

The effect of embargo and security provisions on immovable property transactions

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TABLE OF CONTENTS

LIST OF ABBREVIATIONS.....	iv
ABSTRACT.....	v
KEYWORDS.....	vi
OPSOMMING.....	vii
SLEUTELWOORDE.....	viii
 Chapter 1: Introduction and problem statement	 1
 Chapter 2: Theoretical background: rights in property and the interpretation of legislation in a constitutional state	 4
 2.1 <i>Rights in property: a distinction between real rights and personal rights</i>	 4
 2.1.1 <i>Categories of rights to property</i>	 4
 2.1.2 <i>The importance of the distinction between real rights and personal rights.....</i>	 8
 2.1.3 <i>The subtraction from the dominium test</i>	 9
 2.1.4 <i>The original and derivative acquisition of property rights.....</i>	 13
 2.2 <i>Theoretical background on the interpretation of legislation in a constitutional state</i>	 15
 Chapter 3: The embargo and security provisions impacting property transactions in South Africa.....	 19
 3.1 <i>Introduction: the origin and content of various embargo and security provisions</i>	 19

3.2	<i>A theoretical interpretation of the nature of the embargo provisions.....</i>	21
3.3	<i>The interpretation of the embargo and security provisions in favour of local government contained in section 118(1) and 118(3) of the Municipal Systems Act.....</i>	23
3.3.1	<i>The general interpretation of the section 118(1) embargo provision – no abuse by municipalities</i>	23
3.3.2	<i>Preference afforded to the local authority’s claims under execution or liquidation proceedings</i>	24
3.3.3	<i>The issue of non-extinguishment of the right of security upon transfer of the property.....</i>	30
3.4	<i>The interpretation of the embargo provision in favour of bodies corporate</i>	38
3.5	<i>The interpretation of a registered home owners’ association’s clause</i>	40
3.6	<i>Concluding remarks: a summary of the law as it stands</i>	44
Chapter 4:	The constitutional implications of embargo and security provisions.....	46
4.1	<i>The relevant constitutional clauses.....</i>	46
4.2	<i>The general principles of the section 25(1) constitutionality test: the FNB case.....</i>	47
4.3	<i>The constitutionality of section 118(1) of the MSA.....</i>	51
4.4	<i>The constitutionality of section 118(3) of the MSA.....</i>	58
4.5	<i>The constitutionality of the other embargo provisions.....</i>	63

Chapter 5: Concluding remarks and recommendations	67
BIBLIOGRAPHY.....	70

LIST OF ABBREVIATIONS

HOA	<i>Home Owners' Association</i>
MSA	<i>Local Government: Municipal Systems Act 32 of 2000</i>
PER	<i>Potchefstroom Electronic Law Journal</i>
SALJ	<i>South African Law Journal</i>
THRHR	<i>Tydskrif vir Hedendaagse Romeins-Hollandse Reg</i>
TSAR	<i>Tydskrif vir die Suid-Afrikaanse Reg</i>

ABSTRACT

All South African property transactions require one or more clearance certificates to effect transfer of property into the name of a transferee. This can either be in terms of section 118(1) of the *Local Government: Municipal Systems Act* 32 of 2000 (the *MSA*) read with the security provision contained in section 118(3) of the same Act that creates a statutory hypothec in favour of the municipality, section 15B(3)(a)(i)(aa) of the *Sectional Titles Act* 95 of 1986 or even in terms of a condition of title registered in favour of a home owners' association (hereinafter HOA).

In *City of Tshwane Metropolitan Municipality v Mathabathe* 2013 4 SA 319 (SCA) the Supreme Court of Appeal held that once the debt of the preceding two years has been paid to a municipality, it is obliged to issue a clearance certificate, but that transfer of the property to the transferee will not extinguish the security held by the municipality for historical debts. The decision immediately raise red flags in the minds of practitioners and property buyers alike as the effect of these provisions could be that the local authority will be able to sell the property now registered in a *bona fide* third party's name to recover the historical debt of a previous owner.

Section 25(1) of the *Constitution of the Republic of South Africa*, 1996 prohibits the arbitrary deprivation of private property. Whether section 118(1) and 118(3) of the *MSA* fall afoul of these constitutional provisions is a question investigated in this study. The study also examines the content and constitutionality of similar embargo provisions in favour of bodies corporate and HOAs.

This study finds that the embargo provisions contained in section 118(1) of the *MSA*, section 15B(3)(a)(i)(aa) of the *Sectional Titles Act* 95 of 1986 and an HOA clause, although it does deprive an owner of specific entitlements of ownership in property will not be arbitrary and therefore not unconstitutional. It is recommended that section 118(1) and section 15B(3)(a)(i)(aa) remain unchanged but that legislation be enacted to legitimise and regulate HOAs. The study finally concludes that section 118(3) of the *MSA* constitutes an arbitrary deprivation of property and is unconstitutional. It is recommended that the section be amended to be subject to the same two year time constraint as section 118(1) of the *MSA*.

KEYWORDS

Immovable property

Real security

Embargo and security provisions

Sectional Title Scheme

Home Owners' Association

Levies

OPSOMMING

Elke Suid-Afrikaanse onroerende eiendomstransaksie vereis een of meer uitklaringsertikaat ten einde oordrag te gee aan die transportnemer. Dit kan wees in terme van artikel 118(1) van die *Local Government: Municipal Systems Act* 32 of 2000 (die *MSA*) gelees tesame met die sekuriteits bepaling vervat in artikel 118(3) van dieselfde Wet wat 'n statutêre hipoteek ten gunste van die munisipaliteit skep; artikel 15B(3)(a)(i)(aa) van die *Wet op Deeltitels* 95 van 1986 of selfs in terme van 'n titelvoorwaarde geregistreer ten gunste van 'n huiseienaarsvereniging (hierna HEV).

In *City of Tshwane Metropolitan Municipality v Mathabathe* 2013 4 SA 319 (HHA) het die Hoogste Hof van Appèl bevind dat sodra die skuld vir die afgelope twee jaar aan die munisipaliteit betaal is, sal dit vereis word dat 'n uitklaringsertifikaat uitgereik word, maar dat die oordrag van die eiendom aan die transportnemer nie die sekuriteitsreg ten opsigte van historiese skuld gehou deur die munisipaliteit sal uitwis nie. Hierdie besluit het onmiddelik rooi vlae laat opgaan vir transportbesorgers en kopers aangesien die effek van hierdie besluit kan wees dat die munisipaliteit nou geregtig is om die eiendom wat in 'n *bona fide* derde party se naam geregistreer is te verkoop ten einde die vorige eienaar se skuld te delg.

Artikel 25(1) van die *Grondwet van die Republiek van Suid-Afrika*, 1996 verbied die arbitrêre ontneming van privaat eiendom. Die vraag of artikel 118(1) en 118(3) van die *MSA* in stryd met hierdie bepaling is word ondersoek in hierdie studie. Die studie ondersoek ook die inhoud en grondwetlikheid van soortgelyke veto regte ten gunste van regspersone in deeltitelskemas en HEVs.

Die studie bevind dat die veto regte soos vervat in artikel 118(1) van die *MSA*, artikel 15B(3)(a)(i)(aa) van die *Wet op Deeltitels* 95 van 1986 en die HEV klousule ten spyte daarvan dat dit wel 'n eienaar van spesifieke aansprake op sy eiendom ontnem, nie arbitrêr is nie en dus ook nie ongrondwetlik nie. Dit word aanbeveel dat artikel 118(1) en artikel 15B(3)(a)(i)(aa) onveranderd bly, maar dat wetgewing geïmplimenteer word wat HEVs wetlik sal regverdig en reguleer. Die studie bevind dat artikel 118(3) van die *MSA* arbitrêre ontneming van eiendom tot gevolg het en dat dit ongrondwetlik is. Dit word voorgestel dat die wet gewysig word ten einde die bepaling ook onderworpe te maak aan dieselfde twee jaar tydsbepalings soos vervat in artikel 118(1).

SLEUTELWOORDE

Onroerende eiendom

Saaklike sekerheidsregte

Veto en sekuriteitsbepalings

Deeltitelskemas

Huiseienaarsvereniging

Heffings

Chapter 1: Introduction and problem statement

Statistics South Africa reported that the population of South Africa was approximately 53 million people in 2013, of which a percentage of 54.9% owned a formal dwelling.¹ That equates to 29 million people who could potentially be involved in residential property transactions at any given time. The need for property transactions to be properly regulated and for the transfer process to run as smoothly as possible is therefore apparent on simple face value of the potential numbers involved.

The one requirement all of these property transactions has in common, be it a private sale, sale by auction or even a sale in execution and in terms of an inheritance, is that one or more clearance certificates will be needed to effect transfer of the property into the name of the transferee.² This can either be in terms of section 118(1) of the *Local Government: Municipal Systems Act* 32 of 2000 (hereinafter the *MSA*)³ read with the security provision contained in section 118(3) of the same Act, section 15B(3)(a)(i)(aa) of the *Sectional Titles Act* 95 of 1986 (hereinafter the *Sectional Titles Act*)⁴ or even in terms of a condition of title registered in favour of a home owners' association (hereinafter HOA). The interpretation, legal standing and constitutionality of these provisions have been the subject of various actions and applications brought before several High Courts and the Supreme Court of Appeal in the recent years.

In both *City of Tshwane Metropolitan Municipality v Mathabathe*⁵ as well as the judgement in *City of Tshwane Metropolitan Municipality v Mitchell*⁶, the Supreme Court of Appeal had to interpret the embargo provision contained in section 118(1) of the *MSA* read with the security provision contained in section 118(3) of the *MSA*, which provides a mechanism for local authorities to block a transfer of property if the debt outstanding of the preceding two years has not been paid and provides security for all other historical debts due to the local authority as a charge (burden) upon the property.

¹ Statistics South Africa 2013 <http://www.statssa.gov.za/publications/P0318/P03182013.pdf> (date accessed 13 March 2017).

² Kelly-Louw 2005 *SALJ* 558.

³ *Local Government: Municipal Systems Act* 32 of 2000.

⁴ *Sectional Titles Act* 95 of 1986.

⁵ *City of Tshwane Metropolitan Municipality v Mathabathe* 2013 4 SA 319 (SCA).

⁶ *City of Tshwane Metropolitan Municipality v Mitchell* 2016 2 All SA 1 (SCA).

The Supreme Court of Appeal determined in both instances that once the debt of the preceding two years has been paid, the local authority will be obliged to issue the necessary clearance certificate, but that transfer of the property to the transferee will not extinguish the security the local authority holds over the property in respect of historical debt older than 2 years.⁷ This immediately raises red flags in the minds of practitioners and property buyers alike.⁸ The effect of these provisions could be that the local authority will be able to sell the property now registered in a *bona fide* third party's name to recover the historical debt of a previous owner.⁹

Section 25(1) of the *Constitution of the Republic of South Africa*, 1996 (hereinafter the *Constitution*) provides that no person may be deprived of property except in terms of a law of general application and no law may permit the arbitrary deprivation of property. Whether the effect of the Supreme Court of Appeal's decision therefore falls afoul of these constitutional principles is a question that is investigated in this study.

The study further examines the interpretation by South African courts and legal writers of similar embargo provisions in favour of bodies corporate and HOAs to determine possible solutions to the issue raised above. For instance, the Supreme Court of Appeal in *Willow Waters Home Owners Association v Koka*¹⁰ decided that a condition of title registered in favour of a HOA constituted a real right against the property and the HOA was entitled to recover all historical debt due to it before issuing a clearance certificate permitting the transfer of the property.¹¹

The main research question to be answered in this study is therefore what the practical and constitutional effects of the various embargo and related security provisions in favour of local authorities, bodies corporate and HOAs are on immovable property transactions. This study is based upon a literature review of relevant textbooks, case law, law journals, legislation and Internet sources dealing with the various legislative and contractual principles relating to the embargo and security provisions in a property

⁷ *City of Tshwane Metropolitan Municipality v Mathabathe* 2013 4 SA 319 (SCA) paras 8-11; *City of Tshwane Metropolitan Municipality v Mitchell* 2016 2 All SA 1 (SCA) paras 55-56.

⁸ Kenny 2015 *Without prejudice* 68; Jackson 2013 *Without prejudice* 45-46; Cloete 2013 *De Rebus* 16-17.

⁹ Jackson 2013 *Without prejudice* 45-46; Brits 2014 *Stellenbosch Law Review* 540.

¹⁰ *Willow Waters Home Owner's Association v Koka* 2015 5 SA 304 (SCA).

¹¹ *Willow Waters Home Owner's Association v Koka* 2015 5 SA 304 (SCA) para 22.

transaction and the interpretation thereof by South African courts as well as legal writers.

It is evident through the study and critical interpretation of the various sources available, that this study should be able to provide insight to a problem faced by property buyers and conveyancers on a daily basis as well as providing recommendations as to possible legislative changes required to ensure that the embargo provisions, read with the security provisions, conform to the constitutional protection of private ownership of property.

The following chapter explores the theoretical nature of embargo and security provisions by discussing the distinction between real and personal rights in property, the nature of property and rights therein, the subtraction from the dominium test and the original and derivative manners in which property can be acquired and the effect this may have on the rights of a property owner. The chapter concludes with an overview of the interpretation of legislation in a constitutional state such as South Africa.

Chapter 3 examines how these embargo and security provisions have been interpreted by the various courts and also includes a thorough discussion and critique of these decisions. In Chapter 4 the constitutionality of the various provisions in the light of case law and basic constitutional principles is analysed. The study concludes in Chapter 5 with a summary of the law as it stands as well as recommended changes that may be necessary to ensure the constitutionality thereof.

Chapter 2: Theoretical background: rights in property and the interpretation of legislation in a constitutional state

2.1 Rights in property: a distinction between real rights and personal rights

2.1.1 Categories of rights to property

Before the nature of embargo and security provisions is examined, it would be beneficial to discuss the theoretical background regarding property and the rights to property a person can have.

Badenhorst, Pienaar and Mostert¹² distinguishes between the following property rights:

- Real rights to things
- Personal rights
- Immaterial property rights
- Real rights to other patrimonial rights
- Statutory personal rights created in a contract
- Statutory rights that lie against the state to certain performance or resources

This study focuses only on the first two, namely real rights to things and its distinction from personal rights.¹³ Van der Merwe¹⁴ summarises the following basic features of a 'normal' real right:

- The subject of a real right is a corporeal or incorporeal thing.¹⁵

¹² Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 47.

¹³ For a discussion of the historical background on the distinction between real rights and personal rights see Van der Merwe *Sakereg* 58-60.

¹⁴ Van der Merwe *Sakereg* 63-64.

¹⁵ In Afrikaans Van der Merwe *Sakereg* 63 describes it as a "stoflike saak" but as can clearly be seen from Brits *Real Security Law* 6 it is not only corporeal things that can be the subject of real rights but also incorporeal things such as the registration of a mortgage bond against a long-term lease registered against immovable property.

- A real right provides a direct entitlement to use and dispose the thing to which the right relates.¹⁶
- A real right is an absolute right¹⁷ and in principle gives the right-holder an absolute right of pursuit.¹⁸
- A real right to assets in an insolvent estate provides for a preferent claim upon sequestration or liquidation.
- The juristic rule of first in time, first in right (*prior in tempore potior in iure*) will always find application where there is more than one competing real rights.¹⁹
- The transfer of a real right usually requires some form of publicity.²⁰
- Real rights are not dependent upon a valid obligatory agreement between two contracting parties but is based on a valid real agreement combined with transfer (*traditio* - registration for immovable property and delivery for movables) in the case of derivative acquisition of property and juristic facts such as prescription and expropriation in the case of original acquisition.²¹
- Remedies for the protection or enforcement of real rights are aimed at the return of the thing or the protection against unlawful interference with the thing. It is not primarily aimed at receiving damages for infringement upon the right.²²

¹⁶ As discussed below, real rights contain many more entitlements than only use and disposal.

¹⁷ A discussion of the concepts of the absoluteness and relativity of rights are discussed in the context of the personality theory in para 2.1.3 below.

¹⁸ Van der Merwe *Sakereg* 64 describes this right of pursuit as the competency to enforce a real right wherever the actual thing may be found.

¹⁹ This statement is not necessarily true in all circumstances. For instance Pienaar 2015 *PER* 1482 argues that the rule will not find application where ownership in immovable property is acquired by one of the original manners in which ownership can be acquired such as expropriation or prescription. Brits *Real Security Law* 7 agrees with Pienaar and states that priority of rights will depend upon exactly which rights are competing with one another and the prior in time rule will not always apply.

²⁰ Van der Merwe *Sakereg* 63 fn 37 confirms that real rights in respect of immovable property needs to be registered in a deeds registry and transfer of movable goods are effected by way of delivery in the case of derivative acquisition of property. See also Brits *Real Security Law* 6.

²¹ Brits *Real Security Law* 2-5; Pienaar 2015 *PER* 1499.

²² *Thompson v Pullinger* 1894 1 (OR) 298; *Woods v Walters* 1921 (AD) 303; *Haynes v Kingswilliamstown Municipality* 1951 2 SA 371 (A).

The South African law distinguishes between two broad types of real rights a person may have in property, namely a real right of ownership in one's own property (the *ius in propria*) and a limited real right that one can have in the property of another (the *iura in re aliena*).²³ Ownership, in its unrestricted form, can be described as the most complete real right one can have in property and it confers the most comprehensive control over a thing²⁴ – it includes for instance the right to burden the property as well as the right to alienate the property and receive the proceeds from the disposal of the property.²⁵

A limited real right, on the other hand, is the right to use another person's property in a certain manner in terms of a direct real relationship between the person exercising the limited real right and the property itself.²⁶ The limited real right equates to some or other right "less than ownership" insofar as it does not provide the right holder with the same competencies or entitlements that the owner of the property would have.²⁷ Pienaar²⁸ explains that the *ius in re aliena* is inherently based on two relationships, namely the subject-object relationship between the person and the thing and the subject-subject relationship between the right-holder and all other third parties. The subject-object relationship means that there is a direct relationship between the right holder and the property and that the right holder can exercise her rights without interaction with the owner.²⁹ The subject-subject relationship requires all third parties, including the owner of the property, to respect the right holder's entitlements to the property.³⁰

²³ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 47; Van der Merwe *Sakereg* 69.

²⁴ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 47.

²⁵ Van der Merwe *Sakereg* 173-174 discusses the content of ownership in detail and confirms that the most common entitlements in respect of ownership include the right to enjoy a thing, the right to use it, the right to dispose of it or alienate it (*ius disponendi*) as well as the right to possess it (*ius possidendi*) and the right to claim the property from a person in unlawful possession thereof (*ius vindicandi*).

²⁶ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 48-49; Van der Merwe *Sakereg* 69-70; Pienaar 2015 *PER* 1489.

²⁷ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 47; Van der Merwe *Sakereg* 69.

²⁸ Pienaar 2015 *PER* 1489.

²⁹ Pienaar 2015 *PER* 1489; *Barclays National Bank Ltd v Registrar of Deeds, Transvaal* 1975 4 SA 936 (T) para 941A.

³⁰ Pienaar 2015 *PER* 1489-1490; Lubbe 1997 *Acta Juridica* 248; *Erlax Properties (Pty) Ltd v Registrar of Deeds* 1992 1 SA 879 (A) paras 884I-885B.

It is important to note that the owner's entitlements to the property are limited in a certain way by the independent exercise of the entitlements to which the right holder of the limited real right is entitled.³¹ The right holder of the limited real right may therefore exercise some entitlements in respect of the property of another independently from the owner.³² An example of this is where a right of way has been granted to a neighbour. The owner of the servient property is no longer allowed to forbid the neighbour access to that part of his property on which the road is situated and the holder of the limited right is entitled to use that road independently of the owner of the servient property.

Examples of limited real rights over immovable property of another include usufructs, bonds and praedial servitudes such as a right of way or right of grazing.³³ Van der Merwe³⁴ explains that different categories of limited real rights can bestow different competencies or entitlements upon the holder thereof – for instance limited real rights such as use (*usus*) or a usufruct bestows rights of enjoyment whereas real security rights such as mortgage bonds bestow no rights of enjoyment on the right holder but simply serves as security for the collection of a debt owed to the right holder.

It has been established that real rights require a direct relationship between a person and a thing in the juridical sense and can be distinguished from personal rights flowing from the law of obligations such as the law of contract or the law of delict.³⁵ A personal right is based on a special legal relationship between two subjects such as a contract, the commission of a delict or unjustified enrichment and is usually enforceable only against a particular person and from the proceeds of his patrimony in general.³⁶

³¹ Van der Merwe *Sakereg* 70-83; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 55-65; Pienaar 2015 *PER* 1490.

³² Van der Merwe *Sakereg* 70-83; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 55-65; Pienaar 2015 *PER* 1490.

³³ Van der Merwe *Sakereg* 65 provides a comprehensive list of various limited real rights which include amongst other lesser known rights possession, the right of an heir to claim an inheritance, pledge, mortgage, praedial servitudes and personal servitudes. Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 48 expands this list by including restrictive covenants, mineral rights, mining rights and lease.

³⁴ Van der Merwe *Sakereg* 69.

³⁵ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 51.

³⁶ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 51; Brits *Real Security Law* 2.

2.1.2 The importance of the distinction between real rights and personal rights

The South African law does not contain a *numerus clausus* of listed real rights and new rights can develop as time goes by.³⁷ Badenhorst, Pienaar and Mostert³⁸ are of the opinion that in systems where there exist a range of potential real rights it is essential to determine the basis on which a new real right should be recognised or not. This distinction between real rights and personal rights may prove to be extremely important in the examination of the embargo and security provisions in immovable property transactions as it determines the remedies available to the right holder for enforcement of his rights as well as the protection afforded to the right holder.³⁹

The classification of a right as a real right also determines whether it will be registrable in the Deeds Registry.⁴⁰ Section 63(1) of the *Deeds Registries Act*⁴¹ is the deeming provision for the registration of specific rights in property in the Deeds Registry. In terms of this section only a real right in immovable property is capable of registration against the title deed of that property. It is therefore generally prohibited to register a personal right against a property.⁴² The *Deeds Registries Act*⁴³ contains no definition for a personal right and defines a real right as "including any right which becomes a real right upon registration".⁴⁴ This is a typically circular definition and provides no assistance to determine whether a right is real or personal.⁴⁵ The following section discusses the tests that have been formulated to distinguish between real rights and personal rights.

³⁷ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 48; Van der Merwe *Sakereg* 65-66,70; De Waal 1999 *Electronic Journal of Comparative Law* 3.3; *Denel (Pty) Ltd v Cape Explosive Works Ltd* 1999 2 SA 419 (T) paras 434D-434E.

³⁸ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 49-50.

³⁹ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 50-51.

⁴⁰ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 50-51; Van der Merwe *Sakereg* 59.

⁴¹ *Deeds Registries Act* 47 of 1937.

⁴² There are certain exceptions to this rule, for instance personal rights ancillary or complementary to registrable real rights may be registered in terms of s 63(1) of the *Deeds Registries Act* 47 of 1937. A full discussion of these exceptions can be found in Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 66-69.

⁴³ *Deeds Registries Act* 47 of 1937.

⁴⁴ S102 of the *Deeds Registries Act* 47 of 1937.

⁴⁵ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 50-51; Badenhorst and Coetser 1991 *De Jure* 377.

2.1.3 The subtraction from the dominium test

Traditionally there have been two tests one could apply to determine whether a right is a personal right or a real right, namely the classic theory and the personality theory.⁴⁶ The classic theory focuses on the object of the right – a real right has a thing as the object and is concerned with the relationship between a person and that thing whereas with a personal right, the object of the right is the performance due to the right holder by another person.⁴⁷ This theory is criticised on the basis that the distinction is artificial insofar that real rights also constitute legal relationships between legal subjects *inter se* and certain personal rights (such as a short-term lease of a movable thing) is also a right in property that can lead to the control of a thing.⁴⁸

The personality or personalist theory on the other hand is based upon the way the right in question is enforced.⁴⁹ In terms of this theory a limited real right is absolute and can be enforced against the whole world. This includes any person (also the owner of the property) who seeks to deal with the property to which the limited real right relates and which is in any way inconsistent with the entitlement of the holder of the limited real right to control it.⁵⁰ To return to the earlier example of the right of way servitude the absoluteness of the real right will ensure that the right holder will be entitled to enforce that servitude not only against the original grantor but also against all successors in title and creditors irrespective of whether that person had any actual knowledge of the existence of the servitude.⁵¹ A personal right in contradistinction is classified as a relative right only capable of enforcement against a certain person or groups of persons on the basis of some or other special legal relationship, for example a contract or unjustified enrichment.⁵² In the case of a personal right against an owner to exercise

⁴⁶ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 50-51.

⁴⁷ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 50-51; Van der Walt 1992 *THRHR* 184.

⁴⁸ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 51-52; Van der Walt 1992 *THRHR* 184-185; Delpont and Olivier *Sakereg Vonnisbundel* 5.

⁴⁹ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 51-52.

⁵⁰ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 51-52; *Smith v Farrelly's Trustee* 1904 (TS) 949 para 958.

⁵¹ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 51-52.

⁵² Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 51-52; Van der Merwe *Sakereg* 60-61; Van der Walt 1992 *THRHR* 186; Delpont and Olivier *Sakereg Vonnisbundel* 5.

an entitlement to immovable property, such personal right is also described as a right in property that is protected in terms of section 25 of the *Constitution*.⁵³

This theory is especially criticised⁵⁴ on the basis that the theory of absolute rights versus relative rights loses sight of the fact that in certain instances a personal right can also operate absolutely whereas a real right can be defeated in the correct circumstances.⁵⁵ A personal right obtains a measure of 'absoluteness' by the fact that a contracting party enjoys a large measure of protection in that a delictual remedy is available to him if there is an unlawful interference with the contractual relationship between the original parties by a third party.⁵⁶ The enforceability of an absolute real right on the other hand can be defeated, for instance, by the doctrine of estoppel or the doctrine of notice.⁵⁷

The South African courts found that neither of these theories provided a clear and consistent solution to the problem and continued to develop the subtraction from the dominium test. This test was first formulated in the *Ex parte Geldenhuys*⁵⁸ and can be summarised as follows:

- If an obligation (being the correlative to the right holder's right) is a burden on the property itself it constitutes a subtraction from the dominium of the property and will be a real right capable of registration in the Deeds Office. If the obligation is intended to bind not only the present owner of the property, but also successors in title, it is considered a burden on the property itself. Such obligation will therefore bind all owners of the property, irrespective of the personal identity of the owner or his relationship with the right holder.

⁵³ Brits *Real Security Law* 11; Pienaar 2015 *PER* 1487-1488.

⁵⁴ Other criticisms are discussed in Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 51-52; Van der Merwe *Sakereg* 60-61.

⁵⁵ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 51-52; Van der Merwe *Sakereg* 60-61.

⁵⁶ *Dun v SA Merchants Combined Credit Bureau* 1968 1 SA 209 (C) para 215G; *Jansen v Pienaar* 1881 1 (SC) 276; *Solomon v du Preez* 1920 (CPD) 401.

⁵⁷ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 84 explain the doctrine of notice as ensuring that a person who acquires a real right with notice of an earlier personal right that her predecessor has granted to another person will not be allowed to defeat that personal right for her own benefit. The knowledge of the real right holder therefore terminates that real right in favour of the personal right.

⁵⁸ *Ex parte Geldenhuys* 1926 (OPD) 155.

- However, if the obligation is intended to be a burden on a specific person in his personal capacity, the right will be a personal claim of action (a right *in personam*) and not a real right and will therefore not be registrable. The obligation clings to the person and not the property and will not bind any successive owners of the property.⁵⁹

The court therefore confirmed that where a right is a real right, it will follow the property and be enforceable against a subsequent owner of the property and all other persons, whereas with a personal right, if the property is alienated or disposed of in some or other manner, the right holder cannot enforce his rights against the property, but only the person against whom the obligation lies.⁶⁰ As Reynold J put it quite succinctly in *Fine Wool Products of South Africa Ltd v Director of Valuations*⁶¹ a personal right does not 'run with the land' but is binding upon the owner whereas a real right attaches to the thing itself.

The subtraction from the dominium test is based on the argument that a limited real right diminishes the owner's *dominium* over her property in that it either confers on the right holder certain entitlements inherent in the universal right of ownership or it prevents the owner in one way or another from exercising some of his entitlements of ownership.⁶²

It did, however, become clear to the courts that the application of the subtraction from the dominium test is not without its own difficulties.⁶³ The main criticism is based thereon that personal rights can, in the correct circumstances, also restrict an owner's entitlement to deal with her thing and as a necessary consequence the exercise of her ownership.⁶⁴ The difference between the limitation imposed by a limited real right and

⁵⁹ *Ex parte Geldenhuys* 1926 (OPD) 155 para 162. Also see *Schwedhelm v Hauman* 1947 1 SA 127 (E); *Nel v Commissioner for Inland Revenue* 1960 1 SA 227 (A) para 233A.

⁶⁰ This is of course subject to certain exceptions such as the doctrine of notice which was discussed above.

⁶¹ *Fine Wool Products of South Africa Ltd v Director of Valuations* 1950 4 SA 490 (E) para 509.

⁶² Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 56-57; Van der Merwe *Sakereg* 70-71.

⁶³ In *Vansa Vanadium SA Ltd v Registrar of Deeds* 1997 2 SA 784 (T) at para 794F-G the court states that the subtraction from the dominium test should be used with caution.

⁶⁴ *Lorentz v Melle* 1978 3 SA 1044 (T) para 1050H; Delpont and Olivier *Sakereg Vonnisbundel* 6; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 56-57.

that imposed by a personal right therefore becomes one of degree only.⁶⁵ The courts continued to formulate the additional 'intention test' which could be applied with the subtraction from the dominium test.⁶⁶

This test was confirmed in *Cape Explosive Works Ltd v Denel (Pty) Ltd*⁶⁷ where the Supreme Court of Appeal held that the following two conditions had to be met for a right to constitute a real right:

- the intention of the person who had created the right had to have been to bind not only the present owner of the land but also the successors in title; and
- the nature of the right or condition had to have been such that its registration resulted in a subtraction from the dominium of the land against which it was registered in that it in some way or another limits or reduces the owner's right to deal with her own property.

Pienaar⁶⁸ explains the essence of a limited right is not so much based on the limitation of the owner's entitlements to the property, as personal rights and statutory measures can also limit the entitlements of an owner. The essential requirement for a real right is that it constitutes a real burden on the property that is enforceable not only against the current owner but also against the future owners of the property.⁶⁹

Sonnekus⁷⁰ is of the opinion that the subtraction from the dominium test is a completely unnecessary creation in the South African law. He suggests the following criteria to determine whether a right will be regarded as a real right or not:⁷¹

⁶⁵ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 56-57.

⁶⁶ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 57; *Fine Wool Products of South Africa Ltd v Director of Valuations* 1950 4 SA 490 (E); *Lorentz v Melle* 1978 3 SA 1044 (T); *Nel v Commissioner for Inland Revenue* 1960 1 SA 227 (A); *Erlax Properties (Pty) Ltd v Registrar of Deeds* 1992 1 SA 879 (A) para 885B; *Provisional Trustees, Alan Dogget Family Trust v Karakondis* 1992 1 SA 33 (A).

⁶⁷ *Cape Explosive Works Ltd v Denel (Pty) Ltd* 2001 3 SA 569 (SCA);

⁶⁸ Pienaar 2015 *PER* 1491.

⁶⁹ For a thorough discussion of the application of this rule by our courts see Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 58-61 and Van der Merwe *Sakereg* 70-82.

⁷⁰ Sonnekus 2015 *TSAR* 425.

⁷¹ Sonnekus 2015 *TSAR* 407-409.

- Look at the nature of the object of the right. A real right is a right to a thing while a personal right is always a right to performance. This first qualification must then be confirmed by at least one of the other two criteria.
- The second criterion is how the right has come into existence. A real right can come into existence either originally (such as through prescription) or derivatively (through a real agreement between two persons coupled with either delivery or registration). A personal right can come into existence as a result of various reasons, among others by agreement, through unjustified enrichment or through delict.
- The third criterion that should be taken into account is that the content of the rights and the remedies available for protection differ between the two types of rights. The holder of a real right can enforce his right against the whole world but can generally not require positive action by any third parties whereas with a personal right to performance one will use the remedies available in terms of, for example, the law of contract or the law of delict.

The test put forth by Sonnekus seems to be a mix between the classic theory and the personality theory and the same criticism as levelled against these theories and discussed above can be repeated here. Sonnekus' test provides for circular reasoning insofar as one of the main reasons a jurist would wish to establish whether a right is real or personal is to determine the remedies available to the right holder and whether those remedies are enforceable against one person alone or the whole world – by using the type of remedies available to a right holder as part of the identification process it requires the jurist to know the answer before the question has been asked. As to the origin criteria – except with the original methods of the acquisition of ownership, a real agreement between the parties is often found in both the creation of real and personal rights and its assistance in the classification of the right is therefore somewhat limited.

2.1.4 The original and derivative acquisition of property rights

A final theoretical point relating to property rights that should be noted before continuing is that ownership in property can be obtained either originally or

derivatively.⁷² As a general rule, the original acquisition of ownership is based upon a unilateral act or series of acts by the person who acquires the ownership or by operation of law.⁷³ The title is not derived from that of the previous owner and consequently the new title is not affected by any infirmities in the predecessor's title.⁷⁴ Examples include prescription, expropriation and accession.⁷⁵ Pienaar⁷⁶ explains that the assumption that all limited real rights will in all circumstances fall away upon the acquisition of ownership of immovable property in an original manner is not necessarily true – for instance in cases where ownership is obtained through prescription or expropriation, there are specific statutory measures dealing with limited real rights.⁷⁷ Each instance of original acquisition of ownership will need to be examined on its own merits together with the legal principles applicable to that specific phenomenon to determine the effect it will have on limited real rights held in respect of the property.

In the case of a derivative transfer of ownership, the transferor and the acquirer need to co-operate in terms of the real agreement between the parties to ensure transfer of ownership.⁷⁸ The most important aspect of derivative transfer of ownership for purposes of this study is that the acquirer's rights are derived from the transferor. The transferor cannot transfer more rights than he possesses and any new title will be subject to the same infirmities that the previous title suffered from.⁷⁹ A property burdened by a real right will therefore be transferred to the new owner subject to that same real right.

⁷² Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 71-71; Van der Merwe *Sakereg* 216; *Unimark Distributors (Pty) Ltd v Erf 94 Silverton (Pty) Ltd* 1999 2 SA 986 (T) levels a certain amount of criticism against the rigid distinction between original and derivative manners of the acquisition of ownership.

⁷³ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 72.

⁷⁴ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 2; Van der Merwe *Sakereg* 216; Pienaar 2015 *PER* 1480.

⁷⁵ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 2; Van der Merwe *Sakereg* 216.

⁷⁶ Pienaar 2015 *PER* 1499.

⁷⁷ These include the *Deeds Registries Act* 47 of 1937 and the *Expropriation Act* 63 of 1975. For a full discussion see Pienaar 2015 *PER* 1494-1499.

⁷⁸ Pienaar 2015 *PER* 1480; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 2; Van der Merwe *Sakereg* 216.

⁷⁹ Pienaar 2015 *PER* 1480; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 2; Van der Merwe *Sakereg* 216.

2.2 Theoretical background on the interpretation of legislation in a constitutional state

As Chapter 3 explains, the origin of some of the most important embargo and security provisions is legislation and a brief summary of the principles of the theory of the interpretation of legislation in a constitutional state is therefore necessary.

The Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁸⁰ provides the following summary of how any legislation in South Africa must be interpreted:

- Interpretation is the process of attributing meaning to the words used in the statutory instrument while regarding the context provided by reading the particular provision in the light of the statute as a whole and the circumstances attendant upon its coming into existence.
- Consideration must be given to the language used in the light of the ordinary rules of grammar and syntax.
- Consideration must further be given to the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. This will generally be where one examines the intention of the legislature when drafting the statute.
- Where a provision can have more than one meaning, each possibility must be weighed in the light of the above-mentioned factors.
- The process of interpretation will always be objective rather than subjective and a sensible meaning is to be preferred to one that leads to insensible results or which undermines the apparent purpose of the statute.⁸¹

⁸⁰ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) paras 603E-604D.

⁸¹ This is a very brief summary of the principles applicable to statute interpretation as laid down by the South African Supreme Court of Appeal and the practical application thereof by the courts in the context of interpreting embargo and security legislation are discussed in the following chapters. For a thorough exposition of the theories of statutory interpretation as well as the historical development of statutory interpretation see Du Plessis 'Statute Law and Interpretation' 311-375. Other informative sources include Du Plessis 1998 *Acta Juridica* 8; De Ville 1999 *THRHR* 373; Kellaway *Principles of Legal Interpretation: Statutes, Contracts and Wills*.

In *Manyasha v Minister of Law and Order*⁸² the Supreme Court of Appeal confirmed that the 'golden rule' of interpretation is the following:

It is trite that the primary rule in the construction of statutory provisions is to ascertain the intention of the legislature; in the present matter it is, more pertinently, the intention of the Rulemaker that needs to be determined. One seeks to achieve this, in the first instance, by giving the words of the provision under consideration the ordinary grammatical meaning which their context dictates, unless to do so would lead to an absurdity so glaring that the Rulemaker could not have contemplated it.

However, Froneman J in *Matiso v Commanding Officer, Port Elizabeth Prison*⁸³ explains that determining the intention of the legislature is not paramount in a system of judicial review based on the supremacy of the *Constitution* as it is the *Constitution* that is sovereign and not the legislature.⁸⁴ Interpretation of a statute will therefore always be done in accordance with the normal rules of interpretation while at the same time keeping the principles enshrined in the *Constitution* in mind.⁸⁵ Du Plessis⁸⁶ explains that South Africa is committed to a value-based approach to constitutional interpretation of legislation.

This value-based approach finds its origin within the provisions of the *Constitution* itself. Section 2 of the *Constitution* provides that it is the supreme law of the Republic of South Africa and that any law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled. Section 8 then continues to make the bill of rights applicable to all law, be it common law, statute and customary law and section 39(2) requires that any legislation must be interpreted in such a manner that it promotes the spirit, purport and objects of the bill of rights.⁸⁷ The principles for the interpretation of statutes are derived from these constitutional provisions.⁸⁸

⁸² *Manyasha v Minister of Law and Order* 1999 2 SA 179 (SCA).

⁸³ *Matiso v Commanding Officer, Port Elizabeth Prison* 1994 4 SA 592 (SE).

⁸⁴ For a historical overview of the system of parliamentary sovereignty and its impact on the interpretation of statutes see Du Plessis 2013 *SALJ* 227-228.

⁸⁵ Du Plessis 2013 *SALJ* 228.

⁸⁶ Du Plessis 2013 *SALJ* 238.

⁸⁷ Du Plessis 2013 *SALJ* 327.

⁸⁸ De Ville *Constitutional and Statutory Interpretation* 60; *S v Schietekat* 1999 7 BCLR 771 (CC); *Dulabh v Department of Land Affairs* 1997 4 SA 1108 (LLC).

The adjudicative organs from the High Court level upwards have the responsibility of sustaining the *Constitution's* supremacy while at the same time being subjective to it.⁸⁹ Du Plessis⁹⁰ states that constitutional review of legislation must be done with circumspection and restraint since this value-based approach to statute interpretation is sometimes criticised based on the potential it holds that judges may impose their own values of what is socially beneficial, moral or politically correct.⁹¹

The South African law contains a presumption of constitutionality and a provision that on the face of it is unconstitutional may still survive constitutional scrutiny if it is reasonably possible to read it in a manner that conforms to the *Constitution* without unduly straining its plain meaning.⁹² A court will therefore always try to interpret legislation in such a manner that it conforms to the *Constitution* rather than simply declaring it to be invalid.⁹³ Two more judicially activist manners in which to 'rescue' a statutory provision from unconstitutionality are severance and reading in.⁹⁴ Severance refers to where a court removes the unconstitutional words or phrases in a statute in order that the remaining provisions can maintain constitutionality. Reading in on the other hand requires a court to insert words into a statute in order to render it in line with constitutional principles.⁹⁵

⁸⁹ Du Plessis *Statute Law and Interpretation* 293. This principle is specifically addressed in s 165(2) of the *Constitution* where it is determined that the courts are independent and subject only to the *Constitution* and the law that they are to apply impartially and without fear, favour or prejudice.

⁹⁰ Du Plessis "Statute Law and Interpretation" 293.

⁹¹ This other criticism is that the so-called counter-majoritarian issue is created that refers to the difficulty that arises where an unelected judge may assess the tenability of legislation adopted by a democratically elected government and even strike it down if found to be unconstitutional. For a full discussion of the counter-majoritarian issue and criticism of the value-based approach of constitutional interpretation in South Africa see Du Plessis 2013 *SALJ* 228-241 and Du Plessis "Statute Law and Interpretation" 293.

⁹² Du Plessis "Statute Law and Interpretation" 330; De Ville *Constitutional and Statutory Interpretation* 223-225; Devenish *Interpretation of Statutes* 210-212.

⁹³ Du Plessis "Statute Law and Interpretation" 330.

⁹⁴ Du Plessis "Statute Law and Interpretation" 330. These constitutional remedies are sanctioned by s 172(1)(b) of the *Constitution* which provides that a court testing legislation on constitutional grounds may make any order that is just and equitable.

⁹⁵ This method was especially employed by the courts when required to pronounce on the meaning of the word spouse as used in various pieces of legislation – instead of declaring the statute invalid they read in that the word spouse will include for instance same-sex partners or partners in a monogamous Muslim relationship. See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC); *Daniels v Campbell* 2004 5 SA 331 (CC).

The application of these principles is discussed in a practical manner in Chapter 4 of this contribution. In Chapter 3 the origin of the various embargo and security provisions applicable in property transactions is discussed.

Chapter 3: The embargo and security provisions impacting property transactions in South Africa

3.1 Introduction: the origin and content of various embargo and security provisions

The three most commonly found embargo provisions with relation to immovable property transactions are as follows:

- the embargo provision contained in section 118(1) of the *MSA* in favour of municipalities;
- the embargo provision contained in section 15B(3)(a)(i)(aa) of the *Sectional Titles Act*⁹⁶ in favour of a body corporate of a sectional scheme;⁹⁷ and
- embargo provisions contained in HOA clauses created by contract between the HOA and potential owners of property in a development where the HOA is active and which is usually, as part of its creation, registered against the title deed of the property.

Section 118(1) of the *MSA* originates from legislation and provides the following:

(1) A registrar of deeds may not register the transfer of property except on production to that registrar of deeds of a prescribed certificate-

- (a) issued by the municipality or municipalities in which that property is situated; and
- (b) which certifies that all amounts that became due in connection with that property for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties during the two years preceding the date of application for the certificate have been fully paid.

The security provision contained in section 118(3) of the *MSA* provides that an amount due for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties is a charge upon the property in connection with which the amount is due and enjoys preference over any mortgage bond registered against the property.

⁹⁶ *Sectional Titles Act* 95 of 1986.

⁹⁷ This section was amended by *Sectional Titles Schemes Management Act* 8 of 2011 but still contains the embargo provision providing for preference of a body corporate's claim.

The embargo provision in favour of a body corporate of a sectional scheme also originates in legislation and section 15B(3)(a)(i)(aa) of the *Sectional Titles Act*⁹⁸ provides as follows:

(3) The registrar shall not register a transfer of a unit or of an undivided share therein, unless there is produced to him-

(a) a conveyancer's certificate confirming that as at date of registration-

(i) (aa) if a body corporate is deemed to be established in terms of section 2(1) of the *Sectional Titles Schemes Management Act*, that body corporate has certified that all moneys due to the body corporate by the transferor in respect of the said unit have been paid, or that provision has been made to the satisfaction of the body corporate for the payment thereof.

The *Sectional Titles Act*⁹⁹ does not have a similar security provision in favour of bodies corporate as contained in the *MSA*. On the other hand it also does not contain the two year restriction as stipulated in the *MSA* and a body corporate will therefore be able to claim the full amount due to it by an owner before the issue of a levy clearance certificate.

Embargo provisions in favour of HOAs have their origins in contract.¹⁰⁰ This practice has become prevalent in the so-called security developments where full title properties are sold to individuals, but where the set-up of the development is such that a central body is necessary to fulfil the functions similar to that of a body corporate in a sectional title scheme.¹⁰¹ The owners bind themselves contractually to the rules laid down by the HOA as well as the payment of levies. The contract of sale usually makes provision that the owner will not be entitled to transfer the property to another person without a clearance certificate being provided from the HOA specifying that all amounts due to it have been paid. The first contract signed between a developer and a buyer often requires the embargo provision to be registered as a title condition in the deed of transfer to be carried forward in perpetuity.¹⁰²

The theoretical nature of these provisions will now be examined.

⁹⁸ *Sectional Titles Act* 95 of 1986.

⁹⁹ *Sectional Titles Act* 95 of 1986.

¹⁰⁰ Kenny 2015 *Without prejudice* 69; *Willow Waters Home Owner's Association v Koka* 2015 5 SA 304 (SCA).

¹⁰¹ Kenny 2015 *Without prejudice* 69; *Willow Waters Home Owner's Association v Koka* 2015 5 SA 304 (SCA).

¹⁰² Kenny 2015 *Without prejudice* 69.

3.2 A theoretical interpretation of the nature of the embargo provisions

The three embargo provisions set out above all limit an owner's right to transfer property without first obtaining a clearance certificate in one form or another, while the section 118(3) of the *MSA* security provision creates a charge upon the property in favour of a local authority.¹⁰³ It is therefore essential to determine whether these provisions constitute real rights against the property itself and will be enforceable not only against the current owner but also against her successors in title. If the 'subtraction from the dominium test' together with the intention test as discussed above are applied, the following questions arise:

- Does the embargo or security provision limit the right of the owner in such a way that it amounts to a diminution of her dominium in that property?
- Was it the intention of the person creating the right (in these instances the legislature or the developer) to bind not only the current owner of the property, but also subsequent owners?

While discussing the theoretical nature of section 118(1) of the *MSA* Brits¹⁰⁴ explains that this section does not prohibit the sale of a property but prohibits the registrar of deeds from transferring the property without a clearance certificate. The section is a veto power that does not bestow a limited real right on the municipality in the technical sense of the term.¹⁰⁵ The aim is to create a special and powerful preference for the claims of municipalities but it does not provide the municipality with an active method of enforcement of its claim against the property.¹⁰⁶ For that the municipality will need to rely on section 118(3) of the *MSA*.

Section 118(3) of the *MSA* provides security to the local authority by prescribing that the amount due to it is a burden upon the property itself and does not lie only against the owner of the property or the occupier of the property who for instance incurred the

¹⁰³ Jackson 2013 *Without prejudice* 45; Kelly-Louw 2004 *Juta Business Law* 133; Kenny 2015 *Without prejudice* 69.

¹⁰⁴ Brits *Real Security Law* 393.

¹⁰⁵ Brits *Real Security Law* 395.

¹⁰⁶ Brits *Real Security Law* 395.

charges for municipal services.¹⁰⁷ This section creates a real security right in favour of the municipality and can be described as a tacit statutory lien or hypothec.¹⁰⁸ It provides the municipality with an active manner of enforcement of its claim instead of just the passive security right contained in section 118(1) – it takes preference over the claim of a mortgagee and can be enforced by way of a sale in execution.¹⁰⁹ Unlike with other limited real rights, no registration is required for the municipality to obtain its real security right as it comes into force the moment that there are any outstanding amounts due to it.¹¹⁰ As with other limited real rights the basic principle therefore is that with a derivative acquisition of property, the property will be transferred subject to the limited real right.¹¹¹

When one now also take into account the principles of interpretation that must be applied to all statutes within the South African constitutional state, further questions arise. Was it the intention of the legislator to create a real right against property? Can the embargo and security provisions created by statute be interpreted in such a manner that it conforms to the *Constitution* and advances the objects and purports of the bill of rights? Specifically it needs to be determined whether these provisions result in an arbitrary deprivation of private property that is prohibited by section 25 of the *Constitution*.¹¹²

The questions set out above were exactly the questions the South African High Courts and the Supreme Court of Appeal faced when these provisions were brought before these courts for interpretation. The various court decisions are examined to determine how the courts have applied the theory of rights in property as well as the principles of interpretation of statutes to embargo and security provisions. The discussions will also include the criticism and comments by academic writers where applicable. The Constitutional Court has been tasked with the interpretation of section 118(1) of the *MSA* and this case is discussed in the next chapter when the constitutional impact of the embargo and security provisions are discussed.

¹⁰⁷ Jackson 2013 *Without prejudice* 45; Kelly-Louw 2004 *Juta Business Law* 133.

¹⁰⁸ Brits *Real Security Law* 400-401.

¹⁰⁹ Brits *Real Security Law* 401.

¹¹⁰ Brits *Real Security Law* 401.

¹¹¹ Brits *Real Security Law* 407.

¹¹² Chapter 4 provides a detailed discussion of the constitutionally enshrined right to property and the arbitrary deprivation thereof.

3.3 The interpretation of the embargo and security provisions in favour of local government contained in section 118(1) and 118(3) of the MSA

3.3.1 The general interpretation of the section 118(1) embargo provision – no abuse by municipalities

As is evident from the discussion of the various court decisions below, local governments have tried their utmost to obtain the most benefit from the *MSA* provisions, while the community in general has tried to avoid the various consequences occasioned thereby. In the instance of *City of Cape Town v Real People Housing (Pty) Ltd*¹¹³ the appellant municipality argued that all municipalities are obliged in terms of the *MSA* to collect monies due to it for property rates and taxes and the provision of municipal services. It was further obliged to adopt a credit-control and debt-collection policy and to adopt by-laws to give effect to this policy. The City of Cape Town Metropolitan Municipality, in fulfilment of these obligations, adopted a credit-control and debt-collection policy that provided that payment of any undisputed debt will first be allocated to the oldest debt progressing to the latest debt.

The respondent in this appeal was the owner of an immovable property situated within the appellant's jurisdiction. When the respondent wanted to transfer ownership of the immovable property to a purchaser thereof, the appellant refused to issue a clearance certificate before the full outstanding balance to it had been paid (even the debt older than two years from date of application for the clearance certificate) as any amounts received by it would firstly be allocated to the oldest debt thereby leaving the debt of the previous two years still due.

The court found that the municipality was not allowed in circumstances where an owner had applied for a clearance certificate to allocate the payment received to older debt and refuse the issue of the clearance certificate. The municipality was obliged in terms of national legislation that over-ruled any by-law to issue the certificate where the amount for debt arising during the preceding two years was paid.

¹¹³ *City of Cape Town v Real People Housing (Pty) Ltd* 2010 5 SA 196 (SCA).

Neither the court *a quo* nor the Supreme Court of Appeal was confronted in this instance with the question of what the municipality's remedies were with regard to the historical debt that remained due after the transfer of the property to which it related and the court did not even mention the security requirements of section 118(3). However, this decision did reiterate the Supreme Court of Appeal's stance (which will be proven by the decisions discussed below) that it will always interpret section 118(1) in a strict manner – if the debt of the preceding two years has been paid, a clearance certificate must be issued.

De Visser and Jain¹¹⁴ explain that the practical effect of this decision for municipalities were that they could no longer use the issue of a clearance certificate as leverage for obtaining payment for historical debt. Municipalities are forced to adopt proper revenue administration systems to ensure that they collect outstanding amounts by use of other legal procedures and not simply rely on the embargo provision in section 118(1) of the *MSA*.

3.3.2 Preference afforded to the local authority's claims under execution or liquidation proceedings

As is evident from the discussion of two cases in this section the manner in which the property is obtained can be of great importance when interpreting embargo and security provisions. The basic distinction between original and derivative methods of acquisition of property has been discussed in Chapter 2 above.

It is of great importance to note that a sale of immovable property by way of execution proceedings constitutes an original method of acquisition of ownership as the execution creditor is not the predecessor in title of the owner of the property and there exists no real agreement between the current owner (execution debtor) and the new owner.¹¹⁵ In the event of a sale in execution of immovable property, however, this does not mean that the new owner receives a clean title free from any previous limited real rights that burdened the property.¹¹⁶ Formal cancellation of a limited real right is a requirement of

¹¹⁴ De Visser and Jain 2010 *Local Government Bulletin* 24.

¹¹⁵ Sonnekus 2015 *TSAR* 413.

¹¹⁶ Sonnekus 2015 *TSAR* 413-416 provides an extensive explanation of execution proceedings as an original method of acquisition of ownership and is of the opinion that our common law clearly

the South African deeds registration system and the right will remain enforceable until formally cancelled unless it can be proved that the right has lapsed.¹¹⁷

In sequestration proceedings section 20(1)(a) of the *Insolvency Act* 24 of 1936¹¹⁸ provides for the divesting of the insolvent of his property and vesting it in the Master of the High Court and ultimately the trustee of the insolvent estate.¹¹⁹ The trustee is therefore the successor in title of the insolvent and any sale or transfer of property will not constitute a true original method of acquisition of ownership but will classify as a derivative one.¹²⁰ The trustee has no more entitlements to the property than the insolvent had. If a certain property is subject to limited real rights the only manner in which a trustee will be able to transfer the property free from that encumbrance is if a court order to that effect is obtained or if the application of the limited real right is restricted by legislation.¹²¹ In all other instances the property will still be subject to the same limited real rights as it was in the hands of the insolvent.

The first time the Supreme Court of Appeal had to interpret the inter-relationship between sections 118(1) and 118(3) of the *MSA* the property in question had been sold by way of a sale in execution and the question arose whether the security provision in section 118(3) is subject to the same time limit as contained in section 118(1).

In *BOE Bank v Tshwane Metropolitan Municipality*¹²² BOE Bank was the holder of a mortgage bond over certain immovable property that was sold in a sale of execution. The respondent municipality had a claim against the property in respect of rates and taxes and various surcharges and fees that they claimed took preference over the mortgage bond in terms of section 118(3) of the *MSA*. The municipality had issued a

indicates that in such an instance the acquirer acquires a clean title free from encumbrances. Pienaar 2015 *PER* 1481-1500 on the other succinctly sets out why this principle (i.e obtaining a clean title in execution proceedings) is only applicable to movable property and not immovable property.

¹¹⁷ S 56(1) of the *Deeds Registries Act* 47 of 1937; Pienaar 2015 *PER* 1483.

¹¹⁸ For liquidation proceedings the deeming provision is section 361(3) of the *Companies Act* 61 of 1973 that is still applicable in terms of sec 5 of para 9 of the *Companies Act* 71 of 2008.

¹¹⁹ The Afrikaans text provides for "die oorgang van die eiendom na die Meester".

¹²⁰ Sonnekus 2015 *TSAR* 421-422.

¹²¹ Sonnekus 2015 *TSAR* 421.422. S 47 of the *Insolvency Act* 24 of 1936 for instance provides for how the trustee is to deal with the rights of retention and the landlord's hypothec in liquidation or sequestration proceedings and s 83 of the same Act specifies that a mortgagor will receive a right of preference in these proceedings but the mortgage bond will not be carried forward to a new owner despite the fact that the full outstanding balance under the loan may not be paid.

¹²² *BOE Bank v Tshwane Metropolitan Municipality* 2005 4 SA 336 (SCA).

clearance certificate for all debt that arose within the two years prior to when the application was made, which was paid by the purchaser of the property and was therefore not in issue. The municipality, however, also claimed the historical debt that had arisen prior to the two years covered by section 118(1) certificate and claimed that it took preference over any mortgage bond held by BOE Bank.

BOE Bank contended that section 118(3) of the *MSA* should be interpreted that, if read with section 118(1), the security provision would be limited to the same two year period as contained in section 118(1) and only those debts would form a charge upon the property and take preference over any mortgage bond registered in favour of a mortgage holder.

The court found that the effect of an embargo provision as contained in section 118(1) of the *MSA*, was to afford the municipality a right to veto the transfer of property until its stipulated claims are met – the embargo provision did not render the municipality's claim preferent to that of the existing mortgagees. However, section 118(3) of the *MSA* is on its own wording an independent, self-contained provision and the court found that it does not matter when the component parts of the secured debt became due. Section 118(3) is not subject to the time limit as contemplated in section 118(1).

The effect of this decision was that all debts due to a local authority could be charged against the proceeds of an immovable property sold in a sale of execution irrespective of when it had fallen due (subject to the rules of prescription of course) and that it took preference over any mortgage bond registered in favour of a mortgagee.¹²³ From a theoretical perspective it is important to take cognisance of the fact that the security of the municipality (in later cases described as a statutory hypothec as is discussed below in paragraph 3.3.3) did not survive the sale in execution – the municipality was merely entitled to exercise this security against the proceeds of the sale of the property by the sheriff.

It is also interesting to note that the respondent municipality at first contended that section 118(3) should be interpreted to mean that a new owner of the property would become liable for the historical debt. The municipality did, however, at a later stage

¹²³ Kelly-Louw 2005 *SALJ* 566-568.

concede that this interpretation could not be sustained. The court in this instance was therefore never tasked to make a ruling upon whether this interpretation of the security provision could be correct or not.

Kelly-Louw¹²⁴ called the decision of the court disappointing and is of the opinion that the fact that the security provided to the municipality in terms of section 118(3) was not limited by the time constraint contained in section 118(1) has absurd results in that it completely ignores the real rights of other secured creditors such as bondholders. She is of the opinion that the legislature has a duty to intervene on an urgent basis to limit the security provided in section 118(3) to the same two year time constraint as with the embargo provision. This was clearly not done and from the following decisions of the Supreme Court of Appeal it becomes apparent that the judges in that division do not hold the same view-point as Kelly-Louw.

Kelly-Louw¹²⁵ touches upon a few very important points in her article (which is also relevant to further decisions of the Supreme Court of Appeal discussed below). By deciding from the outset to interpret the wording of section 118(3) in such a wide manner the Supreme Court of Appeal has raised questions of economic sustainability for banks granting bonds as well as questions as to the constitutionality of section 118(3). These aspects receive more attention as further decisions of the Supreme Court of Appeal are discussed.

The application of sections 118(1) and 118(3) in liquidation proceedings came up for review in *City of Johannesburg v Kaplan*.¹²⁶ Krokipark CC was the registered owner of an immovable property. After the liquidation of the closed corporation, Kaplan was appointed as liquidator and sold the property. The property was subject to a mortgage bond and there were outstanding municipal charges and rates and taxes for a number of years. The municipality contended that all outstanding amounts (and not just those amounts that were included in the clearance certificate in terms of section 118(1) of the *MSA*) were a charge upon the property and took preference over any mortgage bond registered against the property.

¹²⁴ Kelly-Louw 2005 *SALJ* 569-570.

¹²⁵ Kelly-Louw 2005 *SALJ* 569-570.

¹²⁶ *City of Johannesburg v Kaplan* 2006 5 SA 10 (SCA).

In this instance the Supreme Court of Appeal had to decide what the effect of section 118(2) of the *MSA* read with section 89 of the *Insolvency Act* 24 of 1936 is on the operation of section 118(1) and 118(3) of the *MSA*. Section 118(2) of the *MSA* provides that where a trustee of an insolvent estate transfers property of the insolvent estate, all the provisions of section 118 are subject to the provisions of section 89 of the *Insolvency Act*.¹²⁷

Section 89(1) of the *Insolvency Act*¹²⁸ provides that all costs of maintaining, conserving and realising any property shall be paid first from the proceeds of the sale of that property in liquidation proceedings. The section specifies that any tax as defined in section 89(5) will form part of the costs of realisation but only for the two years preceding the date of sequestration and for the time period between the date of sequestration and the date of transfer. Section 89(4) specifically states that a tax as defined in the Act will not be afforded any further preference beyond the time period specified in subsection (1). Taxes are then defined in section 89(5) as any amount payable periodically in respect of that property to the state if that liability is an incident of the ownership of the property.

The question was therefore whether the provisions of section 89 of the *Insolvency Act*¹²⁹ limited the municipality's security as set out in section 118(3) of the *MSA* to only those amounts incurred during the two years preceding the liquidation of the debtor. The court discussed the origins of the legislation involved and came to the conclusion that two sets of rules applied in instances where there was no sequestration or liquidation and in instances where the debtor in question has been sequestered or liquidated.

The court held that in instances where there is no sequestration or liquidation the following principles apply:

- The municipality has the right to veto the transfer of immovable property where a certificate is not produced that certifies that the municipal debts as described

¹²⁷ *Insolvency Act* 24 of 1936.

¹²⁸ *Insolvency Act* 24 of 1936.

¹²⁹ *Insolvency Act* 24 of 1936.

in section 118(1) of the *MSA* has been paid in full for the preceding two years from date of application for the certificate.

- Any other amount (not limited to the two year restriction) that has not become prescribed, is a charge upon the property. If an appropriate court order is therefore obtained, the property may be sold in execution and the proceeds will be applied to the municipal debts in preference over any registered mortgage bond.

In instances where the debtor has been sequestrated or liquidated the court held that the position is as follows with regard to municipal debts that fall within the meaning of taxes as defined in section 89(5) of the *Insolvency Act*:¹³⁰

- A clearance certificate will still need to be obtained from the municipality specifying that the debts as meant in section 118(1) of the *MSA* has been paid in full for the two year period preceding the application for the certificate.
- The preference given to the municipality in terms of section 118(3) of the *MSA* is limited by the provisions of section 89 of the *Insolvency Act*⁴³¹ to claims that fell due during the two years prior to the date of sequestration up to the date of transfer.
- Interest charged on the secured claim of the local authority is secured as if it were part of the claim.

Those municipal debts that are not 'taxes' as defined in section 89 of the *Insolvency Act*⁴³² will continue to attract the security offered by section 118(3) of the *MSA* and will take preference over any mortgage bond registered over the property irrespective of when the claim arose. Although the court was not asked to rule on the matter, it noted in passing that property rates will in all probability be a tax as defined in the *Insolvency Act*⁴³³ (and the claim will only enjoy preference in respect of the property rates that fell due during the two years prior to the date of sequestration) whereas service charges

¹³⁰ *Insolvency Act* 24 of 1936.

¹³¹ *Insolvency Act* 24 of 1936.

¹³² *Insolvency Act* 24 of 1936.

¹³³ *Insolvency Act* 24 of 1936.

for measured consumption will probably not qualify as a 'tax' (which will therefore have preference over a mortgage bond irrespective of when it fell due as long as the claim has not prescribed).

In this instance the court was once again confronted with a basic interpretation of the language of the legislative provisions and interpreted the embargo and security provisions in a practical manner suited to a specific situation, namely liquidation proceedings. From this decision it is clear that a municipality will not enjoy unfettered protection where another law seeks to limit the protection contained in the embargo and security provisions.

It is further interesting to note that the court confirmed that in situations where there is not a liquidation or sequestration, the municipality will still be required to perfect its security by obtaining a court order to attach the immovable property. A municipality will not be able to simply exercise its rights to its security without following the correct procedure.

The aspect of original and derivative acquisition of ownership was not addressed in this case as it was not necessary. However, it is important to note that the decision conforms to the basic principle that a sale in insolvency is not a true original method of property acquisition – the trustee was still subject to the same encumbrances as the insolvent was but the encumbrances were limited by legislation. The trustee was obliged to fulfil the obligations towards the municipality before it could pass a clean title to the purchaser.

3.3.3 The issue of non-extinguishment of the right of security upon transfer of the property

The question of the survival of the municipality's security in terms of section 118(3) of the *MSA* after transfer of the property to a third party was first addressed in *City of Tshwane Metropolitan Municipality v Mathabathe*¹³⁴ (hereinafter '*Mathabathe*') with which judgment the Supreme Court of Appeal let the proverbial cat among the pigeons. In this case the immovable property was sold by private auction and the municipality

¹³⁴ *City of Tshwane Metropolitan Municipality v Mathabathe* 2013 4 SA 319 (SCA).

attempted to recover the historical debts on the property by refusing to issue a clearance certificate in terms of section 118(1) of the *MSA* before an undertaking was received from the transferring attorneys that all the arrear amounts will be paid to it upon transfer of the property into the name of the purchaser in preference to the payment of the outstanding mortgage bond registered over the property. The municipality based this demand upon the provisions of section 118(3) that provides security to the municipality for all the outstanding debt owed to it and not just the debt that arose in the two years prior to the application for a clearance certificate.

The court confirmed the viewpoints taken in the decisions previously discussed insofar as it noted the following:

- Municipalities are obliged to collect monies that become payable to them for property rates and taxes and the provision of municipal services and are assisted in this task by two distinct provisions. Firstly, the right to block the transfer of property until the debts incurred in the previous two years are paid (section 118(1)) and secondly by providing them with security for the repayment of the historical debt that is a charge upon the property that is not subject to the two year time limit (section 118(3)).
- The security provided for in section 118(3) amounts to a lien having the effect of a tacit statutory hypothec and no limit is placed upon it except in cases of insolvency. It is in effect security for the payment of the outstanding debt.

The court then concluded its very short judgment by deciding that section 118(3) is a security provision only and cannot be utilised to block the transfer of property and that the municipality was not entitled to request the undertaking from the transferring attorneys. The court furthermore decided that the municipality was incorrect in contending that the security it holds will lapse upon registration of transfer of the property into another person's name.¹³⁵

¹³⁵ It is interesting to note that this is not the first time a court has held that a limited real right survives the transfer of land to a *bona fide* third party. In *Barclays Nasionale Bank Bpk v Registrateur van Aktes, Transvaal* 1975 4 SA 420 (T) para 423 a mortgage bond was cancelled by mistake and the property transferred to a *bona fide* third party – the court held the property to be executable in the

From a practical viewpoint Cloete¹³⁶ explains that the effect of the decision is now that any purchaser who does not purchase property from an insolvent estate can no longer simply accept that he acquires the property free from any municipal debt. A municipality will be entitled, after it issued a clearance certificate to enforce its lien against the property, obtain a court order, sell the property that has already been transferred to the *bona fide* purchaser and apply the proceeds to any historical debt. Cloete¹³⁷ emphasises that this also impacts the financial institutions advancing loans to prospective purchasers as their security may be prejudiced by the security the municipality holds for the historical debt of the previous owner.

One of the suggestions offered by a judge in this case was that a prospective purchaser can simply approach a municipality to ascertain whether there are any outstanding debts due. As Cloete¹³⁸ points out, this may not be a simple matter in practice as the record-keeping of municipalities are often times abysmal and access to the information is not as readily ascertainable as it should be. He is of the opinion that it will now be the duty of a conveyancer to obtain a complete statement from the municipality and advise the purchaser of any outstanding debt. Furthermore, it is advised that the agreement of sale should make provision for the instance where it is discovered that there is historical debt owed to the municipality.

The chaos caused by this decision is reiterated by Ratiba¹³⁹ who calls it one of the most confusing decisions ever in the legal field. Ratiba¹⁴⁰ is of the opinion that the court should have qualified its pronouncement that the municipality does not lose its rights under section 118(3) of the *MSA* upon transfer of the property by specifying exactly what rights of the municipality are not lost in these circumstances. He states that it is impossible that the court could have meant that the statutory hypothec remains intact after the transfer of the property and that the only possible right that could remain intact is the underlying right of the municipality to continue with legal action against the

hands of the new owner as the mortgage bond was a real right enforceable against all owners of the property.

¹³⁶ Cloete 2013 *De Rebus* 16-17.

¹³⁷ Cloete 2013 *De Rebus* 16-17.

¹³⁸ Cloete 2013 *De Rebus* 16-17.

¹³⁹ Ratiba 2014 *Obiter* 696.

¹⁴⁰ Ratiba 2014 *Obiter* 698.

seller of the property even after transfer thereof. He is supported in this view by Brits¹⁴¹ who states that it is arguable that the court meant that it is the personal right of the municipality against the previous owner that is not extinguished upon transfer.

Ratiba says that the current view held by municipalities as a result of this decision that they would be able to sell the property in execution even after it has been transferred to a *bona fide* purchaser is fallacious and scary and was born as a result of the poor choice of words by the Supreme Court of Appeal.¹⁴² He bases his viewpoint on several considerations, the first of which relates to the nature of the tacit hypothec itself. According to Ratiba, the tacit hypothec is a real right against the property that is premised upon the underlying relationship between the debtor and the creditor.¹⁴³ It is his argument that based on this construction of the municipality's right to security it can never extend to a new purchaser as there is no debtor-creditor relationship between the new purchaser and the municipality.

This specific argument of Ratiba is clearly wrong as he misinterprets the very nature of a real right in property as discussed in Chapter 2 of this study. A real right is a charge upon the property and although it may have come into existence as a result of a debtor-creditor relationship, the fact that the relationship has created a real right means that the right will be enforceable against new owners of the property.¹⁴⁴ Only once the underlying reason for the real right (in this instance the municipal debt) has been extinguished completely the real right loses its force and effect. Brits¹⁴⁵ is actually of the opinion that as the security right is created by statute, it is *sui generis* and there is no reason to try and fit it into one of the traditional categories of real security rights.

The second consideration advanced by Ratiba¹⁴⁶ against the interpretation that the Supreme Court of Appeal meant that the statutory hypothec survives transfer of the property is that the court declared that the municipality will need to obtain a court order before it can sell the property in execution and apply the proceeds to the

¹⁴¹ Brits *Real Security Law* 404-405.

¹⁴² Ratiba 2014 *Obiter* 699.

¹⁴³ Ratiba 2014 *Obiter* 699.

¹⁴⁴ Brits *Real Security Law* 407 states that a general feature of a real right is that it is enforceable against the world at large including successors in title.

¹⁴⁵ Brits 2014 *Stellenbosch Law Review* 541.

¹⁴⁶ Ratiba 2014 *Obiter* 699.

payment of the historical debt. According to him it is clear from this statement that the Supreme Court of Appeal requires that the municipality must approach a court for an order declaring the property executable. He contends that it is trite law that before a litigant can approach the court in an action against another litigant there must have been some legal relationship between the two litigants from which obligations and entitlements can arise.¹⁴⁷ That legal relationship is lacking between the municipality and the new owner with regard to the debt incurred by a previous owner. Ratiba declares that this being the case, it is practically and legally illogical to expect a municipality to sue a new owner with which it has no proximate relationship giving rise to rights and duties.¹⁴⁸

The other arguments Ratiba advances are constitutional in nature and are discussed in the following chapter.

Brits¹⁴⁹ agrees with the viewpoint of Ratiba that the conclusion reached by Cloete, although it is a logical inference from the *Mathabathe* decision, is not an acceptable interpretation of section 118(3). He argues that it could never have been the intention of the legislature to grant a municipality a real security right of which the enforcement could in essence be postponed to any arbitrary time in the future.¹⁵⁰ According to him, the strongest indication of this is the fact that section 118(3) is a charge upon the property that takes preference to a mortgage bond.¹⁵¹ This suggests that whenever immovable property is transferred it was the intention of the legislature that the municipality's claim must be paid before the claim of any mortgagee.¹⁵² The logical inference from this is that there cannot be any claim left by the municipality to pass with the land after the mortgagee has been paid as the municipality was supposed to receive payment of its full claim prior to the mortgagee receiving anything.¹⁵³ This would in practice have the effect that no proceeds of a sale could be paid to the seller or the mortgagee before the municipal debts have been paid in full.

¹⁴⁷ Ratiba 2014 *Obiter* 699-700.

¹⁴⁸ Ratiba 2014 *Obiter* 700.

¹⁴⁹ Brits 2014 *Stellenbosch Law Review* 542.

¹⁵⁰ Brits 2014 *Stellenbosch Law Review* 543.

¹⁵¹ Brits 2014 *Stellenbosch Law Review* 543; Brits *Real Security Law* 408.

¹⁵² Brits *Real Security Law* 408.

¹⁵³ Brits *Real Security Law* 408.

What should be evident from the above discussion is that various interpretations can be given to the *Mathabathe* decision, each with its own practical and constitutional implications that is discussed in Chapter 4 below. What is also clear is that *Mathabathe* has received a severe backlash and many academic writers, including the three quoted above expressed the hope that the Supreme Court of Appeal or the Constitutional Court would soon give more guidance on this matter.

In *City of Tshwane Metropolitan Municipality v Mitchell*¹⁵⁴ (hereinafter '*Mitchell*') the Supreme Court of Appeal was faced with the following facts: Mitchell had bought certain immovable property within the jurisdiction of the appellant upon a sale in execution. In terms of the conditions of sale he was obliged to pay the amounts necessary to obtain a clearance certificate, which he duly did. When Mitchell sold the property to Prinsloo she approached the appellant to open an account in her name and was informed that she will be held liable for the historical debt in respect of the property and that she can only open an account in her name once payment of the historical debt has been received. After Prinsloo threatened to cancel the agreement Mitchell then approached the High Court and applied for an order declaring that neither he nor his successors in title can be held liable for the historical debt.

The question before the court was whether the security provided in section 118(3) of the *MSA* is extinguished when the property is sold at a sale in execution and subsequently transferred to the purchaser.

The court *a quo* observed that security in the form of a tacit statutory hypothec is a limited real right in the property that secures the obligation and in the normal course of business there is no reason, while the principal debt is still outstanding, why transfer of the property will terminate the right. The High Court then continued to investigate the provisions of the common law that relates to the survival of hypothecs on property when the property is transferred. It came to the conclusion that a sale in execution is an exception to the general rule that the hypothec will not be extinguished upon transfer of the property. The High Court therefore found that the security held by the

¹⁵⁴ *City of Tshwane Metropolitan Municipality v Mitchell* 2016 2 All SA 1 (SCA).

municipality in terms of section 118(3) of the *MSA* is extinguished upon transfer into the name of a purchaser who purchased the property pursuant to a sale in execution.

The majority of the judges in the Supreme Court of Appeal disagreed with the findings of the court *a quo* and held that the sale in execution and subsequent transfer of the property into the name of the purchaser did not extinguish the hypothec created in section 118(3) of the *MSA* in favour of a municipality. The court based this decision upon the same reasoning as that followed in *Mathabathe* and disagreed with the respondent's contention that the fact that the property is sold by sale in execution and not by way of private treaty should distinguish it from *Mathabathe* and would have the effect that any limited real right is extinguished upon sale of the property in execution.

The court confirmed that this would mean that nothing would prevent the municipality from perfecting its security over the property by obtaining a court order and selling the property in execution to pay the outstanding historical debt. This may in some instances force the new owner to pay the historical debt if she does not wish to lose her property. The court specifically noted that the constitutionality of section 118(3) is not in issue in this matter.

Zondi JA disagreed with the decision of the majority and agreed with the court *a quo* that the security contained in section 118(3) of the *MSA* did not extend beyond transfer of the property where such transfer occurs pursuant to a sale in execution. He based this decision upon interpretation of the South African common law relating to hypothecs and real rights in property.¹⁵⁵

The court in *Mitchell* therefore confirmed the stance it took in the *Mathabathe* case that the municipality's security survives transfer of the property into a *bona fide's* third party's name irrespective of the manner in which the new owner acquires the property. It also reiterated that a municipality will be required to perfect its security before it can apply the proceeds to the payment of the historical debt. It was never discussed in the decision why the municipality chose to try and recover the historical debt from the new owner instead of exercising its security against the proceeds obtained from the sale in execution as the municipality in the *BOE Bank* case did. It was only decided that the

¹⁵⁵ Specifically Voet 20.1.13.

security held by the municipality survived transfer into the name of the purchaser and that the municipality could in the appropriate circumstances approach a court for an order declaring the property executable. Therefore, it is not an order to the purchaser to pay the historical debt.

Miltz and Bitter¹⁵⁶ is of the opinion that both the court *a quo* and the Supreme Court of Appeal erred in basing their decisions upon the common law but instead should have simply considered the meaning and effect of section 118(3) in the light of the intention of the legislature and the established principles of the interpretation of statutes. In their view it is entirely unnecessary to equate the security afforded by section 118(3) to a statutory hypothec and that upon simple interpretation of the section it is clear that section 118(3) is concerned entirely with the order of preference that will only arise if and when the subject property is realised, be it by way of private treaty, a sale in execution or in liquidation proceedings.¹⁵⁷

Their interpretation has the effect that the municipality will receive a preferent claim to the proceeds realised upon the sale of the property (in any manner, not just a sale in execution) that will rank before payment of even the mortgagee of the property.¹⁵⁸ The statutory right of preference of the municipality therefore relates only to the proceeds of the property upon sale and does not vest in the property after transfer thereof to a third party.¹⁵⁹ They are supported in this view by Brits¹⁶⁰ who explains that the charge created in section 118(3) is supposed to be enforced against the proceeds of any disposal of the property and not at any later stage and therefore it cannot survive the transfer of ownership of the property.

This interpretation is acceptable on face value and seems to provide a sustainable solution to the problem at hand, but it is not without its own difficulty. The writers are suggesting that the municipality enforce its right to security against the proceeds of the property upon a disposal. However, what they failed to take into account is that this course of action is exactly what the municipality tried to do in the *Mathabathe* case. In

¹⁵⁶ Miltz and Bitter 2016 *Without Prejudice* 46.

¹⁵⁷ Miltz and Bitter 2016 *Without Prejudice* 47.

¹⁵⁸ Miltz and Bitter 2016 *Without Prejudice* 53.

¹⁵⁹ Miltz and Bitter 2016 *Without Prejudice* 53.

¹⁶⁰ Brits *Real Security Law* 411.

that instance the municipality requested an undertaking from the transferring attorneys that the historical debt would be paid upon registration of transfer of the property and the court refused their request. Although the writers' interpretation could in practice have been a possible solution it is clear that the Supreme Court of Appeal has already indicated that municipalities will not be entitled to exercise their rights in this manner.

One of the main tenets upon which the *Mitchell* decision could be criticised is that the Supreme Court of Appeal found that *any* limited real right survives a sale in execution of the immovable property it relates to. This aspect has already been discussed above in paragraph 3.3.2 and it was concluded that a purchaser buying a property pursuant to a sale in execution usually obtains a clean title free from real security rights. Be that as it may, this study will take the law as it has been pronounced by the Supreme Court of Appeal. The recommendations given in the final chapter therefore find application to both sales in executions and transfer of property in other manners and it will be assumed that the security rights in section 118(3) survive transfer pursuant to these transactions.

If the academic writers and conveyancers therefore hoped for some sanity to prevail when section 118(3) of the *MSA* was placed before the Supreme Court of Appeal again, they were sorely disappointed. The same arguments and problems as discussed with regard to the *Mathabathe* case can still be applied to the interpretation in *Mitchell*. The constitutional implications of this interpretation by the Supreme Court of Appeal are discussed in the next chapter.

3.4 The interpretation of the embargo provision in favour of bodies corporate

Bodies corporate of sectional title schemes are afforded protection by way of section 15B(3)(a)(i)(aa) of the *Sectional Titles Act* 95 of 1986 that provides as follows:

(3) The registrar shall not register a transfer of a unit or of an undivided share therein, unless there is produced to him-

(a) a conveyancer's certificate confirming that as at date of registration-

(i) (aa) if a body corporate is deemed to be established in terms of section 2(1) of the *Sectional Titles Schemes Management Act*, that body corporate has certified that all moneys due to the body corporate by the transferor in respect of

the said unit have been paid, or that provision has been made to the satisfaction of the body corporate for the payment thereof.

It therefore constitutes an embargo provision without a time-limit and a body corporate will be entitled to claim all outstanding amounts due to it upon transfer of the property to a third party.

The interpretation of this section was put to the Supreme Court of Appeal in *Barnard v Regspersoon van Aminie*¹⁶¹ where Barnard acted in the capacity as trustee of an insolvent estate who wished to transfer immovable property to a third party. He was prohibited from doing so by the body corporate of the sectional title scheme who claimed arrear levies and legal costs for the enforcement of their claim against the insolvents. Barnard argued that section 15B(3)(a)(i)(aa) only provides for levies to be paid and that the amount of levies were restricted by the working of section 89(1) and 89(5) of the *Insolvency Act*¹⁶² to the levies that arose in the two years prior to the sequestration.

The court held that the section provided the body corporate with a preferent claim that ranked even above that of a mortgagee who holds the unit as security. Furthermore, the court held that the section referred to 'all monies due' to the body corporate and that it would include legal costs incurred by the body corporate in enforcing its rights against the delinquent owner. It was lastly held that these amounts did not meet the requirements of a tax as defined in section 89(5) of the *Insolvency Act*¹⁶³ and that the claim was therefore not limited to the two year time period as prescribed in section 89(1).

In the appeal case of *First Rand Bank Ltd v Body Corporate of Geovy Villa*¹⁶⁴ the court held that the body corporate's embargo power did not constitute a real security right and that it does not have the power to sell a unit in execution without having regard to a mortgagee's registered right of security.¹⁶⁵ If a body corporate wishes to sell a unit in order to obtain payment of its claim it would have to obtain the mortgagee's

¹⁶¹ *Barnard v Regspersoon van Aminie* 2001 3 SA 973 (SCA).

¹⁶² *Insolvency Act* 24 of 1936.

¹⁶³ *Insolvency Act* 24 of 1936.

¹⁶⁴ *First Rand Bank Ltd v Body Corporate of Geovy Villa* 2004 3 SA 362 (SCA).

¹⁶⁵ *First Rand Bank Ltd v Body Corporate of Geovy Villa* 2004 3 SA 362 (SCA) para 28.

permission.¹⁶⁶ It is unlikely that a mortgagee will give its permission unless the value of the property is sufficient to cover both the body corporate's claim and the claim of the mortgagee.¹⁶⁷ If the mortgagee withholds permission the body corporate will have no other option but to wait for the property to be disposed of and then exercise its embargo provision. Alternatively it can initiate sequestration proceedings and in that event it will have a *de facto* preference above that of a mortgagee as the claim will be paid as part of the section 89(1) of the *Insolvency Act*¹⁶⁸ realisation costs.¹⁶⁹

It is clear from these decisions that a body corporate enjoys a wide embargo right that can be employed effectively to obtain payment of all amounts due to it.¹⁷⁰ It is subject only to prescription and can be enforced upon the disposition of the property by the owner by way of a private treaty, sale in execution or a sale in insolvency.

3.5 The interpretation of a registered HOA clause

HOA's fulfil a very similar function to that of a body corporate in a sectional title scheme but it is currently not regulated by way of legislation.¹⁷¹ Instead the rights and obligations of the HOA and the owners in the development are regulated by way of a contractual relationship.¹⁷² This contractual relationship functions identically to the embargo provision in favour of a body corporate in a sectional title scheme as it empowers the HOA to veto transfer of the property into the name of a purchaser prior to all outstanding levies having been paid. The condition that prohibits transfer of the property without an HOA clearance certificate is usually registered against the title deed of the property to be carried forward in perpetuity.¹⁷³

The Supreme Court of Appeal was tasked with the interpretation of an HOA clause in *Willow Waters Home Owner's Association v Koka*.¹⁷⁴ The appellant in this instance is a duly registered company functioning as the HOA in a residential development. All owners in the development were required to be a member of the HOA who rendered

¹⁶⁶ Brits *Real Security Law* 387.

¹⁶⁷ Brits *Real Security Law* 387.

¹⁶⁸ *Insolvency Act* 24 of 1936.

¹⁶⁹ Brits *Real Security Law* 387.

¹⁷⁰ Brits *Real Security Law* 383 describes it as a *de facto* preference over all other creditors.

¹⁷¹ Brits *Real Security Law* 389.

¹⁷² Brits *Real Security Law* 389.

¹⁷³ Brits *Real Security Law* 389.

¹⁷⁴ *Willow Waters Home Owner's Association v Koka* 2015 5 SA 304 (SCA).

specific services in exchange for the payment of a levy. The title deed of each immovable property contained a title condition that the property could not be transferred without a clearance certificate certifying that the amount due to the HOA has been paid in full. The respondent was the trustee of the insolvent estate of an owner who owns property in the development. The HOA contended that the trustee was not allowed to transfer the property to any other person without all amounts owed to the HOA first being paid and that those amounts constituted realisation costs in terms of section 89 of the *Insolvency Act*.¹⁷⁵

The Supreme Court of Appeal had to decide whether the embargo provision in a title condition registered against the title deed of immovable property, preventing the transfer thereof without a clearance certificate from a HOA, constituted a real or personal right. If it constituted a real right it would mean that the trustee of an insolvent estate was bound by the provisions and could not transfer the property to any person without the debt being paid.

The court held that the two requirements for a right to constitute a real right in terms of the subtraction from the dominium test had been met in that:

- The intention behind the embargo provision was to create a general security for the payment of a debt as in the case of a lien or a mortgage bond and to achieve that purpose it had to bind all the successive owners in the development.
- The embargo provision restricted or took away from the owner's dominium by restricting her right to dispose of the property. It therefore subtracted from the dominium of the property.

As both the requirements had been met the court was satisfied that the HOA clause constituted a real right against the property that was therefore transferred to the trustee of the insolvent estate who was bound thereby. These costs would be included

¹⁷⁵ *Insolvency Act* 24 of 1936.

as realisation costs in the process of liquidation as provided for in section 89 of the *Insolvency Act*.¹⁷⁶

The court found that this provision is akin to the embargo provisions created in favour of municipalities and bodies corporate in legislation. The court confirmed that all these provisions serve a vital and legitimate purpose as effective security for debt recovery in respect of municipal service fees and contributions to bodies corporate for water, electricity, rates and taxes. In effect these provisions ensure the continued supply of such services and the economic viability and sustainability of municipalities in the interest of all inhabitants in the country.

Sonnekus¹⁷⁷ severely criticises this decision and is (in summary) of the opinion that the Supreme Court of Appeal erred in its decision for the following reasons:

- The subtraction from the dominium test should not be applied and if the proper criteria (as set out in Chapter 2 above) are applied to the HOA clauses it can never be regarded as a real right. The HOA clause is merely a personal right of performance between the HOA and the owner and can never be a burden upon the property transferred to successors in title.
- The right held by the HOA is at most a right to share preferently in the proceeds of the sale of the property and cannot constitute a real right against the property and the court erred in not drawing this distinction.
- If the new purchaser acquired the title by way of a sale in execution that constitutes an original form of acquiring ownership all limited real rights in the property is extinguished upon the fall of the hammer. Therefore even if the HOA clause constituted a real right, it would have been extinguished the moment the new owner obtained its original title.¹⁷⁸
- The HOA had the choice to incorporate the development as a sectional title and would therefore have received the legislative protection to which such schemes are entitled. It chose not to do so and cannot now, after it has chosen to put

¹⁷⁶ *Insolvency Act* 24 of 1936.

¹⁷⁷ Sonnekus 2015 *TSAR* 405-431.

¹⁷⁸ See Chapter 2 for a discussion as to why this view can be regarded as incorrect.

itself outside the realm of legislative protection, avail itself of that protection which is only afforded to those who met the requirements laid down in legislation.¹⁷⁹

The appearance of HOA's have become more prevalent in the modern era and the establishment of one is oftentimes a precondition imposed by the local authority for township-establishment.¹⁸⁰ Although Sonnekus criticises the use of the subtraction from the dominium test it is an established requirement in the South African law. The principle of *stare decisis* requires jurists to apply it when deciding whether a right constitutes a real right or not for deeds registration purposes.

If the test is applied to the relationship between a HOA and an owner it becomes clear that the relationship does in fact diminish the dominium of the owner. Not only is an owner required to obtain a clearance certificate before transfer can be effected, but her entitlements to ownership are also restricted by the rules of the HOA as to building restrictions, appearance rules, access control and traffic rules. It is clear that these restrictions will also bind successors in title (otherwise why impose it in the first place?) and the clause is oftentimes specifically worded to apply to successors in title. Therefore, the requirements for the subtraction from the dominium test are fulfilled based on the test set out in *Cape Explosive Works Ltd v Denel (Pty) Ltd*¹⁸¹ (discussed in Chapter 2 above) since the HOA condition creates a real burden on the property and is intended to apply to successors in title.

Kenny,¹⁸² in contradistinction to Sonnekus, remarks that the decision is welcomed in that HOA's are effective and efficient in providing security and upkeep of estates. The consequence of depriving HOA's of a right to collect levies in the event of insolvencies and liquidations would be to deprive it of the ability to effectively manage the estate.

The interpretation of these clauses should not cause much more problems in practice now that the Supreme Court of Appeal has set the principles out clearly and one is

¹⁷⁹ It should be noted in this instance that the development was not suited for the opening of a sectional title register – it had been approved as full title properties that required a HOA to enforce communal rules and regulations and fulfil certain communal functions.

¹⁸⁰ Kenny 2015 *Without prejudice* 69; Sonnekus 2015 *TSAR* 405-431.

¹⁸¹ *Cape Explosive Works Ltd v Denel (Pty) Ltd* 2001 3 SA 569 (SCA).

¹⁸² Kenny 2015 *Without prejudice* 69.

therefore inclined to agree with Kenny that the laudable purpose served by giving HOA's legal protection overrides the other considerations as listed by Sonnekus. Brits,¹⁸³ on the other hand, argues that special legislation should be enacted that specifically legitimises and regulates HOA's instead of simply relying on a somewhat dubious limited real right. However, until such time as legislation is enacted developers and conveyancers should ensure that the HOA contract and title condition is drafted in such a way to ensure that the intention to bind successors in title is clear.

3.6 Concluding remarks: a summary of the law as it stands

Despite the criticism of the various decisions by the Supreme Court of Appeal, the following can be deduced based on the interpretations discussed above:

- Section 118(1) of the *MSA* is an embargo provision with a two year limit which prohibits the transfer of immovable property until the relevant amounts have been paid to the local authority. Once the amounts have been paid, a clearance certificate must be issued and cannot be withheld simply because there is unpaid historical debt. This section will find application in private sales, sales in executions and sales upon insolvency.
- Section 118(3) of the *MSA* is a self-contained security provision without a time limit except in circumstances of insolvency where certain charges are limited by the operation of the *Insolvency Act*¹⁸⁴. This section constitutes a statutory hypothec upon the property that is not extinguished upon the transfer of property either by private treaty or by sale in execution.
- Bodies corporate of sectional title schemes can veto the transfer of any sectional title unit until all amounts due to it have been paid or security for the payment thereof have been provided.
- HOA clauses in title deeds constitute limited real rights against the property and a HOA will be entitled to veto the transfer of property in its development until all

¹⁸³ Brits *Real Security Law* 391.

¹⁸⁴ *Insolvency Act* 24 of 1936.

amounts due to it have been paid, whether the transfer is in terms of a private treaty, sale in execution or a sale in insolvency.

The constitutional aspects relating to the law as it has been summarised and discussed in the previous chapters are analysed in the following chapter.

Chapter 4: The constitutional implications of embargo and security provisions

4.1 The relevant constitutional clauses

The following clauses from the *Constitution* are relevant on the topic of security and embargo provisions as they relate to the right to private property, the possible limitation of that right and the constitutional responsibilities imposed on local authorities in South Africa.

The relevant portion of section 25(1) of the *Constitution* firstly provides that no person may be deprived of property except in terms of a law of general application and that a law may never permit the arbitrary deprivation of property.¹⁸⁵

Whenever it is found that a law does violate or limit any right protected in the *Constitution*, one must also apply the principles as set out in section 36 that states that any right in the Bill of Rights (which include the property rights of section 25) may be limited only by a law of general application. The extent of the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.¹⁸⁶ The factors to be taken into account when applying the section 36 limitation test are:

- the nature of the right;¹⁸⁷
- the importance of the purpose of the limitation;¹⁸⁸
- the nature and extent of the limitation;¹⁸⁹
- the relationship between the limitation and its purpose;¹⁹⁰ and
- whether there are less restrictive means to achieve the purpose.¹⁹¹

¹⁸⁵ S 25(1) of the *Constitution*.

¹⁸⁶ S 36(1) of the *Constitution*.

¹⁸⁷ S 36(1)(a) of the *Constitution*.

¹⁸⁸ S 36(1)(b) of the *Constitution*.

¹⁸⁹ S 36(1)(c) of the *Constitution*.

¹⁹⁰ S 36(1)(d) of the *Constitution*.

¹⁹¹ S 36(1)(e) of the *Constitution*.

The objects of local government are listed in section 152 of the *Constitution* and provide, *inter alia*, that local government is to ensure the provision of services to communities in a sustainable manner¹⁹² and is supposed to promote social and economic development.¹⁹³ Local government is tasked in the *Constitution* to strive, within its financial and administrative capacity to achieve these listed objectives.¹⁹⁴

4.2 The general principles of the section 25(1) constitutionality test: the FNB case

In the case of *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*¹⁹⁵ (hereinafter the *FNB-case*) the Constitutional Court was required to pronounce its interpretation of section 25(1) of the *Constitution* and specifically whether a deprivation of property caused by a statute is 'arbitrary' within the meaning of that term as employed by the *Constitution*. In this matter section 114 of the *Customs and Excise Act* 91 of 1964 authorised the South African Revenue Services to detain and thereby establish a lien over property found on any customs debtor's property. This could be done despite who the actual owner of the property is and despite the fact that neither the owner nor the property had any relation to the debt.¹⁹⁶ First National Bank had been the owner of certain vehicles that was detained in this manner and they challenged the constitutionality of the statutory provision on the basis that it violated section 25 of the *Constitution* and the right of a person to property.

The court made several findings that is not relevant to the topic of this study, but it did formulate what has come to be known as the arbitrariness test in terms of section 25 of the *Constitution*. The following are important findings of the court for the purposes of this study:

¹⁹² S 152(1)(b) of the *Constitution*.

¹⁹³ S 152(1)(c) of the *Constitution*.

¹⁹⁴ S 152(2) of the *Constitution*.

¹⁹⁵ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC).

¹⁹⁶ Sonnekus 2003 *TSAR* raises some doubt as to whether this was indeed the correct interpretation of s 114.

- Section 25 of the *Constitution* did not explicitly guarantee the right to acquire, hold and dispose of property, but is rather a negative protection of property – in other words protection against interference with a person owning property.¹⁹⁷
- The section dealt with all deprivations of property, including expropriations and if a deprivation infringed or limited the rights protected in section 25(1) and could not be justified in terms of section 36, it would be unconstitutional and invalid.¹⁹⁸
- The first question to be answered was if there had been a deprivation of property. A deprivation could, according to the Court, entail the dispossession of all or some of the entitlements to property such as use, enjoyment or the right to dispose thereof.¹⁹⁹ If there had been a deprivation it must be decided whether the law depriving a person of his property is a law of general application.²⁰⁰ Only once these questions had been answered positively must one apply the arbitrariness test.
- Two important principles had to be kept in mind when interpreting section 25 of the *Constitution*. The first, that appropriate circumstances existed where it would be permissible for legislation, in the broader public interest, to deprive a person of property without payment of compensation. Secondly, that in order for such a deprivation to be valid, there had to be an appropriate relationship between means and ends and between the sacrifice required from the individual versus the public purpose it is intended to serve.²⁰¹
- Deprivation of property can be regarded as arbitrary when the law did not provide sufficient reason for the particular deprivation or was procedurally

¹⁹⁷ Currie and De Waal *Bill of Rights Handbook* 533; Van der Walt *Constitutional Property Law* 34-42.

¹⁹⁸ For a full discussion on the inter-relationship between the s 25 enquiry and the s 36 limitation test see Van der Walt *Constitutional Property Law* 72-78.

¹⁹⁹ Van der Walt *Constitutional Property Law* 190-192 described deprivation of property as the usually uncompensated, duly authorized and fairly imposed restriction on the use, enjoyment, exploitation or disposal of property for the sake of the common good.

²⁰⁰ According to Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 545 most laws will comply with this requirement unless it singles out a particular group of persons for discriminatory treatment.

²⁰¹ Van der Walt 2005 *SALJ* 78 calls these factors the complexity of relations that have to be considered to determine whether there is sufficient reason for the deprivation.

unfair.²⁰² It could be established whether sufficient reason existed by considering the various aspects of the deprivation (such as whether it was permanent or whether it was a total deprivation); the purpose served by the deprivation and the relationships affected thereby. The answer would therefore depend upon all the relevant facts of each particular case.

- If the property comprised land or other corporeals the purpose of the deprivation would need to be compelling and where the deprivation was all embracing (instead of just influencing some of the entitlements of ownership) a more persuasive reason for the deprivation would need to be established.²⁰³

In this matter the court decided that the purpose sought to be achieved by the relevant provision was the collection of customs debt that was an important and legitimate legislative purpose. However, the means used to achieve this purpose was found to be arbitrary on the following considerations:

- The provision provided for a permanent and total deprivation of property.
- The owner of the property had no connection to the customs debt.
- The property had no connection with the customs debt.
- The owner of the property had not placed the custom's debtor in possession of the property in circumstances that could have induced the Commissioner to act to his detriment in relation to the incurring of the customs debt.

Van der Walt²⁰⁴ explains that the court found it unnecessary to decide whether the infringement of section 25 is subject to the section 36 justification analysis and simply assumed that it was and concluded that in this particular instance the infringement could not be justified. He is of the opinion that it is difficult to conceive instances where

²⁰² The issue of procedural fairness does not receive further discussion in the *FNB*-case but Van der Walt 2012 *Stellenbosch Law Review* 93 is of the opinion that the mention of procedural fairness in the *FNB*-case has the effect that the deprivation of property would be arbitrary either when there was insufficient reason for it or when it is procedurally unfair in terms of the same principles that apply in administrative law. For a full discussion on this aspect see Van der Walt 2012 *Stellenbosch Law Review* 88-94.

²⁰³ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 528.

²⁰⁴ Van der Walt 2005 *SALJ* 78.

an arbitrary deprivation would be justifiable under section 36 because a proportionality/reasonableness test has already been conducted by utilising the arbitrariness test.²⁰⁵

Van der Walt²⁰⁶ also states that the Constitutional Court surprised everyone by adopting a substantive interpretation instead of simply requiring a rationality review when testing a property deprivation for arbitrariness. Du Plessis and Scott²⁰⁷ explain that the principle has been established by the South African Constitutional Court that every law should be rational and that rationality is the minimum threshold requirement applicable to the exercise of all state power.

A rationality review is itself divided into two parts. Firstly it has to be established that a legitimate governmental objective exists and secondly whether there is a rational connection between the law and the stated purpose.²⁰⁸ Generally a rationality review will not apply any form of a proportionality or reasonableness test. It merely demands a rational connection and that the law in question brings the state closer to achieving its stated objective.²⁰⁹ A proportionality review, on the other hand, requires that a standard of reasonableness is present in the governmental action or law. It 'thickens' the rationality review and requires more than just some form of rational connection between the law and the purpose served by it.²¹⁰

The arbitrariness test employed in the *FNB*-case is clearly not only a rationality review. The Constitutional Court has therefore indicated that in some instances deprivation of property will be required to undergo a proportionality test in order to determine whether it is arbitrary or not.²¹¹ The court indicated that the meaning of non-arbitrariness will fluctuate as a result of the interplay between variable means and ends. It may be foreseeable that in some instances a rationality review will be sufficient while

²⁰⁵ Van der Walt 2005 *SALJ* 78. For a full discussion on this aspect see Van der Walt *Constitutional Property Law* 72-79.

²⁰⁶ Van der Walt 2005 *SALJ* 77.

²⁰⁷ Du Plessis and Scott 2013 *SALJ* 599.

²⁰⁸ Du Plessis and Scott 2013 *SALJ* 600.

²⁰⁹ Du Plessis and Scott 2013 *SALJ* 601-602.

²¹⁰ Du Plessis and Scott 2013 *SALJ* 605-607.

²¹¹ Van der Walt 2005 *SALJ* 78 explains that the test employed here was thicker than a mere rationality review as the court required a strong reason for the deprivation under the particular circumstances. See also Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 524 and Van der Walt *Constitutional Property Law* 108.

in other circumstances a substantive balancing of competing interests will be necessary.²¹²

Roux²¹³ criticises the *FNB* decision on the basis that it failed to properly distinguish between the various enquiries required to determine whether there has been an arbitrary deprivation of property, but instead sucked all the property issues into the vortex of the arbitrariness test. He states that the test laid down in this decision leaves much scope for judicial discretion. The courts can adjust the level of scrutiny and the so-called 'thickness' of the arbitrariness test in any specific case according to the factors to be taken into consideration.²¹⁴ The level of scrutiny can therefore vacillate between two poles, namely a mere rationality review that falls at the lower end of the scale up to a proportionality review at the high end of the scale.²¹⁵ Du Plessis and Scott²¹⁶ agree that any advantages that can be gained by the court employing a variable standard to tests such as this arbitrariness test is undermined if the variable standard is not coupled with clear guidance on how the standard is to be applied and what factors will govern the variability. Failure to provide clear guidelines, in their opinion, runs contrary to the rule of law.²¹⁷

The following section analyses how this test was applied by the Constitutional Court when interpreting the constitutionality of section 118(1) of the *MSA* and how it applied the tentative guidelines provided by the court in the *FNB*-case.²¹⁸

4.3 The constitutionality of section 118(1) of the MSA

This part of the study is based on the Constitutional Court's decision in *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing Gauteng*²¹⁹ (hereinafter

²¹² Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 528, 545.

²¹³ Roux "Section 25" 46-23.

²¹⁴ Roux "Section 25" 46-24.

²¹⁵ Roux "Section 25" 46-24; Van der Walt *Constitutional Property Law* 237-238.

²¹⁶ Du Plessis and Scott 2013 *SALJ* 608.

²¹⁷ Du Plessis and Scott 2013 *SALJ* 608.

²¹⁸ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 524 states that the courts in fact exercised the discretion conferred by the broad formulation of the arbitrariness test with notable self-restraint in future cases.

²¹⁹ *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing Gauteng* 2005 1 SA 530 (CC).

the *Mkontwana* case) in which the Constitutional Court was tasked to pronounce the constitutionality of section 118(1) of the *MSA*.

In this matter several home owners challenged the constitutionality of section 118(1) of the *MSA* on the basis that it arbitrarily deprived them of ownership in their immovable properties. They based this argument upon the fact that all the immovable properties in question had been occupied by someone other than the owner and that the municipal charges were incurred by the occupiers. They could not transfer their properties without the amounts due for the previous two years paid in full. They argued that as a result, they were arbitrarily deprived of one of the incidences of ownership, namely the right to alienate the properties. In all the matters before the court there had been an escalation in the amounts owed for water and electricity without the knowledge of the owners. The outstanding amounts constituted a substantial portion of the market value of the property and the owners argued that the court should interpret section 118(1) to refer only to those charges incurred by the owner of the property and not other occupiers. They therefore required the court to 'read-down' the provision to save it from unconstitutionality.²²⁰

The court confirmed the principle that a legislative provision should always be interpreted to avoid unconstitutionality if that provision is reasonably capable of being interpreted in that way and if that construction is not unduly strained. The court found that the interpretation put forward by the applicants were unreasonable and could never be interpreted in that manner. This is clearly correct as it cannot be fathomed how a municipality in practice is supposed to determine which charges were incurred by an owner (or with her permission) and which were not.

As the court declined to interpret section 118(1) in the manner put forward by the applicants the next step was to consider whether the section is inconsistent with section 25(1) of the *Constitution* or not. The court held that it had to utilise the principles as laid down in the *FNB*-case and the first two questions that needed to be answered was whether there is a deprivation of property and secondly whether it is a law of general application that results in that deprivation.

²²⁰ For an explanation of what 'reading-down' means, see Chapter 2.

The court found that the complete 'taking away of property' was not required for a deprivation of property to occur and whether there had been a deprivation depends on the extent of the interference with or limitation of the use, enjoyment or exploitation of the property in question. Deprivation would require a substantial interference or limitation that went beyond the normal restrictions on property use or enjoyment found in an open and democratic society. The court held that as the right to alienate property was an important incident of the use and enjoyment of property and as section 118(1) of the *MSA* constituted a substantial obstacle to alienation, that the section gave rise to the deprivation of property.

The court found that the *MSA* was obviously a law of general application and the next question that needed to be answered in terms of the *FNB*-case was whether the deprivation was arbitrary. The court confirmed the principles of the *FNB*-case and explained that a deprivation of property was arbitrary within the meaning of section 25 of the *Constitution* if the *MSA* did not provide sufficient reason for the deprivation or was procedurally unfair. It was necessary to look at the relationship between the purpose of the law and the deprivation effected by it to determine whether sufficient reason existed. If the purpose of the law bore no relationship to the property and its owner it would be arbitrary. The greater the extent of the deprivation, the more compelling the purpose and closer the relationship between the means and ends had to be.

The court examined the purpose of section 118(1) of the *MSA* thereafter and found that it was to furnish a form of security to municipalities for the payment of amounts due in respect of the consumption of water and electricity. It was the public duty of municipalities to provide these services and it was therefore important that the possibility of arrear municipal debt be reduced by all legitimate means. The section placed the risk of non-payment of municipal charges by occupiers of the property on the owner of the property instead of placing it on the municipality. The purpose of the section was described by the court as important and laudable. It had the potential to encourage regular payments to the municipality and thereby to contribute to the effective discharge by municipalities of their constitutionally mandated functions.

The court confirmed that the property itself bore a close relationship to the municipal charge in that the service was rendered to the property itself and that the services increased the value of the property and enhanced the use and enjoyment thereof. The court further found that the exact relationship between the owner and the municipal charge would depend upon who occupied the property (for instance the owner personally, a tenant, a usufructuary, a fiduciary or an illegal occupier). However, in all instances the owner would, as a result of her ownership of the property, always have had some connection to the municipal charges consequent upon the rights and responsibilities attached to the incidence of ownership.

Once the court was convinced that there was indeed a relationship between the municipal debt and both the owner and the property, it continued to investigate the question of whether section 118(1) was arbitrary for the want of an appropriate relationship between the means and ends. This involved the following three interrelated steps:

- determining the nature of the property and the extent of the deprivation;
- determining the nature of the means-ends relationship required in the light of the nature and extent of the deprivation; and
- determining whether the relationship between the means and ends were appropriate in the circumstances to constitute sufficient reason for the deprivation in terms of section 25(1) of the *Constitution*.

The court examined the nature of the property and extent of the deprivation and found that section 118(1) deprived a person of a single, but important incident of ownership, namely the right to transfer the property to complete alienation. The owner was not deprived of the right to occupy the property, to rent it out or to use it in any other manner as the right to ownership allowed. The deprivation was furthermore temporary and cannot last for a period of longer than two years. The court noted that it was conceded by all parties that these charges were incurred by the owner herself, the deprivation could not be arbitrary and the question of arbitrariness only concerned the situations where the charges were incurred by a person other than the owner.

The court also noted that the owner had the ability to limit the risk imposed by section 118(1) by choosing a lessee carefully, requiring the occupier to render monthly proofs of payment, installing a pre-paid electricity meter, taking steps to evict unlawful occupiers and informing the municipality of the unlawful occupation. The extent of the deprivation would therefore vary from case to case and may even be influenced by the owner's failure to take reasonable steps to minimize the amounts due to the municipality.

The court then turned to scrutinise what relationship between the means and ends would constitute sufficient reason for the deprivation. It was held that the means employed by section 118(1) was to require the owner of the property to bear the risk of non-payment of consumption charges by the occupiers of the property for the two years prior to the application for the clearance certificate. The end that was achieved by the provision was to attempt to reduce unpaid municipal debt to enable municipalities to provide the services they are constitutionally required to provide. The court examined in detail the different scenarios applicable where the property was occupied by various types of non-owners. It reached the ultimate conclusion that the owner was connected in such a close manner to the property that it was not unreasonable, when taking into account the importance of the ends achieved by this provision, to place the risk of non-payment of consumption charges on the owner. The relationship between the means and ends were therefore sufficient reason for the deprivation and section 118(1) of the *MSA* was found not to be arbitrary.

The court did, however, specifically find that section 118(1) of the *MSA* did not relieve a municipality of its duty to ensure that amounts due were effectively collected from the occupier. It must continue to do everything reasonable to ensure collection of its outstanding debt. The court also held that an owner had a substantial interest in the municipal charges incurred in respect of his property and that any municipality is therefore required to supply copies of all monthly statements rendered to an occupier of the property to the owner on written request.

Freedman²²¹ notes two features that were confirmed in this case and which will be important in all section 25 cases of the future, namely:

- that at the heart of the property deprivation inquiry is the requirement that the deprivation must not be arbitrary; and
- the court has once again retained a wide discretion to decide what is considered an arbitrary deprivation of property.

He furthermore notes that the manner in which the court applied the test for reasonableness adds to the difficulties of the relationship between the right not to be deprived of property and the section 36 limitation clause. The reason for this statement is that the test that the court applied to determine whether the right not to be deprived of property had been infringed, is in effect the same test that one must apply to determine whether an infringement is justifiable under section 36. He states that it would accordingly, be difficult to imagine that any deprivation that has been found to be arbitrary could be saved as being a justifiable limitation of that right.²²²

Van der Walt²²³ criticises the decision of the Constitutional Court in that it paid little or no attention to the preliminary enquiries such as what constitutes property and a deprivation thereof and focused all its attention on the arbitrariness test.²²⁴ He is furthermore of the opinion that the court misapplied its discretion and only applied a rationality test and not a proportionality test. It thereby merely required a rational connection between the purpose of the law and the deprivation effected by it. The court failed to investigate the proportionality between the effect of the infringement on an individual's right to ownership versus the benefit gained by the local authority.²²⁵ The court also failed to properly consider the possibility of alternative strategies (such as the termination of the municipal services) that could achieve the same purpose in just an

²²¹ Freedman 2006 *TSAR* 99.

²²² Freedman 2006 *TSAR* 98-99.

²²³ Van der Walt 2005 *SALJ* 79-89.

²²⁴ He is supported in this view by Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 548.

²²⁵ Van der Walt 2005 *SALJ* 85-86.

effective manner but without infringing on the owner's rights in such an extensive way.²²⁶

He states that the court may have come to a different conclusion had it attached greater weight to considerations that should arguably influence a substantive weighing of the interplay between the means and ends and the relationships involved.²²⁷ These considerations are the following:

- the other means at the disposal of a municipality to enforce payment of the debt;
- the fact that the contractual relationship is between the municipality and the occupier;
- the inefficiency of the municipality to determine the correct amount owing and the effect of that inefficiency on the owner; and
- the fact that evicting an unlawful occupier has become increasingly difficult especially for a private owner who is not in the position to provide alternative housing.²²⁸

The final criticism by Van der Walt that is worthy of consideration is that he argues that the court did not pay sufficient attention to the purpose of the relevant legislative provision.²²⁹ It needed to ask whether the deprivation is really necessary and how high its stated goals rank among the purposes legitimately served by regulatory action.²³⁰ He is of the opinion that there exists a very real possibility that deprivation serves simply as a safety net for the inefficient debt management and debt collection procedures employed by most local authorities.²³¹ This opinion is in line with the everyday experience and perception of most South Africans that local government is inefficient and incapable of fulfilling its constitutionally mandated functions.

²²⁶ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 548.

²²⁷ Van der Walt 2005 *SALJ* 87.

²²⁸ Van der Walt 2005 *SALJ* 87.

²²⁹ Van der Walt 2005 *SALJ* 87.

²³⁰ Van der Walt 2005 *SALJ* 84.

²³¹ Van der Walt 2005 *SALJ* 84.

The practical effect of this decision is in all probability that municipalities now have even less incentive to take legal action against occupiers of properties for arrear consumption charges as owners are compelled to pay the arrears before they can transfer the property.²³²

The constitutionality of section 118(3) of the *MSA* is examined in the next section.

4.4 The constitutionality of section 118(3) of the MSA

As seen in the previous paragraph, the Constitutional Court has now confirmed that section 118(1) of the *MSA* is constitutional. It can be applied by municipalities to block the transfer of property until the municipal debt of the preceding two years has been paid in full, irrespective of whether those charges were incurred by the owner or not. However, the Constitutional Court has not as yet had the opportunity to pronounce any judgment on section 118(3) of the *MSA*. As can be seen from the discussion of the *Mathabathe* and *Mitchell* cases above, the interpretation of section 118(3) of the *MSA* by the Supreme Court of Appeal can be viewed in different ways.

For the purposes of the constitutionality analysis (as many academic writers and practitioners have done) it will be assumed that the effect of the *Mathabathe* decision is that section 118(3) creates a statutory hypothec over immovable property in respect of the municipal charges outstanding for longer than two years. This hypothec survives transfer of the land to another person and can be enforced against that new owner as well as the new mortgagee of the land.

The basic premise is that section 118(3) of the *MSA* will be unconstitutional if it does not provide sufficient reason for the deprivation of property or is procedurally unfair.²³³ According to the *FNB* judgement it can be established whether sufficient reason exists by considering the various aspects of the deprivation (such as whether it is permanent

²³² Kelly-Louw 2004 *Juta Business Law* 136.

²³³ The aspect of procedural fairness received little to no attention in both the *FNB* and the *Mkontwana* cases as the court probably assumed that these types of fiscal efficiency laws will not be found unconstitutional on the ground of procedural unfairness. This aspect will therefore not be discussed in this study and it will be assumed that the law will be procedurally fair. For a more thorough discussion of the aspect of procedural fairness in constitutional matters see Van der Walt 2012 *Stellenbosch Law Review* 88-94.

or whether it is a total deprivation); the purpose served by the deprivation and the relationships affected thereby.

In the instance that section 118(3) is interpreted as stated above, the following two types of property suffers a deprivation:

- The new owner of the property can be deprived of his entire ownership of that property if a municipality would be successful in enforcing its statutory hypothec by obtaining a court order, selling the property in execution and applying the proceeds to the outstanding municipal debt. In this instance the new owner will only receive a right to receive the balance of the proceeds of the sale after the municipality and the mortgagee have been paid.
- A mortgagee holds a real right to the immovable property that entitles him to preferent payment of the mortgage debt from the sale of the mortgaged property. Section 118(3) deprives the mortgagee of this right in relation to the municipality in such a way that it frustrates the very object of the bond as a security measure.²³⁴ In the instances where the proceeds of the sale is insufficient to cover both the municipal debt and the mortgage debt, the mortgagee is deprived of his entire ownership in the property, namely his real right of security.²³⁵

As the *MSA* is obviously a law of general application it is clear that the first requirement of the section 25(1) test have been met – there is a deprivation of property by a law of general application. The next question is therefore whether the deprivation is arbitrary, which means that it must be examined what the purpose of the deprivation as well as the relationships between the means and ends achieved by section 118(3) are.

The object of section 118(3) can be stated as in effect the same as that of section 118(1) that was discussed in the *Mkontwana* matter, namely to provide security for municipalities for the repayment of municipal debt to enable them to fulfil their constitutionally mandated functions. The court in *Mkontwana* described this as an

²³⁴ Brits *Real Security Law* 402.

²³⁵ Du Plessis 2006 *Stellenbosch Law Review* 521; Brits *Real Security Law* 402.

important and laudable objective that should be achieved by any legitimate legislative means.

It should again be emphasised at this point that this finding by the court in the *Mkontwana* matter has been severely criticised in that it never considered the deeper possibility that the deprivation in question in section 118(1) of the *MSA* serves as a safety net for inefficient debt management and collection policies of municipalities, which does not serve the public purpose at all.²³⁶ Van der Walt argues that by providing judicial support for the section 118 procedure it may encourage municipalities to worry even less about proper debt collection practices, safe in the knowledge that they can recoup at least two years worth of losses from the landowner upon transfer of the property.²³⁷ This argument becomes even more poignant in the section 118(3) analysis as the municipality is now given an unbridled charge against the property that it can enforce at any arbitrary time against a current owner or a future owner in preference to any mortgage bond registered over the property.

The following is clear when applying the test as laid down in the *FNB*-case:

- The provision provides for a permanent and total deprivation of property. Both the new owner and the mortgagee will be deprived of their rights that cannot be restored after the municipality has exercised its statutory hypothec;
- Neither the new owner of the property nor the mortgagee has any connection to the municipal debt.²³⁸ It was not incurred by them nor was it incurred by someone authorised by them to occupy the property. In *Mkontwana* the court emphasised that the current owner of a property had the responsibility to take reasonable steps to ensure that the deprivation caused by section 118(1) of the *MSA* was as limited as possible. It could for instance ensure that municipal debt was paid diligently, that proper tenants occupied the property and evict illegal occupiers. None of these steps are, however, available to either the new owner

²³⁶ Van der Walt 2005 *SALJ* 84.

²³⁷ Van der Walt 2005 *SALJ* 84.

²³⁸ Brits *Real Security Law* 410.

or the mortgagee of the property and they will be at the complete mercy of the previous owner and his neglect to ensure payment of municipal debt.²³⁹

- The property has a connection to the municipal debt as stated in the *Mkontwana* matter. The services are rendered to the property and the value of the property increased as a result of the delivery of services.
- The new owner and the mortgagee had not acted in any manner with the property that could prejudice the rights of the municipality generally. Both are for all intents and purposes innocent and *bona fide* third parties who are now connected to the property to which the historical debt relates.
- There are other avenues available to local government for the enforcement and collection of debt and it need not only rely on the provisions of section 118. This includes the disconnection of services due to non-payment as well as the normal debt collections procedures of summons, judgment and related execution steps.

When the court in *Mkontwana* examined the relationship between the means and ends affected by section 118(1) it emphasised that this section only influences a single incident of ownership and that the deprivation was only temporary and that the owner could implement reasonable measures to mitigate the effect of this provision. It was in the light of these factors that the court found that the deprivation was not arbitrary when measured against the achievement of the purpose of the legislation. In the instance of section 118(3) the deprivation concerns the whole of ownership on a permanent basis and the new owner and mortgagee have no way of limiting the effect of the legislative impact on their ownership of the property.

Section 118(3), unbridled by a time limit, distorts the proportionality between means and ends and renders the provision arbitrary as envisaged in section 25(1) of the *Constitution*.²⁴⁰ Although it is argued that the effect of section 118(3) is to enhance the efficacy of local government, this now comes at too high a cost especially if it is taken into account that section 118 of the *MSA* is by no stretch of the imagination the only debt collection procedure available to municipalities.

²³⁹ Du Plessis 2006 *Stellenbosch Law Review* 524; Brits *Real Security Law* 410.

²⁴⁰ Du Plessis 2006 *Stellenbosch Law Review* 526.

In fact Du Plessis²⁴¹ remarks quite justifiably that the intrusive qualities of section 118 are such that they may very well thwart the capacity of vulnerable persons to become property owners. Financial institutions may become more wary to simply provide home loans where their security may be negated to nothing that in turn negates the very constitutional objectives local government is supposed to fulfil. Brits reiterates this point by stating that this state of affairs is causing great apprehension and uncertainty in the property market that is both constitutionally and commercially unacceptable.²⁴²

From this analysis it becomes apparent that the chances of section 118(3) as it was interpreted by the Supreme Court of Appeal in *Mathabathe* surviving the constitutionality test is very slim if a proper proportionality test is applied to the facts of the matter. As a proportionality test has at that stage already found that the law in question is arbitrary in terms of section 25, it is unfathomable that the limitation could be justifiable in terms of section 36 in an open and democratic society.

Fourie J in the recent High Court decision *Jordaan v The City of Tshwane Metropolitan Municipality*²⁴³ relied on much the same arguments as that advanced in this section of the study. He concluded the section 25(1) constitutionality test of section 118(3) by stating that although the security provision served a legitimate and important legislative function that is essential for the economic viability and sustainability of municipalities it does not justify forcing a *bona fide* property owner to pay the municipal debts of her predecessor in title, alternatively to forfeit her ownership if she refuses to do so. According to this decision section 118(3) casts the net too wide as the means employed sanctions the total deprivation of property of a subsequent owner's immovable property under circumstances where that owner has no connection with the transaction that gave rise to the debt in the first place. In the absence of this relationship between the new owner and the debt, the court concluded that no sufficient reason exists for depriving the current owner of her property.

The court also confirmed that once this conclusion was reached that it could not foresee any circumstances where that deprivation could then be justifiable under

²⁴¹ Du Plessis 2006 *Stellenbosch Law Review* 528.

²⁴² Brits *Real Security Law* 413.

²⁴³ *Jordaan v The City of Tshwane Metropolitan Municipality* (NG) (unreported) case number 74195/2013 of 7 November 2016.

section 36 of the *Constitution* as most of the relevant factors listed in section 36 have already been taken into account during the arbitrariness test. The court found itself unable to find that the infringement served a purpose that is considered legitimate by reasonable citizens in a constitutional democracy that value human dignity, equality and freedom above all other considerations. The High Court therefore ordered that the provisions of section 118(3) of the *MSA* are declared to be constitutionally invalid to the extent only that the security provision survives the transfer of ownership into the name of a new or subsequent owner who is not a debtor of the municipality with regard to municipal debts incurred prior to such transfer.

Whether this declaration will in due course be confirmed by the Constitutional Court is an open question although it cannot be imagined that it can come to a different conclusion.

4.5 The constitutionality of the other embargo provisions

The other embargo provisions as contained in section 15B(3)(a)(i)(aa) of the *Sectional Titles Act*²⁴⁴ as well as the provisions in favour of HOA's have not come under constitutional scrutiny and it does not seem that academic writers have expended much or any energy on examining the constitutionality thereof. Both these embargo provisions are unfettered by a time limit and can in effect cause two types of deprivations of property:

- A deprivation of the right to transfer the property. It deprives the owner of one incidence of ownership that in theory can constitute a permanent deprivation if the amount due to a body corporate or a HOA is more than the market value of the property.
- A mortgagee can in execution or insolvency proceedings be deprived of its real security right as these charges will need to be paid first from the proceeds of the property that has been sold by the sheriff or a trustee or liquidator of an insolvent estate.

²⁴⁴ *Sectional Titles Act* 95 of 1986.

- However, both these provisions force the current owner to endure the entire brunt of the provision. The clauses prohibit the transfer of the property until all outstanding amounts have been paid and any new owner will receive a clean title in that respect as she will not be liable for the payment of any debt incurred by the previous owner.

Both these clauses can deprive an owner of some of her entitlements to her property and therefore potentially infringes the rights enshrined in section 25. The arbitrariness test needs to be applied and calls for the question whether the limitation of the right to property will be justifiable in terms of section 36 of the Constitution.²⁴⁵ As previously discussed, the section 36 query will involve substantially the same enquiry as applied in determining whether the deprivation is arbitrary or not so long as the arbitrariness test involves a proper proportionality review of the deprivation in question. The principles of determining whether the deprivation is arbitrary will therefore be applied to both the body corporate and the HOA provision as it will in effect answer the same question.

The purpose of both these provisions is not the same as that of section 118(1) of the *MSA* – but in both instances the sections provide economic and social security to its members for the enforcement of a debt due to a body who provides certain agreed services to them. The most important difference between section 118 and these provisions is that neither a body corporate nor a HOA is constitutionally mandated to assist with the development of South African on a social and economic level. However, the question arises whether it is in the interest of a sound economy (which is of course in itself in the public interest) to place members who have paid their levies in danger of losing the economic and social security offered by a body corporate or a HOA that cannot fulfil its obligations due to outstanding levies. The purpose served is therefore clearly different from that of section 118(1) of the *MSA*, but this alone does not render it unconstitutional.

The same reasoning as that which the court applied in *Mkontwana* with regard to the relationship between the owner and the charge and the charge and the property can be

²⁴⁵ S 8 of the *Constitution* provides for the horizontal application for the Bill of Rights between individuals and there is no reason why the right to be protected against an arbitrary deprivation of property should not apply between individuals as well.

applied here and it will not be repeated in full – there is clearly a connection between the levies, the owner and the property. Suffice it to say that these provisions shift the risk of non-payment of the charges to the owner of the property and to the mortgagee in insolvency proceedings. These provisions, unlike section 118(3), protect the new owner who cannot be held liable for the historical debt due to the body corporate or the HOA. The deprivation is also (in contrast to section 118(1)) not limited to two years and; as was seen by the *Mkontwana* decision, the fact that the deprivation was only temporary played a decisive role in the court's decision that the provision was not arbitrary.

The provisions do not necessarily serve the entire public of South Africa but it does serve all sectional title owners as well as large numbers of newer developments that is subject to a HOA clause. The provisions are capable of depriving an owner or mortgagee of important rights it holds in the property. It can effectively deprive an owner of the ability to dispose of the property. However, it is fully within the control of the owner to ensure that the levies do not accumulate to such an extent. Bodies corporate and HOA's (who are often assisted by managing agents) are not as notoriously bad at record-keeping as municipalities are and an owner should be able to keep track of the payment of levies without too much difficulty.

These type of provisions once again have the practical effect of taking away some of the motivation a body corporate or HOA can have to implement proper debt collection procedures. It can simply sit back and wait for the transfer of property and then exercise its rights but in practice owners do not necessarily sell at frequent intervals. A body corporate or HOA will in all probability rather implement other debt collection procedures to ensure that it continuously has the funds to fulfil its agreed functions.²⁴⁶ If they fail to implement these procedures and wait for a disposal of the property the arrear amounts could have grown to such an extent that the proceeds of the sale may not even be sufficient to cover the outstanding debt. The lack of proper debt management in turn binds the hands of the organisation to fulfil the functions it was

²⁴⁶ This can be problematic too as there are often high costs associated with legal collection procedures and debtors enjoy extensive constitutional protection that makes it difficult to enforce the debt in all instances.

meant to fulfil and in effect means that the entire development suffers as a result thereof.

Hence, it is submitted that the provisions provide sufficient reason for the deprivation, which can be limited through the owner's own actions, and is therefore not arbitrary and unconstitutional.

The final chapter focuses on the conclusions that can be drawn from the foregoing as well as providing recommendations as to the interpretation of various embargo and security provisions and the possibility that legislative changes may be required.

Chapter 5: Concluding remarks and recommendations

In order to answer the main research question, the practical and constitutional effects of the various embargo and security provisions on immovable property transactions can, based on the information contained in this study, be summarised as follows:

- Section 118(1) of the *MSA* provides security for the repayment of debt to a municipality by giving it a veto right against the transfer of property until the municipal debts for the two years preceding the date of application for a clearance certificate has been paid. This section has been interpreted by the Constitutional Court and was found not to violate the right to property as contained in section 25(1) of the *Constitution*. This decision was based (in summary) upon the finding that the purpose served by the section (namely the provision of security for the collection of municipal debt that enables municipalities to fulfil their constitutionally mandated functions) constituted sufficient reason for the temporary deprivation of the owner's right to transfer his property.
- Section 118(3) of the *MSA* provides security for the repayment of a debt to a municipality by providing that any municipal debt is a charge upon the property that takes preference to any mortgage bond registered over the property. This section is not fettered by the same two year time limit as section 118(1) of the *MSA* and applies to all municipal debt whenever it has been incurred, provided that it has not prescribed. The only limitation on the effect of this section is in insolvency, when 'taxes' as defined in section 89(5) of the *Insolvency Act*²⁴⁷ are limited to two years before the date of insolvency. Section 118(3) of the *MSA* creates a statutory hypothec over the property that is not extinguished by transfer into another person's name, even where the new owner bought the property at a sale in execution. This section has not as yet been the subject of constitutional scrutiny by the Constitutional Court, but it is argued that as it is currently structured and interpreted by the Supreme Court of Appeal that it would constitute an arbitrary deprivation of property. This argument is supported

²⁴⁷ *Insolvency Act* 24 of 1936.

by the Pretoria High Court's interpretation of the section that declared the section to be invalid insofar as the application thereof survives the transfer of the property to a third party.²⁴⁸ This declaration of unconstitutionality has not as yet been confirmed by the Constitutional Court.

- Section 15B(3)(a)(i)(aa) of the *Sectional Titles Act*²⁴⁹ as well as the general title provisions in favour of a HOA provides an embargo provision to bodies corporate in sectional title schemes and HOA's whereby they may block transfer of immovable property into a third party's name until all amounts due to it have been paid or security for the payment has been given. This charge will in insolvency proceedings take precedence over the claim of any mortgagee and a trustee or liquidator of an insolvent estate will be obliged to pay these costs first from the proceeds of the sale of the immovable property. These provisions are a mixture between section 118(1) and 118(3) of the *MSA* in that it provides an embargo provision not fettered by a time limit. The constitutionality of these provisions has been questioned and although the Constitutional Court has not been required to make a pronouncement thereon, it is submitted that these provisions may survive constitutional scrutiny.

It is therefore recommended that the legislature intervene in these matters as follows:

- (i) Section 118(1) of the *MSA* should remain unchanged. Although Kelly-Louw²⁵⁰ suggests that this section be amended to only apply to charges incurred by owners and that the time limit be reduced to six months, this section in practice causes little to no problems and it serves the purpose of assisting a municipality to collect debts. If the charges should be limited to only charges incurred by an owner, this opens the door to abuse this section by all owners who will suddenly claim that they were not the occupiers of the property and is therefore not responsible for the charges.

²⁴⁸ *Jordaan v The City of Tshwane Metropolitan Municipality* (NG) (unreported) case number 74195/2013 of 7 November 2016.

²⁴⁹ *Sectional Titles Act* 95 of 1986.

²⁵⁰ Kelly-Louw 2005 *SALJ* 792.

- (ii) Section 118(3) of the *MSA* should be amended to apply to the same two year period as section 118(1). In this manner it may even avoid unconstitutionality as it will also constitute only a temporary deprivation of the property that serves a legitimate governmental purpose. Du Plessis²⁵¹ is of the opinion that if the constitutionality of this section is challenged, that the Constitutional Court may even decide to read down this provision to incorporate the time limit of section 118(1). By limiting the application of this section it would also send out the message to local government that lack of proper debt collection procedures will not be tolerated and that their protection is not unlimited. It should also be amended to state unambiguously that the security afforded by this section will not survive the transfer of the property to a new owner.
- (iii) Legislation should be enacted to provide for HOA's and how they should be managed.²⁵² This has become necessary and the practice of utilising a HOA has become abundant in the last few years and the problems arising therefrom is clear from case law that was discussed before. It is also suggested that any embargo provision in favour of a HOA should be limited to two years preceding the date of application for a clearance certificate to ensure that HOA's also implement proper debt collection strategies and procedures.
- (iv) The same reasoning applies to the embargo provision in favour of a body corporate and it is suggested that this provision also be fettered by a two year time limit.

In the interim until a clearer picture is established by either the legislature or the Constitutional Court it is suggested that conveyancers take great care to ensure that properties are not transferred with historical debt still outstanding. A full statement should be requested from the municipality and any deed of sale should provide that a conveyancer is authorised by the seller to pay any outstanding municipal debt to the local authority from the proceeds of the sale.

²⁵¹ Du Plessis 2006 *Stellenbosch Law Review* 530.

²⁵² Although the *Community Scheme Ombud Service Act* 9 of 2011 applies to schemes where a HOA is active it provides only for the resolution of disputes within the community and it does not actually legislate HOA's and their rights and obligations as such.

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