

23 MAY 2016

# REAL ESTATE ALERT

IN THIS  
ISSUE

## SECTION 118 (1) THE INTERPRETATION OF 'IN CONNECTION WITH THAT PROPERTY'

Section 118(1) of the Local Government: Municipal Systems Act, No 32 of 2000 (Municipal Systems Act) states that:

# SECTION 118 (1) THE INTERPRETATION OF 'IN CONNECTION WITH THAT PROPERTY'

*Does the township owner, in instances where he does not take out a separate certificate of registered title for the erf, pay the rates due in respect of the remainder of the township as a whole or does he pay the rates due only for the erf sold?*

*Erven are only rated separately when transferred from the township owner to the purchaser.*



**Section 118(1) of the Local Government: Municipal Systems Act, No 32 of 2000 (Municipal Systems Act) states that:**

"(1) A registrar of deeds may not register the transfer of property except on production to that registrar of deeds of a prescribed certificate:

- (a) issued by the municipality or municipalities in which that property is situated; and
- (b) which certifies that all amounts that became 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."

In the context of the sale of a standalone erf, the words 'in connection with that property' do not pose a difficulty. What happens, however, when the erf sold forms part of the remainder of the township? Does the township owner, in instances where he does not take out a separate certificate of registered title for the erf, pay the rates due in respect of the remainder of the township as a whole or does he pay the rates due only for the erf sold?

These issues were considered and adjudicated on by the Supreme Court of Appeal in *City of Tshwane Metropolitan Municipality and Uniqon Wonings (Pty) Ltd* (20771/2014) [2015] ZASCA 162.

## **The Creation of the Remainder**

In 2003 Uniqon Wonings (Pty) Ltd (Uniqon) purchased a portion of a farm in Gauteng to develop a township, Six Fountains Estate, on the property. The township, consisting of 200 erven, was approved by Kungwini Local Municipality (Kungwini). Certain erven were transferred to purchasers on opening of the township register and Uniqon, as owner of the land on which the township was proclaimed, remained the owner of the remainder of the township comprising the unsold erven (Remainder). As owner, Uniqon was responsible for the rates for the Remainder.

## **Levying Rates on the Remainder**

From the outset Uniqon experienced problems with Kungwini regarding the billing of rates for the Remainder – it was billed for the individual unsold erven instead of for the Remainder as a whole.

This is contrary to the established practice of many years of valuing and rating new townships as a whole or what remains of a township after transfer of individual erven to purchasers. Erven are only rated separately when transferred from the township owner to the purchaser. In *Florida Hills Township Ltd v Roodepoort-Maraiburg Town Council* 1961 (2) SA 386 (T), Kuper J confirmed that the remainder retains its own identity and continues to be reflected as the 'remainder' in the Deeds Office even though its area is reduced from time to time by the sale of individual erven to purchasers.

# SECTION 118 (1) THE INTERPRETATION OF 'IN CONNECTION WITH THAT PROPERTY'

CONTINUED

*The City of Tshwane incorrectly levied rates against the individual unsold erven instead of against the Remainder and in June 2012 instituted action against Uniqon for alleged outstanding rates due.*



In 2011 Kungwini was disestablished and Six Fountains Estate subsequently fell under the jurisdiction of the City of Tshwane Metropolitan Municipality (City of Tshwane). The City of Tshwane also incorrectly levied rates against the individual unsold erven instead of against the Remainder and in June 2012 instituted action against Uniqon for alleged outstanding rates due in respect of every erf in the Remainder.

#### **Application for clearance certificate**

In 2013 Uniqon, to comply with s118(1) of the Municipal Systems Act, applied to the City of Tshwane for the issue of three clearance certificates in respect of erven that had been sold. The City of Tshwane refused to issue the clearance certificates on the basis that all arrear rates for the Remainder had to be paid first. Uniqon instituted an urgent application in the High Court, Pretoria for an order that the City of Tshwane issue the required clearance certificates against tender of payment of rates it considered due in respect of the individual erven that had been sold and not against the payment of rates in respect of the Remainder.

#### **The Mooikloof case**

Before the City of Tshwane could file its answering affidavit judgment was handed down by Prinsloo J in a very similar case, *Mooikloof Estates (Pty) Ltd v The City of Tshwane & another*, case number 29998/2013 (unreported). In *Mooikloof* it was held that an erf did not come into existence until such time as it was transferred as a separate entity from the township owner to the purchaser and that since s118(1) of the Municipal Systems Act referred to the individual erf to be transferred and not to the remainder, rates could not be levied against the erf.

The High Court held that the clearance certificate must be issued by the City of Tshwane on receipt of payment of only the clearance application fee and not the arrear rates for the remainder.

#### **High Court**

In line with the *Mooikloof* judgment, Uniqon now argued that it only had to pay the clearance application fees for the issue of the required clearance certificates. Uniqon's amended notice of motion sought orders amongst others that the City of Tshwane issue the three clearance certificates on receipt of the clearance application fees and that going forward the City of Tshwane levy rates on the Remainder as a whole and not on the individual unsold erven. The High Court concurred with the conclusions in *Mooikloof* finding that the words 'in connection with that property' in s118(1) of the Municipal Systems Act meant the specific property to be transferred and not the Remainder. The High Court accordingly ordered, amongst others, that the City of Tshwane issue the three clearance certificates on payment of the clearance application fee and that going forward the City of Tshwane levy rates on the Remainder as a whole and not on the individual unsold erven.

#### **Supreme Court of Appeal**

On appeal, the Supreme Court of Appeal (SCA) explained that the crux of the matter was the correct interpretation of s118(1) with particular reference to the meaning of the phrase 'in connection with that property' and whether or not rates could be determined for a specific property for clearance certificate purposes if that erf formed part of the remainder and had been taxed accordingly.

# SECTION 118 (1) THE INTERPRETATION OF 'IN CONNECTION WITH THAT PROPERTY'

CONTINUED

*The SCA found an equitable solution, which took the interest of the township owner and the municipality into account.*



The SCA examined the wording of s118(1) of the Municipal Systems Act closely and concluded that the phrase 'in connection with that property' meant the *specific erf to be transferred* and not the remainder. Therefore, the SCA held that Uniqon must pay the outstanding rates for the erven to be transferred and not for the Remainder.

The question that subsequently arose was how to determine the pro rata share of rates for the specific erf that previously formed part of the Remainder? The SCA saw no reason why the City of Tshwane could not determine the outstanding rates for each specific erf based on the valuation roll for the Remainder and the copy of the township plan already in its possession.

In conclusion, the SCA found an equitable solution, which took the interest of the township owner and the municipality into account. On the basis of the SCA's decision, a township owner only pays outstanding rates for the specific property to be transferred instead of the remainder of the township and the City of Tshwane is not deprived of outstanding rates for that property.

*Natasha Fletcher  
and Muhammad Gattoo*

**2014**

**PROPERTY & CONSTRUCTION TEAM OF THE YEAR**

THE AFRICAN LEGAL AWARDS

**2015 RANKED #1 BY DEALMAKERS FOR M&A DEAL FLOW 7 YEARS IN A ROW**

1<sup>st</sup> by General Corporate Finance Deal Flow

**2014** 1<sup>st</sup> by M&A Deal Flow  
1<sup>st</sup> by M&A Deal Value  
1<sup>st</sup> by General Corporate Finance Deal Flow

**2013** 1<sup>st</sup> by M&A Deal Flow  
1<sup>st</sup> by M&A Deal Value  
1<sup>st</sup> by Unlisted Deals - Deal Flow

**2012** 1<sup>st</sup> by M&A Deal Flow  
1<sup>st</sup> by General Corporate Finance Deal Flow  
1<sup>st</sup> by General Corporate Finance Deal Value  
1<sup>st</sup> by Unlisted Deals - Deal Flow

**2015**

**1<sup>ST</sup>**  
South African law firm and 12<sup>th</sup> internationally for Africa & Middle East by deal value

**2<sup>ND</sup>**  
South African law firm and 2<sup>nd</sup> internationally for Africa & Middle East by deal count

**1<sup>ST</sup>**  
South African law firm and 15<sup>th</sup> internationally for Europe buyouts by deal value

**NO.1**

**6**

**YEARS IN A ROW**  
for client service excellence

**#6YearsInARow**

## OUR TEAM

For more information about our Real Estate practice and services, please contact:



**Attie Pretorius**  
National Practice Head  
Director  
T +27 (0)11 562 1101  
E attie.pretorius@cdhlegal.com



**Muhammad Gattoo**  
Director  
T +27 (0)11 562 1174  
E muhammad.gattoo@cdhlegal.com



**Bronwyn Brown**  
Senior Associate  
T +27 (0)11 562 1235  
E bronwyn.brown@cdhlegal.com



**Andrew Heiberg**  
Regional Practice Head  
Director  
T +27 (0)21 481 6317  
E andrew.heiberg@cdhlegal.com



**Simone Immelman**  
Director  
T +27 (0)21 405 6078  
E simone.immelman@cdhlegal.com

**Natasha Fletcher**  
Associate  
T +27 (0)11 562 1263  
E natasha.fletcher@cdhlegal.com



**Allison Alexander**  
Director  
T +27 (0)21 481 6403  
E allison.alexander@cdhlegal.com



**Len Kruger**  
Director  
T +27 (0)11 562 1049  
E len.kruger@cdhlegal.com

**Janke Strydom**  
Associate  
T +27 (0)11 562 1613  
E janke.strydom@cdhlegal.com



**Mike Collins**  
Director  
T +27 (0)21 481 6401  
E mike.collins@cdhlegal.com



**Nayna Parbhoo**  
Director  
T +27 (0)11 562 1701  
E nayna.parbhoo@cdhlegal.com

**Samantha Kelly**  
Associate  
T +27 (0)11 562 1160  
E samantha.kelly@cdhlegal.com



**Lucia Erasmus**  
Director  
T +27 (0)11 562 1082  
E lucia.erasmus@cdhlegal.com



**Muriel Serfontein**  
Director  
T +27 (0)11 562 1237  
E muriel.serfontein@cdhlegal.com



**Simone Franks**  
Director  
T +27 (0)21 670 7462  
E simone.franks@cdhlegal.com



**Fatima Gattoo**  
Director  
T +27 (0)11 562 1236  
E fatima.gattoo@cdhlegal.com



**Daniel Fyfer**  
Director  
T +27 (0)21 405 6084  
E daniel.fyfer@cdhlegal.com



**John Webber**  
Director  
T +27 (0)11 562 1444  
E john.webber@cdhlegal.com

### BBBEE STATUS: LEVEL THREE CONTRIBUTOR

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

### JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.  
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

### CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.  
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

©2016 1086/MAY