

SUMMARY OF THE JUDGMENT

PROPERTY'S HISTORIC DEBTS PASS TO NEW OWNER AFTER EXECUTION SALE

City of Tshwane Metropolitan Municipality v PJ Mitchell (38/2015) [2016] ZASCA 1 (29 January 2016)

For a property transfer to be registered, proof must be submitted to the deeds office that rates and taxes for the preceding two years have been paid (section 118(1) of the Municipal Systems Act). Older debts are secured by section 118(3) of the Act which creates a charge on land in favour of a municipality. In this judgment the Supreme Court of Appeal overturned previous judgments that held that this hypothec is extinguished where transfer follows on an execution sale. Thus in both a private and an execution sale a municipality can, having exhausted the debt collection provisions in its by-laws against the original debtor, proceed against the property's successor in title.

The Judgment can be viewed [here](#).

FACTS

Mitchell purchased a property in Wonderboom, Gauteng, at a sale in execution. The property was situated within the municipal boundaries of the City of Tshwane (the municipality). When Mitchell applied for a clearance certificate, the municipality indicated that a total amount of R232,828.25 was outstanding in respect of municipal service fees, levies and rates. That amount included debts older than two years preceding the date of the application for a clearance certificate (historical debt).

Clause 6.4 of the 'CONDITIONS OF SALE IN EXECUTION OF IMMOVABLE PROPERTY' provided that Mitchell was responsible for payment of "all costs and charges necessary to effect transfer including conveyancing costs, rates, taxes and other like charges necessary to procure a rates clearance certificate, transfer duty or VAT attracted by the sale and any Deeds Office registration levies."

Mitchell disputed the correctness of the amount claimed for purposes of obtaining a clearance certificate in terms of section 118(1) of the Local Government: Municipal Systems Act, 32 of 2000 (the Act). The dispute was subsequently settled and the municipality issued figures relating to the preceding two years' rates and taxes only. This was paid, leaving the historical debt of R106,219.75 still outstanding, due and payable if it had not become prescribed.

Mitchell then sold the property to Prinsloo who, before taking transfer, applied to the municipality for the supply of municipal services such as electricity, waste removal and

water to the property. A municipal official refused to open an account in her name until the historical debt was paid. As a result, Prinsloo then instructed her attorney not to proceed with the transfer until the issue of the historical debt had been resolved.

Mitchell then approached the Gauteng Division of the High Court, Pretoria, seeking, among others, an order declaring that he was not liable for the historical debt owed to the municipality by previous owners.

The Pretoria High Court relied on an exception allowed in common law and held that the security that the municipality held over the property in terms of section 118(3) is extinguished by the sale in execution and subsequent transfer of the property.

The municipality appealed to the Supreme Court of Appeal.

The relevant parts of section 118 provides as follows:

‘(1) A registrar of deeds may not register the transfer of property except on production to that registrar of deeds of a prescribed certificate –

(a) issued by the municipality or municipalities in which that property is situated; and

(b) 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 for the certificate, have been fully paid.

... .

(3) An amount 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.’

HELD:

- A provision such as the one contained in section 118(1), sometimes referred to as an “embargo” or “veto” provision, can be traced back to provincial ordinances concerning local authorities passed many years ago. Nowadays it is described as a tacit statutory hypothec.
- Distinguishing between 118(1) and 118(3), it is said that the principal elements of section 118(1) is ‘an embargo provision with a time limit’ and that of section 118(3), a ‘security provision without a time limit’.
- The effect of section 118(3) is to create a security for payment of outstanding municipal debts in favour of the municipality.

- The court *a quo*, in finding that the hypothec was extinguished, distinguished the SCA judgment in *Mathabathe* where it was accepted by the court that the hypothec existed after transfer following a private auction and on an extract from *Voet*. However, the distinction sought with regard to the *Mathabathe* judgment was incorrect. Neither was the reliance on the *Voet* text warranted as it related to instances where the hypothec was created by agreement, and not by court proceedings where a debtor obtains judgment to enforce his rights (i.e., execution proceedings), and was thus not authority for making an exception in the event of execution sales. (The exception referred to in *Voet*, in the discussion of hypothecs created by agreement (such as mortgage bonds), was that on a sale in execution, the hypothec is extinguished and the new owner is granted a clean title.) The present matter was distinguishable as the hypothec was created by a statute that places no limit to its duration.
- 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 section 118(3) survives transfer.

Thus the sale in execution and subsequent transfer of the property into the name of Mitchell did not extinguish the hypothec created by section 118(3) of the Act in favour of the municipality. *"This means that the municipality is not prevented from perfecting its security over the property, should it wish to do so, to ensure payment of the historical debt. Perfecting its security would involve obtaining a court order, selling the property in execution and applying the proceeds to pay off the outstanding historical debt. In that event, the respondent might be forced to pay the debt in order to avoid losing his property. It is in that sense that the respondent, as owner of the property, could be said to be liable for the historical debt. It must be remembered, at this point, that the constitutionality of s 118(3) of the Act is not in issue in this matter."*

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