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In the recent judgment of *Jordaan and Others v City of Tshwane Metropolitan Municipality and Others*[1] the Constitutional Court provided clarity regarding section 118(3) of the Local Government: Municipal Systems Act 32 of 2000 ("the Act").

The Gauteng Division of the High Court of South Africa declared section 118(3) to be unconstitutional and invalid to the extent that the charge can be transferred from one owner to a new owner. This declaration of unconstitutionality must be confirmed by the Constitutional Court. The Tshwane municipality cross appealed the matter prior to its arrival at the Constitutional Court.

The Constitutional Court held that the section was not unconstitutional if it was interpreted correctly. The correct interpretation provided by the court is one where the charge on the property is not transferred from a previous owner to a new owner.

Charge on the property refers to any municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties.

In *Jordaan*, the Constitutional Court joined together three similar matters, the applicants in all of the matters were owners, or corporations acting on behalf of the owners, of property in Tshwane and Ekurhuleni. In each case the recent transferee had complained that the relevant municipality had suspended the provision of municipal services and refused to conclude a consumer services agreement until the historical debts pertaining to the immovable property had been satisfied.

SUPREME COURT OF APPEAL

In previous judgments the Supreme Court of Appeal ("SCA") found that the new owner of an immovable property could be held liable for the historical debt relating to that property.

In *City of Tshwane Metropolitan Municipality v Mathabathe and Another*[2] the SCA found that the municipality erred in assuming that upon registration of a transfer it lost its rights to claim under the Act. The SCA stated that section 118(3) leads to, "the security provided by the subsection amounting to a lien having the effect of a tacit statutory hypothec".[3] The combined effect of which was that a claim for a charge on the property by the municipality was a preferential claim to any other creditor and could be transferred to the new owner when a property was sold.

In *Tshwane City v Mitchell*[4] the SCA confirmed that section 118(3) created a statutory hypothec over the immovable property in favour of a municipality for payment of historical debts. The statutory hypothec was held not to be extinguished when the property in question was transferred from one owner to another. The SCA also specifically stated[5] that it did not matter if the sale was pursuant to a sale in execution, public auction or by way of private treaty.

CONSTITUTIONAL COURT

In *Jordaan*, the Constitutional Court found that it was not necessary to declare section 118(3) to be unconstitutional as the section was capable of being interpreted in a manner that was not outside of the boundaries of the Constitution or its principles.[6]

The court held that when a charge upon a property is capable of being transferred from one person to another it is a requirement that the charge is registered in the Deeds Office. As section 118(3) does not require the charge to be registered or noted on the deeds registry, the charge can only be satisfied by the current owner and cannot be transferred to the new owner.

A municipality had sufficient time and numerous means to proceed against the previous owner in order to recover an outstanding charge. The municipality is notified of an impending sale in terms of section 118(1) of the Act, as a municipality is required to provide a clearance certificate which confirms that all municipal charges have been paid for the preceding two year period. Upon receiving a request for such a certificate a diligent municipality would surely attempt to recover any charges outstanding in terms of the property.

The court held that the charge on the immovable property against the existing owner, and the preference for a municipality's charge against the existing owner over the claim of a mortgagee against such an owner, when coupled with the warning that a municipality receives by the request for a clearance certificate in terms of section 118(1), provides sufficient opportunity for the municipality to reclaim any outstanding amounts from a would be seller before the transfer of an immovable property occurs.

As a last resort, if the municipality is unable to recover outstanding charges from a seller before a sale occurs, the municipality can apply for an interdict preventing the transfer of the immovable property until the seller satisfies the outstanding charges.

The court stated that allowing a debt to transfer with the property from an historical owner to a new owner would amount to an arbitrary deprivation of property which would violate section 25(1) of the Bill of Rights. As a result section 118(3) would have to be interpreted in a way that this could not occur. The court provided the correct interpretation of the section as a declaratory portion of the order and stated that; "upon transfer of a property, a new owner is not liable for debts arising before transfer from the charge upon the property under section 118(3)."[7]

The court also highlighted the fact that a municipality has certain duties to perform. One of which is a duty to do everything possible to reduce the amounts owing to it by timeously collecting all monetary amounts that are due and payable to it, and by implementing credit controls and debt collection policies a municipality would make this task easier. Another is a duty to provide services to its residents. A municipality which allows the transfer of an immovable property to take place and then refuses to open a new account for the new owner to receive such services until they satisfy any charge on the property pertaining to the immovable property is not providing any services to that new owner.

OUTCOME OF THE JUDGMENT

A purchaser of an immovable property is protected from a claim by a municipality for any charge on the property pertaining to the immovable property.

Section 118(3) of the Act still applies, and a municipality can proceed with a claim against a current owner of a property at any time before the debt prescribes (30 years). Such a claim will rank in preference to that of a mortgage bond registered over the property.

In terms of section 118 of the Act, a municipality is entitled to claim outstanding debt from the seller for a period of two years prior to being obliged to issue a certificate, however, a municipality is entitled to prevent a transfer of an immovable property by applying for an interdict preventing the transfer before the settlement of the charge on the property by the seller.

The municipality will not lose the claim against the seller if the property is transferred, but rather loses the security for the claim provided by the statutory hypothec over the property, as this security cannot be transferred to the new owner. In a scenario where a municipality is owed outstanding charges which are older than two years, the municipality would be entitled to claim the outstanding amount which is older than two years from the seller, but would have to do so on an unsecured basis.

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[1] [2017] ZACC 31.

[2] 2013 (4) SA 319 (SCA).

[3] *Ibid* p325.

[4] 2016 (3) SA 231 (SCA).

[5] *Ibid* p238, "No distinction can therefore 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 s118(3) survives transfer."

[6] See *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* 2016 (6) SA 596 (CC) p639 where the learned Judge Cameron said, "Since *Hyundai*, it has been gold-plate doctrine in this court that judges must embrace interpretations of legislation that fall within constitutional bounds over those that do not, provided that the interpretation can be reasonably ascribed to the section. Where a legislative provision is reasonably capable of a meaning that places it within constitutional bounds, it should be preserved. Only if this is not possible, this court has held, should resort be had to the remedy of notional severance."

[7] *Jordaan and Others v City of Tshwane Metropolitan Municipality and Others* [2017] ZACC 36.



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