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Section 118(3) of the Local Government: Municipal Systems Act 32 of 2000 in view of the *Jordaan* decision

by

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Linda Mabaso

September 2019

Summary

The Local Government: Municipal Systems Act 32 of 2000 (the Systems Act) is a legislative tool vital for municipal revenue collection, which in turn ensures that municipalities are able to deliver on their constitutional obligation to provide much needed public services. Section 118 has been a cause of much contention since the Act came into effect.

Disputes between the municipality and homeowners have become a common reoccurrence, with most of the matters ending up in court proceedings. Cases such as *Mkontwana*, *Mathabathe*, *Mitchell* and *Jordaan* have shaped the interpretation and application of the Systems Act.

The *Jordaan* case, in particular, has brought about changes with regard to new owners and issues related to property transfers. The focus of this dissertation is to detail the effect and analyse the influence of the *Jordaan* decision on section 118 of the Act. To effectively reflect on the changes brought about by the *Jordaan* case, I consider the history of the Act, the influences of other court cases as well as legislation.

Acknowledgements

I want to thank the Lord Jesus Christ for the grace He has given me to complete this dissertation, He has been the pillar of my strength. I also want to thank my family, especially my children who have been very supportive. A special thanks to everyone who encouraged me through this time.

Lastly, I want to thank Prof Brits whose guidance and support has enabled me reach this far.

2 Timothy 1:7 King James Version (KJV)

“For God hath not given us the spirit of fear; but of power, and of love, and of a sound mind,”

Table of content

1. Introduction

The Local Government: Municipal Systems Act 32 of 2000 (the "Systems Act") has proved over the years to be a problematic statute for municipalities, landowners and mortgage creditors.[1] The courts have done a commendable job in piecing together the Act and the inharmonious interpretations that have sprung from it.

In this dissertation, I will focus mainly on section 118(3) and, although references to other subsections will invariably be visible, they are not the main subject of this dissertation. For instance, section 118(1), due to its links with section 118(3), will appear frequently. Case law and other statutes that are pertinent to the subject are also mentioned. There is also a brief discussion of the basic definitions of property and mortgage. Since I will be looking at section 118(3) with relation to banks (as mortgagees), it follows that the subject of mortgages will also be part of the discussion and the effect that *Jordaan* has had or may have on them.

Beginning with section 118(1),[2] and proceeding to section 118(3),[3] the Systems Act has seen many legal disputes between municipalities and aggrieved parties, predominantly property owners and mortgagees. These disagreements have ranged from amounts owed to the prescription of debts.[4]

Sections 118(1) and 118(3), although both serve similar collection purposes, target different debts and their effects on the owner and the municipality are different as well.[5]

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[1] H Delport "The implications of section 118(3) of the Local Government: Municipal Systems Act 32 of 2000 for purchasers of immovable property" (2015) 78 *THRHR* 219-236 220.

[2] Section 118(1) of the Systems Act:

> "(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."

[3] Section 118(3) reads:

> "(3) 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."

[4] *Jordaan and Others v Tshwane Metropolitan Municipality and Others* 2017 (6) SA 287 (CC) paras 5, 9, 11.

[5] *BOE Bank Ltd v Tshwane Metropolitan Municipality* 2005 (4) SA 336 (SCA).

Section 118(1) is an "embargo"[6] clause that serves as a restraint on the property by preventing the owner from transferring the property to a purchaser unless certain debts owed to the municipality are fully paid. It targets the "two-year debt", which can be defined as moneys owed to a municipality for services rendered for a period of no longer than two years prior to applying for the clearance certificate.[7] The subsection gives a right to the municipality to withhold the issuance of a clearance certificate until the debt has been fully paid.[8]

Section 118(3) is the security clause which does not have the same time limitation as section 118(1).[9] It deals with the entire debt owed with regard to the property before the application for a clearance certificate – debts that potentially go back up to thirty years. The debt covered by this section can be referred to as the "historical debt".

Section 118(3) creates a statutory hypothec that, although enforceable, will not necessarily prevent a sale of the property by the withholding of a clearance certificate.[10] The hypothec is a charge against the property which gives the municipality a preference over the mortgagee and, indeed, any mortgage bond, even though the bond may have been registered prior to the charge becoming known.[11]

The court in the *Mathabathe*[12] case commented that section 118(1) and section 118(3) must be interpreted differently because subsection (1), being an embargo provision, and subsection (3), being a security provision, have different remedies that apply to them, and the failure to distinguish between the two would have adverse effects on the relief sought.[13]

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[6] *Jordaan and Others v Tshwane Metropolitan Municipality and Others* 2017 (6) SA 287 (CC) para 21. The term was first used by Curlewis J in *Johannesburg Municipality v Cohen's Trustees* 1909 TS 811 when commenting on the purpose of s 26 of Ordinance 43 of 1903 "to give the council an embargo or hold on property in respect of which rates have been imposed".

[7] R Brits "The statutory security right in section 118(3) of the Local Government: Municipal Systems Act 32 of 2000 – Does it survive transfer of the land? [Discussion of City of *Tshwane Metropolitan Municipality v Mathabathe* 2013 4 SA 319 (SCA)]" (2014) 25 *Stell LR* 536-548 536.

[8] *Jordaan and Others v Tshwane Metropolitan Municipality and Others* 2017 (6) SA 287 (CC) para 16.

[9] R Brits "The statutory security right in section 118(3) of the Local Government: Municipal Systems Act 32 of 2000 – Does it survive transfer of the land? [Discussion of City of *Tshwane Metropolitan Municipality v Mathabathe* 2013 4 SA 319 (SCA)]" (2014) 25 *Stell LR* 536-548 537-540.

[10] 540.

[11] 536.

[12] *City of Tshwane Metropolitan Municipality v Mathabathe and Another* 2013 (4) SA 319 (SCA).

[13] Para 12: "The Municipality failed to draw that distinction and thus confused the two distinct remedies available to it."

2. The law before the *Jordaan* case: development of real security law

Section 118(3) of the Systems Act is not without history or a forerunner. In fact, it represents an adaptation and modernisation of previous statutes.[14] When interpreting it, therefore, it is important to also refer to preceding statutes and case law if confronted with ambiguous or vague expressions.[15] I will discuss briefly the history of the hypothec and mortgage in this chapter, as it will help with the interpretation and analysis of section 118(3).

Roman law,[16] from which most of our private law derives, provides a basis for greater comprehension of the rights made available by section 118(3). The rights that were created are for the securing and protection of one's property. The point of departure is the word "property".

Property comes from the word "*proprius*" or "*proprietas*". *Proprius* means one's own, or one's exclusively owned thing.[17] *Proprietas* in Roman law refers to ownership, but the other word frequently used is "*dominium*", which means uncontested or total control over a thing.[18] It can be taken to also mean mastery of a thing with only the operation of law as its restrictor.[19] The owner or *dominus* can dispose[20] of the property in any manner he sees fit, and choose how to use it, and is entitled to its produce or its fruits.[21] In this context property and ownership can be deemed as synonymous.[22]

The right to own, consume and dispose of a thing in Roman law is called *jura in re*.[23] It is this *dominium* that was later termed a "real" right.[24] A real right is a right that can be maintained or sustained against all other persons.[25] In its undisturbed state, it

[14] *Jordaan and Others v Tshwane Metropolitan Municipality and Others* 2017 (6) SA 287 (CC) paras 15, 18-19.
[15] Para 2.
[16] NS Siphuma *The lessor's tacit hypothec: A constitutional analysis* (2013) LLM thesis Stellenbosch University 21 details the development of real security law.
[17] WL Burdick *The principles of Roman law and their relation to modern law* (2015) 325.
[18] 325.
[19] 325.
[20] *Jus disponendi* is a Latin term representing the right to dispose of a thing, including to destroy, gift, sell or abandon it: see http://www.duhaime.org/LegalDictionary/J/JusDisponendi.aspx.
[21] WL Burdick *The principles of Roman law and their relation to modern law* (2015) 325.
[22] 325.
[23] 347.
[24] 347.
[25] R Brits *Mortgage foreclosure under the Constitution: Property, housing and the National Credit Act* (2012) LLD dissertation Stellenbosch University 24.

is called *dominium plenum* (absolute ownership or full control) but when it has a limitation or a qualification it is called *dominium limitatum* (limited ownership).[26]

Under Roman law, property rights fall into two classes, namely the absolute rights of property (ownership / *dominium* / one's own things) (*jura* or *ius in sua re* / *jus in re propria*) and rights in the things owned by another (*jura in re aliena*).[27]

The right over property belonging to another (*jus in re aliena*) does not carry the same force as the right to *dominium* (*jus in re propria*), yet at a point it (*jus in re aliena*) can diminish the *dominium* of the owner over his property.[28] Having rights over another's property essentially translates to the owner's *dominium* being reduced. The ownership right, if undisturbed, is unlimited.A *jus in re aliena* is limited, but the degree of limitation depends on the terms of agreement which gave birth to the right.[29]

2.1 Real security right

A real security right is a right created to secure the fulfilment of a previously arranged or agreed upon obligation.[30] The real security right can be formed by an agreement, a rule of common or statutory law, or a court order.[31] It is a right over the property belonging to another (*ius in re aliena*) to ensure the fulfilment of an obligation.[32] It consists of an agreement or an obligation that is meant to be secured, a property that is to be used as the means of security and a right that is created owing to that obligation. This is a right over a thing or object, regardless of whether the thing is fixed or movable and is given to the creditor as security in the event that the owner of the thing becomes incapable of fulfilling his obligation.[33]

This right against the owner is suspended until there is a breach of the agreement. It bestows on the creditor a right *in rem* over a specified property by designating it as security for the debt or obligation in case of a breach.[34] There is an

[26] WL Burdick *The principles of Roman law and their relation to modern law* (2015) 325.
[27] 325.
[28] 325.
[29] 354.
[30] R van den Bergh "The development of the landlord's hypothec" (2009) 15 *Fundamina* 155-167 155.
[31] R Brits *Mortgage foreclosure under the Constitution: Property, housing and the National Credit Act* (2012) LLD dissertation Stellenbosch University 32.
[32] 36.
[33] R van den Bergh "The development of the landlord's hypothec" (2009) 15 *Fundamina* 155-167 155.
[34] R van den Bergh "The development of the landlord's hypothec" (2009) 15 *Fundamina* 155-167 155, citing WW Buckland *A textbook of Roman law from Augustus to Justinian* (1975) 473.

essential (or accessory) relationship between creditor and debtor, without which there can be no security.[35]

2.2 History of the real security right

Real security laws date back to ancient times. The Emperor Justinian, who ruled around 530-533 AD,[36] is credited with advancing Roman law and to that effect much of the security rights developed under him.[37]

In Roman times, personal security was very common, since most of their day-to-day transactions were dependent on trust and dependability,[38] and hence they were fidelity based.[39] This period is credited with developing three forms of real security rights namely *fiducia*, *pignus* and *hypotheca*.[40]

2.2.1 Fiducia

The term *fiducia* (or *fiducia cum creditore*)[41] derives its root from the word '*fides*', which means trust or faith.[42] This real security right saw ownership of the object transferred to the creditor. The borrower transferred ownership to the creditor who would keep the property until the debt had been fully paid. Thereafter the property was reinstated to the borrower.[43]

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[35] R Brits *Mortgage foreclosure under the Constitution: Property, housing and the National Credit Act* (2012) LLD dissertation Stellenbosch University 35

[36] NS Siphuma *The lessor's tacit hypothec: A constitutional analysis* (2013) LLM thesis Stellenbosch University 13.

[37] 13.

[38] F Schulz *Classical Roman law* (1961) 402: "Roman fides, Roman pedantic accuracy, honesty, and reliability in business matters were the strong pillars of that credit."

[39] R van den Bergh "The development of the landlord's hypothec" (2009) 15 *Fundamina* 155-167 155: "execution on the person of the debtor was still in force, and personal credit consequently implied much greater security for the creditor than it provides in modern times."

[40] NS Siphuma *The lessor's tacit hypothec: A constitutional analysis* (2013) LLM thesis Stellenbosch University 9-12.

[41] R van den Bergh "The development of the landlord's hypothec" (2009) 15 *Fundamina* 155-167 155, citing F Schulz *Classical Roman law* (1961) 406-407: "Fiducia was the oldest type of real security. It was used to constitute real security for the creditor and consisted in the transfer of ownership of the object which was to serve as security to the creditor".

[42] E Cooke (ed) *Modern studies in property law* (2002) 43.

[43] E Cooke (ed) *Modern studies in property law* (2002) 43.

2.2.2 Pignus

Pignus is another form of security introduced at the time. It saw the borrower retain ownership rights but lose possession of the object of execution to the creditor.[44] In both instances, *fiducia* and *pignus*,[45] the borrower would lose control of the property until fulfilment of a pre-existing obligation. This was a problem if the object was required to settle the debt, for instance a farmer who was a debtor needed to cultivate the land but was unable to because he had lost *dominium* while a creditor who had acquired the land encumbered as security, could also not use it since he did not have full ownership.[46]

2.2.3 Hypotheca

The *hypotheca* developed in a farming context in rural settings where a farmer would pledge his farm as security until the obligation or debt was satisfied. The *hypotheca* was well-suited to this scenario because it allowed the debtor to retain possession of the crops or whatever security object was used.[47] It therefore did not deprive the owner of his property but rather the creditor was awarded a right of security without necessarily taking possession.[48] This type of arrangement proved useful and it was later extended to urban leases where the security object was property that had been brought into the debtor's premises as *invecta et illata*.[49] This form of security was initially only formulated by agreement or a contract.[50] However, already under Emperor Justinian the contractual requirement was removed and a legal presumption instead became the basis for the *hypotheca* in urban leases. From then on, the *hypotheca* arose by operation of law rather than contract.

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[44] WL Burdick *The principles of Roman law and their relation to modern law* (2015) 381, 440.
[45] NS Siphuma *The lessor's tacit hypothec: A constitutional analysis* (2013) LLM thesis Stellenbosch University 8: *fiducia* (also known as *fiducia cum creditore contracta)* and *pignus* were the main forms of real security prior to the evolution of the lessor's tacit hypothec *(hypotheca).*
[46] R van den Bergh "The development of the landlord's hypothec" (2009) 15 *Fundamina* 155-167 158.
[47] This worked out well because it allowed the farmers to till the land and because they were necessary tools of trade for the repayment of the debt. See NS Siphuma *The lessor's tacit hypothec: A constitutional analysis* (2013) LLM thesis Stellenbosch University 19.
[48] NS Siphuma *The lessor's tacit hypothec: A constitutional analysis* (2013) LLM thesis Stellenbosch University 19; R van den Bergh "The development of the landlord's hypothec" (2009) 15 *Fundamina* 155-167 158.
[49] NS Siphuma *The lessor's tacit hypothec: A constitutional analysis* (2013) LLM thesis Stellenbosch University 10 (citing *D* 20.2.4): "We accept that property brought on to an urban leasehold is hypothecated, as if this had been impliedly agreed. The opposite is true of rural tenancies."
[50] R van den Bergh "The development of the landlord's hypothec" (2009) 15 *Fundamina* 155-167 158.

2.3 Mortgage

The term *hypotheca* translates to *hypotheec*[51] in Roman-Dutch law and in English law the closest term to it is mortgage.[52] As civilisation and trade increased, the necessity of credit increased as well. The term "mortgage" in its broad sense describes a broad spectrum of real security rights. It covers any form of "*ius in re aliena*" until an obligation is fulfilled.[53] It can also be described in the narrowest form to mean a specific real security right – a "charge" or a burden against the land.[54]

In this sense, a mortgage is a charge upon the land similar to the charge imposed on land by section 118(3)[55] of the Systems Act. However, conventional mortgages are express real security rights created through agreements between parties and thus differ in this sense from implied security rights (tacit hypothecs and liens), including the section 118(3) charge. The creditor uses a tool called a mortgage bond to reduce to writing his real security rights, setting out conditions and the object of execution, wherein the borrower also acknowledges his debt.[56] The main object of the mortgage bond is to give notice to the public by having it registered at the Deeds Registry whereby the creditor indicates his interest concerning a specified property. This publication serves as notice to other creditors of the hypothecated property.[57] In case of a default in repayment by the borrower, the creditor enforces his right by applying to court for a judgment and execution order.[58] The registered mortgage bond bestows upon the creditor the right to call up[59] the mortgage and that right is followed up by the right to attach and sell the property. Through the courts, the defaulting borrower is forced to sell the hypothecated property on behalf of the creditor. The process of calling up of the mortgage and obtaining a judgment is called "mortgage foreclosure".[60]

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[51] R Brits *Mortgage foreclosure under the Constitution: Property, housing and the National Credit Act* (2012) LLD dissertation Stellenbosch University 29-30.
[52] 29-30.
[53] For a more detailed discussion on mortgage, see R Brits *Mortgage foreclosure under the Constitution: Property, housing and the National Credit Act* (2012) LLD dissertation Stellenbosch University 28-30.
[54] 30: "special type of real security right that comes into existence by way of contract and registration, for the purpose of hypothecating specific immovable property as security for a principal obligation."
[55] "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."
[56] R Brits *Mortgage foreclosure under the Constitution: Property, housing and the National Credit Act* (2012) LLD dissertation Stellenbosch University 37.
[57] 37-38.
[58] 45-46.
[59] 45.
[60] 22.

This process allows the mortgagee to enjoy a secured and preferential right[61] over the property ranking higher than any other creditor.

3. Older statutes

Sections 49 and 50 of Transvaal Local Government Ordinance 17 of 1939 (the Transvaal Ordinance)[62] set the foundations and even the wording bears similarities with the current provisions found in section 118 of the Systems Act.

Section 49[63] held the owner and occupier of the premises jointly and severally liable for the consumption charges for water, electricity and ancillary services supplied to a property by the municipality. The municipality could sue and pursue the owner and occupier jointly and severally after having given written notice to one of them. The owner was consequently empowered to sue and recover from the occupier for the portion of liability he had paid if he had been made to suffer undue loss through the suit.[64] The opposite is also true; the occupier had the same right of recourse against

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[61] With the exception of the statutory hypothec in section 118(3), which "enjoys preference over any mortgage bond registered against the property".

[62] The ordinance, before subsequently being replaced by the Systems Act, was also applicable in the provinces of Mpumulanga, Limpopo and North West.

[63] S 49(1) and (2) provides:

> "(1) All moneys due for sanitary services, all moneys due as basic charges for water made in terms of section 81(1), all other moneys due for water where any water closet system on such premises has been installed, and all moneys due as basic charges for electricity made in terms of section 83(1), shall be recoverable from the owner and occupier jointly and severally of the premises in respect of which the services were rendered; provided that the owner shall in the absence of any agreement to the contrary, be entitled to recover from the occupier of the said premises for the time being any such charges paid by him in respect of the occupation of such occupier.
>
> (2) If any charges due in respect of any premises for sanitary services, or if basic charges due for water made in terms of section 81(1), or if other charges due in respect of any premises for water where any water closet system on such premises has been installed, or if basic charges due for electricity made in terms of section 83(1), shall remain unpaid for a period of six weeks after the date on which written notice shall have been given by the council to the owner or occupier of his indebtedness, the council may proceed jointly and severally against the owner and occupier for the time being of such premises for the amount of such charges or any part thereof, and may recover the same from such owner or occupier; provided that every such occupier shall be entitled to deduct from any rent or other amount payable by him to the owner of the premises any portion of such charges paid by or recovered from him under this sub-section which the owner could not lawfully have required him to pay and the production of the receipts for such portion of such charges so paid or recovered from such occupier shall be a good and sufficient discharge for the amount so paid or recovered as payment of rent or other amount."

[64] S 49(2) provides:

> "(2) If any charges due in respect of any premises for sanitary services, or if basic charges due for water made in terms of section 81(1), or if other charges due … *the*

the owner to the amount that the owner had unduly benefitted from the settling of the municipal debt arising from the consumption charges.[65]

The Transvaal Ordinance contained an embargo clause in section 50(1), which had been carried over from previous ordinances.[66] While it continued to include an "embargo" power, it went a step further and introduced the term "charge" in section 50(3). The "charge" it introduced was designed to serve as support for the "embargo". The embargo itself had served as a restraint against the transfer of a property whereas the charge was a security, a type of collateral or a claim on the property.[67] These provisions were conjoined, and they served as a "double weapon" [68] for the municipalities.

These provisions were created with the intention of giving the municipality "real and extensive preference"[69] rights to a property in a sale of execution or giving the right to hold the property ensuring payment before the property was realised. The previous proclamations had given the municipality embargo powers but these on their own had failed to provide adequate cover for the municipal claim.[70] Even though the municipality could "hold" the property to prevent it from being sold, once sold the municipality was on the same level as all the other creditors with competing interests, even if the municipality was the judgment creditor.[71]

The introduction of section 50(2) brought about the "charge" akin to section 118(3). The intention of the legislature was not to bestow a local municipality with a

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> *council may proceed jointly and severally against the owner and occupier for the time being of such premises for the amount of such charges or any part thereof, and may recover the same from such owner or occupier; provided that every such occupier shall be entitled to deduct from any rent or other amount payable by him to the* owner of the premises any portion of such charges paid by or recovered from him under this…" (emphasis added).

[65] S 49(2): "provided that every such occupier shall be entitled to deduct from any rent or other amount payable by him to the owner of the premises any portion of such charges paid by or recovered from him".

[66] For a brief history of s 50, see L du Plessis "Observations on the (un-)constitutionality of section 118(3) of the Local Government: Municipal Systems Act 32 of 2000" (2006) 17 *Stell LR* 505-531 511-512.

[67] S 50(2).

[68] *Jordaan and Others v Tshwane Metropolitan Municipality and Others* 2017 (6) SA 287 (CC) para 50.

[69] H Delport "The implications of section 118(3) of the Local Government: Municipal Systems Act 32 of 2000 for purchasers of immovable property" (2015) 78 *THRHR* 219-236 222, citing *Johannesburg Municipality v Cohen's Trustees* 1909 TS 811: "a very real and extensive preference over the proceeds of rateable property realised in insolvency and to compel payment of the burden thus imposed before the sale of such property could be carried through even in the cases where insolvency had not supervened".

[70] *Jordaan and Others v Tshwane Metropolitan Municipality and Others* 2017 (6) SA 287 (CC) para 21.

[71] *Brakpan Municipality v Chalmers* 1922 WPD 98; *Rabie v Rand Townships Registrar* 1926 TPD 286.

statutory right to recover debts but rather to ensure that in a sale in execution the municipality had a preference over mortgage bondholders.[72]

Section 50(3) also stated explicitly that the municipality's claim would rank higher than even the mortgage bond over that property.[73] This would be effective from the moment the ordinance came into effect and would not operate retrospectively.[74]

The wording of section 50(3) stipulated that "any amount due in terms of … subsection (1) shall be a charge upon the land or right in land in respect of which such amount is owing and shall … be preferent to any mortgage bond registered against such land or right in land".[75] The amounts due were subject to the time frame highlighted by section 50(1), namely three years.[76] There is a difference between section 50(3)[77] and section 118(3),[78] with the wording of section 50(3) stipulating the amount due to be limited to amounts outstanding for three years, as stipulated under the embargo power in section 50(1).[79] Section 50(1) and section 50(3) were read together and section 50(3),[80] which contains the security provision, was used to shore up the embargo proviso, not as a standalone security right. It brought together the charge and coupled it with the embargo. Section 50(1) refers to all debts including current and historical ones whereas section 118 distinguishes between the historical debts in section 118(3) and the two-year debt in section 118(1).

Under section 50 the backdating of the claim was not indefinite and applied to the two-year (which later became the three-year) period as stated in the Transvaal

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[72] *Jordaan and Others v Tshwane Metropolitan Municipality and Others* 2017 (6) SA 287 (CC) para 22.
[73] Para 21.
[74] S 50(3) which was previously s 50(2): "be preferent to any mortgage bond registered against such land or right in land subsequent to the coming into operation of this Ordinance."
[75] S 50(3): "Any amount due in terms of paragraph (a), (b), (c) or (d) of subsection (1) shall be a charge upon the land or right in land in respect of which such amount is owing and shall, subject to the provisions of section 142 (6), be preferent to any mortgage bond registered against such land or right in land subsequent to the coming into operation of this Ordinance."
[76] S 50(1): "that all amounts for a period of three years immediately preceding the date of such registration due in respect of such land or right in land for sanitary services or so due as basic charges".
[77] S 47 of Ordinance 11 of 1977 later amended to s 50(3) which provided for a three-year debt instead of two.
[78] R Brits "Why the security provision in section 118(3) of the Local Government: Municipal Systems Act 32 of 2000 is not enforceable against successors in title - A follow up occasioned by the SCA's *Mitchell* judgement" (2017) 28 *Stell LR* 47-67 50 points to the differences between s 118(3) and its predecessors.
[79] S 50(1) provided: "(a) that all amounts for a period of three years immediately preceding the date of such registration due in respect of such land or right in land for sanitary services or so due as basic charges for water or as other costs for water where any water closet system on the ground is concerned has been installed or so due as basic charges for electricity in terms of the provisions of this Ordinance or any by-law or regulations."
[80] It was previously s 50(2).

Ordinance. Since the charge and embargo power were conjoined, once the embargo was settled it followed that the charge would also extinguish and did not survive transfer.[81] The charge followed the owner and no one else. Once the transfer to the new owner occurred, the charge was of no effect.[82]

Section 50 also applied to insolvency matters, read with section 89 of the Insolvency Act 24 of 1936. In the case of *Greater Johannesburg Transitional Metropolitan Council v Venter NO*,[83] a corporation was liquidated and sixty of its property stands had to be sold at an auction. The properties were sold for an amount of R3.8 million. Section 50(1) stated that before a clearance certificate was sought, amounts due and payable with regard to the debts owed by the properties had to be settled. In this case these debts amounted to R353 595,47.[84]

The debt was paid and at the time of payment the respondent did not contest the validity of it. After the transfer of the property, the respondent brought an application to court disputing the amounts paid. It stated that it was obliged to pay the full amount even though it did not agree with the municipal charges levied. It further stated that had it refused to pay or disputed the amount, it would have delayed the liquidation process.[85] In its contestation it did not deny that some of the moneys were due to the municipality. Of the R353 616,74 paid, the respondent admitted that the R222 305,02 was due and payable to the municipality, but it claimed that the balance of R131 311,72 was to be returned by the municipality because it disputed that portion of the debt.[86] Judgment was granted in favour of the respondent.

[81] *Jordaan and Others v Tshwane Metropolitan Municipality and Others* 2017 (6) SA 287 (CC) para 21. S 168 of the Natal Local Authorities Ordinance 25 of 1974 provided that rates "shall be a charge upon the property the subject thereof and shall be payable by the owner of such property".
[82] *Jordaan and Others v Tshwane Metropolitan Municipality and Others* 2017 (6) SA 287 (CC) para 25.
[83] *Eastern Metropolitan Substructure of the Greater Johannesburg Transitional Metropolitan Council v Venter NO* 2001 (1) SA 360 (SCA).
[84] Para 4.
[85] Para 9.
[86] *Eastern Metropolitan Substructure of the Greater Johannesburg Transitional Metropolitan Council v Venter NO* 2001 (1) SA 360 (SCA) para 4.

The municipality took the matter on appeal to the SCA. In the court *a quo* the respondent had based its claim on section 89(1),[87] read with section 89(4)[88] of the Insolvency Act. It contended that the debt in section 50(1) was not a "tax"[89] as defined in section 89(5)[90] of Insolvency Act, while it further argued that section 89(4) allowed a trustee to obtain a clearance certificate without paying such a debt.[91]

The SCA commented that this reading of section 89(1) and section 89(4) by respondent was erroneous.[92] The court referred to the *Galloway*[93] case, where it was highlighted "that if any of the items prescribed by sec 50 (1) of the Local Government Ordinance was not a 'tax', as defined in section 89(5) of the Insolvency Act, the effect of section 89(4) was to relieve a trustee or liquidator from payment thereof as a prerequisite for obtaining a clearance certificate".[94] The SCA further stated that this broad interpretation was erroneous ,as it reflected an incorrect interpretation of section 89(4), read with section 89(1) of Insolvency Act, and it did not relieve a trustee from paying the debts stipulated in section 50(1) of the Transvaal Ordinance. A trustee will

[87] S 89(1): "The cost of maintaining, conserving, and realizing any property shall be paid out of the proceeds of that property, if sufficient and if insufficient and that property is subject to a special mortgage, landlord's legal hypothec, pledge, or right of retention the deficiency shall be paid by those creditors, pro rata, who have proved their claims and who would have been entitled, in priority to other persons, to payment of their claims out of those proceeds if they had been sufficient to cover the said cost and those claims. The trustee's remuneration in respect of any such property and a proportionate share of the costs incurred by the trustee in giving security for his proper administration of the estate, calculated on the proceeds of the sale of the property, a proportionate share of the Master's fees, and if the property is immovable, any tax as defined in subsection (5) which is or will become due thereon in respect of any period not exceeding two years immediately preceding the date of the sequestration of the estate in question and in respect of the period from that date to the date of the transfer of that property by the trustee of that estate, with any interest or penalty which may be due on the said tax in respect of any such period, shall form part of the costs of realization."

[88] S 89(4): "Notwithstanding the provisions of any law which prohibits the transfer of any immovable property unless any tax as defined in subsection (5) due thereon has been paid, that law shall not debar the trustee of an insolvent estate from transferring any immovable property in that estate for the purpose of liquidating the estate, if he has paid the tax which may have been due on that property in respect of the periods mentioned in sub section (1) and no preference shall be accorded to any claim for such a tax in respect of any other period."

[89] *Eastern Metropolitan Substructure of the Greater Johannesburg Transitional Metropolitan Council v Venter NO* 2001 (1) SA 360 (SCA) para 24.

[90] S 89(5): "For the purposes of subsections (1) and (4) 'tax' in relation to immovable property means any amount payable periodically in respect of that property to the State or for the benefit of a provincial administration or to a body established by or under the authority of any law in discharge of a liability to make such periodical payments, if that liability is an incident of the ownership of that property."

[91] *Eastern Metropolitan Substructure of the Greater Johannesburg Transitional Metropolitan Council v Venter NO* 2001 (1) SA 360 (SCA) paras 23-24.

[92] Paras 23-24

[93] *Greater Johannesburg Transitional Metropolitan Council v Galloway NO and Others* 1997 (1) SA 348 (W) 356.

[94] *Eastern Metropolitan Substructure of the Greater Johannesburg Transitional Metropolitan Council v Venter NO* 2001 (1) SA 360 (SCA) para 23.

only be exempted from paying any debt if these were taxes that preceded the two years before sequestration. The court referred to the *Nel*[95] case, where section 50(1) was called an embargo clause. The SCA held that the amounts that the respondent was contending for were due and payable contrary to the respondent's belief.[96] The judgment was therefore granted in favour of the municipality.

4. Current statute

Section 118 of the Systems Act came into effect on 1 March 2001.[97] Whilst it has familiar clauses as its predecessors, it has its own nuances as well. Section 118 provides municipalities with the same veto powers of restriction to transfers, as was found in section 50 of Transvaal Ordinance. The evolution to the current statute is evidenced by the increased powers of the municipality bestowed by the embargo found in section 118(1), as well as the charge contained in section 118(3).[98] The phrasing has also become more concise, leaving less room for ambiguity.[99]

Before delving into the impact that the current statute has had on the municipality, I will highlight the role of municipalities.

[95] Cited in para 21: *Nel NO v Body Corporate of the Seaways Building and Another* 1996 (1) SA 131 (A) 134B.
[96] *Eastern Metropolitan Substructure of the Greater Johannesburg Transitional Metropolitan Council v Venter NO* 2001 (1) SA 360 (SCA) para 36.
[97] *Jordaan and Others v Tshwane Metropolitan Municipality and Others* 2017 (6) SA 287 (CC) para 25, citing L du Plessis "Observations on the (un-)constitutionality of section 118(3) of the Local Government: Municipal Systems Act 32 of 2000" (2006) 17 *Stell LR* 505-531 509-512.
[98] *Jordaan and Others v Tshwane Metropolitan Municipality and Others* 2017 (6) SA 287 (CC) para 20.
[99] The Transvaal Ordinance phrases "charge" and "preference over land" were later turned into "preference over property" in the Systems Act.

4.1 Role of the municipality

A municipality is a state-formed entity[100] and its primary role and powers[101] are founded by, but are not limited to, the Constitution.[102] Section 152 of the Constitution reads as follows:[103]

> "(1) The objects of local government are –
> (a) to provide democratic and accountable government for local communities;
> (b) to ensure the provision of services to communities in a sustainable manner;
> (c) to promote social and economic development;
> (d) to promote a safe and healthy environment".

A municipality is by its very nature a creature of statute and owes its formation and governance to legislation.[104] Section 73(1) of the Systems Act states that a municipality must give effect to the provisions of the Constitution by prioritizing the basic needs of a community and promoting the development of that local community. The Act furthermore provides that municipal services must be accessible and equitable.[105]

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[100] S 2(a) of the Systems Act: "A municipality is an organ of state within the local sphere of government".

[101] S 229 of the Constitution outlines the municipal fiscal powers and functions as follows:

> "(1) Subject to subsections (2), (3) and (4), a municipality may impose –
> (a) rates on property and surcharges on fees for services provided by or on behalf of the municipality; and
> (b) if authorised by national legislation, other taxes, levies and duties appropriate to local government or to the category of local government into which that municipality falls, but no municipality may impose income tax, value-added tax, general sales tax or customs duty.
> (2) The power of a municipality to impose rates on property, surcharges on fees for services provided by or on behalf of the municipality, or other taxes, levies or duties -
> (a) may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across municipal".

S 8 of the Systems Act:

> "(1) A municipality has all the functions and powers conferred by or assigned to it in terms of the Constitution and must exercise them subject to Chapter 5 of the Municipal Structures Act.
> (2) A municipality has the right to do anything reasonably necessary for, or incidental to, the effective performance of its functions and the exercise of its powers."

[102] Constitution of the Republic of South Africa, 1996.

[103] Other sections and subsections have been excluded because of relevance to the subject matter.

[104] S 151(1) of the Constitution: "The local sphere of government consists of municipalities, which *must be established* for the whole of the territory of the Republic." (emphasis added)

[105] S 73(2)(a) of the Systems Act.

In order to fulfil its duties, a municipality must have a budget and funds to facilitate the discharge of those duties. It is authorised by law to raise the funds that it needs to accomplish its constitutional mandate.[106] The Systems Act contains a provision to that effect as well. In this regard, section 4(1) states as follows:

> "The council of a municipality has the right to -
> (c) finance the affairs of the municipality by
> (i) charging fees for services; and
> (ii) imposing surcharges on fees, rates on property and, to the extent authorised by national legislation other taxes, levies and duties."

The municipal right endowed by section 4(1)(c) allows the municipality to charge fees, rates and levies to boost the municipal fiscus. Section 118 of the Systems Act is invoked in scenarios where persons default on the payment of these levies. It is used to ensure that the municipality collects on its debts and does not fall behind in its budget. Cameron J calls it a "municipality-friendly debt-collection device".[107] The section speeds up the debt collection exercise of the municipality by lessening the procedural requirements needed to effectively collect debts.[108]

4.2 Section 118(1) and (3)

Section 118(1) of the 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."

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[106] S 153 of the Constitution:
"A municipality must -
(a) structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community".

[107] *Jordaan and Others v Tshwane Metropolitan Municipality and Others* 2017 (6) SA 287 (CC) para 16.

[108] Para 30: "by-pass at least some debt collection enforcement procedures … renders the property immediately and expeditiously".

Section 118(1) contains an embargo clause that restricts the transfer of property by the Deeds Office if there are outstanding debts owing to the municipality for the two years prior to applying for the clearance certificate.

While section 118(1) is an embargo provision with a time limit that restricts the transfer of property, section 118(3) creates a charge against the property that has no time limit except for prescription after thirty years.[109] Section 118(3) reads as follows:

> "(3) 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."

The section 118(3) charge upon the property enjoys a preference over any mortgage bond registered against the property. This charge, which is in favour of the municipality, has been a point of contention whether it constitutes a real right enforceable against current owners only or also against successors in title.[110]

4.3 Section 118(3) hypothec

Section 118(3) effectively establishes a statutory hypothec that is only enforceable in favour of municipalities and it is created by the legislature. In the *BOE Bank*[111] case section 118(3) was defined as "*sui generis*", a one of a kind hypothec not wholly a lien and not fully a hypothec.[112] It presents its own unique challenges, such as with the interpretation[113] and application of this unique hypothec. Whilst the interpretation of

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[109] *Jordaan and Others v Tshwane Metropolitan Municipality and Others* 2017 (6) SA 287 (CC) para 72; *City of Tshwane Metropolitan Municipality v Mathabathe and Another* 2013 (4) SA 319 (SCA) para 11.

[110] *Jordaan and Others v Tshwane Metropolitan Municipality and Others* 2017 (6) SA 287 (CC) paras 11, 30-33, 40.

[111] *BOE Bank Ltd v Tshwane Metropolitan Municipality* 2005 (4) SA 336 (SCA).

[112] Para 21.

[113] Arguments raised in para 20. Maasdorp JP stated that: "There was no question that the municipality's claim did not survive transfer to the new owner". H Delport "The implications of section 118(3) of the Local Government: Municipal Systems Act 32 of 2000 for purchasers of immovable property" (2015) 78 *THRHR* 219-236 226 comments that "there is nothing in the judgment of the Supreme Court of Appeal, expressly or by implication, warranting the conclusion that on a sale of a property a municipality may institute proceedings against the new owner to recover the historical municipal debt owed by the previous owner. Reading that into the judgment would be far-fetched". Statements such as these show that the judicial decisions have not be assented to by other legal scholars who believe there have been misinterpretations in some of the rulings. See also *Jordaan and Others v Tshwane Metropolitan Municipality and Others* 2017 (6) SA 287 (CC) para 18: "preceding

other liens has been relatively trite, section 118 has not always followed conventional reasoning. Cases such as *Mitchell*[114] and *Mkontwana*[115] are evidence of how the concepts of lien and hypothec were wrongly read and led to wrong precedent.[116]

4.4 How can the section 118(3) hypothec be perfected?

Owing to its "*sui generis*" nature, the perfecting of the section 118(3) hypothec is not the same as that of an express hypothec, such as a mortgage. It is also worth taking note of the leeway it has been granted,[117] namely the ability to by-pass some procedures which the perfection of other hypothecs must adhere to.

Historically, before a security right could be deemed transmissible, the conditions of publicity and formality had to be met.[118] The security right had to be published so that the parties would be made aware of its existence and the potential impact on other transactions.[119] The court in *Jordaan* even quoted from a 1901 publication where it was stated that "mortgages shall be effected in so open and public a manner that no one can afterwards complain that he had no notice of them".[120] This not only outlined the requirement of publicity but also its usefulness for society.

The nature of the municipality's statutory hypothec is similar to a lien,[121] but there is no requirement of publicity for this hypothec, unlike mortgagees, even when it is being perfected.[122] The Systems Act does not provide an outline on how to perfect the hypothec. It does, however, cover perfection under its by-laws,[123] which also state that it can apply to court to interdict (stop) transfer of property in instances where the seller

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statutory history shows … no attempt was made to confer a right of execution on municipalities that survived transfer to a new owner."

[114] *Tshwane City v Mitchell* 2016 (3) SA 231 (SCA).

[115] *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett and Others v Buffalo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC).

[116] H Delport "The implications of section 118(3) of the Local Government: Municipal Systems Act 32 of 2000 for purchasers of immovable property" (2015) 78 *THRHR*,231

[117] See *Jordaan and Others v Tshwane Metropolitan Municipality and Others* 2017 (6) SA 287 (CC) para 30: "by-pass at least some debt collection enforcement procedures … renders the property immediately and expeditiously".

[118] Para 31.

[119] Para 32.

[120] AFS Maasdorp "The law of mortgage" (1901) 18 *SALJ* 233-248 240. See *Jordaan and Others v Tshwane Metropolitan Municipality and Others* 2017 (6) SA 287 (CC) para 36.

[121] Para 21.

[122] Para 39.

[123] *Tshwane City v Mitchell* 2016 (3) SA 231 (SCA) para 25; By-law 18(1) of the City of Tshwane Metropolitan Municipality Standard Electricity Supply By-Laws, LAN 1076 in *Gauteng Provincial Gazette 227* of 7 August 2013.

opted to only settle the two-year debt under section 118(1) before such transfer is completed. In the *Mitchell* case a precedent for perfection was set.[124] The case also outlined the counter measures in the municipal by-laws that serve as a buffer for ensuring that the municipality attaches property in a fair and equitable manner.[125] The municipality would still need to perfect its hypothec by seeking a judgment against the debtor and another order to attach the property accompanying the former.[126] The municipality would also have to register the attachment at the Deeds Office.

5. Case law leading up to the *Jordaan* case

One of the landmark cases that impacted the Systems Act leading up to *Jordaan* is *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Services*[127] (the *FNB* case), which – although it does not deal with section 118 directly – deals with the general question of allowing "statutory liability on a property holder for the debts of another".[128]

5.1 The *FNB* case

In this case FNB had leased two cars to two different companies (Lauray and Airpark). It had also sold another car to Airpark by way of an instalment sale agreement. The agreement provided that FNB would remain the owner until the last instalment was paid. Airpark and Lauray owed the Commissioner of the South African Revenue Service (SARS) large amounts in outstanding customs duties and related debts. Acting in terms of his powers, section 114 of the Customs and Excise Act 91 of 1964, the Commissioner seized the cars as security for the debts owed to SARS. FNB was owed substantial amounts of money in terms of the instalment sale agreement and the leases and it was the owner of all three cars.

Section 114 permitted a seizure of goods without requiring any prior application to court by the Commissioner. The effect of the Commissioner's action frustrated FNB's rights in terms of those agreements and its right to ownership of the cars. This

[124] *Tshwane City v Mitchell* 2016 (3) SA 231 (SCA) para 40.
[125] Para 25.
[126] Para 23.
[127] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).
[128] *Jordaan and Others v Tshwane Metropolitan Municipality and Others* 2017 (6) SA 287 (CC) para 64.

led to section 114 of the Customs and Excise Act being challenged as an arbitrary deprivation of the property.

Section 114[129] of the Customs and Excise Act was therefore challenged in terms of section 25(1) of Constitution, which is the property clause. It reads as follows:

> "(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

The relevant part of section 114(1) of Customs and Excise Act reads as follows:

> "(b) The claims of the State shall have priority over the claims of all persons upon anything subject to a lien contemplated in paragraph (a) or (aA) and may be enforced by sale or other proceedings if the debt is not paid within three months after the date on which it became due."

For the court to come to its conclusion, it had to decide the following:[130]

> "(a) Does that which is taken away from the property holder by the operation of the particular law in question amount to "property" for purpose of section 25?
> (b) Has there been a deprivation of such property by the law or conduct?
> (c) If there has, is such deprivation consistent with the provisions of section 25(1)?
> (d) If not, is such deprivation justified under section 36 of the Constitution?
> (e) If it is, does it amount to expropriation for purposes of section 25(2)?
> (f) If so, does the expropriation comply with the requirements of section 25(2)(a) and (b)?
> (g) If not, is the expropriation justified under section 36?"

On the definition of property, the court held that it is "practically impossible" to exhaustively define what constitutes property as envisaged by the Constitution, but ownership of corporeal moveable things would have to be an essential element of such a constitutional definition of property.[131] The respondent raised the question of

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[129] S 114(b): "The claims of the State shall have priority over the claims of all persons upon anything subject to a lien contemplated in paragraph (a) or (aA) and may be enforced by sale or other proceedings if the debt is not paid within three months after the date on which it became due."
[130] Para 46.
[131] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 51.

whether juristic persons were entitled to protection in terms of section 25 of the Constitution. In response the court cited section 8(4) of the Constitution, which reads:

> "A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person."

The court had previously stated in the *First Certificate*[132] case that:

> "[M]any 'universally accepted fundamental rights' will be fully recognised only if afforded to juristic persons as well as natural persons. For example, freedom of speech, to be given proper effect, must be afforded to the media, which are often owned or controlled by juristic persons".[133]

It therefore held that juristic persons were entitled to similar protection as natural persons.[134]

Another issue that had to be resolved related to possession and ownership. It was found that FNB's ownership of the vehicle was not physical since FNB was not in possession of the cars, but its interests served as a security device to reserve and secure payment on the agreements of sale and lease. It was further held that FNB did not need to exercise enjoyment or prove that it reserved any interest in the cars aside from using them as security.[135] The court held that the use or enjoyment of a thing had little bearing on the definition of property with regard to this case.[136] In this regard the court also stated that:

> "Neither the subjective interest of the owner in the property, nor the economic value of the right of ownership ... can determine the characterisation of the right".[137]

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[132] *Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC).
[133] Para 57.
[134] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 42, citing *Investigating Directorate: Serious Economic Crimes Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) (SA) 545(CC) and held that denying juristic persons the right to privacy "would lead to the possibility of grave violations of privacy in our society, with serious implications for the conduct of affairs". The same can said of juristic persons if they were denied property rights protection.
[135] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 53.
[136] Para 55: "The 'reservation of ownership' is not what the inquiry should focus on".
[137] Para 56.

The court therefore held that the right of ownership that FNB had in the vehicles in question constituted property for purposes of section 25.[138]

With regard to whether there was a deprivation of property, the court explained that the term "deprivation" was a broad expression which included but was not limited to the infringement of rights to "use, enjoyment or exploitation of private property".[139] It further held that "[d]ispossessing an owner of all rights, use and benefit to and of corporeal movable goods, is a prime example of deprivation in both its grammatical and contextual sense".[140] The court held that dispossession was quite evident and that there was indeed a deprivation by SARS when invoking section 114 of the Customs and Excise Act to seize the cars belonging to FNB at the warehouse.

The next step was to decide if the deprivation was arbitrary or justifiable. On the aspect of arbitrariness, the court held that standards of justifiability and reasonability had to be established to allow deprivation to be permitted by law. If no plausible reason for deprivation[141] could be put forward, then the deprivation was most likely arbitrary and subject to the limitation clause section 36.[142] It was upon much deliberation that the two tests were used, the "rationality test"[143] and the "proportionality test".[144] The court resolved on having the option of using both and employing the most appropriate one depending on the case. The court set out a series of questions, that upon answering would determine which test to employ.

To establish if there was sufficient reason for deprivation the court had to determine the following:

> "(a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question, and ends sought to be achieved, namely the purpose of the law in question.
> (b) A complexity of relationships has to be considered.
> (c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.

[138] Paras 55-56.
[139] Para 57.
[140] Para 61.
[141] I Currie & J de Waal *The bill of rights handbook* (6 ed 2013) 540, 545 "A deprivation that is procedurally unfair is arbitrary".
[142] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 67.
[143] Paras 65-71.
[144] Paras 71-80.

(d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.
(e) Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation, than in the case when the property is something different, and the property right something less extensive. […]
(f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially."
(g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution.
(h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with 'arbitrary' in relation to the deprivation of property under section 25."[145]

After employing the test, the court held that "once the deprivation has been adjudged to be arbitrary, no scope remains for justification under section 36".[146]

5.2 The *Mkontwana* case

Mkontwana bought a property in Port Elizabeth valued at R24 560. The terms of the purchase agreement were that Mkontwana would pay the outstanding debt in order for a clearance certificate to be issued. This debt amounted to R10 728,08 incurred by previous occupiers who were occupying the property illegally. Upon several municipal reviews the debt was adjusted to an amount of R2 504,60. This debt was for services prior to the two years as determined by section 118(1).

The question was whether the embargo induced by section 118(1) amounted to a deprivation of property. If indeed there was deprivation, the next question was whether, considering that this property had been unlawfully occupied, the embargo imposed by section 118(1) on the purchaser constituted an arbitrary deprivation.

[145] Para 100.
[146] Para 110.

The court *a quo* held that there was insufficient connection between the property owner and the debts, while it further held that section 118(1) did not have enough grounds to limit the landowner's property rights based on a debt amassed by charges for services the owner did not enjoy.[147]

The matter was subsequently appealed by the municipality. The Constitutional Court took a different view to that of the high court and found that there was a close enough connection between the deprivation imposed by section 118(1) and the consumption charges for services to the extent that the services were delivered and consumed on the premises.[148] It was held that, although the owner had not benefitted from the land, due to the services that the municipality had continued to offer, the land had benefitted and the property appreciated in value,[149] and therefore the owner indirectly benefitted.[150]

In *Mkontwana*[151] the court had to determine whether the owner could be held liable for debt accrued by another. The link between the landowner, and legal and illegal occupier(s) was explored, and the matter of control exercised was considered in light of deprivation. A contestation regarding the constitutionality of section 118(1) when pitted against the property clause was brought before the Constitutional Court. Was section 118(1) consistent with the section 25(1) of the Constitution with regard to deprivation of property? The court had to also decide whether or not it was lawful in terms of the Constitution to restrain a landowner from finalising a transfer of his property until such a time as the two-year debt had been paid.

The Constitutional Court held that the owner had enough control and could have evicted the illegal occupants or taken other reasonable action[152] to prevent debt accruing and therefore was not precluded from paying. The deprivation imposed by

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[147] *Mkontwana v Nelson Mandela Metropolitan Municipality & Another; Bisset & Others v Buffalo City Municipality & Others* (SECLD) unreported case nos 1238/02 and 903/02 of 30 September 2003 para 57.
[148] *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett and Others v Buffalo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) para 53.
[149] Para 40: "the supply of electricity and water to a property ordinarily increases its value; the consumption of electricity and water enhances its use and enjoyment".
[150] Paras 40, 42 and 53.
[151] *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett and Others v Buffalo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC).
[152] Para 47.

section 118(1) was deemed to be slight and the limitation "temporary".[153] The court therefore concluded that the deprivation was not arbitrary. In addition, the court however held that municipalities should take "reasonable steps" to reduce amounts owing.[154] The court held that section 118(1) had not infringed upon section 25(1) constitutional provision to the extent it could be deemed inconsistent with the property clause.

5.3 The *Mathabathe* case

In the *Mathabathe*[155] case the court held that the preferent right conferred upon municipalities by section 118(1) and section 118(3) was not undisputed. The court had to determine whether the municipality, after being paid the two-year debt, is it entitled to withhold the clearance certificate until the rest of the debt (the historical debt) has been paid too.

In the *Mathabathe* case, Nedbank had sold a property by public auction on behalf of the owner of the property, Thomas Mathabathe. An offer was made and accepted for an amount of R1.3 million. The transferring attorneys applied for a clearance certificate as required by section 118(1). The municipality responded by seeking to induce payment for the whole amount outstanding – not just for the two-year debt but also for the historical debt. The total amount outstanding in relation to municipal rates and services was R162 722,26 which included the historical debt of R151 324,22. The attempts to obtain a clearance certificate by the transferring attorneys were frustrated by the municipality and the matter was taken to the high court.

The applicant sought an interdict against the application of section 118(1) by the municipality to restrict transfer and requiring an undertaking to pay the historical debt under section 118(3). The applicant also sought an order for the strict adherence of section 118 (1) by the municipality. The municipality launched a counter application and sought an undertaking for the payment of the historical debt as part of its prayer.[156]

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[153] *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett and Others v Buffalo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) para 45.
[154] Para 49.
[155] *City of Tshwane Metropolitan Municipality v Mathabathe* 2013 (4) SA 319 (SCA).
[156] Para 5.

The high court found in favour of the applicant. The court decided that the municipality should release the clearance certificate as per section 118(1). It further stated that the municipality should not use the section 118(3) security clause to withhold a clearance certificate.[157]

The municipality took the matter to the Supreme Court of Appeal. On appeal the municipality argued that it had sought some sort of guarantee by the transferring attorneys that the debt owed will be paid once the transfer had been effected.[158] It explained that it did not contest the ruling of the high court but was appealing against the rejection of its counter application.[159]

The SCA held that the municipality had mixed up the two subsections and had therefore misapplied the remedies.[160] Using section 118(1), an embargo provision with a time limit, to force an undertaking to be made for future payment, had turned section 118(1) into a means of securing payment – a security provision[161] in the manner of section 118(3). The court effectively rejected this approach. The ruling left new property owners in a precarious position where they may be blindsided by historical debt, which one would have assumed extinguished upon transfer or at the very least followed the old owner.

5.4 The *Mitchell* case

The *Mitchell*[162] case deals with the interpretation of section 118(3) of the Systems Act. The question raised was whether the section 118(3) security provision for moneys owed to municipalities extinguished when the property was sold at a sale in execution or whether it survived transfer to a new owner.

The respondent (Mitchell) had purchased a property at a sale in execution. The property was subject to a municipal debt of R 232 828,25 for rates and services. Of the R232 828,25 the applicant paid the two-year debt, which amounted to R126 608,50 to be able to apply for and obtain a clearance certificate. Mitchell obtained the clearance certificate and took ownership while the remainder of the debt, the historical debt of R106 219,75, remained unpaid.[163]

[157] Para 6.
[158] Para 6.
[159] Para 7.
[160] Para 12.
[161] Para 12.
[162] *City of Tshwane Metropolitan Municipality v Mitchell* 2016 (3) SA 231 (SCA).
[163] Para 4.

Mitchell then sold the property to another (Prinsloo). Prinsloo applied to the municipality for services to the property and the application was denied with the municipality ordering her to first pay the historical debt which had been left unpaid following the initial transfer to Mitchell. Prinsloo had not yet finalised the transfer from Mitchell and subsequently refused to proceed with the purchase until the issue of the historical debt was resolved.[164]

Litigation between Mitchell and the municipality ensued, with the municipality contending that its security right under section 118(3) was not extinguished by the sale and transfer of the property, and was enforceable against Mitchell and transferrable to his successors in title.[165] It could therefore justifiably deny services to Prinsloo or any would-be successor-in-title until the historical debt had been paid. Mitchell argued that the municipality should seek redress from the previous owner(s) who had incurred the historical debt instead of pursuing and attempting to collect it from him, as he was not liable for the historical debt nor was his successor-in-title.

Mitchell's application was granted by the court *a quo*, namely an order to receive municipal services[166] and open an account with the municipality to service the property.[167] The court *a quo* held that the security provision under section 118(3) was extinguished by the sale in execution and transfer.[168] Mitchell and his successor-in-title were entitled to services from the municipality, since they had paid the fees and had met the requirements for a clearance certificate under section 118 (1). Mitchell was only liable for the two-year debt and the municipality had no right to refuse the supply of municipal services to Mitchell or his successors-in-title because of

[164] Para 5.
[165] Para 11.
[166] Para 6. The order granted was:

> "1. It is declared that: -
> 1.1 the security provided by section 118(3) of Act No 32 of 2000 [the Act] in favour of the respondent with regard to the property known as Erf 296, Wonderboom Township, Registration Division J.R., Gauteng [the property], was extinguished by the sale in execution and subsequent transfer of that property into the name of the applicant;
> 1.2. the applicant (or his successor in title); is not liable for the payment of outstanding municipal debts older than 2 years which were incurred by his predecessor(s) in title prior to the date of transfer of the said property into his name;
> 1.3. the respondent has no right to refuse the supply of municipal services (such as electricity, water, sanitation and waste removal) to the applicant (or his successor in title) with regard to the said property only because of outstanding municipal debts older than 2 years."

[167] Para 10.
[168] Para 6.

outstanding historical debts.[169] If there was no agreement or arrangement directing as such, the new owner or his successors-in-title did not inherit the debt owing to the municipality and was not liable for the payment of historical debts incurred by previous owners.[170]

The municipality then appealed the high court's ruling to the SCA, which overturned the initial ruling that the hypothec created by section 118(3) did not pass the burden to the new owners in a sale of execution.[171]

The SCA in *Mitchell* upheld the appeal of the municipality. The court referenced the *Mathabathe* decision and remarked that the statement made in *Mathabathe* – namely that the municipality "was plainly wrong in its contention that 'upon registration [of transfer] . . . [it] loses its rights under section 118(3) of the Act"[172] This was taken to mean that the municipality's rights did not extinguish upon transfer of property and that the secured debt could survive transfer onto a new owner.[173] Outstanding debts from the previous owners survived regardless of whether it was a sale of execution or public auction. The constitutionality of section 118(3) was not raised, however. The court also gave an outline of how municipalities were to meet certain guidelines based on their by-laws before perfecting their hypothec.[174] The municipality had to confirm that "there is no occupier on the property concerned; and the person who had entered into the contract to receive the services cannot be traced or has absconded, is unable to pay, or does not exist" before it could perfect its hypothec.[175] The perfection of the hypothec is also outlined, beginning with obtaining an order of court, attaching and selling the property to satisfy the historical debt.[176] Once the municipality perfected its hypothec the new owner could see their property attached and sold because of previous owner's unpaid or unsatisfied historical debt.

[169] Para 6.
[170] Para 23.
[171] Para 52.
[172] *City of Tshwane Metropolitan Municipality v Mathabathe* 2013 (4) SA 319 (SCA) para 12.
[173] see also AF Theunissen *The effect of embargo and security provisions on immovable property transactions* (2017) LLM mini-dissertation North-West University 45.
[174] *City of Tshwane Metropolitan Municipality v Mitchell* 2016 (3) SA 231 (SCA) para 26.
[175] Para 26.
[176] Para 23.

6. A discussion of the *Jordaan* case

6.1 Introduction

The *Jordaan* case was a consolidation of cases involving different municipalities, namely eThekwini,[177] Tshwane and Ekurhuleni. Individuals and corporations that owned properties or held interests in the properties within the municipalities complained that services to these properties had either been suspended or refused until the historical debts had been settled in terms of section 118(3).[178] The high court, as court *a quo*, had ruled that section 118(3) was constitutionally invalid if it was read as allowing municipalities to enforce historical debt incurred by previous owners against successors-in-title.[179] The matter was referred to the Constitutional Court for confirmation. It was deemed to be worth the Constitutional Court's attention despite there being some factual and procedural disputes.[180] The Constitutional Court judged the matter as "ripe" for decision.[181]

The municipalities claimed they had not employed section 118(3) but their own by-laws to decline the services sought by the applicants.[182] This meant that the matter of the validity of section 118(3) did not need to be heard at the Constitutional Court, since municipalities could simply collect the debt using their by-laws. For the interests of justice, the court decided to consider the substance of the challenge to section 118(3) and not be diverted from it on procedural or other grounds.[183]

6.2 Facts

Ms Jordaan lived with her parents and minor children in a residential property in Pretoria. She bought a property from Standard Bank at an auction. She had to pay municipal service charges to obtain a clearance certificate as provided for in section 118(1) under the terms of the sale agreement. Tshwane had initially claimed that an amount of R88 000 was due and payable under section 118(1). Ms Jordaan, with the help of New Ventures Consulting, eventually paid a reduced amount of R35 000 after

[177] *Jordaan and Others v Tshwane Metropolitan Municipality and Others* 2017 (6) SA 287 (CC) para 3 fn 7.
[178] Para 4.
[179] *Jordaan and Another v Tshwane City and Another, and Four Similar Cases* 2017 (2) SA 295 (GP)
[180] Para 2.
[181] Para 9.
[182] Para 11.
[183] Para 12.

recalculations. New Ventures Consulting proved that the municipality had also endeavoured to claim the historical debt under section 118(3), which they were not supposed to do.

Tshwane's stance was that its policies were to ensure that it either received payment or obtained an undertaking from the new owner to pay the historical debt of previous owners before entering into a new services account. New Ventures Consulting confirmed that this had become the norm with Tshwane, as it had denied opening new service accounts and was using this denial to induce payment for historical debts from new owners. When Ms Jordaan sought to enter into a consumer agreement with Tshwane, she was informed that this would only be possible if she settled the historical debt on her new property. Ms Jordaan then took the matter to court where an order compelling Tshwane to enter into a consumer agreement with her was granted.[184] One of the parties that joined Jordaan in the class suit was New Ventures Consulting,[185] who joined in its corporate capacity and as the representative of a class of parties that had been affected by the municipality. It raised concern on Tshwane's Credit Control and Debt Collection Policy[186] which was being used to demand payment of all debts outstanding, namely the two-year debt as well as the historical debt. If the owner (seller) failed to comply, the municipal services were refused. The municipality used the refusal of services to compel new owners into agreeing to an undertaking to repay debts which they never incurred, since they had yet to receive municipal services with regard to the said property.

6.3 *Analysis*

The high court declined to grant the municipality's claim in the *Jordaan* case due to the burden it imposed on new owners. Having looked at the history, language and common law context of section 118(3)[187] the Constitutional Court had to decide whether the infringement brought about by section 118(3) amounted to an arbitrary

[184] *Jordaan and Another v Tshwane City and Another, and Four Similar Cases* 2017 (2) SA 295 (GP) paras 3-7.
[185] *Jordaan v City of Tshwane Metropolitan Municipality; New Ventures Consulting & Services (Pty) Ltd v City of Tshwane Metropolitan Municipality; Livanos v Ekurhuleni Metropolitan Municipality; Oak Plant Rentals (Pty) Ltd v Ekurhuleni Metropolitan Municipality* 2017 (2) SA 295 (GP) (High Court judgment).
[186] Tshwane Credit Control and Debt Collection Policy of 30 August 2012.
[187] *Jordaan and Others v Tshwane Metropolitan Municipality and Others* 2017 (6) SA 287 (CC) paras 18-19.

deprivation of property. The court held that it was not necessary to invalidate the provisions of section 118(3) seeing as the municipality could execute its mandate using other statutes.[188]

When dealing with the issue of hypothecs, the court noted that, for a debt to be claimable against a new owner (purchaser), “notice” or a “publication” of the debt must be given to alert the rest of the world, since the right is enforceable against all.[189] Without a notice or publication, permitting the transmissibility of a debt seems unfair to the purchaser who is denied the right to assess the risks involved with purchasing a certain property.

Since the ruling declared that historical debt does not “survive” a transfer, a municipality cannot refuse to supply services to a purchaser’s property or cut off their existing supply of services for historical debt incurred by prior owners of the property.[190] Debts due from the previous owner cannot be lawfully transferred from that owner’s account onto the account of a new owner of the same property. The municipality can no longer attach and sell a purchaser’s property to settle the previous owner’s municipal debts.[191]

The previous owner (seller) can dispose of the property after having settled the debt due in terms of section 118(1), though the seller remains liable to the municipality for the historic debt.[192] Nothing stops the municipality from claiming any amount that remains unpaid by the seller even after transfer, using whatever debt collection mechanisms are available to it.[193]

[188] Paras 53, 54 and 78.
[189] Para 36.
[190] Para 20.
[191] Para 76.
[192] Para 54.
[193] Paras 53-54.

7. The effect of section 118(3) on banks before *Jordaan*

The interpretation and application of section 118(3) has been a cause for much confusion, which has negatively impacted banks. This lack of consistency has been evident in municipal dealings as well as in the court rulings.[194] When considering the duration of time involved in the section 118(3) debt, it has a greater bearing on mortgagee rights than section 118(1). It is not an embargo that merely holds transactions being concluded, but is a burden running with the land impacting on ownership and other limited real rights on a larger scale.[195] As such, the problems posed by both sections will differ in as much as the remedies do differ as well.[196] The embargo clause frustrates transactions while the security clause is more impactful because it attaches to a property itself.[197] Even in the case of another party encumbering and selling the property, municipalities still have the power to reclaim or repossess the proceeds and discharge of the debt from that transaction.[198]

In *Mathabathe* the court held that the municipality should release a clearance in terms of section 118(1) even though an outstanding historical debt remained unpaid in terms of section 118(3). The municipality had sought to use section 118(1) to secure full payment of outstanding debt including the historical debt. The court stated that although section 118(3) could not be used to restrain transfer of property, it could be used to secure payment once a judgement for outstanding debt was granted in favour of municipality.[199]

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[194] L du Plessis "Observations on the (un-)constitutionality of section 118(3) of the Local Government: Municipal Systems Act 32 of 2000" (2006) 17 *Stell LR* 505-531 512-516.

[195] *Jordaan and Others v Tshwane Metropolitan Municipality and Others* 2017 (6) SA 287 (CC) paras 23-26.

[196] *City of Tshwane Metropolitan Municipality v Mathabathe and Another* 2013 (4) SA 319 (SCA) para 9.

[197] L du Plessis "Observations on the (un-)constitutionality of section 118(3) of the Local Government: Municipal Systems Act 32 of 2000" (2006) 17 *Stell LR* 505-531 524: "a section 118(3) ''deprivation'' is therefore more likely to be ''arbitrary'' than a section 118(1) ''deprivation'' which may be justified … [a] closer relationship between ownership and the supply of municipal services."

[198] L du Plessis "Observations on the (un-)constitutionality of section 118(3) of the Local Government: Municipal Systems Act 32 of 2000" (2006) 17 *Stell LR* 505-531 521: "Section 118(3) deprives the mortgagee of that preferent right vis-à-vis a municipality in a manner that frustrates the object of the bond as a mechanism in securitatem debiti. In some instances the proceeds of the sale of a property may be sufficient to cover both the municipal and mortgage debts, but that does not detract from the fact that prior to the sale the mortgagee had been deprived of a real right to preferent payment of a debt from the proceeds of the sale of the property, that is, from his/her real security to the property. Section 118(3) therefore also (and even to a greater extent than section 118(1)) effects a deprivation of property as envisaged in section 25(1) of the Constitution."

[199] *City of Tshwane Metropolitan Municipality v Mathabathe and Another* 2013 (4) SA 319 (SCA) para 11.

There is interplay between the subsections, but that interplay does not elicit an interchange of powers which the municipality had sought to employ. It had tried to use the section 118(1) embargo powers for collecting a section 118(3) debt. The ruling by the court meant that even though the clearance certificate had been issued,[200] the outstanding historic debts remained, even after transfer of the property, it was not extinguished.

Prior to *Mathabathe*, the presumption[201] was that issuing a clearance certificate cancelled any debts owing and if any debts remained, they were not recoverable from the new owner after transfer. Such debt was deemed as having been extinguished and the property received a clean slate which meant the municipality could not pursue the new owner who had not incurred the debt.

Mathabathe changed that presumption and the old debt could now affect the new owner; the court held that the charge was upon the property.[202] This meant that the charge had survived transfer and the new owner had to carry the burden of historical debt and banks would be deprived of its hypothetical right.

The other issue is of control over the property by the owner. In *Mkontwana* the subject of control was raised; the owner was deemed as having control or being expected to exercise control in the leasing of his property and choice of tenants.[203] However, banks do not have that type of control over the property. Indeed, the mortgagor retains control as well as the duty to pay municipal debts. It was highlighted as such in the judgement that "[i]t is ordinarily not the municipality but the owner who has the power to take steps to resolve a problem arising out of the unlawful occupation of her property. It is accordingly not unreasonable to expect the owner to bear the risk".[204] This continues to bolster the argument that the owner is the one who has control and as such must bear the risk.

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[200] Para 9.
[201] See rulings of *City of Johannesburg v Kaplan NO and Another* 2006 (5) SA 10 (SCA); *BOE Bank Ltd v Tshwane Metropolitan Municipality* 2005 (4) SA 336 (SCA); *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett and Others v Buffalo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC).
[202] *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett and Others v Buffalo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) para 11.
[203] Paras 56 and 61.
[204] Para 59

Section 118(3) diminishes the bank's security rights and renders them to be subservient to the municipal charge, since they can be dislodged by the higher-ranking statutory hypothec of the municipality, and thus the mortgagee's rights are infringed. When the banks' "real right to preferent payment of a debt from the proceeds of the sale of the property"[205] is superseded by the municipality's charge against the same property, it frustrates the object of the mortgage bond.

8. Impact of *Jordaan* on banks

One of the possible consequences of *Jordaan* is that the rights of banks are now pitted against those of the municipality more acutely. Since the Constitutional Court's decision declared that the charge regarding the historical debt does not survive transfer of ownership, purchasers, successors-in-title and banks that fund home purchasers will no longer be burdened with historical debts.[206] This resonated with previously held views of various scholars[207] who had questioned the reading of section 118(3) in *Mathabathe* as well as in *Mitchell,* and whether the legislature had intended to create a charge that survived transfer.[208]

The *Jordaan* ruling revived the previously held stance of the security provision under section 50(2) of the Transvaal Ordinance wherein the burden on the land did not pass to the new owner. For instance, if a property belonging to the municipal debtor is sold in execution, the municipality gets the proceeds thereof because of the preference created under section 118(3) while the successor in-title receives a clean slate. [209] This has had the effect of unburdening new mortgagees who fund purchasers. In the instance where the new owner defaults on municipality charges, the municipality can still seek to attach the property[210] and will have a preference. In *Jordaan*, BASA [211] who represented banks, were unable to have their concerns addressed. BASA sought an order declaring section 118(3) unconstitutional for

[205] L du Plessis "Observations on the (un-) constitutionality of section 118(3) of the Local Government: Municipal Systems Act 32 of 2000" (2006) 17 *Stell LR* 505-531 521.
[206] Para 81.
[207] Para 10.
[208] Para 18: "preceding statutory history shows … no attempt was made to confer a right of execution on municipalities that survived transfer to a new owner."
[209] *Tshwane City v Mitchell* 2016 (3) SA 231 (SCA) para 54.
[210] Para 58
[211] Banking Association South Africa as amicus curiae in the *Jordaan* case.

infringing the security rights of mortgagees who fund purchases for new owners.[212] BASA's position as *amicus curiae* meant that it could not exclusively raise the matters that were bank related as part of the *Jordaan* action and because the court managed to resolve the main issue without tackling the constitutionality of section 118(3). Therefore, the banks' questions were left unresolved.

9. Conclusion

Security rights developed under Roman Law and due to increases in trade, terms such as hypothec and mortgage became entrenched.[213] Since the 1800s to date, case law shows that there is a gradual transition in the development of the municipal claim from an ordinary claim to a *sui generis* lien ranking higher than other claims.[214]

Although the Systems Act has seen very little development in terms of amendments,[215] it has still progressed in application and interpretation due to case law. Cases like *Mkontwana*, *Mathabathe*, *Mitchell* and most recently *Jordaan* have contributed to the current interpretation of section 118(3). Even though the *Jordaan* case brought about relief for new owners, the decision did not entertain the question of the constitutional validity of section 118(3), meaning that banks still rank lower that municipalities and the status of section 118(3) hypothec remains the same.

Banks have been left somewhat disadvantaged when presenting claims that compete with those of municipalities and therefore the overbearing nature of the municipal claim needs a re-evaluation.[216] In my opinion, courts ought to decide on the validity of section 118(3) and outline a precise way for municipalities to perfect their hypothecs as is the case with other conventional security rights. Such a qualification might aid in dispelling the injustices banks feel is imposed on them.

In conclusion, I am of the view that the *Jordaan* case has had a large influence in the direction our law has taken protecting new owners and mortgagees. Questions regarding competing interests with other creditors (mainly banks) will have to be settled either by legislative amendments or court decisions.

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[212] *Jordaan and Others v Tshwane Metropolitan Municipality and Others* 2017 (6) SA 287 (CC) paras 13, 72.
[213] R van den Bergh "The development of the landlord's hypothec" (2009) 15 *Fundamina* 155-167 158.
[214] *Jordaan and Others v Tshwane Metropolitan Municipality and Others* 2017 (6) SA 287 (CC) paras 21-40.
[215] Local Government: Municipal Systems Amendment Act 44 of 2003.
[216] *Jordaan and Others v Tshwane Metropolitan Municipality and Others* 2017 (6) SA 287 (CC) paras 72-79.

Bibliography

Brits R "The statutory security right in section 118(3) of the Local Government: Municipal Systems Act 32 of 2000 – Does it survive transfer of the land? [Discussion of *City of Tshwane Metropolitan Municipality v Mathabathe* 2013 4 SA 319 (SCA)]" (2014) 25 *Stell LR* 536-548

Brits R "Why the security right in section 118(3) of the Local Government: Municipal Systems Act 32 of 2000 is not enforceable against successors in title – a follow-up occasioned by the SCA's Mitchell judgment" (2017) 28 *Stell LR* 47-67

Brits R *Mortgage foreclosure under the Constitution: Property, housing and the National Credit Act* (2012) LLD dissertation Stellenbosch University

Burdick WL *The principles of Roman law and their relation to modern law* (2015) Rochester: The Lawyers Co-operative Publishing

Cooke E (ed) *Modern studies in property law* Vol 2 (2002) Hart Publishing

Currie I & De Waal J *The bill of rights handbook* (6 ed 2013) Juta

Delport H "The implications of section 118(3) of the Local Government: Municipal Systems Act 32 of 2000 for purchasers of immovable property" (2015) 78 *THRHR* 219-236

Du Plessis L "Observations on the (un-)constitutionality of section 118(3) of the Local Government: Municipal Systems Act 32 of 2000" (2006) 17 *Stell LR* 505-531

Maasdorp AFS "The law of mortgage" (1901) 18 *SALJ* 233-248

Siphuma NS *The lessor's tacit hypothec: a constitutional analysis* (2013) LLM thesis Stellenbosch University

Schulz F *Classical roman law* (1961) Oxford University Press

Theunissen AF *The effect of embargo and security provisions on immovable property transactions* (2017) LLM mini-dissertation North-West University

Van den Bergh R "The development of the landlord's hypothec" (2009) 15 *Fundamina* 155-167

Legislation

Cape Ordinance of 1912

Divisional Councils Act 40 of 1889

Ordinance 9 of 1912

Ordinance 43 of 1903

Constitution of the Republic of South Africa, 1996

Customs and Excise Act 91 of 1964

Deeds Registries Act 47 of 1937

Insolvency Act 24 of 1936

Local Government: Municipal Systems Act 32 of 2000

Local Government: Municipal Systems Amendment Act 44 of 2003

Local Government Ordinance 17 of 1939

Local Government Ordinance 11 of 1977

Tshwane's Credit Control and Debt Collection Policy (Council Resolution of 30 August 2012)

Case law

BOE Bank Ltd v Tshwane Metropolitan Municipality 2005 (4) SA 336 (SCA)

Brakpan Municipality v Chalmers 1922 WPD 98

City of Johannesburg and Even Grand 6 CC 2009 (2) SA 24 (SCA)

City of Johannesburg v Kaplan NO and Another 2006 (5) SA 10 (SCA)

City of Tshwane Metropolitan Municipality v Mathabathe 2013 (4) SA 319 (SCA)

Darries and Others v City of Johannesburg and No [2009] 3 All SA 277 (GSJ)

Eastern Metropolitan Substructure of the Greater Johannesburg Transitional Metropolitan Council v Venter NO 2001 (1) SA 51 (A)

First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC)

Greater Johannesburg Transitional Metropolitan Council v Galloway NO and Others 1997 (1) SA 348 (W)

Investigating Directorate: Serious Economic Crimes Offences v Hyundai Motor Distributors (Pty) Ltd 2001 (1) (SA) 545 (CC)

Jordaan and Others v Tshwane Metropolitan Municipality and Others 2017 (6) SA 287 (CC)

Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett and Others v Buffalo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others 2005 (1) SA 530 (CC)

Mkontwana v Nelson Mandela Metropolitan Municipality & Another; Bisset & Others v Buffalo City Municipality & Others (SECLD) unreported case Nos 1238/02 and 903/02 of 30 September 2003

Nel NO v Body Corporate of the Seaways Building and Another 1996 (1) SA 131 (A)

Nhlapo v Nhlapo (883/2006) [2013] ZAFSHC 59

Rabie NO v Rand Townships Registrar 1926 TPD 286

Tshwane City v Mitchell 2016 (3) SA 231 (SCA)

Union Government v Cape Rural Council (Cape Rural Council) 1912 CPD 857