Analysis of the tacit hypothec: section 118 of the Local Government: Municipal Systems Act 32 of 2000 in light of the CC's judgment in *Jordaan v City of Tshwane*

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Declaration

Unless provided otherwise, in submitting this dissertation, I declare that I am the solely owner of the all the work contained herein. To the extent that the necessary reference is made, I am the original author of this work, and I have not previously submitted wholly or partially this dissertation anywhere for any qualification.

Summary

Finally, the Constitutional Court has cleared the air surrounding the interpretation of section 118 of the Local Government: Municipal Systems Act 32 of 2000.

This dissertation evaluates and examines the interpretation of subsection (1) and (3) of the Systems Act. In this dissertation I argue that the historical debts which subsist in the immovable property extinguish upon the transfer of the property to the new owner. In previous cases the court has held that historical debts incurred in the land by the previous owner do not lapse when the land is transferred to another person. By implication, the court suggested that the municipality does not lose its limited real rights in the property in question even if the property is no longer in the name of the person who incurred municipal service fees.
Consequently, the municipality may obtain an execution order against the property in order to recover its outstanding historical debts. It goes without saying that this would have drastic repercussions to the new owner of the property should the local authority decide to execute the land. As such I argue that this interpretation is incorrect for a number of reasons provided in this dissertation. In the recent case of *Jordaan vs The City of Tshwane* the Constitutional Court provided clarity regarding the interpretation these subsections.

Therefore, the problem of this research revolves around the interpretation and the constitutionality of subsection (1) and (3) of the Systems Act.

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Chapter 1:

INTRODUCTION

1.1 Research Problem

In this contribution, I examine the effect of section 118 of the Local Government: Municipal Systems Act 32 of 2000 (hereafter the Systems Act) when the house is sold to a new owner. The question in this regard is whether the debts subsist to the new owner.

1.2 Research questions

- Is there any difference between section 118(1) and section 118(3) of the Systems Act and if so, what?[1]
- Does the provision of section 118(3) permit a municipality to claim, from a new owner of the property, debts incurred by a predecessor in title?
- Is section 118 of the Systems Act constitutionally valid?[2]

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[1] See section 118 of the Municipal 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.
(2) In the case of the transfer of property by a trustee of an insolvent estate, the provisions of this section are subject to section 89 of the Insolvency Act, 1936 (Act 24 of 1936).
(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.
[…]."

[2] See *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) ("*Jordaan* HC"). The high court ordered that the provisions of s 118(3) are "declared to be constitutionally invalid to the extent only that the security provision "a charge upon the property" survives transfer of ownership into the name of a new or subsequent owner who is not a debtor of the municipality with regard to municipal debts incurred prior to such transfer".

1.3 Hypotheses

- After this research, it should be clear that there are dissimilarities between section 118(1) and section 118(3), and that the impact of these sections is different when the new owner acquires ownership of the immovable property in sale execution.[3]
- The Supreme Court of Appeal ("SCA") has twice found that previous debts under section 118(3) of the Systems Act survive upon transfer of ownership to the new owner.[4] As many authors have criticised this judgment, I further argue that is not correct to say that previous debts can be transferred to the new owner upon transfer of ownership.[5]
- The Constitutional Court ("CC") has recently held that section 118 of the Systems Act is valid as far as the "historical debts" do not survive upon transfer to the new owner.[6] It is clear from this judgment that section 118 is constitutionally valid provided that the new owner does not bear the burden to pay historical debts.

1.4 Methodology

Law is not a static norm, therefore, it must be developed in order to accommodate the needs of an ever-changing society. In this dissertation I use an historical approach to examine if the new section 118 of the Systems Act does not have elements of old statutes such as the Local Government Ordinance 17 of 1939. I further discuss the constitutionality of section 118 of the Act by using a constitutional approach. I will also study literature and case law on this topic.

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3 See further discussion R *Brits Real Security Law* (1 ed 2016) 394 & 400-405 ("Brits 2016"). As it has been discussed in many cases, Brits states that s 118(1) the so-called "embargo power" affects transfer of ownership and its debts is only limited to two-years preceding clearance application, whereas s 118(3) is viewed as some sort of tacit statutory lien or hypothec, because municipality obtains a real security over this section.

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

5 See *City of Tshwane Metropolitan Municipality v Mitchell* 2016 (3) SA 231 (SCA) paras 12-14 ("*Mitchell* SCA").

6 See *Jordaan and Others v City of Tshwane Metropolitan Municipality and Others; City of Tshwane Metropolitan Municipality v New Ventures Consulting and Services (Pty) Limited and Others; Ekurhuleni Metropolitan Municipality v Livanos and Others* 2017 (6) 287 (CC) ("*Jordaan* CC") para 76, where the Court stated that if s 118(3) of the Systems Act allows new owners to be liable for historical debts it would be constitutional impermissible. See also the high court held in *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) that s 118 is invalid to the extent that the new owner bears the burden to pay historical debts.

1.5 Motivation for study

As stated above, the interpretation of section 118 of the Systems Act by the SCA, has raised many issues and uncertainties around this section.[7] The purpose of this contribution is to clarify that such interpretation is likely to yield an absurd outcome, and it can be challenged constitutionally. This means that if one were to accept the SCA's interpretation, many people (new owners) may lose their home due to the fact that municipalities may exercise their limited real right over the property in order to recover debts as defined by section 118(3). It means that regardless of whether the new owner receives the title at the sale in execution or by regular deed of sale or by other means, his rights to property may be violated.[8] In this dissertation, I argue and criticise the SCA interpretation and further support the *Mitchell* high court judgment and *Jordaan* constitutional court judgment.[9]

1.6 Overview of chapters

Chapter 2 fully discusses the difference between subsection 118(1) and subsection 118(3) of the Systems Act. The courts in many cases have illustrated these two subsections are not the same and their purpose is completely different.[10] In this section, I critically analyse these two subsections and scrutinise the impact of each subsection when the new owner acquired ownership of the land.

Brand JA in *BoE Bank Ltd v City of Tshwane Metropolitan Municipality* held that subsection 118(3) of the Systems Act provides municipalities with a special real security right over the property since the debts in this subsection are not limited to two-year-old debts. Subsection (1) on the other hand, has a limited scope because debts under this subsection

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7 The SCA has failed twice to clarify the uncertainties as to whether s 118(3) of the Systems Act historical debts survive transfer and pass on to the new owner. See further the *Mathabathe* SCA and *Mitchell* SCA cases, where the court held that the new owners are likely to pay the amount of historical debts incurred by their predecessors over the land.

8 See *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Services* 2002 (4) SA 768 (CC) ("*FNB* CC") para 57, where the court held the such violation must pass constitutional test (non-arbitrary test).

9 The high court in *Mitchell HC* found that s 118(3) of the Act is unconstitutional to the extent that it violates rights of the new owners unjustifiable. The CC also confirm in *Jordaan CC* that if the provisions of s 118(3) imposes an obligation to new owners to pay historical debts it would be impermissible in the light of constitutional dispensation.

10 See *BOE Bank Ltd v City of Tshwane Metropolitan Municipality* 2005 (4) SA 336 (SCA) para 7 ("*BOE Bank*"), where Brand JA held that although these two sections its purpose it to ensure municipal debts collection, they are two separate remedies. See furthermore R Brits *Real Security Law* (1 ed 2016) 395 where the author points out that subsection 1 cannot afford municipality with security over the property without subsection (3)'s corporation.

are limited debts for the two years preceding the application of the clearance certificate.[11] In this section, these two subsections will be discussed in light of the recent CC judgment *Jordaan*. The judgment in this case further exclusively illustrates the difference underlying these two subsections.

In the abovementioned discussion, it should become clear that as much as these subsections purport to work as debt collection mechanisms for municipalities, their operation yields absolutely different results. Subsection (1) seeks to restrict the transfer of ownership while subsection (3) might yield unjustifiable outcomes should the municipality decide to exercise its limited real right. Therefore, it is noteworthy to understand that these subsections operate interrelatedly as far as time and debts are concerned.

Chapter 3 seeks to demonstrate if subsection (1) and/ or (3) of the Systems Act does allow the municipality to reclaim, from a new owner the so-called 'municipal debts'. In the SCA the constitutionality of section 118 was not the issue. Furthermore, the majority judgment in both the *Mathabathe* and *Mitchell* cases, the court ruled that upon transfer of ownership, the section 118(3) historical debts survive the transfer to the new owner. Many academics have raised criticism and different opinions about SCA's decisions in this respect.[12] In this chapter, I analyse and criticise the SCA's decisions since the decisions create "ambiguity"[13] and uncertainty as far as the interpretation of section 118(3) of the Systems Act is concerned.

The SCA's decisions are one of the reasons why this chapter focuses on determining if historical debts are transferred to the new owner. The purpose of this contribution is to further establish whether historical debts are indeed transmissible to the new owner upon transfer of ownership. Fourie J in the high court judgment in *Jordaan* held that new owners are neither co-principal debtors nor debtors to the municipality, and therefore are not

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11 See 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?" (2014) 3 *Stellenbosch Law Review* 536-548 536 ("Brits 2014").

12 H Delport "The implication of section 118(3) of the Local Government: Municipal Systems Act 32 of 2000 for purchasers of immovable property" (2015) 78 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 219-236. 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?" (2014) 3 *Stellenbosch Law Review* 536-548. R Brits "Why the security right in section 118(3) of the Local Government: Municipal Systems Act 32 of 200 is not enforceable against successors in title-A follow-up occasioned by the SCA's *Mitchell* judgment" (2017) 28 *Stellenbosch Law Review* 47-67. See also I Miltz & J Bitter "Historical debt" (2016) *Without Prejudice* 46-47. See further D Tumbo & JD van der Merwe "What about innocent mortgagees?" (2017) *Without Prejudice* 18-19.

13 See R Brits *Real Security Law* (1 ed 2016) 404. See also B Cloete "Clearance certificate: does the municipality's lien survive the transfer?" (2013) 534 *De Rebus* 46-47 46.

liable for the outstanding debts incurred by their predecessors.[14] The focus of this chapter is to expand on the reasoning of the High Court ("HC") and the CC's judgments as to why the section 118(3) charge upon property should not be allowed to survive the transfer to the new owner.

The effect of section 118(3) is much wider than the effect in section 118(1) of the Act. Therefore, to allow the SCA's interpretation might lead to massive practical issues, for instance, a constitutionality challenge and possible invalidation of this section. It is pivotal to understand why section 118(3) should be interpreted in a manner that promotes our constitutional objectives. This dissertation offers a way in which one should interpret section 118 in the light of surrounding circumstances to ensure that all parties are treated and protected equally.

After reading this chapter, it should be clear that new owners should not be allowed to carry the burden of their predecessors to pay outstanding debts unless the parties agreed to do so, for instance, if parties agreed to reduce the purchase price. To allow the SCA's interpretation, it could jeopardise our constitutional mandate and create an imbalance in legal protection.

The previous two chapters focused on illustrating the difference between subsections (1) and subsection (3) of the Systems Act and determining if a municipality has a claim against new owners. The purpose of chapter 4 is to determine the constitutionality of section 118 of the Act. As Cameron J pointed out in the CC's *Jordaan* judgment that the High Court was correct to decide on the constitutionality of subsection (3) of the Systems Act.[15] The question in this regard is whether the provisions of section 118 are constitutionally valid and, if so, to what extent.

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[14] See *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) para 103. Also see further the *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Services* 2002 (4) SA 768 (CC), where the constitutional court declared s 114 of the Customs & Excise Act 91 of 1964 ("Customs & Excise Act") unconstitutional to the extent that it allows the commissioner to attach property of the co-debtor and the property of the innocent third party, who does not owe any debt to the commissioner in terms of the Customs & Excise Act.

[15] See *Jordaan and Others v City of Tshwane Metropolitan Municipality and Others; City of Tshwane Metropolitan Municipality v New Ventures Consulting and Services (Pty) Limited and Others; Ekurhuleni Metropolitan Municipality v Livanos and Others* 2017 (6) 287 (CC) para 9.

The court in *Mkontwana v Nelson Mandela Metropolitan Municipality and Bissett v Buffalo City Municipality*,[16] found that subsection (1) of the Act is not unconstitutional. As posed by Du Plessis, the question is whether subsection (3) of the Systems Act can pass constitutional muster as subsection (1) did in the *Mkontwana* case. [17] This part of the work intends to clarify a possible constitutional challenge to subsections (1) and (3) of the Act. I further illustrate the reasoning of the courts, as to why subsection (1) is valid.

One can conclude by stating that section 118 of the Systems Act provides municipalities with at least two remedies. The first instance affords the municipality with a power to restrict transfer should the two-year debts remain unpaid. The second mechanism vests municipalities with a *sui generis* real security over the property. As mentioned above, these two subsections will be discussed in light of leading case law and commentaries in order to determine its constitutional validity, especially in light of the CC's judgment in *Jordaan*.

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

[17] See L du Plessis "Observations on the (un-) constitutionality of section 118(3) of the local government: municipal systems act 32 of 2000" (2006) 3 *Stellenbosch Law Review* 505-531 506.

Chapter 2:

The difference between section 118(1) and section 118(3) of the Systems Act

2.1 Introduction

It is important to note that the Systems Act unifies the South African local government municipal position unlike before 2001.[18] The South African legislature has modified these different statutes by introducing the Systems Act in order to curb the shortfalls of the previous local ordinances.[19] It has been said that section 118 of the Act affords the municipalities with two essential debt collection mechanisms.[20] The purpose of this chapter is to illustrate that, although subsections (1) and (3) seek to ensure effective debt collection for the municipalities, the effect of these debt collection measures is different. Subsection (2) of the Act requires that if the immovable property is transferred by the trustee of the insolvent estate, subsections (1) and (3) are subject to the Insolvency Act 24 of 1936. This dissertation however does not discuss subsections (1) and (3) in the event of a sequestration.[21] Therefore, this part of the work seeks to manifest the effect of these two subsections on the land and also the extent to which these subsections apply.

2.2 Restraint of transfer: section 118(1)

2.2.1 Origin of subsection (1)

In this section of the work I explain and trace back the origin of the restraint of transfer provision and further discuss its effect on the property of the transferor in light of the decided case law.

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[18] The Local Government: Municipal Systems Act came into effect on the 1 March 2001. Before this date, different pieces of legislations applied in various municipalities. See s 47 of the Local Government Ordinance 9 of 1912 (Transvaal Province); s 50 of the Local Ordinance 17 of 1939; s 103 of the Local Government Ordinance 15 of 1935 (the Orange Free State Province); s 119 of the Local Government Ordinance 8 of 1962 (the Orange Free State); ss 88 and 96 of the Municipal Ordinance 20 of 1974 (the Cape Province) and s 124 of the Natal Ordinance 21 of 1942.

[19] See also the preamble of the Systems Act, which provides that "whereas the system of local government under the apartheid failed dismally to meet the basic needs of the majority of South Africa […]." This means that before the Systems Act took effect the law in place could not provide sufficient mechanisms for the municipalities to perform effective debt collection.

[20] See L du Plessis "Observations on the (un-) constitutionality of section 118(3) of the local government: municipal systems act 32 of 2000" (2006) 3 *Stellenbosch Law Review* 509. See also *BOE Bank Ltd v City of Tshwane Metropolitan Municipality* 2005 (4) SA 336 (SCA) para 7.

[21] See for general discussion on the impact of insolvency R Brits *Real Security Law* (1 ed 2016) 413-414 para 6.6.4.

Subsection (1) is unprecedented in a sense that old legislations such section 50 of the Local Ordinance 17 of 1939 (the Ordinance 17 of 1939) combined the embargo power and preferent charge in one provision.[22] It could therefore be argued that subsections (1) and (3) are independent but interrelated subsections. According to the structure of section 118 as a whole, one may suggest that none of these subsections is dependent on another. It is also suggested that subsection (1) is a *sui generis* clause because it affords the municipality with a special kind of right that is only limited to debts for the preceding two years.

The restraint of transfer clause in subsection (1) derives its similarity from the old pieces of legislation.[23] However, it differs slightly from section 50(1) of the Local Ordinance 17 of 1939, which covered the debts of a longer three-year period, whereas in the current statute the period is only two years. Pragmatically speaking, subsection (1) lessens the burden for the transferor because he need not have to pay for the three-year period debt, only the debt of two-years prior to the transfer. Accordingly, it follows that the new subsection (1) may be classified as a robust debt-collection mechanism. This is because, as much as its debts are limited to a shorter period of two years, it can also have a severe consequence because it can block the transfer process for an indefinite period of time if the outstanding two-year debt is not paid or if the municipality is not willing to settle for the lesser amount. This means that transfer will be prevented while the property continues to accumulate further charges that will maybe at a later stage will render the landowner homeless should the municipality decided to obtain judgment against the immovable property.

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[22] See s 50 of the Local Ordinance 17 of 1939, and also the discussion in *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) para 23. See further L du Plessis "Observations on the (un-) constitutionality of section 118(3) of the local government: municipal systems act 32 of 2000" (2006) 3 *Stellenbosch Law Review* 510, where he illustrates that the provisions of subs (1) and (3) of the Act contain opposite numbers as compare to the defunct local government ordinances in South Africa's four pre-1994 provinces, and both provide veto and a hypothec akin respectively.

[23] The Ordinance 17 of 1939 of the Transvaal province for the first time combined the veto power to the hypothec charge. See also s 26 of the Local Ordinance 43 of 1903 and s 47 of the Local Ordinance 9 of 1912, which provided the municipality with only a veto power and not the mortgage effect over the land.

2.2.2 Case law

Section 118(1) has been constitutionally challenged in two cases.[24] This subsection seems to be clear and unambiguous because it simply requires a payment of the two-year debt preceding the application date for the clearance certificate.[25] It follows that this subsection has been described as "something not wholly in the nature of either a lien or a hypothec, but *sui generis*, whereby the council practically obtains a preference over other creditors".[26] From this wording, one could possible describe the nature of this subsection as the partially lien and/ or hypothec mechanism. Accordingly, Van der Walt and Pienaar point out that each legislation may create its own unique statutory security rights depending on the circumstances, but generally speaking the statutory security rights established in terms of the statute can either be "statutory mortgages, statutory liens, statutory fictitious pledges or preferent rights".[27] The point of view is that the statutory security rights created by subsection (1) are preferential rights, because the municipality has a first priority for the two-year debts incurred preceding the date of the application for a clearance certificate.

The court in *Rabie* case describes the restraint of transfer of property as the mechanism that interferes with the right of the owner to transfer ownership of the property. The court, in this case, articulates that the subsection (1) enables the municipality to prohibits the owner from "exercising one of the privileges of dominium 'viz the right to transfer' (and thus that it had to be preferent; and like a *jus retentionis*)".[28] However, this right in terms of section 118(1) of the Systems Act is not an absolute right because in situations such as the insolvency

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[24] *Geyser & Another v Msunduzi Municipality & Others* 2003 (3) BCLR 235 (N) ("*Geyser*"); *Mkontwana v Nelson Mandela Metropolitan Municipality and Bissett v Buffalo City Municipality & Bissett v Buffalo City Municipality; Transfer Rights Action Campaign & Others v Members of the Executive Council Local Government & Housing, Gauteng & Others* 2005 (1) SA 530 (CC); *BOE Bank Ltd v City of Tshwane Metropolitan Municipality* 2005 (4) SA 336 (SCA).

[25] See also *Geyser & Another v Msunduzi Municipality & Others* 2003 (3) BCLR 235 (N) 248, where Kondile J points out that the wording of section 118 of the Systems Act are clear and unambiguous and they should be given its "ordinary, literal and grammatical meaning".

[26] See *Cohen's Trustees v Johannesburg Municipal* 1909 TH 134 137; see also *Jordaan and Others v City of Tshwane Metropolitan Municipality and Others; City of Tshwane Metropolitan Municipality v New Ventures Consulting and Services (Pty) Limited and Others; Ekurhuleni Metropolitan Municipality v Livanos and Others* 2017 (6) 287 (CC) para 21, where Cameron J relies on the *Cohen's Trustee* case, where Innes CJ held that the embargo power affords the municipality with a special right of preference over other creditors, and that it creates a "very real and extensive preference over the proceeds of rateable property realised in insolvency".

[27] See AJ van der Walt & GJ Pienaar *Introduction to the Law of Property* (6 ed 2009) 278; where the authors also provide that statutory mortgage "is created when a real security right over movables or immovables is established without the normal requirements for such a right".

[28] See *Rabie No v Rand Townships Registrar* 1926 TPD 286 ("*Rabie*") 290.

the municipal debts are limited to debts that are not exceeding two-years immediately preceding the sequestration.[29] Notably, the restraint of transfer provision does not vest the municipality with a hypothec or charge over the land on its own without subsection (3). It is important to separate this subsection from the charge upon the property in section 118(3). The court in the *Geyser* case interpreted subsection (3) in a manner that seems to suggest that both subsections (1) and (3) are subject to the time limit in the restraint of transfer clause of which this is incorrect. Kondile J's assessment of the Systems Act is flawed for at least four reasons. Firstly, according to the court subsection (1) of the Systems Act creates an embargo power and simultaneously vests the municipality with mortgage right. This interpretation is incorrect because it implies that both subsections (1) and (3) are subject to the two-year period debt.[30]

Secondly, the court also implied that should the transferor pay the two-year debt he, is automatically discharged from other debts that are not included in the two-year debt. This is an old position whereby the embargo power and the secured preference were conjoined in a single provision. In *City of Johannesburg v Even Grand 6 CC*[31] it was held that the municipality has a discretion to accept the exact amount due for the two-year debt or the lesser amount if it is the best offer available to settle the two-year debt. This cannot be said in terms of the *Geyser* case because it would mean that the municipality will lose its right of hypothecation in subsection (3). Thirdly, it would also be impossible to alienate the property in the instances whereby the proceeds of the property are less than the municipal debts under subsection (1). Fourthly, the court's interpretation also proposes that subsection (3) depends on subsection (1), which is not true. I do not believe that the legislature intended this interpretation. It is therefore offered that the embargo power confers a special kind of right to

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29 See TJ Scott & S Scott *Wille's law of mortgage and pledge in South Africa* (3 ed 1987) 109; see also s 89 of the Insolvency Act 24 of 1936 ("Insolvency Act").

30 See L du Plessis "Observations on the (un-) constitutionality of section 118(3) of the local government: municipal systems act 32 of 2000" (2006) 3 *Stellenbosch Law Review* 514, where the author points out that in the *Geyser* case the judge "apparently conceived of the subsection (3) remedy as ancillary to the subsection (1) remedy […]."; see also *Jordaan and Others v City of Tshwane Metropolitan Municipality and Others; City of Tshwane Metropolitan Municipality v New Ventures Consulting and Services (Pty) Limited and Others; Ekurhuleni Metropolitan Municipality v Livanos and Others* 2017 (6) 287 (CC) para 24, where Cameron J explains the effect of this old position, namely that once the debts were paid the municipality's charges were lost, is no longer in operation and that the intention of the legislature was to hold the owner liable for the debts he incurred at the time he was the owner of the property and no one else.

31 2009 (2) SA 111 para 18 ("*Even Grand*").

veto the transfer of the land until a pre-condition is met, but it does not afford the right to hypothecation.

Therefore, it is perceived that subsection (1) of the Systems Act is only limited to the debts that are due for the two-year prior the application of the alienation of the land. Furthermore, it cannot be used by the municipality to recover historical debts.

2.3 The tacit statutory lien or hypothec:[32] section 118(3)

2.3.1 General context

Section 118(3) of the Systems Act affords the municipality with extensive protection. Notably, this subsection does not have a time-limit like the restraint of transfer provision. This subsection has been widely criticised due to its possible unconstitutionality.[33] The focus of the following discussion is on the nature of subsection (3) and the effect it has on the property. As stated above, subsection (3) differs from the above discussed "veto or embargo" subsection. This is because subsection (3) may in certain circumstances render the registered owner of the land homeless. Therefore, after reading this section it should be clear that subsection (3) has a great impact on the right of the new owner and possibly various mortgagees.

Notably, the SCA has interpreted this subsection as capable of holding the new owner liable for the municipal debts incurred by his or her predecessor.[34] For this reason, it is essential to construe the intention of the legislature in a manner that is in line with the Bill of Rights.[35] The tacit hypothec mechanism comes into play when there is an amount due, that amount falls outside the ambit of subsection (1) and it is subject to the prescription period.[36] In

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32 See *City of Johannesburg v Kaplan No & Another* 2006 (5) SA 10 (SCA) para 20.

33 See R Brits "Why the security right in section 118(3) of the Local Government: Municipal Systems Act 32 of 200 is not enforceable against successors in title-A follow-up occasioned by the SCA's *Mitchell* judgment" (2017) 28 *Stellenbosch Law Review* 47-67. See also I Miltz & J Bitter "Historical debt" (2016) *Without Prejudice* 46-47. See further D Tumbo & JD van der Merwe "What about innocent mortgagees?" (2017) *Without Prejudice* 18-19.

34 See the *City of Tshwane Metropolitan Municipality v Mathabathe and Another* 2013 (4) SA 319 (SCA) and *City of Tshwane Metropolitan Municipality v Mitchell* 2016 (3) SA 231 (SCA), where the SCA on two occasions held that the new owner will be liable for the debts under subsection (3) of the Systems Act.

35 See *Jordaan and Others v City of Tshwane Metropolitan Municipality and Others; City of Tshwane Metropolitan Municipality v New Ventures Consulting and Services (Pty) Limited and Others; Ekurhuleni Metropolitan Municipality v Livanos and Others* 2017 (6) 287 (CC) para 44.

36 See H Delport "The implication of section 118(3) of the Local Government: Municipal Systems Act 32 of 2000 for purchasers of immovable property" (2015) 78 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 219-236 222, where he states that subsection (3) comes into play only if the municipality wishes to obtain a judgment against the owner to recover debts due for any period that falls outside s 118(1) of the Act.

other words, the municipality cannot rely in subsection (1) if it wants to claim historical debts. This implies that subsection (3) is a "self-evidently"[37] security provision of which it intends to collect debts that are separate from subsection (1) of the Act.

2.3.2 The nature of the right conferred by subsection 118(3)

This subsection provides that "an amount due for municipal service fees, […] 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". For convenience sake, the municipal debts under subsection (3) will be referred to as "the historical debts". On the wording of this subsection, there is no time frame like the embargo clause. This suggests that the debts under this subsection are not subject to the time limit.[38] As long as the debt has not prescribed,[39] it is covered by this subsection.

Brits describes historical debts as "that part of the total that is due for the rates and services rendered prior to the two-year period".[40] Ponnan JA in *Mathabathe* relied on the *BoE Bank* judgment to illustrate that subsection (3) is a charge upon land that has an effect of a lien or tacit hypothec on the land.[41] It is clear that historical debts are those arrears that have subsisted in the land for more than a period of two years. The effect of this statutory hypothec is that the municipality has a power to call upon the burdened property and realise it in order to satisfy the historical debt. Miltz and Bitter provide that regardless of whether or not the property in question has another mortgage registered over it,[42] as soon as the property is sold the proceeds must first cover the historical debt before any other mortgagees are paid. It could be argued that the existence of the debts is accessory to the land in question. This implies that

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37 See *City of Tshwane Metropolitan Municipality v Mathabathe and Another* 2013 (4) SA 319 (SCA) para 12.

38 See further R Brits "Why the security right in section 118(3) of the Local Government: Municipal Systems Act 32 of 200 is not enforceable against successors in title-A follow-up occasioned by the SCA's *Mitchell* judgment" (2017) 28 *Stellenbosch Law Review* 47-67 50. See also *BOE Bank Ltd v City of Tshwane Metropolitan Municipality* 2005 (4) SA 336 (SCA) para 11.

39 See *Jordaan and Others v City of Tshwane Metropolitan Municipality and Others; City of Tshwane Metropolitan Municipality v New Ventures Consulting and Services (Pty) Limited and Others; Ekurhuleni Metropolitan Municipality v Livanos and Others* 2017 (6) 287 (CC) para 25, where Cameron J held that historical debts "embrace the total of accumulated municipal debts, including municipal taxes going back 30 years, and other charges for three years.

40 See 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?" (2014) 3 *Stellenbosch Law Review* 536-548 538.

41 See *City of Tshwane Metropolitan Municipality v Mathabathe and Another* 2013 (4) SA 319 (SCA) para 10, where Ponnan JA describes the nature and the effect of subsection (3) on the land.

42 See I Miltz & J Bitter "Historical debt" (2016) *Without Prejudice* 46-47 47 ("Miltz & Bitter").

the right conferred by subsection (3) on a municipality may only be extinguished upon the payment of the historical debts (or when the burdened property is no more).

2.3.3 Case law

The courts have pointed out that the purpose of section 118 as a whole is to afford municipalities with debt collection measures.[43] The courts have further described subsection (3) as a mechanism that affords the municipality a "tacit statutory hypothec".[44] Brand JA articulates that the tacit hypothec affords the municipality a preference over any mortgage bonds registered against the property.[45] One could possibly argued that the South African legislature intended to confer on the municipality an extraordinary protection that is identical to a mortgage under real security law. Furthermore, the counsel in *BoE Bank* case contended that subsection (3) should be interpreted in the light of subsection (1) and thus also be limited to the two-year period debts. The court rejected this contention and held that the legislature would have made it clear should it wish to limit the tacit hypothec provision to the two year period. The court held that "subsection (3) is on its own an independent, self-contained provision [and] it does not require to be incorporated into subsection (1) "to make it comprehensible or work".[46] Therefore, it could be summed up that subsection (3) is not subject to the time limit in subsection (1).

The vexing legal question before the court in *Summer Symphony Properties v City of Tshwane Metropolitan Municipality*,[47] and *BoE Bank* was whether the right of the municipality conferred by subsection (3) overrides any rights of other mortgagees in the proceeds of the burdened property? In responding to this question, Du Plessis J in *Summer Symphony Properties* relied on the wording of the Act that the historical debts under subsection (3) take preference above any mortgage bonds registered whether before or after the

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43 See *Jordaan and Others v City of Tshwane Metropolitan Municipality and Others; City of Tshwane Metropolitan Municipality v New Ventures Consulting and Services (Pty) Limited and Others; Ekurhuleni Metropolitan Municipality v Livanos and Others* 2017 (6) 287 (CC) para 16; *BOE Bank Ltd v City of Tshwane Metropolitan Municipality* 2005 (4) SA 336 (SCA) para 7.

44 See also *Stadsraad van Pretoria v Letabakop Farming Operations (Pty) Ltd* 1981 (4) SA 911 (T) 918; *City of Tshwane Metropolitan Municipality v Mathabathe and Another* 2013 (4) SA 319 (SCA) para 10; *City of Tshwane Metropolitan Municipality v Mitchell 2016* (3) SA 231 (SCA) para 8.

45 See *BOE Bank Ltd v City of Tshwane Metropolitan Municipality* 2005 (4) SA 336 (SCA) paras 12-14.

46 See *BOE Bank Ltd v City of Tshwane Metropolitan Municipality* 2005 (4) SA 336 (SCA) para 8; *City of Tshwane Metropolitan Municipality v Mathabathe and Another 2013* (4) SA 319 (SCA) para 10; R Brits *Real Security Law* (1 ed 2016) 540.

47 [2005] JOL 14995 (T).

commencement of the Act is irrelevant. In *BoE Bank*, Brand JA held that the Systems Act does not provide expressly or by implication that it should not be applied to mortgage bonds registered before 2001. Therefore, the court concluded that there is no basis against the retrospectivity presumption.[48] For these reasons, the court found that subsection (3) applies to all mortgage bonds registered before and after the commencement of the Systems Act. In other words, even if another bond was registered before the Act came into operation, the municipal right will still prevail over that mortgage bond. It is clear that this provision intends to protect and recover all outstanding debts (including historical debts) vested in the land. It seems like it is not so much about the owner in his personal capacity, but it is whether the land in question owes the historical debts to the municipality?[49] De Villiers J in *Stewart's Trustee & Marnitz v Unionndale Municipality*,[50] expressed that the mortgage affords the mortgagee with a charge over the property and that the mortgage affects the whole entire *dominium* of the land. One could perhaps suggest that the historical debts are accessory to the land in question. In other words, the historical debts have the capacity to limit the entitlements of the owner in the property. Therefore, it is proposed that subsection (3) vests the municipality with the tacit hypothec of which in suitable circumstances it may obtain judgment against the land so to recover its historical debts.

2.4 Conclusion

It goes without saying that the municipalities have a duty to collect public funds as envisaged in the Constitution.[51] In line with their duties, they also have the power to enact by-laws in order to ensure an effective and efficient debt collection procedure.[52] In ensuring this obligation the legislature has introduced the comprehensive Systems Act that enables the municipality to collect their debts due by its debtors.

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48 See *BOE Bank Ltd v City of Tshwane Metropolitan Municipality* 2005 (4) SA 336 (SCA) para 14; *Summer Symphony Properties* [2005] JOL 14995 (T) 6, where the court held that "while section 118(3) interfered with the second applicant's rights as they existed until March 2001, the section is not for that reason retrospective."

49 See R Brits *Real Security Law* (1 ed 2016) 542 where he reasons that on face value of this subsection "it seems like the charge is not enforceable against the owner in his personal capacity, but rather in his capacity as owner of the property […]."

50 See *Stewart's Trustee & Marnitz v Unionndale Municipality* 1899 (7) SC 110 112.

51 See s 152 & 153 of the Constitution.

52 See *City of Tshwane Metropolitan Municipality v Mathabathe and Another* 2013 (4) SA 319 (SCA) para 9; s 96 of the Systems Act empowers the local authority to enact by-laws to ensure effective debt collection.

The above-discussed court decisions and commentaries are important because first they provide that subsections (1) and (3) are two separate independent subsections. Secondly, the nature and the effect of these subsections are also not the same. The restraint of transfer clause empowers the municipality to delay the transfer of ownership until a stipulated condition is fulfilled. I have discussed that to transfer ownership, the transferor must pay the two-year municipal debts preceding the application date of the purported transfer.

The strongest debt collection mechanism of the municipality is the one conferred by subsection (3), namely the "tacit lien or statutory hypothec".[53] In terms of this subsection, the municipality enjoys the right of preference on the proceeds of the burdened immovable property by operation of law. As discussed above in *Summer Symphony Properties* and *BoE Bank* cases the courts have confirmed the superior position of the municipality on the proceeds of the property that owes the historical debts. Therefore, in the next section, it should be clear that the historical debts are by and large not capable of being transferred to the new owner in title.

[53] *BOE Bank Ltd v City of Tshwane Metropolitan Municipality* 2005 (4) SA 336 (SCA) para 10. *City of Johannesburg v Kaplan No & Another* 2006 (5) SA 10 (SCA) para 16.

Chapter 3:

The claim of the historical debts from the new successor

3.1 Introduction

In chapter 2 of this dissertation I have shown that the municipality has two debt collection measures. Accordingly, there is no question of transmissibility in subsection (1) because it simply requires the payment of two-year municipal debt. On the other hand, section 118(3) begs the question if its debts can be transferred to the new owner. The SCA's interpretation has generated a plethora of uncertainties that seem to suggest that the new property owner will be liable for the historical debts. In this chapter I clarify that the strongest limited right conferred by subsection (3) of the Act in the municipality extinguishes upon the time of sale and transfer of ownership. As it has been argued before, for the purposes of this dissertation, I also argue that the statutory hypothec of the municipality comes to an end when the property in question is sold and transferred to a new successor, regardless whether the property is sold in execution or not.[54] Therefore, the mere fact that the property in question has been sold in execution or in the private sale does not justify the likelihood of a violation of the new owner's right to property should the municipality decides to obtain the judgment against the property.

I shall therefore examine if the municipality can claim the historical debts from the new innocent owner in title.

3.2 *PJ Mitchell HC*[55]

As much as I agree with the judgment of the court that the historical debts in subsection (3) of the Act did not survive transfer to the new owner, however, my underlying reasons are different. Fourie J decided the case in terms of the common law without much effort to try to seek the true intention of the legislature. In this aspect of the work, I offer an explanation why I do not agree with the reasoning of the court in this matter.

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[54] See 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?" (2014) 3 *Stellenbosch Law Review* 536-548 536. See also H Delport "The implication of section 118(3) of the Local Government: Municipal Systems Act 32 of 2000 for purchasers of immovable property" (2015) 78 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 219-236.

[55] See *Perregine Joseph Mitchell v City of Tshwane Metropolitan Authority* (unreported, referred to as case no: 50816/14; 8 September 2014; accessed at 9 October 2014. Available online at http://www.ghostdigest.com/articles/mitchell/54673 ("*Mitchell* HC").

In *casu*, the court had to decide if the historical debts survive the transfer, and thus entitle the municipality to claim such debts from the new successor. The court put reliance on the common law position that the distinction had to be drawn between the transfer of land in the instance of private sale and the sale in execution. Fourie J continued to illustrate that in the event of voluntary sale the land passes ownership to the new owner with its burden regardless of the purchaser being aware or unaware of the burden,[56] whereas in the case of the sale in execution the new owner receives the land with a clean tittle.[57] The court relied in a number of authors[58] to conclude that the South African position was still the same today. The court made the following remarks. Firstly, that the present matter dealt with the sale in execution, secondly, that the municipality knew or ought to reasonably know about the pending transfer of ownership within its jurisdiction, and yet it did not enforce its statutory hypothec right. Conversely, it could not at a later stage purport to claim the outstanding historical debts from the new owner. For these reasons, the court concluded that the municipality was unable to claim subsection (3) debts from the new successor and thus the new owner had not become a co-debtor for the payment of these debts.[59]

It seems that the decision of the court would be different had the municipality exercised its right in terms of subsection (3). To be more precisely, it seems that had the facts of the case dealt with the transfer of property in a private sale the court would have probably ruled in favour of the municipality. One could perhaps suggest that it was unnecessary for the court to rely on the common law principles in its ruling. This is not to convey that the common law rules are superfluous in totality. However, it is because the rules govern the statutory interpretation require the court to construe the intention of the legislature from the wording of

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56 *Perregine Joseph Mitchell v City of Tshwane Metropolitan Authority* (unreported, referred to as case no: 50816/14; 8 September 2014; accessed at 9 October 2014. Available online at http://www.ghostdigest.com/articles/mitchell/54673 para 12.

57 *Perregine Joseph Mitchell v City of Tshwane Metropolitan Authority* (unreported, referred to as case no: 50816/14; 8 September 2014; accessed at 9 October 2014. Available online at http://www.ghostdigest.com/articles/mitchell/54673 para 13.

58 See RW Lee & T Honore (eds) *Family, things and succession* (2 ed 1986) 332-333 para 458; TJ Scott & S Scott *Wille's law of mortgage and pledge in South Africa* (3 ed 1987) 190; PJ Badenhorst & H Mostert (eds) *Silberberg and Schoeman's law of property* (5 ed 2006) 380; see also s 56(1)(a) of the Deeds Registries Act 47 of 1937.

59 *Perregine Joseph Mitchell v City of Tshwane Metropolitan Authority* (unreported, referred to as case no: 50816/14; 8 September 2014; accessed at 9 October 2014. Available online at http://www.ghostdigest.com/articles/mitchell/54673 para 16.

the legislation.[60] Furthermore, other authors suggest that the section 118(3) simply requires a mere purposive interpretation of the statute without importing the common law principles.[61] It is no doubt that to allow the municipality to claim the unpaid historical debts from the new successor in the event of the voluntary sale would violate the his right to property. The suggestion is that such unwanted effect or interpretation may be avoided by interpreting subsection (3) purposefully and taking cognisance of the Constitution.

3.3 SCA*: Mathabathe* and *Mitchell*

3.3.1 Context

As stated above, the purpose of this contribution is to comment and analyse the judgments of these authorities. The main focus is to determine if the SCA interpretation of the subsection (3) is what the legislature intended. At this stage, it should be clear that subsection (3) creates a tacit lien on behalf of the municipalities. This part of the work intends to clarify that the interpretation adopted by the SCA in these cases, is most likely to produce absurd outcomes.

The broad question is whether the historical debts incurred by the previous owner survive transfer to the new owner? Although the High Court in *Mitchell* judgment rejected that historical debts survive, it solely relied on the common law position. The discussion that follows illustrate the *Mathabathe* and *Mitchell* decisions, respectively.

3.3.2 Discussion

The *Mathabathe* case dealt with a private sale of property, whereas the *Mitchell* case deals with a sale in execution. In *Mathabathe* case the SCA held that the historical debts do not extinguished upon transfer of the ownership to the new successor.

In the *Mathabathe* case the municipality refused to issue a clearance certificate as subsection (1) requires unless the outstanding debts (including historical debts) were paid

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60 See C Botha *Statutory interpretation: an introduction for students* (5 ed 2012). See *Transvaal Consolidated Land & Expropriation Co Ltd v Johannesburg City Council* 1972 (1) SA 88 (W) 94G; *De Beers Industrial Diamond Division (Pty) Ltd v Ishizuka* 1980 (2) SA 191 (T); *Fundstrust 9Pty) Ltd (In liquidation) v Van Deventer* 1997 (1) SA 710 (A); *Irwin v Davies* 1937 CPD 442.

61 See I Miltz & J Bitter "Historical debt" (2016) *Without Prejudice* 46-47. H Delport "The implication of section 118(3) of the Local Government: Municipal Systems Act 32 of 2000 for purchasers of immovable property" (2015) 78 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 219-236. See also R Brits "Why the security right in section 118(3) of the Local Government: Municipal Systems Act 32 of 200 is not enforceable against successors in title-A follow-up occasioned by the SCA's *Mitchell* judgment" (2017) 28 *Stellenbosch Law Review* 47-67 51, the author provides by actual wording interpretation it is logical to concluded that s 118(3) does not survive transfer.

or the conveyancer guaranteed that at registration of transfer such debts would be paid within a reasonable time (in other words, within 48 hours after registration). The court rejected this interpretation that the conveyancer must assure that at the registration of the property the outstanding debts would be paid.[62] It pointed out that the municipality misconstrued its rights conferred by subsection (3). It held that subsection 118(3) is a security provision that affords the municipality with a lien having the effect of a tacit statutory hypothec. As such, upon transfer of the property the municipality *does not* lose its rights in terms of subsection (3).

In the *Mitchell* case the court rejected the court *a quo*'s reliance on Voet that a distinction must be drawn between a sale in execution and a private sale.[63] The court rejected the order of the High Court that the "applicant or his new successor" was not liable for the historical debts incurred by his predecessor. Baartman AJA held that the issue at the court of first instance was not about determining if the applicant or his successor was liable for historical debts.[64] The court opined that the real question before it was whether the municipality had a right to refuse to open a new account for the applicant.[65] It held that section 118(3) creates a limited real right on behalf of the municipality. It further relied on *BoE Bank Ltd* for the view that there was no reason to terminate the right of the municipality created in section 118(3) while the debts were still outstanding. In order words, the court stated that as long as the debts were still unpaid, the municipality would always have the right to recover its debts due over the property in question, regardless who the owner was.

3.4 Interpretation of subsection (3) by the CC in *Jordaan*

3.4.1 Context

Like the HC and the SCA courts, the Constitutional Court firstly described the origin, the nature of subsection (3) and the rights it confers on the municipality. It was unprotested before the court that subsection (3) confers a tacit statutory hypothec that affords the municipality a priority with regard to the proceeds of the burdened immovable property. The crucial matter at

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62 *City of Tshwane Metropolitan Municipality v Mitchell* 2016 (3) SA 231 (SCA).

63 See *City of Tshwane Metropolitan Municipality v Mitchell* 2016 (3) SA 231 (SCA) para 16, where Baartman AJA held that in deciding if historical debts survive transfer to the new owner, the nature of the sale is irrelevant.

64 Para 22.

65 Para 22.

this stage is: to what extent does this right protect the municipality? The issue before the court was the meaning and constitutional validity of subsection 118(3).

The court described the words “charge upon the property” as words originated from the common law. However, the court warned that this does not mean that the common law meaning of the charge upon the land must be imported into the constitutional era, because it may produce unwanted outcomes. To conclude that the historical debts did not survive transfer, the court explained the meaning of the word “charge” as ascribed by the SCA. The CC described the charge as the amount of money due to the municipality by its debtor, and that the municipality may execute judgment against the property in order to recover the outstanding debts.[66] For this reason it concluded that the legislature did not intend that the historical debts pass upon transfer to the new owner in title.[67]

3.4.2 Discussion

It is trite that real security rights are accompanied by the appropriate publicity. To conclude that historical debts lapsed upon transfer, the CC was strongly persuaded by the fact that subsection 118(3) of the Systems Act lacks sufficient publicity that is required in real security law. The court relied on Voet that a real security right over immovable property only survives transfer only if it has been formally established or properly constituted.[68] Furthermore, Deeds Registries Act articulates that limited real rights including mortgage bond come into existence as soon as it is registered in the Deeds Registry, and if this has not been complied with the real security rights are not created in favour of the creditor.[69] In order words, the unregistered mortgage gives rise to personal rights as oppose to real security right. Typically speaking, this implies that section 118(3) creates a personal right on behalf of the municipality, but because of the underlying policy consideration this view cannot be accepted. This is because the public bodies such as municipalities have a duty in terms of the Constitution to collect and monitor public revenue. It is therefore, instructive to provide public bodies with sufficient safeguard to ensure that public funds are collected effectively.

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66 See *Jordaan and Others v City of Tshwane Metropolitan Municipality and Others; City of Tshwane Metropolitan Municipality v New Ventures Consulting and Services (Pty) Limited and Others; Ekurhuleni Metropolitan Municipality v Livanos and Others* 2017 (6) 287 (CC) para 29.

67 Para 30.

68 See J Voet *Commentary on the pandects* (1956) 488 para 20.1.13.

69 See s 16 of the Deeds Registries Act 47 of 1937.

furthermore, it is also essential to balance the competing interests of the public and the rights of individual. This entails that where limited rights are created *ex lege* they should be construed as narrowly as possible.[70] In light of subsection (3) the lack of publicity is a strong argument that suggests that the historical debts are extinguished upon the transfer of ownership.

The court relied in *Harris v Trustee of Business* judgment as the authority to state that registration is indispensable to create real rights in land.[71] It is important to remember that the limited real right is a right over the property of another (*ius in re aliena*) to secure an obligation.[72] Therefore, for real security rights to be transmissible to everyone (including a new successor), it must be announced to the whole world by means of registration.[73] The main reason of enforcing publicity principle in the mortgage is to ensure that no creditor is deceived and no one else can afterward complain that he had no knowledge of the existing limited real right in the property.[74]

The court further contrasted subsection 118 (3) with other existing legislation, especially the Land and Agricultural Development Bank Act.[75] The court paid close attention to the similar words that these two pieces of legislation use, and also the difference that exists between them. The court remarked that both subsection 118(3) and the Land Bank Act uses

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70 See R Brits "Why the security right in section 118(3) of the Local Government: Municipal Systems Act 32 of 200 is not enforceable against successors in title-A follow-up occasioned by the SCA's *Mitchell* judgment" (2017) 28 *Stellenbosch Law Review* 47-67 53, where he suggests that the existing rights that are created by operation of law should be interpreted restrictively; *City of Tshwane v Uniqon Wonings (Pty) Ltd* 2016 (2) SA 247 (SCA) para 24. Where it was held that the legislation that limits existing rights must be interpreted restrictively. See also *National Director of Public Prosecutor v Rautenbach &* Others 2005 (1) All SA 412 (SCA) para 56; *National Director of Public Prosecutions* v *Seevnarayan* 2004 (2) All SA 491 (SCA) para 18, 22 27, where the court held that Prevention of Organised Crime Act 121 of 1996 places an extraordinary restriction on the private property of the owner, in order to surmount such an arbitrary deprivation, it must be interpreted restrictively and should be applied with care and diligence.

71 See *Jordaan and Others v City of Tshwane Metropolitan Municipality and Others; City of Tshwane Metropolitan Municipality v New Ventures Consulting and Services (Pty) Limited and Others; Ekurhuleni Metropolitan Municipality v Livanos and Others* 2017 (6) 287 (CC) para 35.

72 See R Brits *Mortgage foreclosure under the Constitution: property, housing and the National Credit Act* (2012) LLD thesis University of Stellenbosch 31. See also *Jordaan and Others v City of Tshwane Metropolitan Municipality and Others; City of Tshwane Metropolitan Municipality v New Ventures Consulting and Services (Pty) Limited and Others; Ekurhuleni Metropolitan Municipality v Livanos and Others* 2017 (6) 287 (CC) para 38.

73 See also PJ Badenhorst & H Mostert (eds) *Silberberg and Schoeman's law of property* (5 ed 2006) 80.

74 See AFS Maasdorp "The law of mortgage" (1901) 18 *South African Law Journal* 233-248 240, where the author provides that the law insists that mortgage shall be affected in so open and public manner that no one can afterwards complain that he had no notice of them. See s 63 (1) of the Deeds Registries Act 47 of 1947.

75 See the Land and Agricultural Development Bank Act 15 of 2002 ("Land Bank Act").

words “charge upon the property”.[76] The Land Bank Act was enacted after the Systems Act and expressly intends to bind the owner and its new successor because it provides publicity requirements. This Act provides that before the bank advances any payment of a loan, it must convey in writing to the Deeds Office information about the loan, including its amount and date.[77] Furthermore, in *Thienhaus No v Metje and Ziegler Ltd,*[78] the court held that where the terms of the mortgage are reduced in writing serve more than one function (including the record of the bond). Accordingly, this could not be said about subsection (3) because its limited real rights were not registered at all.

It seems that the only justification that could possibly save the criticism looming from subsection 118(3) is to ensure that the publicity principle is effectively complied with.[79] The court held that the Systems Act itself could not be interpreted as to fulfil the publicity requirements.[80] In other words, the Systems Act does not provide publicity either expressly or (by necessary) implication. Therefore, the gist of this judgment is that the historical debts created in terms of subsection 118(3) of the Systems Act does not survive transfer to the new owner in title. In terms of the common law position if the new owner receives ownership of the property by mean of private sale he would not be protected against the burden that the property carries, regardless of being aware or unaware of the hypothecation. As such, the CC also pointed out that this would be harsh consequences on the new owner and possibly to any mortgagee that has a real security right in the property, and thus it would be impermissible in light of the Constitution. Notably, the CC firstly relied on the purposive statutory interpretation to construe the true legislature’s intention. Secondly, it evaluated the impact of the lack of publicity element in subsection (3). As pointed above another strong factor that convinced the court to rule that historical debts lapse upon transfer, was that the Land Bank Act that came

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76 See *Jordaan and Others v City of Tshwane Metropolitan Municipality and Others; City of Tshwane Metropolitan Municipality v New Ventures Consulting and Services (Pty) Limited and Others; Ekurhuleni Metropolitan Municipality v Livanos and Others* 2017 (6) 287 (CC) para 41.

77 See s 31(2) of the Land Bank Act.

78 See *Thienhaus No v Metje & Zetje Ltd* 1965 (3) SA 25 (A) 31D-E.

79 See JC Sonnekus & EC Schlemmer “Covering bonds, the accessorial principle and remedies founded in equity-not self-evident bedfellows” (2015) *South African Law Journal* 340 371 353, where the authors explain that the only justification of the preferential position of the secured creditor is not only the fact that the debt exists but also that it has been published.

80 See *Jordaan and Others v City of Tshwane Metropolitan Municipality and Others; City of Tshwane Metropolitan Municipality v New Ventures Consulting and Services (Pty) Limited and Others; Ekurhuleni Metropolitan Municipality v Livanos and Others* 2017 (6) 287 (CC) para 43.

two years after the enactment of the Systems Act provided the publicity principle. In terms of this legislation every property that is burdened by the Bank passes ownership together with the Bank's real security rights, consequently such limited rights are enforceable against the new successor. As such, this could not be said about subsection (3) of the Systems Act since it lacked the publicity requirement. According to the court the lack of publicity requirement was therefore an indicative that historical debts were not transferrable to the new successor of the property.

The CC's *Jordaan* decision exclusively deals with the transmissibility and the constitutionality of subsection (3) of the Systems Act. The CC as the highest court gave a narrow interpretation to this subsection, that its debts are not transmissible to the new owner in title. Because of this restrictive interpretation subsection 118(3) is constitutionally sound because the charges upon the property extinguish upon the transfer of ownership from one the predecessor to the new successor.[81] This judgment conveys that subsection (3) historical debts extinguish upon the transfer and the new successor in title cannot be held liable for the debts incurred by his predecessor, unless there are other reasons provide otherwise such an agreement between the parties (or overriding public policy).

Notably, the constitutional validity of subsection (3) applies only to the new successors in title.[82] In other words, the court did not deal with the constitutionality of subsection (3) when it comes to the right of other mortgages who extent loans to the new owner. The decision of the CC does not also affect the tacit hypothec and the preferential right of the municipality in this subsection. The court concluded that it was unconstitutional to hold the new owner liable for his predecessor's historical debts, since it would be an arbitrary deprivation of property to claim historical debts from the new owner who was not connected to such debts.

3.5 Conclusion

In this chapter I have answered the question whether the historical debts survive transfer of the property to the new holder of the property. Based on the judgment of the highest court and

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81 See R Brits "Why the security right in section 118(3) of the Local Government: Municipal Systems Act 32 of 200 is not enforceable against successors in title-A follow-up occasioned by the SCA's *Mitchell* judgment" (2017) 28 *Stellenbosch Law Review* 52-53, where he provides an extensive discussion on the reasons for why s 118(3) should not survive transfer.

82 D Tumbo & JD van der Merwe "What about innocent mortgagees?" (2017) *Without Prejudice* 18-19 18.

its reasoning as stated above, the historical debts do not survive the transfer to the new owner. As indicated by the CC, the lack of publicity in subsection (3) is a strong argument that suggests that the historical debts extinguish upon the registration of the immovable property to the new owner. To put it differently, the court found that the legislature intended to hold the previous owner who incurred copious amount while he was still the owner, and no one else. In this regard, the plausible HC's decision in the *Jordaan* deserves appreciation because the SCA had twice avoided to address the constitutional issue, and also incorrectly concluded that the historical debts did not extinguish upon transfer of ownership. However, it is not clear if the mortgagees are also protected in this judgment because this point was not raised before the court. The courts have remarked in several cases that the municipality may exercise its right of execution[83] in order to recover its debts that fall outside the ambit of subsection (1) that are not yet prescribed. This statement of the court seems to suggest that the municipality may execute the immovable property that owes the local authority. Whether this means that even if other mortgagees have limited real right in the same property is yet to be seen.

In the last part of this contribution I discuss the constitutionality of subsections (1) and (3) of the Systems Act in light of the case law. Notably, subsection 118(1) has received considerable criticism and it was constitutionally challenged in more than one case.[84] Although the courts have found that subsection (1) is constitutionally acceptable, their decisions are not without criticism.[85] I shall therefore expand on this and further consider the constitutionality of subsection 118(3) in more detail.

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83 See *Jordaan and Others v City of Tshwane Metropolitan Municipality and Others; City of Tshwane Metropolitan Municipality v New Ventures Consulting and Services (Pty) Limited and Others; Ekurhuleni Metropolitan Municipality v Livanos and Others* 2017 (6) 287 (CC) para 30; *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); *City of Tshwane Metropolitan Municipality v Mathabathe and Another* 2013 (4) SA 319 (SCA) para 11; *City of Johannesburg v Kaplan No & Another* 2006 (5) SA 10 (SCA) para 25.

84 See *Mkontwana v Nelson Mandela Metropolitan Municipality and Bissett v Buffalo City Municipality & Bissett v Buffalo City Municipality; Transfer Rights Action Campaign & Others v Members of the Executive Council Local Government & Housing, Gauteng & Others* 2005 (1) SA 530 (CC); *Geyser & Another v Msunduzi Municipality & Others* 2003 (3) BCLR 235 (N), *City of Tshwane v Uniqon Wonings (Pty) Ltd* 2016 (2) SA 247 (SCA). In all these cases s 118(1) was constitutionally challenged on the basis that it violates the right of the owner to property in the constitution.

85 See L du Plessis "Observations on the (un-) constitutionality of section 118(3) of the local government: municipal systems act 32 of 2000" (2006) 3 *Stellenbosch Law Review* 506. See also AJ van der Walt "Retreating from the FNB arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and*

Chapter 4:

The constitutionality of section 118 of the Systems Act

4.1 Introduction

The previous chapters focused on the nature and enforceability of section 118 of the Systems Act. Once the provision of any Act has been constitutionally challenged, it is therefore, important to test that particular provision against the Constitution.[86] After engaging in an extensive interpretation exercise, the court in the *FNB* case confirmed that the relevant provision of the challenged Act was unconstitutional. Thereafter, this case has been applied in many cases as a framework to assess the alleged unconstitutional provision. This section discusses the constitutional validity of section 118 of the Systems Act. Since both the *Mkontwana* and *Jordaan* cases pertain to a constitutionality challenge of subsection (1) and (3) respectively, I shall evaluate and discuss these two judgments. For the purposes of this research I do not investigate the nature of the property in the above cases.

4.2 The constitutional challenge of section 118(1) in light of the *Mkontwana* CC

The purpose of this portion of the research is to explain the constitutionality challenge of section 118(1) of the Systems Act as discussed by the CC in the *Mkontwana* case. It was necessary for the CC to decide on the constitutionality of this subsection because of the uncertainty created by the different High Courts in *Geyser* and *Mkontwana*.[87] Accordingly, the CC judgment in *Mkontwana* clarifies this uncertainty surrounding the interpretation of section 118(1). In this discourse I examine the *FNB* methodology as applied by the court in the *Mkontwana* case. It is note worth to recall that both cases deal with more or less the same

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Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae) (CC)" (2005) 122 *South African Law Journal* 75-89 79.

86 S 172(1)(a) of the Constitution empowers a competent court to invalidate any law or conduct that is inconsistent with the Constitution. See also L du Plessis *Re-interpretation of statute (*2002) 83-85 ("Du Plessis 2002").

87 See the judgment of the High Court in *Nokuthula Phyllis Mkontwana v Nelson Mandela Municipality & Others* (SECLD) Case No 1238/02 & *Peter William Bissett and Others v Buffalo City Municipality &* Others (SECLD) as yet unreported, referred to as case no 903/2002, 13 September 2003; available online at http://www.ghostdigest.com/articles/mkontwana-v-nelson-mandela-municipality/51888. ("*Mkontwana* HC"), where the High Court declared subsection (1) invalid to the because it permits arbitrary deprivation of property that is against the Constitution. See also *Geyser & Another v Msunduzi Municipality & Others* 2003 (3) BCLR 235 (N) where the court dismissed the constitutional challenges and confirmed the constitutional validity of subsection (1).

legal question whether the innocent party should be held liable for the debts incurred by someone (such as tenant)? However, the focus in this part is not to examine the existing differences between these two judgments. It is rather to explain the constitutional validity of subsection (1) and the reasons of the court applied thereto. Neither do I intend to criticise or challenge the correctness of the *Mkontwana* case. But I propose to discuss and explain the reasons of the court for upholding the constitutional validity of subsection (1). The current legal position with regard to constitutional validity of subsection (1) is that it is valid, and the debts may be recovered from the registered owner of the land should the similar facts arise.

Van der Walt questioned if the *Mkontwana* case should be seen as a confirmation of the arbitrariness test as established in the *FNB* or it deviates or it secludes from the *FNB* methodology?[88] It could be argued that the *Mkontwana* court is distinguishable from the *FNB* case. The fundamental difference pointed out by the court relates to the nature of the connection between the property and the debts in question. The Customs and Excise Act explicitly empowers the Commissioner to attach the property of the third party, whereas in terms of subsection (1) the municipality may attach and sell the property in execution.[89] The facts of the *Mkontwana* are bit similar to the *FNB*. On the facts of both cases, owners of the property did not personally incur the debts purported to be recovered by the creditors. However, because of the strong relationship between the owner, property and the consumption charges, the *Mkontwana* court concluded that the owner is liable for the debts incurred by non-owners. Furthermore, the court held that it was not unreasonable to expect the owner of the property to make payment for consumption charges consumed in his property. In *Geyser* case, Kondile J also pointed out that in limited number of cases where the owner of the property is not the consumer of the municipal services, the owner or the lessor cannot be said to be a third party who was not connected to the municipal debts.[90] What may be depicted from this

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88 See AJ van der Walt "Retreating from the FNB arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae) (CC)"* (2005) 122 *South African Law Journal* 79.

89 See 2.2.1 & 2.2.2 regarding the nature and the extent of subsection (1) application. It is important to note that the municipality may not rely on this subsection alone to claim that it (the municipality) has a security over the property in question. However, as pointed by H Jackson "Not much comfort for conveyancers" (2013) *Without Prejudice* 45-46 45, provides that "s 118(1) gives a municipality the capacity to block the transfer of ownership of the property until debts have been paid in certain circumstances."

90 See *Geyser & Another v Msunduzi Municipality & Others* 2003 (3) BCLR 235 (N) 250.

dictum, is that due to the close relationship between an owner, consumption charges and the property, the owner cannot be said to be an innocent third party as in the case of *FNB* case. It seems that what ties the owner of the property to the debts incurred by non-owners in the property is the fact that he is a registered owner of the property. Consequently, the court concluded that the owner of the property is linked to the debts incurred with respect to his property. Whether such debts were incurred by third party is irrelevant.

In the next section I consider the constitutionality of subsection (3) in light of the *Jordaan* court.

4.3 A constitutionally challenge of section 118(3): the *Jordaan* case

In the recent judgment of the CC in the *Jordaan* case, section 118(3) of the Systems Act, the so-called "statutory lien or hypothec", was challenged with success. In the above it is provided that subsection (3) of the Act provides the municipality with a real security rights over the proceeds of the property for all municipal debts incurred. It is accepted that debts under this subsection are total amounts of all municipal debts that the property has ever incurred. These accumulated municipal debts are known as the "historical debts". It has also been said in the above discussion that historical debts afford the municipality with a right to obtain a judgment against the property in question and sell it in execution so to recover its outstanding amount of all debts that the property owes.

The CC had to confirm or decline the SCA interpretation that historical debts survive a transfer to the new owner in the property. The confirmation of the SCA interpretation would mean that a new owner who purchases land that has incurred historical debts will be liable to the local authority for such historical debts, regardless of his relation with the debts. The appellant argued before the court that SCA's interpretation of section 118(3) was likely to violate the right of the new owner. One of the contentions advanced by the municipalities was the fact that in terms of the Constitution they have a constitutional duty to ensure effective and efficient municipal services.[91] The CC heavily criticised the municipalities' interpretation that historical debts survive transfer. The court remarked that such interpretation would require more justification than just a duty imposed by the Constitution on the municipality. It reasoned

[91] See *Jordaan and Others v City of Tshwane Metropolitan Municipality and Others; City of Tshwane Metropolitan Municipality v New Ventures Consulting and Services (Pty) Limited and Others; Ekurhuleni Metropolitan Municipality v Livanos and Others* 2017 (6) 287 (CC) para 46.

first that municipalities have ample powers to enforce and recover debts incurred by the owner of the property before the transfer took place.[92] Secondly, the municipality was aware of the purported transfer and most probably has the information of the pending transfer of the land under its jurisdiction. Therefore, the municipality should have used these opportunities to ensure that it recovered all debts due by the current owner, not to wait and act in an arbitrary stage.[93] Unlike the *Mkontwana* case, the court in *Jordaan* seems to recognise that a municipality has powerful debt-collection armoury at its disposal, and what is needed was the municipality to act timeously and enforce it. According to the court since the municipality had failed to do so, it had to provide more persuasive justifications for their interpretation of subsection (3).[94]

The municipality further argued that the historical debts took effect before the transfer was affected, and therefore the new owner acquired dominium that was burdened or already diminished by the historical debts.[95] The court disagreed with this contention and held that this did not connote that the municipality must act at a later stage against the new owner. The court alluded that enforcing historical debts against the previous owner would be justifiable because he was responsible for those debts incurred. But to hold a new owner liable for the historical debts would objectively speaking violate his right to property.[96] Cameron J noted that the SCA's interpretation would not only prejudice the new owner's right but also the mortgagee's real right of security who advanced loans to facilitate and obtain the land.[97]

The municipality also relied on the *Mkontwana* judgment to try to persuade the court that its interpretation was justified by the fact that the consumption charges improved the value and enjoyment of the property.[98] The court rejected this view on the basis that the owner has already paid the purchase price of the land and surely the seller has included such value in the purchase price. According to the court this would be an unconstitutional deprivation since it would require the new owner to pay a double price for only one property. One may suggest

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92 Para 56.
93 Para 56.
94 Para 57.
95 Para 62.
96 Para 64. The court held that the position is different when the historical debts are enforced against the new owner in title who has no connection with the debts whatsoever.
97 Para 61. See also the argument advanced by BASA that the new mortgagees of an innocent owner will also suffer if the CC permits historical debts to survive transfer to the successor in title.
98 Para 67.

that the CC's interpretation of section 118(3) supports the above-mentioned view that, statutory real security rights should be interpreted as restrictively as possible.

Therefore, the court concluded that section 118(3)-historical debts could not survive transfer to the new innocent successor.[99] The court held that the present case resembles the *FNB* case, especially in terms of the insufficient connection between the historical debts incurred, and the owner of the property. Conversely, it can further be distinguished from the *Mkontwana* case. For the reasons, the court found that subsection (3) was constitutionally invalid to the extent that it was unjustifiable deprive the new owners of their right to property. It was unnecessary for the court to continue to test section 118(3) against the general limitation provision. The *Jordaan* approach seems to accord with the *FNB* methodology in a sense that section 36 comes into play after the alleged provision has been tested against section 25(1). The *Jordaan* judgment seems interesting because it completely deviates from the *Mkontwana* and *Geyser* approach. In these two judgments the courts put emphasis on the legitimate government purpose.[100] In the present judgment the court seems to have considered both the competing interests of the new owner and the municipality and the purpose of the deprivation. In *Mkontwana* and *Geyser* cases the court seems to put much emphasis on the extent of deprivation that it was temporary, for this reason the deprivation was justifiable. It is therefore suggested that where the legislation intends to burden unrelated person, it is likely that it may be declared invalid or the court could order a compensation as it did in the *Arun Property Development (Pty) Ltd v Cape Town City*.[101]

In line with the CC's approach in *Arun* decision it could further be argued that section 118(3) seems to cast the net too far. This is because it has been noted by the court in *FNB* and *Arun* that where the regulation imposes a heavy burden on the private individual, it

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99 Para 68.

100 See also AJ Van der Walt *Constitutional property law* (1 ed 2005) 158, where the author criticises that it seems like the court in the *Mkontwana* put much emphasis on section as a debt-collection mechanism in the public utilities and the court easily accepted and give too much value to such government purpose.

101 2015 (2) SA 584 (CC) ("*Arun* CC"). In this case the owner of the land was a developer (Arun Property Development). In terms of s 28 of the Land Use and Planning Ordinance 15 of 1985 (LUPO) vests ownership of the private land owned to the local authority. In terms of LUPO the owner who voluntarily give up his land to the local authority for public use was not subject to compensation. After donating certain piece of land, Arun approaches the court to order the local authority to pay compensation for the surplus land that the municipality has received. After a prolonging discussion the CC found that the local authority has received extra piece of land that is needed for public use and therefore it ordered a compensation in terms of s 26 of the Expropriation Act and the Constitution.

should be weighed against all the circumstances and it must be justifiable. The suggestion is that where the regulation imposes unreasonable burden on the individual such the effect of section 118(3) on the new owner, the court should invalidate the impugned provision or order a just and equitable compensation for the loss suffered by the individual.[102] The powers of the court to order a just and equitable compensation is evidence in *Arun* case, where the court ordered the compensation for the loss of the surplus land to the local authority. It could therefore be argued that the court in *Jordaan* could have ordered such a compensation if the court decided not to invalidate subsection (3).

According to the court if the legislation deprives the private owner of all his entitlements, there was a presumption that such legislation must comply with the compensation requirement.[103] This implies that the court may choice to save the impugned provisions by ordering the compensation,[104] or invalidating the unconstitutional provision for its excessive effect. It is therefore conceded that if the provision in dispute is burdensome one can possible argue that it constitutes arbitrary deprivation and/or it does not comply with expropriation requirements.

To sum up one can possible suggests that the *Jordaan* decision is important for threefold reasons. Firstly, it gives clarity that the historical debts do not survive transfer to the new successor of the immovable property. Logically, the new successor cannot be a co-debtor to the local authority for the historical debts. Secondly, it further confirms the principle that the municipality must exercise its limited real right before the transfer takes effect. It could be inferred from this statement that if the municipality fails to enforce its right timeously it would be impossible to recover its historical debts by executing judgment against the property because the property would have been transferred to the new owner. In this instance the municipality is more likely to have a personal claim against the previous owner. Thirdly, in line

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[102] See H Mostert "The distinction between deprivation and expropriations and the future of the 'doctrine' of constructive expropriation in South Africa" (2003) 19 *South African Journal on Human Rights* 567 569. See also BV Slade "Compensation for what? An analysis of the outcome in *Arun Development (Pty) Ltd Cape Town City*" (2016) 19 *Potchefstroom Electronic Law Journal* 2-25 9. See for general discussion on excessive regulatory AJ van der Walt "Compensation for excessive or unfair regulation: a comparative overview of constitutional practice relating to regulatory takings" (1999) 14 *South African Public Law* 277.

[103] See *Arun Property Development (Pty) Ltd v Cape Town City* 2015 (2) SA 584 (CC) para 33. See also minority judgment in *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2008 (6) SA 12 (SCA) para 41; *Belinco (Pty) Ltd v Bellville Municipality & Another* 1970 (4) SA 589 (A) 597C.

[104] See *Arun Property Development (Pty) Ltd v Cape Town City* 2015 (2) SA 584 (CC) para 41. The court ordered compensation in order to save the provision of s 28 of LUPO.

with the *FNB* case, the legislation purports to deprive one his property shall do so by providing a clear content, nature and the extent of such deprivation and the good cause must justify this deprivation.

4.4 Conclusion

The question that this section addresses is whether section 118 of the Systems Act is valid? I have first discussed that subsection (1) is constitutionally valid in terms of the *Geyser* and the *Mkontwana* cases. As far as the CC's judgment is concerned about the restraint of transfer provision, it is still valid and enforceable against the person who purports to transfer the land. According to the *Mkontwana* court, whether or not the registered owner has incurred the debts in his property is irrelevant. This means that even if the property was occupied by unlawful occupiers, or anyone for that matter with or without the permission of the registered owner, it makes no different. According to the court the owner has a duty to ensure that municipal debts are paid every month. If the landowner does not occupy the land, then he must ensure that occupants pay monthly rates accordingly.

On the other hand, subsection (3) of the Act was found to be arbitrary and thus unconstitutional to the extent that it purports to recover the historical debts from the new successor who was not the principal debtor. The new person in title has no relation with the debt incurred by his predecessor. This suggests that the municipality should try to enforce its right before the transfer is affected. It also implies that should the local authority fails to do that it cannot hold the new owner liable for the outstanding debts. However, it is most likely that it could possibly have a personal claim against the predecessor, but nevertheless the new owner receives a title free of any form of burden from his predecessor.

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