

REPUBLIC OF SOUTH AFRICA



GAUTENG HIGH COURT DIVISION, PRETORIA

CASE NO: 39315/13

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
	06/05/14
	DATE
	[Signature]
	SIGNATURE

In the matter between:

In the matter between:

MPHO GIFT MOTSOATSOA

Applicant

and

**CITY OF TSHWANE METROPOLITAN
MUNICIPAL AUTHORITY**

Respondent

J U D G M E N T

MNGQIBISA-THUSI, J:

[1] The applicant seeks the following relief:

1.1 that the respondent be ordered to deliver municipal services (electricity) to the property situate at Erf 6909 Saulsville township, registration Division J.R, province of Gauteng (also known as 21 Mataboge Street, Saulsville) ("the property").

1.2 That the respondent be ordered to open a municipal account in the name of the applicant for municipal services which reflect municipal services and costs from date of registration of the property in the name of the applicant.

1.3 Costs.

[2] During May 2012 the applicant purchased the property from a third party. Before registration of the property into the name of the applicant, applicant's attorney applied, in terms of section 118(1) of the **Local Government: Municipal Systems Act 32 of 2000** ("the Act"), to the respondent for a clearance certificate in order to facilitate the transfer of the property into the name of the applicant.

[3] In response and on 16 July 2012 the respondent sent the applicant's attorney a 'Written Statement issued in terms of

section 118(1) in which it is reflected that the outstanding amount is R33 309.72. From the statement it appears that this amount is made up of two amounts: an amount of R 31 719.72 (Outstanding Amounts) and an amount of R 1 590.00 ('Additional Amounts'). The amount for 'Additional Amounts' is described as 'Interest @ 5%'.

- [4] The applicant paid the total amount of R 33 309.22. On 15 August 2012 the respondent issued a clearance certificate for the property. The property was registered in the applicant's name on 9 October 2012.
- [5] After registration of the property in the applicant's name, she applied to the respondent for a municipal account for municipal services (including electricity) to be opened in her name. The respondent, however, refused to open the account until the applicant paid the amount of R12 740.89 which it claimed was a historical debt owed for services rendered to the property. This amount was due for more than two years preceding the application for a clearance certificate and was for services rendered to the previous owner of the property.
- [6] The applicant has admitted that it owes the respondent an amount of approximately R3 500.00, a debt incurred from the date of registration of the property in her name. However,

the applicant contends that the respondent is frustrating her in complying with her obligation to pay for the services rendered by refusing to open an account for municipal services in her name. Applicant has tendered payment of this amount.

- [7] In terms of section 152(b) of the Constitution, municipalities are empowered to make and administer by-laws for the effective administration. In terms of section 75A (1) of the Act municipalities have the right to levy and recover municipal fees for any services rendered and to charge interest on any outstanding amount. Furthermore, in terms of section 96 of the Act, municipalities have an obligation to collect moneys that become due and payable for municipal services rendered. In order to comply with its obligations the municipalities have to implement credit control and debt collecting policies. In order to comply with its obligations the respondent Furthermore, in order for the municipalities to comply with their obligation to collect moneys owed for municipal services they are assisted by two separate and distinct remedies found in sections 118(1)(b) and 118(3) of the Act.

- [8] Sections 118(1)(b) and 118(3) of the Act read 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 -

- (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.'

[9] The effect of section 118(1) (b) of the Act is that no registration of transfer of the property can take place until a debt of two years preceding application for registration has been paid. In this matter the application of section 118(1) (b) of the Act is not in dispute since the amount due for municipal services for the two year period preceding applicant's application for a clearance certificate has been paid by the applicant.

[10] Furthermore, it is common cause:

10.1 that section 118(3) creates a lien in the form of a tacit statutory hypothec in favour of municipalities for municipal debts preceding two years of application for registration of transfer of property, and is not subject to time limits. *Stadsraad van Pretoria v Letabakop*

Farming Operations (Pty) Ltd 1981 (4) SA 911 (T); *BOE Ltd v City of Tshwane Metropolitan Municipality* 2005(4) SA 336 (SCA) at para. [7]; *City of Johannesburg v Kaplan NO and Another* 2006 (5) SA 10 (SCA) at para [10]; *City of Tshwane Metropolitan Municipality v Mathabathe and Another* 2013 (4) SA 319 (SCA) at para [10].

10.2 that the municipality does not lose its hypothec merely because the property has been transferred in that hypothec is attached upon the property and not the owner of the property. *Mkontwana v Nelson Mandela Metropolitan Municipality*; *Bisset v Buffalo City Municipality*; *Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng* 2005 (1) SA 530 (CC); *Mathabathe (supra)*.

[11] The issue in dispute is whether section 118(3) of the Act entitles the respondent to refuse to open an account for municipal services and to render such services to the applicant on the basis that the property's historical debt remains unpaid.

[12] It is not in dispute that the respondent has an obligation to recover outstanding debts for municipal services rendered.

Furthermore, it is not in dispute that section 118(3) does not render the new owner liable for the historical debt. So much was conceded by the respondent in the *BOE* matter (*supra*) at para. 5. However, section 118(3) gives a municipality a preferent claim for the historical debt over a bank's claim under a mortgage bond to the proceeds of a sale in execution of the property.

- [13] The following submissions were made on behalf of the applicant. The applicant cannot be held responsible for debts owed by the previous owner in circumstances where the respondent did not disclose the historical debt to the applicant at the time a c statement in terms of section 118 was sought. Furthermore, that the respondent, in terms of the Act and its own by-laws had an obligation to enforce its debt procedures against the previous owner. It is the applicant's contention that it would not be in the public interest for new owners to be held liable for historical debt where municipalities failed to recover same from the previous owner. Furthermore, it was submitted on behalf of the applicant that on a proper interpretation of section 118 (3), the respondent has a hypothec over the property which it could have enforced against the previous owner when the property was sought to be transferred to the applicant. It was also submitted on

behalf of the applicant that the respondent does not have an election, in instances where there is a historical debt, to seek payment of a historical debt from a new owner who has no obligation to pay rather than performing its statutory obligations to recover the historical debt from the previous owner.

- [14] The respondent refuses to open an account for the applicant on the ground that the property still owes a historical debt. For this contention the respondent relies on its Credit Control By-laws, in particular, section 5.2(d) which provides that:

"The right of Council to restrict, disconnect or terminate a service due to non-payment for any other service or assessment rate shall be in respect of any service rendered by Council, and shall prevail notwithstanding the fact that payment has been made in respect of any specific service and shall prevail notwithstanding the fact that the person who entered into an agreement for supply of services with the Council and the owner are different entities or person, as the case may be."

- [15] The respondent contends that by refusing to open an electricity account and provide such service to the applicant, it is acting within its legislative powers. In argument respondent's counsel did not make any submission with regard to the fact that it was the practice of the respondent when issuing statements reflecting outstanding amounts when

a property is sought to be transferred, that in the statement sent to the applicant's attorneys, only the amount of interest charged to the amounts outstanding was reflected. Further it was argued on behalf of the respondent that section 118(3) entitles it to withdraw services from a property if there are outstanding amounts owing. The sum total of the respondent's argument was that the applicant had an obligation to find out from it whether there were other amounts outstanding over the property.

- [16] The above argument on behalf of the respondent is misplaced. The respondent seems to lose sight of the fact that the effect of section 118(3) is to place a lien over the property indefinitely, which lien, in the event of the property being sold, gives the respondent's claim preference over the rights of a mortgagee. Nothing can be read in section 118(3) entitling the respondent to withhold municipal services to the property. The applicant has tendered to pay the amounts she owes if an account is opened in her name. The respondent, in order to comply with its debt recovery and collection obligations can still pursue the previous owner or obtain a court order for the sale in execution of the property in order to recover the amounts owing to it from the proceeds of the sale. *City of Johannesburg v Kaplan NO and another* 2006 (5)

SA 10 (SCA) at para. [26]; *Real People Housing (Pty) Ltd v City of Cape Town* 2010 (1) SA 411 (C). Moreover, when the application for a section 118(1) statement was made, it was apparent to the respondent that the statement was sought in order to obtain a clearance certificate for the purpose of transferring the property from the previous owner to the purchaser, being the applicant. At that stage the respondent had the opportunity to assert its right to claim payment of the outstanding historical debt from the proceeds of the sale of the property to the applicant. In the *Real People* matter (*supra*) at para. 34 the court held that:

"...It may very well be so, that after payment of municipal fees due in respect of the two-year period preceding the date of application for a certificate, there may still be municipal fees due in respect of the earlier period, such as was the case in *Geyser*¹, *Kaplan* and *BOE Bank Ltd*. The Municipality is not without a remedy, should it issue a clearance certificate under such circumstances. Payment by a property owner of indebtedness in an amount contemplated in s 118(1) (b) does not relieve the property owner of any liability of an amount due in respect of an earlier period."

¹2003 (5) SA 18 (N); 2003 (3) BCLR 235.

[17] It is not in the public interest nor can it be expected from the respondent that it can just shirk its responsibility to promptly recover and collect the outstanding amount and expect the transferee to suffer the consequences of its failure to perform its constitutional obligations. Nowhere in its papers does the respondent allege what steps it took to recover the outstanding debt from the previous owner. Furthermore, the respondent has in no way lost its right to recover the historical debt as its lien endures until such time that the property is sold or it obtains a court order for the sale in execution of the property in order to recover the amounts owing.

[18] It is apparent from the respondent's previous practice and also from the cases which dealt with the application of section 118 that it is practice that, in their section 118 statements, municipalities reflect the outstanding amount (being the debt due within two years of the application of a clearance certificate) and an additional amount owing (being the debt owing and due for the period preceding the two year period prior to the application for a clearance certificate). In this case, the respondent, for whatever reason failed, when it issued the section 118 statement to reflect the additional amount owing. Therefore, the respondent cannot through its


own negligence, seek to hold the applicant to ransom by not providing her with electricity for a debt it is not owing and in circumstances in which the respondent could have enforced laid its claim from the proceeds of the sale to the applicant.

[19] In the premises I am of the view that the refusal by the respondent to open an account for and to provide the applicant with electricity is unlawful as it breaches the applicant's constitutional right to be supplied with electricity, particularly since the applicant has tendered to pay the amounts it owes and there is no indication that she is not prepared to pay for any services provided by the respondent.

[20] Accordingly the following order is made:

1. that the respondent is ordered to deliver municipal services (electricity) to the property situate at Erf 6909 Saulsville township, registration Division J.R, province of Gauteng (also known as 21 Mataboge Street, Saulsville) ("the property").
2. that the respondent is ordered to open a municipal account in the name of the applicant for municipal services which reflect municipal services and costs from date of registration of the property in the name of the applicant.

3. That the respondent is to pay the costs as between party and party.



N P MNGQIBISA-THUSI
Judge of the High Court

Appearances:

For Applicant: Adv J Vorster

Instructed by: MD Mitchell Attorneys

For Respondent: Adv K Mnyandu

Instructed by: Gildenhuis Malatji Inc.