THE NEWSLETTER WITH A DIFFERENCE

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Why 30 years of municipal debt may fall on you!

Your municipality can force you to pay 30 years of debt....

Property owners and tenants may be liable for historical debt on their homes for up to 30 years in the past, due to a recent Supreme Court of Appeal ruling. The debt concerns rates and taxes, water and electricity, sewage and refuse charges.

Taking a step back

The crisis pertaining to historical municipal debt has a history itself. To understand the big picture it is necessary to look at section 118 of the Municipal Systems Act (MSA) 32 of 2000 which, inter alia, states that:

Restraint on transfer of property

A Registrar of Deeds or other registration officer of immovable property may not register the transfer of property except on production to that registrar of deeds of a prescribed certificate (a Clearance Certificate – own insertion)

(a) Issued by the Municipality in which that property is situated.

(b) Which certifies that all amounts 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.

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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 against the property.

Section 118 (1) of the MSA endeavours to protect the municipality's right to claim outstanding debt in two ways: the first is an embargo (in short, no payment and no transfer of the property to a new purchaser) and the second is by giving the municipality a form of security over the property. This, one would imagine, is a clear cut legal matter. But to everyone's surprise it has become a contentious issue.

In 2005 the Constitutional Court ruled in Mkontwana vs Nelson Mandela Metropolitan Municipality that section 118 (1) must be interpreted to have reference to rates and taxes as well as all electricity, water, sewage and other municipal services. Furthermore, the court ruled, in a watershed decision, that the owner of the property remains liable for the payment of these services even if an occupier/tenant had the benefit thereof and even if the utility account was in fact in the occupier/tenant's name. The owner still has redress against the tenant, but at the owner's peril.

In 2013 the Supreme Court of Appeal (SCA) revisited section 118 of the Municipal Systems Act in Tshwane Municipality vs Mathabathe, but this time with reference to the latter part of section 118 (1) (b) which reads as follows: "…*during the two years preceding the date of application for the certificate have been fully paid*."

The SCA ruled that section 118(1) (b) of the MSA is an embargo clause that protects the municipality's claim for rates, taxes and services (which we now know includes the tenant's utility account in terms of the Mkontwana case). It was, however, held that the municipality's right to embargo is limited to the two years preceding the application of the clearance certificate. The municipality was thus frustrated in that it couldn't enforce the embargo for historical debt, i.e. a debt older than two years, regardless the origin thereof. If there was debt older than two years, but the two years immediately prior to the request for the clearance certificate had been paid, the municipality would have to issue the clearance certificate.

The SCA, however, went further to reiterate that the words in section 118(3) which reads: "*is a charge upon the property"* creates a security in the form of a lien or tacit statutory hypothec *(a limited real right established by law over a debtor's property which gives a creditor a preferential right to have claims paid out of the hypothecated property as last recourse when the debtor is in default.)* in favour of the municipality.

Furthermore, that unlike the embargo clause, the security was not limited to two years. In this specific case the municipality was of the opinion that its security over the property would be extinguished once it is transferred. The SCA ruled that "*The municipality was plainly wrong in its contention that upon registration [to the purchasers] it loses its right [tacit Hypothec] under Section 118(3)."* This has the effect that the municipality can hold the new owner liable for the seller's and all other previous debt after transfer of the property.

Many a legal scholar was of the opinion that this judgement was in law simply incorrect.

Opening Pandora's Box

Then in January 2016, in the case of The City of Tshwane Metropolitan Municipality v PJ Mitchell, the SCA had the opportunity to revisit this paradox.

The SCA, in a majority ruling, reiterated that the tacit statutory hypothec created in sec 118 (3)cretaed in the MSA is indeed not extinguished on transfer of the property regardless whether it is a sale in execution (as it was in this case) or a normal sale transaction.

The absurd consequence of this is that the municipality can perfect its security, i.e. obtain a court order and sell an owner's property in execution for debt of the seller, the owner before that and even their occupant's and tenant's utility accounts (if one considers Mkontwana) with the understanding that the specific debt hasn't prescribed yet (30 years in respect of rates, refuse and sewage, and three years in respect of electricity and water).

Where does it leave the public?

This situation obviously scares the wits out of most prospective purchasers. Although sec 118 (1) limits the embargo of the municipality, nothing hinders the purchaser to make it a contractual condition that the transferring attorney must request a full clearance certificate (including historical debt) and not an abridged certificate (for only two years prior to request). The problem, however, remains that the municipality can still in good faith issue an erroneous clearance certificate omitting certain outstanding debt.

The purchaser can also seek a contractual guarantee from the seller that there is no outstanding debt apart from that covered by the clearance certificate. Keep in mind that the seller might be innocent and unaware of any outstanding debt as the municipality might have made a calculation error or under billed for services. It might even be that the municipality retrospectively reviews the property evaluation or realises that it has all along been using the wrong valuation schedules in the two-year period covered by sec 118 (1) or even before that.

The purchaser can even insist on a contractual indemnity from the seller regarding any claims from the municipality. The seller might refuse because he/she him/herself might be unaware of any historical debt and wishes not take any responsibility therefor. On the other hand, such an indemnity might be worthless as the seller may die, become insolvent, be a pauper or emigrate. It is questionable how far this will take the purchaser.

It is a pity that the law is currently interpreted in a manner that gives municipalities vast rights to infringe on innocent people's property rights whilst the very crisis is the result of their own ineffectiveness, incompetence or negligence.

Sweeping powers for municipalities?

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It needs to be added that although the debt on a property only prescribes after 30 years it is doubtful if they still have the records or even have the resources to engage in an exercise of this magnitude to extinguish possible historical debt.

It needs to be noted that in neither the Mathabathe nor the Mitchell case did the judgement revolve around the question of whether the Municipality can in fact perfect their tacit statutory hypothec and sell the property in execution for outstanding debt. Both of these cases revolved around different issues although the need arose to make a ruling about the interpretation of the aberrant hypothec.

The only solution to this problem is that the legislature must change the relevant section to read that the tacit statutory hypothec is cancelled on transfer. Any other construction will be unfair and will push the already wavering property market into the abyss. It remains to be seen if the legislature is willing to change the relevant legislation.

Lastly it has to be noted that it wasn't the Mitchell case in early 2016 that introduced the tacit statutory hypothec topic set out sec 118 (3) of the MSA to the industry. It wasn't even the MSA that introduced it in 2000 as the idea of the tacit statutory hypothec has its origins in section 50(1) the old Transvaal Local Government Ordinance 17 of 1939. It has been there all along and was maybe given publicity for the first time via the Mathabathe case and the subsequent Carte Blanche coverage. Despite predictions after the Mathabathe case that the courts will be inundated with civil cases against owners by municipalities perfecting their security for historical debt, this did not transpire. I am not aware of any such cases.

Maybe, just maybe, the municipalities are more up to scratch with debt collecting than what we like to believe.

My personal take on this is that sec 118 (3) of the Municipal Systems Act will not withstand the scrutiny of the Constitutional Court in reference to the property rights contained in Section 25 of the Constitution.

I believe that in the end sanity will prevail.

Written by/Geskryf deur: Tiaan (M.C.) van der Berg

ETHICAL CODE

3. MANDATES

No estate agent shall –

3.2 on behalf of a prospective purchaser or lessee, offer, purport or attempt to offer to purchase or lease any immovable property or negotiate in connection therewith or canvass, or undertake or offer to canvass a seller or lessor therefor, unless he has been given a mandate to do so by such prospective purchaser or lessee, as the case may be, or his duly authorised agent;

SAAKLIKE REG VAN UITBREIDING IN TERME VAN ART 25 VAN DIE DEELTITELWET / REAL RIGHT OF EXTENSION IN TERMS OF SEC 25 OF THE SECTIONAL TITLES ACT

Art 25 van die Deeltitelwet, Wet 95 van 1986, bepaal dat 'n ontwikkelaar vir hom die reg om uit te brei in 'n skema kan voorbehou. Met die opening van die deeltitelskema sal die ontwikkelaar aansoek doen in terme van Art 25(4) vir die voorbehoud van die reg, en 'n sertifikaat van saaklike reg word dan aan hom uitgereik wat bepaal dat hy die reg het om nog geboue in die skema op te rig. Hierdie reg is gewoonlik gekoppel aan 'n sekere tydperk. Die effek daarvan is dat 'n ontwikkelaar 'n skema in fases kan ontwikkel. Dus bou hy byvoorbeeld 20 eenhede en verkoop daardie eenhede, maar hy het die reg om nog 20 eenhede binne 'n sekere tydperk binne die skema te bou. Hierdie reg van uitbreiding is 'n saaklike reg waaraan 'n geldelike waarde gekoppel en kan ook onderverdeel word en verkoop word aan 3de persone. Dus as jy 'n saaklike reg van uitbreiding koop, koop jy die reg om 'n eenheid te bou op 'n spesifiek geallokeerde stuk grond in die skema.

Section 25 of the Sectional Titles Act 95 of 1986 makes provision that a developer can reserve a right to extend a sectional scheme. With the opening of the sectional scheme the developer will apply in terms of Section 25(4) for the reservation of the right of extension, and a certificate of real right of extension will be issued to him which will stipulate that he has the right to erect more buildings in the scheme within a specific time period. The effect of this right is that a developer can develop the scheme in phases, for example he will build 20 units and sell those immediately, but he has the right to build another 20 units at a later stage. This right of extension is a real right to which a monetary value can be attributed. The real right can also be subdivided and sold to 3rd persons. If you purchase a real right of extension, you are purchasing the right to build a unit on a specified piece of land in the sectional scheme.

Written by/Geskryf deur: Ramona Michael

RICH'S REVIEW

A colleague recently introduced me to a vintage bookstore, one where the owners make the experience. An absolute must for the ardent or picky reader!

They stock over 200 000 books to choose from, all in a respectable condition. Ranging from philosophy to fairytails and everything in between. John and Alida Rutland opened this bookstore in 2010 and managed over the years to bring reading, education and joy to thousands of people in and around the disadvantaged communities of Pretoria.

To find those gems that went out of print or is no longer stocked by the big bookstores, visit Rutland Books at 75 Soutpansberg Road, Riviera – Pretoria (012) 329 4007. John Rutland told me that there are more than 1.5 kilometres of shelving. He took me on a tour to their "store-rooms of more books", three outside flatlets, 2 garages and the attics above the rooms - fully stocked! Alida is a serious reader and can show you where anything and everything is. If they do not have the book on their shelves, they will pretty much make sure to find it for you.

Written by/Geskryf deur: Rich Redinger

Bonds / Verbande

Frequently Asked Questions / Gereelde Vrae

WHAT IS THE DIFFERENCE BETWEEN TRANSFER DUTY, TRANSFER FEES AND TRANSFER COSTS?

Transfer duty is a form of tax payable by the purchaser to SARS when acquiring a property. Transfer duty is charged on a scale depending on the price and / or value of the property.

Transfer fees are the conveyancer's fees for the service of transferring the property into the purchaser's name in the deeds office.

Transfer costs is a collective term which include transfer fees, deeds office fees, FICA fees, levies and transfer duty.

WAT IS DIE VERSKIL TUSSEN HEREREGTE, OORDRAG FOOIE EN OORDRAGKOSTES?

Hereregte is 'n vorm van belasting betaalbaar deur die koper aan SARS met verkryging van eiendom. Hereregte word bereken in ooreenstemming met 'n glyskaal, afhangende van die prys en / of waarde van die eiendom.

Oordragfooie is die fooie betaalbaar aan die aktevervaardiger vir sy / haar professionele diens om toe te sien tot die oordrag van die eiendom in die koper se naam.

Oordragkoste is die oorkoepelende term vir fooie, aktekantoor fooie, FICA, heffings en hereregte.

Written by/Geskryf deur: Marike Snyman

What our clients have to say / Wat ons kliënte sê

- Thank you very much for the professionalism and consistency in execution of this transaction since inception. The constant communication and transparency has kept everyone in the loop through the whole journey.
- I feel it necessary to place on record once more of the professional service I received from MC Van der Berg in processing my transaction. This now accounts for 4 x transactions in the last 15 years and I have never been disappointed and in fact I always demand upon signing the OTP your firm is utilized as a condition to the sale.
- Your service has been nothing short of exceptional. You've been completely professional, but at the same time incredibly caring, supportive and helpful. You went way beyond the call of duty and almost became a friend who was willing to listen to my personal frustrations and anxieties when you didn't have to, and most importantly to help find solutions. Thank you and God bless. I really appreciate it, and you.

SUDOKU

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BOERERAAT – GROENTE

- Om groente gouer te laat sag kook, voeg 'n teelepel suiker by terwyl dit kook.
- Om groente langer vars te hou, draai dit in waspapier toe voordat dit in die yskas gebêre word.
- Week bone, stampmielies en ander soortgelyke droë kos oornag. Dit sal tyd, geld en ure se kookwerk bespaar.

Werknemer van die maand

Liza Louw het op 24 Februarie 2014 deel geword van die MC-Span as Projek koördineerder.

Sy lewer 'n diens van onskatbare waarde ten opsigte van ons webwerf, bemarkingsmateriaal asook die opleidingsmateriaal vir MCademy.

Liza is getroud met Dawid en het 2 seuns. Die oudste seun is onlangs getroud.

Soos dié van julle wat al 'n ruk lank 'n pad met ons stap weet ondersteun ons Huis-Remmelos, 'n selfsorgsentrum vir kwadrupleë in Germiston. Waarom het ons gekies om hulle te ondersteun? Want daar is weining staatshulp en vanweë hul gestremdhede kan die meeste van die inwoners doodeenvoudig nie werk en 'n eie inkomste verdien nie.

Twee jaar gelede het ons 'n konsert ten bate van die huis gehou en hierdie jaar maak ons weer so. Die kunstenaar het geen bekendstelling nodig nie en het boonop weggestap met 7 Ghoema toekennings hierdie jaar.

Elvis Blue gaan ons op 2 Junie 2016 by die Atterbury Teater vermaak met liedjies soos Toe ons jonk was, Rede om te glo, Die Hemel en baie ander gunstelinge. Bespreek nou jou kaartjies by sarie@mcvdberg.co.za of skakel haar by (012) 660 6000.

Ek was aangenaam verras met Elvis Blue se webblad, www.elvisblue.co.za. Sy "Elvis says" is inspirerend en humoristies! Ek deel graag sy wyshede oor voorlopers of "pioneers" uit sy "Elvis Says" van 23 September 2015:

"They share their money and their time and all the other things they have that are scarce. They step up, when others step away. They walk the talk when it comes to giving second chances, giving of themselves, giving it all, you know, all the hard stuff that is so much easier *not* to do. These people somehow find the fortitude to do it, brave it. Pioneers lay the groundwork, lead the way, prepare solid foundations, and take the lead – these are words that to me describe pioneers."