale. The local municipality does not lose its right in terms of section 118 (3) whether the sale is a private sale or a sale in execution and its lien survives transfer allowing the municipality to perfect its security over the property in order to settle the debts owed by previous owners.

The Courts' decisions may and is likely to have a devastating impact on purchasers as new owners of immovable property as they cannot be certain that during the process of applying for clearance figures from the municipality that all of the historical debts will be accounted for. It is therefore prudent that purchasers and financial institutions do their utmost to ensure that the

full debt owing to the municipality in respect of the property has been settled and paid in full before the transfer of the property occurs. If at some later stage the local municipality becomes aware of outstanding debts in respect of any property, the municipality may perfect their security against the property and the new owner would then be forced to pay the debt in order to avoid their property being sold to satisfy the debt.

Notwithstanding the rights afforded to the municipality, the municipality would still bear the burden of proof regarding the amount of the debt claimed. However, the new owner will be left with very little recourse as they would not be aware of the historical debts attaching to the property and as such the possible arguments and defences which could possibly have been raised by the previous owner when such debts arose will be unavailable to them.

In our view this decision is very likely to come before the Constitutional Court as the case raises serious questions regarding the constitutionality of section 118 (3) of the Act. One would expect the Court to find the section unconstitutional as it is an unjustifiable infringement of the right to property as contained in the Constitution.

In the interim, we suggest the inclusion of the following clause in agents' offers to purchase to protect prospective purchasers against the effect of this ruling:

The seller shall obtain the necessary clearance certificate from the relevant Local Authority in terms of Section 118(3) of the Municipal Systems Act 32 of 2000 (as amended). The seller hereby warrants and acknowledges that once the necessary Clearance Certificate figures has been obtained from the relevant Local Authority, full payment of the outstanding debt shall be made and shall not limit such payment in terms of Section 118(1) of The Municipal Systems Act (as amended) to an amount equal to the outstanding figures for a period of 2 (two) years preceding the application for rates clearances. The seller hereby indemnifies the Purchaser against any claims which may arise from the aforementioned..

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