OBSERVATIONS ON THE (UN-) CONSTITUTIONALITY OF SECTION 118(3) OF THE LOCAL GOVERNMENT: MUNICIPAL SYSTEMS ACT 32 0F 2000

Lourens du Plessis
B Jur et Comm LLB B Phil LLD Hons BA
Professor of Public Law, University of Stellenbosch

1 Introduction

Can section 118(3) of the Local Government: Municipal Systems Act[1] (''the act'') withstand constitutional scrutiny – in terms of section 25(1) of the Constitution,[2] to be more exact? The Constitutional Court – in *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng*[3] (''the *Mkontwana* case/judgement'') – left this question open, expressly and deliberately.[4] In the same breath the court found that section 118(1) of the act, the operational stable companion of section 118(3), is not unconstitutional. It has therefore become significant to reflect on the likely constitutional fate of section 118(3) which, at present and at best, can but be guesstimated. The destiny of section 118(1) was also not a foregone conclusion prior to the *Mkontwana* judgement, especially after two separate (sets of) challenges in different high courts resulted in a judgement in one case – *Geyser v Msunduzi Municipality*[5] (''the *Geyser* case/judgement'') in the Natal Provincial Division – upholding the impugned provision, and in a joint judgement, in two other cases – *Mkontwana v Nelson Mandela Metropolitan Municipality*[6] and *Bissett v Buffalo City Municipality*[7] (''the *Mkontwana* case/judgement *a quo*'') in the South Eastern Cape Local Division – upholding the challenge.

It will be shown that there is a strong case to be made that section 118(3), especially as construed in two recent judgements of the Supreme Court of Appeal – to wit *BoE Bank Ltd v Tshwane Metropolitan Municipality*[8] (''the *BoE* case/judgement'') and *City of Johannesburg v*

[1] 32 of 2000.
[2] Constitution of the Republic of South Africa, 1996.
[3] 2005 2 BCLR 150 (2005 1 SA 530) (CC).
[4] The *Mkontwana* judgement *supra* par 13; *cf* also 4 1 *infra*.
[5] 2003 3 BCLR 235 (2003 5 SA 18) (N). (Page number references will be to the BCLR version.)
[6] SECLD Case no 1238/02 (decided 13 September 2003).
[7] SECLD Case no 903/02 (decided 13 September 2003).
[8] 2005 4 SA 336 (SCA).

Kaplan[9] (''the *Kaplan* case/judgement'') – is unconstitutional. One (or both) of the following discursive strategies may be deployed to consider the constitutionality of the provision under discussion:

- First, on the assumption that the Constitutional Court in its *Mkontwana* judgement[10] advanced cogent reasons in support of its finding that section 118(1) is not unconstitutional, it may be determined whether the same (or analogous) reasons could *mutatis mutandis* (also) safeguard section 118(3) against a constitutional challenge.
- A second possibility is to argue that mistakes in the Constitutional Court's reasoning in support of the constitutionality of section 118(1) should not be repeated in an assessment of the constitutionality of section 118(3). Van der Walt,[11] for instance, argues convincingly that the court's substantial reasoning in *Mkontwana*[12] is not beyond criticism. He suggests that declaring section 118(1) unconstitutional would have been a (more) sustainable outcome – for policy reasons and in the light of the Constitutional Court's own approach in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*[13] (''the *FNB* case/judgement'').

In the discussion that follows the first strategy will be brought into play without adaptation. It is unlikely that the Constitutional Court will, in the near future, renege on its line of (substantial) reasoning in the *Mkontwana* judgement.[14] Thus, though there is merit in confronting the outcome of that reasoning head on (as Van der Walt's thoughtful assessment of the judgement shows[15]), I shall, as a second strategy, rather explore the possibility of a more likely achievable rerouting of the substantial argumentation in *Mkontwana*.

2 The act and its objectives as context

The Local Government: Municipal Systems Act is a transformative chunk of legislation purporting 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''.[16] In its preamble it attaches importance (and, indeed, precedence) to a brand of local

[9] 2006 5 SA 10 (SCA).
[10] *Supra*.
[11] ''Retreating from the *FNB* Arbitrariness Test already? *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng* (CC)'' 2005 *SALJ* 75.
[12] *Supra*.
[13] 2002 7 BCLR 702 (2002 4 SA 768) (CC).
[14] *Supra*.
[15] Van der Walt 2005 *SALJ* 75.
[16] *Cf* the preamble.

government "in our non-racial democracy" which does not "just seek to provide services to all our people", but is enjoined "to be fundamentally developmental in orientation" – hence "a need to set out the core principles, mechanisms and processes that give meaning to developmental local government and to empower municipalities to move progressively towards the social and economic upliftment of communities and the provision of basic services to all our people, and specifically the poor and the disadvantaged". Still in a preambular vein, the act (also) professes to procure "active engagement of communities in the affairs of municipalities of which they are an integral part, and in particular in planning, service delivery and performance management"; "efficient, effective and transparent local public administration that conforms to constitutional principles", and financial and economic viability. Finally the preamble makes it clear that "a strong system of local government capable of exercising the functions and powers assigned to it" as well as "a more harmonious relationship between municipal councils, municipal administrations and the local communities through the acknowledgement of reciprocal rights and duties" are prerequisites to the achievement of the lofty objectives aforesaid.[17]

The act consists of 12 chapters and 124 sections:

- Chapter 1 and section 1 (the definition clause) coincide.
- Chapter 2 determines the legal nature and stipulates the rights and duties of municipalities (including duties commensurate with the exigencies of co-operative government) as well as the rights and duties of (members of) local communities.
- Chapter 3 is the normative *fons et origo* of municipalities' functions and powers and includes a general empowerment clause as well as provision for empowerments peculiar to third-sphere[18] government.

[17] The long title explicates these (and other more immediate) objectives of the act as follows:
"To provide for the core principles, mechanisms and processes that are necessary to enable municipalities to move progressively towards the social and economic upliftment of local communities, and ensure universal access to essential services that are affordable to all; to define the legal nature of a municipality as including the local community within the municipal area, working in partnership with the municipality's political and administrative structures; to provide for the manner in which municipal powers and functions are exercised and performed; to provide for community participation; to establish a simple and enabling framework for the core processes of planning, performance management, resource mobilisation and organisational change which underpin the notion of developmental local government; to provide a framework for local public administration and human resource development; to empower the poor and ensure that municipalities put in place service tariffs and credit control policies that take their needs into account by providing a framework for the provision of services, service delivery agreements and municipal service districts; to provide for credit control and debt collection; to establish a framework for support, monitoring and standard setting by other spheres of government in order to progressively build local government into an efficient, frontline development agency capable of integrating the activities of all spheres of government for the overall social and economic upliftment of communities in harmony with their local natural environment; to provide for legal matters pertaining to local government; and to provide for matters incidental thereto."

[18] "Spheres of government" is the South African Constitution's appellation for what, in relation to the vertical division of state power, is conventionally referred to as "tiers of government" *cf* eg s 40(1) of the Constitution.

- Chapter 4 was designed with the development of a culture of community participation in mind and accordingly it provides for processes, procedures, regulations and guidelines to facilitate such participation.
- A quadripartite chapter 5 is concerned with smoothing the progress of integrated development and planning.
- Chapter 6 is about establishing a performance management system and measuring/monitoring performance under that system.
- A quinquepartite chapter 6 regulates matters pertaining to local public administration and (the management of) human resources.
- Chapter 7, also divided into five parts, regulates in quite some detail matters pertaining to local public administration and human resources.
- Chapter 8 concerns itself with the provision of and payment for municipal services. Municipalities' general duty in this regard is verbalised in section 73 of the act as follows:

> "73 General duty
> (1) 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.
> (2) Municipal services must-
> *(a)* be equitable and accessible;
> *(b)* be provided in a manner that is conducive to-
> (i) the prudent, economic, efficient and effective use of available resources; and
> (ii) the improvement of standards of quality over time;
> *(c)* be financially sustainable;
> *(d)* be environmentally sustainable; and
> *(e)* be regularly reviewed with a view to upgrading, extension and improvement."

- Chapter 9 deals with credit control and debt collection,
- and chapter 10 with provincial and national monitoring and standard setting.
- The heading to chapter 11 is "Legal matters" and this is the chapter in which section 118 occurs. "Legal matters" dealt with in this chapter include legal proceedings,[19] legal representation for employees or councillors of a municipality,[20] the evidential value of certain certificates[21] and copies of the *Provincial Gazette*,[22] prosecution of offences,[23] fines and bail[24] and time of notices and payments,[25] service of documents and process,[26] public servitudes[27] and custody of

[19] S 109.
[20] S 109A (inserted by s 43 of Act 51 of 2002).
[21] S 110.
[22] S 111.
[23] S 112.
[24] S 113.
[25] S 114.
[26] S 115.
[27] S 116.

documents.[28] Section 118, the last section in the chapter, occurs under the heading "Restraint on transfer of property".

- Chapter 12 deals with miscellaneous matters.

3 A bird's-eye view of sections 118(1) and (3) and their history

Section 118 reads as follows:

> "118 Restraint on transfer of property
>
> (1) A registrar of deeds may not register the transfer of property except on production to that registrar of deeds of a prescribed certificate-
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> *(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 120 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."

Sections 118(1) and (3) provide municipalities with two remedies, other than typical debt collection measures, to procure the payment of amounts[29] (or an amount[30]) due in connection with a property "for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties". What is included in the said amounts/amount may broadly be classified as *consumption charges*, on the one hand, and (municipal) *taxes*, on the other.[31] Their greatest common factor is that they are *debts – municipal* debts.

The section 118(1) remedy is a "veto" or "embargo provision", affording a municipality a right to prevent the transfer of property until its claims for consumption charges and taxes for the two years preceding

[28] S 117.
[29] As s 118(1) has it.
[30] As s 118(3) has it.
[31] That such a distinction may be relevant, will appear from the discussion in 4 2 2 *infra*.

the date on which a section 118(1)(b) certificate is first applied for, have been met.[32] The veto provision does not automatically render a municipality's claim preferent to that of an existing mortgagee in the case of a sale in execution.[33] The section 118(3) remedy, a tacit statutory hypothec[34] (of more recent origin than the veto[35]) caters for this eventuality. Express words to the effect that the section 118(3) hypothec affords a municipality with preferent real security *only* in respect of debts accruing within a specified time limit, have been omitted from section 118 which, at least in this one respect, renders it a historical oddity compared to most of its predecessors.[36] Recent case law on section 118(3) has dealt with the effect of this omission.[37]

Section 118 as it presently stands dates from 5 December 2002.[38] However, for purposes of the present discussion nothing turns on the differences between section 118 as it presently stands and its immediate predecessor, since the latter provided for both the veto and the hypothec in the very words presently occurring in sections 118(1) and (3) respectively.[39]

Sections 118(1) and (3) are neither unprecedented, transformative constituents nor wholesome fruits of (the) post-apartheid (dispensation of) local government. They have opposite numbers in the now defunct local government ordinances in South Africa's four pre-1994 provinces.[40] Section 50 of the Transvaal Local Government Ordinance,[41] for instance, provided for both a veto and a hypothec akin to those in sections 118(1) and (3) respectively. There are differences though.

Section 50(1), the normative *fons et origo* of the veto in the Transvaal ordinance, read as follows:[42]

> "No transfer of any land or of any right in land as defined in section 1 of the Local Authorities Rating Ordinance, 1977, within a municipality shall be registered before any registration officer until a written statement in the form set out in the Third Schedule to this Ordinance and

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[32] *Pretoria Stadsraad v Geregsbode, Landdrosdistrik van Pretoria* 1959 1 SA 609 (T) 613E-F; *Stadsraad van Pretoria v Letabakop Farming Operations (Pty) Ltd* 1981 4 SA 911 (T) 917C-H; the *BoE* judgement *supra* par 7.

[33] *Rabie v Rand Townships Registrar* 1926 TPD 286 290; *Nel v Body Corporate of the Seaways Building* 1996 1 SA 131 (A) 134B-135C; *First Rand Bank Ltd v Body Corporate of Geovy Villa* 2004 3 SA 362 (SCA) 369F-370E; the *BoE* judgement *supra* par 7.

[34] Or a tacit hypothec *sui generis* *cf* 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*; cf* also *Stadsraad, Pretoria v Letabakop Farming Operations (Pty) Ltd supra*; *First Rand Bank Ltd v Body Corporate of Geovy Villa supra* 368J - 369A.

[35] In the former Transvaal, for instance, a remedy akin to the present s 118(3) remedy was introduced in response to the court's finding in *Rabie v Rand Townships Registrar supra* 290 that a provision akin to the s 118(1) veto provision does not render a municipality's claim preferent.

[36] This will be shown shortly.

[37] As will be shown in 4 2 *infra*.

[38] S 44 of the Local Government Laws Amendment Act 51 of 2002 effected the amendment.

[39] What the 2002 amendment did, was to include ss (1A) and (4) in s 118.

[40] And in some so-called independent homelands too - c*f* eg the Ciskei Municipal Act 17 of 1987 s 91(2)(b).

[41] 17 of 1939.

[42] Provisions of s 50 without opposite numbers in s 118 have not been included in the verbatim quotation that follows.

signed and certified by the town clerk or other officer authorised thereto by the council, shall be produced to such registration officer, and unless such statement shows

(a) that all amounts for a period of three years immediately preceding the date of such registration due in respect of such land or right in land for sanitary services or so due as basic charges for water or as other costs for water where any water closet system on the ground is concerned has been installed or so due as basic charges for electricity in terms of the provisions of this Ordinance or any by-law or regulations;

(b) that all amounts, if any, for a period of three years immediately preceding the date of such registration due in respect of such land or right in land for rates levied in terms of the provisions of the Local Authorities Rating Ordinance, 1977, or in terms of the provisions of any prior Ordinance;

. . .

have been paid to the council: Provided that, in the case of the transfer of immovable property by a trustee of an insolvent estate, the provisions of this section shall be applied subject to the provisions of section 89 of the Insolvency Act, 1936 (Act 24 of 1936) . . .''

Section 50(3) then proceeded to make provision for the tacit hypothec, *cross-referencing* (significantly, it must be added) to, amongst others, sections 50(1)(a) and (b):

''Any amount due in terms of paragraph (a), (b) . . . of subsection (1) shall be a charge upon the land or right in land in respect of which such amount is owning and shall, subject to the provisions of section 142 (6), be preferent to any mortgage bond registered against such land or right in land subsequent to the coming into operation of this Ordinance.''

Section 50(3) equated municipal debts recoverable by invoking the veto as remedy and debts constituting a preferent charge on a property in favour of a municipality, for the charge comprised ''[a]ny amount due in terms of paragraph (a) [or] (b). . . of subsection (1)''. The subsection 1 amounts, in their turn, carried a time limit: they were required to have accrued over a three-year period prior to the registration of the property in respect of which the prescribed certificate was required. The subsection 3 amounts were therefore subject to the same time restriction, to wit the three years immediately preceding the registration for which a section 50(1) certificate was sought. As pointed out previously, the position at present is that section 118 contains no express verbal reference to a time limit of any sort in respect of the hypothec occasioned by its subsection 3.

Section 50 of the Transvaal Local Government Ordinance of 1939 for the first time linked the veto to the hypothec (at least in the former Transvaal). Section 50's predecessors – to wit section 26 of Ordinance 43 of 1903 and section 47 of Ordinance 9 of 1912 – provided only for a veto procedure and not for a hypothec. Ordinance 9 of 1912 for the first time limited the municipal debts in respect of which a veto could be exercised to only those amounts that accrued during the two years immediately preceding the date of application for a transfer of the immovable property in respect of which the amounts have so accrued.

Section 119 of the Orange Free State Local Government Ordinance[43] provided for a veto power akin to that in section 118(1) of the present act and section 50(1) of the Transvaal ordinance. The Free State ordinance made no provision for a hypothec of any sort, however.

[43] 8 of 1962.

Section 175 of the Natal Local Authorities Ordinance[44] called a veto power into existence, and dealt in quite some detail with the manner in which it had to be exercised. A preceding section (section 168), under the heading "Liability for Rates", stated that "rates shall be a charge upon the property the subject thereof and shall be payable by the owner of such property". "Charges upon the property" were not said to constitute preferent real security in favour of a municipality, and reference to a time limit was therefore redundant.

Section 96 of the Cape Municipal Ordinance[45] dealt extensively with the veto power while section 88 provided for a hypothec. Municipal debts incurred during "the current financial year" and during the two years preceding the current financial year were said to be charges upon the property payable by the owner and his successors in title "in preference to any other debt, obligation, mortgage or hypothec on such property".

From the brief historical survey it appears that in none of South Africa's former provinces there was legislative provision for a time-wise unfettered hypothec securing (the payment of) municipal debts. In the Orange Free State there was no provision for a hypothec; in Natal "charges upon the property" enjoyed no preference and in Transvaal and the Cape Province debts secured by the hypothec were restricted timewise.

4 Relevant case law

Since no judicial forum has as yet entertained an all-out challenge directed at the constitutionality of section 118(3) in particular, case law (potentially) relevant to this issue provides but clues as to how an all-out challenge might be disposed of some time in future. Case law resulting from the constitutional challenge(s) to section 118(1)[46] raises substantial issues that will probably come up again in the event of a challenge to the constitutionality of section 118(3). These questions of substance will be dealt with later on in this discussion.[47] For the time being a mostly descriptive overview of the course of constitutional challenges to section 118(1) will suffice as backdrop to the *BoE*[48] and *Kaplan*[49] judgements in which the scope and meaning of section 118(3) was assayed. It will have to be ascertained whether the construction of the latter provision in the two cases just mentioned may (or may not) eventually aid an assessment of its constitutionality.

[44] 25 of 1974.
[45] 20 of 1974.
[46] In one of the s 118(1) challenges, that in the *Geyser* case *supra*, the s 118(1) challenge actually overlapped with a s 118(3) challenge though the issue in the case was a s 118(1) matter *cf* 4 1 *infra*.
[47] See 5 2 and 6 *infra*.
[48] *Supra*.
[49] *Supra*.

4 1 The section 118(1) challenge(s)

A judgement on the constitutionality of section 118(1) of the act was first handed down (on 2003-02-06) in the *Geyser* case.[50] At issue was the respondent municipality's refusal to provide the applicant owner of a residential property with a section 118(1) certificate (enabling her to have the transfer of her property to a new owner registered). An amount of R125 935,68 for water and electricity consumption, run up by tenants, was outstanding in respect of the property which the owner never occupied. R 47 145,29 was run up during the two years preceding the date on which the owner first applied for a certificate, and the municipality (eventually) sought payment of this latter amount before it was prepared to issue the certificate. The KwaZulu-Natal Law Society as second applicant joined the owner applicant in seeking, first, a declaratory order that the words "municipal service fees" in section 118 do not include charges for electricity and water supplied by the municipality and that all amounts in connection with the property as envisaged in by sections 118(1) and (3) are to be restricted to amounts which became due during the two years preceding the date of application for the section 118(1) certificate. Secondly, and in the alternative, the applicants sought a court order that section 118 (as a whole) is inconsistent with section 25(1) of the Constitution. The court per Kondile J concluded, on a decidedly literalist reading of section 118, that the words "municipal service fees" in section 118 indeed include charges for electricity and water supplied by the municipality,[51] while the respondents conceded (and the court accepted without much ado) that a two-year time limit, as contended by the applicants, applies *in respect of both sections 118(1) and (3)*.

As to the applicants' alternative contention, about the (un-)constitutionality of section 118, the court held that the impugned section passes constitutional muster because even though it makes for a deprivation of property as envisaged in section 25(1) of the Constitution, there is sufficient reason for such a deprivation so as to preclude objections that it is arbitrary. The section furthermore strikes a fair balance between the public interest it serves and the property interests it affects. In support of these conclusions the court relied on the Constitutional Court's *FNB* judgement[52] invoking an arbitrariness test "more demanding than an enquiry into mere rationality but a less strict evaluation than that of proportionality under section 36 of the Constitution".[53]

Since the court in the *Geyser* case was essentially seized with a section 118(1) issue (to wit a municipality's refusal to issue a certificate making possible the registration of transfer of a property) the judgement *in casu* arguably provides a *ratio decidendi* for the constitutionality of section

[50] *Supra*.
[51] The *Geyser* judgement *supra* 245E-249E.
[52] *Supra* especially par 65.
[53] The *Geyser* judgement *supra* 250E-F.

118(1) only.[54] This probably was not foremost in Kondile J's mind, however, because in dealing with the issue of constitutionality he collapsed subsections (1) and (3), as appears from the following dicta:

> "The extent of the impact of the deprivation in s 118 of the Act on a property owner's enjoyment of the incidents of ownership is very limited. It embraces a single incident of ownership and partially so in that it merely delays transfer. The property owner continues to enjoy the majority of the incidents of ownership. Section 118 of the Act ensures, by the imposition of a legal or tacit security in favour of a municipality preferent to the mortgage bond holder's, that the purpose sought to be achieved is not defeated. Were the amounts due for municipal service fees not to enjoy preference over any mortgage bond registered against the property, the property owner could easily increase the mortgage liability to the full value of the property and then dissipate the proceeds of the mortgage bond, thus rendering the provisions of s 118 of the Act nugatory. The two-year limitation in s 118 of the Act also reflect (*sic!*) reasonableness. These additional facts demonstrate a fair balance between the public interest served and the property interest affected and provide sufficient reason for the deprivation herein. Accordingly the deprivation in terms of s 118 of the Act is not arbitrary."[55]

The judge apparently conceived of the subsection 3 remedy (the hypothec) as ancillary to the subsection 1 remedy (the veto), which means that the constitutionality of the latter may vouch for the constitutionality of the former – and (in all probability) *vice versa* (too). It is notable that, in the scheme of things from the court's perspective, it is a considerable raison d'être for the constitutionality of both subsections that their effects are subject to a two-year time limit.

In the *Mkontwana* case *a quo*[56] the interpretation of the phrase "in connection with that property" in section 118(1)(b) and the constitutionality of section 118(1) were at issue. The first issue need not detain us beyond noting that the court concluded that consumption charges (mainly for water and electricity) are amounts in connection with the property even though they normally become due for services and commodities rendered in terms of a contractual relationship between a municipality and the consumers of those services and commodities. The constitutional challenge was clearly directed at (and dealt with by the court as an impugnment of) section 118(1) (the veto provision) and not (also) section 118(3) (the hypothec provision). In its assessment of section 118(1)'s constitutionality the court per Kroon and Leach JJ, like Kondile J in the *Geyser* case,[57] relied on the Constitutional Court's *FNB*

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[54] The Constitutional Court in the *Mkontwana* judgement *supra* par 13 for instance said the following about the way in which s 118(3) was dealt with in the *Geyser* case:
"It has been submitted that this Court will not be the court of first and last instance when it comes to the determination of the constitutionality of section 118(3). It is said that this is because the High Court has already considered and dismissed challenges to the constitutional validity of section 118(3) in the *Geyser* judgment (*supra*). However very little is said in the *Geyser* judgment about the meaning and effect of section 118(3). Nor in that judgment is the constitutionality of section 118(3) considered separately from the constitutionality of section 118(1). This is not surprising because section 118(3) was not really a matter of "live controversy" in that case. The municipality had not relied upon section 118(3) and therefore this section was not really in issue. The challenge to section 118(3) in the *Geyser* case can rightly be said to be one bordering on the abstract."

[55] The *Geyser* judgement *supra* 251D-G.

[56] *Supra*.

[57] *Supra*.

judgement,[58] but analysed it more rigorously – and gave more thought to possible legal and factual parallels with the case at hand[59] – than Kondile J did. After considering – in terms of section 25(1) of the Constitution (as construed in the *FNB* judgement) – what kind of action qualifies to be a "deprivation of property" and thereupon expounding the Constitutional Court's test (in *FNB*) for "*arbitrary* deprivation of property", the court in *Mkontwana a quo* concluded that section 118(1) authorises a deprivation of property for which it fails to provide sufficient reason.[60] Voicing its disagreement with Kondile J's opposite conclusion the court pointed out that

> "while it may . . . be crucially important for local authorities to recover their debts, care must be taken not to throw the baby out with the bathwater and sacrifice the constitutional rights of landowners on the altar of expediency. Fiscal statutory provisions, no matter how indispensable for the economic well-being of the community at large, are not immune to the discipline of the Constitution and must conform to its standards." [61]

In the court's view, where the owner of a property does not also occupy it, a rational link between ownership of that property and the debts of the consumer of services and commodities who occupies (or occupied) the property, is wanting – especially when taking into account that such debts arise from a contractual relationship between the consumer and the supplier of the said services and commodities.[62] The court also thought – and was at pains to point out in considerable detail – that the act itself provides for numerous more conventional measures than the section 118(1) remedy that still give teeth to municipal credit control and debt collection to a significant extent.[63] A municipality moreover owes its ratepayers a fiduciary duty to act in the interest of the community it serves, even under difficult circumstances, and this includes collecting, with due diligence, amounts owing to it.[64] To collect debts when a property changes hands may be a convenient moment for the municipality, but it is hardly the best moment: the municipality should rather act promptly the moment a consumer falls into arrears with her/his payments.[65] Taking into account all the factors aforesaid the court concluded that the deprivation of property for which section 118(1) provides, is unconstitutional.[66]

In the *FNB* case[67] Ackermann J left open the question whether an arbitrary deprivation of property in terms of section 25(1) of the Constitution can be justified under the general limitation clause (section

[58] *Supra*.
[59] *Cf* eg the *Mkontwana* judgement *a quo supra* par 50(a)-(d).
[60] Par 53(a)-(h).
[61] Par 53(a).
[62] Par 53(b).
[63] Par 53(c).
[64] Par 53(d).
[65] Par 53(e).
[66] Par 56-59.
[67] *Supra*.

36). The court in *Mkontwana a quo*[68] thought it best to actually proceed with a limitation enquiry in respect of the section 118 (arbitrary) deprivation, attaching considerable weight to the considerations of *proportionality* verbalised in section 36(1)(a)-(e) of the Constitution. The court thought that – given all the many debt collection and credit control measures available to municipalities – the bottom line in considering whether section 118(1) constitutes a reasonable and justifiable limitation to the section 25(1) right(s) is this:

> ''[T]he coercion under s 118(1), premised on the infringement of landowners'' constitutional rights to their property, in our view, cannot serve to justify the infringement where the end sought to be achieved is readily attainable through many other viable and far less damaging means. The limitation upon rights of owners caused by the deprivation which offends against s 25(1) of the Constitution is therefore not reasonable and justifiable under s 36.''[69]

The conclusion was thus inevitable: section 118(1) of the act cannot survive constitutional scrutiny under section 25(1). The court said next to nothing about section 118(3), but there is a dictum that may be construed obliquely to suggest that section 118(3) is unconstitutional too (or that it at least authorises an arbitrary deprivation of property):

> ''[I]t is not the responsibility of owners to act as debt collectors for municipalities nor to fill a *quasi*-suretyship role in respect of the contractual debts due by consumers . . . ''[70]

The High Court adjourned the case pending confirmation of its declaration of constitutional invalidity of section 118(1) by the Constitutional Court (as required in terms of section 167(5) of the Constitution). The Constitutional Court, in its *Mkontwana* judgement,[71] did not confirm the said declaration and handed down a judgement sustaining the constitutionality of section 118(1) instead. The Constitutional Court's judgement followed a line of reasoning akin to – but considerably more elaborate than – that of Kondile J in the *Geyser* case.[72] Whether the *ratio decidendi* in the Constitutional Court's judgement may serve to throw light on – and could provide cogent reasons for – the constitutionality of section 118(3), will be considered[73] after two judgements of the Supreme Court of Appeal on the construction of this provision have been taken into account. It is significant to bear in mind, however, that the Constitutional Court in its *Mkontwana* judgement calculatingly (and thoughtfully) refrained from expressing a view on the constitutionality of section 118(3):

> ''The construction of section 118(3) is far from straightforward and the reasoned judgment of another court on how the section is to be interpreted is likely to be helpful. In the

[68] *Supra* pars 60-68.
[69] Par 67.
[70] Par 55.
[71] *Supra*.
[72] *Supra*.
[73] In 5 1 infra.

circumstances, it is not in the interests of justice for this Court to consider the constitutional validity of section 118(3) at this stage."[74]

4 2 Case law on section 118(3)

The constitutionality of section 118(3) was not challenged in any of the following two cases, but vital aspects of the interpretation of the provision – some of which (may) also pertain to its constitutionality – were at issue. The construction placed upon this provision by the Supreme Court of Appeal, (most likely[75]) acting as a court of final instance in both cases, will weigh heavily (and will at least be the point of departure) in considering its constitutionality.

4 2 1 The BoE case[76]

The issue in this case was the competing claims by the appellant bank and the respondent municipality to the proceeds realised from a sale in execution of immovable property. The bank's claim was based on mortgage bonds over the property while the municipality's claim was for debts in respect of municipal rates and services rendered in connection with the property and secured by a section 118(3) hypothec preferent to the bank's bonds. The municipality's section 118(1) claim had been paid from the proceeds of the sale, but payment out of such proceeds of amounts outstanding for longer than two years, in the judgement also referred to as "the historical debt", remained in issue. The bank's case was that section 118(3) of the act did not apply to mortgage bonds that had been registered prior to the commencement of the act on 1 March 2001, because that would amount to affording the provision retrospective effect unwarranted by its wording. The court *a quo* rejected this argument and the bank appealed against *that* finding,[77] *but also* sought and obtained leave to appeal on the further basis, not argued in the court *a quo*, namely that section 118(3) must be read as incorporating – and having its effects restricted by – the time limit of two years in section 118(1). It is unnecessary to deal with the issue of retrospectivity in the context of the present discussion.

The applicant conceded that a reading of section 118(3) which incorporates the section 118(1) time limit, is not the only possible reading of the provision, but is the linguistically feasible and allowable reading most in conformity with the exigencies of section 25(1) of the

[74] The *Mkontwana* judgement *supra* par 13.

[75] "Most likely" because it is arguable that a constitutional issue was involved in the first of the two cases in which event the Constitutional Court would have been the court of final instance. This is a "less likely" reading of the situation, though.

[76] *Supra*.

[77] *Summer Symphony Properties 13 CC and BoE Bank Ltd* v *City of Tshwane and The Registrar of Deeds* TPD Case no 20768/02 (decided 23 March 2003).

Constitution and therefore the reading to be preferred.[78] Prefacing its exposition of the appellant's contention in this regard, the court expressed the view that "s 118(3) is on its own wording an independent, self-contained provision" which "does not require the incorporation of the time limit in s 118(1) to make it comprehensible or workable",[79] and then continued:

> " . . . It was therefore rightly conceded by the bank that the introduction of such time limit into s 118(3) is not a necessary implication. Accordingly, the bank's contention was not that the interpretation suggested by it constituted the only - or even the most - plausible reading of 118(3). What it contended was that its interpretation was a plausible one, which was rendered most likely by reason of other considerations. Included amongst these was the consideration that this narrower reading of s 118(3) would be more in conformity with the guarantee of property rights in s 25(1) of the Constitution . . . It would also be the reading, so it was contended, that avoids the total negation of bondholders" rights that may result from the more expansive interpretation of the section, as aptly demonstrated by the facts of this case. It is clear, however, that these considerations will come into play only if the construction of s 118(3) contended for by the bank is indeed a plausible one. This flows from the settled principle that considerations outside the wording of a statutory provision, including considerations of constitutional validity, do not permit an interpretation which is unduly strained . . ."[80]

The appellant sought to convince the court, with reference to possible dictionary meanings of "all amounts due" and "an amount due" in sections 118(1) and (3) respectively, that a grammatical reading of the latter – and not just "considerations outside the wording of [the] statutory provision" – incorporating reference to (and thereby the effects of) the time limit in the former, is a distinct possibility. Brand JA, however, dismissed this endeavour as "unhelpful references to the numerous dictionary meanings of 'an' and to various rules of interpretation stated in the abstract"[81] and then proceeded to state what he regarded as plausible meanings of "all" and "an" in the two subsections:[82]

> "In ss (1) "all amounts" - plural - refers to a number of different debts that became due at different times. The purpose of "all" is to indicate that, despite their different ages, every one of these debts falls within the purview of the section, provided that it became due within the preceding two-year period. Subsection (3), on the other hand, does not refer to a category or class of debts but to the aggregate of different debts secured by a single charge or hypothec. For purposes of s 118(3) it therefore does not matter when the component parts of the secured debt became due. The amounts of all debts arising from the stipulated causes are added up to become one composite amount secured by a single hypothec which ranks above all mortgage bonds over the property."

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[78] As to the requisite of reading a statutory provision in conformity with the Constitution, *cf* eg *Govender v Minister of Safety and Security* 2001 4 SA 273 (SCA) *The National Director of Public Prosecutions v Mohamed* 2003 5 BCLR 476 (CC) par 35 and, in general, Du Plessis *Re-interpretation of Statutes* (2002) 201. *Cf* also *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: in re Hyundai Motor Distributors (Pty) Ltd v Smit* 2000 10 BCLR 1079 (2001 1 SA 545) (CC) pars 22-24; *De Lange v Smuts* 1998 7 BCLR 779 (1998 3 SA 785) (CC) par 85 and *Numsa v Bader Bop (Pty) Ltd* 2003 2 BCLR 182 (2003 3 SA 513) (CC) par 37.

[79] The *BoE* judgement *supra* par 8.

[80] Par 8.

[81] Par 9.

[82] Par 10.

Brand JA also thought that if the legislature really intended to render section 118(3) subject to the section 118(1) time limit, it could have done so in one of a number of more direct and explicit – and verbally express or literal(-ist) – ways, of which he offered putative examples.[83] The court's unstated conclusion seemed to be that the reading of section 118(3) proposed by the appellant was both implausible and unduly strained. With the interpretation of statutes it often so happens that, like beauty, ''plausibility'' and the absence of ''undue strain'' are in the eye of the beholder. The assumption without ado of another judge – to wit Kondile J in the *Geyser* case[84] – that section 118(3) operates subject to the two-year time limit in section 118(1), amply illustrates that views of what is ''plausible'' and ''not unduly strained'' will vary from beholder to beholder. And surely Kondile J, devoutly literalist in construing the words ''municipal service fees'' in section 118,[85] can hardly be suspected of wilfully extending the plausible beyond the strain that, in the eye of the literalist beholder, the clear and unambiguous meaning of (the linguistic signifiers in) sections 118(1) and (3) can bear.

The Supreme Court of Appeal's insistence that sections 118(1) and (3) cater for dissimilar eventualities and thus operate independently from each other, entails that the constitutionality of the one subsection cannot really be said to depend on that of the other. This leaves the door open for a challenge to subsection 3 on the basis that it is inconsistent with section 25(1) of the Constitution, notwithstanding the Constitutional Court's finding in the *Mkontwana* case[86] that subsection 1 is not thus inconsistent. The court's purportedly ''plausible'' and ''not unduly strained'' construction of section 118(3), excluding a time limit of any sort, moreover renders the subsection particularly vulnerable to a section 25(1) challenge – as will be shown more fully later.[87]

4 2 2 The Kaplan case[88]

Section 118(2) of the act subjects section 118 as a whole to section 89 of the Insolvency Act[89] ''[i]n the case of the transfer of property by a trustee of an insolvent estate''. The *Kaplin* case mostly dealt with the effect of section 118(2) on the construction of the operational scope of section 118(3). This issue is not pertinent to the present discussion and need not detain us.

Of significance for present purposes was (only) the Supreme Court of

[83] Par 11.
[84] *Supra*.
[85] The *Geyser* judgement *supra* 245E-249E; *cf* also 4 1 *supra*.
[86] *Supra*.
[87] *Cf* 5 1 2 5 *infra*.
[88] *Supra*.
[89] 24 of 1936.

Appeal's confirmation of its construction of section 118(3) in the *BoE* case,[90] upholding an appeal against a judgement *a quo* which had been premised on the assumption that the time limit in section 118(1) applies to section 118(3) too. This judgement elicited the following response from the Supreme Court of Appeal:

> "This Court has . . . found (in a case that did not involve a liquidation or insolvency) the ground on which the Judge a quo relied to be unsustainable: see *BOE Bank Ltd v City of Tshwane Metropolitan Municipality* 2005 (4) SA 336 (SCA), in which it was held that the only plausible interpretation of s 118(3) is that it is an independent self-contained provision . . . , not subject to the time limit contemplated in s 118(1)."[91]

5 *Mkontwana* reasoning and the constitutionality of section 118(3)

The time has now come to do more pertinently what was envisaged at the beginning of this article,[92] namely

- first, to determine whether the reasons advanced in support of the constitutionality of section 118(1) in the *Mkontwana* judgement[93] could *mutatis mutandis* (also) safeguard section 118(3) against a constitutional challenge assuming, for argument's sake, that those reasons were cogent given the purpose for – and the context in – which they were advanced, and
- secondly, to reflect on how viable a reconsideration of substantial mistakes – if any – in the Constitutional Court's *Mkontwana* reasoning might be when the constitutionality of section 118(3) is/will be considered.

5 1 Treading in the *Mkontwana* path

By the time the *Mkontwana* case[94] reached the Constitutional Court (in the manner mentioned before[95]) the Transfer Rights Action Campaign (TRAC) (and unspecified "others") had sought (and obtained) leave from the Constitutional Court to approach it directly on the issue of the constitutionality of both section 118(1) of the act and section 50(1)(a) of the Provincial Government Ordinance1[96] (Gauteng).[97] The municipalities involved in the litigation in the *Mkontwana* case *a quo*[98] and the national minister responsible for local government also appealed against the

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[90] *Supra*.
[91] The *Kaplan* judgement *supra* par 8.
[92] *Cf* 1 *supra*.
[93] *Supra*.
[94] *Supra*.
[95] *Cf* 4 1 *supra*.
[96] 7 of 1939.
[97] *Cf* 3 *supra* for the relevant provisions of the ordinance (there still referred to as a Transvaal ordinance).
[98] *Supra*.

judgement in *Mkontwana a quo*[99] and TRAC's application was opposed by the Gauteng MEC for Local Government.

There was a majority judgement (per Yacoob J) and a minority judgment (per O'Regan J) in *Mkwontana*, but the order made in both instances was the same. Sachs J, in a judgement concurring in both judgements, rightly pointed out that the latter judgement subsumed the former.[100] Similar weight may thus be attributed to both judgements though the majority judgement will serve as point of departure in the discussion that follows.

Focusing on debts incurred as a result of (what the court termed) "consumption charges", that is, amounts due for the rendering of municipal services such as water and electricity, and not so much for municipal taxes,[101] both the majority and minority judgements professed to explicate the implications of the Constitutional Court's landmark judgement in the *FNB* case[102] for section 118(1) issues.

5 1 1 Deprivation

The first finding of significance in the *Mkontwana* judgement is that the encroachment on property authorised by section 118(1) constitutes a "deprivation of property" as envisaged in section 25(1) of the Constitution: by vetoing the registration of the transfer of property if municipal debts are outstanding, section 118(1) deprives the owner of a significant incident of ownership, namely the right to alienate the property.[103]

A mortgagee's right to the mortgaged property is a real right entitling him or her to preferent payment of the mortgage debt from the proceeds of the sale of the mortgaged property.[104] Section 118(3) deprives the mortgagee of that preferent right *vis-à-vis* a municipality in a manner that frustrates the object of the bond as a mechanism *in securitatem debiti*. In some instances the proceeds of the sale of a property may be sufficient to cover both the municipal and mortgage debts, but that does not detract from the fact that prior to the sale the mortgagee had been deprived of a *real right to preferent payment of a debt from the proceeds of the sale of the property*, that is, from his/her real security to the property. Section 118(3) therefore also (and even to a greater extent than section 118(1)) effects a

[99] *Supra*.
[100] The *Mkontwana* judgement *supra* par 127,
[101] *Cf* 3 *supra*.
[102] *Supra*.
[103] The *Mkontwana* judgement *supra* pars 32-33 and 84-91.
[104] According to Scott & Scott *Wille's Law of Mortgage and Pledge in South Africa* 3 ed (1987) 4 "[m]ortgage is a right over the property of another (*ius in re aliena*) which serves to secure an obligation".

deprivation of property as envisaged in section 25(1) of the Constitution.[105]

5 1 2 Is the deprivation ''arbitrary''? The FNB test

Having determined that section 118(1) effects a deprivation of property, the Constitutional Court in *Mkontwana* proceeded to determine whether this is also an *arbitrary* deprivation proscribed by section 25(1) of the Constitution. For this purpose the court invoked the test developed by Ackerman J in the *FNB* case:[106]

> ''Having regard to what has gone before, it is concluded that a deprivation of property is ''arbitrary'' as meant by section 25 when the ''law'' referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair. Sufficient reason is to be established as follows:
> (a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question, and ends sought to be achieved, namely the purpose of the law in question.
> (b) A complexity of relationships has to be considered.
> (c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.
> (d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.
> (e) Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation, than in the case when the property is something different, and the property right something less extensive. This judgment is not concerned at all with incorporeal property.
> (f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.
> (g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution.
> (h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with ''arbitrary'' in relation to the deprivation of property in s 25.''

5 1 2 1 Objectives of and justification for section 118(1)

Yacoob J prefaced his application of the *FNB* test with the observation that the laudable objective of section 118(1) is to ''encourage regular payments of consumption charges and thereby to contribute to the effective discharge by municipalities of their constitutionally mandated functions''. He then continued:

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[105] There is a passage in the Mkontwana judgement that seems to suggest that a deprivation must be substantial to qualify as *deprivation* *cf* the *Mkontwana* judgement *supra* par 32. Van der Walt 2005 *SALJ* 79-80, however, rightly points out that in the *Mkontwana* judgement nothing of substance turned on this requirement and I would suggest that that will be the case with an assessment of the constitutionality of s 118(3) too.

[106] *Supra* par 100 ; the *Mkontwana* judgement *supra* pars 34-35 and 92.

"It also has the potential to encourage owners of property to discharge their civic responsibility by doing what they can to ensure that money payable to a government organ for the delivery of service is timeously paid. It follows that the relationship between consumption charges on the one hand and the owner of property and the property itself on the other must be examined."[107]

The foregoing observations were also meant to justify the shift of the risk for the non-payment of consumption charges from a municipality to the owner of the property. However, this does not justify, *ex identitate ratione*, a shift of risk from a municipality to a mortgagee. Mortgagees, mostly financial institutions, cannot be said to have a "civic responsibility" akin to that of property owners. They render a service advancing sums of money which enable people to afford immovable property, and to be able to do business meaningfully these institutions need appropriate security for the repayment of sums of money thus advanced. 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 questionable than the grounds on which section 118(1) exposes property owners to a similar a risk. True, it is unfair to expect from "the community" to ultimately "pay" the municipal debts of defaulters, but the antidote to that mischief cannot (reasonably and fairly) be to expect from financiers who capacitate members of the community to own property, to in effect foot the municipal bills of defaulters – who may not even be their customers! Once again the finger points straight to municipalities to do their debt collection properly (as many of them indeed do).

Reference was previously made to the fact that the court in the *Geyser* case[108] thought that if amounts due for consumption fees were not to enjoy preference over mortgage bonds, a property owner could increase the mortgage liability to the full value of the property, dissipate the proceeds of the mortgage bond and thereby render the provisions of section 118 nugatory. However, if this is the eventuality for which section 118(3) was meant to cater, it should have targeted *it* more particularly, for the provision as it presently stands is then overbroad.

5 1 2 2 The relationship consumption charge-property

Considering the relationship between the consumption charge and the property affected by section 118(1) the majority in the *Mkontwana* case concluded as follows:

"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. 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. There is therefore more than just a close

[107] The *Mkontwana* judgement *supra* par 38.
[108] *Supra*; *cf* 4 1 *supra*.

relationship between the property and the consumption charge: the property and the consumption charge are closely interrelated.'' [109]

A mortgagee does not really share in the advantages devolving upon a property owner as a result of the supply of municipal services. If it is really the case that the availability of these services increases the value of the property, this would at best benefit a mortgagee indirectly. A bond is typically fixed at a certain amount after a valuation of the property at the time when money is advanced to the mortgagor. Subsequent increases in the value of the property therefore do not inevitably benefit the mortgagee, and if such benefits are to be reaped from the said increases, they will be minimal – especially compared to the benefits accruing to the owner. Given the tenuous relationship between a mortgagee and the advantages accruing to a property as a result of the supply of municipal services, a section 118(3) ''deprivation'' is therefore more likely to be ''arbitrary'' than a section 118(1) ''deprivation'' which may be justified with reference to the much closer relationship between ownership and the supply of municipal services.

5 1 2 3 The relationship owner-consumption charge

Assessing the relationship between the owner of a property and consumption charges in connection with such property the majority of the Constitutional Court in the *Mkontwana* case thought that

''there is a level at which the owner and the debt are usually connected or related regardless of the nature of the relationship between the owner and the occupier and of whether the property is lawfully occupied. This is because the owner is bound to the property by reason of the fact of ownership whichentails certain rights and responsibilities. Both the owner and the consumption charge are closely related to the property and the property is always the link between the owner on the one hand and the consumption charge in respect of water and electricity provided by the municipality on the other.''[110]

Both the majority and the minority emphasised that there are certain reasonable steps that a property owner who is not occupying a property can take to prevent an unreasonable accumulation of consumption charges in connection with the property.[111] Apart from choosing tenants carefully, the owner can, for instance, request monthly statements from the municipality and/or install pre-paid electricity meters.

Once again the relationship between the mortgagee and consumption charges is much more tenuous than the relationship between the owner and such charges. None of the steps that an owner can take to help ensure the payment of consumption charges is at the disposal of a mortgagee. The mortgagee hardly has a say in who occupies the property. A bank or building society has the freedom of choice to conclude a contract with a (prospective) mortgage debtor, but as a rule it has no say in the contracts

[109] The *Mkontwana* judgement *supra* pars 39-40.
[110] *Supra* par 41.
[111] Pars 47 and 101-102.

of lease that an owner-mortgagor concludes with occupants of the property.

5 1 2 4 Unlawful/*mala fide* occupation

The Constitutional Court further held that there is nothing unconstitutional about section 118(1) putting a landowner at risk to pay the municipal debts of unlawful and even *mala fide* occupiers of her/his property. There is a duty on the owner not only to inform the municipality about the unlawful occupation of her/his property, but also to take the necessary steps to have the unlawful occupiers evicted.[112] It goes without saying that a mortgagee (bank or building society) has none of these remedies at its disposal, and is mostly in a difficult position even to learn of unlawful occupation of a mortgaged property.

5 1 2 5 Means and ends – and the two-year time-limit

As far as the relationship between means and ends is concerned the Constitutional Court found that the restriction in section 118(1) affects but one (significant) incident of ownership.[113] By contrast section 118(3) affects a mortgagee's real right to a mortgaged property in its entirety and may even extinguish it.[114]

Key to the Constitutional Court's favourable assessment of the relationship between means and ends in section 118(1) is the fact that the deprivation of what the court termed "a single but significant element of ownership" can be of effect for two years only. Yacoob J explained:[115]

> "We are concerned in this case with the deprivation of a single but important incident of ownership in immovable property namely the right to pass transfer of property to complete alienation. The owner can continue to occupy the property, let it or do anything else that ownership allows. The deprivation is moreover temporary. The High Court was incorrect in finding that, like the deprivation in the FNB case, the deprivation in the present case "may continue indefinitely". The deprivation lasts for two years only. It is correct that if there are substantial arrears for consumption charges and all payments over an extended period are for current consumption only and are credited to the amount first owing, the substantial sum may remain outstanding indefinitely and thereby constitute an obstacle to transfer. If, however, no further obligations are incurred to increase the existing indebtedness of the same occupier the limit on the power of the owner to transfer the property will last no more than two years. Nevertheless, an owner could in the purchase and sale agreement delay transfer for a period of two years on appropriate conditions. Moreover there is nothing to make the subsequent occupier liable for the consumption charge indebtedness of a previous occupier. This means that the owner could, if he is able successfully to eject a delinquent occupier, either occupy the property or secure a reliable tenant or other occupier for a two year period in order to terminate the deprivation."

None of the safety mechanisms mentioned in the *dictum* above is at the disposal of a mortgagee whose real right to a property can in effect be

[112] Pars 48 and 59-60.
[113] Par 51.
[114] *Cf* 5 1 1 supra.
[115] The *Mkontwana* judgement *supra* par 44.

extinguished by section 118(3). If what in effect amounts to a mortgagee's liability *vis-à-vis* a municipality for the debts of the occupiers of a mortgaged property cannot (as a second best option) be understood to be subject to a time-limit akin to the property owner's analogous liability, section 118(3) must undoubtedly be unconstitutional.

First, section 118(3), unbridled by a time-limit, distorts the proportionality between means and ends to such an extent that it renders the envisaged deprivation of property arbitrary. The following *dictum* of Ackermann J in the *FNB* case[116] bears repetition in the present context:

> "Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation, than in the case when the property is something different, and the property right something less extensive. This judgment is not concerned at all with incorporeal property."[117]

Secondly, section 118(3), unrestricted by a time-limit, falls foul of affording, in the particular situation(s) envisaged in section 118 of the act, mortgagees in relation to owners of property equality "before the law and . . . equal protection . . . of the law".[118]

Finally, it must be borne in mind that the *Geyser* judgement[119] hinted that section 118(3) is constitutional precisely because its effects are limited by the two-year time restriction in section 118(1). Section 118(3) as construed in the *BoE*[120] and *Kaplan*[121] judgements lacks this vital time attribute that vouched for its constitutionality in *Geyser*.

5 2 Rerouting the *Mkontwana* path – a (substantial) possibility?

Reasons advanced in the *Mkontwana* judgement *a quo*[122] to conclude that section 118(1) is unconstitutional, can be raised as points of substantial criticism of the Constitutional Court's conclusions in the *Mkontwana* judgement.[123] In a nutshell these reasons were, first, that the link between a property owner who does not occupy a property and consumption charges accruing to that property, is too tenuous to justify, with constitutional backing, the deprivation of the owner's right to

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[116] *Supra* par 100.

[117] In *South African Permanent Building Society v Messenger of the Court, Pretoria* 1996 1 SA 401 (T) 403C-D Curlewis J reacted in a similar vein when urged to construe a statutory provision akin to s 118(3) expansively:

"I am not prepared to go an inch beyond what s15(4)(b) sets out. The right may be "not wholly in the nature of a lien or a hypothec, but *sui generis*", but is nothing more. I am pleased that this is the conclusion since commercial undertakings (indeed the public generally) requires certainty from our law rather than doctrinal purity or juristic rightness, and more good bonds have enjoyed a certain and preferred existence for many years: this should not be lightly disturbed. If Parliament wishes to bring about a change, then the intention to do so must be clearly expressed and the ambit of the change clearly defined."

[118] As required by s 9(1) of the Constitution.

[119] *Supra*; *cf* 4 1 *supra*.

[120] *Supra*.

[121] *Supra*.

[122] *Supra*.

[123] *Supra*.

transfer the property to a new owner, and, secondly, that there are feasible means, other than the said deprivation, that municipalities could (and should preferably) use to collect debts for services provided.[124] The Constitutional Court in its judgement in the *Mkontwana* case[125] prioritised considerations other than those uppermost in the mind of the *court a quo* in assessing the constitutionality of section 118(1).[126] From a *stare decisis* perspective the higher court's judgement of course prevails, but this does not necessarily make it a substantially better reasoned judgement than *Mkontwana a quo*.[127] "Policy considerations" inevitably enter the arena of judicial reasoning in a case like this, and it cannot simply be said, effortlessly and without ado, that some policy reasons are preferable to others. A complex interplay of factors has to be considered and choices cannot lightly be made.

Van der Walt[128] in his assessment of the *Mkontwana* judgement[129] makes very much the same point. Generally speaking he shows preference for the policy reasons determining the outcome of *Mkontwana a quo,*[130] but in addition – and at a theoretico-methodological level – he calls for an assessment of the substance and quality of the *policy reasoning* from which such reasons themselves – and the criteria for their prioritisation – emerge. He reads the *FNB* judgement[131] as an instance of invoking a thick arbitrary test inclining towards proportionality rather than (mere) rationality. Of the *Mkontwana* judgement,[132] on the other hand, he says the following:

> "In the *Mkontwana* decision, which . . . involved deprivation for fiscal efficiency purposes, the Court was indeed satisfied with a fairly low level of rationality review, merely ensuring that the regulatory measure in question was rationally related to a legitimate government function, without concerning itself with the question whether regulation should be subjected to strong or weak review in the area of fiscal efficiency. Moreover, the *Mkontwana* Court engaged in a less rigorous analysis of the relationships between purpose, property and owner than was the case in *FNB*, with the result that the overall outcome has the appearance of having been sanctioned by low-level rationality scrutiny. This indicates that *Mkontwana* represents a shift towards lower level rationality review for deprivation cases."[133]

Van der Walt's point is not that an arbitrariness test as thick as it turned out to be in the *FNB* judgement[134] can and must always (and inevitably) be invoked. Operational leeway must, however, be left for an adaptable test on a continuum between rationality and proportionality so

[124] *Cf* 4 1 *supra*.
[125] *Supra*.
[126] *Cf* 5 1 *supra*.
[127] *Supra*.
[128] 2005 *SALJ* especially 88.
[129] *Supra*.
[130] *Supra*.
[131] *Supra*.
[132] *Supra*.
[133] Van der Walt 2005 *SALJ* 82.
[134] *Supra*.

as to honour the possibility, envisaged in the *FNB* judgement,[135] that – depending on the "interplay between variable means and ends, the nature of the property in question and the extent of its deprivation"[136] – some forms of deprivation may call for more compelling reasons dispelling arbitrariness than others. Deprivations serving the end of fiscal efficiency should, for instance, be scrutinised more strictly, than deprivations safeguarding public health and safety interests. The mere formulaic test in the *Mkontwana* judgement is incapable of thus differentiating:

> "By and large the test applied by the Court in *Mkontwana* looks more like a rationality enquiry than a substantive weighing of means and ends: the Court made sure that the deprivation was for a legitimate purpose and that there was some relationship between means and ends, but no more; in particular the Court clearly did not want to review the wisdom or suitability of the legislative choice of means. That amounts to rationality review."[137]

An avenue of substantial reasoning that, in the case law so far, has not really been explored in construing section 118, is to assay the possible impact of this section (and subsections 1 and 3 in particular) on the stated, transformation-friendly objectives of the act (in, for instance, its preamble and long title[138]). Section 118 is substantially similar to most of its predecessors in apartheid era provincial ordinances on local government, and the differences that there are, other than variations in wording, actually render section 118 more of an encroachment on property rights than most of its predecessors. [139] The omission of the two-year time limit in section 118(3) is a telling case in point. It may be argued that the effects of section 118 are to enhance the efficiency of local government especially in relation to debt collection – but this comes at a cost. The intrusive qualities of section 118 are of such a nature that they may thwart the capacity of more vulnerable people to become property owners. Section 118(3), in particular, can have an adverse impact on the availability of loans to buy property – and once again the poor and vulnerable segments of the community will have to bear the brunt. Such an outcome can hardly be squared with local government that is "fundamentally developmental in orientation" and committed to "the social and economic upliftment of communities . . . specifically the poor and the disadvantaged".[140] As was pointed out before[141] – with reference to the *Mkontwana* judgement *a quo*[142] – section 118(1) (and the same can be said of subsection 3) could provide an easy way out for municipalities less diligent in collecting their debts, and how this makes for "efficient, effective and transparent local public administration that conforms to

[135] *Supra* par 100 ; the *Mkontwana* judgement *supra* par 92.
[136] *Cf* 5 1 2 *supra*.
[137] Van der Walt 2005 *SALJ* 87.
[138] *Cf* 2 *supra*.
[139] *Cf* the historical overview in 3 *supra*.
[140] *Cf* the preamble in 2 *supra*.
[141] Cf 4 *1 supra*.
[142] *Supra*.

constitutional principles" and for financial and economic viability[143] is difficult to see. And then, to complete the picture, there is section 73 of the act requiring municipal services to be "equitable and accessible"[144] and to "be provided in a manner that is conducive to ... the prudent, economic, efficient and effective use of available resources; and ... the improvement of standards of quality over time".[145] Sections 118(1) and (3), especially when construed in the manner of thin, mechanistic rationality, constitute a menace to these laudable objectives.

6 Possible outcomes of a constitutional challenge to section 118(3) – in conclusion

It may be argued, cogently and convincingly, that section 118(3) of the act is inconsistent with section 25(1) of the Constitution, and that a court called upon to (constitutionally) review the former provision, will have to declare – as section 172(1)(a) of the Constitution requires – that it is invalid. The shortcut to this conclusion is the argument that section 118(3) is inconsistent with the Constitution on the grounds advanced by the Constitutional Court in its *Mkontwana* judgement[146] to sustain the constitutionality of section 118(1). The point is not that these grounds do not apply to section 118(3), but rather that (as was argued before[147]) the said subsection shows up to be unconstitutional *precisely if the said grounds are relied on*. Within the purview of section 118(3), relationships (and links) key to the constitutional assessment of deprivations in terms of section 25(1) become simply too tenuous to take the sting of arbitrariness out of those deprivations.

A proponent of the unconstitutionality of section 118(3) may also embark on more of a collision course in order to prove her or his point, confronting the outcome of the substantial reasoning in the *Mkontwana* judgement[148] head on. This strategy will be fruitless in fora other than the Constitutional Court which, in constitutional matters, all are lower courts bound by the judgements of the Constitutional Court, but it will probably also not be very productive in the Constitutional Court itself because the court will have to be convinced that there are sound reasons why it should go back on a judgement of quite recent origin. In the twelve years of its existence, the Constitutional Court has not done something like this. The hope that there might be a first time need of course not forever be disappointed. However, there is a third – and it is submitted for the time being best – option that may also be explored, namely to take the shortcut but, at the same time, suggest a rerouting of the substantial (mode of) reasoning in *Mkontwana* putting it back on the *FNB* track

[143] *Cf* the preamble in 2 *supra*.
[144] S 73(2)(a).
[145] S 73(2)(b)(i) and (ii).
[146] *Supra*; *cf* also 5 1 *supra*.
[147] In 5 1 2 2 5 1 2 5 *supra*.
[148] *Supra*; *cf* also 5 1 *supra*.

where there will be operational leeway for an adaptable arbitrariness test on a continuum between (thinner) rationality and (thicker) proportionality so as to cater for diverse eventualities.[149] The prime justification for such rerouting is that sections 118(1) and (3) do cater for dissimilar eventualities – as the Supreme Court of Appeal was at pains to point out in its *BoE* judgement.[150] This creates space for arguing policy issues anew, and for (re-)considering the nature of deprivations occasioned by section 118(3) holistically – in the light of the rest of the act and of its (transformative) objectives. This also opens the door to the application of a thicker, proportionality test – appropriate to the exigencies of fiscal efficiency measures – in order to determine whether section 118(3) provides for "arbitrary deprivation of property"[151].

It is submitted that the third strategy will most likely result in a conclusion that section 118(3) is downright unconstitutional. A court may, however, also conclude that the reading of section 118(3) in conformity with the Constitution suggested by the appellant in the *BoE* case,[152] is both achievable and preferable. Since this conclusion will amount to reversing a *ratio decidendi* informing two judgements of the Supreme Court of Appeal, only this court or the Constitutional Court will have the authority to make such a finding. This reading strategy can at best result in a partial or limited invalidation of section 118(3): section 118(3) will be unconstitutional *only* insofar as it does not operate subject to the two-year time limit in section 118(1). Another way of achieving the same result will be to read words into section 118(3) stating explicitly that, like section 118(1), it is subject to a two-year time limit. Reading in conformity with the Constitution is an interpretive strategy while reading in is a form of relief – traceable to section 172(1)(b) of the Constitution and – granted in lieu of an all out declaration of invalidity of an impugned statutory measure. However, from a practical point of view it will make little difference whether a court reads section 118(3) in conformity with the Constitution or order the reading of words into it to limit the scope of its operation timewise.[153] The imposition of such a time limit, smacking of rationalised formalism devoid of (substantial) proportionality, will not be the most satisfactory judicial response to a constitutional impugnment of section 118(3). The present article set out to develop cogent and credible arguments that section 118(3) is unconstitutional in its entirety, and this goal will be achieved if I could convince readers agreeing with my basic propositions, that any lesser invalidation of this substantially impugnable provision will be but a consolation prize.

[149] *Cf* 5 2 *supra*.
[150] *Supra*; *cf* also 4 2 1 *supra*.
[151] In the words of s 25(1) of the Constitution.
[152] *Supra*; *cf* also 4 2 1 *supra*.
[153] Du Plessis *Re-interpretation* 140-143.

OPSOMMING

Artikel 118(1) van die Wet op Plaaslike Regering: Munisipale Stelsels 32 van 2000 stel as voorvereiste vir die registrasie van die oordrag van 'n eiendom die voorlegging aan die registrateur van aktes van 'n sertifikaat, uitgereik deur die munisipaliteit binne wie se gebied die eiendom geleë is, waarin gesertifiseer word dat alle munisipale skulde, vir die twee jaar periode voorafgaande aan die aansoek vir sodanige sertifikaat, betaal is. Volgens artikel 118(3) maak 'n bedrag verskuldig aan die munisipaliteit 'n las uit op die eiendom in verband waarmee die bedrag verskuldig is, en geniet dit voorrang bo enige verband wat teen die eiendom geregistreer is.

Die Konstitusionele Hof het in *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng* 2005 2 BCLR 150 (2005 1 SA 530) (KH) tot die slotsom gekom dat artikel 118(1) getoets aan artikel 25(1) van die Grondwet nie 'n arbitrêre ontneming van eiendom veroorloof nie en dus grondwetlik is. Dit laat die vraag onstaan of artikel 118(3), die operasionele stalmaat van artikel 118(1), ook grondwetlike aanvegting ingevolge artikel 25(1) sou kon oorleef.

In hierdie artikel word betoog dat artikel 118(3) na alle waarskynlikheid ongrondwetlik is. Dié gevolgtrekking volg, eerstens, uit 'n aanlê van juis die kriteria wat in die *Mkontwana*-uitspraak aanleiding gegee het tot die bevinding dat artikel 118(1) grondwetlik is. Tweedens word die moontlikheid ondersoek dat sekere substansiële argumente oor (byvoorbeeld) beleidsoorwegings wat in die *Mkontwana*-uitspraak nie behoorlik uit die verf gekom het nie, in die oorweging van die grondwetlikheid van artikel 118(3) weer geopper sou kon word en na alle waarskynlikheid die gevolgtrekking sal versterk dat artikel 118(3) ongrondwetlik is.