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CONSTITUTIONAL COURT RULING

By now most people have heard the fantastic news that the Constitutional Court has ruled that once a property has been transferred, the rights of Municipalities in terms of section 118(3) of the Local Government: Municipal Systems Act ("the Act") against the owner of that property cannot be enforced against the new owner of that property.

In terms of section 118(1) of the Act, a Registrar of Deeds may not register the transfer of a property except on the production to the Registrar of Deeds of a prescribed certificate issued by the Municipality in which the property is situated 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 or the certificate have been fully paid. This is commonly known as a Rates Clearance Certificate.

Section 118(3) provides that any amount which is 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.

In the Supreme Court of Appeal case of *City of Tshwane v Mthabathe*, the Supreme Court of Appeal, held that in terms of section 118 (3) of the Act 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.

In the Supreme Court of Appeal case of *City of Tshwane Metropolitan Municipality v Michelle*, this position was confirmed and the Supreme Court of Appeal held that a Municipality could 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.

The effect of these rulings was that the new owner effectively became liable for any debts owed by the previous owner by virtue of the fact that, although the previous owner was the party who had to pay the debt, the property remained as security for the Municipality who could then sell the property in order to recover the debt owed by the previous owner. This was obviously terrible news for property owners and also for the banks which loaned the monies for the purchase of the properties.

The North Gauteng High Court in the matter of *Chantelle Jordaan and Others v The City of Tshwane Metropolitan Municipality and Others*, held that section 118(3) of the Act was 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 was not a debtor of the municipality with regard to municipal debts prior to such transfer.

As the same was declared unconstitutional, it had to be referred to the Constitutional Court who could either confirm such decision or reject such decision or make an alternative ruling.

After a thorough review of the history leading up to the passing of section 118(3) and the South African law, the Constitutional Court held that section 118(3) was not unconstitutional because of the fact that it was quite clear that it should have been interpreted to read that it could not be enforced against a new owner. This means that the Municipalities enjoy a preference over any mortgage bond registered over the property but cannot enforce the rights against the new owner. The Municipality can of course take the necessary steps to recover the monies against the old owner and can sell the property in execution at any time prior to the transfer.

No doubt from now onwards, the Municipalities will carefully check what amounts are due and owing in respect of the property prior to issuing a clearance certificate and, although they will be obliged to issue a Clearance Certificate in terms of section 118(1), they will nevertheless advise the parties that unless any amounts which are outstanding are paid, which they will take the necessary action against the existing owner and attach the property before transfer.

However, once transfer has been effected, they cannot attach or sell the property.

Questions have arisen as to whether parties that had been forced to pay monies to the Municipality in respect of debts owed by the previous owner, can recover the monies from the relevant Municipality.

It is our opinion that the Constitutional Court has simply stated what the law is and has been all the time and that therefore any payments which were enforced against the new owner can be recovered from the Municipality (subject to a number of technical defences which the Municipality could raise). Certainly if the payment was made under protest, we believe that the monies can be recovered from the relevant Municipality.

This newsflash has been prepared for information purposes only and does not constitute legal advice, or a legal opinion, the practical application of the provisions of this newsflash will vary depending on the facts of each case.

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