

BIZCOMMUNITY Concourt judgment a big win for real estate

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Today's ruling by the Constitutional Court means that new homeowners will no longer have to worry about being held liable for historical debt incurred by previous owners, and having their municipal services cut off as a result, or possibly even having their property attached and sold in execution.



The judgment brings to an end a long period of confusion “and no little controversy” since judgment was given in 2013 in the Gauteng High Court case *Mathabathe vs Municipality of Tshwane*, which concerned the process of obtaining and lodging a municipal clearance certificate.

In terms of Section 118(1) of the Municipal Systems Act, conveyancers are obliged to obtain such clearance certificates before properties can be transferred to new owners, in order to ensure that any rates and utility charges to the local authority by the property seller have been paid up to date.

However, the Act in fact only stipulates that the municipality must issue the certificate if the outstanding debt for the two years immediately preceding the date of sale has been paid in full, and in the above case the court ruled that if there was debt older than that (historical debt), the property could be transferred to the new owner but the seller would remain indebted to the municipality for historical debt.

Charge upon the property

All would have been fine at that point, except for the fact that Section 118(3) of the Act stipulates that all municipal debt (including the historical debt) is actually “a charge upon the property”, rather than on a person – which led the court to also rule that the municipality would therefore have a lien (statutory tacit hypothec) over the property for the payment of the historical debt – and that this lien would not be extinguished when the property was transferred to a new owner.

The effect of this, in legal language, was seemingly that a municipality which wanted to ‘perfect its lien’ could thus attach the property from the new owner and sell it on auction to settle the previous owner’s historical debt. And in fact some municipalities did start trying to use this judgment to try to collect historical debt from new owners. Some even went so far as to refuse to open utility accounts in the name of new owners until they had settled the previous owners’ historical debt.

This has obviously created a major worry and frustration for property buyers, and for the real estate industry as a whole, and the situation was only slightly improved by the 2014 judgment in the case of PJ Mitchell v City of Tshwane Metropolitan Authority, when the same court ruled that a municipality’s lien over a property had been extinguished by a sale in execution and that the new owner should be granted a clean title.

In that case, the court did also rule that a municipality cannot refuse to provide services to a new owner on the grounds that there is a historical debt that has not been paid – but it remained to be decided what should happen when a property is not sold in execution but, as is usually the case, in terms of an agreement between buyer and seller.

Unanimous judgment

And this is exactly what today’s ruling by the Constitutional Court makes clear. The unanimous judgment, which was handed down by Justice Edwin Cameron, is that Section 118(3) of the Municipal Systems Act is capable of being interpreted so that the ‘charge upon the property’ does not survive transfer of that property to a new owner.

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