

Concourt rules new homeowners not liable for debts of previous owners

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Constitutional Court justices. Picture: Tracy Lee Stark

The highest court in SA has found against municipalities for wanting to make people cough up for debts that aren't theirs.

Municipalities cannot hold a new property owner liable for a previous owner's historical municipal debt, the Constitutional Court ruled on Tuesday.

The precedent-setting ruling gives relief to home and business owners, who have been saddled with years of historical municipal debt – dating back to 20 years – and have been denied municipal services until the debt had been paid. The outstanding debt includes water, electricity, rates and taxes charges associated with a property.

In a ruling majority written by Justice Edwin Cameron, the court found that upon transfer of a property, a new owner is not liable for old municipal debt. The court upheld a ruling by the high court in Pretoria in November last year – mainly the part stipulating that the liability of the old municipal debt rests with the previous owner.

Metropolitan municipalities of Tshwane and Ekurhuleni brought an application at the Constitutional Court to appeal the Pretoria High Court ruling.

Municipal debt specialist New Ventures Consulting and Services, which has represented several property owners who have carried the liability for the historical debt, was a respondent in the matter. The Banking Association of South Africa, commercial property financier Tuhf and the Ethekewini Metropolitan Municipality joined the matter as friends of the court.

The metropolitan municipalities of Tshwane, Ekurhuleni and Cooperative Governance and Traditional Affairs Minister Des van Rooyen were ordered to pay costs for the appeal application.

Giving municipalities the power to claim historic debt has implications for the banking industry.

In theory, municipalities would be the first to claim the debt from the proceeds of a property sale, which could result in banks not getting their money back. This would happen when the municipal debt and the amount owed to the bank is larger than the value achieved from the property sale.

Historically, a property was not allowed to be transferred to a new buyer until a municipal certificate that cleared debt spanning over two years was issued under section 118 (1) of the Municipal Systems Act.

However, debts that surpassed the two-year cut off became the liability of the new owner. If the owner failed to pay the debt, the municipality was then permitted to attach and sell the property to settle the debt.

At the heart of the appeal is the interpretation of section 118 (1) and (3) of the act. The act includes a security provision for historical debt to be incurred by the new owner, which municipalities used in their refusal to issue a clearance certificate during the sale of a property until all debts had been paid. This section of the act was declared unconstitutional by Judge Dawie Fourie at the High Court as it unjustifiably limited the property rights of new owners under the Constitution.

In its judgement, the court assessed common law factors that could impact on how section 118 (3) of the Municipal Systems Act can be interpreted in line with the Bill of Rights. Cameron said the sections of the Act must be interpreted so that historical debt is not transferred to the new owner.

It is on this basis that the court ruled that the section 118 (3) is “well capable of being interpreted ” so that the historical debt is not transferred to a new owner of the property. The court did not confirm the ruling by the High Court that sections of the Act were unconstitutional and invalid, as Cameron said the sections can be “properly and reasonably” interpreted without Constitutional objection.

Section 118 doesn't require a formal registration of the property's historical municipal debt with the Deeds Registry office when it's about to be transferred to a new owner.

“What is notable about section 118(3) is that the legislature did not require that the charge [historical debt] be either registered or noted on the register of deeds. Textually, there is no indication that the right given to municipalities has a third-party effect [to a new owner]... It [historical debt] stands alone, isolated and unsupported, without foundation or undergirding and with no express words carrying any suggestion that it [historical debt] is transmissible,” he said in the judgement.

The respondents in the matter argued that making a new owner liable for historical debt could prejudice new homeowners and promote the deprivation of property, in line with the prescripts of the Bill of Rights. Cameron held this view, saying if the debt survives the transfer to the new owner under section 118(3), “there could be a significant deprivation of property”.

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