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Municipality has a constitutional duty to ensure the provision of services – Judge.

The North Gauteng High Court last month handed down a landmark decision that protects the purchasers of properties that were bought at a Sheriff's sale or from an insolvent estate, from claims by a municipality for the previous owner's municipal debts.

The judgment, by Judge Dawie Fourie, held that the City of Tshwane Metropolitan Municipality (CTMM) could not hold the new owner liable for property rates and municipal charges incurred by the previous owner. He said that the debt did not belong to the property, but to whoever owned the property at the time when the debts were incurred.

In 2013, Pretoria property investor, Perregrine Joseph Mitchell, bought a residential property in the Wonderboom area on a Sheriff's sale. These sales are known as sales in execution. He then on-sold it to a Mrs Prinsloo. The CTMM demanded that Prinsloo pay R126 608 before allowing her to open a municipal services account. She refused to pay the money, and told Mitchell that she was not prepared to continue with the sale. Mitchell then hauled the CTMM to court.

Fredah Kekana's case

Moneyweb highlighted CTMM's allegedly unlawful practice earlier this year, when we reported on the plight of disabled Tshwane resident Fredah Kekana. She too had bought her home on a sale in execution, and then found that she was unable to open a municipal services account – on the basis that she would first have to undertake to pay the previous owner's arrear rates. She successfully challenged the CTMM in court.

Read [New property owners held liable for defaulters' dues](#)

Common law position

Several municipalities have attempted to recover arrear rates from the subsequent owner. They allege that the Municipal Systems Act (MSA) allows them to do this.

Judge Fourie, quoting ancient legal authorities said, “It appears that in terms of the common law when mortgaged properties have been sold and delivered ‘on the petition of creditors by order of a Judge’ (which is another way of referring to a sale in execution), the hypothec (a right of preference) is extinguished and the new owner will be granted a clean title.” He concluded by saying that, in his view, this was still the legal position.

The Judge noted that, unlike a private sale, when a forced sale took place there was no agreement – only an order of Court, “whereafter the property is publicly converted into cash to satisfy the claims of creditors.”

The debt and the security for the debt

The MSA states: “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.”

This means that if a property is sold, the municipality has a right, ahead of the lender or any other claimant, to receive, from the proceeds of the sale of the property, payment of any money owing to it.

The Judge found that the municipality had the chance to recover its outstanding money from the Sheriff at the time that the Sheriff sold it to Mitchell. It had not done so.

When a property is sold, the Deeds Office will not transfer the property to the new owner unless the municipality has given the seller a rates clearance certificate. This certificate confirms that the preceding two years’ rates have been paid.

In court, lawyers for the CTMM referred the Judge to a number of bylaws and acts in order to justify its actions. Judge Fourie found that the owner or occupier of the property at the time in which the debt was incurred was liable for payment of the debt. “There is no indication that the definition of “owner” also includes successors in title,” said Judge Fourie.

The Constitution, and the Bill of Rights, places a number of obligations on municipalities. In the context of municipal services, the Constitution and other laws, balance a right to access to “municipal services which the municipality provides,” with the duty of the consumer, “where applicable”, to pay for these municipal services.

Does this judgment solve the problem for all property buyers?

Media reports have portrayed this judgment as having solved this problem once and for all. Judge Fourie appeared to have made a distinction between forced sales ‘normal’ sales’.

Common sense and the law

There are rules relating to the interpretation of Acts of parliament, such as the MSA. One need ask oneself what the lawmakers had in mind when they stipulated that the property was the security for the municipal debt? Common sense tells us that they intended for a municipality to fully recover all outstanding debts from the proceeds of the sale of the property before letting it

out of their grip. Any other interpretation would prejudice the property market – and would be grossly unfair.

Common sense must surely prevail.

Mitchell told Moneyweb that he was satisfied with the outcome. He did not ask the court to award costs against the CTMM.

The CTMM's spokesperson, Blessing Manale, had not responded to Moneyweb's request for comment by the time of publication.