

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Case No:20768/2002

In the matter between:

SUMMER SYMPHONY PROPERTIES 13 CC
BOE BANK LIMITED

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JURISDICTIONS: YES / NO.

(3) ...

23.03.2003

DATE

1st Applicant

SIGNATURE

2nd Applicant

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY
THE REGISTRAR OF DEEDS

1st Respondent
2nd Respondent

JUDGEMENT

DU PLESSIS J:

This application and counter application for declaratory orders concern the correct interpretation of section 118(3) of the Local Government: Municipal Systems Act, 32 of

2000 (“the Act”) and its effect on the facts of this case. The section provides:

““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.” (I have underlined the words that are pertinent.)

I will refer to “municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties” collectively as “municipal debts”.

The facts are as follows. Section 118 of the Act came into operation on 1 March 2001. The second applicant, a bank, held a first mortgage bond over *Erf 958 Wonderboom Extension 3, Registration Division JR, Gautneg* (the property”). On 5 June 2001 the second applicant obtained a judgment sounding in money against the then owners of the property. The property was declared executable. The property was sold in execution on 7 December 2001. The first applicant purchased the property for R725 000.¹

¹ Mr WJP van Aswegen bought the property on behalf of a nominee and later nominated the first applicant.

The conveyancers charged with the transfer of the property into the first applicant's name obtained from the first respondent, the municipality in whose area the property is, a certificate in terms of section 118(1)² of the Act. The first respondent certified that an amount of R287 900,29 was owing in respect of municipal debts that became due in the two years preceding the date of application for the certificate (Since October 1999). The first respondent further informed the conveyancers that a further amount of R655 273,83 was owing in respect of earlier municipal debts ("the old municipal debts").

The first applicant paid the amount of the certificate and the property was transferred into its name. The Sheriff of Wonderboom now has to distribute the proceeds of the sale in execution. The second respondent contends that, in that distribution, its mortgage bond over the property takes precedence over the R655 273,83 owing to the first respondent in respect of the old municipal debts.

Before I deal with the arguments, a brief explanation of the interest of the different parties is called for. The first respondent initially held the view that section 118(3) in effect means that the first applicant (the new owner of the property) became liable for the old municipal debts after transfer of the property into its name. The applicants then brought

² In terms of section 118(1) no property may be transferred without a certificate from the relevant municipality "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".

the application and sought declaratory orders aimed, first, at declaring that the aforementioned is not the effect of section 118(3). In its answering affidavit the first respondent abandoned its aforesaid view. The declaratory order in that regard is now academic and the applicants did not pursue it.

The declaratory orders were also aimed at declaring that the old municipal debts did not form a charge upon the property.

The first respondent brought a counter application in which it seeks a declaratory order that the old municipal debts constitute a charge upon the property "and enjoy.. preference over the second applicant's mortgage bonds in the distribution of the proceeds of the sale in execution". As the proceeds of the sale are to be distributed by the Sheriff of Wonderboom, the first respondent joined him as the third respondent. Neither the Sheriff nor the second respondent, the Registrar of Deeds, took any active part in the application.

In terms of section 118(1) the certificate by the relevant municipality concerns municipal debts that became due in the two years preceding the date on which the certificate was applied for. Section 118(3) provides that "an amount due" for municipal debts "is a charge upon the property" and "enjoys preference over any mortgage bond registered against the property". Mr Ellis for the applicants accepted that the words "an amount" in section 118(3) mean all amounts, and that the charge is not limited to municipal debts in

respect whereof the certificate had been issued or, put differently, the charge is not limited to municipal debts that became due in the two years preceding the certificate. I therefore proceed on the basis, without finding, that any amount due in respect of municipal debts is a charge upon the relevant property.

Mr Ellis argued that, on the particular facts of this case, the charge upon the property is nevertheless limited to municipal debts that became due in the three years preceding the date of registration of the property into the name of the first applicant. He developed the argument as follows. In terms of section 50(3) of Ordinance 17 of 1939 (T) (the predecessor in this province of section 118(3) of the Act), the charge upon the property was limited to municipal debts that became due in the three years preceding the date of registration of a transfer of the property. Thus, on the day before the Act came into operation the first respondent's preference was limited to municipal debts that became due in the three years preceding transfer of the property. To hold that from the day on which the Act came into operation (1 March 2001), the charge became unlimited would limit the rights the second applicant enjoyed on the previous day by virtue of its bond over the property. It would be retrospective application of section 118(3). In view of the well-known presumption against retrospectivity and in the absence of an indication in the Act that section 118(3) is retrospective, the section cannot be applied retrospectively.

An Act is retrospective if it deems the law, as at a date in the past, to have been what it was not. (*Adampol (Pty) Ltd v Administrator, Transvaal 1989 (3) SA 800 (AD)* at 811 to 813; *Cromhout v Multilateral Motor Vehicle Accidents Fund; SANTAM v Williams 1998 (1) SA 563 (SCA)* at 569F). There is nothing in section 118(3), read in its full context, to indicate that it is retrospective. That does not mean that the section did not affect existing rights. “Retrospective operation is one matter. Interference with existing rights is another. If an act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective”.³

On the face of it section 118(3) did affect the first applicant’s rights. The preference of its bond over old municipal debts was removed. Legislation must be interpreted to interfere with existing rights as little as possible but there is no rule that existing rights cannot be interfered with. I find nothing in section 118(3) or in its context that limits its effect on rights that existed prior to its enactment.

I conclude that, while section 118(3) interfered with the second applicant’s rights as they existed until 1 March 2001, the section is not for that reason retrospective.

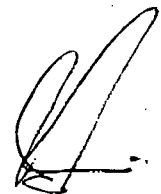
³ The quote is from *West v Gwynne [1911] 2 Ch 1* at 1. Our courts have repeated it with approval. See *Adampol (Pty) Ltd v Administrator, Transvaal 1989 (3) SA 800 (AD)* at 811 and 812.

It follows that the application cannot succeed while the counter application must succeed.

The first respondent conceded the correctness of the first applicant's initial contention as to the effect of section 118(3). It is not practical however to reflect that limited success on the part of the first applicant in a costs order. The two applicants made common cause and used one attorney and one counsel. As such they were not successful and costs must follow the event.

The following order is made:

- (1) It is declared that the amount due to the first respondent for municipal fees , surcharges on fees, property rates and other municipal taxes, levies and duties on the property known as **Remaining Extent of Erf 958, Wonderboom Extension 3, Registration Division JR** (the Erf) for the period preceding October 1999 is a charge upon the Erf and enjoys preference over the second applicant's mortgage bonds in distribution of the proceeds of the sale in execution of the Erf on 7 December 2001 in case no 13737/97.
- (2) The applicants are ordered to pay the first respondent's costs.



B. R du Plessis

Judge of the Highcourt