



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 38/2015

In the matter between:

**CITY OF TSHWANE METROPOLITAN
MUNICIPALITY**

APPELLANT

and

PEREGRINE JOSEPH MITCHELL

RESPONDENT

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

Coram: Mpati P, Bosielo, Saldulker and Zondi JJA and Baartman AJA

Heard: 4 November 2015

Delivered: 29 January 2016

Summary: Local Government – Section 118(3) of the Local Government: Municipal Systems Act 32 of 2000 creating charge on land (hypothec) in favour of municipality for debt due to it for rates, taxes and services – hypothec not extinguished upon transfer – municipality must comply with jurisdictional requirements in terms of own by-laws before pursuing owner for debt.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Fourie J sitting as court of first instance): judgment reported *sub nom Mitchell v City of Tshwane Metropolitan Municipal Council* 2015 (1) SA 82 (GP).

1 The appeal is upheld.

2 Paragraph 1 of the order of the court a quo is set aside and replaced with the following:

‘1 The application is dismissed.’

3 No order is made as to the costs of the appeal.

JUDGMENT

Baartman AJA (Mpati P, Bosielo and Saldulker JJA concurring)

[1] This appeal concerns the interpretation of s 118(3) of the Local Government: Municipal Systems Act, 32 of 2000 (the Act). The question is whether the security provided for in s 118(3) of the Act in favour of a municipality, for moneys owed to it for services delivered in respect of fixed property, is extinguished when the property is sold at a sale in execution and subsequently transferred to the purchaser.

[2] On 22 February 2013 the respondent purchased a fixed property known as Erf 296, Wonderboom Township, Gauteng (the property), at a sale in execution. The property is situated within the appellant’s municipal boundaries. Clause 6.4 of the ‘CONDITIONS OF SALE IN EXECUTION OF IMMOVABLE PROPERTY’ provided: ‘The purchaser shall be 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 rate clearance certificate, transfer duty or VAT attracted by the sale and any Deeds registration office levies.’

[3] In terms of s 118(1) of the Act, a registrar of deeds may not register the transfer of property, except on production of a certificate – commonly referred to as a

clearance certificate – confirming that all amounts due to the municipality in respect of that property for service fees, levies, rates and taxes for the two years preceding the date of application for the certificate, have been paid in full. When the respondent applied for a clearance certificate, the appellant issued a ‘written statement’ reflecting an outstanding amount of R232 828.25 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).

[4] The respondent disputed the correctness of the amount reflected in the ‘written statement’ as being payable for purposes of obtaining a clearance certificate in terms of s 118(1). The dispute was, however, settled and the appellant issued a certificate reflecting the outstanding amount due to it as R126 608.50, which represented only the debt due for the two years preceding the date of the respondent’s application for issue of the certificate. The respondent paid that amount, leaving the historical debt of R106 219.75 still outstanding, due and payable if it had not become prescribed.

[5] The respondent subsequently sold the property to Ms Lynette Prinsloo (Prinsloo) who, before taking transfer, applied to the appellant 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 and informed her that she would be held liable for the historical debt. Prinsloo accordingly gave instructions to the attorney who was to deal with the transfer not to proceed with it until the issue of the historical debt had been resolved.

[6] The respondent then approached the Gauteng Division of the High Court, Pretoria, seeking, among others, an order declaring that he, ‘or his assigns and successors in title of the Property’, were not liable for the historical debt owed to the appellant by previous owners. On 8 September 2014, the high court (Fourie J) granted the following order in favour of the respondent:

‘1. It is declared that:

1.1 the security provided by section 118(3) of Act No 32 of 2000 [the Act] in favour of the respondent with regard to the property known as Erf 296, Wonderboom Township,

Registration Division J.R., Gauteng [the property], was extinguished by the sale in execution and subsequent transfer of that property into the name of the applicant;

1.2. the applicant (or his successor in title); is not liable for the payment of outstanding municipal debts older than 2 years which were incurred by his predecessor(s) in title prior to the date of transfer of the said property into his name;

1.3. the respondent has no right to refuse the supply of municipal services (such as electricity, water, sanitation and waste removal) to the applicant (or his successor in title) with regard to the said property only because of outstanding municipal debts older than 2 years.

2. There shall be no order with regard to costs.'

With leave of the court a quo, the appellant now appeals against this order.

[7] The relevant parts of s 118 provide 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.'

[8] In *BOE Bank Ltd v Tshwane Metropolitan Municipality*¹ Brand JA observed that provisions such as those contained in s 118(1), 'sometimes referred to as "embargo" or "veto" provisions, can be traced back to provincial ordinances concerning local authorities passed many years ago'.² He said, further³:

¹ *BOE Bank Ltd v Tshwane Metropolitan Municipality* (240/2003) [2005] ZASCA 21 (29 March 2005); 2005 (4) SA 336 (SCA).

² Para 7. Brand JA was referring to s 50(1) of Transvaal Local Government Ordinance 17 of 1939, the wording of which was similar to that of s 118(1) of the Act.

³ Para 7.

'Whereas s 50(1) of the Ordinance contained an embargo or veto provision, similar to s 118(1), s 50(2) provided for a "charge" similar to s 118(3), which has since been described as amounting to a tacit statutory hypothec. . . .'⁴

[9] This court has also described the principal elements of s 118 as 'an embargo provision with a time limit (s 118(1))' and 'a security provision without a time limit (s 118(3))'.⁵ It held that the effect of s 118(3) is to create a security for payment of outstanding municipal debts in favour of the municipality.⁶ As to the extent of the outstanding municipal debts, the following was said in *BOE Bank*:

' . . . For purposes of s 118(3) it therefore does not matter when the component parts of the secured debt became due. The amounts of all debts arising from the stipulated causes are added up to become one composite amount secured by a single hypothec which ranks above all mortgage bonds over the property.'⁷

It follows that in the present matter the historical debt was a charge upon the property, as was the amount paid for purposes of obtaining the clearance certificate.⁸

[10] The court below observed that security in the form of a tacit statutory hypothec is a limited real right (as opposed to a personal right) in the property of another that secures an obligation. 'Generally speaking', it said, 'there is no reason, whilst the principal debt is still outstanding, why transfer in the normal course of business should terminate this right.'⁹ And, quoting Voet 20.1.13, the court said that 'immovables subject to a special hypothec pass subject to their burden, whether they have been transferred by onerous or lucrative title to another and whether that other is aware or unaware of the mortgage bond'¹⁰. However, after

⁴ Section 50(2), which later became s 50(3) of the Transvaal Local Government Ordinance contained wording similar to s 118(3) of the Act.

⁵ *City of Johannesburg v Kaplan N.O. & another* (111/05) [2006] ZASCA 39 (29 March 2006); 2006 (5) SA 10 (SCA) para 13.

⁶ Paras 15 and 16.

⁷ Para 10.

⁸ Although in his heads of argument counsel for the respondent submitted that the historical debt has become prescribed and that the issue had become moot, that argument was not persisted with before us.

⁹ Para 9.

¹⁰ Para 12.

referring to an exception to this 'rule' contained in Voet 20.1.13¹¹, it concluded thus:

'It therefore appears that in terms of the common law when mortgaged properties have been sold and delivered "on the petition of creditors by order of a Judge" (which is another way of referring to a sale in execution), the hypothec is extinguished and the new owner will be granted a clean title. This is, in my view, still the law today.'¹²

[11] With regard to the application of the exception to the present matter the court a quo reasoned that it must be accepted that the appellant was aware of the sale in execution prior to transfer, as it had been requested to issue a certificate in terms of s 118(1) of the Act and that, whilst holding a statutory hypothec, it kept silent by not exercising its right of preference over the proceeds of the sale of the property. In those circumstances, it should follow, so the court held, that the appellant's statutory hypothec 'was extinguished by the sale in execution and subsequent transfer of the property into the name of the [respondent]'.¹³

[12] In holding that the appellant's security over the property (hypothec) had been extinguished by the sale in the execution and subsequent transfer of the property, the court a quo distinguished the present matter from this court's decision in *City of Tshwane Metropolitan Municipality v Mathabathe & another*,¹⁴ on the basis that in that case the property was sold, 'not at a sale in execution, but by public auction on behalf of the mortgagor'.¹⁵ In *Mathabathe*, the property was sold by public auction at the request of the owner and by agreement between him, as mortgagor, and the mortgagee. The municipality sought an undertaking from the owner, or transferring attorney, that the historical debt would be paid on the date of transfer or soon thereafter. The municipality alleged that it needed the undertaking because its security over the land would be lost once transfer took place.

¹¹ The exception reads; 'Another exception is when mortgaged properties have been sold and delivered on the petition of creditors by order of a Judge with employment of the formalities of the spear, and creditors holding a hypothec have kept silent. Nevertheless, by our customs in such a case the price takes the place of the thing, and a hypothecary creditor is permitted to contest with the rest of the creditors the privilege of preference over the price of the mortgaged property.' (Percival Gane's Translation, 1956 at 488-489).

¹² Para 13.

¹³ Para 14 of the judgment.

¹⁴ *City of Tshwane Metropolitan Municipality v Mathabathe & another* (502/12) [2013] ZASCA 60 (22 May 2013); 2013 (4) SA 319 (SCA).

¹⁵ Para 11.

[13] In *Mathabathe*, Ponnann JA said the following on the issue of the undertaking sought by the municipality:

‘Unlike ss (1), ss (3) is not an embargo provision – it self-evidently is a security provision. The Municipality failed to draw that distinction and thus confused the two distinct remedies available to it. It, moreover, was plainly wrong in its contention that “upon registration [of transfer] . . . [it] loses its rights under s 118(3) of the Act”. It follows that in at least those two fundamental respects the Municipality has misconstrued the import of s 118(3). Having misconstrued the section, it sought, in addition to the security that it enjoys for the historical debt to which no limit in duration exists, the postulated undertaking. In that it had to fail.’¹⁶

[14] This court has therefore clearly held that a transfer of property from one owner to another does not extinguish the security created by ss 118(3). Counsel for the respondent did not argue that *Mathabathe* was wrongly decided, but submitted that at least in respect of sales in execution, the statutory hypothec created in terms of s 118(3) ‘is to be enforced against the proceeds of the sale of the property at a sale in execution’.

[15] In my view, the distinction drawn by the court a quo between the present matter and *Mathabathe*, and relied on by counsel for the respondent in this court, is not justified. The reliance on the exception in Voet 20.1.13 is, in my opinion, misplaced. The text relied upon appears under the main title: *The contract of pledge and hypothec, and the agreements attached to it*. The subheading to section 13 reads: *Immovables specially mortgaged pass with burden*. And in 20.1.1 a hypothec is defined as ‘a praetorian and discretionary agreement, by which a right *in re* is established for a creditor in security of his credit, without transference of the possession to that creditor’. Title one (1) of Book 20 (Voet 20.1) deals, therefore, with instances where the ‘hypothec’ was created by agreement, such as an agreement in terms of which a debt was secured by means of a mortgage bond registered over immovable property in favour of a creditor, or an agreement formalised by a praetor. In my view, the exception in Voet 20.1.13, on which the court a quo relied, does not apply to a hypothec created by a statute that places no limit to its duration. There is

¹⁶ Para 12.

nothing in the Act that indicates that any exception to the application of the provisions of s 118(3) was contemplated where property is purchased at a sale in execution. On the contrary, there are indications that the exception to the common law invoked by the court a quo does not apply to the statutory hypothec created by s 118(3) of the Act.

[16] The provisions of s 118, including s 118(3), are made subject to s 89 of the Insolvency Act 24 of 1936 in the case of the transfer of property by a trustee of an insolvent estate (s 118(2) of the Act). Section 118(5) provides that subsection (3) 'does not apply to any amount referred to in that subsection that became due before a transfer of a residential property or a conversion of land tenure rights into ownership contemplated in subsection (4) took place'. Clearly, then, if a limited duration of the hypothec created by s 118(3) was ever contemplated in respect of property purchased at a sale in execution, the legislature would have made provision for it. (Compare *BOE Bank*, above, para 11¹⁷.) It did not do so and the exception contained in Voet 20.1.13 cannot, in my view, be read into s 118(3) of the Act. 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 s 118(3) survives transfer. It follows that the court below erred in concluding that the appellant's statutory hypothec had been extinguished by the sale in execution and subsequent transfer of the property into the name of the respondent.

[17] Counsel for the respondent, however, submitted that s 118(3) of the Act must be interpreted in accordance with the common law, in terms of which, he contended, a hypothec 'is upon transfer of the property extinguished and the new owner obtains a clean title to the ownership of the property free of security' when mortgaged property has been sold at a sale in execution. In such a case, counsel argued, the price replaces the property and is shared by the hypothec creditors, in order of

¹⁷ '[11] Conversely, if the Legislature really intended to render s 118(3) subject to the same two-year time limit contemplated in s 118(1), it could have done so in a number of ways. It could, for instance, have repeated the wording of s 118(1). Or, it could have followed the precedent of the 1939 Transvaal Ordinance by simply referring to "any amounts due in terms of s 118(1)." This would have the added advantage of avoiding repetition of the cumbersome language enumerating the different causes from which the debts may arise. The inference is clear. If the Legislature intended to introduce a time limit into s 118(3), it would not have done so in the convoluted way suggested by the bank.'

preference, with the rest of the creditors. In this regard, counsel relied, among others, on the judgment of this court in *Land en Landboubank van Suid-Afrika v Absa Bank Bpk en andere*, (519/94) [1996] ZASCA 76 (11 June 1996); 1996 (4) SA 543 (A). In that matter, Hefer JA dealt with the interpretation and effect of s 55(2)(c) of the Land Bank Act 13 of 1944, as amended. The Land Bank Act authorised the Land Bank to obtain payment of a loan, which it had advanced and had been secured by mortgage bond, by selling the mortgaged property by public auction without following any judicial process and to apply the proceeds of the sale to settle the amount due to it. Section 55(2)(c) provided, in summary, that the board (of the Land Bank) could transfer the mortgaged property to the purchaser and give the latter a legally valid title (*regsgeldige titel*), even though the property may have been hypothecated or had been subject to a right of retention or an encumbrance in favour of another.

[18] In the course of considering the meaning of the words ‘*regsgeldige titel*’, Hefer JA referred to the rights of a mortgagee when the property over which it had held security was sold at a sale in execution. The learned judge of appeal said (at 550G–H):

‘Word die grond in die uitvoering van ‘n hofbevel verkoop, verloor verbandhouers hul regte ten opsigte van die grond maar hulle behou hul aanspraak op voorkeer onder die *pretium succedit in locum rei* reël.’¹⁸

[19] Hefer JA merely mentioned this (the effect of a sale in execution on the rights of mortgagees), however, when he made the observation that the directions contained in s 56 of the Land Bank Act, regarding the distribution of the proceeds of a sale of land in terms of the provisions of s 55, did not place holders of security in respect of the land in a worse position than that which obtains following a sale in execution. This court did not deal, in that matter, with the question whether a statutory hypothec survived transfer, but rather with the meaning of the words ‘*regsgeldige titel*’. The question it was called upon to answer was whether a purchaser of land at a public auction, authorised by s 55 of the Land Bank Act,

¹⁸ Loosely translated, the court said: ‘Where land is sold in execution of a court order the bondholders lose their rights in respect thereof [ie, they lose their security over the land], but retain their claim for preference under the rule *pretium succedit in locum rei*.’

received transfer of such land free of any encumbrance despite the fact that it (the land) may have been hypothecated. The reliance on *Land en Landboubank v Absa* for the proposition that s 118(3) of the Act should be interpreted in accordance with the common law relating to the effect of a sale in execution on the rights of bondholders is, therefore, misplaced.

[20] In view of the conclusions I have reached, it becomes unnecessary to deal in detail with counsel's further reliance on the provisions of Rules 45(11)(a)(i)¹⁹ and 46(5)(a)²⁰ of the Uniform Rules of Court for the submission that the appellant was called upon 'to set a reserve price at the sale in execution of the property for the preferent claim it may have against the judgment debtor'. The appellant's failure to have exercised its rights in terms of the relevant rules, so the argument went, prohibits it from perfecting its security over the land pursuant to the sale in execution. This argument assumes that a notice of the sale in execution had been served on the appellant as required by the relevant rule. There was no evidence to that effect before the court a quo. In any event, the rules cannot be used as an aid to interpret legislation.²¹ Counsel's further argument, therefore, cannot in any case be sustained.

[21] I proceed to deal with paragraphs 1.2 and 1.3 of the order of the court a quo. In paragraph 1.2, the court declared that the respondent (applicant before it), or his successor in title, was not liable for the historical debt. In paragraph 1.3, it declared that the appellant (respondent before it) had no right to refuse the supply of municipal services with regard to the property only because of outstanding municipal debts older than two years. I am not certain that the respondent was entitled to these

¹⁹ 'Subject to any hypothec existing prior to the attachment, all writs of execution lodged with any sheriff appointed for a particular area or any other sheriff before or on the day of the sale in execution shall rank pro rata in the distribution of the proceeds of the goods sold, in the order of preference referred to in paragraph (c) of subrule (14) of rule 46.'

²⁰ 'No immovable property which is subject to any claim preferent to that of the execution creditor shall be sold in execution unless- (a) the execution creditor has caused notice, in writing, of the intended sale to be served by registered post upon the preferent creditor, if his address is known and, if the property is rateable, upon the local authority concerned calling upon them to stipulate within ten days of a date to be stated a reasonable reserve price or to agree in writing to a sale without reserve; and has provided proof to the sheriff that the preferent creditor has so stipulated or agreed, . . .'

²¹ See *Moodley v Minister of Education & Culture, House of Delegates* (539/87) [1989] ZASCA 45 (31 March 1989); 1989 (3) SA 221 (A) at 233 D-F and *Islamic Unity Convention v Minister of Telecommunications* (CCT 33/07) [2007] ZACC 26(7 December 2007); 2008 (3) SA 383 (CC), para 57.

orders. With regard to paragraph 1.2 of the order, it is true that in a letter addressed to the respondent's attorney, dated 22 July 2013, the appellant's acting Legal Director: Litigation and Claims wrote as follows:

'1 Ms Briel indicated to Ms Prinsloo that in terms of Section 118(3) the City of Tshwane has a lien over the property in terms of the historical debt, and also stated that in terms of the Mathabathe . . . judgment the above lien does not fall away after transfer of the property and that the CoT *may* hold the new owner liable for the historical debt;

. . .

4 The City of Tshwane is of the view that they *may* proceed against the new owner for the historical debt.' (Own emphasis.)

[22] The appellant never stated that it was holding the respondent liable for the historical debt. It merely expressed a belief that it could proceed against the 'new owner' - which could be Ms Prinsloo who was expecting to take transfer of the property - for recovery of the historical debt. The respondent, therefore, acted prematurely in seeking the order granted in paragraph 1.2 of the order of the court a quo. The real issue, at that stage, was the appellant's refusal to conclude a contract with Ms Prinsloo for the provision of municipal services.

[23] However, in view of the provisions of s 19(1)(a)(iii) of the Supreme Court Act 59 of 1959²² (reproduced in s 21 of the Superior Courts Act 10 of 2013),²³ the court a quo was entitled, in the exercise of its discretion, to deal with the issue of liability for the historical debt.²⁴ Counsel for the appellant did not argue otherwise. I agree with the court a quo that '. . . in the absence of an agreement to that effect, the [respondent] . . . has not become a co-debtor with regard to the principal debt . . .'.²⁵ But, as has been shown above, the sale in execution and subsequent transfer of the property into the name of the respondent did not extinguish the hypothec created by s 118(3) of the Act in favour of the appellant. This means that nothing would prevent

²² It provided that a provincial or local division of the Supreme Court shall, in addition to any powers or jurisdiction which may be vested in it by law, have power-
'in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.'

²³ The papers were issued on 7 August 2013, before Act 10 of 2013 came into operation.

²⁴ See *Ex Parte Nell* 1963 (1) SA 754 (A) at 758E-760C and the relevant cases cited there.

²⁵ Para 16 of the judgment.

the appellant 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.

[24] As to paragraph 1.3, it is unclear how, and on what basis, that order was granted. It appears, from the judgment of the court a quo (para 17), that the submission of counsel for the appellant was that 'the real issue [was] not the opening of a new account, but the question whether the [appellant] is entitled to refuse the supply of municipal services as long as there is a debt outstanding with regard to this property'. The order granted in paragraph 1.3 seems to have been fashioned from this submission. But the order sought in the notice of motion, which was not amended, was not a declarator; it was a *mandamus* directing the appellant 'to open a Municipal account in the name of the Applicant or his assigns and successors in title of The Property . . .'. In my view, however, the *mandamus* should have been sought by, or in the name of, Ms Prinsloo. The respondent never applied for and the appellant never refused him the supply of municipal services to the property. Moreover, Ms Prinsloo was not a party in the application. It is for this reason, I think, that the court a quo did not grant the *mandamus* sought in the notice of motion. No case was made out in the papers for the order (*mandamus*) sought in his name. In my view, it was not open to the court a quo to grant paragraph 1.3 of its order, whether in the alternative, which was not prayed for, or under the prayer for further or alternative relief.

[25] In conclusion, and since the court a quo made reference to certain by-laws when it considered the question whether the appellant was entitled to refuse the supply of municipal services, I wish to make the following observations. By-

law 18(1)²⁶ of the appellant's standard electricity by-laws provides that the consumer is liable for all electricity supplied to his or her premises. A 'consumer' is defined in the by-laws as:

'The occupier of any premises to which the Municipality has agreed to supply or is actually supplying electricity, or if there is no occupier, the person who has entered into a current valid agreement with the Municipality for the supply of electricity to the premises, or, if such a person does not exist or cannot be traced or has absconded or for whatever reason is not able to pay, the owner of the premises.'

[26] Counsel for the appellant conceded that before a municipality can look to an owner for payment, it has to comply with its own by-law: it has to show that (1) there is no occupier on the property concerned and (2) the person who had entered into the contract to receive the services cannot be traced or has absconded, is unable to pay, or does not exist. Assuming that historical debts include amounts due in respect of electricity consumption – a municipality may 'consolidate any separate accounts of persons liable for payments to the municipality'²⁷ - I agree.

[27] To sum up, the court below should not have made the orders it granted and the respondent's application should have been dismissed for the reasons set out above. It follows that the appeal must succeed. As to costs, the court below ordered that '[t]here shall be no order with regard to costs'. Counsel were in agreement that that order should not be altered, irrespective of the result of the appeal. In my view, the same should apply in this court. The case involves vindication of constitutional rights relating to property.²⁸

[28] In the result, I make the following order:

1 The appeal is upheld.

2 Paragraph 1 of the order of the court a quo is set aside and replaced with the following:

²⁶ 'City of Tshwane Metropolitan Municipality Standard Electricity Supply By-Laws, LAN 1076, *Gauteng Provincial Gazette* 227, 7 August 2013.'

²⁷ *Rademan v Moqhaka Municipality & others* (173/11) [2011] ZASCA 244 (1 December 2011); 2012 (2) SA 387 (SCA), para 19.

²⁸ *Biowatch Trust v Registrar, Genetic Resources, & others* (CCT 80/08) [2009] ZACC 14 (3 June 2009); 2009 (6) SA 232 (CC) paras 21 - 22

'1 The application is dismissed.'

3 No order is made as to the costs of the appeal.

E D Baartman
Acting Judge of Appeal

Zondi JA (Dissenting):

[29] I have had the benefit of reading the judgment prepared by my colleague, Baartman AJA. Unfortunately, I find myself in respectful disagreement with her conclusion that the security created by s 118(3) of the Local Government: Municipal Systems Act, 32 of 2000 (the Act) survives a transfer of property from one owner to another even in circumstances where such transfer occurs pursuant to a sale in execution.

[30] The appeal concerns the interpretation of s 118(3) read with s 118(1) of the Act and in particular whether a sale of immovable property in execution of a judgment, and its subsequent transfer pursuant thereto, extinguishes the statutory hypothec the section creates over that property in favour of a municipality for the payment of a municipal debt.

[31] The background facts have been set out in detail by Baartman AJA, but it is convenient to recount those which I regard as particularly pertinent to the view which I take. The respondent, Mr Mitchell, bought immovable property (the property) situated within the appellant's boundaries, at a sale in execution on 22 February 2013. In terms of the conditions of sale, Mr 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. In order to facilitate transfer of the property into his name, he applied for, and obtained

from the appellant, a clearance certificate. The clearance certificate indicated that an amount of R232 828.25 was owed to the appellant for municipal services which included electricity, sanitation, waste removal and water. He paid an amount of R126 608.50, which represented municipal debts not older than two years preceding the date of application for the clearance certificate. Upon payment of the said sum the clearance certificate was issued to him. This left an amount of R106 219.75 outstanding in respect of municipal debts older than two years preceding the date of application for the certificate (the historical debt). All these municipal debts were incurred by the previous owner of the property.

[32] Mr Mitchell in due course sold the property to a Ms Prinsloo. Pending transfer of the property into her name Ms Prinsloo applied to the appellant for the supply of municipal services to the property. Her application was refused on the ground that a municipal debt (historical debt) in the amount of R106 219.75 in connection with the property was owing. She was told that as the new owner of the property, she was liable for its payment and that she had to settle it first before the municipal services could be supplied to the property.

[33] When Prinsloo threatened to cancel the sale agreement, because of the disagreement with the appellant about liability for a historical debt Mr Mitchell got involved in the discussion with the appellant. He contended that the security conferred by s 118(3) in favour of the appellant for the payment of a historical debt terminated in this matter as he bought the property at a sale in execution of a judgment against a judgment debtor.

[34] The appellant and Mitchell reached an impasse and in the result Mitchell approached the Gauteng Division of the High Court, Pretoria seeking inter alia the following relief:

‘1. It is declared that the lien (*hypothec*) over the property, better known as: Erf 296 Wonderboom Township, Registration Division J.R., The Province of Gauteng (Herein referred to as “*The Property*”) held in terms of Section 118(3) of Act 32 of 2000, upon transfer, do not pass over to The Property’s new owner or assigns and successors in title.

2. THAT the Applicant or his assigns and successors in title of The Property is not liable for the historical municipal debt of previous owners.

3. THAT the Respondent is hereby ordered to open a Municipal account in the name of the Applicant or his assigns and successors in title of The Property for Municipal Services on registration of The Property reflecting Municipal Services and costs as from date of registration.
4. THAT the Respondent pay the cost.'

[35] The municipality opposed the application and raised certain questions of law in terms of Rule 6(5)(d)(iii) of the Uniform Rules of Court. Essentially, it contended that Mitchell was liable for the payment of the historical debt incurred by his predecessor in title because a security which s 118(3) creates in favour of a municipality over a property, for the payment of debts in connection with that property, survives the transfer of the property from one owner to the other even in circumstances where such transfer occurs pursuant to a sale in execution of a judgment against a judgment debtor.

[36] The court a quo upheld Mitchell's contention and held that he was not liable for the payment of the historical debt, and also held that the appellant had no right to refuse him the supply of municipal services merely because the debts incurred by the previous owner are outstanding.

[37] Regarding the nature of the right conferred by s 118(3) the court a quo correctly described it as a real right of security created by statute in favour of the municipality. It stated that there is, generally speaking, no reason why transfer of the property in the normal course of business should terminate the real right while the principal debt is still outstanding. Relying on Voet 20.1.13 it held, however, that where the property is sold at a sale in execution the real right of security is extinguished and the new owner obtains a clean title. It justified the distinction on the basis of the reasoning that a sale in execution does not take place in terms of an agreement, but follows upon an order of court whereafter the property is publicly converted into cash to satisfy the claims of creditors, whereas in the case of a private sale this is not the case. It accordingly concluded that the s 118(3) charge does not survive the transfer of property where such transfer takes place pursuant to a sale in execution.

[38] With regard to the status of the historical debt it held that where transfer is acquired pursuant to a sale in execution a new owner acquires a clean title free from burdens resulting from unpaid debts. The principal obligation arising from unpaid debts however continues to exist and is not affected by the loss of security with the result that the person who incurred those unpaid debts remains liable to the municipality for their payment. This was so, it held, because there is a distinction between a tacit statutory hypothec as a form of security and the principal obligation (debt). The former is a security for payment of the debt and the latter is a debt. And the extinction of the security does not affect the existence of the underlying debt.

[39] On the question whether the municipality may refuse the supply of municipal services as long as there is a debt outstanding with regard to the property, it held that neither the Act, the applicable by-laws nor the credit-control policy document contain a provision, expressly or by necessary implication, providing that the successor in title of property with regard to which there are historical debts outstanding, is liable for those debts as a co-debtor, jointly and severally with the principal debtor or that the municipality has the right to refuse the supply of municipal services to such a new owner of the property. The appeal against these findings and the order is with leave of the court below.

[40] The case for the appellant is this: the tacit statutory hypothec provided for in s 118(3), being a burden on the property, survives the transfer of the property from one owner to another 'irrespective of whether the property was sold in execution, or through a sale in the normal course of business'. In developing this argument it contended that it may, at any time perfect its statutory hypothec to the value of outstanding municipal debts provided that such debts have not become prescribed by obtaining an appropriate court order; sell the property in execution and apply the proceeds to settle the outstanding municipal debts notwithstanding the fact that those debts were incurred by an erstwhile owner / occupier prior to registration of transfer of the property into the name of the current owner. In support of this proposition the

appellant placed heavy reliance on *Mathabathe*²⁹ (para 12) where it was held by this court:

‘Unlike ss (1), ss (3) is not an embargo provision – it self-evidently is a security provision. The Municipality failed to draw that distinction and thus confused the two distinct remedies available to it. It, moreover, was plainly wrong in its contention that “upon registration [of transfer] . . . [it] loses its rights under s 118(3) of the Act”. It follows that in at least those two fundamental respects the Municipality has misconstrued the import of s 118(3). Having misconstrued the section, it sought, in addition to the security that it enjoys for the historical debt to which no limit in duration exists, the postulated undertaking. In that it had to fail.’

Interpretation of s 118 of the Act

[41] The relevant parts of s 118 provide:

‘(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.

(1A) A prescribed certificate issued by a municipality in terms of subsection (1) is valid for a period of 60 days from the date it has been issued.

...

(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.’

In interpreting s 118(3) read with s 118(1) the ‘inevitable point of departure is the language’ of its provision itself, read in context and having regard to its purpose and

²⁹ *City of Tshwane Metropolitan Municipality v Mathabathe & another* (502/12) [2013] ZASCA 60 (22 May 2013); 2013 (4) SA 319 (SCA).

the background to its enactment.³⁰ In *Manyasha v Minister of Law and Order*,³¹ this court reiterated the ‘golden rule’ of statutory interpretation in the following terms:

‘It is trite that the primary rule in the construction of statutory provisions is to ascertain the intention of the legislature; in the present matter it is, more pertinently, the intention of the Rulemaker that needs to be determined. One seeks to achieve this, in the first instance, by giving the words of the provision under consideration the ordinary grammatical meaning which their context dictates, unless to do so would lead to an absurdity so glaring that the Rulemaker could not have contemplated it’

In *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School*³² (para 17) this court pointed out that it is, however, also a well-established rule of construction that words used in a statute must be interpreted in the light of their context. Van Heerden JA, writing for the majority of this court, referred to *Jaga v Dönges NO & another; Bhana v Dönges NO & another* 1950 (4) SA 653 (A) in which Schreiner JA stated (at 662G-H and 664H) that the ‘context’ which informs interpretation:

‘. . . is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background.

. . .

(T)he legitimate field of interpretation should not be restricted as a result of an excessive peering at the language to be interpreted without sufficient attention to the contextual scene.’

This court observed in *Natal Joint Municipal Pension Fund v Endumeni Municipality*,³³ that this approach is consistent with the emerging trend in statutory construction and is the approach that courts in South Africa should follow.

³⁰ *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13 (16 March 2012); 2012 (4) SA 593 (SCA) para 19.

³¹ *Manyasha v Minister of Law and Order* (113/97) [1998] ZASCA 112 (27 November 1998); 1999 (2) SA 179 (SCA) at 185A-D.

³² *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School* (207/07) [2008] ZASCA 70 (30 May 2008); 2008 (5) SA 1 (SCA).

³³ *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13 (16 March 2012); 2012 (4) SA 593 (SCA).

[42] Municipalities are obliged by the Act (s 96) to collect moneys that become payable to them for property rates and taxes and for the provision of municipal services in order to ensure that municipal services are provided to the local community in a financially and environmentally sustainable manner. To that end they are required to adopt, maintain and implement a credit-control and debt-collection policy and adopt by-laws that give effect to such policy and its implementation and enforcement.³⁴

[43] It is common cause that as enjoined by s 96 of the Act read with its Credit Control By-Laws,³⁵ the appellant has adopted a Collection Policy: Arrear Debtor Accounts, which specifies its credit-control and debt-collection mechanisms. It has also adopted various by-laws such as the previously mentioned Credit Control By-Laws, as well as Water Supply By-Laws³⁶ and Standard Electricity By-Laws³⁷ regulating inter alia the supply of municipal services, payment for such services and termination of supply of municipal services.

[44] Section 118 of the Act is another statutory instrument that was enacted in order to assist municipalities in collecting moneys due to them. It does so by providing them with two distinct remedies which are contained in subsecs (1) and (3). In *BOE Bank Ltd v Tshwane Metropolitan Municipality*,³⁸ this court pointed out that the s 118(1) remedy is a 'veto' or 'embargo' provision, affording a municipality a right to refuse to issue a clearance certificate unless all municipal debts for the preceding two years have been settled in full. If the certificate is not issued, the Registrar of Deeds may not register the transfer of the property. The veto provision does not,

³⁴ *City of Cape Town v Real People Housing (Pty) Ltd* (77/09) [2009] ZASCA 159 (30 November 2009); 2010 (5) SA 196 (SCA) para 1.

³⁵ Credit Control By-Laws, Local Authority Notice 226, *Gauteng Provincial Gazette* 44, 27 February 2002.

³⁶ Water Supply By-Laws, Local Authority Notice 2267, *Gauteng Provincial Gazette* 801, 5 November 2003.

³⁷ Standard Electricity By-Laws, Local Authority Notice 1132, *Gauteng Provincial Gazette Extraordinary* 234, 25 June 2003.

³⁸ *BOE Bank Ltd v Tshwane Metropolitan Municipality* (240/2003) [2005] ZASCA 21 (29 March 2005); 2005 (4) SA 336 (SCA).

however, automatically render a municipality's claim preferent to that of an existing mortgagee in the case of sale in execution.³⁹

[45] The s 118(3) remedy, a tacit statutory hypothec, caters for this eventuality. It creates in favour of a municipality a security for the payment of the prescribed municipal debts so that a municipality enjoys preference over a registered mortgage bond on the proceeds of property.⁴⁰

[46] Sections 118(1) and (3) are not novel. They can be traced back to the pre-1994 provincial ordinances. For instance s 50 of the Transvaal Local Government Ordinance 17 of 1939 provided for both a veto and a hypothec akin to those in ss 118(1) and (3) respectively. Section 50(1) of the Ordinance⁴¹ was a veto provision and s 50(3)⁴² equated municipal debts recoverable by invoking the veto as remedy and debts as constituting a hypothec. But unlike the provision of s 118(1) of the Act, which has a two year period limit the s 50(1) amounts were required to have occurred over a three-year period prior to the registration of the property in respect of which

³⁹ *BOE Bank v Tshwane* para 7, relying on inter alia *Rabie v Rand Township Registrar* 1926 TPD 286 at 290.

⁴⁰ *City of Johannesburg v Kaplan NO & another* (111/05) [2006] ZASCA 39 (29 March 2006); 2006 (5) SA 10 (SCA); *City of Tshwane Metropolitan Municipality v Mathabathe & another* (502/12) [2013] ZASCA 60 (22 May 2013); 2013 (4) SA 319 (SCA) para 10.

⁴¹ Section 50(1) provided:

'No transfer of any land or of any right in land as defined in section 1 of the Local Authorities Rating Ordinance, 1977, within a municipality shall be registered before any registration officer until a written statement in the form set out in the Third Schedule to this Ordinance and signed and certified by the town clerk or other officer authorized thereto by the council, shall be produced to such registration officer, and unless such statement shows-

(a) that all amounts for a period of three years immediately preceding the date of such registration due in respect of such land or right in land for sanitary services or so due as basic charges for water or as other costs for water where any water closet system on the ground is concerned has been installed or so due as basic charges for electricity in terms of the provisions of this Ordinance or any by-law or regulations;

(b) that all amounts, if any, for a period of three years immediately preceding the date of such registration due in respect of such land or right in land for rates levied in terms of the provisions of the Local Authorities Rating Ordinance, 1977, or in terms of the provisions of any prior Ordinance;

...

have been paid to the council: Provided that, in the case of the transfer of immovable property by a trustee of an insolvent estate, the provisions of this section shall be applied subject to the provisions of section 89 of the Insolvency Act, 1936 (Act 24 of 1936) . . .'

⁴² Section 50(3) provided:

'Any amount due in terms of paragraph (a), (b) . . . of subsection (1) shall be a charge upon the land or right in land in respect of which such amount is owing and shall, subject to the provisions of section 142 (6), be preferent to any mortgage bond registered against such land or right in land subsequent to the coming into operation of this Ordinance.'

the clearance certificate was required. The s 50(3) amounts were subject to the same time restriction. The s 118(3) amounts are not subject to a time limit.

[47] This court in *City of Johannesburg v Kaplan* (para 26.2) summarised the operation of s 118(3) in situations where the municipal debtor is not subject to a sequestration or liquidation order as follows:

‘Any amount due for municipal debts (ie not limited by the aforesaid period of two years) that have not prescribed is secured by the property and, if not paid and an appropriate order of court is obtained, the property may be sold in execution and the proceeds applied in payment of the debts. In such event, the proceeds will be applied to payment of the municipal debts in full. Only after satisfaction of such debts will the remainder, if any, be available for payment of the debt secured by a mortgage bond over the property.’

[48] Section 118(3) does not state what happens to the security when the property over which it was created is sold in execution of a judgment against the judgment debtor at the instance of an execution creditor. Does it survive transfer or does it terminate? At first glance the wording of s 118(3) appears to be sufficiently broad and general to cover such a situation but on its proper analysis it becomes clear that the subsection does not protect the security once the property over which it was created is sold in execution. It is the proceeds of sale that secures the payment of outstanding municipal debts, and the municipality must be paid in full before any mortgagee is paid because its debts, provided that they have not become prescribed, enjoy preference over any mortgage bond.

[49] In my view this construction is consistent with the common law. According to Voet 20.1.13,⁴³ immovables subject to a special hypothec generally pass subject to their burden, ‘whether they have been transferred by onerous or lucrative title to another and whether that other is aware or unaware of the burden on the property’. However, according to him there were exceptions to this general rule and one of them was:

‘. . . when mortgaged properties have been sold and delivered on the petition of creditors by order of a judge with employment of the formalities of the spear, and creditors holding a

⁴³ Voet 20.1.13 (Translated by Percival Gane, 1956) at 488-489.

hypothec have kept silent. Nevertheless by our customs in such a case the price takes the place of the thing, and a hypothecary creditor is permitted to contest with the rest of the creditors the privilege of preference over the price of the mortgaged property.⁴⁴ (footnote omitted.)

[50] It therefore seems to me that under the common law the burden on a property does not survive the transfer of the property from one person to another where such transfer takes place pursuant to a sale in execution and the creditors holding a hypothec 'have kept silent'. In other words, purchasers who obtained transfer of the burdened property pursuant to a sale in execution obtained a free title. *Mathabathe* did not concern a sale in execution. It dealt with the transfer of immovable property pursuant to a private sale and therefore what is stated in para 12 of that judgment must be understood in that context, and cannot provide support for the contention that the burden on the property survives the transfer irrespective of the nature of the sale giving rise to that transfer.

[51] In my view the roots of s 118(3) are firmly attached to the common law and should for that reason be interpreted in a manner that is harmonious with the common law if possible. And it is possible to do so, and there are no indications that it was plainly intended to alter the common law.⁴⁵

[52] The legislature must be taken to have been aware of the position under the common law regarding the fate of security over property when such property is transferred pursuant to a sale in execution. If it had been intended that the security created by s 118(3) in favour of the municipality for the payment of its historical debt should continue to exist even beyond its sale in execution one would have expected the legislature to have used precise and definite language to give effect to that intention. And the fact that no such language occurs in s 118(3) is a strong argument in favour of the view that the common law rights of the owners – to obtain a clean title – who obtain transfer of the burdened property through a sale in execution were not

⁴⁴ Ibid.

⁴⁵ *Ngqukumba v Minister of Safety and Security & others* (CCT 87/13) [2014] ZACC 14 (15 May 2014); 2014 (5) SA 112 (CC) para 16.

taken away. In my view this is a sensible meaning of s 118(3). It does not undermine the purpose for which the subsection was enacted, namely to provide a mechanism for municipalities which assists them in collecting historical debts that become payable to them, which is one of the obligations imposed upon them by the Act.

[53] It is clear from s 118(3) and other statutory provisions which pre-date it that their purpose is to create in favour of a municipality a security over immovable property for the payment of the historical debt owing to it in connection with that property, and to ensure in the case of a sale in execution that it enjoys preference over a registered mortgage bond on the proceeds of the property.

[54] Rule 46(5)(a) of the Uniform Rules of Court,⁴⁶ the statutory provision governing sales in execution of immovable property imposes an obligation on the execution creditor intending to sell the property in execution to notify the municipality, in whose area the property concerned is located, of the intended sale and to call upon it to stipulate within the prescribed period before the date of sale a reasonable reserve price or to agree in writing to a sale without reserve. The rule also requires the sheriff to be provided with proof before proceeding with the sale that the municipality has stipulated a reserve price or agreed to a sale without reserve. It therefore provides sufficient and adequate protection to a municipality in the event that a property in connection with which historical debts are owing, is sold in execution. The rule in effect obliges a municipality to ensure that it recovers from the proceeds of sale all historical debts owing to it in connection with a property before that property is transferred so that a purchaser would, upon its transfer to him or her, receive a clean title.

⁴⁶ Rule 46(5)(a) provides:

(5) No immovable property which is subject to any claim preferent to that of the execution creditor shall be sold in execution unless –

(a) the execution creditor has caused notice, in writing, of the intended sale to be served by registered post upon the preferent creditor, if his address is known and, if the property is rateable, upon the local authority concerned calling upon them to stipulate within ten days of a date to be stated a reasonable reserve price or to agree in writing to a sale without reserve; and has provided proof to the sheriff that the preferent creditor has so stipulated or agreed; or’

[55] In my view, looking at the provisions of s 118 as a whole, and having regard to the provisions of the common law, I come to the conclusion that the legislature in enacting s 118(3) did not intend the duration of the security it confers on a municipality over a property for the payment of historical debts in connection with that property to extend beyond transfer of such property where such transfer occurs pursuant to a sale in execution.

[56] I conclude therefore that the burden on the property terminates when the property is transferred to the new owner pursuant to a sale in execution. In the light of the conclusion I have reached on the construction of s 118(3) it becomes unnecessary to consider whether the appellant's by-laws entitle it to refuse to provide municipal services to the new owner who takes transfer of property pursuant to a sale in execution only because of an outstanding historical debt.

[57] It follows that, in my view, the appeal should fail. With regards to costs, for the reasons set out in paragraph [27] of the judgment, I agree that there should be no order as to costs.

[58] In the result I would dismiss the appeal with no order as to costs.

D H Zondi
Judge of Appeal

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