IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: 50816/14

In the matter between:

PERREGRINE JOSEPH MITCHELL Applicant

and

CITY OF TSHWANE METROPOLITAN MUNICIPAL AUTHORITY Respondent

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
DATE 8/9/14 SIGNATURE

JUDGMENT

FOURIE, J:

[1] This is an application in terms of which the applicant applies for a declaratory order that "the lien (hypothec)" over a certain immovable property held in terms of section 118(3) of Act 32 of 2000 did not pass upon transfer to the applicant or his successor in title; that the applicant or his successor in title is not liable for the historical municipal debts of previous owners; and that the respondent be ordered to open a municipal account in the name of the applicant or his successor in title for the supply of municipal services to the said property. The application is opposed and although there is no answering affidavit, notice was given in terms of Rule 6(5)(d)(iii) that the respondent intends to raise questions of law only.

BACKGROUND

[2] On 22 February 2013 the applicant purchased Erf 296, Wonderboom Township, Gauteng at a sale in execution. The property is situated within the municipal boundaries of the respondent. In terms of section 118(1) of the Local Government: Municipal Systems Act, No. 32 of 2000 a registrar of deeds may not register the transfer of property, except on production of a certificate in terms of which it is certified that all amounts that became due in connection with that property for municipal service fees, levies and rates and taxes for the two years preceding the date of application for the certificate, have been fully paid.

[3] The respondent issued a certificate on 6 February 2013 indicating that the total historical municipal debt, including municipal debts older than two years, was R232,828.25. A dispute with regard to the validity of this certificate then ensued whereafter a new certificate was issued indicating that the outstanding municipal debt for the two years preceding the date of application for the certificate amounts to R126,608.50. After payment of this amount the applicant took transfer of the property. The outstanding balance of R106,219.75, representing historical debts older than two years, remained unpaid.

[4] After taking transfer of the property, the applicant sold it to a certain Prinsloo. On 8 July 2013, before taking transfer of the property, Prinsloo attended the offices of the respondent to apply for the supply of municipal services to the property, such as electricity, sanitation, waste removal and

water. The respondent refused to enter into an agreement with Prinsloo for the supply of municipal services to the property until the historical debts in the amount of R106,219.75 have been paid in full. Prinsloo then indicated to the applicant that she will not proceed with the purchase of the property until the issue with regard to payment of the historical debts has been resolved.

CASE FOR THE APPLICANT

[5] It was contended on behalf of the applicant that the respondent's lien in terms of section 118(3) of the Municipal Systems Act, which is a charge upon the property, "should be enforced over the proceeds of the property and/or against the previous owner" only. Therefore, so it was argued, the respondent is not entitled to hold the applicant and/or his successors in title liable for the payment of historical municipal debts older than two years and which had been incurred by previous owners or occupiers of the property. It should then also follow that the respondent is obliged to open a municipal account in the name of the applicant (or his successor in title) for municipal services with regard to the property.

CASE FOR THE RESPONDENT

[6] It was contended on behalf of the respondent that the security provided by section 118(3) is a charge upon the property and any amount due for municipal debts that have not yet become prescribed, is secured by the property. Therefore, so it was argued, the security provision contained in this subsection survives a transfer of the property from one owner to another

and should be enforceable against the applicant and/or his successors in title. Furthermore, as long as the historical debts remain unpaid, the respondent shall be entitled to refuse the supply of municipal services to this property.

DISCUSSION

[7] I shall first consider the question whether the respondent's right of security is still effective after transfer of the property into the name of the applicant. I shall then consider the question whether the applicant or his successor in title is liable for the payment of historical municipal debts. Finally, the issue with regard to the opening of a new account and the supply of municipal services to the new owner, whilst payment of the historical municipal debts are still outstanding, will be decided.

SECURITY

[8] To the extent that section 118 of the Municipal Systems Act is relevant, subsections (1) and (3) 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.

(2) ...

(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."*

[9] To determine whether this right of security is still effective after transfer of the property, one has to ask what the nature of this right is. Section 118(3) specifically provides that an amount due is a charge upon the property and enjoys preference over any mortgage bond registered against the property. This is, in my view, a real right of security created by statute in favour of a municipality. This right has also been described as a lien having the effect of a tacit statutory hypothec (Stadsraad, Pretoria v Letabakop Farming Operations (Pty) Ltd 1981 (4) SA 911 (T) at 917 and BOE Bank Limited v Tshwane Metropolitan Municipality 2005 (4) SA 336 (SCA) at 341H). 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 there is no reason, whilst the principal debt is still outstanding, why transfer in the normal course of business should terminate this right. It was stated as follows by Ponnan, JA in City of

Tshwane Metropolitan Municipality v Mathabathe 2013 (4) SA 319 (SCA) at 325 (par 12):

> *"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."*

[10] However, there is more to this than meets the eye. It was contended on behalf of the applicant that this right should have been enforced "over the proceeds of the sale in execution". As authority for this submission counsel relied, *inter alia,* on BOE Bank Ltd v Tshwane Metropolitan Municipality, *supra*, at p 340 par 5 and City of Johannesburg v Kaplan N.O. and Another 2006 (5) SA 10 (SCA) at pp 15 and 16, par 16 where reference was made to this right as a preference over a mortgage on the "proceeds of the property".

[11] In both these matters there was already a realisation or liquidation of the property concerned. In the one matter (BOE Bank) there were competing claims to the proceeds realised from a sale in execution, whereas in the other (City of Johannesburg) the first respondent was the liquidator of a close corporation which had already been placed in liquidation. In City of Tshwane Metropolitan Municipality v Mathabathe, *supra*, the property was sold, not at

a sale in execution, but by public auction on behalf of the mortgagor. In that case no judgment was obtained and the property was sold by agreement between the mortgagee and mortgagor.

[12] What is the position if the immovable property is sold at a sale in execution as opposed to a sale in the normal course of business? According to Voet 20.1.13 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. However, according to him there are certain exceptions:

> *"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."*
>
> (Translated by Percival Gane, 1956.)

[13] 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. See in this regard Lee & Honoré, Family, Things and Succession, 2nd Edition pp 332 – 333 par 458; Wille's

Mortgage and Pledge, 3rd Edition, p 190; and Silberberg and Schoeman, The Law of Property, 5th Edition, p 380 (cf. also section 56(1)(a) of the Deeds Registries Act No 47 of 1937). The difference between a sale in execution and a private sale, as I understand it, is 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 puplicly converted into cash to satisfy the claims of creditors, whereas in the case of a private sale this is not so.

[14] In the present matter it is common cause (or at least not in dispute) that the property concerned was purchased by the applicant at a sale in execution. It must be accepted that the respondent was aware of a sale prior to transfer as it was requested to issue a certificate in terms of section 118(1) of the Act. Such a certificate was ultimately provided to the applicant whilst the respondent, holding a statutory hypothec, kept silent by not exercising its right of preference over the proceeds of the property. There is also no explanation by the respondent in this regard. It should follow that under these circumstances the respondent's statutory hypothec was extinguished by the sale in execution and subsequent transfer of the property into the name of the applicant.

HISTORICAL DEBTS

[15] This brings me to the next question. Who is now the debtor after the property was transferred into the name of the applicant? Put differently, does the applicant now also become a co-debtor with the principal debtor with regard to historical debts older than 2 years? It should be pointed out that a

tacit statutory hypothec as a form of real security is not in law the same concept as the principal obligation. The one is a debt and the other security for payment of the debt. When the respondent's statutory hypothec was extinguished by the sale in execution and subsequent transfer of the property, the applicant obtained a clean title. However, the principal obligation (historical debts older than two years), continued to exist and is not affected by the loss of security. The person (customer, occupier or owner) who incurred these debts (and failed to pay) also remains to be the debtor.

[16] Is there any statutory provision or agreement which provides for the delegation or *adpromissio* (agreement to become jointly liable) with regard to the principal debt? It was suggested on behalf of the respondent that section 118(3) could be interpreted to make provision for such a delegation, as "the debts are tied up with the property and its intrinsic worth and not with a consumer". I do not agree with this submission. Subsection (3), with specific reference to the words "charge upon the property" signifies in my view only that it is security for the payment of a debt (City of Tshwane Metropolitan Municipality v Mathabathe, *supra*, p 324, par 11). As I have already pointed out, a tacit statutory hypothec as a form of real security should not be confused with the principal debt. The former is dependent on the existence of the latter. Furthermore, the property cannot be substituted for the principal debtor because things cannot be the bearer of rights and obligations. Therefore, under these circumstances and in the absence of an agreement to that effect, the applicant (or his successor in title) has not become a co-

debtor with regard to the principal debt and is not liable for the payment of historical debts incurred by previous owners or occupiers.

OPENING OF NEW ACCOUNT

[17] Counsel for the respondent pointed out during argument that the real issue is not the opening of a new account, but the question whether the respondent is entitled to refuse the supply of municipal services as long as there is a debt outstanding with regard to this property. I agree.

[18] He referred me to the respondent's By-laws, more particularly the Standard Electricity Supply By-law (Gauteng Provincial Gazette Extraordinary No 227 of 7 August 2013), the Water Supply By-law (Gauteng Provincial Gazette No 801 of 5 November 2003), Credit Control By-law (Gauteng Provincial Gazette Extraordinary No 44 of 27 February 2002) and the Credit Control and Debt Collection Policy (Council Resolution, 30 August 2012). It was submitted that, on a proper construction of these By-laws, the embargo provision (or right of refusal) contained in these By-laws is also applicable to subsequent owners. Counsel for the respondent was unable to refer me to a provision in any of these By-laws dealing specifically with this issue as far as a subsequent owner is concerned. I was also unable to find any. What remains is an exercise, by means of interpretation, to find an answer.

[19] Both the Electricity and Water Supply By-laws make provision for an application which has to be approved by the municipality. This implies that

electricity and water will be supplied in terms of an agreement subject to the provisions of these By-laws. The Electricity Supply By-law provides in section 18 for the payment of charges. It provides that the "consumer" is liable for all electricity supplied to his or her premises. Section 21 thereof provides that the municipality has the right, after giving notice, to disconnect the electricity supply to any premises if "the person liable for payment for the supply or for payment for any other municipal service" fails to pay any charge due to the municipality in respect of the premises.

[20] In the Electricity By-law a "consumer" is defined to mean the occupier of any premises or the person who has entered into a valid agreement with the municipality or if such a person does not exist or cannot be traced, the owner of the premises. The "owner" in relation to immovable property, means the person registered as such in the office of the registrar of deeds. There is no indication that this definition of "owner" also includes his successors in title. It refers, by implication, to the person who is the owner of the property when these amenities are supplied to the property and consumed by the consumer, occupier or owner of the premises.

[21] As far as the Water Supply By-law is concerned, section 7 refers to the payment for water supply services. It provides that in respect of water supply services provided for any premises, the owner, occupier and customer are, in accordance with the municipality's By-laws relating to credit control and debt collection, jointly and severally liable for the payment of all applicable charges. In terms of section 9 thereof the engineer may restrict or discontinue water supply services if "the customer has failed to pay" the

applicable charges on the date specified. Section 10 makes provision for the restoration of water supply services. In terms thereof the water supply services shall be restored when a customer enters into an agreement for the payment "of his or her arrears" after the restriction or disconnection of his or her water supply services.

[22] A "consumer" in terms of the Water Supply By-law is defined as any end user who receives water supply services and a "customer" means a person with whom the municipality has concluded an agreement for the provision of municipal services. To the extent that the definition of "owner" is relevant, it means the person in whom from time to time is vested the legal title to premises. The words "in whom from time to time is vested" should be understood in its proper context. The supply of water to a customer or occupier of a particular premises is not necessarily dependent on who the owner is. To put it in another way: there may be, from time to time, different owners whilst the customer or occupier of the premises remains the same person. This does not mean that a subsequent owner is now also liable for a debt which was incurred in the past, when another person was the owner. If that was the intention, the Legislature could have said so.

[23] The Credit Control By-law provides in section 5.2 thereof that the council may restrict or disconnect the supply of water, gas and electricity or discontinue any other service to any premises "whenever a user of any service" fails to make full payment on the due date. It also provides that the council shall reconnect and restore the supply of the restricted or

discontinued services only after "the full amount outstanding ... have been paid in full".

[24] In the Credit Control By-law a "user" is not described, but a "customer" is defined to mean any occupier of premises to which the council has agreed to supply services, or if there is no occupier, then the owner of the premises. To the extent that the definition of "owner" is relevant, it means the person in whom from time to time is vested the legal title to the premises. Also in this By-law there is no indication that the definition of "owner" also includes his successors in title. By implication it refers to the person who is the registered owner of the property when these amenities are supplied and consumed by the customer, occupier or owner of the premises.

[25] The Credit Control and Debt Collection Policy provides for certain credit control and debt collection measures. There is no indication that the definition of "owner" also includes a successor in title with regard to outstanding debts. It provides in clause 5.1 thereof that legal steps should be taken to collect arrears on all accounts that are more than 90 days in arrears. Clause 5.3 thereof provides, before any property can be transferred from one owner to another, that all outstanding amounts "associated with the relevant property are payable" whereafter the chief financial officer will issue a certificate to that effect in terms of section 118(1) of the Systems Act, 2000.

[26] It further provides that notwithstanding payments by the applicant of the outstanding amounts for the preceding two years as provided for in subsection (1) of section 118, the clearance certificate "will be withheld until

the applicant or transferring attorney, as the case may be, has provided sufficient security to the Finance Department to the effect that upon day of registration of transfer the outstanding amount will be paid". No doubt, if the intention was that the supply of services to the new owner (or his successor in title) may be refused as long as there is a historical debt outstanding with regard to the property, this was an opportune moment to have included such a stipulation. Fact of the matter is there is no such provision.

[27] Finally, reference was also made to the judgment of Yacoob J in Mkontwana v Nelson Mandela Metropolitan Municipality & Other 2005 (1) SA 530 (CC). In this matter the constitutional validity of section 118(1) was challenged. The impetus for the challenge was that the section has the effect of forcing owners to pay debts that were incurred not by them, but by occupiers of their properties. The learned Judge discussed the connection between the consumption charge, the property and the owner (par 41 and further). I do not understand this judgment, when reference was made to the owner of the property, that it should also include successors in title as far as historical debts are concerned. In my view this judgment does not support the respondent's case as far as this issue is concerned.

[28] It should also be pointed out that a municipality has a constitutional duty to ensure the provision of services. In terms of section 152(1)(b) of the Constitution this is one of the objects of local government. Section 4(3) of the Systems Act requires a municipality to "respect the rights of citizens and those of other persons protected by the Bill of Rights". In addition thereto section 5(1)(g) provides that members of the local community have the right

"to have access to municipal services which the municipality provides", provided the duties set out in subsection (2)(b) are complied with. Subsection 2(b) provides that members of the local community have the duty "where applicable" to pay promptly service fees and charges imposed by the municipality.

[29] I have to conclude that neither the Systems Act, the By-laws referred to above nor the Policy Document, contain a provision, expressly or by necessary implication, that the successor in title of property with regard to which there are historical debts outstanding, are liable for these 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 right to discontinue the supply of municipal services relates to the customer, occupier or owner of the property when the historical debt was incurred. The applicant (or his successor in title), not being a debtor or co-debtor with regard to historical debts, is entitled to the supply of services as pointed out above. This interpretation is supported by the settled principle that considerations outside the wording of a statutory provision do not permit an interpretation which is unduly strained (BOE Bank Ltd v Tshwane Metropolitan Municipality, *supra*, 342F).

CONCLUSION

[30] To sum up: The security provided by section 118(3) of the Systems Act, No 32 of 2000 in favour of the respondent was extinguished by the sale in execution and subsequent transfer of the property into the name of the

applicant. The outstanding principal debt (historical debts older than 2 years) which was incurred prior to the sale in execution remains unaffected by the subsequent transfer of the property into the name of the applicant. However, the applicant (or his successor in title), is not liable for the payment of this debt which was incurred by his predecessor(s) in title. 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 this property only because of an outstanding principal debt (historical debts older than 2 years).

[31] Finally I come to the question of costs. During argument both counsel submitted, having regard to the nature and complexity of this matter, that no order should be made with regard to costs, irrespective of the outcome. I agree.

ORDER

In the result I make the following order:

1. It is declared that:

    1.1. the security provided by section 118(3) of Act No 32 of 2000 in favour of the respondent with regard to the property known as Erf 296, Wonderboom Township, Registration Division J.R., Gauteng, 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.

D S FOURIE
JUDGE OF THE HIGH COURT
PRETORIA

Date: 8 September 2014