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REAL ESTATE

Property buyers may be liable for historical debt

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In a recent judgement handed down by the Supreme Court of Appeal, the court ruled that a hypothec created by section 118(3) of the Municipal Systems Act 32, 2000 (the "Act") in favour of a municipality over immovable property for outstanding municipal debt is not extinguished by a sale in execution and subsequent transfer of the property. The municipal debt includes; municipal service fees, surcharges on fees, property rates and other municipal taxes and levies incurred in relation to the property.

INTRODUCTION

In the matter between City Tshwane Metropolitan Municipality v PJ Mitchell (38/2015) (2015) ZASCA, the court held that the right of the municipality to perfect its security in terms of the hypothec can be enforced at any time before the debt prescribes (a term of 30 years) and, further, that section 118(1) of the Act, in terms of which an owner of a property is liable for municipal debt dating back only two years in order to obtain a rates clearance certificate, does not limit the duration of the hypothec.

The hypothec enjoys preference over any mortgage bond registered over the property.

THE OUTCOME OF THE JUDGEMENT

The effect of the judgment is that the municipality is entitled to perfect its hypothec over immovable property, which ranks in preference to any other security over the property, for any outstanding municipal debt in relation to that property incurred within the last 30 years. This appears to be the case regardless of whether the property has been sold in execution, by private treaty or by public auction and transferred to a new owner.

In order to safeguard against risks which may be created by or which may arise following the judgment, purchasers of immovable property and indeed creditors funding the purchase of such properties, should ensure that adequate contractual protections are put in place.

These may include warranties from the seller that there is no outstanding municipal debt in respect of the relevant property, and an indemnification in favour of the purchaser, that should any future claim relating to outstanding municipal debt arise against the purchaser (or any of its successors or assigns), as the new owner of the property, the seller shall indemnify the new owner for such claims. Unfortunately these contractual protections will not be obtainable in sales of execution where the property is disposed of by the Sheriff. It has been suggested that purchasers take out insurance should there be a concern.



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