

Introduction

Following the Supreme Court of Appeal's *Mathabathe* judgment in 2013, this area of practice has become fraught with risks for buyers, sellers, banks, estate agents, attorneys, and many others. Every property acquisition can now result in unintended consequences for the unaware. This article explores the question "what type of Rates Clearance Certificate" ("RCC") a seller is legally obliged to obtain and make payment of in order to pass transfer.

The law

There are two types of RCC, namely an Abridged (2 year) clearance (in terms of s118(1) of the Local Government: Municipal Property Rates Act) or a full (Historical) clearance (in terms of s118(3)) of the same Act). Although it is a legal requirement that a RCC be obtained prior to registration of transfer, there is no stipulation as to what type of RCC must be obtained – this leaves it open to a seller to obtain and pass transfer on payment of either, unless there is another law (or agreement) obliging the seller to do otherwise.

Agreement by the parties

The parties to a sale agreement can expressly agree as to which type of RCC must be obtained (and in light of the *Mathabathe* judgment it is certainly prudent to provide for this in all sale agreements going forward). But historically standard sale agreements have not specifically provided for the type of RCC to be obtained. In the absence of express agreement, the question remains as to what type of RCC is required, as between seller and purchaser, by law.

Where there is no express agreement – arguments for and against

A seller may need to obtain an Abridged RCC for many reasons, some of which may relate to a failure to pay amounts lawfully owed, and others of which may relate to their refusal to pay amounts claimed that are not lawfully owed. As the law requires a RCC to be obtained, but does not specify which type of RCC is required, sellers will inevitably argue that it is their legal right to choose which to obtain, and that no inference of illegality or impropriety can be drawn from their

What type of rates clearance certificate is a seller legally obliged to obtain?

choice to obtain an Abridged (as opposed to a Historical) clearance.

Purchasers, however, will argue that the purpose of a RCC is to ensure that the slate is wiped clean and the property is transferred free of municipal debt, and that in this context, if the sale agreement is silent as to the type of RCC that the seller must obtain, then by implication the seller should be obliged to obtain a full clearance. Purchasers will also be quick to point out the potential prejudice that could result if the seller does not settle all of its Historical debt.

Application for RCC

Unfortunately, the manner in which certain municipalities issue RCCs does not help the situation. Unless you are familiar with the law and practice relating specifically to the issuing of rates clearance figures, it can be incredibly difficult to understand the figures returned by the municipality, and to determine whether they are Abridged or Historical. Each municipality has its own prescribed application forms. Johannesburg, for example, uses forms that do not require the conveyancer to indicate whether the figures sought are Abridged or Historical.

In the past, some conveyancers may not even be aware of the practical difference in the two types of RCCs or the consequences of passing transfer on either, and thus may not question the figures received from the municipality. They might simply pass the figures on for payment to a seller who may not appreciate the consequences. In most instances the conveyancer will not advise the purchaser of what type of figures are being paid, and thus the purchaser will be unaware of the potential danger awaiting it when transfer is passed on Abridged figures.

How to distinguish between Abridged / Historical figures

In Johannesburg's case, the only way to determine whether the figures returned are Abridged or Historical, is to examine the totals in the 'Total outstanding' blocks and compare these figures to the totals in the 'S 118 Balance' blocks. If there is a difference, then the figures are either incorrectly calculated, or are Abridged figures. There are thus incidents where property transfers are registered in which the sellers and buyers and sometimes even the conveyancers, do not realise that the property is being transferred without the Historical debt relating to same having first been cleared.

Duty on conveyancer / agent

This raises the issue of the professional responsibility of conveyancers and estate agents and the duty (if any) owed by them to the seller, buyer, mortgagee, and others to advise them of the distinction in the types of RCC figures, the type of figures obtained in a particular transaction, and the consequences of relying on Abridged figures. This will be more fully considered in another article in this series. This could extend further to advising on the inclusion of a clause in sale agreements to provide for the type of RCC to be obtained, and further in relation to a conflict of interest and breach of confidentiality which may arise where the seller insists on passing transfer on Abridged figures, but the buyer is unaware of this or objects to same.

Balancing competing interests

In constitutional jurisprudence the way to determine which of two competing interests or rights will dominate is to ask whether the “means” – the infringement of the seller’s right to choose which RCC he wants to apply for – is proportional to the “end” – the prejudice that is averted by the buyer. The courts adopt a holistic view and look at all relevant factors. Although a full analysis of this issue is beyond the scope of this article, the authors are of the opinion that a court would find that the means justify the end and that it is reasonable to limit a seller’s choice where such extreme prejudice could befall a buyer. It is always open to a seller who still wants to use an Abridged RCC to get consent from the purchaser to do so, or to expressly provide for same in the contract. Sellers are also advised to deal with any incorrect charges before they market the property.

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