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

1 Introduction

South Africa prides itself as a country with the best land-registration system in the world (Radloff "Land Registration and Land Reform in South Africa" 1996 29 *John Marshall LR* 809 811). However, the intoxicating affect of such a rosy picture as depicted in the legal literature and pertaining to the land-registration system in this country continues to hold and tantalise the mind of a novice property practitioner until, at least one arrives at the point where the actual processes involved in effecting the transfer of property and the eventual registration of a title deed to the property are engaged. This is the exact point where one begins to experience the lived realities of the frustrations often meted out to the relevant process participants such as the transferring attorneys, sellers and purchasers of property alike and least of all not forgetting the financial institutions.

The turning point starts with section 92 of the Deeds Registries Act 47 of 1937 (hereinafter "the Deeds Act") in terms of which no transfer of land may (shall) be registered without a rates-clearance certificate from the local authority in whose jurisdiction the land lies (Christie *Conveyancing Practice Guide* 3ed (2008) 19).The comedy of errors often accompanying the efforts geared towards practical compliance with the section leaves much to be desired. It is in the context of such problems arising during the processes of obtaining rates-clearance certificates from the municipality that the need to critically evaluate the recent supreme court of appeal judgment in the case of *City of Tshwane Metropolitan Municipality v Mathabathe* ((502/12) [2013] ZASCA 60 (hereinafter "the *Mathabathe* case")) emanates. Such a need is further bolstered by the fact that, practical problems that were experienced in the case under discussion should be acknowledged, and always be kept in mind when judgements similar to the one under discussion are analysed. The reality of it all is that "In South Africa, the management of municipal services has been an ongoing dilemma for the new government because of what it terms 'a culture' of non-payment among users" (Ruiters "Contradictions in Municipal Services in Contemporary South Africa:

Disciplinary Commodification and Self-disconnections" 2007 27(4) *Critical Social Policy* 487).

The purpose of this note is therefore to critically evaluate the *Mathabathe* case with a view to determining whether the judgment in the case constitutes a welcomed solution to a long-standing problem or not. This will be done in three parts. In the first part an outline of the contextual background within which the evaluation is to take place will be presented. This entails detailing the dilemma often facing the municipalities in the provision of services and the legal framework pertaining thereto, coupled with a brief description of how the same translates into frustrations often directed at various participants in the receiving end of the property-registration process. The second part will provide a brief outline of the facts and decision of the *Mathabathe* case. The last part will give an analysis of the relevant decision, which analysis will also discuss the important issues raised by the practical implementation of the judgment.

2 The contextual background

In South Africa, municipalities are expected to raise a large percentage of their revenue themselves. In aggregate and in the year 2001, this translated into approximately 92 per cent of their budget, with the remaining 8 per cent coming from transfers from the national and provincial spheres (Republic of South Africa "Intergovernmental Fiscal Reviews (IGFR)" 146 (9 October 2001) http://www.treasury.gov.za/publications/igfr/2001/IGFR.pdf (accessed 2014-03-13)). Practically, there is evidence that points out to the fact that local authorities rely, to a large extent, on user charges especially utility fees on electricity and water to obtain the revenues that are needed to finance their operations (Fjeldstad "What's Trust Got to do With it? Non-payment of Service Charges in Local Authorities in South Africa" 2004 42(4) *Journal of Modern African Studies* 539).

Despite such a gigantic task being placed on the shoulders of respective municipalities, it is nevertheless very apparent that the legacy of "apartheid" has left a very large and ugly mark on the otherwise good work of the municipalities. Most of these municipalities are time and time again confronted with numerous complex problems related to overcoming the legacy of our past. Among the many problems reported are firstly those associated with municipal administrative staff. Literature shows that many municipalities have skills shortages which were caused by the leaving in droves of the skilled and experienced municipal managers. Also and according to Pycroft, the amalgamation of former white municipalities with their surrounding black townships had, at the time, brought with it the challenge of creating a unified administration largely characterised by the incorporation of officials from the former black local authorities with officials from the former white town councils (Pycroft "Democracy and delivery: The Rationalization of Local Government in South Africa" 2000 66(1) *International Review of Administrative Sciences* 143 146). In his opinion, Pycroft, states that the unification of administrative structures has frequently

led to the over-staffing of municipalities and thus placing a severe burden on the finances of the council. Added to this, is the issue of inappropriate or inadequate training of municipal staff.

The cumulative effect of the above problems contributed to a larger extent towards the creation and crystallisation of the second major problem of inability to collect outstanding debt in most cases coupled with inadequate collection of revenues in some instances. Granted, this problem has also been largely precipitated by the widespread culture of non-payment of services largely traceable to the protest-motivated payment boycotts of the 1980s and early 1990s and which has worsened over the years (Republic of South Africa http://www.treasury.gov.za/publications/igfr/2001/IGFR.pdf 151). Once again, according to Pycroft the recovery rates in some former homeland municipalities were, on average, as low as 42 per cent (Pycroft 2000 66(1) *International Review of Administrative Sciences* 147). For municipalities, this has of course practically translated into year-end deficits, a reduction of local government services to balance the budget, and higher fees and taxes for those who do pay (Fjeldstad 2004 42(4) *Journal of Modern African Studies* 539).

To counterbalance the second problem above, municipalities had to come with innovative measures that sought to encourage (and sometimes even bulldoze) compliance with requests for payment of municipal services despite that there was a conspicuous failure on the part of municipalities to implement appropriate cost-recovery techniques. Most notably, financially weak municipalities with inexperienced staff often failed to render monthly accounts (Pycroft 2000 66(1) *International Review of Administrative Sciences* 147) or in the few instances where such accounts were rendered, they turned out to reflect incorrect billing methods (Smith and Hanson "Access to Water for the Urban Poor in Cape Town: Where Equity Meets Cost Recovery" 2003 49(8) *Urban Studies* 1517 1540), or in even worst cases, accounts were submitted to wrong addresses (Smith and Hanson 2003 49(8) *Urban Studies* 1536). According to these commentators, as far back as 1997, local authorities had developed a debt-management policy that called for recovering debts owed to the local authority. In the main, the policy included sanctions (warning, disconnections, legal process and evictions) in the event of non-payment of accounts. It also made provision for domestic consumers in arrears to make arrangements with a service provider to begin paying off a portion of their debts. With arrangements proving to be unsuccessful, local authorities had, by 1998, begun using water supply cut-offs as a mechanism for debt management. The latter, however, also magnified the problems for the municipalities when the water supply cut-offs sparked widespread township revolts, making these areas periodically ungovernable while also encouraging widespread illegal reconnections as a form of community resistance to the rigid debt-management strategies put in place by municipal authorities (Smith and Hanson 2003 49(8) *Urban Studies* 1533–1544).

From the legal statutory perspective, when it comes to the collection of outstanding debts, municipalities have, at their disposal, the legal framework contained in the Local Government: Municipal Systems Act 32 of 2000 (hereinafter "the MSA"). Section 96 of the MSA provides that municipalities are obliged to collect moneys that become payable to them for property rates and taxes and for the provision of municipal services. It is at the intersection between this section and the previously mentioned section 92 of the Deeds Act that conveyancing processes start to kick in. Practically, this entails the transferring conveyancer and, in attempting to comply with the Deeds Office requirements, having to approach the municipality with a view to first obtaining the rates-clearance quotation which is nothing but the outstanding services debt in respect of a particular property, and settling the amount reflected in the quotations before being furnished with the requisite clearance quotations for purposes of section 92 of the Deeds Act.

3 The legal framework for the collection of municipal revenue and its relevance to conveyancing procedures

The point of departure is the MSA, which is said and seen in literature circles as a transformative piece of legislation which, for all intents and purposes, had the characteristics to represent a definite break with the "apartheid" system of local government which ''failed dismally to meet the basic needs of the majority of South Africans'' (Du Plessis "Observations on the (Un-) Constitutionality of Section 118(3) of the Local Government: Municipal Systems Act 32 of 2000" 2006 17(3) *Stellenbosch LR* 505 506). Of relevance for our purpose is section 118(1) and (3) of the Act and which is contained in Chapter 11 thereof with the heading "Legal matters". The section is the last section in the chapter, and occurs under the heading ''Restraint on transfer of property''. Subsection 1 thereof provides that:

> "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."

In the same vein subsection 3 of the same section is 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".

What inevitably happens in practice and flowing from the above is that conveyancers will before lodgement of deeds at the Registry Office for purposes of registration of transfer, transmit an application to the relevant municipality for the obtaining of clearance figures, which can either be for a

"full clearance", meaning that all amounts outstanding will be paid, or alternatively be for and "abridged clearance", again meaning that only amounts owed arising during the two-year period prior to application for figures will be paid. In instances where a full certificate is obtained there would normally be no problems and none of the parties involved in the transaction can be said to have suffered any prejudice. However, if on the other hand the seller obtained an abridged, two-year clearance, there would still have been monies owing to the municipality after transfer of ownership, effectively meaning that the seller remained liable for such monies, but the debt will, legally speaking, no longer be secured by the property. It is primarily for this reason that many municipalities displayed some reluctance, and in most cases an outright refusal in the issuing of abridged clearances, choosing rather to issue them in instances whereby the transferring conveyancer furnishes in advance a written guarantee in favour of the municipality, and to the effect that all moneys outstanding will be settled from the proceeds of the sale. Needless to mention, conveyancers often complied with the municipality requests for undertakings but admittedly only in those cases where it became clear to the conveyance, after working out the finances, that sufficient moneys will be available to cover the full municipal debt. This practically implied that in those cases where the full municipal debt far exceeded the available cash, the transaction would not proceed, often resulting in the sale of property not going through.

It was indeed a dispute arising out of such typical refusal by the City of Tshwane Municipality that gave rise to the decision in the *Mathabathe* case.

4 The *Mathabathe* case

4 1 Facts of the case

Thomas Mathabathe, the then owner of erf 1080 Kosmosdal, granted Nedbank, the mortgagee, a power of attorney to sell his property by public auction. Auction Alliance was appointed as the auctioneer. Mr Lawrence made an offer to purchase the property, which offer was accepted by Mr Mathabathe. The conveyancers instructed to attend to the registration of transfer of the property applied to the appellant, the City of Tshwane Metropolitan Municipality (the municipality) to issue them with the requisite clearance certificate contemplated by section 118(1) of the MSA. The municipality issued a statement recording that the total amount due was R162 722,26, which included what had been termed as "historical debt", that is, debt due to the municipality for services prior to the two years envisaged in section 118(1)(b) of the MSA.

The conveyancers' endeavours to persuade the municipality to exclude the amount of the historical debt were unsuccessful. The municipality instead sought an undertaking from the conveyancers that the historical debt will be paid to the municipality on the date of registration of the property into

the name of the purchaser, or within a reasonable time thereafter (that is, 48 hours).

Mr Mathabathe and Nedbank applied to the North Gauteng High Court to order the municipality to issue a statement limited to the amounts due for municipal services during the two years preceding the date of application for the certificate and to issue a certificate on payment of that limited amount. The municipality opposed the application and, in a counter-claim, sought the relief that Mr Mathabathe and Nedbank be ordered to pay the historical debt and that the transferring attorneys provide the municipality with an undertaking to pay such debt.

The matter was heard by Goodey AJ who granted the relief sought by Mr Mathabathe and Nedbank and dismissed the municipality's counter-claim. The municipality sought and was granted leave to appeal, which appeal was limited to the dismissal of the counter-claim.

4 2 Judgment

The Supreme Court of Appeal, in dismissing the appeal, discussed the provisions of section 118(1) and 118(3) of the MSA. The court ultimately ruled that section 118(1) is accordingly a veto or embargo provision with a time limit, and that section 118(3) is a security provision without a time limit

5 The discussion and the analysis

Admittedly, the court in the *Mathabathe* case has done what the old adage of "stirring the hornet's nest", meant by issuing one of the most confusing decisions in the legal field ever. This is so because the decision in the case inadvertently raised a number of issues and questions which had both practical and constitutional connotations. It is submitted that the vagueness and the ambiguous nature of the words chosen by the honourable judge of appeal had the unfortunate potential of attracting a plethora of interpretations thereto and this would unfortunately have drastic implications and/or consequences depending on the position adopted by the person seeking to unscramble and interpret the decision. For this reason, this part of the paper will proceed along the lines of exploring all the possible interpretations to the decision as well as determining the logic of the same.

5 1 The constitutional implications of the decision

In laying down its judgment the court has most interestingly differentiated between what it referred to as the "embargo provision" and the "hypothec provision". The constitutional implications of the embargo provision as detailed in the *Mathabathe* decision has already been the subject matter of case law. The issue was first dealt with in the case of *Geyser v Msunduzi Municipality* (2003 (5) SA 18 (N)), where the court (as per Kondile J) opined that section 118(1) did provide for the deprivation of property in the sense

that it authorises interference with the property owner's right to transfer her property, but that such deprivation was not arbitrary as contemplated in section 25(1) (*Geyser v Msunduzi Municipality supra* 38I). The court's reasoning was to the effect that the extent of the deprivation flowing from section 118 on a property owner's enjoyment of the incidents of ownership was very limited. It embraced a single incident of ownership only and even then with the partial delay of transfer because pending transfer, the property owner continued to enjoy the majority of the incidents of ownership (*Geyser v Msunduzi Municipality supra* 38F–G). In the premises the deprivation of the first applicant's property could therefore not be said to be arbitrary, but was rather rationally related to the objects that section 118 sought to achieve. With the same mindset in place, the Constitutional Court in *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng (KwaZulu-Natal Law Society and Msunduzi Municipality* as *amici curiae*) (2005 (1) SA 530 (CC)), ultimately found that section 118(1) of the MSA is not unconstitutional.

On the contrary, the constitutionality of section 118(3) is still moot in that there is to date no noted constitutional challenge to the section. This means therefore that the discussion herein will mainly hinge upon the possible arguments that could be raised in the event such a challenge is launched in future. However, before determining and dealing with the possible constitutional implications of the decision in as far as section 118(3) is concerned, two possible interpretations emanating from the decision will have to be addressed. The first issue relates to the question of tacit hypothec in the section and, as elaborated upon by the judge, could be understood and said to survive the transfer. The second issue relates to the enquiry whether the hypothec is intended to be preferent only to existing mortgage or could similarly be understood to extend to the new mortgage on the property in question.

5 1 1 Does the hypothec survive the transfer?

The court in the case under discussion has made it clear that municipalities "are given the capacity to block the transfer of ownership of the property until debts have been paid in certain circumstances" and further that "(T)he principal elements of s 118 are accordingly a veto or embargo provision with a time limit (s 118(1)) and a security provision without a time limit (s 118(3))" (*Mathabathe* par 9). What this literally and practically boils down to is that, if a municipality were to exercise its veto or embargo rights by blocking the transfer of property on the basis that certain debts (that is, the two-year debts or current debts) have not been paid, it naturally follows that once the debt to the municipality for the two-year period, immediately preceding the date of application for rates figures, is paid, the embargo provision comes to an end, effectively meaning that the municipality can no longer refuse to issue a clearance certificate and the seller, once in possession of such clearance certificate, is therefore free to transfer the property to whomever.

In fact this entitlement is succinctly summed up by Nugent JA in the case of *City of Cape Town v Real People Housing* ((77/09) [2009] ZASCA 159 (30 November 2009)), and who emphatically declares that "(I)t is apparent that the section was construed by the majority to mean that a municipality must issue a clearance certificate if no debts were incurred during the preceding two years, notwithstanding that earlier debts exist, because otherwise there would have been no basis for finding that the deprivation is capable of being restricted to no more than two years. If an owner is entitled to a clearance certificate when debts have not been incurred for two years, albeit that earlier debts have not been paid, it must follow that an owner is also entitled to a certificate if debts incurred in that period have been expunged" (*City of Cape Town v Real People Housing supra* par 11), and further that a municipality had no discretion to grant or withhold a clearance certificate at will and thereby frustrate the exercise of the ordinary rights of ownership as such a discretion would be absurd and would certainly not survive constitutional challenge (*City of Cape Town v Real People Housing supra* par 13). *Prima facie*, up until this point, there appears to be no problem at all arising out of the dealings between a municipality and the seller of property.

However, a disturbing problem will start to crystallise as soon as the transfer has taken place on the strength of the abridged certificate. This problem is better explained through the following unscrambling of the innuendos contained in the exact wording of the *Mathabathe* case decision. A close inspection of the judgment will clearly reflect the following points. On the one hand it is true to say that the court 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). Again the municipality had, with the same correct understanding that hypothecs generally get lost once the subject matter of the hypothec ceases to exist, pleaded, and again correctly so, that once the transfer takes place without the necessary guarantees being put in place, they stand to lose the protection of section 118(3). On the other hand, midway its decision, the same court (and in dismissing the municipality's guarantee claim) 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), and in my opinion without importantly qualifying its statements by *inter alia* specifying or giving an indication of what rights of the municipality are not lost in the circumstances. By so doing, the court had 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. Undoubtedly it is this unfortunate poor choice of words that accounts for the fallacious and scariest impression currently held by some municipalities and which is to the effect that the hypothec can indeed survive the transfer so much that the new purchaser can be placed in the shoes of the previous owner, and thus entitling the municipality the right to attach the property in the hands of the subsequent purchaser, and consequently subjecting the

same to a sale in execution. In fact it is alleged that some municipalities were at the time of writing this casenote, even threatening to implement such interpretation.

In my opinion there are evidently a number of considerations which clearly vitiates against such interpretation being visited upon the judgement in the *Mathabathe* case. The first consideration relates to the concept of tacit hypothec itself as well as its legal nature. A tacit hypothec is by definition, a claim (or real right) a creditor has to the property of a debtor and which generally covers the proceeds realised by the sale of property in execution of the judgment of a court, or on the insolvency of the debtor. Clearly this definition presupposes that the existence of tacit hypothec is premised on the underlying relationship between the debtor and a creditor. In fact according to some legal commentators, "real security was always dependent upon an obligation. The relationship between creditor and debtor was essential, and without it there could be no security" (Van den Bergh "The Development of the Landlord's Hypothec" 2009 15(1) *Fundamina: A Journal of Legal History* 155 156). On this basis therefore it is arguable that the tacit hypothec that the municipality has over the property can never be said to extend to the new purchaser who clearly does not have a debtor-creditor relationship with the municipality. Furthermore it is common cause that in Roman law and more specifically as provided for by Dig 20.6.7 and Dig 20.6.8.1, one of the recognised ways by which a creditor will lose a hypothec over a *res*, will be where the creditor explicitly consented to the sale of the res, or had the *res* sold at his instance (Staniland "Roman Law as the Origin of the Maritime Lien and the Action in Rem in the South African Admiralty Court" 1993 5 *SA Merc LJ* 276 282). This being the case, it stands to reason therefore that the municipality, by simply issuing out an abridged certificate on the strength of which the property can be transferred, will in all likelihood be said to have explicitly consented to the sale of the *res* and thus simultaneously losing the hypothec effectively meaning that no such tacit hypothec is left to exist, and by the same token extend beyond the transfer of the property into the new purchaser's name.

Again, the honourable judge in the *Mathabathe* case refers to the *City of Johannesburg v Kaplan NO* (2006 (5) SA 10 (SCA)) and declares that: "(A)ny amount due for municipal debts (that is, not limited by the aforesaid period of two years) that have not prescribed is secured by the property and if not paid and an appropriate order of court is obtained, may be sold in execution and the proceeds applied in the payment of the debts …" (*Mathabathe* case par 11). It is respectfully submitted that the phrase "and an appropriate order of court is obtained" makes it pertinently clear that the judge has in mind that a court order must first be obtained by a municipality to enforce its claim under the charge before it can get its hands on the proceeds of a sale of the property to settle historic debts. It is also trite that civil-law procedures generally require plaintiffs to have watertight and actionable causes of action as a prerequisite for courts to entertain their claims. Cause of action on the other hand is defined as an aggregate of operative facts, a series of acts or events, which gives rise to one or more

legal relations of right-duty enforceable in the courts (Clark "The Code Cause of Action" 1924 33 *Yale LJ* 817 828). Clearly this definition presupposes that before a litigant can approach the court in an action against another litigant, there must have been, as of necessity, a legal relationship between the parties giving rise to obligations and entitlements. In fact, the core of a cause of action consists of a primary right and corresponding duty together with a breach of that duty (Harris "What Is a Cause of Action" 1928 16 *California LR* 459 475). This being the case, it is therefore practically and legally illogical to expect a municipality to have a right to sue an individual (that is, the subsequent purchaser) with whom it does not have any proximate relationship giving rise to rights and duties. By the same token the current and popular approach followed by a number of municipalities consisting of service disconnections based on the debts of the previous owner, and as meted out to new owners clearly does not have any legal basis in our law.

Another consideration that thirdly vitiates against such a conclusion is the case of *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* (cct19/01) [2002] ZACC 5; 2002 (4) SA 768; 2002 (7) BCLR 702 (16 May 2002) par 100) in which the Constitutional Court clearly held that a statutory lien, be it over movable or immovable property, could be unconstitutional and invalid for constituting an arbitrary deprivation of property if it allowed attachment and sale of property not belonging to the debtor (Van Der Merwe and Pienaar *Introduction to the Law of Property* 4ed (2002) 312).

Lastly and clearly in support of the view that the municipality's right to attach the property exists only against the current owner, some legal commentators correctly recognise that the Deeds Registry Act in section 92(1) thereof, and other subordinate legislation in the four former provinces of Cape, Transvaal, Free state and Natal, created a *sui generis* kind of tacit hypothec for arrear taxes in favour of the State and local and provincial authorities and that the pieces of legislation prevent registration of transfer of land until certain taxes and moneys have been paid and grant a preference over the proceeds of the land in the event of a sale in execution or insolvency (Van Der Merwe and Pope "Property – Part III" in Du Bois (ed) *Wille's Principles of South African Law* 9ed (2007) 656).

5 1 2 Is the hypothec preferent to the existing or new mortgage?

From the discussions above, it is very clear and apparent that the hypothec in the municipality's favour does not enjoy any preference to the new mortgage. However, an answer to the question whether the municipal hypothec enjoys preference to the existing bond lies in section 118(3) of the MSA as quoted verbatim above. The court, in the *Mathabathe* case has, while declaring the section to being a self-evident security provision

(*Mathabathe* case par 10), proceeded to signify its acquiescence with the understanding ascribed thereto by the judiciary and as evinced by *City of Johannesburg v Kaplan NO*, which is mainly that, in a sale in execution scenario, "the proceeds will be applied to payment of the municipal debts 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" (*City of Johannesburg v Kaplan NO supra* G26).

Despite such judicial understanding, the constitutional viability of this provision has never been challenged in a court of law. Neither has the section been the subject matter of much debate among the legal commentators. From the existing limited literature, one is, however, able to discern a number of possible ways through which a constitutional attack on the section could be formulated and sustained in the event that such court challenge is launched in the foreseeable future.

In the first instance, section 25 of the Constitution of the Republic of South Africa, 1996 (the Constitution) clearly prohibits the deprivation of property. Also and in terms of subsection 4(b) of the same section, property is not limited to land only. According to legal commentators, although it is by no means clear what should be included in this term, it seems very likely that it includes all kinds of rights (both real and personal) with regard to all kinds of property (movable and immovable corporeal property, immaterial and/or intellectual property, and incorporeal property) (Van Der Merwe and Pienaar *Introduction to the Law of Property* 344). In the same vein, a mortgage is defined as "a real right in respect of the immovable property of another securing a principal obligation between a creditor and a debtor" (Van der Merwe and Pope "Real Security" in Du Bois (ed) *Wille's Principles of South African Law* 9ed (2007) 631). This implies that the rights arising out of a mortgage bond, constitutes real rights created in favour of the mortgagee and by law, entitling such mortgagee a preferent payment of the mortgage debt from the proceeds of the sale of the mortgaged property. By declaring the charge to enjoy preference over any mortgage bond registered against the property, section 118(3) of the MSA clearly and in many ways, frustrates the object of the bond as a mechanism in *securitatem debiti*. This being the case, it is therefore arguable that the section as is, clearly constitutes deprivation of property as envisaged in section 25(1) of the Constitution.

In the second place, it is an additional requirement of section 25 that the prohibited deprivation should also be arbitrary. In *First National Bank of SA Ltd v Commissioner, South African Revenue Service; First National Bank of SA Ltd v Minister of Finance supra*), Ackerman J postulated the test to determine the arbitrariness of the legal provision. According to Ackerman J the test is whether the legal provision in question "does not provide sufficient reason for the particular deprivation in question or is procedurally unfair" (*FNB* case par 100). Furthermore, whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts and the merits of each particular case. There are arguably a number of reasons

why the deprivation occasioned above can be said to be arbitrary in the circumstances.

Firstly, it is a settled fact that financial institutions are merely in the business of rendering finance which enables the people to afford immovable property. In discharging this objective, financial institutions have, of late, extended their helping hand to the low-income housing market. By so doing, they are effectively assisting to cure a long-standing, contentious and much-debated problem of the unavailability of housing finance in the lower-income housing market which was occasioned by the decade-long practice of redlining and was evidenced by the threat over the last decade of the Community Reinvestment Legislation and current discussions in respect of the Financial Charter (Fish *A Guide to Buying Or Selling a House in South Africa* (2005) 93). Needless to mention, to be able to do business meaningfully these institutions need appropriate security for the repayment of sums of money thus advanced. However, the grounds on which section 118(3) puts them at risk to effectively stand in for the non-payment of consumption charges on a mortgaged property are much more unjustifiable. In other words, it is grossly unfair and unreason-able to leave financial institutions in a predicament and expect them to suffer the consequences of defaulters failing to pay their accounts and more so if one keeps in mind that the non-collection of debts may have been the result of the municipality itself failing to conduct their debt collection properly.

The other reason why the deprivation can be seen to be arbitrary is the legal position of the municipality, or even the owner of the property in comparison to that of the financial institution, more especially in instances where the property is leased. Legally and practically speaking, it is common for municipalities to enter into written contracts with the owners that regulate the provision of services to the properties involved. Similarly, it is also customary for owners to enter into lease agreements in instances where the property is leased. In both cases, both the municipality and the owner are able to hold the defaulting parties to the contracts so entered into and codified. However, none of the legal mechanisms that the municipality or an owner can resort to with a view to helping ensure that the payment of consumption charges is at the disposal of a mortgagee. In actual fact the mortgagee hardly has a say in who occupies the property. Instead, a mortgagee has only the freedom of choice as far as the conclusion of a binding contract with a (prospective) mortgage debtor, but have no say whatsoever in the contracts of lease that an owner-mortgagor concludes with occupants of the property or the services contract that a municipality enters into with the owner of the property.

Lastly, and having regard to the case of *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng*, whereas one is mostly likely to agree, understand and identify with the finding of the court to the effect that the deprivation occasioned by the veto provision only affects one incident of ownership, and for a limited period

only, the same rationale cannot sustain the deprivation in terms of section 118(3) in the sense that the deprivation affects a mortgagee's real right to a mortgaged property in its entirety and may even lead to same being extinguished.

6 Conclusion

Municipalities have always been plagued by various challenges when it comes to the collection of debts due to them. To a large extent, some of the challenges are related to a myriad of institutional internal problems. The existence of these challenges ultimately leads to the municipalities coming up with innovative ways of exploiting the legal framework created by legislation such as the MSA and its predecessors by *inter alia* demanding guarantees from conveyancers at the time of transfer of properties falling within their jurisdictions. For a while, this practice continued unabated and it was not until the case of *Mathabathe* that this newfound method was thwarted, effectively resulting in municipalities having now to put their own house in order by being proactive in their debt-collection activities and no longer wait until a property is transferred before they can demand that all the debts pertaining to it be settled. From the discussions above, it is quite clear that even the court's recognition of the security provision of section 118(3) comes as cold comfort to the municipalities for two reasons. Firstly, the court has made it clear that municipalities still had to take a positive lead by applying for a court order before they could even start enjoying the privileges afforded to them by the enabling section. Secondly, to the extent that a preferent charge is created in favour of the municipality, the section appears to constitute only a temporary reprieve for municipalities as a constitutional challenge to the section which has tremendous prospect of success and may be launched any time from now on (the court having paved a way for such challenge by commenting on the constitutionality of section 118 (1) as has been done in a number of cases similar to the aforementioned).

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