

Can a Municipality Claim Interest Owing as Part of the Section 118(1) Clearance Amount?

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INTRODUCTION

Municipalities throughout South Africa utilise a well known debt-collection mechanism known as “clearance” to collect arrear debt from its customers. When the customer wants to transfer the property (for example, when they sell it, or when they die and their executor wants to transfer it to the heirs of the deceased) that customer’s conveyancing attorneys need to obtain a document known as a rates clearance certificate from the municipality before transfer of the property will be allowed to pass in the Deeds Office.

There have been many instances in which municipalities have claimed amounts as part of the debt due to obtain a clearance certificate, in which the court has disagreed with the municipality’s interpretation and made a ruling that those amounts are not supposed to be included in the calculation of how much needs to be paid to obtain the rates clearance certificate.

The law that regulates clearance certificates is section 118 of the Local Government: Municipal Systems Act, and unfortunately it is relatively misunderstood by the layperson because it is written in very old fashioned language in a convoluted way that requires much interpretation, or “unpacking” to understand.

THE MYTH OF “COMPLETE CLEARANCE”

Some people assume that the point of the clearance certificate system is to ensure that all amounts owing by the seller are paid before transfer. This is not entirely correct. The municipality is only allowed to refuse to issue the rates clearance certificate if certain amounts – which is not all amounts owing – are not paid.

The amounts that the municipality is permitted to refuse to issue clearance for if not paid, include:

1. all utility service charges (electricity and water, and sometimes gas, which have not prescribed)
2. property rates which have not prescribed
3. refuse and sewer charges which have not prescribed
4. sundry charges, in the case of business customers

However, the municipality is only entitled to demand payment of the portion of these amounts incurred in the period of two years before making application for clearance figures.

Unfortunately, often municipalities ask for higher amounts in their clearance figures documents, and consumers pay them thinking that it is lawful for the municipality to be requiring payment of those amounts. If you are aware of what a municipality can and cannot lawfully claim, you can protect yourself from being a victim of a municipality’s unlawful conduct in attempting to coerce you into making payment of amounts you do not need to pay at the time of clearance, in order to obtain a clearance certificate.

This does not mean – however – that you can forget about or escape liability for amounts that remain owing after you have obtained your clearance certificate. These amounts remain due and payable as they always had been and the municipality could chose to take credit control action (disconnection or summons) to recover these amounts.

WHAT ABOUT INTEREST?

Up until very recently it was widely accepted that municipalities were lawfully entitled to include interest charges in the amounts claimed for a rates clearance certificate.

However, in *Tshimao Moatshi v City of Tshwane Metropolitan Municipality and Others*¹, the court considered this question and returned a surprising answer. First the court asked whether the legislation was to be interpreted to include interest within the calculation of the amounts to be paid to obtain a rates clearance certificate – the court held that the answer was no. The court looked at the types of charges the legislation expressly stated that a municipality could charge in relation to a rates clearance certificate, and found that interest was not among that list. Interest was such a different kind of charge (in the court’s view, at least) that it did not fit in with the other types of charges in the list that a municipality was permitted expressly to charge.

The court reasoned thus that it was not the intention of the legislature to permit a municipality to claim arrear interest be paid before issuing a rates clearance certificate.

ANALYSIS OF CASE

The authors are of the view that the learned Judge may not have taken sufficient account of various statutory provisions in other laws that create a framework for a municipality to charge, and recover interest. It is submitted that when the power of a municipality to charge and recover municipal debt is properly construed with reference to all of the relevant empowering provisions, it is evident that a municipality is, in law, entitled to recover interest charges accrued as part of the clearance process – provided, of course, that those interest charges have not prescribed, and that they have been incurred in the two year period prior to application for the clearance figures.

IN DUPLEM

There is one other important qualification when it comes to interest that should not be forgotten. The in duplem rule is a common law rule that holds that a creditor may not charge more interest, than the total of the capital debt. This rule has been codified (put into statute) in the National Credit Act, but the National Credit Act does not apply to every type of charge between parties – it only applies to charges that are defined as “credit” within the ambit of that Act.

Municipalities are bound to comply with the provisions of the National Credit Act, and for this reason, they are not allowed to claim more interest than the principal debt.

PLAYING DEVIL'S ADVOCATE

Taking a step back for a moment and assuming that this case is never overturned on appeal, what would this mean for the average consumer?

1. That municipalities can't include interest charges as part of the amounts claimed for clearance
2. That potentially other kinds of amounts that were typically included in the past, also ought to be excluded, on the same rationale as in the Moatshi case. Examples would include penalty charges or fines levied by municipalities, and deposits charged by municipalities. It would be extremely interesting to see how a court reacts to a claim that these kinds of charges are not to be included within the ambit of clearance figures.

CONCLUSION

In some cases it is difficult to know whether the amount presented to you (or your conveyancers) for payment to obtain a rates clearance certificate, is correct. There are a number of complex laws that govern what can be charged, and recovered, at different times, and for different reasons. Reach out to an experienced attorney in municipal law if you require assistance.

¹ (45 183/2018) [2024] ZAGPPHC 331 (11 April 2024)



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