THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

DATE 29 January 2016

STATUS Immediate

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City of Tshwane Metropolitan Municipality v Peregrine Joseph Mitchell (38/2015) [2015] ZASCA 1 (29 January 2016)

The Supreme Court of Appeal (SCA) today handed down judgment upholding the appeal by the appellant and substituting the order of the order of the court below.

The issue before the SCA was whether a municipality could hold a successor in title, in respect of property, liable for an unpaid debt incurred by a previous owner for municipal services supplied prior to transfer and the interpretation of s 118(3) of the Local Government: Municipal Systems Act, 32 of 2000 (the Act).

The respondent purchased the fixed property known as Erf 296, Wonderboom Township, Gauteng (the property), at a sale in execution. The property was situated within the appellant's municipal boundaries. When the respondent applied for a clearance certificate, the appellant (the Municipality) issued a 'written statement' reflecting a total amount of R232 828.25 as being outstanding 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).

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) of the Act. The dispute was, however, settled and the Municipality 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. According to the Municipality, this historical debt was a charge on the land (a hypothec) in its favour and was due to it for rates, taxes and services, in terms of s118(3) of the Act.

The respondent subsequently sold the property to Ms Lynette Prinsloo (Prinsloo) who, before taking transfer, applied to the Municipality 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 until the historical debt was paid. Prinsloo then instructed her attorney not to proceed with the transfer until the issue of the historical debt had been resolved. The respondent then approached the Gauteng Division of the High Court, Pretoria, seeking, among others, an order declaring that he was not liable for the historical debt owed to the appellant by previous owners.

The court below relied on an exception created by the common law and held that the security that the Municipality held over the property in terms of s118(3) of the Act the Municipality's had been extinguished by the sale in the execution and subsequent transfer of the property. The court below distinguished the present matter from this court's decision in *City of Tshwane Metropolitan*

Municipality v Mathabathe & another 2013 (4) SA 319 (SCA) 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.

Writing for the majority, Baartman AJA ((Mpati P, Bosielo and Saldulker JJA concurring) (the majority) upheld the appeal. The majority found that the distinction drawn by the court below between the present matter and *Mathabathe* was not justified, and that the court below's further reliance on the exception created by the common law in relation to sales in execution of hypothecated immovable property was also misplaced, as s118(3) of the Act created a statutory hypothec, and not a hypothec created by agreement in terms of the common law. The court accordingly disagreed with the respondent's submission 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, and held that it is clear that it was not intended that there be a distinction drawn between property sold at a sale in execution or in a private sale when considering the question whether the hypothec created by s 118(3) survives transfer.

The majority further stated that there was nothing preventing 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.

On the question whether Ms Prinsloo could be held liable for the historical debt, it was held that this issue was the SCA, but made the observation that before the 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.
The majority therefore concluded that the court below should not have granted the orders which it did and the respondent's application should have been dismissed.

Writing a dissenting judgment, Zondi JA held that s 118(3) must be interpreted in a sensible manner that is harmonious with the common law and does not undermine the purpose for which it was enacted, which is to provide a mechanism for municipalities to collect historical debts, and that there is no indication that the subsection was enacted with the intention to alter the common law. Accordingly, he held, the security created by the subsection does not survive a sale in execution, rather 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 its debts, provided that they have not become prescribed, He further held that if it had been intended that the security created by s 118(3) should continue to exist even beyond its sale in execution, the legislature would 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 obtains transfer of the burdened property through a sale in execution were not taken away. In my view this is a sensible meaning of s 118(3). He concluded that he would have dismissed the appeal.

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