THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case no:502/12

In the matter between:

CITY OF TSHWANE METROPOLITAN MUNICIPALITY **Appellant**

and

THOMAS MATHABATHE **First Respondent**
NEDBANK LIMITED **Second Respondent**

Neutral citation: *City of Tshwane Metropolitan Municipality v Mathabathe & another* (502/12) [2013] ZASCA 60 (22 May 2013)

Bench: **PONNAN and MAJIEDT JJA, ERASMUS, SWAIN and ZONDI AJJA**

Heard: **6 MAY 2013**

Delivered: **22 MAY 2013**

Summary: Local authority – charge upon property in favour of municipality – s 118(3) of Local Government: Municipal Systems Act 32 of 2000 – nature of security discussed.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Goodey AJ sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

PONNAN JA (JA and JJA concurring):

[1] The outcome of the dispute in this appeal turns on an interpretation of s 118(3) of the Local Government: Municipal Systems Act 32 of 2000 (the Act) read with s 118(1). To the extent here relevant those subsections 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.'

[2] The facts giving rise to the dispute are either common cause or undisputed. During 2010 the first respondent, Mr Thomas Mathabathe, the then owner of Erf 1080 Kosmosdal Ext 17 (the property), appointed the second respondent, the mortgagee of the property, Nedbank Ltd (Nedbank), by virtue of a special power of attorney to sell the property by public auction on his behalf. Auction Alliance (Pty) Ltd was appointed the auctioneer by Nedbank. On 11 December 2010 and at a public auction conducted by it, Mr Lesley Thomas Lawrence made an offer to purchase the property for the sum of R1.3 million. That offer was accepted by Mr Mathabathe on 13 December 2010.

[3] Pursuant to the conclusion of the sale agreement between Messrs Mathabathe and Lawrence, Nedbank instructed attorney Y Viviers of Weavind & Weavind Incorporated to attend to the registration of transfer of the property into the name of the latter. With a view to discharging her mandate, Ms Viviers applied to the appellant, the City of Tshwane Metropolitan Municipality (the Municipality), to issue her with the requisite clearance certificate contemplated by s 118(1) of the Act in respect of the property. According to the certificate furnished by the Municipality to Ms Viviers the total amount outstanding in respect of municipal rates and services was R162 722.26, which included, what has been termed 'the historical debt' of R151 324.22. The historical debt

was for charges levied by the Municipality for the provision of municipal services to the property prior to the two years envisaged in s 118(1)*(b)*.

[4] When Ms Viviers' various attempts at persuading the relevant officials in the employ of the Municipality to exclude the historical debt came to naught, Mr Mathabathe and Nedbank, as the first and second applicants, respectively, launched an application in the North Gauteng High Court. The relief sought against the Municipality was:

'1. That the Respondent be ordered to issue to the Applicants a written statement in terms of the provisions of Section 118(1) of the **Local Government: Municipal Systems Act, 32 of 2000** that is limited to amounts that became due in connection with the Erf 1080, Kosmosdal Ext 17 for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties during the two years only preceding the date of application for the certificate applied for in terms of the provisions of Section 118(1) of the **Local Government: Municipal Systems Act, 32 of 2000** as well as a detailed calculation of the said amount.

2. An order that the Respondent issue to the First Applicant a certificate in terms of the provisions of section 118(1) of the **Local Government: Municipal Systems Act, 32 of 2000** upon payment of the amount to it that is owed in respect of Erf 1080, Kosmosdal Ext 17 with regards to municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties during the two years only preceding the date of application for the certificate applied for in terms of the provisions of Section 118(1) of the **Local Government: Municipal Systems Act, 32 of 2000**.

3. An order declaring that the Respondent is strictly bound to adhere to the provisions of Section 118(1) of the **Local Government: Municipal Systems Act, 32 of 2000** and, more in particular, that the Respondent is obliged to issue a certificate in terms of the

provisions of section 118(1) of the **Local Government: Municipal Systems Act, 32 of 2000** upon payment to it of an amount equal to the outstanding debt in respect of a property for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties during the two years only preceding the date of application for the certificate applied for in terms of the provisions of Section 118(1) of the **Local Government: Municipal Systems Act, 32 of 2000**.

4. Costs on the scale as between attorney and client.'

[5] The application was opposed by the Municipality. It, moreover, was met with a counter-application, which sought the following relief:

'1. That the First Applicant and/or Second Applicant be ordered to pay an amount of **R 87 440.17** (eighty seven thousand four hundred and forty four rand and seventeen cent) upon finalization of this application to enable the Respondent to issue a clearance certificate for the property, Erf 1080, Kosmosdal Ext 17 thereby enabling the First Applicant and/or Second Applicant to pass transfer to the purchaser as per their deed of sale dated 13 December 2010.

2. That the transfer attorneys of the Applicants provide the Respondent with an undertaking that the arrear amount of **R 87 743.64** (opening balance on **Account No. 3317602419** as at the beginning of August 2009) will be paid to the Respondent on date of registration of the property into the name of the purchaser or within a reasonable time thereafter, i.e. within 48 hours after registration was effected, as per the proviso in **Section 118 (3) of the Local Government: Municipal Systems Act, 32 of 2000**; and

3. Costs on the scale as between attorney and client.'

[6] The matter came before Goddey AJ, who granted the relief sought by the respondents and dismissed the Municipality's counter-application. In each instance he ordered the costs to follow the result. The present appeal is with the leave of the high court. The order of the high court granting leave to appeal to this court suffers some confusion. Thus in its notice of appeal filed with this court the Municipality intimated that it 'does not appeal against the order granting prayers 1, 2 and 3 of the Respondents' notice of motion'. And in heads of argument filed on its behalf the following explanation is to be found:

'18.

The Appellant was initially of the view that it can withhold the issuing of the Section 118(1) certificate, unless an undertaking is given that the amount covered by Section 118(3) will be paid subsequent to the registration of the transfer of the property.

19.

The Appellant had subsequent to the judgement of the court *a quo*, conceded the Respondents' entitlement to a Section 118(1) certificate on compliance of the requirements.

20.

The Appellant therefore did not appeal the court *a quo's* findings, granting prayers 1, 2 and 3 of the Respondents' notice of motion, and conceded same when leave to appeal was sought. The Appellant tenders the Respondents' costs in the court *a quo* insofar as Respondents were successful with such relief.'

[7] That leaves the appeal against the dismissal by the high court of the Municipality's cross-application. In so far as that is concerned it was put thus in the Municipality's heads of argument:

'The Appellant only appeals the dismissal of the Appellant's counterclaim with costs, and specifically the dismissal of the counterclaim in which the Appellant sought an undertaking from the Respondents (prayer 2) that the arrear amount will be paid on date of registration or within a reasonable time thereafter.'

From the bar in this court counsel clarified that, if successful, the Municipality would content itself with the relief presaged in prayer 2 of its counter-application. It is accordingly to a consideration of that issue that I now turn.

[8] In support of that relief it was alleged on behalf of the Municipality that:

'13.1 Ms Y Viviers, as transferring attorney, failed to take cognizance of the provisions of Section 118(3) of the **Local Government: Municipal Systems Act, 32 of 2000** ("*the Act*") which provides as follows:

...

13.2 The Second Applicant as the mortgagee over the property known as Erf 1080, Kosmosdal Ext 17 ("*the property*") should know that the Respondent enjoys preference over any mortgage bond registered against the property and that the Respondent enjoys a ***lien*** (***hypothec***) over the property.

13.3 The Respondent, however as soon as the clearance certificate is issued, without an undertaking from the transferring attorney that upon registration the conveyancer will pay over the outstanding monies to the Respondent, loses its rights under Section 118(3) of the Act. . . .

...

15.1 It is noticeable . . . that the legislature did not include the wording of "*two years preceding the date of application*" in Section 118(3) of the Act.

15.2 If there are still remaining amounts due in excess of the two years period then the Respondent has a ***lien*** in terms of section 118(3) of the Act and the Respondent can only issue a clearance certificate upon receiving an undertaking from the transferring attorney that the Respondent will receive the outstanding amounts, in excess of the two year period, on date of registration of the property into the name of the purchaser or within a reasonable time thereafter, i.e. within 48 hours after registration was effected.

15.3 I can absolutely state that the Respondent will always issue a clearance certificate upon payment of the amount due on the clearance figures memo issued by its Finance Department or when the arrear amount exceeds the two year period, upon receiving an undertaking from the transferring attorney that the Respondent will receive the outstanding amounts, in excess of the two year period, on date of registration of the property into the name of the purchaser.'

[9] Municipalities are obliged to collect moneys that become payable to them for property rates and taxes and for the provision of municipal services (s 96). They are assisted to fulfil that obligation in two ways: first, they are given security for repayment of the debt, in that it is a charge upon the property concerned (s 118(3)); and, second, they are given the capacity to block the transfer of ownership of the property until debts have been paid in certain circumstances (s 118(1)) (per Nugent JA, *City of Cape Town v Real People Housing (Pty) Ltd* 2010 (5) SA 196 (SCA) para 2). The principal elements of s 118 are accordingly a veto or embargo provision with a time limit (s 118(1)) and a security provision without a time limit (s 118(3)) (*City of Johannesburg v Kaplan NO & another* 2006 (5) SA 10 (SCA) para 13). The two subsections thus provide the municipality with two different remedies. Although the purpose of both is to ensure

payment of the municipal claims that fall within the stipulated categories, the mechanisms employed to achieve that purpose are different (*BOE Bank Ltd v Tshwane Metropolitan Municipality* 2005 (4) SA 336 (SCA) para 7).

[10] As Brand JA observed in *BOE Bank* (para 8) 's 118(3) is on its own wording an independent, self-contained provision'. The security provided by the subsection amounts to a lien having the effect of a tacit statutory hypothec (*Stadsraad van Pretoria v Letabakop Farming Operations (Pty) Ltd* 1981 (4) SA 911 (T) at 917A-H; *BOE Bank* (*supra*) at 341F-H) and no limit is placed on its duration outside of insolvency (*Kaplan* para 20). Its effect is to create 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 the property (*Kaplan* para 16). Subsection (3), according to Brand JA (*BOE* para 10), 'does not refer to a category or class of debts but to the aggregate of different debts secured by a single charge or hypothec. 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'.

[11] It bears noting that the security given to a municipality by s 118(3) is a charge upon the property. *Irwin v Davies* 1937 CPD 442 at 447 put it thus: 'Sweet, *Law Dictionary*, says that a "charge" on property "signifies that it is security for the payment

of a debt or performance of an obligation. . . '". In *Kaplan* (para G26), Heher JA explained:

'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.'

[12] Unlike subsection (1), subsection (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 Section 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.

[13] In the result the appeal is dismissed with costs.

V M PONNAN
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	T Strydom SC Instructed by: M A Christian Attorneys Pretoria Honey Attorneys Bloemfontein
For Respondents:	P G Cilliers SC (with J L Myburgh) Instructed by: Weavind & Weavind Incorporated Pretoria Matsepes Bloemfontein