GHOSTS OF THE MUNICIPAL DEBTS' PAST: IS *MITCHELL* RESURRECTING THE *MATHABATHE* SPECTRE? – NOT QUITE

Perregrine Joseph Mitchell v City of Tshwane Metropolitan Municipal Authority (50816/14) [2014] ZAGPPHC 758

1 Introduction

The unfortunate choice of words by the judiciary in the case of *City of Tshwane Metropolitan Municipality v Mathabathe* ((502/12) [2013] ZASCA 60 (hereinafter "*Mathabathe* case") has resulted in a barrage of incorrect interpretations being attributed to the decision. All of these have translated into massive uncertainty, coupled with boundless confusion as regards the whole issue of the collection of municipal debts by the municipality. Also, it had become clear to municipal entities that some of the erstwhile innovative ways of exploiting the legal framework created by the applicable legislation (eg, the withholding of certificates and demanding guarantees) have effectively been thwarted by the *Mathabathe* case. Responding thereto and moreover seizing upon the opportunity created by the now-existing uncertainty, municipalities have been quite inventive, and taken it upon themselves to embark on a myriad of newfound steps and methods which are generally grossly unfair and sometimes bordering on the illegal, in order to collect outstanding rates and taxes (Rice "Municipality Receives Beating in Court after Disconnecting Home Owner's Electricity Supply" 15 May 2015 http://heidelbergnigelheraut.co.za/1159/municipality-receives-beating-in-court-after-disconnecting-home-owners-electricity-supply/ (accessed 2015-07-10)). To a large extent, the entities have been engaging in, and in fact, intensifying the long-standing practice of conducting large-scale impromptu electricity disconnections, coupled with the recent refusal to connect new owners of properties with historical debts (Beamish "Tshwane Tries to Make New Owner Pay the Old Owner's Municipal Account" 30 April 2014 http://www.moneyweb.co.za/archive/new-property-owners-held-liable-for-defaulters-due/ (accessed 2015-07-13).

It was indeed a dispute arising out of such typical refusal to reconnect electricity by the municipality of the City of Tshwane that gave rise to the decision in the case of *Perregrine Joseph Mitchell v City of Tshwane Metropolitan Municipal Authority* (50816/14) [2014] ZAGPPHC 758 (hereinafter "*Mitchell* case"). Although, being a decision of the High Court, this latest decision cannot legally be expected to overrule the pronouncements made by the Supreme Court of Appeal in *Mathabathe* case (Brits "The Statutory Security Right in Section 118(3) of the Local

Government: Municipal Systems Act 32 of 2000 – Does it Survive Transfer of the Land? [Discussion of City of Tshwane Metropolitan Municipality v Mathabathe 2013 4 SA 319 (SCA)]" 2014 25 *Stell LR* 536 542). The *Mitchell* case is nevertheless considered important mainly due to its assisting in throwing new light on the issue of municipal liens, and consequently bringing a new dimension to the debate.

The purpose of this note is therefore to conduct a close evaluation of the *Mitchell* case with a view to determining the extent to which the judgment in the case supplements or deviates from the one in the *Mathabathe* case. This will be done in three parts: in the first part a brief outline of the facts and decision of the *Mitchell* case will be rendered; the second part will provide an analysis of the relevant decision. Importantly, and in an attempt to answer the question in the title, the analysis will compare the two cases in so far as their pronouncements relate to the principles pertaining to the municipal lien. This part will also discuss and explore the important issues raised by the judgment in the case under discussion, and in the process detail the possible practical implications thereof. The last part will conclude the discussion.

2 The *Mitchell* case

2 1 Facts of the case

On 22 February 2013 the applicant purchased Erf 296, Wonderboom Township in Gauteng, situated within the municipal boundaries of the respondent at a sale in execution. The conveyancers were instructed to attend to the registration of transfer of the property. They applied to the respondent, the City of Tshwane Metropolitan Municipality (the municipality), to issue them with the requisite clearance certificate contemplated by section 118(1) of the Municipal Systems Act (32 of 2000, hereinafter "the MSA"). The respondent duly issued a certificate, indicating that the total historical municipal debt, including municipal debts older than two years, was R232 828.25. A dispute with regard to the validity of this certificate then ensued, whereafter a new certificate was issued, indicating that the outstanding municipal debt for the two years preceding the date of application for the certificate amounted to R126 608.50. After payment of this amount the applicant took transfer of the property. The outstanding balance of R106 219.75, representing historical debts older than two years, remained unpaid.

After taking transfer of the property, the applicant sold it to a certain Prinsloo. Before taking transfer of the property, Prinsloo attended the offices of the respondent to apply for the supply of municipal services to the property, such as electricity, sanitation, waste removal and water. The respondent refused to enter into an agreement with Prinsloo for the supply of municipal services to the property until the historical debts in the amount of R106, 219.75 had been paid in full. Prinsloo then indicated to the applicant that she would not proceed with the purchase of the property until the issue of payment of the historical debts had been resolved.

The applicant took the municipality to court, arguing that, in terms of section 118(3) of the MSA, the respondent's lien was a charge upon the property, and so "should be enforced over the proceeds of the property and/or against the previous owner" only. Seen in this light, the respondent was therefore not entitled to hold the applicant and/or his successors in title liable for the payment of historical municipal debts older than two years, and which had been incurred by previous owners or occupiers of the property. As such the respondent was obliged to open a municipal account in the name of the applicant (or his successor in title) for municipal services with regard to the property. On the other hand, the municipality's contention was to the effect that the security provided by section 118(3) was a charge upon the property, and any amount due for municipal debts that had not yet prescribed, was secured by the property. It was therefore argued that the security provision contained in this subsection survives a transfer of the property from one owner to another, and should be enforceable against the applicant and/or his successors in title. Furthermore, as long as the historical debts remained unpaid, the respondent should be entitled to refuse the supply of municipal services to this property.

The matter was heard by Fourie J, who granted the relief sought by Mitchell and dismissed the municipality's claims.

2 2 Judgment

The High Court, in dismissing the municipality's contentions, discussed the provisions of section 118(1) and 118(3), as well as old authorities, and ultimately declared that (a) the security provided by section 118(3) of the MSA in favour of the respondent with regard to the property in dispute was extinguished by the sale in execution, and subsequent transfer of that property into the name of the applicant; (b) the applicant (or his successor in title) was not liable for the payment of outstanding municipal debts older than two years, which had been incurred by his predecessor(s) in title prior to the date of transfer of the said property into his name; and (c) the respondent had no right to refuse the supply of municipal services (such as electricity, water, sanitation and waste removal) to the applicant (or his successor in title) with regard to the said property merely because of outstanding municipal debts older than two years.

3 The discussion and the analysis

In an equally direct, unequivocal, convincing and well-reasoned judgment, the Court in the *Mitchell* case has undoubtedly done what the *Mathabathe* decision had omitted to do in the first place. In so doing, it has also managed to remedy the damage and the attendant dilemma visited upon the conveyancing processes by the confusing decision of the previous case. This feat was achieved through the crystallisation of principles and setting down of the law relating to collection of rates and taxes in very clear and unequivocal terms. In the process of delivering its judgment, the Court also raised a number of important peripheral issues that may in future have the undeniable effect of levelling the field of play between local government and

consumers. This very important need to set down ground rules has already been indirectly hinted at in legal commentaries (Brits 2014 25 *Stell LR* 541). The relevant analysis which is neatly and conveniently organised into specific headings follows hereunder.

3 1 The municipal lien issue

The Court started by reiterating the position as hinted upon in the *Mathabathe* case, albeit from a very clear and comprehensible position. As indicated in previous commentaries on a similar issue, the Court in the *Mathabathe* case commenced its analysis of the law on a correct footing, but sadly concluded the analysis on a sour note (see in this regard Ratiba "The Municipal Debt Collection Beyond the Mathabathe Case – A Welcome Solution or Multiplication of Problems? *City of Tshwane Metropolitan Municipality v Mathabathe* (502/120) [2013] ZASCA 60" 2014 35 *Obiter* 691). Most notably, the Court in the *Mathabathe* case was correct in recognising that "(T)he security provided by the subsection amounts to a lien having the effect of a tacit statutory hypothec …" (*Mathabathe* case par 10). This effectively and again accurately meant that once the transfer takes place without the necessary guarantees being put in place, the municipality stands to lose the protection of section 118(3). However midway through its decision, the same Court (and in a surprisingly contradictory manner) proceeded to make a pronouncement that "(I)t [the municipality], moreover, was plainly wrong in its contention that 'upon registration [of transfer] ... [it] loses its rights under Section 118(3) of the Act'" (*Mathabathe* case par 12). This the court had done without, most importantly, qualifying its statements by *inter alia* specifying or giving an indication of what rights of the municipality are not lost in the circumstances. In so doing, the Court had therefore inadvertently created an impression that the statutory tacit hypothec stays intact and attaches to the property after transfer, when in fact what stays intact is the underlying right to proceed against the seller by other means, even after the transfer (Ratiba 2014 35 *Obiter* 698).

In similar fashion the Court in *Mitchell* started by acknowledging the provisions of section 118(3), which are to the effect 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" (*Mitchell* case par 8). However, unlike the court in the *Mathabathe* case, this court did not simply extinguish the municipal lien issue solely on the basis of acknowledging its existence, and based on the fact that it was not lost to the municipality on the transfer of property. On the contrary, the Court made it clear that the question whether the municipal lien survives the transfer or not, can only be successfully answered by engaging in a thorough investigation of the nature of the municipal lien as well as what it entails. Following up on this enquiry, the Court (par 9) then correctly noted that previous case law identified the right so created by the abovementioned subsection to be nothing but "a lien having the effect of a tacit statutory hypothec" (*Stadsraad, Pretoria v Letabakop Farming Operations (Pty) Ltd* 1981 (4) SA 911 (T) 917; and *BOE*

Bank Limited v Tshwane Metropolitan Municipality 2005 (4) SA 336 (SCA) 341H). Ordinarily and as a tacit statutory hypothec, the right so created has been acknowledged to have the effect of automatically rendering a municipality's claim preferent to that of an existing mortgagee in the case of a sale in execution, thereby strengthening the municipality's rights slightly more than a veto or embargo provision could do in the circumstances (Du Plessis "Observations on the (Un-)constitutionality of Section 118(3) of the Local Government: Municipal Systems Act 32 of 2000" 2006 3 *Stell LR* 505 510). Furthermore, it is worth pointing out that some legal commentators have even walked the extra mile to the extent of describing such right as a tacit hypothec *sui generis* (Van der Merwe ''Does the Restraint on the Transfer Provision in the Sectional Titles Act Accord Sufficient Preference to the Body Corporate for Outstanding Levies?'' 1996 *THRHR* 367 378).

Therefore to this extent there is absolutely nothing that can be found to be faulty with the Courts' viewing of the right as being nothing but "a real right created by statute in favour of a municipality", and furthermore as "a limited real right (as opposed to a personal right) in the property of another that secures an obligation (*Mitchell* case par 9). This is in fact the most agreed upon view, and held by some legal commentators/authors who see and more readily classify the right as a real right (Brits 2014 25 *Stell LR* 537 and 540), alternatively special rights or privileges (Boraine and Van Wyk "Reconsidering the Plight of the Five Foolish Maidens: Should the Unsecured Creditor Stake a Claim in Real Security?" 2011 74 *Journal of Contemporary Roman-Dutch Law* 347 350). In this regard and given the succinct descriptions of the right so conferred upon the municipal establishments by the said section 118, the value of this judgment can therefore be said to lie in the fact that it clearly and painstakingly explains and describes the nature of the right that has been said not to have been lost in the course of the new transfer. In other words, unlike the *Mathabathe* case, this Court did not leave it up to the fanciful construction or footwork of the individual reader to determine what is or is not lost in the circumstances.

However, a problem seems to rear its ugly head when it comes to the second leg of the enquiry, being in respect of both the actual and practical meaning and effect of what can in the circumstances be conveniently described as "the act of losing" the right under discussion. This is so because the Court in the present case committed an error slightly similar to the one made in *Mathabathe*, albeit on a different level. Whereas the decision is to be applauded for correctly holding that the tacit hypothec does not survive the transfer, it nevertheless and at face value proceeded to create more confusion in as far as the circumstances, under which such non-survival can be said to take place, are concerned. A close-up and word-for-word review of the specific Court's utterances in this regard will serve to illustrate the point more clearly.

In the decision, the Court starts its analysis by briefly drawing a distinction amongst diverse situations pertaining to sales (*Mitchell* case par 10–11). The situations in question are firstly, sales arising out of liquidations (as was the case in the matter of *City of Johannesburg v Kaplan* 2006 (5) SA 10 (SCA)), and secondly, sales arising out of judgment executions (as was the

case in the matter of *BOE Bank Limited v Tshwane Metropolitan Municipality* 2005 (4) SA 336 (SCA)), and, lastly, voluntary sales by public auctions (as was the case in the *Mathabathe* decision), and which may be extended to cover sales by private treaty. He then posed a question which in the main sought to determine the legal position where "the immovable property is sold at a sale in execution, as opposed to a sale in the normal course of business" (*Mitchell* case par 12). In answering the question posed, the Court then makes a brief reference to Voet. The essence of Voet's arguments can aptly be said to be the following: at all given times, whenever immovables subject to a special hypothec are transferred, they pass subject to their burden, irrespective of whether such transfer is by onerous or lucrative title, or whether the transferee has knowledge or not of the hypothec in question. Nonetheless Voet does acknowledge a number of exceptions to this rule, one of which is expressed in his words as follows: "When mortgaged properties have been sold and delivered on the petition of creditors by order of a Judge with employment of the formalities of the spear, and creditors holding a hypothec have kept silent. Nevertheless by our customs in such a case the price takes the place of the thing, and a hypothecary creditor is permitted to contest with the rest of the creditors the privilege of preference over the price of the mortgaged property" (as quoted verbatim from par 12 of the *Mitchell* case).

Upon equating the "petition by creditors" with "sale in execution", the Court then safely draws a conclusion to the effect that the answer to the question, previously posed and as emanating from the common law, seems to be that sales in executions will most definitely extinguish the hypothec (par 13), but will, most importantly, leave the question open in the case of normal sales.

With all due respect, the statements made by the Court with regard to the distinction between a forced sale and normal sale have the potential to attract incorrect interpretations. For that reason it is submitted that, owing to the unwarranted distinction between sales types, it is possible for an adverse inference to be drawn. Such inference is simply that the *Mathabathe* judgment was reinterpreted in the *Mitchell* judgment to mean that, after the occurrence of a particular transfer, the purchaser and his property can no longer be threatened by municipal debt issues relating to periods prior to transfer. This will then have the effect of freeing the property and the purchaser from any prior municipal debt, but only in respect of properties purchased at sales in execution. The overall impression created is therefore that only in the stipulated cases will the lien disappear. The possibility of such an impression arising is perhaps further buttressed by the Court's observation that, "Generally speaking there is no reason, whilst the principal debt is still outstanding, why transfer in the normal course of business should terminate this (municipal lien) right" (*Mitchell* case par 9). A survey of a plethora commentaries elicited in reaction to the decision give a clear indication that this is in fact the most prevalent view held, and as such the current and prominent interpretation attributed to the decision (Bechard "Municipal Rates Ruling 'Not Such Good News'" 16 October 2014 http://www.iol.co.za/business/personal-finance/municipal-rates-ruling-not-such-good-news-1.1766279 (accessed 2015-07-13); Theodosiou "Perregrine

Joseph Mitchell v City of Tshwane Metropolitan Municipal Authority, Case No: 50816/14, Gauteng Division of the High Court, Pretoria (8 September 2014)" 12 November 2014 http://www.schindlers.co.za/perregrine-joseph-mitchell-v-city-of-tshwane-metropolitan-municipal-authority-case-no-50816-14-gauteng-division-of-the-high-court-pretoria-8-september-2014/ (accessed 2015-07-13); and Erasmus De Klerk Inc "Are you Liable for Historical Arrear Property Rates on your Property?" 2 March 2015 http://remax-rentals.co.za/liable-historical-arrear-property-rates-property/ (accessed 2015-07-13)).

Yet the above widely-held view and/or conclusion clearly needs re-examination mainly for the following reasons. In the first place, on a proper contextualisation of the decision under discussion and a proper interpretation of the legal principles involved, it is nonetheless still possible to argue that, even in normal sales the lien will technically disappear, based on the reasons previously given in a similar account of this topic (Ratiba 2014 35 *Obiter* 699–700). Again, it is the writer's contention that contrary to the above popularly, held interpretation of the decision, what the Court did in this matter was merely to come out very specifically and clearly on the stipulated cases, unlike the silence in the *Mathabathe* case which, as previously indicated and hinted at, has occasioned unwarranted interpretations. This then arguably positions the current case to be at least a step ahead of the *Mathabathe* one.

Furthermore on the facts, and again based on the Court's own reasoning, it is perfectly arguable that, although the case involved a property that was sold in execution, there is no reason for the judgment not to apply to all property sales, irrespective of the cause thereof. This is so mainly because of two things: In the first place, and as indicated above, the court in the *Mitchell* case (par 9 thereof) draws a clear distinction between a municipality's lien over a property and the cause of a debt on that property. In drawing such distinction, the Court by simple deduction is clearly implying that the municipal lien over the property exists solely due to the fact that the owner of the property is a party to the cause of the debt. In other words, it follows that the new municipal lien over the same property will arise only if the new owner is a party to a new debt caused on that property. In the second place, the Court has once again posed a question relating to the determination of the debtor after the transfer. In answering the same, the Court most importantly points out the differences between the concept of the principal obligation and a tacit statutory hypothec as a form of real security in law. In the judge's own words, "the one is a debt and the other security for payment of the debt. When the respondent's statutory hypothec was extinguished by the sale in execution and subsequent transfer of the property, the applicant obtained a clean title. However, the principal obligation (historical debts older than two years), continued to exist and is not affected by the loss of security. The person (customer, occupier or owner) who incurred these debts (and failed to pay) also remains to be the debtor" (*Mitchell* case par 15). Likewise, the Court could not find any statutory provision in existence having the effect of establishing joint and several liability between the previous owner and subsequent transferee of property burdened by municipal debt. Concluding that the property itself is a thing (and as such incapable of bearing legal rights and duties), and thus

could not justify such substitution, the Court correctly held such debt incapable of surviving the transfer (*Mitchell* case par 16). Needless to say, it is therefore a well-substantiated submission of this case note that the Court's dealing with the question of historical debts in the manner described, clearly makes a case for equal application of the decision to transfers of property in general.

In addition to the above, and coupled to the potential to lead to confusion about the different types of sales as described, the decision also raises two further important considerations that should apply and inform the legal issues determining the appropriate practices pertaining to the collection of municipal debt in future. The issues in question are firstly the guidelines on the correct and/or suitable interpretation of applicable legislation pertaining thereto, followed by the issue of the constitutional obligations of the municipal entities.

For this reason, the next section of this paper will explore these issues.

3 2 The correct interpretation of municipal legislation and relevant by-laws

In order to facilitate a better understanding of how the Court in the case under discussion dealt with the interpretation of relevant statutes and by-laws, this case note proposes a two-pronged approach. Firstly, there will be a background discussion on the rules relating to the interpretation of statutes, and this will be followed by a brief synopsis of the Court's approach to the legislation and by-laws which served before it.

3 2 1 The background to statutory interpretation

As a rule, the underlying principle of statutory interpretation is to arrive at what is the most appropriate and practical meaning of a piece of legislation. For the most part, interpretation involves the process of "construing exacted law-texts with reference to and reliance on other law-texts, concretising the text to be construed so as to cater for the exigencies of an actual or hypothesised concrete situation" (Du Plessis *Re-interpretation of Statutes* (2002) 18). Conventionally and/or historically, two approaches exist to facilitate this process. The first approach, which is known as the "literal approach", was first adopted into South Africa in the case of *De Villiers v Cape Divisional Council* (1875 Buch 50). The crux of the approach was clearly articulated in the case of *Principal Immigration Officer v Hawabu* (1936 AD 26), where the starting point of the interpretation process was stipulated to be the literal meaning of the word to be interpreted. In terms of this approach, if the meaning of the word is clear, then the meaning attached to the word should be taken to represent the exact intention of the legislature (*Principal immigration Officer v Hawabu supra* 30–32), and as such be put into effect. However, if the literal meaning of the word is found to be ambiguous, vague or misleading to an extent that an application thereof will result in absurdity (*Venter v R* 1907 TS 910 913–914; and *Union Government v Mack* 1917 AD 731 739–740), then other aspects of the

legislation, such as the title, headings to chapters and other sections, the text in another official language, and in the event of failure thereof, common-law presumptions should be resorted to in the quest to establish the intention of the legislature (*Farrar's Estate v CIR* 1926 TPD 501 508). The second approach which is diametrically opposed to the first, is known as the "contextual approach". In terms of this approach, whenever legislation stands to be interpreted, emphasis must be placed on the purpose or object of the legislation in question. In order to establish the purpose or objective of the legislation to be interpreted, due consideration of the context of the legislation, including relevant social factors and political policies, should be made (Van Schalkwyk and Geldenhuys "Section 80A(c)(ii) of the Income Tax Act and the Interpretation of Tax Statutes in South Africa" 2009 17 *Meditari Accountancy Research* 167 170). Usually expressed as the so-called "mischief rule", this approach acknowledges and encourages the use of external factors, such as the common law prior to enactment of the legislation, mischief in the law not covered, new remedies and the reasons for such remedies, in order to arrive at the true meaning and purpose of the provision before the Court.

Legal commentators are in agreement that the dawn of the constitutional era led to a gradual shift in preference and emphasis from the literal approach to the contextual approach and/or other approaches, such as the purposive approach (Du Plessis and De Ville "Bill of Rights Interpretation in the South African Context (1): Diagnostic Observations" 1993 4 *Stell LR* 63; Davis "Democracy: Its Influence Upon the Process of Constitutional Interpretation" 1994 10 *South African Journal on Human Rights* 103; and Goldswain "The Purposive Approach to the Interpretation of Fiscal Legislation – The Winds of Change" 2008 16 *Meditari Accountancy Research* 107 113–115). There are several reasons that can account for this, one of which is that over time the former approach had received much criticism to the point of being viewed as being archaic, although it still retains some hard-line proponents who from time to time vouch for it and apply it judicially (*Public Carriers Association v Toll Road Concessionaries (Pty) Ltd* 1990 (1) SA 925 (A) 943J, *Swanepoel v City Council of Johannesburg* 1994 (3) SA 789 (AD) 795I–796B; and *Kalla v The Master* 1995 (1) SA 261 (T) 269C–G), or acknowledge it in the literature (Pearmain "Interpretation of Statutes: Legal Principles" 28 September 2013 http://lawinmypocket.co.za /2013/interpretation-of-statutes-legal-principles-2/ (accessed 2015-07-27).

However, chief amongst the reasons for favouring the contextual approach is the fact that the Constitution itself proscribes a form of interpretation that is akin to this approach. This can be deduced from the following constitutional provision: "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" (s 39(2) of the Constitution of the Republic of South Africa, 1996 (hereinafter "the Constitution")). The end result is therefore that, when confronted with any issue of statutory interpretation, the Court should preferably apply the contextual approach as it is the one most likely to promote the spirit of the Constitution. Needless to say, any court that utilises the contextual approach, and accordingly sets a precedent by crystallising interpretational

guidelines which have the effect of complying with our constitutional ideals, should be applauded. In actual fact, and as per Ngcobo, J: "The Constitution is now the supreme law in our country. It is therefore the starting point in interpreting any legislation. Indeed, every court 'must promote the spirit, purport and objects of the Bill of Rights' when interpreting any legislation. That is the command of section 39(2). Implicit in this command are two propositions: first, the interpretation that is placed upon a statute must, where possible, be one that would advance at least an identifiable value enshrined in the Bill of Rights; and second, the statute must be reasonably capable of such interpretation. This flows from the fact that the Bill of Rights 'is a cornerstone of [our constitutional] democracy'." It "affirms the democratic values of human dignity, equality and freedom" (*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) [72] 521E–522B).

3 2 2 The *Mitchell* case approach

In the same breath, and most notably in the case under discussion, the municipality had sought to advance an argument to the effect that a proper construction of the delegated legislation that was in place at the time would have resulted in the embargo provision (or right of refusal), contained in the said by-laws also becoming applicable to subsequent owners. Clearly, and by implication, this argument in effect sought to confer the literal meaning to the phrase "owner" as used in the by-laws. Granted, if this approach is allowed to hold sway, then obviously owner will be the person in whose name the property is registered at the deeds registry, and by the same token this will be wide enough to cover subsequent owners. However, the Court correctly did not accept such interpretation, choosing rather to use the contextual approach. At paragraph 22, the Court specifically stated that the "words 'in whom from time to time is vested' (and which are used in conjunction with the definition of owner) should be understood in [their] proper context". Having said that and again after taking a closer look at the words "owner", "occupier", "customer", etcetera, as invariably used in the applicable pieces of municipal legislation, the Court then proceeded to conclude most importantly that "this does not mean that a subsequent owner is now also liable for a debt which was incurred in the past, when another person was the owner" (*Mitchell* case par 22). Further, in the absence of any specific reference being made to the subsequent owner in the relevant by-laws, it accordingly found it difficult to extend such burden to the subsequent transferee, mainly because "If that was the intention, the Legislature could have said so" (*Mitchell* case par 22).

It is therefore arguable that by emphasising the text in the contextual approach in matters of such social- and human-rights importance, the Court is to be commended for two reasons. Firstly, it has assisted immensely in crystallising a lack in guidance in legislation pertaining to the collection of municipal debt. This will hopefully have the effect of nipping the draconian powers of the municipalities in the bud, and sending a message that no-one is above reproach and thus no-one can be allowed to pass onto innocent victims the end result of what in a majority of cases is brazen indolence,

coupled with a lack of planning and organisation. Secondly and crucially, this is in line with the current trend to bring the spirit of the Constitution into the process of interpreting legislation. The logic for this cannot be faulted. It is equally submitted that, since a lot of the current by-laws and pieces of legislation represent fragments of the past, to apply the rigid literal interpretation to legislation of that nature is bound to lead to human-rights abuses of some magnitude, a fact that is an absolute "no-no" in a constitutional democracy like that of South Africa.

3 3 The constitutional duty of municipalities

From a constitutional perspective there are three primary spheres of government, namely local, provincial and national government (National Business Initiative "Overview of municipal service delivery mechanisms" August 2006 http://www.google.co.za/url?url=http://nbisp.nbi.org.za/Lists/Publications/Attachments/76/Overview_Municipal_Service_Delivery_Mechanisms.pdf&rct=j&frm=1&q=&esrc=s&sa=U&ved=0CB0QFjACahUKEwiDq4uUkP7GAhVHCSwKHQj6Df8&usg=AFQjCNHrRGuf30GeqsfzAjkXMVTje0Kahw (accessed 2015-07-28) 8). The functional areas of each sphere are outlined by the Constitution. The Constitution itself is described as the supreme law of the land, meaning that all law or conduct inconsistent with it is invalid, and most importantly, all obligations imposed by it must be fulfilled (s 2 of the Constitution). One of the obligations imposed by the Constitution is the provision of basic services, a duty that falls squarely onto the shoulders of municipalities countrywide. The serious and imperative nature of this obligation (National business initiative http://www.google.co.za/url?url=http://nbisp.nbi.org.za/Lists/Publications/Attachments/76/Overview_Municipal_Service_Delivery_Mechanisms.pdf&rct=j&frm=1&q=&esrc=s&sa=U&ved=0CB0QFjACahUKEwiDq4uUkP7GAhVHCSwKHQj6Df8&usg=AFQjCNHrRGuf30GeqsfzAjkXMVTje0Kahw 3) is deduced from the number of constitutional provisions sequentially described hereunder. The starting point in this regard is section 152 of the Constitution, which sets down the objects of local government, including the provision of services to communities in a sustainable manner and the promotion of social and economic development (s 152(1)(b) and (c) of the Constitution). Properly construed and all things being equal, the said objects evidently include the provision of basic services in whatever form to the community, firstly, on a sustainable basis, and secondly, in a way that is designed to promote social and economic growth. In the same vein, section 153 of the Constitution further determines that each municipality must give priority to the basic needs of the community (s 153(1)(a) of the Constitution). Further, section 214 of the Constitution lists a range of issues to be taken into account when the annual Division of Revenue Act is submitted to Parliament, one of which is "the need to ensure that provinces and municipalities are able to provide basic services and perform the functions allocated to them" (s 214(2)(d) of the Constitution). Finally, section 227 of the Constitution stipulates amongst other things that "Local government and each province is entitled to an equitable share of revenue raised nationally to enable it to provide basic services and perform the functions allocated to it" (s 227(1)(a) of the Constitution). It is worth

mentioning that similar sentiments are echoed in section 73 of the MSA, in terms of which the "municipality must give effect to the provisions of the Constitution by *inter alia* giving priority to the basic needs of the local community and ensuring that all members of the local community have access to at least the minimum level of basic municipal services" (s 73(1)(a) and (c) of the Municipal Systems Act 32 of 2000).

Judicially, the municipal obligation pertaining to service delivery (and most importantly for our current purposes, specifically the provision of electricity) has fittingly received adequate attention in two leading fair and well-reasoned judgments. Firstly, in the matter of *Joseph v City of Johannesburg* 2010 (3) BCLR 212 (CC); 2010 (4) SA 55 (CC) the Constitutional Court *inter alia* stated that: "The provision of basic municipal services is a cardinal function, if not the most important function, of every municipal government. The central mandate of local government is to develop a service delivery capacity in order to meet the basic needs of all inhabitants of South Africa, irrespective of whether or not they have a contractual relationship with the relevant public service provider. The respondents accepted that the provision of electricity is one of those services that local government is required to provide. Indeed, they could not have contended otherwise. In *Mkontwana*, Yacoob J, held that 'municipalities are obliged to provide water and electricity to the residents in their area as a matter of public duty'. Electricity is one of the most common and important basic municipal services, and has become virtually indispensable, particularly in urban society" (*Joseph v City of Johannesburg supra* par 34). With reference to a range of other legislative provisions relating to local government, it was further stated in the same case, that "Taken together, these provisions impose constitutional and statutory obligations on local government to provide basic municipal services, which include electricity. The applicants are entitled to receive these services. These rights and obligations have their basis in public law. Although, in contrast to water, there is no specific provision in respect of electricity in the Constitution, electricity is an important basic municipal service which local government is ordinarily obliged to provide" (*Joseph v City of Johannesburg supra* par 40). The specific reference to electricity should be noted. Furthermore in *Mazibuko v City of Johannesburg* 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) the Constitutional Court, confirming the obligation on the state (in this case, the municipality) to provide services that give effect to the socioeconomic rights in the Constitution, had the following to say: "The Constitution envisages that legislative and other measures will be the primary instruments for the achievement of social and economic rights. Thus it places a positive obligation upon the State to respond to the basic social and economic needs of the people by adopting reasonable legislative and other measures. By adopting such measures, the rights set out in the Constitution acquire content, and that content is subject to the constitutional standard of reasonableness" (*Mazibuko v City of Johannesburg supra* par 66).

The decision of the *Mitchell* case under discussion should therefore be read against this background and also understood in this context. In deciding the way it did by aligning its pronouncements with the principles espoused in the Constitution, and as highlighted by the two cases mentioned above, it is

submitted that the Court is to be applauded for giving substance to the constitutional imperatives, long confirmed by the highest Court, and entrenched in the Constitution closer to the people and municipal structures *in fora* most accessible to the two mentioned participants. By so doing the Court introduced the constitutional imperatives into the age-old practice of municipal debt collections, and thereby building into the practice the necessary and requisite fairness and probity that should be brought to bear in the practice itself.

4 Conclusion

The unfortunate choice of words by the judiciary in the *Mathabathe* case has resulted in a barrage of wrong interpretations being accorded to the decision. The misleading interpretations have been the direct consequences of the Court in the *Mathabathe* case failing to qualify its statements by *inter alia* specifying what rights of the municipality have not lost in the transfer of property, pursuant to the issuing of an abridged certificate. In so doing, the Court had therefore inadvertently created an impression that the statutory tacit hypothec stays intact and attaches to the property after transfer, when in fact what stays intact, is the underlying right to proceed against the seller by other means, even after the transfer has taken place. In contrast, the *Mitchell* case is significant for two main reasons: Firstly, unlike the *Mathabathe* decision, it has taken the matter a step further by making it clear that the question whether the municipal lien survives the transfer or not, can only be successfully answered by engaging in a thorough investigation of the nature of the municipal lien, as well as what it entails. Hence the value of this judgment revolves around the fact that it clearly and painstakingly explained and described the nature of the right that is said not to have been lost in the course of the new transfer. This remains the case notwithstanding the latter decision's minor and inadvertent error of limiting its discussions to transfers arising out of sales in execution, when in actual fact there is nothing in principle preventing the extension of the *Mitchell* pronouncements to all types of transfers. In the second place, the *Mitchell* case has thrown the spotlight on two further important considerations that should in future apply and inform the legal issue and questions of determining the appropriate practices pertaining to the collection of municipal debt. The issues in question are the guidelines as regards the correct or suitable interpretation of applicable legislation pertaining thereto coupled with the constitutional obligations of the municipal entities.

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