CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 283/16, 293/16 and 294/16

CCT 283/16

In the matter between:

CHANTELLE JORDAAN	First Applicant
NEW VENTURES CONSULTING & SERVICES (PTY) LIMITED	Second Applicant
CLASS OF AFFECTED MUNICIPAL SERVICE CONSUMERS	Third Applicant
F M KEKANA	Fourth Applicant
M R MALEBOLOA	Fifth Applicant
S R MALEBOLOA	Sixth Applicant
M MAMOTSAU	Seventh Applicant
BILLIE ANN LIVANOS	Eighth Applicant
LEAH HENDERSON	Ninth Applicant
CLIFTON DUNESINVESTMENTS 317 (PTY) LIMITED	Tenth Applicant
GEMMA DIAMONDS (PTY) LIMITED	Eleventh Applicant
OAK PLANT RENTALS (PTY) LIMITED	Twelfth Applicant
STEPPING THE WORLD (PTY) LIMITED	Thirteenth Applicant

and

CITY OF TSHWANEMETROPOLITAN MUNICIPALITY	First Respondent

EKURHULENI METROPOLITAN MUNICIPALITY Second Respondent

MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS Third Respondent

CCT 293/16

In the matter between:

CITY OF TSHWANE METROPOLITAN MUNICIPALITY Applicant

and

NEW VENTURES CONSULTING & SERVICES (PTY) LIMITED First Respondent

CLASS OF AFFECTED MUNICIPAL SERVICE CONSUMERS Second Respondent

F M KEKANA Third Respondent

M R MALEBOLOA Fourth Respondent

S R MALEBOLOA Fifth Respondent

M MAMOTSAU Sixth Respondent

CCT 294/16

In the matter between:

EKURHULENI METROPOLITAN MUNICIPALITY Applicant

and

BILLIE ANN LIVANOS First Respondent

LEAH HENDERSON Second Respondent

NEW VENTURES CONSULTING & SERVICES (PTY) LIMITED Third Respondent

CLIFTON DUNES INVESTMENTS 317 (PTY) LIMITED	Fourth Respondent
GEMMA DIAMONDS (PTY) LIMITED	Fifth Respondent
OAK PLANT RENTALS (PTY) LIMITED	Sixth Respondent
STEPPING THE WORLD (PTY) LIMITED	Seventh Respondent
and	
TUHF LIMITED	First Amicus Curiae
BANKING ASSOCIATION SOUTH AFRICA	Second Amicus Curiae
eTHEKWINI METROPOLITAN MUNICIPALITY	Third Amicus Curiae
JOHANNESBURG ATTORNEYS ASSOCIATION	Fourth Amicus Curiae

Neutral citation:	*Jordaan and Others v City of Tshwane Metropolitan Municipality and Others* [2017] ZACC 31
Coram:	Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J
Judgments:	Cameron J (unanimous)
Heard on:	23 May 2017
Decided on:	29 August 2017
Summary:	Local Government: Municipal Systems Act — meaning of section 118(3) — charge upon the property — common law meaning — section 25 of the Constitution — right not to be deprived of property arbitrarily Limited real rights — publicity requirement — charge does not survive transfer — section 118(3) is constitutional

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ORDER

Application for confirmation of an order of the High Court of South Africa, Gauteng Division, Pretoria and appeals against that order.

The following order is made:

1. The appeals succeed.
2. The order of invalidity is not confirmed.
3. It is declared that, upon transfer of a property, a new owner is not liable for debts arising before transfer from the charge upon the property under section 118(3) of the Local Government: Municipal Systems Act 32 of 2000.
4. The appellants in the appeals and the Minister are to pay the applicants' costs, including the costs of two counsel.

JUDGMENT

CAMERON J (Mogoeng CJ, Nkabinde ADCJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J concurring)

Introduction

[1] At issue is the meaning and constitutional validity of section 118(3) of the Local Government: Municipal Systems Act (Act).[1] This provides that "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] The High Court of South Africa, Gauteng Division, Pretoria (High Court)

[1] 32 of 2000.

[2] In full, section 118 of the Act provides:

"Restraint on transfer of property

(Fourie J) declared section 118(3) constitutionally invalid.[3] It did so "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".[4] Pursuant to this, the High Court also granted declaratory relief against the City of Tshwane Metropolitan Municipality (Tshwane) and Ekurhuleni Metropolitan Municipality (Ekurhuleni) at the instance of individual and corporate ratepayers. All

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(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.

(1A) A prescribed certificate issued by a municipality in terms of subsection (1) is valid for a period of 60 days from the date it has been issued.

(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.

(4) Subsection (1) does not apply to—

(a) a transfer from the national government, a provincial government or a municipality of a residential property which was financed with funds or loans made available by the national government, a provincial government or a municipality; and

(b) the vesting of ownership as a result of a conversion of land tenure rights into ownership in terms of Chapter 1 of the Upgrading of Land Tenure Rights Act, 1991 (Act 112 of 1991):

Provided that nothing in this subsection precludes the subsequent collection by a municipality of any amounts owed to it in respect of such a property at the time of such transfer or conversion.

(5) Subsection (3) does not apply to any amount referred to in that subsection that became due before a transfer of a residential property or a conversion of land tenure rights into ownership contemplated in subsection (4) took place."

[3] *Jordaan v City of Tshwane Metropolitan Municipality; New Ventures Consulting & Services (Pty) Ltd v City of Tshwane Metropolitan Municipality; Livanos v Ekurhuleni Metropolitan Municipality; Oak Plant Rentals (Pty) Ltd v Ekurhuleni Metropolitan Municipality* 2017 (2) SA 295 (GP) (High Court judgment).

[4] The relevant part of the High Court order reads:

> "The provisions of section 118(3) of the [Act] 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."

were new property owners who complained that they were being denied services because the municipalities invoked section 118(3).

[2] The central issue is whether the provision permits a municipality to reclaim, from a new owner of property, debts a predecessor in title incurred. If it does, its constitutional validity must be determined. If it does not, then the declaration of invalidity was unnecessary. But to determine the provision's true meaning, its language and history, as well as its setting in the common law and under the Constitution, must be scrutinised.

Background and ripeness

[3] The matter comes to this Court as a confirmation application under section 167(5) of the Constitution[5] plus two appeals in which Tshwane and Ekurhuleni appeal against the High Court's order of constitutional invalidity.[6] This Court consolidated the matters. eThekwini Metropolitan Municipality (eThekwini), which was admitted as an *amicus curiae* (friend of the court),[7] made common cause with the other two municipalities. All contended that the provision is constitutionally sound and makes a new owner responsible for historical debts.[8] So did the Minister of Cooperative Governance and Traditional Affairs (Minister). The Minister, though not formally an appellant, was perforce joined as a party in one of the matters, because of the statutory invalidity claimed, and participated in the proceedings in both Courts.

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[5] Section 167(5) of the Constitution provides:

> "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar stature, before that order has any force."

Section 172(2)(a) of the Constitution is to the same effect.

[6] Section 172(2)(d) of the Constitution provides:

> "Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."

[7] Third amicus curiae.

[8] eThekwini originally sought either admission as an *amicus curiae* or joinder as a party. Its admission as an *amicus curiae* enabled it to provide the Court with full written and oral submissions on the issues.

[4] The applicants are individuals and corporations owning, or acting on behalf of owners of, property in Tshwane or Ekurhuleni. Each of the owners is a relatively recent transferee. Each complained that the municipality in question suspended municipal services or refused to conclude a consumer services agreement for municipal services until the historical debts relating to the property had been cleared.[9]

[5] The applicants' complaints gave rise to factual disputes.[10] The principal dispute was the municipalities' claim that they had not invoked section 118(3) when they declined to conclude service agreements, but had relied on their by-laws or debt collection policies.[11] It was also contended that the applicants could take the service refusals on review under the Promotion of Administrative Justice Act.[12] For both these reasons, it was argued that the constitutional challenge was premature. The High Court decided that the disputes precluded neither the determination of the constitutional challenge nor the grant of declaratory relief.[13]

[6] Before us, Ekurhuleni persisted that this Court should refuse to countenance the constitutional question because the parties' issues could be determined without

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[9] The High Court heard the matters together, but no consolidation order was granted. There were five applications before the High Court – the first two against Tshwane and the remaining three against Ekurhuleni. Similar relief was sought in four of the applications (except that in the fourth application, additional relief was sought, namely a declaratory order relating to Ekurhuleni's alleged obligation to render municipal services and to open a services account under circumstances where there is a debt outstanding in respect of the property concerned beyond the two-year period provided for in section 118(1) of the Act).

[10] High Court judgment above n 3 at paras 5-6, 14-6 and 82.

[11] Section 96 of the Act is headed "Debt collection responsibility of municipalities". It provides:

> "A municipality—
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> (a) must collect all money that is due and payable to it, subject to this Act and any other applicable legislation; and
>
> (b) for this purpose, must adopt, maintain and implement a credit control and debt collection policy which is consistent with its rates and tariff policies and complies with the provisions of this Act."

Tshwane's Credit and Debit Control Policy of 30 August 2012 provides that clearance certificates in terms of section 118(1) of the Act may be issued only upon security being provided for full payment of outstanding amounts – including historical debts.

[12] 3 of 2000.

[13] High Court judgment above n 3 at paras 14-6.

reaching it. It invoked *Mhlungu*[14] where Kentridge AJ laid down, as a general principle, that where it is possible to decide any case without reaching a constitutional issue, that course should be followed.[15] *Mhlungu* should be set in its proper perspective. It was decided under the interim Constitution, where this Court had solely constitutional jurisdiction,[16] and the Appellate Division of the Supreme Court, which became the Supreme Court of Appeal, had solely non-constitutional jurisdiction.[17] That bifurcation of appellate power, and the cautions and courtesies it necessitated, has long been expunged from our constitutional landscape. From 4 February 1997, the Constitution conferred constitutional jurisdiction on the Supreme Court of Appeal,[18] subject to appeal to this Court, and at the same time empowered this Court to develop the common law.[19]

[7] The consequence of this was both logical and inevitable. This Court was in due time given jurisdiction to decide non-constitutional matters that raise arguable points of law of general public importance which it ought to consider.[20] It thus became the apex Court on all matters.

[8] The result is that under the final Constitution the approach *Mhlungu* espoused has long since been abandoned in favour of its opposite, namely that constitutional

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[14] *S v Mhlungu* [1995] ZACC 4; 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) (*Mhlungu*) at para 59, approved in *Zantsi v Council of State, Ciskei* [1995] ZACC 9; 1995 (4) SA 615 (CC); 1995 (10) BCLR 1424 (CC) at para 3.

[15] *Mhlungu* id was also cited to the High Court, which considered itself bound by its approach and that it was "settled jurisprudence that a court should not ordinarily decide a constitutional issue unless it is necessary to do so" (High Court judgment above n 3 at para 15).

[16] Section 98 of the interim Constitution.

[17] Section 101(5) of the interim Constitution: "The Appellate Division shall have no jurisdiction to adjudicate any matter within the jurisdiction of the Constitutional Court".

[18] Section 168 of the Constitution.

[19] Section 173 of the Constitution provides:

> "The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[20] The Constitutional Court was "the highest court on all constitutional matters" before the enactment of the Constitution Seventeenth Amendment Act 72 of 2012 (Amendment Act), which gave this Court final appellate jurisdiction in all cases. See section 3(a) of the Amendment Act, which came into effect on 23 August 2013.

approaches to rights determination must generally enjoy primacy.[21] Far from avoiding constitutional issues whenever possible, this Court has emphasised that virtually all issues – including the interpretation and application of legislation and the development and application of the common law – are, ultimately, constitutional. This affects how to approach them from the outset.

[9] The constitutional dispute was large and pressing. The High Court's decision to decide it despite the factual and other considerations the municipalities sought to strew in its path was clearly right. The matter was ripe for decision there, and it is ripe for decision here.

[10] There are further factors that show this. The Supreme Court of Appeal has twice pronounced on the meaning of section 118(3).[22] In both cases, the constitutional validity of the provision was not in issue, and the Court expressed its view without considering the constitutional context.[23]

[11] The municipalities argued that they relied on their by-laws and debt collection policies to justify their refusal to open consumer agreements until historical debt was settled. Despite these disclaimers of Tshwane and Ekurhuleni, it is evident that

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[21] See the minority judgment in *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31; 2016 (1) SA 132 (CC); 2015 (12) BCLR 1407 (CC) at para 51, with which the majority judgment expressed no disagreement.

[22] *City of Tshwane Metropolitan Municipality v Mathabathe* [2013] ZASCA 60; 2013 (4) SA 319 (SCA) (*Mathabathe*) at para 12, where Ponnan JA, with Majiedt JA, Erasmus AJA, Swain AJA and Zondi AJA concurring, held that Tshwane's contention, in those proceedings, that it lost its rights under section 118(3) upon transfer to a new owner was "plainly wrong"; and the majority judgment in *Tshwane City v Mitchell* [2016] ZASCA 1; 2016 (3) SA 231 (SCA) at para 23, where Baartman AJA, with Mpati P, Bosielo JA and Saldulker JA concurring, reversed a first-instance declaration that a successor in title is not liable under section 118(3) for the historical debt relating to the property, instead holding that the sale in execution and subsequent transfer of the property into the name of the successor in title did not extinguish the hypothec created by section 118(3) in favour of the municipality, with the consequence that nothing prevents the municipality from perfecting its security over the property to ensure payment of the historical debt. Zondi JA, in dissent, held that the real right of security under section 118(3) does not survive transfer to a new owner after a sale in execution (para 29). Brits *Real Security Law* (Juta & Co Ltd, Cape Town 2016) at 404-5 suggests that the Supreme Court of Appeal's statement in *Mathabathe* is "ambiguous" and "not clear at all", in that the Court may have meant to say merely that the municipality's personal claim against the original property owner is not lost upon transfer; but this seems hard to warrant.

[23] See du Plessis "Observations on the (un-)constitutionality of section 118(3) of the Local Government: Municipal Systems Act 32 of 2000" (2006) 17 *Stell LR* 505 at 517.

municipalities do invoke section 118(3) to refuse new owners municipal services if historical debts are unpaid. Furthermore, the High Court rejected the municipalities' contention that their by-laws and rates collection policies permitted this conduct. The Court's conclusion that, properly interpreted, these by-laws and policies do not, on their own, allow that, is unassailable. Besides, the municipalities' protestation that their by-laws and policies, rather than section 118(3), justify their stance is tumble-down logic, since a municipality's credit control and debt collection policy must in any event comply with the provisions of the Act.[24] Disjunction would be artificial.

[12] For all these reasons, the interests of justice require this Court to consider the substance of the challenge to section 118(3), and not to be diverted from it on procedural or other grounds.

[13] Apart from eThekwini, two non-governmental organisations were admitted as *amici curiae*. TUHF Limited is a social housing organisation.[25] The Banking Association South Africa (BASA)[26] is an association incorporated under the Companies Act.[27] It has 32 member banks, including the largest in South Africa. Both TUHF and BASA associated themselves with the applicants in challenging the meaning the municipalities ascribed to section 118(3). They contended for either confirmation of the order of invalidity or an interpretation that assuaged their constitutional objections to it. TUHF advanced arguments about the distinctive nature of the hypothec (or right of security over property) that section 118(3) confers on a local authority. BASA advanced an additional ground of unconstitutionality. This was that section 118(3) permitted arbitrary deprivation of not just the new owner's

[24] Section 96 is set out in full above n 11.

[25] First amicus curiae.

[26] Second amicus curiae.

[27] 71 of 2008.

property rights, but of real security rights the new owner confers on any mortgagee who extends a fresh loan on the security of the property post-transfer.[28]

[14] On 25 May 2017, after the oral hearing, the Johannesburg Attorneys Association (JAA) successfully applied to the Court for admission as an *amicus curiae*.[29] The JAA sought to respond only to the submission by eThekwini that there is, or ought to be, a legal duty on conveyancers to disclose historical debts to property purchasers or transferees. The JAA focused on a conveyancer's duties and ethical position should this Court hold that the section 118(3) right survives transfer. In view of the conclusion this judgment reaches, it is not necessary to consider these submissions.[30]

What does section 118(3) mean?

[15] Before deciding whether section 118(3) unjustifiably limits constitutional rights, we must determine what it means. And to find out we have to journey into the origins of the phrase "charge upon the property" in South African statute law, for that history casts light on the provision's meaning.

[28] The parties' arguments, including BASA's, were confined solely to the question whether the charge created in section 118(3) survives transfer to a new owner. The constitutional validity of the provision that, pre-transfer, an amount due to the municipality "enjoys preference over any mortgage bond registered against the property" was not debated. *City of Johannesburg v Kaplan N.O.* [2006] ZASCA 39; 2006 (5) SA 10 (SCA) (*Kaplan*) at para 26 explained this as meaning that, if execution on the property is levied, municipal debts are first paid in full: "Only after satisfaction of such debts will the remainder, if any, be available for payment of the debt secured by a mortgage bond over the property." The constitutionality of the preference over mortgagees is discussed by du Plessis above n 23 at 523.

[29] The JAA explained that it had learned of submissions affecting its members' interests only after oral argument. On 26 May 2017, the Court directed the JAA to file its application. On 1 June 2017, the JAA did so. In the absence of opposition it was on 5 June 2017 admitted as fourth *amicus curiae* and directed to file written submissions, to which the parties were invited to respond. On 9 June 2017, the JAA filed written submissions.

[30] The JAA submitted that the conveyancer may be appointed by the buyer or the seller, but is the agent of the seller in transferring the property. The conveyancer's mandate is limited: the conveyancer does not resolve disputes, nor is the conveyancer the seller's agent in relation to disclosure of representations made by the seller. A conveyancer can apply for rates clearance figures on the seller's behalf, but cannot know whether those figures are correct. Further, some municipalities do not include details of the historical debt on their rates clearance figures since the municipality is not required to render "full and final" figures at the time of clearance. The conveyancer cannot reveal the seller's historical debt to the buyer because of the conveyancer's duty of confidentiality to the seller – but not revealing this may be detrimental to the purchaser, and the conveyancer has a duty to the buyer and seller to act in both of their best interests. This, it said, creates a conflict for the conveyancer.

[16] The historical antecedents of section 118(3) show that two distinct mechanisms were imported into statute law to assist and protect municipalities in collecting debts due to them. The first was an embargo. This put the intending transferor of property with unpaid municipal debts in a squeeze. If she wanted to transfer, she had to pay up first. This was a municipality-friendly debt-collection device. It secured payment of municipal debts on pain of sterilising saleable property in the defaulting debtor's hands.

[17] Later enactments added a second municipality-friendly mechanism. This was a preferent claim, which conferred a priority in the debt-collecting process. It put municipalities ahead of other rights-holders in the queue when execution was levied on ratepayers' immovable property. Importantly, linked to this preference was the municipality's right to expeditiously execute against the immovable property in settlement of historical debts.

[18] The third mechanism is that for which the municipalities now contend. It is transmissibility. Does the municipality's claim to execute upon the ratepayer's property survive beyond transfer to a new owner? The preceding statutory history shows that this never arose: no attempt was made to confer a right of execution on municipalities that survived transfer to a new owner. It was solely and only the existing owner, barred from passing transfer until municipal debts were squared, and over whose mortgagees the municipality enjoyed preference, who was responsible.

[19] The legislative history illuminates all three features. The need for statutory intervention to assist municipalities to collect debts became evident so far back as 1848. A municipality contended that, "by reason of its nature", "and without any express enactment to that effect", under Roman and Roman Dutch law it enjoyed a preference over other creditors for the taxes it was empowered to levy.[31] The Supreme Court of the Colony of the Cape of Good Hope rejected this argument. It

[31] *Municipality of Green Point v Powell's Trustees* (1848) 2 Menz 380 (*Green Point*).

held that the municipality, as merely a creature of the statute creating it,[32] enjoyed no power or privileges except as were expressly conferred. And a preferent right over other creditors was not among these.[33] This decision was consistently endorsed[34] and followed.[35]

[20] The legislative response to these Cape decisions was to introduce a restraint on transfer until municipalities certified that outstanding municipal debts had been paid.[36] These provisions expressly empowered a municipality to embargo[37] transfer of

[32] Ordinance No. 4 of 1839.

[33] *Green Point* above n 31, per Wylde CJ and Menzies J; Musgrave J dissenting.

[34] See *Municipality of Mossel Bay v Holloway's Trustee* (1884) 3 SC 50, where the municipality conceded that, under *Green Point* above n 31 the rates were not preferent, but tried to limit the decision's impact, arguing that municipal rates are nevertheless "in the nature of rights *in rem* attaching to the property". The municipality sought to establish, not that its claim survived transfer, but only that it did not have to be proved in the land owner's insolvency, but fell directly due, without being ensnared in the claims process. For this purpose, the municipality urged, the rates, although not preferent, were "a burden running with the land". De Villiers CJ rejected this attempt to limit *Green Point*. He held that: "It is clear that if there is no preference there is no right *in rem*". Consequently municipal rates were not "in the nature of *jura in rem* [real rights] attaching to the property". The municipality, therefore, had to prove its claim along with the rest of the creditors.

[35] The Cape Court affirmed that, before special legislative provision to that effect was introduced, municipalities enjoyed no "tacit hypothecation" for rates, and could not prevent transfer of land because rates arrears were unpaid: see the summary of the position before the Divisional Councils Act 40 of 1889 (Cape) was enacted in *Smuts v Cathcart Divisional Council* (1896) 13 SC 359 at 362-3 (per de Villiers CJ). The same decision affirmed that a municipality cannot refuse services to a new owner who tenders payment of rates he himself has incurred. Nor could councils expand the "rates due" by refusing certification, and thus blocking transfer, so as to claim "all other arrear rates" (at 363).

[36] Section 275 of the Divisional Councils Act 40 of 1889 (Cape) provided that: "Before passing transfer of any immovable property . . . every Registrar of Deeds shall require the production of a receipt or other voucher showing that the rates last due to the council upon such property have been paid". Section 99 of the Rural Council Act 33 of 1909 contained a similar provision. See *Union Government (Minister of Lands) v Cape Rural Council* 1912 CPD 857 at 859 (*Cape Rural Council*). Maasdorp JP observed at 863, citing *Cape Divisional Council v Marais* 2 Buch AC 350, that it was "quite clear" that until the passing of the 1889 statute, divisional councils "had no tacit hypothecation in any shape or form in respect of any portion of their rates". The 1889 statute, however, imposed a duty upon the Registrar "which operated as a security for the payment of rates, and created a kind of statutory tacit hypothec" in favour of the divisional council. But, he added (at 863-4), the "security of tacit hypothec" lasts "so long, and only so long" as the Registrar's duty continues – making plain that there was no question that the municipality's claim did not survive transfer to the new owner. See, too, page 865, where Maasdorp JP makes clear that calling the municipality's right a "tacit hypothec" was just "an illustration" – and that a right constituting "something more than a mere prohibition to pass transfer, something more than a mere duty imposed on the Registrar" was "certainly not vested" in the local authority, since the right did not remain intact once the Registrar had allowed transfer to pass. Maasdorp JP goes on to reject an argument akin to that urged in this case regarding transmissibility, pointing out that if the contention were correct "the hypothec which under the earlier Act would, under ordinary circumstances, have lasted only for twelve months, would now in respect of the rates due inside the municipalities endure for the period of prescription" – that could not have been the legislature's contemplation.

[37] The term, which is picked up in later cases, including *BOE Bank v City of Tshwane Metropolitan Municipality* [2005] ZASCA 21; 2005 (4) SA 336 (SCA) at para 7, appears to have originated in the first-instance judgment of Curlewis J in *Cohen's Trustees v Johannesburg Municipality* 1909 TH 134 (overruled in *Johannesburg Municipality v Cohen's Trustees* 1909 TS 811 (*Cohen's Trustees*)). Curlewis J said that the effect of section 26

property within its jurisdiction until it furnished a certificate that arrear rates had been paid.[38] This is the apparent origin of section 118(1) of the present Act, which prohibits transfer of property without a certificate issued by the municipality certifying that all municipal debts due in connection with that property during the preceding two years of application for the certificate "have been fully paid".[39]

[21] The municipalities' embargo power was thought, on distinguished authority, to afford them preference over other creditors.[40] But in 1926, the full court of the Transvaal Provincial Division decisively refuted this.[41] It held that the municipalities'

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of Ordinance 43 of 1903 "is to give the council an embargo or hold on property in respect of which rates have been imposed – 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", words Greenberg J later echoed in *Rabie N.O. v Rand Townships Registrar* 1926 TPD 286 at 292. In *Cape Rural Council* above n 36 at 867, McGregor AJ refers to the certificate as a "statutory voucher".

[38] *Cohen's Trustees* above n 37 per Innes CJ; Solomon J and Bristowe J concurring. Ordinance 43 of 1903 appears to be the first local government legislation outside the Cape that imposed an embargo on transfer until arrears were squared. Because the case was about whether "rates imposed" included interest, the retrospective period for which the certificate had to be issued does not appear. Section 26 provided:

> "No transfer or cession of any rateable property shall be passed before any Registrar of Deeds or Registrar of Mining Rights or other Government official until the receipt or certificate signed by the Town Clerk or other person authorised by the Council shall be produced to such official for payment of the rates imposed on such property."

Unlike later ordinances, the 1903 Ordinance contains no separate provision limiting the retrospective period for which arrears had to be certified as paid.

Section 47 of Ordinance 9 of 1912 afforded municipalities a "privilege of preventing transfer" (*Rabie N.O.* above n 37 at 291 per Greenberg J) regarding unpaid rates arrears "for a period of two years immediately preceding the date of application for transfer". The terms of section 47(b) of Ordinance 9 of 1912 are set out below n 41. By contrast with the 1903 Ordinance, the 1912 Ordinance was the first to limit the municipal debts in respect of which a veto could be exercised to only the amounts that accrued during the two years immediately preceding the date of application for a transfer (du Plessis above n 23 at 511).

[39] Section 118 is set out in full above n 2.

[40] In *Cohen's Trustees* above n 37, Innes CJ (who at 817 calls it a "clearance certificate") states at 817 that the result of the provision was "to create, in effect, a very real and extensive preference over the proceeds of rateable property realised in insolvency". Solomon J said at 821 that the effect of the embargo provision was that "the council obtains a species of lien upon all rateable property and *in case of the insolvency of the owner secures a preference over other creditors*". (Emphasis added.).

[41] *Rabie N.O.* above n 37 dealt with section 47(b) Ordinance 9 of 1912. This provided: "No transfer of any premises within a municipality shall be passed or registered . . . until a written statement . . . signed and certified by the town clerk or other officer authorised . . . shall be produced . . . nor unless such statement shows (b) that all charges, if any, for a period of two years immediately preceding the date of application for transfer due in respect of such premises on account of rates . . . have been paid to the council".

Greenberg J, in giving the judgment of the Court (Curlewis JP and Gey van Pittius J concurring), says at 289 this was "similar to" the provision in *Cohen's Trustees*. At 290 he distinguishes *Cohen's Trustees* as dealing with interest and illustrating "only" the practical result of the provision; the decision did not show "that the section creates a lien in the strict legal sense". It was argued that the right enabled the municipality to prevent

power to prevent transfer until arrear rates had been paid did not constitute a claim ranking in priority to a mortgage bond registered over the premises. The Court held one could go no further than saying that the result of the provision was "in effect to create a preference" of sorts, "something not wholly in the nature of a lien or a hypothec but *sui generis*".[42] This conclusion flowed in part from the "extraordinary results"[43] the Court considered would follow from granting municipalities priority over all other creditors.[44]

[22] The phrase "charge upon the property" in the present Act has its statutory roots in section 50[45] of the 1939 Transvaal Local Government Ordinance.[46] This imposed "a charge upon the premises" in respect of rates and taxes owed[47] – though the effect of the provision was limited to the rates due for two (later three)[48] years preceding the

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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*) (at 290).

[42] Id per Greenberg J at 292. The difficulty in conceptualising and tagging the right the statute conferred on a municipality was further explored in *Bloemfontein Town Council v Estate Holtzman* 1936 OPD 134 (*Holtzman*), where Fischer J expressed at 141 "an obvious difficulty in affixing a label to or defining them", noting that they "have been described as being in the nature of a lien and as securing a preference on insolvency" (he calls it at 140 "the restraint on transfer section"). *Holtzman* held at 142 that the provision in issue there did create a preference in favour of the municipality.

[43] *Rabie N.O.* above n 37 at 290-1 ("No matter how small the claim for rates or how valuable the property, as long as the rates were unpaid there could be no execution" by another creditor). Other provincial statutes expressly conferred a preferent right on municipalities. An instance is article 6 of Chapter 87 of the Law Book of the Orange Free State, which provided that "*verschuldigde erfpacht en dorpsbelastingen zyn preferent voor alle andere vorderingen of verbanden op de gronden of erven en daaropstaande gebouwen*" (as quoted by Fischer J in *Holtzman* above n 42 at 139). Counsel's argument in *Holtzman* asserted that the "Transvaal has no legislation" like article 6 of Chapter 87.

[44] The cases are discussed in Brits above n 22 at 397-8.

[45] Id at 399.

[46] Ordinance 17 of 1939, which came into effect on 1 December 1939: see *Pretoria Stadsraad v Geregsbode, Landdrosdistrik van Pretoria* 1959 (1) SA 609 (T) at 613C-D (*Pretoria Stadsraad*). The *Pretoria Stadsraad* decision, as well as *Stadsraad van Pretoria v Letabakop Farming Operations (Pty) Ltd* 1981 (4) SA 911 (T), gave effect to the preference the 1939 Ordinance enacted. Ackermann J in the latter case (O'Donovan J concurring) at 918C noted the "far-reaching effects" (*verreikende gevolge*) of the enactment of the Ordinance on the rights of registered mortgagees, whose claims had to bow before the municipality's, because it had the power to embargo transfer.

[47] Section 50(2)(a) of the Ordinance.

[48] The Ordinance was amended by section 47 of Ordinance 11 of 1977. This extended the period from two to three years. It also changed the text of the charge provision from "charge upon the premises" to "charge upon the land". The new section 50(3) read:

> "Any amount due in terms of paragraph (a), (b), (c) or (d) of subsection (1) shall be a charge upon the land or right in land in respect of which such amount is owing and shall, subject to

date of application for transfer.[49] But the Ordinance, in particular section 50, contained a second important feature that neutralised the 1926 full court decision. It provided that a municipality's claim for the amounts owing would be "preferent to any mortgage bond passed over such property".[50] From 1939, municipalities thus had a double-weaponed arsenal: embargo plus preferent charge.

[23] Section 50(3) of the 1939 Ordinance differed signally from section 118(3).[51] Its operation was expressly limited to "any amount due" under the embargo provision in section 50(1). The embargo and the preferent charge were conjoined. This had two consequences. First, the provision was limited to the rates due for a specified period (two and later three years)[52] preceding the date of application for transfer. The retrospective period of the municipalities' claim was not indefinite. Second, because the embargo operated only until the arrears were paid, there was no question that the "charge" survived transfer.[53] Only the original owner was on the line.

[24] These features of the pre-constitutional provisions – the time limitation and the embargo link – meant that, once the outstanding charges had been paid to secure transfer to the new owner, the charge lost its force. It no longer operated. The effect

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> the provisions of section 142(6), be preferent to any mortgage bond registered against such land or right in land subsequent to the coming into operation of this Ordinance."

[49] Du Plessis above n 23 at 570 calls section 50(1) of the 1939 Ordinance "the normative *fons et origo*" of the veto.

[50] The imposition of the preference was not retrospective: the provision operated only "subsequent to the coming into operation of this Ordinance".

[51] Brits "Why the security provision in section 118(3) of the Local Government: Municipal Systems Act 32 of 2000 is not enforceable against successors in title" (2017) 28 *Stell LR* 47 at 50 points to the differences between section 118(3) and its predecessors.

[52] When enacted, section 50(1)(b) of Ordinance 17 of 1939 required that the certificate cover "all charges, if any, for a period of two years immediately preceding the date of application for transfer". Section 47 of Ordinance 11 of 1977 later amended the period to read "three years". See above n 48.

[53] Section 168 of the Natal Local Authorities Ordinance 25 of 1974 was similarly circumscribed in its effect. It provided that rates "shall be a charge upon the property the subject thereof *and shall be payable by the owner* of such property". (Emphasis added.). Section 175 of the same Ordinance conferred a power of embargo on local authorities. The Natal Ordinance was repealed by section 95 of Act 6 of 2004, which repealed Part 6 (sections 148-75) of Chapter X of the Ordinance.

Section 119 of the Orange Free State Local Government Ordinance 8 of 1962 provided only an embargo or veto power, but no hypothec. See, too, sections 88 and 96 of the Cape Municipal Ordinance. (Du Plessis above n 23 at 511.)

was to vest responsibility for municipal property-related debts in the owner at the time they were incurred, and no one else.

[25] Section 118(3) took effect on 1 March 2001.[54] Against the background of its predecessors,[55] its enactment appeared to signal a radical departure. This is because the provision, though in the same section of the statute, evinces no express link with the embargo in the earlier subsection.[56] This has the consequence, first, as the Supreme Court of Appeal held,[57] that the charge in subsection (3) operates independently of the embargo in subsection (1). This means the charge upon the property has no express retrospective time limit on the debts it covers. The two-year time limit is absent.[58] The charge takes effect in respect of all debts owed to the municipality that have not prescribed.[59] This may embrace the total of accumulated municipal debts, including municipal taxes going back 30 years, and other charges for three years.

[26] Second, and pertinent here, delinking the two provisions created the basis for the suggestion,[60] which the municipalities and the Minister have embraced, that the charge survives transfer and, thus, can be enforced against the new owner. This approach must be assessed in the light of the fact that there is no evidence at all that before 1 March 2001 any enactment ever sought to impose on a new owner responsibility for a previous owner's debts. The sole effect of the preceding

[54] The history of the provision is set out in du Plessis above n 23 at 509-12.

[55] The statutory predecessors of section 118 are set out in *Kaplan* above n 28 at paras 14-22.

[56] The Supreme Court of Appeal rebuffed attempts to create a link between subsections (1) and (2) by importing a two-year limit into section 118(3) in both *BOE Bank* above n 37 and *Kaplan* above n 28.

[57] *BOE Bank* above n 37 at para 7.

[58] Instancing the omission of the two-year time limit in section 118(3), du Plessis above n 23 at 528 considers section 118, though "substantially similar to most of its predecessors in apartheid era provincial ordinances", to be "actually . . . more of an encroachment on property rights than most of its predecessors".

[59] This is thirty years for "any debt in respect of any taxation imposed or levied by or under any law" (section 11(a)(iii) of the Prescription Act 68 of 1969), which appears to include municipal rates and, possibly, sewer and refuse charges (see *Alberts v Roodepoort Maraisburg Municipality* 1921 TPD 133; *City of Johannesburg v Renzon and Sons (Pty) Ltd* 2010 (1) SA 216 (W)) and three years in respect of electricity and water charges (section 11(d) of that Act).

[60] Discussed but rejected by 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) 25 *Stell LR* 536 at 542-3.

enactments was to embargo transfer until a municipal debt-payment certificate was provided, and, later, to give municipalities preference, coupled with a charge, over other creditors before transfer. This means that, if the subsection has the meaning the municipalities and the Minister give it, it would have constituted a radical innovation on the South African legal landscape.

[27] The question is, thus, whether the separation of subsection (3) from subsection (1) in section 118 means that the charge "upon the property" survives transfer so as to burden succeeding owners with the previous owner's historical debts.

Common law setting

[28] Given the statutory history, the words "charge upon the property" must be seen in the light of the meaning they previously bore within the common law setting of limited real rights of security in property for indebtedness. This does not mean that we must impose upon a post-constitutional statute a pre-constitutional meaning. Nor does it mean that we must resurrect archaic concepts that may be inappropriate to our conception of property rights under the Constitution.[61] It simply recognises that the phrase did not spring from nowhere. It was lodged in the present Act imbued with a statutory setting against the background of a common law meaning.[62] This may provide helpful clues to illuminate its import.

[29] The case law indicates that, without an express enactment conferring preference above other holders of real rights in the property, the embargo over property transfers until arrear rates are paid gives the municipality no preference above registered rights holders in the property. The cases also show that, enacted on

[61] It has been said, rightly, that the decisions of this Court indicate that the Constitution "requires a fundamental shift from abstract, rights-based, to contextual, non-hierarchical thinking about property rights": Van der Walt *Constitutional Property Law*, 3 ed (Juta & Co Ltd, Cape Town 2011) at 521. See, most recently, *Daniels v Scribante* [2017] ZACC 13, 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC).

[62] When a statute employs concepts and phrases familiar to the common law or previous statutes, the presumption that legislation is enacted against the background of the common law setting in which it takes effect (expressed as "the legislator is presumed to know the common law") operates. Du Plessis and de Ville, *Constitutional and Statutory Interpretation* (Interdoc Consultants, Johannesburg 2000) is a useful practical aid to meaning.

its own, a legislatively created "charge upon the property" means no more than that a debt may be recovered by execution upon the property. There is thus no magic in the word "charge",[63] and no abstruse technical meaning associated with it.[64] The Supreme Court of Appeal has explained, illuminatingly, that the word "charge" in section 118(3) means no more than that any amount due for municipal debts that have not prescribed is secured by the property and that, after an order of court has been obtained, the property may be sold in execution and the proceeds applied to pay those debts.[65]

[30] This points to the conclusion that a mere enactment, without more, that a claim for a specified debt is a "charge" upon immovable property does not make the charge transmissible. So it does not endure beyond transfer. And the creditor's claim is not enforceable against successors in title. This does not mean the charge is ineffective or illusory. There is reason enough for its enactment even without transmissibility. It is this: the "charge" helps municipalities elude the constrictions of the Rules of Court that would otherwise need to be complied with in order to render the property executable. In other words, the charge allows municipalities to by-pass at least some debt collection enforcement procedures. It renders the property immediately and expeditiously executable, subject to an order of court. In this way, it gives the preference teeth.

[31] And this conclusion is strengthened by the way in which real rights (rights that take effect directly against property, rather than against the assets of an individual

[63] Nor is there any magic in calling the charge a "hypothec". Both words convey a right of security realisable against property, as opposed to a personal claim only against the debtor. Sohm in *Sohm's Institutes of Roman Law* 3 ed (OUP, Cape Town, 1907) at 354 claims that the hypothec or real right of security "was borrowed, both in name and in substance, from Greek law", but Thomas in *Textbook of Roman Law* (North-Holland Publishing Company, Amsterdam/New York/Oxford, 1976) at 332 bluntly asserts the opposite: the institution, "despite its Greek name, was of Roman origin".

[64] See *Irwin v Davies* 1937 CPD 442 at 447. There, Davis J held that a "first charge" meant that assets were so bound that the debt owed "is to come out of them in priority to any other debts", and quoted *Sweet's Law Dictionary* to the effect that a charge on property signifies that the property is security for the payment of a debt or the performance of an obligation.

[65] *Kaplan* above n 28 at para 26.

debtor)[66] have historically been conferred on creditors in our law. Roman law afforded many real rights in property, and many of these granted creditors security for repayment of debts. From the earliest roots of our law, both publicity and formality were seen as pivotal to creating a transmissible right of security against property.

[32] It seems to have been necessary that the right the creditor acquired be afforded some form of public expression.[67] From about 500 CE, criticism was levelled against real rights of security for repayment because many were conferred without fulfilling a requirement that they be created with some measure of publicity, so that other creditors could know of their existence.[68]

[33] In Roman Dutch law, according to Johannes Voet (1647-1713), its most prodigious and authoritative exponent, a real right of security over immovable property can survive transfer to a new owner and, thus, bind successors in title only if it has been "formally established"[69] or properly constituted.[70] This entailed a written document, concluded with proper formalities before a judge of the place in which the immovable property was situated (*coram lege loci*), with payment of an appropriate percentage of the debt.[71]

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[66] Joubert et al (eds) *LAWSA* vol 7 at 198.

[67] According to Thomas above n 63 at 333:

> "Each successive creditor had to be informed of the number and value of the charge incurred before his own or the debtor would be guilty of the criminal offence of *stellionatus*, swindling. If encumbrances exceeded the value of the thing, when it became necessary to realise, then, apart from privileged hypothecs and, in later law, those registered with the authorities or effected before three witnesses, the rule was the earlier in time prevailed: *qui prior est in tempore potior est iure*."

[68] See Van der Merwe *Sakereg* (Butterworths, 1989) at 609.

[69] Voet *Commentary on the Pandects* Book 20, Title 1, Section 13 (Gane's translation, Butterworth & Co. (Africa) Ltd, Durban 1956) page 488.

[70] The Latin is "*effectus hypothecae specialis in immobilibus solemniter secundum modum superius descriptum constitutae in eo consistit, quod res ipsas afficiat, deinceps transituras cum suo onere in quemvis possessorem*" (the effect of a special hypothec constituted over immovables with the proper and necessary formalities [*solemniter*] in accordance with the process described above lies in this, that it will impress upon the very things themselves, so that thereafter they will pass to any possessor with their very own burden).

[71] See Voet 20.1.9-12. The requirement of formality was cemented a century and a half before Voet wrote, in a *Placaet* the Emperor Charles V issued on 15 May 1529. This required that every sale or hypothecation (grant of right of security) of land, houses or other immovable property had to take place before a judge. See Jones *Conveyancing in South Africa*, 4 ed (Juta & Company Limited, Cape Town 1991) at 3.

[34] At common law it thus appears that the creation and continued existence of a real right in immovable property required some formal, public and legally recognised act (*coram lege loci*).[72] As early as 1840, it was settled doctrine at the Cape that—

> "the *dominium* [title] or *jus in re* [real right] of immovable property can only be conveyed by transfer made *coram lege loci* [formally according to the law of the place concerned], and this species of transfer is an essential to divest the seller of, and invest the buyer with, the *dominium* or *jus in re* of immovable property as actual tradition [handing over or conveyance] is to convey the *dominium* of movables."[73]

[35] In the early 20th century, Innes CJ, relying on *Harris*, authoritatively imported into modern South African law the rule that with rare and nominate exceptions registration is indispensable to create real rights in land.[74] He stated that "the general rule of our law is that real rights in land can only be validly constituted by registration *coram lege loci*".[75] Innes CJ instanced prescription and acquisition of an interest in land by marriage in community of property as two exceptions to the general rule.

[36] In short, long-standing doctrine in our law is that a real right of security over immovable property can arise only by giving notice of its creation to the world in general: "The law insists that mortgages shall be effected in so open and public a manner that no one can afterwards complain that he had no notice of them."[76]

[37] This was the case before registration of title in central deeds registries became common practice.[77] Since then,[78] the act of formality required for the constitution of a

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[72] See the discussion in Voet 20.1.10ff.

[73] *Harris v Trustee of Buissine* (1828-1849) 2 Menz 105 at 107-8.

[74] *Lucas's Trustee v Ismail and Ayob* 1905 TS 239.

[75] Id at 242.

[76] Maasdorp "The law of mortgage" (1901) 18 *SALJ* 233 at 240.

[77] Jones above n 71 at 3-13; Carey Miller and Pope *Land Title in South Africa* (Juta & Co Ltd, Kenwyn 2000) at 45-8. Jones explains (at page 3) that: "The history of colonization and expansion northwards determined the underlying principles of our system of registration", which originated with the *Placaet* of 1529.

transmissible real right of security in immovable property is registration in the deeds office.

[38] And there is good reason for this. Real security in property is a limited real right with the purpose of ensuring satisfaction of a debt or obligation to another, usually ahead of other, unsecured creditors. This is important for it illustrates the difference between real security rights specifically of security (which are designed to shore up debt, and are a sub-category of limited real rights) and limited real rights in the broader sense. It moves us away from asking whether a real security right is in principle enforceable against a third party – which, as a sub-species of limited real rights, it must in principle be – and towards focusing on the purpose for which the limited right was created. The point of the right of security in property is to ensure payment of a debt. Then the question becomes the one at issue here: if that debt could be satisfied by execution upon the property *before* the debtor disposes of the property – or even later – why should it be enforceable against innocent third parties who are unconnected with the debt and may not even know of its existence?

[39] Against this background, what is notable about section 118(3) is that the legislature did not require that the charge be either registered or noted on the register of deeds.[79] Textually, there is no indication that the right given to municipalities has third-party effect: no provision is made to fulfil the publicity requirement central to the functioning of limited real rights. It stands alone, isolated and unsupported, without foundation or undergirding and with no express words carrying any suggestion that it is transmissible.

[40] A useful contrast arises from a statute enacted soon after section 118(3) took effect, the Land and Agricultural Development Bank Act.[80] This provides that, before

[78] Seemingly from 1882, when formal land registers began to be maintained in the Cape: Jones above n 71 at 3-4.

[79] Under the Deeds Registries Act 47 of 1937, which, for the first time, formalised and systematised the national system of registration of title: see Carey Miller above n 77 at 47 and Jones above n 71 at 6 and 14-31.

[80] 15 of 2002.

the Bank makes any payment of a loan, it must transmit in writing to the Registrar of Deeds information about the advance, including its amount and date.[81] The Registrar must then "cause a note thereof to be made in his or her registers in respect of the property". This note the statute says "has the effect of creating in favour of the Bank a charge upon the property until the amount of the advance together with interest and costs has been repaid".[82]

[41] This is the bullseye target section 118(3) does not even attempt to hit. The two provisions use the same language ("charge upon the property") – but the Land and Agricultural Development Bank Act contains the logical corollary that secures transmissibility, namely registration by public act in the register of deeds. It thus shows that, when legislation creates a transmissible charge upon immovable property, registration in the Deeds Registry (or some other act of publicity or formality) is specified. Its absence from section 118(3) provides a telling indication that the charge takes effect only against the current owner and not successors.[83]

[42] Were there no Constitution, one would thus conclude, on the wording of section 118(3) alone, that the unregistered charge it creates is enforceable against the property only so long as the original owner holds title. The absence of any requirement that the charge be publicly formalised is a strong interpretative indicator that the limited real right section 118(3) creates is defeasible on transfer of ownership.

[43] And it is no answer to suggest that the statute itself fulfils the publicity requirement. In the case of the charge contemplated in section 118(3), the statute is evidence only of the *existence* of potential debt on the property. There is no indication as to the value of that debt. Registration of the charge would provide that detail.

[81] Section 31(2).

[82] Section 31(3).

[83] In this way, the issues create an illuminating perspective on *Municipality of Mossel Bay v Holloway's Trustee* (1884-1885) 3 SC 50. There, the municipality contended that its claim for rates, although not preferent, was "a burden running with the land". The Court there held that "if there is no preference there is no right *in rem*". We hold here that conferment of a statutory preference upon a creditor is not, in itself, to burden the land. Registration or its equivalent is, in addition, required.

Even where a covering mortgage bond is registered, the amount of which may fluctuate over time, the bond to be effective must include a fixed amount beyond which future debts shall not be secured.[84] So the legislated fact of the charge, alone, does not render the requirement of registration or formalisation redundant. That remains necessary to fulfil the publicity purpose by providing details of the charge.[85]

Constitution

[44] But, fortunately, we live in a constitutional state. And that makes the Constitution supreme. The position under the common law provides but a useful backdrop to the process of interpreting section 118(3) in accordance with and in the light of the Constitution. If there is any doubt about the meaning of the section, that doubt must be resolved to accord best with the spirit, purport and objects of the Bill of Rights.[86] Since *Hyundai*,[87] all legislation must be approached through the prism of the Bill of Rights.[88] And it has been "gold-plate doctrine"[89] in this Court that, if a meaning conformable with the Bill of Rights can reasonably be ascribed to legislation,

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[84] See section 50(4) read with section 51(1) of the Deeds Registries Act above n 79.

[85] Sonnekus and Schlemmer "Covering bonds, the accessorial principle and remedies founded in equity – not self-evident bedfellows" 2015 *SALJ* 340 at 353:

> "The only justification for the preferential position enjoyed by a secured creditor is to be found in the fact that not only the amount involved in the existing debt secured by the bond is published to enable all potential creditors to calculate the creditworthiness of the debtor as potential credit seeker after deducting the potentially existing liabilities from the known assets, but the specific immovable asset encumbered for this liability is also identified."

[86] Section 39(2) of the Constitution provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[87] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) (*Hyundai*) at paras 21-4 and *Chagi v Special Investigating Unit* [2008] ZACC 22; 2009 (2) SA 1 (CC); 2009 (3) BCLR 227 (CC) at para 14.

[88] *Hyundai* id at para 21.

[89] See *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic; Mavava Trading 279 (Pty) Ltd v University of Stellenbosch Legal Aid Clinic* [2016] ZACC 32; 2016 (6) SA 596 (CC); 2016 (12) BCLR 1535 (CC) at para 135 where Cameron J said:

> "Since *Hyundai*, it has been gold-plate doctrine in this Court that judges must embrace interpretations of legislation that fall within constitutional bounds over those that do not, provided that the interpretation can be reasonably ascribed to the section. Where a legislative provision is reasonably capable of a meaning that places it within constitutional bounds, it should be preserved."

that meaning must be embraced, rather than one that offends the Constitution. Thus approached, the question is whether the values and rights in the Constitution point to the conclusion that the section 118(3) charge on property survives transfer to a new owner.

Municipalities' constitutional duties to provide services

[45] All three municipalities contended that the constitutional setting points to the conclusion that the charge indeed survives transfer and thus burdens new owners. Their contentions demand careful consideration.

[46] Tshwane based its argument on the constitutional duties municipalities bear. These oblige them to provide services to the whole community, and progressively to realise rights of access to housing, water and sanitation.[90] This, Tshwane said, justifies concluding that the charge survives. Tshwane admitted a difficulty with the provision. This is that potential purchasers do not know the extent of the historical debt fixed to the property. But this, it urged, could be fixed. The Court could infer an obligation that municipalities have to supply information about historical debts. This would shine a light on the murk that surrounds a prospective owner when buying a property saddled with municipal debt.

[47] Section 118(3), Tshwane contended, imports an implied duty on both a municipality and previous owner to fess up to the prospective transferee about historical debt. This would afford ample options (cancelling or renegotiating the deal; or shouldering the debt). Adding to this, Ekurhuleni invoked the Act's provision that gives members of the local community the right to be informed of decisions of the

[90] Section 27 of the Constitution. Section 73(1) of the Act provides:

> "A municipality must give effect to the provisions of the Constitution and—
>
> (a) give priority to the basic needs of the local community;
>
> (b) promote the development of the local community; and
>
> (c) ensure that all members of the local community have access to at least the minimum level of basic municipal services."

municipality affecting their rights, property or reasonable expectations.[91] This provides, it urged, a statutory foundation for purchasers to demand information from the municipality about historical debts.[92] Ekurhuleni also noted that section 118(1) already obliges municipalities to provide some information about past debts during the transfer process – at least for the two preceding years.[93] This benefits both the transferee and the bondholder.

[48] Ekurhuleni, like Tshwane, thus urged that the special public responsibilities of municipalities show that the legislature made a fundamental choice: to burden the new owner with responsibility for historical debts.

[49] The Minister contended that there was a legitimate governmental purpose for the survival of the charge. This is to create empowered and functional municipalities that generate revenue for service delivery. But the Minister conceded that section 118(3) should be used as only a "last resort and where the seller is nowhere to be found".

[50] eThekwini emphasised the shared civic duties of municipalities and owners. Hence, in a transformative context, the charge survives for the collective good.

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[91] Section 5(1)(c) and (d) of the Act provide:

> "Members of the local community have the right—
>
> . . .
>
> (c) to be informed of decisions of the municipal council, or another political structure or any political office bearer of the municipality, affecting their rights, property and reasonable expectations; and
>
> (d) to regular disclosure of the state of affairs of the municipality, including its finances."

[92] Compare *Mkontwana v Nelson Mandela Metropolitan Municipality* [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) (*Mkontwana*) at para 67 (municipalities' duty under section 118(1) to provide accounts to owner where others occupy the property).

[93] The Supreme Court of Appeal held in *City of Cape Town v Real People Housing (Pty) Ltd* [2009] ZASCA 159; [2010] 2 All SA 305 (SCA); 2010 (5) SA 196 (SCA) at paras 10-4, applying *Mkontwana* id at para 45, that section 118(1) does not empower a municipality to refuse clearance until all historical debts are paid – but only those arising in the preceding two years.

[51] These arguments are not without force. The notion that owning property comes with burdens for the public good is not outlandish. This Court has increasingly emphasised the constitutional limitations on private property as well as the constitutional vision that property utilisation must conduce to the public good.[94] So the notion that a new owner may be burdened by historical debt relating to the property should not be treated as landing from planet Pluto.

[52] But the full constitutional context affords a richer picture. This appreciably attenuates the considerations the municipalities say favour imposing the charge on new owners.

[53] Start with this: as the Minister rightly noted, historical debts exist only because municipalities have not recovered them. This while the statute expressly obliges every municipality to collect "all money that is due and payable to it"[95] and to implement a credit control and debt collection policy.[96] As this Court pointed out in *Mkontwana*, a municipality has a duty to send out regular accounts, develop a culture of payment, disconnect the supply of electricity and water in appropriate circumstances, and take appropriate steps to collect amounts due.[97] In addition, for the sake of service delivery, it is imperative that municipalities do everything reasonable to reduce amounts owing.[98]

[54] And the statute does indeed provide a full-plated panoply of mechanisms enabling efficient debt recovery in the cause of collecting publicly vital revenue. Here

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[94] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* [2011] ZACC 33; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC); *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* [2015] ZACC 29; 2015 (6) SA 440 (CC); 2015 (11) BCLR 1265 (CC) and *Daniels* above n 61.

[95] Section 96(a) of the Act.

[96] Section 96(b) of the Act. Section 102(1)(c) likewise empowers a municipality to "implement any of the debt collection and credit control measures provided for in this Chapter in relation to any arrears on any of the accounts" of persons liable for payments to the Municipality.

The Chapter of the statute to which section 102(1)(c) refers is Chapter 9, titled "Credit Control and Debt Collection", in which section 96 also falls. Section 118 by contrast falls in Chapter 11, "Legal Matters".

[97] *Mkontwana* above n 92 at para 47.

[98] Id at para 62.

the parts of section 118(3) that are uncontested are integral. These are the charge on the property against the existing owner, and the municipality's preference over registered mortgagees. During argument the municipalities conceded, correctly, that the provision enables them to enforce the charge against the existing owner up to the moment of transfer – and to do so above and before any registered mortgagees. And they were constrained to concede, also correctly, where there are unpaid municipal debts, that the charge enables them to slam the legal brake on any impending transfer by obtaining an interdict against transfer.[99]

[55] Add this: section 118(1) places municipalities on notice that a transfer within their jurisdiction is pending. Because the provision embargoes each and every transfer until the municipality issues a clearance certificate for the last two years' debt, prospective transferors and their attorneys are obliged to notify municipalities of every impending transfer. Doing so is indeed indispensable and invariable. This gives the municipality full power, and full opportunity, to enforce the charge against the existing owner for all recoverable debt, even beyond the last two years.

[56] In this way, all outstanding debt can be recovered, as a charge against the property, *before* transfer. Neat. This power does not improve with age. It is no jot or tittle better *after* transfer than before. So why wait? If transfer nowise strengthens a municipality's position, why not act pre-transfer? The municipalities and the Minister had no answer. Indeed, during oral argument, Tshwane conceded perforce and rightly that, should the Court find municipalities have ample power to recover outstanding debt from current owners, there would be little justification for making the charge survive.

[99] Yekiso J would therefore appear to have been correct at first instance in *Real People Housing (Pty) Ltd v City of Cape Town* 2010 (1) SA 411 (C) at para 34 when he said:

> "The municipality still retains a right [post-transfer] to proceed against the previous owner by way of an action to recover the balance outstanding, and may even take appropriate steps to attach the proceeds of sale of the property as security for payment of the balance outstanding, to be paid once the process of alienating shall have been completed."

[57] To itemise these ample powers is not to approach the interpretive task as providing a chance to scold municipalities for known inefficiencies.[100] *Mkontwana* rightly cautioned against this.[101] Indeed, this Court gave considerable weight there to the heavy public duties municipalities have to perform.[102] It is rather to consider whether, against the objective fact of a powerful armoury of existing statutory debt-collection weapons, there is any public interest warrant, constitutional need or fair justification for reading the charge in section 118(3) to survive transfer.

Deprivation of property

[58] Apart from the considerations the municipalities advanced as favouring survival of the charge, we also weigh the severe consequences of imposing historical debts on a new owner. The Bill of Rights prohibits "arbitrary deprivation of property".[103] It was rightly not disputed that the new owner has a property interest that would be affected if the charge were transmissible. Equally, the interests of bond-holders who advance loans to the transferee would be affected[104] if the debts, accumulated during the previous owner's title, were to operate as a charge against the new owner.[105]

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[100] O'Regan J noted in *Mkontwana* above n 92 at para 106, more than a dozen years ago, that "[i]t is clear from the record before us that expanding municipal debt is a significant nation-wide problem". It takes no stretch of judicial notice to know that things have got worse since then. Delport "The implications of section 118(3) of the Local Government: Municipal Systems Act 32 of 2000 for purchasers of immovable property" (2015) 78 *THRHR* 219 at 220 records that in September 2014 the Department of Cooperative Governance and Traditional Affairs reported to a parliamentary portfolio committee that by the end of June 2014 municipalities were collectively owed R94.02 billion for arrear rates and municipal services fees – up R7 billion from one year before.

The argument about inefficiency is not new. So far back as *Cohen's Trustees* above n 37 at 818-9, where the question was whether "rates" included interest, Innes CJ recorded that it was argued "that the machinery created by this section afforded an inducement to the council not to collect its rates".

[101] *Mkontwana* above n 92 at para 124 (whether municipalities carry out their constitutional obligations with due diligence cannot "have any direct bearing" on the question of constitutionality).

[102] *Mkontwana* above n 92 at para 38 (regular payments of consumption charges "contribute to the effective discharge by municipalities of their constitutionally mandated functions"). Van der Walt "Retreating from the FNB arbitrariness test already?" 2005 *SALJ* 75 at 82 pithily says, discussing *Mkontwana* that the decision licensed "deprivation for fiscal efficiency purposes".

[103] Section 25(1) of the Constitution.

[104] On the position of mortgagees, see *Stadsraad van Pretoria v Letabakop Farming Operations (Pty) Ltd* 1981 (4) SA 911 (T), du Plessis above n 23 at 523, Brits, above n 51 at 64-6.

[105] BASA's arguments were confined to the interests of the new owner's mortgagees, and did not cover the interests of the old owner's bond-holders.

[59] This Court has summarised its jurisprudence regarding constitutionally cognisable deprivation of property by saying that there is a constitutionally significant deprivation of property only where the interference with a property right is "substantial" – meaning that the extent of the intrusion must be extensive to have a legally significant impact on the rights of the affected party.[106]

[60] Does this happen if the charge takes effect in the hands of a new owner to satisfy debts incurred during a preceding owner's title? As the applicants compellingly contended, the new owner's property could be sold in execution to satisfy the charge. And, if the historical debts are big enough, the new owner could be left with very little – or even, where the debt exceeds the value of the property, with nothing. The municipalities were constrained to concede that the historical debt could be so big as to extinguish the new owner's entire interest in the property.

[61] The same applies to the bond-holder, who advances money to the new owner to finance the transfer, but finds that its security, carefully calculated on the value of the property before transfer, becomes useless afterwards. The effect of allowing the charge to take effect post-transfer is thus to substantially interfere with or limit the transferee's ownership as well as the mortgagee's real right of security.

[62] Despite these far-reaching effects, not only the municipalities but also the Minister contended that there was no deprivation. This, they urged, was because the charge took effect at the time when the debts were incurred – under the previous

[106] *South African Diamond Producers Organisation v Minister of Minerals and Energy and others* [2017] ZACC 26 (*Diamond Producers*) at para 47, applying *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Services* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) (*FNB*) at para 57; *Mkontwana* above n 92 at para 32; *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd* [2010] ZACC 20; 2011 (1) SA 293 (CC); 2011 (2) BCLR 189 (CC) (*Offit*) at paras 41-4; *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 73. Compare *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* [2009] ZACC 24; 2009 (6) SA 391 (CC); 2010 (1) BCLR 61 (CC) (applying the "substantial interference" test).

owner.[107] This meant that the new owner, when taking transfer of the property, acquired dominium that had already diminished in the hands of the previous owner.

[63] This argument is fallacious. Enforcement of the charge against the owner during whose title the debts accumulate does not amount to a deprivation of property. The previous owner was as property owner responsible for the debts incurred on the property.[108] The charge served to enforce the debts for which the previous owner was responsible. It is fanciful to construe payment of a debt that is lawfully owing as imposing a deprivation of property on the debtor.[109] The debtor's patrimony is diminished – but this is in consequence of lawful subtraction, through payment of a debt for which the debtor itself is responsible. There is no constitutionally cognisable deprivation.[110]

[64] The position is different when a debt is enforced against the property of an owner who had no connection at all with it. It is then that a constitutionally cognisable deprivation occurs. This is precisely what would happen if the charge in section 118(3) were to take effect on new owners.

[65] The municipalities also contended that the consumption for which the debts were incurred, under the old owner, enhanced the value of the property. This, they said, made it just to impose the historical debt on the new owner. For this they invoked the reasoning in *Mkontwana*.[111] This argument is also fallacious.

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[107] The parties at times spoke of "subtraction" and at times of "deprivation". These are not equivalent. See *Diamond Producers* above n 106 at para 49.

[108] *Mkontwana* above n 92 restricted responsibility for debts incurred by others on the property to the two years preceding application for transfer. The present point is that the debts lawfully due from the previous owner did not constitute a subtraction of ownership.

[109] It is in any event unjust to construe the deprivation or subtraction or attenuation of dominium as occurring before the sale transaction because the purchaser buys what is visible on either the land itself or its title as registered in the deeds office and is ignorant of, with no means of knowing about, historical debt. So, to say that debts subtracted from that title are known to the transferee is plainly unjust.

[110] In any event, to argue that the new owner does not receive the property free of any encumbrances, as the municipalities and the Minister did, begs the question whether the debt survives transfer. It is to this question that the consideration whether deprivation is just is directed.

[111] *Mkontwana* above n 92 at para 40.

[66] First, it is difficult to see how *past consumption* of municipal services, in contradistinction to their *continuing supply*, enhances a property's value. *Mkontwana* was concerned with the current enhancement of a property's value, in the hands of the present owner, by the continuing supply to it and consumption on it of municipal services.[112]

[67] *Mkontwana* also recognised that the value of a property was enhanced if municipal services were accessible from it.[113] That is clear. A plot in the bundu, without electricity or piped water, is in most circumstances much less valuable than one in town. But the applicants astutely pointed out that any value reflected in this way has already been factored into the purchase price. The new owner paid more precisely because of the urban location of the property, and its accessibility to municipal services. To make the new owner pay for this value again by making historical debts enforceable against the transferee is a form of double debit that makes it a constitutional deprivation.

[68] We must therefore conclude that, if the charge in section 118(3) survives transfer, there could be a significant deprivation of property.

[112] Yacoob J in *Mkontwana* above n 92 at para 40, said:

> "It cannot be accepted that electricity and water are merely consumed at the property. These amenities are supplied to the property, accessed and consumed by the occupier on the property and are enjoyed by the occupier as part and parcel of the enjoyment of the occupation of the property."

[113] Yacoob J in *Mkontwana* above n 92 at para 40, continued:

> "What is more, the supply of electricity and water to a property ordinarily increases its value; the consumption of electricity and water enhances its use and enjoyment. Indeed, the consumption of electricity and water by the occupier is integral to the use and enjoyment of the affected property and to its inherent worth."

Is the deprivation arbitrary?

[69] Two cases have considered the constitutional sustainability of imposing statutory liability on a property holder for the debts of another. They are *FNB*[114] and *Mkontwana*.[115]

[70] In *FNB*, a statute permitted the revenue services to impound and sell a vehicle belonging to a leasing company to recover a debt owed by the tax debtor to whom the vehicle was leased.[116] This Court concluded that the provision was arbitrary. The end the legislature sought to achieve by depriving the leasing company of its property was payment of a customs debt. This, the Court held, was "a legitimate governmental objective of undisputed high priority".[117] Yet the lessor/property owner had no connection to the transaction giving rise to the debt; the property seized, itself, had no connection with the debt; and the property owner had not placed the debtor/taxpayer in possession of the property in a way that could induce reliance by the revenue authorities to act to their detriment.[118] The Court struck the provision down.

[71] In *Mkontwana*, by contrast, the companion provision to that in issue here was upheld. The question was whether the embargo section 118(1) imposed against transfer to a new owner, against payment by the existing owner of two years' preceding outstanding municipal debts, could be justified where the accumulated debts were incurred by persons other than the owner. This Court held that it was. Even though the debts might have been incurred by tenants, illegal occupiers, usufructuaries or other possessors, good faith or bad faith, there remained a close link between the current owner, the property and the arisal of the debt.[119]

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[114] *FNB* above n 106.

[115] *Mkontwana* above n 92.

[116] *FNB* above n 106 at para 4 succinctly summarises the statutory powers at issue.

[117] Id at para 31. Compare *Mkontwana* above n 92 at para 38 (the purpose of placing the risk of non-payment of municipal consumption charges on the owner of property is "important, laudable and has the potential to encourage regular payments of consumption charges").

[118] *FNB* above n 106 at paras 107-8.

[119] *Mkontwana* above n 92 at paras 38-43, 45, 51-60 and 99.

[72] A crucial consideration in the Court's reasoning was that the imposition was limited to two years' debts.[120] In section 118(3), if the municipalities' interpretation is correct, there is no time limit. The only bound is prescription. More importantly, as one who arrives fresh and bare of previous proprietary control over the property, the new owner will have had no control whatsoever over how the debt arose. This, as counsel for BASA persuasively pointed out, was the epitome of arbitrariness.

[73] The new owner's deprivation is arbitrary in cases where the debt is much smaller than the value of the property, and even where it is relatively trivial. This is because it is intrinsically arbitrary to impose responsibility for payment of a debt on a property owner who has no connection with it and who had no control at all over the property or those occupying the property when the debt was incurred. Control in this sense was integral to the reasoning in *Mkontwana*.

[74] This case is thus close to *FNB*, but different from *Mkontwana*. The imposition on a new owner of municipal property of unprescribed debts without historical limit would constitute an arbitrary deprivation of property.

[75] It may be useful to add that none of the parties suggested that anything turns on how the transferee acquired title, whether at a sale in execution or by regular deed of sale or by other means.[121]

[76] As in *FNB*,[122] it seems unnecessary to enter the section 36 limitation analysis, but, to the extent that it is, it would be difficult to sustain the municipalities' interpretation of the provision. In short, if section 118(3) meant that new owners are

[120] Id at para 45: "The deprivation lasts for two years only".

[121] Compare *Tshwane City v Mitchell* [2016] ZASCA 1; 2016 (3) SA 231 (SCA), where a sale in execution was in issue; the dissenting judgment of Zondi JA found that in those circumstances the charge did not survive transfer.

[122] *FNB* above n 106 at para 110.

liable, post-transfer, for a previous owner's debts, it would be constitutionally impermissible.

[77] Section 39(2) enjoins us, when interpreting legislation, to promote the spirit, purport and object of the Bill of Rights. To avoid unjustified arbitrariness in violation of section 25(1) of the Bill of Rights, we must thus interpret section 118(3) of the Act so that the charge it imposes does not survive transfer. Far from the provision being merely capable of this interpretation, it is from historical, linguistic and common law perspectives the overwhelmingly persuasive interpretation.[123]

[78] It follows that, because the provision can properly and reasonably be interpreted without constitutional objection, it is not necessary to confirm the High Court's declaration of invalidity. This means that, purely as a matter of form, the appeal must succeed, though not for the reasons the appellants advanced. In fact, the reasons that led the High Court to conclude that the provision was invalid are substantially vindicated in this judgement. To make this clear, I would grant a declaration that the charge does not survive transfer.

Costs

[79] In form, this Court must thus decline to confirm the High Court's declaration of constitutional invalidity and thus allow the municipalities' appeal. In substance, however, the confirmation applicants have won, because the interpretation of the provision that favours them (and whose opposite would render the provision constitutionally invalid) has prevailed. They are therefore entitled to their costs.

[80] I would not grant the confirmation applicants the costs of four counsel, as sought. They are entitled to the costs of two counsel.

[123] See Brits above n 51 at 410-3 (contending for an interpretive resolution of the constitutionally offensive impact of transmissibility).

Order

[81] The following order is made:

1. The appeals succeed.
2. The order of invalidity is not confirmed.
3. It is declared that, upon transfer of a property, a new owner is not liable for debts arising before transfer from the charge upon the property under section 118(3) of the Local Government: Municipal Systems Act 32 of 2000.
4. The appellants in the appeals and the Minister are to pay the applicants' costs, including the costs of two counsel.

For Jordaan and Others (applicants in CCT 283/16 and respondents in CCT 293/16):	D Unterhalter SC, L G F Putter SC, H Varney and S Ogunronbi instructed by Ross Attorneys
For City of Tshwane Metropolitan Municipality (first respondent in CCT 283/16 and applicant in CCT 293/16):	T Motau SC, A Vorster, S Scott and I Phalane instructed by Gildenhuys Malatji Inc
For Ekurhuleni Metropolitan Municipality (second respondent in CCT 283/16 and applicant in CCT 294/16):	W J Vermeulen SC and P Sieberhagen instructed by Chiba & Tourapi Attorneys
For Minister of Cooperative Governance and Traditional Affairs (third respondent in CCT 283/16):	L Montsho-Moloisane SC, L Bomela and K Bokaba instructed by State Attorney, Pretoria
For TUHF Limited (first amicus curiae):	I Miltz SC and J J Bitter instructed by Schindlers Attorneys
For Banking Association South Africa (second amicus curiae):	A Cockrell SC and C Tabata instructed by Cliffe Dekker Hofmeyr
For eThekwini Metropolitan Municipality (third amicus curiae):	A A Gabriel SC and J P Broster instructed by Linda Mazibuko & Associates