

Collecting service debts

Constitutional Court speaks

A recent judgment by the Constitutional Court confirms that the electricity and water charges owed to a municipality must be paid before properties can be transferred to a new owner.

This is a major victory for municipalities in their effort to collect outstanding services charges.

Right to property

The Constitutional Court considered three cases (CCT 57/03, CCT 61/03 and CCT 1/04) concerning section 118(1) of the Municipal Systems Act 32 of 2000 and a similar provision in the Gauteng Local Government Ordinance. In September 2003, the South

Eastern Cape High Court declared section 118(1) constitutionally invalid as it permitted arbitrary deprivation of property in conflict with the right to property.

Issue

The issue is whether section 118(1) of the Systems Act and section 50(1)(a) of the Gauteng Ordinance are constitutionally valid. In effect, both sections mean that transfer of immovable property cannot take place unless all electricity and water consumption charges that are due to a municipality for a specified period are paid. These charges include those due by all occupiers of the property, including occupiers who are not the owners.

Section 118(1) requires payment of amounts due for two years before the municipality issues a certificate. In section 50(1)(a) the period is three years.



Applicants' argument

The applicants' arguments included:

- that the provisions should only apply to service charges due by the property owner for the relevant period, not non-owner occupiers;
- that the provisions are inconsistent with section 25(1) of the Constitution because they amount to an arbitrary deprivation of property;
- that the responsibility for collecting the amounts due from the occupier rests with the municipality – making the owner responsible is arbitrary; and
- that section 118(1) is not procedurally fair because it does not impose any obligation on municipalities to keep property owners informed at reasonable intervals of the amounts owing by occupiers when property owners request this in writing.

The Court dealt with all the arguments.

Applies to all service charges

First, the Court held that the provisions apply to all service charges connected with the property, whether they are incurred by the owner or by a non-owner occupier.



Deprivation of property

The Court held that deprivation of property can take place without actually taking property away. Deprivation also depends on how much interference there is in the owner's use or enjoyment of the property. The right to sell property is an important part of an owner's use and enjoyment of it.

The sale of immovable property is usually completed by transfer to the new owner at the Deeds Office. Sections 118(1) and 50(1)(a) of the Ordinance mean that transfer can only take place when all outstanding service charges have been paid, even if the service charges are due by people other than the owners and for which they are not liable. This can hinder the sale of property and thus deprive owners of its use and enjoyment. The Courts agreed with the High Court that section 118(1) gives rise to deprivation of property.

Not arbitrary deprivation

However, a deprivation of property is arbitrary only if the law either does not provide 'sufficient

reason' for it or is procedurally unfair. The relationship between the purpose of the law and the property deprivation it causes is the key to assessing whether there is sufficient reason for a particular deprivation.

The Court held that the purpose of section 118(1) is to give municipalities a form of security for payment of water and electricity charges. In this sense the law burdens property owners. Municipalities must provide water and electricity to the residents in their area as a matter of public duty. It is therefore important to reduce the risk of debts to the municipality remaining unpaid. Section 118(1) places this risk on the owner. The Court held that this has the potential to encourage regular payment of service charges and therefore helps municipalities carry out their functions. It also has the potential to encourage property owners to behave in a responsible way by doing what they can to make sure that money due to a municipality for the delivery of a service is paid. It is therefore not unreasonable for the owner to bear this risk.

The provisions are therefore not arbitrary to the extent that they cover service charges due by tenants.

Fairness

The Court held that a municipality should not be required to furnish the property owner with information on a continuous basis in order for the law to be procedurally fair. However, the owner has an interest in knowing how much is owed and a municipality is obliged to provide the information if it is requested to do so. On the written request of the owner, a municipality must thus provide the owner with copies of monthly accounts of amounts owing for water and electricity by occupiers of their property. Municipalities must furnish the information to all owners intending to sell their property and they can be forced to provide it by a court, if necessary.

Duty to collect debts

The Court held that section 118(1) does not relieve the municipality of its duty to collect debts. It must continue to take all reasonable

key points

- Charges owed to the municipality must be paid before the property can be transferred.
- Every municipality must, on request, provide property owners with the service accounts of their tenants.

steps to ensure appropriate collection of its debts. If the municipality is inefficient to the point of negligence, which causes damage to the property owner, the owner may have a legal claim for damages against the municipality.

Comments

The decision of the Court confirms that the electricity and water charges must be paid to the municipality before a property can be transferred.

The decision places obligations on both the property owners and municipalities. Property owners must ensure that service charges are paid (by tenants, for example, if the owner is not the occupier). If not, they are personally liable to pay the charges before being able to transfer their property. Municipalities, on the other hand, must ensure that correct records are kept and if the property owner requests it in writing, must provide copies of monthly accounts showing all amounts owing for water and electricity. Municipalities must also furnish the information to all owners intending to sell their property.

Overall, the Court's decision is welcomed as it confirms as legitimate one of the tools municipalities use to recover outstanding service debts.