CONSTITUTIONAL COURT OF SOUTH AFRICA

Chantelle Jordaan and Others v City of Tshwane Metropolitan Municipality and Others; City of Tshwane Metropolitan Municipality and Others v Chantelle Jordaan and Others; Billie Ann Livanos v Ekurhuleni Metropolitan Municipality

CCT 283/16
CCT 293/16
CCT 294/16
Date of Judgment: 29 August 2017

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today the Constitutional Court handed down judgment in an application for confirmation of an order by the High Court of South Africa, Gauteng Division: Pretoria (High Court) that declared section 118(3) of the Local Government: Municipal Systems Act, 2000 constitutionally invalid. This section provides that an amount due for municipal services rendered on any property is a charge upon that propert**y** and enjoys preference over any mortgage bond registered against the property.

The matter came before the High Court after the City of Tshwane and Ekurhuleni municipalities suspended, or refused to contract for the supply of, municipal services to the applicants' properties. This was on the basis that the applicants, who are relatively recent transferees of municipal properties, owe the municipalities for municipal services rendered to these properties before transfer. In other words, the municipalities required these new owners to pay historical municipal debts. The applicants complained that they faced darkness, having no electricity, and many other inhumane conditions because they bought property whose previous owners failed to meet their obligations to the municipality – and against whom the municipality failed to enforce its rights in fulfilment of its constitutional obligations.

The High Court found section 118(3) constitutionally invalid, to the extent only that it has the effect of transferring to new or subsequent owners municipal debts incurred before transfer. The High Court found this to be an arbitrary deprivation of property in terms of section 25 of the Constitution. It said that new owners of property are not liable for municipal debts incurred by previous owners. Therefore municipalities may not sell the property in execution to recover the debt or refuse to supply municipal services on account of outstanding historical debts.

In considering whether to confirm the High Court's declaration of constitutional invalidity, this Court had to determine whether the provision, properly interpreted, in fact means that, when a new owner takes transfer of a property, the property remains burdened with the debts a previous owner incurred. If the provision was capable of an interpretation that did not impose constitutionally invalid consequences, the High Court's declaration of constitutional invalidity would be unnecessary.

Before this Court, Tshwane, Ekurhuleni and now eThekwini municipality, which was admitted as *amicus curiae* (a friend of the Court), contended that a proper construction of section 118(3) was that the charge survives transfer. They argued that for municipalities to properly fulfil their constitutional duties of service delivery, in the greater good, they needed extra-ordinary debt collecting measures. This meant burdening new owners with the responsibility for historical debts. Both in the High Court and in this Court, the Minister of Cooperative Governance and Traditional Affairs also presented argument in support of the municipalities' stand.

The municipalities however conceded that nothing prevented them from enforcing their claims for historical debts against those who incurred them, namely the previous owners. The municipalities conceded further that their powers included interdicting any impending transfer to a new owner by obtaining an interdict against the old, indebted owner, until the debts were paid.

Also admitted as *amici curiae* were the social housing organisation, TUHF Ltd (TUHF); The Banking Association of South Africa (BASA), an association with thirty-two member banks and the Johannesburg Attorneys Association (JAA). TUHF and BASA associated themselves with the applicants in challenging the meaning the municipalities ascribed to section 118(3). They advanced further arguments including that section 118(3) permitted arbitrary deprivation of not just the new owner's property rights, but of real security rights the new owner confers on any mortgagee who extends a fresh loan on the security of the property post-transfer. The JAA focused on a conveyancer's duties and ethical position should this Court hold that the section 118(3) right survives transfer.

In a unanimous judgment, penned by Cameron J, this Court weighed the historical, linguistic and common law factors bearing on how the provision should be understood, plus the need to interpret it compatibly with the Bill of Rights.

The Court held that the provision is well capable of being interpreted so that the charge does not survive transfer. Indeed, it must be so interpreted. The Court held that a mere

statutory provision, without more, that a claim for a specified debt is a "charge" upon immovable property does not make that charge transmissible to successors in title of the property. Public formalisation of the charge is required (e.g. registration in the Deeds Registry) so as to give notice of its creation to the world.

Section 118 does not require this public formalisation process. In any event, the Bill of Rights prohibits arbitrary deprivation of property, which would happen if debts without historical limit are imposed on a new owner of municipal property.

Therefore, to avoid unjustified arbitrariness in violation of 25(1) of the Bill of Rights, the Court held that section 118(3) must be interpreted so that the charge it imposes does not survive transfer to a new owner.

In the result, the Court held that, because section 118(3) can properly and reasonably be interpreted without constitutional objection, it is not necessary to confirm the High Court's declaration of invalidity. For clarity, the Court, however, granted the applicants a declaration that the charge does not survive transfer.

As this represents a victory in substance for the applicants, the Court held that the municipalities and the Minister should pay the applicants' costs, including the costs of two counsel.