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NEW PROPERTY OWNERS ARE NO LONGER LIABLE FOR HISTORICAL MUNICIPAL DEBT

In the recent case heard by the North Gauteng High Court, *Chantelle Jordaan and Others v The City of Tshwane Metropolitan Municipality and Others,* which judgment was handed down on 7 November 2016, it has been held that the provisions of section 118(3) of the Local Government: Municipal Systems Act 32 of 2000 are constitutionally invalid to the extent that the security provision, being "a charge upon the property", survives transfer of ownership into the name of a new or subsequent owner who is not a debtor of the municipality with regard to municipal debts incurred prior to such transfer.

The ruling was founded on the outcome of five independent court cases. To mention two instances, one matter concerned commercial property with a historical debt of more than R12 million and the other concerned an applicant who had been without electricity since December 2013.

The court held that by relying on the provisions of section 118(3), a municipality would be entitled to perfect its security (subject to compliance with its own by-laws) by obtaining a court order, selling the property in execution and applying the proceeds to pay off the historical debt. This means that section 118(3) could result in a loss of ownership for new or subsequent owners and consequently a loss of the ability to use, enjoy or exploit the property. Moreover, the court went on to say that the mere existence of such a drastic remedy as a security provision constitutes a severe limitation of the new owner's property rights in terms of section 25(1) of the Constitution of the Republic of South Africa, 1996 and as a result constitutes a deprivation of rights for purposes of section 25(1) of the Constitution. The court held that such deprivation was arbitrary and could not be justified in terms of section 36 of the Constitution.

Prior to 2013 it was inferred that a rates clearance certificate confirmed that no municipal debts were in arrears. Moreover, in instances where a rates clearance certificate was issued and the property was subsequently transferred, the municipality could not enforce any old municipal debts, other than against the previous owners who themselves incurred the debt. However, this position was altered by *The City of Tshwane v Mathabathe* to the extent that legal action could be taken by the municipalities against the present owner of the property for any municipal debts in arrears to the extent that the new owner could be sued for the previous owner's debt. However, in *Tshwane Metropolitan Municipality v PJ Mitchell*, the court found that the property in terms of s118 (3) stands only as security for historical debts and municipalities could not claim historical debts from the current owners. However, it was confirmed that municipalities could have the property attached and sold if the municipality were to perfect its security which would result in innocent purchasers and homeowners being forced to pay the outstanding historical debts to avoid losing their property in a sale in execution.

It must be noted that the *Mitchell's* case did not decide on the constitutionality of section 118(3), whereas property rights as entrenched in section 25 of the Constitution were considered in the recent *Jordaan* case.

In the *Jordaan* case the question was asked *"Why should a municipality be entitled to visit the sins of a predecessor in title upon innocent third parties when there is no relationship or connection between that party and the debts in question?"*. It was contended on behalf of the applicants that historical debts incurred by a former property owner may not be transferred to a new property owner, unless there is an agreement between them to this effect. One has to weigh the economic viability and sustainability of municipalities against forcing a property owner to pay the municipal debts of his predecessor in title or to forfeit his ownership if he refuses to do so. The court was therefore correct, in our view, in saying that new property owners are in no position whatsoever to manage and control the indebtedness of their predecessors in title, whereas in the ordinary course of business, a municipality is in a position to do so. The court was of the opinion that section 118 (3) "casts the net far too wide".

Furthermore, after considering municipal by-laws the court held that it did not render the new owner liable and as a result the municipality has no right in law to refuse municipal services if the historical debt is unpaid. If the municipality were to do so it would be "disregarding its constitutional duty to ensure the provision of services". The judgment is consequently welcomed by industry players as municipalities, in this case, have been ordered to render municipal services where there is no outstanding debt on the part of the new owner.

The declaration of section 118(3) as unconstitutional has been referred to the Constitutional Court for confirmation. We are of the opinion that if section 118 (3) is confirmed as unconstitutional, the security held over the property by the municipality would no longer exist vis a vis new property owners and that municipalities would not be able to claim historical debt on the part of the new owners, or execute against the properties of new owners and subject to such other orders as may be made by the Constitutional Court in this regard. This is however all dependent on whether the municipality will take this matter on appeal or not, which we are of the opinion is likely to happen as well as the Constitutional Court's ruling as to the constitutionality of section 118(3).