CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 57/03

NOKUTHULA PHYLLIS MKONTWANA — Applicant

versus

NELSON MANDELA METROPOLITAN MUNICIPALITY — First Respondent

MINISTER OF PROVINCIAL AFFAIRS AND CONSTITUTIONAL DEVELOPMENT — Second Respondent

Case CCT 61/03

PETER WILLIAM BISSETT — Applicant

ANNA MARIA ELZA VAN DER STRAETEN — Second Applicant

NEDCOR BANK LIMITED — Third Applicant

versus

BUFFALO CITY MUNICIPALITY — First Respondent

MINISTER FOR PROVINCIAL AND LOCAL GOVERNMENT — Second Respondent

MEMBER OF THE EXECUTIVE COUNCIL FOR LOCAL GOVERNMENT AND HOUSING — Third Respondent

Case CCT 1/04

TRANSFER RIGHTS ACTION CAMPAIGN AND OTHERS — Applicants

versus

MEMBER OF THE EXECUTIVE COUNCIL
FOR LOCAL GOVERNMENT AND HOUSING
IN THE PROVINCE OF GAUTENG AND OTHERS Respondents

Together with

KWAZULU-NATAL LAW SOCIETY First Amicus Curiae

MSUNDUZI MUNICIPALITY Second Amicus Curiae

Heard on : 10-11 March 2004

Decided on : 6 October 2004

JUDGMENT

YACOOB J:

Introduction

[1] One of the five objects of local government in our Constitution is to ensure the provision of services to communities in a sustainable way.[1] Municipalities supply water and electricity to consumers in their area subject to the payment of a consumption charge. In practice consumers of water and electricity are occupiers of property. Some own property they occupy and others do not. These three cases concern the constitutional validity of laws that in effect burden owners in relation to consumption charges for water and electricity supplied to other people who occupy their immovable property.

[1] Section 152(1)(b).

[2] Section 118(1) (section 118(1)) of the Local Government: Municipal Systems Act[2] (the Act) is one of these provisions.[3] It places limits on the owner's power to transfer immovable property. The registrar of deeds may not effect transfer of any property without a certificate issued by the municipality to the effect that the consumption charges due during a period of two years before the date of issue of the certificate have been paid.[4] The section is being challenged principally on the basis that it gives rise to arbitrary deprivation of property contrary to section 25(1) of the Constitution.

[3] In September last year section 118(1) was declared to be constitutionally invalid by the South Eastern Cape Local Division of the High Court (the High Court) in two cases before it.[5] The High Court held that the section permitted arbitrary deprivation of property in conflict with section 25(1) of the Constitution and referred the declaration of invalidity for confirmation to this Court in terms of section 172(2) of the Constitution. The applicants in both these cases[6] have applied for confirmation

[2] Act 32 of 2000.

[3] The section is set out in full in para 27(a) of the judgment. Insertions indicate applicants' preferred interpretation.

[4] Subsection (1A) provides that the certificate is valid for 120 days.

[5] *Nokuthula Phyllis Mkontwana v Nelson Mandela Municipality and Others* (SECLD) Case No 1238/02 and *Peter William Bissett and Others v Buffalo City Municipality and Others* (SECLD) Case No 903/2002, 13 September 2003, as yet unreported.

[6] Id, Nokuthula Phyllis Mkontwana in the *Mkontwana* case, and Peter William Bissett, Anna Marie Elza van der Straeten and NEDCOR Bank Ltd in the *Bissett* case.

of this order. The municipalities cited in each of the two cases[7] as well as the Minister responsible for Local Government opposed confirmation and appealed against the High Court order.[8]

[4] There is also before this Court an application for direct access which came to be made in the following circumstances. In December 2002 an application was launched in the Witwatersrand Local Division of the High Court (the WLD application). That application required a consideration of the meaning and constitutionality of national, provincial and local government legislation including section 118(1) that burdened owners in relation to payment for water and electricity supplied to consumers who occupied the property. Certain consequential relief was also sought in the application. The applicants included an association of persons and are jointly referred to as the WLD applicants.[9] Responsible government entities[10] as well as utility companies responsible for the delivery of water[11] and electricity[12] were joined as respondents in these proceedings.

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[7] Nelson Mandela Metropolitan Municipality in the *Mkontwana* case and Buffalo City Municipality in the *Bissett* case.

[8] All this happened during October 2003.

[9] Transfer Rights Action Campaign, TREKNET Properties CC, Marion Cameron NO and Dianna Jennifer Parnell.

[10] City of Johannesburg Metropolitan Municipality, Ekurhuleni Metropolitan Municipality, Member of the Executive Council for Local Government and Housing in the Province of Gauteng, Minister for Provincial and Local Government, Minister of Justice and Constitutional Development, The South African Local Government Association and The Registrar of Deeds, Johannesburg.

[11] Johannesburg Water (Pty) Ltd.

[12] City Power (Pty) Ltd.

[5] Legislation additional to section 118(1) in issue in the WLD application may be briefly summarised. Section 118(3) of the Act is to the effect that any consumption charge owing is a "charge upon the property in connection with which the amount is owing and enjoys preference over any mortgage bond registered against the property". Sections 49 and 50(1)(a) of a Gauteng Local Government Ordinance (the Ordinance)[13] were also challenged. Section 49[14] in effect renders the owner and occupier of premises jointly and severally liable to a municipality for the consumption charges for water and electricity supplied to that property. The section empowers the municipality to sue the owner and occupier jointly and severally after written notice to one of them. It also confers on the owner and occupier the right to recover from the other the latter's share of the liability discharged by the former. Section 50(1)(a)[15] of the Ordinance has the same effect as section 118(1) of the Act except that the

[13] No 17 of 1939, which is also applicable in the provinces of Mpumulanga, Limpopo and North West.

[14] Section 49(1) and (2) provide:

> "(1) All moneys due for sanitary services, all moneys due as basic charges for water made in terms of section 81(1), all other moneys due for water where any water closet system on such premises has been installed, and all moneys due as basic charges for electricity made in terms of section 83(1), shall be recoverable from the owner and occupier jointly and severally of the premises in respect of which the services were rendered; provided that the owner shall in the absence of any agreement to the contrary, be entitled to recover from the occupier of the said premises for the time being any such charges paid by him in respect of the occupation of such occupier.
> (2) If any charges due in respect of any premises for sanitary services, or if basic charges due for water made in terms of section 81(1), or if other charges due in respect of any premises for water where any water closet system on such premises has been installed, or if basic charges due for electricity made in terms of section 83(1), shall remain unpaid for a period of six weeks after the date on which written notice shall have been given by the council to the owner or occupier of his indebtedness, the council may proceed jointly and severally against the owner and occupier for the time being of such premises for the amount of such charges or any part thereof, and may recover the same from such owner or occupier; provided that every such occupier shall be entitled to deduct from any rent or other amount payable by him to the owner of the premises any portion of such charges paid by or recovered from him under this sub-section which the owner could not lawfully have required him to pay and the production of the receipts for such portion of such charges so paid or recovered from such occupier shall be a good and sufficient discharge for the amount so paid or recovered as payment of rent or other amount."

[15] Quoted in full in para 27(b). Insertions indicate applicants' preferred interpretation.

certificate required by the Ordinance must cover debts due for three years before the date of the certificate.

[6] The by-laws in issue in the WLD application are those of the City of Johannesburg Metropolitan Municipality. They are by-law 4(2) of the water by-laws[16] and by-law 36 of the electricity by-laws.[17] The former makes owners and consumers jointly and severally liable in respect of water charges[18] while the latter does the same for electricity charges.[19]

[7] In January this year almost all the parties in the WLD application[20] applied for direct access to this Court. The aim was to have all the issues in the WLD application heard together with the application for confirmation and the appeal.[21] The issues to be decided in this appeal can be ascertained only after the fate of the application for direct access is decided. That application is considered first.

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[16] Standard Water Supply By-laws published in Administrator's Notice 21 of 5 January 1977.

[17] Greater Johannesburg Metropolitan Council's Electricity By-laws published in the Provincial Gazette No 16 of 17 March 1999.

[18] Section 4(2) of the water by-laws provides: "The owner and consumer shall be jointly and severally liable for compliance with every financial obligation and other requirement imposed upon either of them in terms of these by-laws."

[19] Section 36 of the electricity by-laws provides that: "The owner and the consumer shall be jointly and severally liable for compliance with any financial obligation or other requirement imposed upon them by these by-laws."

[20] Except for the MEC for Local Government and Housing in the Province of Gauteng, The Minister for Provincial and Local Government, Minister of Justice and Constitutional Development, The South African Local Government Association and the Registrar of Deeds, Johannesburg.

[21] The application for confirmation and appeal had by this stage been set down for hearing.

[8] Before this is done however it is convenient to mention that an attack on the constitutionality of sections 118(1) and 118(3) of the Act was considered by the KwaZulu-Natal High Court in the case of *Geyser*[22] (the *Geyser* case) and dismissed some six months before the delivery of the judgment of the High Court. It was held there that both subsections were not inconsistent with section 25(1) of the Constitution because the deprivation to which they gave rise was not arbitrary. There were therefore two conflicting judgments in relation to the constitutionality of section 118(1) by the time the direct access application was heard by this Court.

Direct Access

[9] Applications for direct access are now governed by rule 18 of the rules of this Court. In substance, the rule allows for direct access to be granted if it is in the interests of justice to do so.[23] The interests of justice is a broad concept and requires a consideration of many factors.[24]

[10] All the parties in the WLD application were agreed during argument before this Court that direct access should be granted. They submitted that it would be in the interests of justice for this Court to hear the case before it had been entertained by any other court. They relied on the saving of time and costs, the importance of the matter,

[22] *Geyser and Another v Msunduzi Municipality and Others* 2003 (5) SA 18 (N); 2003 (3) BCLR 235 (N).

[23] Rule 18(2)(a).

[24] *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) para 8; *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 (CC) para 35; *Moseneke and Others v The Master and Another* 2001 (2) SA 18 (CC); 2001 (2) BCLR 103 (CC) para 19.

and on a need to resolve the uncertainty created by competing judgments in the High Court. The application for confirmation and the appeal are concerned only with section 118(1) of the Act. We were accordingly urged not to decide the fate of this section in isolation, but to grant direct access and decide all the other legal issues in the light of the more comprehensive factual matrix presented in the WLD application.

[11] A useful point at which to start in considering an application for direct access is to recognise the importance of the principle that it is ordinarily not in the interests of justice for this Court to be a court of first and last instance.[25] The Constitution and the rules of this Court do, however, provide for this Court to be the court of first and final instance, but only in exceptional circumstances.[26] The saving of time and costs, the importance of the issue or the existence of conflicting judgments on an issue in a case do not, without more, constitute exceptional circumstances and justify this Court being a court of first and last instance. Indeed the importance and complexity of the issues raised would weigh heavily against this Court being a court of first and final instance. As a general rule, the more important and complex the issues in a case, the more compelling the need for this Court to be assisted by the views of another court.

[25] *Brink v Kitshoff NO* 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) para 14; *Transvaal Agricultural Union v Minister of Land Affairs and Another* 1997 (2) SA 621 (CC); 1996 (12) BCLR 1573 (CC) para 18; *Bruce and Another v Fleecytex* above n 24; *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others* 1998 (4) SA 1157 (CC); 1998 (7) BCLR (CC) 855 para 32; *Christian Education South Africa v The Minister of Education* 1999 (2) SA 83 (CC); 1998 (12) BCLR 1449 (CC) para 12; *Van Der Spuy v General Council of the Bar of South Africa (Minister of Justice and Constitutional Development, Advocates for Transformation and Law Society of South Africa Intervening)* 2002 (5) SA 392 (CC) para 19; 2002 (10) BCLR 1092 (CC) para 18; *National Gambling Board v Premier, KwaZulu-Natal, and Others* 2002 (2) SA 715 (CC); 2002 (2) BCLR 156 (CC) paras 29 and 38; *Satchwell v President of the Republic of South Africa and Another* 2003 (4) SA 266 (CC); 2004 (1) BCLR 1 (CC) para 6.

[26] *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) paras 4 and 6; *Dlamini* above n 24; *Moseneke* above n 24; *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) and Others* 2004 (5) BCLR 445 (CC) paras 7-8.

Each of the issues in respect of which direct access is sought must be considered separately.

[12] It is significant that section 118(1) is already before this Court in the application for confirmation and leave to appeal. There are conflicting judgments in relation to the constitutional validity of section 118(1). It is also true that the WLD application canvasses the factual background on a broader basis than has been done in the *Mkontwana* and *Bissett* cases. The determination of the application for confirmation and that for leave to appeal by this Court will result in a final decision as to the constitutionality of section 118(1). No delay is occasioned by hearing the applicants on section 118(1) in the light of the new evidence they present. It is therefore in the interests of justice to grant direct access to the WLD applicants, to consider the evidence placed before the High Court in the WLD application, and to decide the constitutional validity of section 118(1) by reference to all the arguments advanced. In the circumstances, direct access should be granted in relation to all the issues raised concerning the interpretation and constitutionality of section 118(1).

[13] The position in relation to section 118(3) is different. It has been submitted that this Court will not be the court of first and last instance when it comes to the determination of the constitutionality of section 118(3). It is said that this is because the High Court has already considered and dismissed challenges to the constitutional validity of section 118(3) in the *Geyser* judgment. However very little is said in the *Geyser* judgment about the meaning and effect of section 118(3). Nor in that

judgment is the constitutionality of section 118(3) considered separately from the constitutionality of section 118(1). This is not surprising because section 118(3) was not really a matter of "live controversy" in that case. The municipality had not relied upon section 118(3) and therefore this section was not really in issue. The challenge to section 118(3) in the *Geyser* case can rightly be said to be one bordering on the abstract. Section 118(3) has not been used by the municipality in relation to any of the applicants in the WLD case either. The construction of section 118(3) is far from straight forward and the reasoned judgment of another court on how the section is to be interpreted is likely to be helpful. In the circumstances, it is not in the interests of justice for this Court to consider the constitutional validity of section 118(3) at this stage.

[14] Section 49 of the Ordinance as well as the by-laws of the City of Johannesburg in issue in the direct access application can be dealt with together. They are important provisions that raise complex questions concerning the appropriateness of rendering owners jointly and severally liable for payment of water and electricity not consumed by them but by others on their property. It is not in the interests of justice for this Court to be the court of first and last instance on these issues. Although the provincial legislation and by-laws are inter-related with section 118(1), there are sufficient differences between these provisions to render it advisable that another court should decide the issue of the constitutionality of these provisions before we consider it.

[15] It has already been pointed out that section 50(1)(a) of the Ordinance is similar to section 118(1), except that an owner wishing to sell the property would be able to pass transfer only after all amounts owing in respect of the property for a period of three years before the date of the certificate have been paid. Arguments advanced by the parties about the interpretation and constitutionality of section 50(1)(a) are virtually the same as those directed at section 118(1). There is so little difference between the two provisions that a decision on the constitutional validity of section 118(1) by this Court would directly impact on the constitutionality of section 50(1)(a). Indeed, a decision that the former is unconstitutional might lead to the conclusion that the latter is unconstitutional too. It is therefore in the interests of justice for the application for direct access to be granted in relation to section 50(1)(a).

[16] The application for direct access concerning the interpretation and constitutionality of sections 118(1) and 50(1)(a) must therefore be granted. The application must be refused in all other respects.

Parties before the Court

[17] The applicants and the respondents in the WLD application are therefore before the Court in addition to the applicants and respondents in the confirmation proceedings.[27] This Court also admitted two parties as amici curiae on their application. Both were parties in the *Geyser* case. The first amicus,[28] contests the

[27] The respondents in the confirmation application also appeal against the order.

[28] The KwaZulu-Natal Law Society.

constitutionality of section 118(1) of the Act and the second amicus[29] contends for its validity. There are therefore broadly two sets of parties. The applicants in the confirmation proceedings, the applicants in the WLD application and the first amicus all of whom regard the burden placed on owners of property by section 118(1) as constitutionally objectionable. Then there are municipalities supported by a provincial MEC, national minister responsible for local government and the second amicus who urge that the section is good. I will refer to the former simply as the applicants and to the latter as respondents.

The factual background

[18] All the applicants tell us of an escalation of amounts owing in respect of electricity and water charges without their knowledge. In many cases, there are disputes between the applicant and the municipality about whether the municipality acted negligently and whether the owner ought to have taken more steps to ensure that amounts were in fact paid. In most cases large amounts of money have become due. There are allegations of illegal reconnection of water and electricity in some of the factual situations in the WLD application.

(a) The High Court cases

[19] In the *Mkontwana* case, Ms Mkontwana bought a house in Port Elizabeth for R24 560.00 by an agreement that provided for her to pay the outstanding consumption charges necessary to obtain the section 118(1) certificate. She is not well off and was

[29] The Msunduzi Municipality.

only able to buy the house with the help of a state housing subsidy of R16 000.00. When she first applied to the municipality for a certificate in October 2001, she was informed that consumption charges in excess of R10 000.00 had been incurred by previous occupiers and had to be paid before the certificate could be issued. Somewhat curiously, the municipality sought payments of amounts that had become due more than two years and up to five years before the date of the statement. The same municipality later issued a document saying that the amount required to be paid was more than R20 000.00. There followed four statements of account, each varying in amount, and all of them unclear, confusing, contradictory and irreconcilable. Ultimately in September 2002, after the intervention of attorneys and considerable negotiation, the amount was settled at less than R2500.00.

[20] In the *Bissett* case, applicants, co-owners of property in Buffalo City sold it for R110 000.00 in July 2001. The municipality issued a document in August 2001 requiring payment of less than R2500.00 before the certificate could be issued. When this amount was paid a month later, the sellers were presented with another statement of account according to which more than R14 000.00 remained owing for consumption charges during the relevant two year period. This document, to the extent that it is intelligible, lacks the necessary detail and is contradictory. An undated statement of account later produced by the same municipality shows that the amount owing was less than R8000.00.

[21] The same pattern is evident in the dealings between the second of the applicants who also owned property in the Buffalo City municipal area which was sold for R60 000.00. I need say no more than that R9219.93 was paid by this applicant to obtain a section 118(1) certificate after some negotiation and under protest. This applicant discovered some months later that the actual sum owing was around R2000.00 less than the sum that had actually been paid.

(b) The WLD application

[22] Four of the five applicants in the WLD application are owners of property. The fifth is an administrator of a deceased estate which owns the property in question. In relation to the cases of the four applicants who own property, the factual background, to the extent that it needs to be recited for the purposes of this case is very similar. Owners had let the property to tenants in all cases. Large sums of money had become outstanding in relation to consumption charges. The municipalities concerned had made unsuccessful efforts to collect the money. In one case, the municipality had in fact informed the owner that a substantial sum of money had been owing by the tenant and the owner had renewed the lease with the same tenant after receipt of this information. The municipality's efforts to secure payment by the disconnection of electricity and water, resulted, in many instances, in the unlawful reconnection of electricity. There are material disputes of fact on the papers relating in particular to whether the predicament that had ultimately eventuated was the result of inaction by the municipality or of the lack of reasonable, responsible conduct on the part of the owners.

[23] The experience of the administrator of the deceased estate raises issues similar to those in the High Court. The property had been occupied by tenants pursuant to agreements of lease they had entered into with the deceased. The property is worth R95 000.00 according to the estate account. The municipality required payment of an outstanding sum slightly in excess of R1550.00 for the issue of a section 50(1) certificate and provided a written document to this effect. Some months later however the municipality indicated that the amount required to be paid exceeded R22 000.00. Like in the other cases before the WLD, there is a dispute about the extent of the municipality's tardiness in the execution of its debt collection responsibilities.

Repeal of section 50

[24] The whole of section 50 was repealed exactly two weeks before the WLD application was launched.[30] It was contended by some of the respondents that the application concerning the constitutionality of section 50(1)(a) of the Ordinance is accordingly moot and ought not to be entertained. The applicants answer that one of the WLD applicants has been prejudiced by the application of the section and that the Court should accordingly deal with it. There is in fact a dispute on the papers concerning the validity of the section, whether one of the applicants was obliged to pay certain consumption charges owing to obtain the certificate and, if not, whether that applicant is entitled to recover the amounts paid. A cause of action can be moot

[30] It was repealed by the Local Government Laws Amendment Act 51 of 2002 on 5 December 2002. The application was launched on 19 December 2002.

only if its resolution will have no practical effect.[31] A decision about the validity of section 50(1)(a) will have practical effect. The issue is not moot.

Issues

[25] Several matters call for our attention. The first is whether section 118(1) and section 50(1)(a) can reasonably be interpreted so that they apply only if the consumption charges are due by the owner. Secondly, if these provisions cannot be so construed, we must decide whether they are consistent with section 25 of the Constitution. Thirdly, if any of these laws is found to be unconstitutional, the appropriate remedy must be considered. Finally, if the relevant provisions are not struck down for their failure to comply with the Constitution it will be necessary to evaluate contentions made by one of the applicants in the High Court and which the High Court found unnecessary to consider. It is submitted before this Court that section 118(1) is inconsistent with sections 9(1), 26 and 34 of the Constitution.

Application: further evidence

[26] A few days before the hearing, the municipality in the *Bissett* case tendered evidence aimed essentially at showing the amount of consumption charges recovered by it through the section 118(1) procedure during a three year period. The explanation for this late tender of evidence was that the municipality had been alerted to the need

[31] *President, Ordinary Court Martial, and Others v Freedom of Expression Institute and Others* 1999 (4) SA 682 (CC); 1999 (11) BCLR 1219 (CC) para 8. See also *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* 1997 (3) SA 514 (CC); 1996 (12) BCLR 1599 (CC) para 15; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) n 18; *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) para 9; *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC) para 92.

that this additional information be placed before us by the submission of one of the parties. This information had not been placed before the High Court. This Court will receive additional evidence on appeal only if there is compelling reason to do so. There is none in this case. The amount of money actually recovered by the use of the procedure is not particularly helpful largely because it is impossible to tell whether the money recovered in consequence of the use of the procedure would not in any event have been paid. More importantly, however, the figure put up in the evidence does not relate to consumption charges incurred by non-owner occupiers. In the circumstances, the materiality of the evidence is doubtful. The application for leave to introduce further evidence must accordingly be refused.

Interpretation

[27] The WLD applicants correctly point out that we must construe a legislative provision so as to avoid its unconstitutionality if it is reasonably capable of being interpreted in that way or, to put it differently, the construction is not unduly strained.[32] I will address this contention on the assumption that all these laws will be unconstitutional if not interpreted in the way suggested by the WLD applicants. They contend that sections 118(1) of the Act and 50(1)(a) of the Ordinance are reasonably

[32] *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) para 59 and the authorities referred to in n 87 thereof; *Nel v Le Roux NO and Others* 1996 (3) SA 562 (CC); 1996 (4) BCLR 592 (CC) para 18; *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) para 85; *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) paras 22-26; *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)* 2002 (1) SA 429 (CC); 2001 (11) BCLR 1109 (CC) paras 24.

capable of being so interpreted without attributing an unduly strained meaning to the language used.

[28] The submission is that each of these provisions must be interpreted as if the words "by the owner" or "due by the owner" had been inserted at appropriate points in each of the provisions so as to render it less burdensome. Each of these sections is set out in full below. The words added by the applicants to demonstrate the reasonable meaning contended for are in bold.

(a) Section 118(1) of the Act provides

> "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 **[by the owner]** 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."

(b) Section 50(1)(a) of the Ordinance reads

> "(1) No transfer of any land or of any right in land as defined in section 1 of the Local Authorities Rating Ordinance, 1977, within a municipality shall be registered before any registration officer until a written statement in the form set out in the Third Schedule to this Ordinance and signed and certified by the town clerk or other officer authorised thereto by the council, shall be produced to such registration officer, and unless such statement shows—

> (a) that all amounts **[due by the owner]** for a period of three years immediately preceding the date of such registration due in respect of such land or right in land for sanitary services or so due as basic charges for water or as other costs for water where any water closet system on the ground concerned has been installed or so due as basic charges for electricity in terms of the provisions of this Ordinance or any by-law or regulation . . . have been paid to the council . . . ."

[29] Interpreted in this way, section 118(1) of the Act and section 50(1)(a) of the Ordinance would require that consumption charges due only by the owner for the relevant period must be paid as a precondition to transfer. This preferred construction involves an assumption that the purpose of enacting the laws in question is limited. The aim is to secure only those consumption charges due by the owner. In other words the legislation does not seek to secure municipalities against non-payment of consumption charges due by occupiers other than the owner.

[30] It is highly unlikely that the purpose was so narrow. If it was, it is inconceivable that the text would not have said so expressly. Each of these provisions, on its face, is broadly worded and secures the payment of all consumption charges "in connection with" the property. The interpretation advanced by the WLD applicants is unreasonable. These laws are not reasonably capable of the suggested interpretation.

The constitutionality of section 118(1) and section 50(1)(a)

[31] It is helpful to repeat that section 118(1) of the Act and section 50(1)(a) of the Ordinance make transfer of immovable property subject to the precondition that all

consumption charges due "in connection with" or "in respect of" that property by anyone have been paid. The applicants submit that these provisions are inconsistent with section 25(1) of the Constitution because they amount to an arbitrary deprivation of property. Section 25(1) provides:

> "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

[32] Almost all the parties accepted that these provisions do bring about a deprivation of property. There was one submission however that they do not, but are merely regulatory provisions. They do not prevent transfer altogether, the argument went, but are measures that merely delay transfer until a certificate has been obtained. The contention has no merit. In *First National Bank*[33] (the *FNB* case) this Court held that the taking away of property is not required for a deprivation of property to occur.[34] Whether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation. It is not necessary in this case to determine precisely what constitutes deprivation. No more need be said than that at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation.

[33] *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); 2002 (7) BCLR 702 (CC).

[34] Id para 57.

[33] Alienation of immovable property is ordinarily completed by transfer to the new owner in the office of the registrar of deeds. The right to alienate property is an important incident of its use and enjoyment. The effect of section 118(1) and section 50(1)(a) of the Ordinance is that transfer can take place only if all outstanding consumption charges have been paid. It follows that owners cannot transfer their properties unless consumption charges due by people other than themselves and for which they are not liable have been paid. It was correctly pointed out that these laws do not literally require the owner to pay outstanding consumption charges. The reality is, however, that if the person liable for the debt does not or cannot pay, the owner who wants to effect transfer must, unless the relevant agreement provides for a party other than the owner to effect the payment, pay all outstanding consumption charges. The payment must be made regardless of whether the owner is liable to pay. The provisions are not merely procedural. They are a substantive obstacle to alienation and constitute a deprivation of property within the meaning of section 25(1). Indeed, it is distinctly possible that all consumption charges for the two or three year period might be so high as to exceed the market value and render a sale uneconomical. It follows that I agree with the High Court[35] and with the *Geyser* judgment[36] that section 118(1) does give rise to deprivation of property.

Is the deprivation arbitrary?

(a) The nature of the section 25(1) analysis

[35] Above n 5 para 44.

[36] Above n 22 at 2003 (5) SA 18 (N) at 37C-D; 2003 (3) BCLR 235 (N) at 250B-C.

[34] The meaning of arbitrary in section 25 of the Constitution was determined in the *FNB* case. After a thorough analysis[37] Ackermann J concluded that a deprivation of property is arbitrary within the meaning of section 25 of the Constitution if the law in issue either fails to provide "sufficient reason" for the deprivation or is procedurally unfair.[38] To determine whether there is sufficient reason for a permitted deprivation, it is necessary to evaluate the relationship between the purpose of the law and the deprivation effected by that law.[39] A complexity of relationships must be considered in this assessment including that between the purpose of the provision on the one side, and the owner of the property as well as the property itself on the other.[40] If the purpose of the law bears no relation to the property and its owner, the provision is arbitrary. The customs law in issue in the *FNB* case fell into this category. It permitted total deprivation of property even when the customs debt bore no relationship either to the owner or to the property itself.[41]

[35] The *FNB* judgment also sets out the approach to be adopted if there is a connection between the purpose of the deprivation and the property or its owner.[42] In these circumstances, there must be sufficient reason for the deprivation otherwise the deprivation is arbitrary. The nature of the relationship between means and ends that

[37] *FNB* above n 33 paras 61-99.

[38] Id para 100.

[39] Id para 100(a).

[40] Id paras 100(b), (c) and (d).

[41] Id para 108(a) and (b).

[42] Id paras 100(d), (e), (f) and (g).

must exist to satisfy the section 25(1) rationality requirement depends on the nature of the affected property and the extent of the deprivation. A mere rational connection between means and ends could be sufficient reason for a minimal deprivation. However, the greater the extent of the deprivation the more compelling the purpose and the closer the relationship between means and ends must be.

(b) The High Court judgment on arbitrariness

[36] The High Court was persuaded that there was, in this case, no connection between the consumption charge and either the property or its owner. It was held that there were four significant similarities between the deprivation permitted in the *FNB* case and that allowed by section 118(1).

a) Both laws permitted deprivation absent any connection between the relevant debt and the owner of the property.[43]

b) Section 118(1) permitted a deprivation of property when "there would be no connection between the owner and the property on the one hand and the municipal debt on the other" and was accordingly similar "to the position in the *FNB* case where there was no connection between the property and the customs debt".[44]

c) The owner of the property had in neither case induced the creditor to act to its detriment in relation to "the incurring of the debt".[45]

[43] Above n 5 para 50(a).

[44] Id para 50(b).

[45] Id para 50(c).

d) The deprivation brought about by section 118(1) and the customs law in issue in the *FNB* case could both continue indefinitely until the debt was paid.[46]

[37] The High Court concluded, on the basis of these perceived parallels, that the *FNB* judgment was "powerful and persuasive authority" for the conclusion that section 118(1) was far-reaching and therefore arbitrary.[47] It was in the circumstances unnecessary for the High Court to decide whether there was sufficient reason for the deprivation. The applicants supported this reasoning.

[38] The High Court saw the purpose of section 118(1) as being the protection of municipalities and the promotion of the collection of debts owed to a municipality.[48] It is however necessary to examine the purpose more closely. The purpose of section 118(1) is to furnish a form of security to municipalities for the payment of amounts due in respect of the consumption of water and electricity (consumption charges). The ultimate effect of the law is that the property in connection with which the consumption charges have been incurred provides security for the payment of that consumption charge. In this sense the law burdens the owners of property. Municipalities are obliged to provide water and electricity to the residents in their area

[46] Id para 50(d).

[47] Id para 51.

[48] Id paras 34, 58 and 64.

as a matter of public duty.[49] It is therefore important that the possibility that municipal debt remains unpaid be reduced by all legitimate means. Section 118(1) is concerned amongst other things, with the question whether the municipality or the owner of property should bear the risk when non-owner occupiers who are obliged to make these payments in the first instance fail to do so. In more specific terms therefore, the purpose of the provision is to place this risk on the owner. The purpose is important, laudable and has the potential to encourage regular payments of consumption charges and thereby to contribute to the effective discharge by municipalities of their constitutionally mandated functions. It also has the potential to

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[49] Section 27(1)(b) of the Constitution provides:

> "Everyone has the right to have access to—
> . . .
> sufficient food and water".

The relevant parts of section 152 of the Constitution provide:

> "(1) "The objects of local government are—
> (a) . . .
> (b) to ensure the provision of services to communities in a sustainable manner;
> (c) to promote social and economic development;
> (d) to promote a safe and healthy environment; . . .
>
> (2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1)."

Section 153 of the Constitution provides:

> "A municipality must—
> (a) structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community; and . . . ."

Section 73(1) of the Local Government: Municipal Systems Act 32 of 2000 provides:

> "(1) A municipality must give effect to the provisions of the Constitution and—
> (a) give priority to the basic needs of the local community;
> (b) promote the development of the local community; and
> (c) ensure that all members of the local community have access to at least the minimum level of basic municipal services."

encourage owners of property to discharge their civic responsibility by doing what they can to ensure that money payable to a government organ for the delivery of service is timeously paid. The municipality also has responsibilities in this regard but this aspect is briefly discussed later in this judgment. It follows that the relationship between consumption charges on the one hand and the owner of property and the property itself on the other must be examined.

[39] It is convenient to first discuss the relationship between the consumption charge and the property. As I have already said, the High Court in effect found that section 118(1) permitted a deprivation of property when "there would be no connection between the owner and the property on the one hand and the municipal debt on the other" and was accordingly similar "to the position in the *FNB* case where there was no connection between the property and the customs debt". In my view, however, the difference between the nature of the connection between the property and the debt in the two cases is both fundamental and decisive. In the *FNB* case, affected property (a motor vehicle in that case) leased by the owner to the customs debtor could have been sold in execution even if the vehicle had nothing whatever to do with the customs debt. The consequences of section 118(1) do not go that far. Section 118(1) does not permit the deprivation of property where there is no connection between it and the consumption charges. As the High Court correctly points out the debt giving rise to deprivation is required to have "become due in connection with that property". The High Court reasoned however that electricity and water consumed by a non-owner "would, generally, benefit neither the owner nor the property", that the service was

merely being provided at the property and that the property-debt relationship was therefore similar to that in the *FNB* case.

[40] It cannot be accepted that electricity and water are merely consumed at the property. These amenities are supplied to the property, accessed and consumed by the occupier on the property and are enjoyed by the occupier as part and parcel of the enjoyment of the occupation of the property. What is more, the supply of electricity and water to a property ordinarily increases its value; the consumption of electricity and water enhances its use and enjoyment. Indeed, the consumption of electricity and water by the occupier is integral to the use and enjoyment of the affected property and to its inherent worth. There is therefore more than just a close relationship between the property and the consumption charge: the property and the consumption charge are closely interrelated.

[41] What of the connection between the consumption charge and the owner? The High Court concluded that there was none, on the basis that section 118(1) applies in the case of "a vast array of non-owners" including "tenants, persons exercising rights of habitatio or exercising rights of usufruct or fideicommissum, squatters or other mala fide occupiers".[50] It is self evident that the exact character of the relationship between the owner and the consumption charge will vary depending on whether the property is occupied by the owner, a tenant, a usufructuary, a fiduciary or an unlawful occupier. However, there is a level at which the owner and the debt are usually

[50] Above n 5 para 50(a).

connected or related regardless of the nature of the relationship between the owner and the occupier and of whether the property is lawfully occupied. This is because the owner is bound to the property by reason of the fact of ownership which, as I will consider in more detail later, entails certain rights and responsibilities. Both the owner and the consumption charge are closely related to the property and the property is always the link between the owner on the one hand and the consumption charge in respect of water and electricity provided by the municipality on the other.

[42] The applicants correctly point out that the deprivation occurs even when there is no contractual relationship between the owner and the municipality that obliges the latter to supply water and electricity to property that belongs to the former. However, it does not follow from the absence of a contractual relationship that there is no relationship. In many instances, the owner benefits from the increase in the value of the property and the enhanced use and enjoyment of it because electricity and water are available there. In some instances, notably in the case of the unlawful occupier who has never had the consent of the owner to occupy, it is arguable that the supply of electricity and water to the property for consumption by that occupier is of no benefit to that owner at all. It is however fallacious to require that the owner must benefit from the consumption charge before it can be said that there is a relationship between the consumption charge and the property. The mere fact that the consumer of water and electricity supplied to the property is an unlawful occupier cannot break the strong owner, property and consumption charge chain. The High Court was also incorrect in

concluding that the subsection reveals no connection between the consumption charge and the owner.

[43] The High Court wrongly held that the consumption charge was connected neither to the property nor to the owner. The charge is connected to both. It becomes necessary therefore to examine whether section 118(1) is arbitrary for want of the appropriate relationship between means and ends. In other words, we must decide whether there is sufficient reason for the deprivation.

(c) Is section 118(1) arbitrary for want of an appropriate relationship between means and ends?

[44] There are three interrelated steps to this enquiry. We must determine in turn:

a) the nature of the property concerned and the extent of the deprivation;
b) the nature of the means–ends relationship that is required in the light of the nature and extent of the deprivation and
c) whether the relationship between means and ends accords with what is appropriate in the circumstances and whether it constitutes sufficient reason for the section 25(1) deprivation.

[45] We are concerned in this case with the deprivation of a single but important incident of ownership in immovable property namely the right to pass transfer of property to complete alienation. The owner can continue to occupy the property, let it or do anything else that ownership allows. The deprivation is moreover temporary.

The High Court was incorrect in finding that, like the deprivation in the *FNB* case, the deprivation in the present case "may continue indefinitely".[51] The deprivation lasts for two years only. It is correct that if there are substantial arrears for consumption charges and all payments over an extended period are for current consumption only and are credited to the amount first owing, the substantial sum may remain outstanding indefinitely and thereby constitute an obstacle to transfer. If, however, no further obligations are incurred to increase the existing indebtedness of the same occupier the limit on the power of the owner to transfer the property will last no more than two years. Nevertheless, an owner could in the purchase and sale agreement delay transfer for a period of two years on appropriate conditions. Moreover there is nothing to make the subsequent occupier liable for the consumption charge indebtedness of a previous occupier. This means that the owner could, if he is able successfully to eject a delinquent occupier, either occupy the property or secure a reliable tenant or other occupier for a two year period in order to terminate the deprivation.

[46] The extent of the deprivation is affected by the amount of the consumption charge owing. The larger the amount the greater the extent of the deprivation. Indeed, transfer becomes virtually impossible for two years after the date on which the consumption charges due exceed the market value of the property. It is necessary to emphasise that we are not concerned in this case with the deprivation of property consequent upon consumption charges incurred by and for the benefit of the owner.

[51] Id para 50(d).

All the parties agreed that the deprivation that would result from that situation would not be arbitrary. We are concerned with the deprivation of property occasioned by electricity and water consumption on the part of non-owner occupiers only.

[47] The basic reason for the accumulation of consumption charges due in connection with any property occupied by non-owners is non-payment by those occupiers. However, it is ordinarily possible for both the municipality and the owner to guard against an unreasonable accumulation of outstanding consumption charges. The municipality has a duty to send out regular accounts, develop a culture of payment, disconnect the supply of electricity and water in appropriate circumstances, and take appropriate steps for the collection of amounts due. The owner's ability to protect her own interest by ensuring that consumption charges are kept within reasonable limits depends to some extent on the nature of the relationship between her and the occupier. If that occupier is on the property with the knowledge and consent of the owner, the latter can, amongst other things, choose the occupier carefully and stipulate that proof of payment in relation to consumption charges be submitted monthly on pain of some sanction including ejectment. As will appear more fully later, where the occupier is a usufructuary, the owner could compel the occupier to comply with the obligation to care for the property and to ensure that all amounts due for the use and occupation of the property are paid. The position is somewhat different where the property was initially unlawfully occupied without the knowledge and consent of the owner. It has been suggested that the owner is completely innocent and utterly powerless in this situation. That is, however, not the whole truth. The

owner has the responsibility to take reasonable steps to ensure that it is not unlawfully occupied and to take reasonable steps to evict the occupier as a matter of urgency if the circumstances warrant this. I return to this later.

[48] The amount of the consumption charges due in connection with any property at any time would depend on a number of factors. As the following examples show, arrear consumption charges may accumulate in circumstances where the owner or the municipality alone has failed to carry out the duties appropriate to each effectively or where both the owner and the municipality have acted reasonably and the arrear accumulation is due to some other circumstance which might or might not have been appreciated by the owner, the municipality or both. The owner might fail to take reasonable steps to ensure that the property was not unlawfully occupied, fail to take reasonable steps to ensure the eviction of the unlawful occupier and fail to inform the municipality of the fact of the unlawful occupation. In these circumstances, there would be no-one to blame but the owner.

[49] Whether and the way in which the municipality discharges its duty to take reasonable steps to secure timeous payment could have a severe impact on the amount owing. The municipality might, for example, send no statement of account, take no steps to recover amounts owing and continue to supply water and electricity for a period as long as two years without question in the case of a failure of a non-owner occupier to make payment. The municipality might have been requested by the owner to be kept informed on the status of the account in relation to consumption charges

due by the occupier at reasonable intervals and might have refused to do so. The municipality might know or might have been informed by the owner that the occupier is on the property without the owner's knowledge and consent. The municipality might know that there are pending legal proceedings for the ejectment of an applicant already considerably in arrear and might continue to supply electricity and water despite objection from the owner. The owner, on the other hand, might have taken all reasonable steps required of a responsible owner, but to no avail. The applicants emphasise that a municipality cannot sit by and allow consumption charges to escalate regardless and in the knowledge that recovery will be possible whenever the property falls to be transferred. They are right. The municipality must comply with its duties and take reasonable steps to collect amounts that are due.

[50] But this is not the only possible scenario. The municipality might do everything reasonable including the disconnection of supply. Yet the occupier might (and this is shown to have happened in the evidence before us) in effect steal electricity and water from the municipality without the knowledge either of the municipality or the owner. The evidence also reveals the possibility of successive occupiers put in by the owner who occupy for relatively short periods each and whose indebtedness cannot be laid at the door of any subsequent occupier. The owner could well be lumbered with this indebtedness again in circumstances where neither the owner nor the municipality were strictly to blame.

[51] Bearing this immediate context in mind, I now consider the relationship between means and ends that is appropriate to constitute sufficient reason for the deprivation. As I have said before, the deprivation we are concerned with here involves a single but significant element of ownership and lasts effectively for two years. It is not an insubstantial deprivation. The provision in effect requires the owner of the property to bear the risk of non-payment of consumption charges by non-owner occupiers. In my view, there would be sufficient reason for the deprivation if the government purpose was both legitimate and compelling and if it would, in the circumstances, not be unreasonable to expect the owner to take the risk of non-payment. To decide this question it is necessary to evaluate the relationship between the consumption charge and the property relative to that between the consumption charge and the owner. The closer the relationship between the consumption charge and the property, the more tenuous the link between the consumption charge and the owner can be. Conversely, the more tenuous the link between the consumption charge and the property the closer the consumption charge must be to the owner to qualify as sufficient reason.

[52] The importance of the purpose of the provision has been discussed earlier.[52] It is emphasised that municipalities are obliged to provide water and electricity and that it is therefore important for unpaid municipal debt to be reduced by all legitimate means. It bears repeating that the purpose is laudable, has the potential to encourage regular payments of consumption charges, contributes to the effective discharge by

[52] Above para 38.

municipalities of their obligations and encourages owners of property to fulfil their civic responsibility.

[53] It is now necessary to consider the position of each category of occupiers and set of circumstances by reference to which the constitutionality of section 118(1) was called into question by the applicants and by the High Court.[53] I start with tenants. There is a close interrelatedness between the consumption charge and the property as well as that between the consumption charge and the owner. It has been pointed out that the supply of electricity and water enhance the use, enjoyment, and value of the property. It has an impact on the amount of rent payable. The benefit to the owner and the property in these circumstances cannot be gainsaid. The relationship between the owner and the consumption charge is so close as to justify a reasonable expectation that the owner would choose a responsible tenant, monitor payment by the tenant of consumption charges that are due and ensure that the agreement of tenancy is appropriately crafted. An agreement could provide, for example, that the consumption charges must be regularly paid by the tenant, that proof of payment is given to the owner and that eviction or other consequences would follow if there is non-payment. There is therefore no basis to suggest that it would be unreasonable for the owner to bear the risk. The provisions are therefore not arbitrary to the extent that they cover consumption charges due by tenants.

[53] See above n 50.

[54] The section 118(1) certificate must also cover the consumption charges due in connection with the property by an occupier who holds over unlawfully after the termination of a lease or some other legal relationship that rendered occupation lawful at the time it began. Here again, the relationship between the consumption charge and the property as well as the owner are sufficiently strong for the owner to bear the risk. There are allegations that tenants and those who hold over reconnect electricity and water illegally after the municipality has effected a disconnection consequent upon the failure by the occupier to pay consumption charges. The submission that it is arbitrary for the owner to bear the risk of non-payment in these circumstances must also be rejected. The relationship between the owner, the property and the consumption charge remains sufficiently close to expect the owner to take the risk. The owner would have chosen the tenant and would receive rental where the occupier concerned is a tenant or would be entitled to damages for holding over from an unlawful occupier. The connection is sufficiently strong.

[55] Fiduciaries and usufructuaries must be discussed next. It is not necessary to discuss the usufruct and fideicommissum in detail here. The usufruct is an institution in which the usufructuary has the right to possess, use and enjoy property belonging to another in such a way that the substantial character of the property is preserved and there is a duty to restore the property to the owner upon the termination of the usufruct.[54] A fideicommissum is a disposition of property to a fiduciary who is required to pass the property onto another beneficiary, the fideicommissary, on the

[54] Corbett, Hofmeyr, Kahn *The Law of Succession in South Africa* 2 ed (Juta Law, Lansdowne 2001) at 366.

happening of an event or on a specified date.[55] Both fiduciaries and usufructuaries cannot diminish, alienate or consume the property.[56] Both the fiduciary and the usufructuary can let the property.[57]

[56] In a usufruct, the relationship between the consumption charge and the property is as close as it is in the case of a tenant. It is true that in the case of a usufruct created by will, the owner who has been given the property would have no control over who the usufructuary would be. Nevertheless there is some connection between the usufructuary and the owner in the sense that the owner has the right to ensure that the usufructuary cares for the property, does not burden the property unduly by the use and enjoyment of it and provides security for the restoration of the property to the owner in good condition. The consumption charge is incurred in the course of the usufructuary's use and enjoyment of the property sanctioned by the very instrument that resulted in her becoming the owner. Indeed, the owner's right to alienate the property is limited by the rights of the usufructuary during the term of the usufruct. The owner acquires the property subject to the usufruct. It cannot therefore be said that it is unreasonable to expect the owner to carry the risk of non-payment by the usufructuary as a necessary incident of the condition attaching to that ownership.

[55] Id at 260.

[56] Id at 297 and 380.

[57] Id at 300 and 381.

[57] In the case of a fideicommissum, the fiduciary will be hit by the provisions of section 118(1) because she remains the owner of the property until and unless the condition that would result in the property being transferred to the fideicommissary is fulfilled. If the occupier of property is someone other than the fiduciary, the fiduciary will be obliged to pay the consumption charges incurred by that occupier before that property can be transferred to the eventual beneficiary, the fideicommissary. When the fideicommissary becomes the owner as a result of the fulfilment of the condition, section 118(1) will apply to her if and when she wishes to alienate the property. In other words, the fiduciary is in effect the owner of the property until the condition is fulfilled and the fideicommissary becomes the owner of the property after the condition is fulfilled. In the circumstances, the fact that property is subject to a fideicommissum has no impact upon the arbitrariness or otherwise of section 118(1).

[58] Finally, it is necessary to consider whether it is arbitrary for the owner to be burdened with the risk of paying consumption charges for water and electricity supplied to the property and consumed by a narrow category of unlawful occupiers: occupiers who got on to the property without the knowledge or consent of the owner and who remain on the property. To put the question in another way: Is it unreasonable to expect an owner of property to pay these charges as a prerequisite to transfer of the property if the municipality supplies water or electricity to unlawful occupiers and if these occupiers do not discharge their indebtedness to the municipality? The enquiry involves a comparison of the position of the municipality

and the owner in relation to the property, the unlawfulness of the occupation and the consumption charge.

[59] This unlawful occupation benefits neither the property nor the owner and, in most cases, is prejudicial to both. It is nevertheless the duty of the owner to safeguard the property, to take reasonable steps to ensure that it is not unlawfully occupied and, if it is, to take reasonable steps to ensure the eviction of the occupier. If the owner performs these duties diligently, unlawful occupiers will not, in the ordinary course, remain on the property for a long period. It is ordinarily not the municipality but the owner who has the power to take steps to resolve a problem arising out of the unlawful occupation of her property. It is accordingly not unreasonable to expect the owner to bear the risk.

[60] The relationship between the property and the consumption charge in these circumstances is strong because the water and electricity is supplied to and consumed on the property in the course of its use and enjoyment. This relationship compensates for the somewhat attenuated connection between the owner and the consumption charge. It is true that legal proceedings may be protracted at times but this does not afford justification to transfer the risk from the owner of the property to the municipality. It may be that the municipality ought not to have supplied the unlawful occupier with electricity and water in the circumstances that prevailed. This would mean simply that the amount cannot be said to be "due" in connection with the property and any dispute in relation to this must be resolved by a court. This can be

done either before transfer or, if the owner pays to obtain the certificate, after transfer. Owners of property have to bear the risk in relation to many occurrences as an integral incident of the exercise of the right of ownership. They for example bear the risk if the property is damaged or destroyed or if movables are stolen. There seems to me to be little difference in principle between the risk borne by the owner in relation to the theft of movable property and that borne by an owner of immovable property in relation to consumption charges incurred as a result of the unlawful occupation of that property. The burden placed on the owner by section 118(1) in consequence of unlawful occupation does not render section 118(1) arbitrary.

[61] The applicants emphasised that the municipality supplied the service to the occupier and that this local government body had rightly been allocated the statutory duty to ensure that all amounts due were effectively collected from the occupier. It was also stressed that the owner had never asked for the service, did not directly benefit from it and had little control over consumption. In these circumstances, the applicants strongly resisted what they regarded as a provision that in truth relieved the municipality of the obligation to collect amounts due to it and transferred them to the owner. This the applicants said rendered the provision arbitrary.

[62] Section 118(1) does not relieve the municipality of its duty. It must continue to do everything reasonable to ensure appropriate collection of its debt. That municipal debt as a whole has accumulated to devastating proportions is of considerable concern. So too is the evidence to the effect that, in relation to many of the applicants

before this Court, large amounts due in relation to consumption charges have remained outstanding for a considerable period. There is disputed evidence before us concerning the degree of inefficiency of the municipalities that have been cited. No more should be said about this aspect than that if the inefficiency of the municipality degenerates to the extent where it can be proved to be negligence that occasioned damage to the owner of the property concerned, owners may have a delictual claim for damages against the municipality. It must be emphasised that it is imperative for municipalities to do everything reasonable to reduce amounts owing. Otherwise, the sustainability of the delivery of municipal services is likely to be in real jeopardy.

[63] The KwaZulu-Natal Law Society, relied on the circumstance that there was a great deal of confusion created by the requirements of the section and that this had an impact on the speed with which property was transferred. Parties to contracts did not understand the terms of the impugned provision and the completion of the certificate requirement also resulted in undue delays. The fear was that this would have a serious impact on the property market. It has been shown in these cases that some municipalities have been less than efficient in the issue of certificates, that the accounts sent by them have in many instances been unclear and that there are instances in which amounts said to be due as a precondition for the issue of a certificate have reduced considerably and inexplicably over time. In the *Geyser* case in which the Society was an applicant the seller was first informed by the municipality that the amount required to obtain the section 118(1) certificate was R125 934.68. By

the time the matter came to be argued in court some months later however it became common cause that the sum required was R47 145.29.

[64] All these are matters of concern but they do not render the provision arbitrary. Counsel was inclined to concede that these difficulties could well be the result of the fact that this was a new provision and that these negative consequences would probably diminish as all the affected parties gained a greater understanding of the provision and its implications. It is necessary for all municipalities to ensure that they have reasonably accurate records and that they are able to provide complete, credible, comprehensible and reasonably detailed information in relation to consumption charges that are owing within a reasonable time of being requested to furnish it. Without this, the transfer process is likely to be unduly slowed down. It must be understood by all concerned that municipalities have the obligation to furnish this information to all owners intent upon selling their property. It must also be understood that they can be compelled to provide that information by court proceedings if this should turn out to be necessary.

Procedural fairness

[65] It was held in the *FNB* case that the law that results in a deprivation of property must, in addition to showing an appropriate relationship between means and ends, be procedurally fair.[58] Nothing was however said in that case about what procedural fairness entailed in the context of the determination of arbitrariness for purposes of

[58] Above n 38.

section 25(1) of the Constitution. It was contended that section 118(1) was not procedurally fair principally because it did not impose any obligation on municipalities to keep property owners informed of the amounts owing by occupiers at reasonable intervals when this is requested by the property owners in writing. This meant that owners were often taken by surprise by the large amounts of consumption charges owing when certificates were sought in the process of the transfer of property. Owners were accordingly often unable to pay consumption charges due with the speed required by the exigencies of the situation. This, it was said, was unfair. This Court has held in contexts other than a section 25(1) arbitrariness investigation that procedural fairness is a flexible concept and that the requirements that must be satisfied to render an action or a law procedurally fair depends on all the circumstances.[59] This proposition applies equally to procedural fairness mandated by section 25(1).

[66] The circumstances here are that the municipality has, or ought to have, a running accurate record of the amounts that are due, a municipality would know if the amounts outstanding are unreasonably high and it would be theoretically possible for the municipality to keep the owner informed. The practical implications of a municipality assuming a responsibility of this kind are considerable. Additional

[59] *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC) para 39; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 para 216; *Janse Van Rensburg NO and Another v Minister of Trade and Industry and Another NNO* 2001 (1) SA 29 (CC); 2000 (11) BCLR 1235 (CC) para 24; *Permanent Secretary, Department of Education and Welfare, Eastern Cape, and Another v ED-U-College (PE) (Section 21) Inc* 2001 (2) SA 1 (CC); 2001 (2) BCLR 118 (CC) para 19; *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)* 2001 (3) SA 1151 (CC); 2001 (7) BCLR 652 (CC) para 101.

resources and processes need to be put in place. The other side of this coin is that owners are, or ought to be, in a position to care for their property, keep in touch with occupiers and monitor the occupation and use of their properties. These considerations point to a conclusion that a municipality should not be required to furnish the owner of property with information on a continuous basis for the law to be procedurally fair. Owners also complain however that municipalities refuse to provide information even if they are requested to do so. There is no basis for this refusal. The owner has an interest to know how much is owing and a municipality is obliged to provide the information if requested to do so.

[67] Fairness requires a municipality to provide an owner of property with copies of all accounts if the owner requests them. The absence of this requirement would render the deprivation in this case procedurally unfair. However, it is reasonably possible to interpret the section to mean that there is a necessary implication that the municipality is indeed obliged to furnish accounts to the owner upon request where the property is not occupied by the owner. It has been pointed out that the municipalities in this case disputed the obligation to furnish the information. It is important for there to be certainty in this regard. It is accordingly appropriate to declare that every municipality is obliged to provide copies of monthly accounts in respect of amounts owing for water and electricity by occupiers of property where the owner is not the occupier on the written request of the owner.

Other arguments

[68] One of the applicants contended that section 118(1) was unconstitutional by reason of its inconsistency with sections 9(1), 26, and 34 of the Constitution. Each of these arguments must now be considered.

[69] Section 9(1) of the Constitution provides:

> "Everyone is equal before the law and has the right to equal protection and benefit of the law."

The essence of the applicant's argument is that an owner of property occupied by a non-owner is in effect rendered surety for the debt owing by the occupier. As I understand it, the argument goes that an owner in this category is denied equal protection of the law because she is treated differently from the owner who occupies the property or owns property that is unoccupied. The latter, so it is argued, is not burdened with any suretyship while the former is. The complaint is that not all owners of property are treated alike. The argument must be rejected. The suggestion implied by the argument that owners could be held liable for debts of occupiers when there are none is absurd. It is quite impossible to hold any owner liable for consumption charges that do not exist. There is a fundamental and obvious difference between the position of the owner of property who occupies it and the owner whose property is occupied by others. A law that recognises these differences and treats the owner in each category differently cannot, for that reason alone, offend the equality principle.

[70] The argument based on section 26 of the Constitution[60] is that section 118(1) impedes the right of access to adequate housing guaranteed by subsection (1), and that it is inconsistent with the government obligation to take reasonable legislative and other measures to give effect to this right in terms of subsection (2). It is true that section 118(1) places restrictions on the transfer of property and that the right of access to housing could be affected if the property in question has been bought for the purposes of housing. But the obstacles to transfer are not in reality placed by the government. The reason for the difficulty is that consumption charges due in respect of that property have not been paid by the previous occupiers. It could not be contended that a law which obliges owners to pay consumption charges owing by them to the municipality before the property can be validly transferred would constitute a breach of the right to housing or is inconsistent with the state's obligations. The cause of the trouble is the failure of the owner to pay. In the same way, the cause of the obstacle to transfer where consumption charges are due by the occupier is the failure of the occupier to pay. This argument too, must fail.

[71] The last argument advanced is that the certificate requirement unjustifiably limits section 34 of the Constitution.[61] This contention is based on the fact that a

[60] Section 26 provides:

> "(1) Everyone has the right to have access to adequate housing.
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
> (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

[61] The section provides:

municipality is not obliged to go to court to get any judgment against the owner or occupier before the restriction on the right to transfer becomes operative. The suggestion is that this case is similar to the *Lesapo* case in which the creditor was entitled, without approaching a court, to enter into execution and receive payment of the debt.[62] *Lesapo's* case is very different from this one. Here, an aspect of the right of property is restricted. This judgment holds that the section 118(1) restriction does not amount to a limitation of the right of every person not to be deprived of property arbitrarily, of the section 9 equality right or of the section 26 right to housing. Nor is it apparent that the restriction involves the limitation of any other rights in our Bill of Rights. Section 34 does not extend so far as to prevent the imposition of any restriction on any right without the order of a court having first been obtained. The section gives everyone the right of access to a court to have justiciable issues decided impartially. A dispute about the amount of the consumption charge that must be settled before a section 118(1) certificate can be issued is a justiciable issue. There is nothing to prevent any owner or purchaser of property, including any applicant in this case, from accessing a court to have the justiciable issue resolved. The last argument has nothing to commend it.

Section 50(1)(a)

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[62] *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC) para 20.

[72] It has already been pointed out that section 50(1)(a) has the same effect as section 118(1) save in one respect. Section 50(1)(a) requires that the certificate that must be obtained as a necessary step precedent to transfer must cover consumption charges that remain owing for a period of three years before the date of issue of the certificate. It will be remembered that the section 118(1) certificate must cover only a two year period.[63] The question that must be answered therefore is whether section 50(1)(a) is arbitrary by reason of the fact that the period of three years is unacceptably long. There was no argument to this effect. Nor could there be. Section 50(1)(a) is accordingly not arbitrary for the reasons advanced in this judgment in support of the same conclusion in relation to section 118(1).

The practicalities

[73] This judgment holds that the owner of property is, in effect, obliged to ensure that certain consumption charges owing to the municipality in connection with a property are paid before that property can be validly transferred. The facts of the cases before us show that there is the possibility of a whole range of disputes that might arise in the process of the application of both section 118(1) and section 50(1)(a). Some of the disputes that may arise in connection with the consumption charges alleged by the municipality to remain owing in connection with the property may concern the accuracy of the amount, whether the sum relates to consumption charges as contemplated by each of the provisions and whether the amount alleged is limited to the relevant period of two or three years. In the nature of things, the

[63] There is no issue between national and provincial governments about which law prevails and this judgment must therefore be understood as not being concerned with that issue.

resolution of these disputes can take time. The passage of more than a reasonable time between the sale of property and its transfer can be unduly onerous to both the parties to the sale. The delay could be considerable if the dispute between the parties cannot be resolved without resorting to court proceedings. If municipalities keep accurate and full records and supply information to owners, the time taken to resolve any disputes that may arise would be minimal in most cases. It must be pointed out however that the owner who wishes to effect transfer of property reasonably quickly in circumstances where it is not possible to resolve a dispute in connection with the amount of consumption charges required to be paid to facilitate transfer is not necessarily in an impossible position. It may be possible, in appropriate cases, for an owner to demonstrate that she has a clear right to transfer, that there is a dispute about this and that the balance of convenience justifies the grant of an order compelling a municipality to issue a certificate subject to appropriate conditions pending the final determination of court proceedings aimed at resolving the dispute. A municipality or owner found, at the end of the day, to have been wrong in the attitude taken at the time of transfer will have to face the appropriate consequences. It is therefore appropriate for all owners and municipalities to negotiate meaningfully and in good faith when disputes around the application of section 118(1) or section 50(1)(a) arise.

Costs

[74] The parties who contend for the invalidity of section 118(1) and section 50(1)(a) have failed. However, they raised important issues and concerns about legislative provisions that intrude upon the important right of an owner to transfer

property. An order obliging them to pay the costs of this application would have a chilling effect on members of South African society who wish to approach a court to raise important constitutional concerns. In the circumstances, there should be no order as to costs in relation to proceedings in this Court or in the High Court. The WLD proceedings have not yet been terminated and may continue there in the light of this judgment. It will in the circumstances be inappropriate to make any order in relation to the costs of the WLD proceedings. However, all the parties in the WLD case must pay their own costs in relation to the proceedings in this Court.

The Order

[75] The following order is made:

A. Case CCT 1/04

Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing in the Province of Gauteng and Others

(1) The application for direct access is granted only to the extent that it concerns the challenge to the constitutionality of section 118(1) of the Local Government: Municipal Systems Act 32 of 2000 and section 50(1)(a) of the Provincial Government Ordinance No 17 of 1939 (Gauteng).

(2) The application for direct access is refused in all other respects.

(3) The application for the declaration of the constitutional invalidity of section 118(1) of the Local Government: Municipal Systems Act 32 of

2000 and section 50(1)(a) of the Provincial Government Ordinance No 17 of 1939 (Gauteng) is dismissed.

B. Case CCT 57/03

Nokuthula Phyllis Mkontwana v Nelson Mandela Metropolitan Municipality and Another

(1) The appeal succeeds.

(2) The order of the South Eastern Cape Local Division of the High Court is accordingly not confirmed.

(3) The order of the South Eastern Cape Local Division of the High Court is set aside and replaced by the following order:

(a) The application is dismissed.

(b) There is no order as to costs.

C. Case CCT 61/03

Peter William Bissett and Others v Buffalo City Municipality and Others

(1) The application by the Buffalo City Municipality to introduce further evidence is refused.

(2) The appeal succeeds.

(3) The order of the South Eastern Cape Local Division of the High Court is accordingly not confirmed.

(4) The order of the South Eastern Cape Local Division of the High Court is set aside and replaced by the following order:

(a) The application is dismissed.

(b) There is no order as to costs.

D. It is declared that a municipality is obliged to supply copies of all monthly statements rendered to an occupier of property for the supply of water or electricity to that property to an owner of the property who requests them in writing.

Chaskalson CJ, Langa DCJ, Madala J, Moseneke J, Ngcobo J, Skweyiya J and Van der Westhuizen J concur in the judgment of Yacoob J.

O'REGAN J:

[76] I have read the judgment written by Yacoob J. Although I concur in the order he proposes, the reasoning by which I reach this conclusion is somewhat different to his. The crisp issue we need to determine is whether section 118(1) of the Local Government: Municipal Systems Act, 32 of 2000 (the Act) is in breach of section 25 of the Constitution. Section 50(1)(a) of the Gauteng Local Government Ordinance[1] is

[1] Section 50(1)(a) of the Gauteng Local Government Ordinance, 17 of 1939, which has now been repealed is in similar terms to section 118(1), save for providing for a period of three years rather than two years. Its terms are as follows:

also under challenge in the case on the same grounds. It is in similar terms to section 118(1) and will stand or fall by the reasoning that applies to section 118(1).

[77] Before turning to that question, I note that I agree with Yacoob J's reasoning and order concerning the grant of direct access. I also agree with him that the argument that section 118(1) should be interpreted to apply only to consumption charges incurred by the owner is not sustainable and falls to be rejected for the reasons he gives. The difference between this judgment and his relates only to the approach that should be adopted to answer the question whether a particular legislative provision constitutes a limitation of section 25(1) of the Constitution.

[78] Section 118(1) of the Act provides as follows:

> "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

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"(1) No transfer of any land or of any right in land as defined in section 1 of the Local Authorities Rating Ordinance, 1977, within a municipality shall be registered before any registration officer until a written statement in the form set out in the Third Schedule to this Ordinance and signed and certified by the town clerk or other officer authorised thereto by the council, shall be produced to such registration officer, and unless such statement shows—

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

> other municipal taxes, levies and duties during the two years preceding the date of application for the certificate have been fully paid."

The provision requires that a registrar of deeds may not transfer property unless he or she has received a certificate from the relevant municipality that all amounts owing in connection with the property in respect of rates and service charges in the previous two years have been paid. The issue in this case is whether, to the extent that service charges for water and electricity have been incurred by consumers other than the owner of the property, it is a breach of the owner's rights to hinder transfer of the property in this way.

The approach to section 25 of the Constitution

[79] Determining whether a particular statutory provision constitutes a breach of section 25(1) of the Constitution requires a contextual understanding of section 25 of the Constitution which provides that:

> "(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
>
> (2) Property may be expropriated only in terms of law of general application ─
>
> (a) for a public purpose or in the public interest; and
>
> (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
>
> (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including ─
>
> (a) the current use of the property;
>
> (b) the history of the acquisition and use of the property;
>
> (c) the market value of the property;

(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(e) the purpose of the expropriation.

(4) For the purposes of this section ─

(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and

(b) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1).

(9) Parliament must enact the legislation referred to in subsection (6)."

[80] This Court considered the approach to the interpretation of section 25 in *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* ("the *First National Bank* case").[2] In that case, the Court held that section 25 had to be

[2] 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC).

understood in the light of the overall purpose of our Constitution. Ackermann J, for a unanimous court, reasoned as follows:

> "The preamble to the Constitution indicates that one of the purposes of its adoption was to establish a society based, not only on 'democratic values' and 'fundamental human rights', but also on 'social justice'. Moreover the Bill of Rights places positive obligations on the State in regard to various social and economic rights.[3] Van der Walt (1997)[4] aptly explains the tensions that exist within s 25:
>
> > '[T]he meaning of s 25 has to be determined, in each specific case, within an interpretative framework that takes due cognisance of the inevitable tensions which characterize the operation of the property clause. This tension between individual rights and social responsibilities has to be the guiding principle in terms of which the section is analysed, interpreted and applied in every individual case.'
>
> The purpose of s 25 has to be seen both as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between these two functions."[5]

[81] The property clause must therefore be interpreted in a manner which seeks to establish a balance between the need to protect private property, on the one hand, and to ensure that property serves the public interest, on the other. This balance will need to be struck in the light of our history. The inclusion in section 25 of the provisions of subsections (5) to (9) emphasises the importance, in particular, of the need for land

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[3] See, for example, sections 24 (in regard to the environment), 26 (housing), 27 (health care, food, water and social security) and 29 (education).

[4] The original reference is to Van der Walt *The Constitutional Property Clause: A Comparative Analysis of Section 25 of the South African Constitution of 1996* (Juta, 1997) at 15-16.

[5] Above n 2 at para 50.

reform and the importance of security of tenure on land. These provisions highlight the inequities of land distribution in South Africa, as a result of the processes of colonial and apartheid dispossession. As this Court has emphasised on many occasions, our Constitution is a document committed to social transformation.[6] It insists that the deep injustices of our past characterised by racial dispossession and exclusion be addressed and reversed. The Constitution's commitment to the protection of property rights must be interpreted in a manner consonant with that vision.

[82] The history of dispossession in South Africa, however, has also made it sharply apparent that property, whether land or other possessions, is important to individuals and to communities, not only for material reasons, but for reasons of culture, identity and dignity. We should be careful in approaching the property clause, not to underestimate the importance of property in our constitutional scheme. Property is valued, partly at least, because we are acutely conscious of the deep damage inflicted in the past, particularly on black South Africans, by the taking of their land and possessions. Nevertheless it is also quite clear that the right to property is not an absolute one in our constitutional order. In approaching the property clause we must therefore recognise the constitutional value of property, and the importance of protecting it, while recognising that it is not absolute. A balance must be struck

[6] See, for example, the comments of Mahomed J in *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 262; Chaskalson P in *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) at para 8; Chaskalson CJ in *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC) at para 50; Ngcobo J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 73 and Moseneke J in *Minister of Finance and Another v Van Heerden* CCT 63/03, 29 July 2004, as yet unreported at paras 22-23.

between the need to protect property, on the one hand, and the recognition that rights in property may be appropriately limited to facilitate the achievement of important social purposes, including social transformation, on the other.

[83] Each particular subsection in the property clause needs to be understood in the light of this context and these goals. In this case, as in the *First National Bank* case,[7] we are concerned with the proper interpretation of section 25(1) of the Constitution. In that case, the Court, in order to determine whether the relevant statutory provision constituted a limitation of section 25(1), held that it is necessary to determine first, whether it constitutes a "deprivation" for the purposes of that section; and, secondly, whether that deprivation is arbitrary. A third requirement is to consider whether any deprivation is caused by a law of general application. It is quite clear that section 118(1) does constitute a law of general application and this issue need not trouble us further.[8]

Does section 118(1) constitute a deprivation of property?

[84] The question of what constitutes a deprivation of property was considered in the *First National Bank* case.[9] In that case, the Court was concerned with a challenge to section 114 of the Customs and Excise Act, 91 of 1964. Section 114 permitted the Commissioner of the South African Revenue Service to detain and sell property to

[7] Above n 2.

[8] Section 118(1) is a provision in an Act of Parliament which governs all municipalities in South Africa. It is clearly a law of general application as contemplated by section 36 of the Constitution.

[9] Above n 2.

meet customs debt. The challenge in the case related to the categories of property that the Commissioner could attach which included goods on any premises in the possession of or under the control of the customs debtor. The challenge was brought by a bank that provides finance for the leasing of motor vehicles. Three of its motor vehicles had been attached by the Commissioner on the premises of a customs debtor and were to be sold by the Commissioner.

[85] The Court considered the question of what constituted a deprivation for the purposes of section 25(1). It noted that the phrase "deprivation of property" can be misleading as it may suggest that deprivation refers to the taking away of property in its entirety. This understanding of the phrase was rejected by the Court in the light of international jurisprudence. The Court continued as follows:

> "In a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned."[10]

[86] The Court did not however conclude that "deprivation" in section 25(1) should have such a wide ambit. It was not necessary to do so for the purpose of the *First National Bank* case. In that case, the effect of the challenged provision was that an owner could be deprived of all rights in a corporeal movable. Once the property had been detained by the Commissioner it could be sold to meet the customs debt. It was clear, therefore, that section 114 could result in a loss of ownership and consequently

[10] Id at para 57.

a loss of the ability to use, enjoy or exploit the property. Loss of ownership must clearly constitute a deprivation for the purposes of section 25(1) and it was not necessary for the Court to consider in any great detail the precise ambit of what would constitute a deprivation for the purposes of section 25(1) in circumstances where an interference with property fell short of a loss of ownership.

[87] In this case, an owner is not deprived of ownership by section 118(1) of the Act, but one of the incidents of ownership, the ability to alienate immovable property, is impaired. Accordingly, it is necessary to consider whether an interference with ownership falling short of loss of ownership will fall within the concept of "deprivation" in section 25(1). Understanding what deprivation means within section 25(1) requires an evaluation of the constitutional purpose of that section.

[88] It could be argued that "deprivation" in section 25(1) relates only to the complete removal of ownership or other real rights in property and not to limitations on real rights. Indeed, Mr Unterhalter argued that the limitation on property rights of owners occasioned by section 118(1) did not constitute a deprivation for the purposes of section 25(1). In my view, section 25(1) should not be interpreted so narrowly.

[89] There can be no doubt that some deprivations of property rights, although not depriving an owner of the property in its entirety, or depriving the holder of a real right of that real right, could nevertheless constitute a significant impairment in the interest that the owner or real right holder has in the property. The value of the

property in material and non-material terms to the owner may be significantly harmed by a limitation of the rights of use or enjoyment of the property. If one of the purposes of section 25(1) is to recognise both the material and non-material value of property to owners, it would defeat that purpose were "deprivation" to be read narrowly.

[90] Moreover, as will be seen later, one of the considerations relevant to determining whether a deprivation is arbitrary or not is the extent of the deprivation itself and the effect on the property owner. Establishing whether a "sufficient reason" exists for the deprivation will depend on the character of the deprivation. A minor deprivation will more easily be held to have a "sufficient reason" than an invasive deprivation. "Deprivation" in section 25(1), therefore, should not be given too limited a meaning. It should be emphasised, however, that there may be limitations on property rights which are either so trivial or are so widely accepted as appropriate in open and democratic societies as not to constitute "deprivations" for the purposes of section 25(1). This is not a matter which I need to decide for the purposes of this case, and it may be left open for further consideration in future.

[91] The ability to alienate immovable property may be considerably impaired by section 118(1). The right to alienate property is an important incident of ownership and interference with that right can significantly impair the enjoyment and benefit an owner derives from property. The extent of the actual impairment will in most cases depend on the quantum of the unpaid service charges. The higher that quantum, and

the closer to the overall value of the property, the greater the impairment of the right to alienate may be. In some of the individual cases under consideration here, the quantum of service charges has mounted to a point where it constitutes a significant proportion of the overall value of the property. In such circumstances, the effect of section 118(1) may be that the right to alienate the property will be limited for at least a period of two years. Such an impairment of the right to alienate property is neither trivial, nor is there any suggestion by the litigants that such limitations are ordinarily imposed by most open and democratic societies. I conclude therefore that section 118(1) does constitute a deprivation for the purposes of section 25(1) of the Constitution.

Is the deprivation arbitrary?

[92] The question of what constitutes an arbitrary deprivation was also considered in the *First National Bank* case.[11] In that case, the Court identified the following considerations relevant to determining whether a deprivation is arbitrary:

> "Having regard to what has gone before, it is concluded that a deprivation of property is 'arbitrary' as meant by s 25 when the 'law' referred to in s 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair. Sufficient reason is to be established as follows:
>
> (a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question and ends sought to be achieved, namely the purpose of the law in question.
>
> (b) A complexity of relationships has to be considered.

[11] Above n 2.

(c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.

(d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.

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

(f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.

(g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by s 36(1) of the Constitution.

(h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with 'arbitrary' in relation to the deprivation of property under s 25."[12]

[93] A deprivation will be arbitrary if it is either without "sufficient reason" or procedurally unfair. There can be no doubt that the requirement of procedural fairness is an important one in evaluating whether a deprivation is arbitrary or not. I agree with the reasoning and conclusion of Yacoob J that section 118(1) must be understood to require a municipality to furnish statements of account when requested to do so in

[12] Id at para 100.

writing by an owner. I need say no more about procedural unfairness in this judgment.

[94] The other issue is whether there is sufficient reason for the deprivation. The approach established in the *First National Bank* case requires a court to consider the extent of the deprivation, on the one hand, and evaluate it in the light of the purpose of the legislation that occasions the deprivation. What will constitute sufficient reason will depend, as we said in the *First National Bank* case, on the extent of the deprivation,[13] the nature of the property concerned[14] and all the relevant facts of the particular case,[15] one of which would be the relationship between the purpose for the deprivation and the person whose property has been affected.[16] In my view, the test established by *First National Bank* is one of "sufficient reason" in each case which must be determined in the light of all the facts of the case. I turn now to consider first the extent of the deprivation caused by section 118(1) and then to evaluate that deprivation in the light of the purpose of section 118(1).

The extent of the deprivation

[95] In this case, section 118(1) provides that a registrar of deeds may not transfer immovable property unless he or she has received a certificate from the relevant

[13] Id at para 100(f).

[14] Id at para 100(d) and (e). Para 100(e) states that "where the property in question is ownership of land or a corporeal movable, a more compelling purpose will have to be established".

[15] Id at para 100(b) and (h).

[16] Id at para 100(c).

municipality stating that all rates and service charges incurred in respect of that property for the two years prior to the issue of the certificate have been paid. If that certificate is not forthcoming, the immovable property may not be transferred. An owner who wishes to alienate the property will not be able to do so unless the necessary certificate is acquired.

[96] Payments made to a municipality, however, may be allocated to old debt rather than to current charges. If payments made to meet current charges are in fact allocated to old debts, current charges will remain unpaid and the limitation on the right to transfer may last longer than two years. Whether an owner may stipulate the purpose for which payments are made and require a municipality to reflect the payments against current debts may depend on the terms of the service contract between the consumer and the municipality and on other legislation. It is not an issue we can determine in this case. We must accept therefore that the period for which the limitation may last may be longer than two years and will depend on the circumstances of each case.

[97] An important factor relevant to determining the extent of the limitation on the property right in any particular case will be the extent of indebtedness. Ordinarily, a municipality should require consumption charges to be paid, and legislation affords municipalities a range of tools to ensure that charges are paid.[17] However, as the facts of several of the cases before us illustrate, municipalities have permitted consumption

[17] Chapter 9 of the Local Government: Municipal Systems Act, 32 of 2000 provides the mechanisms which a municipality may use to recover debt.

charges to accumulate to inordinate amounts. So, for example, Ms Mkontwana[18] who has purchased a home for R24 560 was initially informed that an amount of R10 728,08 needed to be paid in order for a certificate to be issued. This amount was revised on several occasions by the Council and she was finally informed that an amount of R2 504,61 needed to be paid. When Mr Bissett and Mrs van der Straeten[19] sought to transfer their property in East London, having sold it for R110 000, they were informed that an amount of R14 479,06 needed to be paid before a certificate could be issued. Treknet CC[20] sold a property for R3,7 million and then found that R137 355,64 needed to be paid before a section 118(1) certificate could be issued. In each of these cases, the amount of indebtedness construed in the context of the value of the property concerned was significant.

[98] Where no adequate security exists to meet the outstanding consumption charges, the effect of section 118(1) is that an owner who wishes to transfer property to a purchaser will have either to pay the charges owing or suspend transfer for a period of two years and install a new tenant or occupier in the property who must pay all consumption charges. In practice, the greater the amount of consumption charges owing, the greater the potential deprivation of the rights of an owner. Where only a trivial amount of money is owing, an owner would be able to pay the outstanding

[18] The applicant in *Mkontwana v Nelson Mandela Metropolitan Municipality and Others,* the first of the three applications being considered together in this matter.

[19] The first and second applicants respectively in *Bissett and Others v Buffalo City Municipality and Others*, the second of the three applications in this matter.

[20] The second applicant in *Transfer Rights Action Campaign and Others v City of Johannesburg Metropolitan Municipality and Others*, the third application under consideration.

amounts and obtain transfer. If the amounts owing are trivial, particularly when viewed in the light of the market value of the property, the infringement of the owner's enjoyment of the property will not be oppressive. However, where the amounts owing are substantial, the effect may be a material limitation on the owner's rights.

[99] In the High Court, Kroon and Leach JJ concluded that section 118(1) infringed section 25(1).[21] A key reason for this conclusion was the fact that section 118(1) operated even where the consumer of the relevant municipal services was not the owner of the property concerned. The High Court mentioned tenants, persons exercising rights of habitatio, usufructuaries, fiduciaries who hold the property subject to a fideicommissum, squatters and mala fide occupiers and concluded that there was no necessary relationship between these classes of consumer of municipal services and the owner, nor did the owner necessarily benefit from the consumption of service charges by these classes of occupier.[22] I shall return to this reasoning later. However, what needs to be noted in the context of determining the scope of the deprivation is that owners are in a position to minimise the deprivation in relation to all these classes of occupier.

[21] *Nokuthula Phyllis Mkontwana v Nelson Mandela Municipality and Others* (SECLD) Case No 1238/02 and *Peter William Bissett and Others v Buffalo City Municipality and Others* (SECLD) Case No 903/2002, 13 September 2003, as yet unreported.

[22] Id at para 50.

[100] First, in relation to tenants, landowners can limit the potential effect of section 118(1) in several ways through the contractual arrangements they reach with tenants. They could include a provision within the lease agreement in terms of which tenants must pay consumption charges, and keep landowners informed of such payments. In this case, most of the lease agreements in question did contain provisions requiring tenants to pay municipal service charges, though none of these agreements expressly stipulated that tenants should keep lessors informed of these payments. Alternatively, the same effect could be achieved by drafting the lease agreement in such a manner that lessors pay consumption charges and those charges must then be paid to lessors by tenants.

[101] Landowners can also reduce their risk in relation to the consumption of services by tenants and other occupiers (including usufructuaries, and unlawful tenants) by requesting municipalities to furnish them with regular statements of account. Although some of the municipalities, in written argument, suggested that they would not be obliged to furnish such written statements to landowners, this argument was expressly abandoned in oral argument before the Court. I agree with Yacoob J that municipalities would be obliged to furnish landowners with statements of account in relation to consumption charges due in respect of their properties.[23] By keeping a close eye on the extent of the outstanding service charges, owners can take timely steps to ensure that indebtedness does not get out of hand. In relation to unlawful

[23] See para 66 of the judgment of Yacoob J.

occupiers, they can take steps to evict the unlawful occupier and put municipalities on notice that the occupiers are unlawful.

[102] A further method whereby landowners could restrict the effect of section 118(1) would be to install pre-paid electricity meters on the property and require occupiers, which would include not only tenants, but usufructuaries, and also other occupiers, only to consume electricity on a pre-paid basis.[24] Should owners do so, the possibility of incurring significant consumer charges in relation to electricity would be avoided. It is clear therefore that there are various steps which landowners may take to limit the risk of the limitation of their right to transfer their property.

[103] Nevertheless, despite the fact that there are steps that may be taken by responsible landowners to minimise the risk of harm, it must be concluded that section 118(1) has the potential to constitute a significant deprivation of the rights of an owner of property. The fact that it is possible for this risk to be reduced by responsible action on the part of the landowner reduces the scope of the deprivation, but does not eliminate it.

The purpose of the deprivation

[104] I turn now to consider the purpose of the deprivation. It is clear from its provisions that the purpose of section 118(1) is to encourage the payment of municipal rates and service charges. It achieves this purpose by limiting the rights of owners to

[24] The question of whether pre-paid meters for water are available is not an issue resolved on the papers before us.

transfer property in circumstances where there are outstanding debts incurred in connection with that property. This limitation, in turn, has the purpose of encouraging responsible owners to take steps to ensure that substantial municipal debts are not incurred by occupiers of their property.

[105] This purpose needs to be understood in the light of the constitutional role of municipalities under our new constitutional order, a role of great importance. Section 152 of the Constitution provides that:

> "(1) The objects of local government are—
>
> (a) to provide democratic and accountable government for local communities;
>
> (b) to ensure the provision of services to communities in a sustainable manner;
>
> (c) to promote social and economic development;
>
> (d) to promote a safe and healthy environment; and
>
> (e) to encourage the involvement of communities and community organisations in the matters of local government.
>
> (2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1)."

Local government thus bears the important responsibility of providing services in a sustainable manner to their communities. This task is particularly important given the deep divisions in our towns, the scars of spatial apartheid which still exist and the fact that many poor communities are still without access to basic facilities such as water, adequate sewerage systems, refuse collection, electricity and paved roads. The ability of local government to carry out its constitutional mandate depends on its financial stability.

[106] It is clear from the record before us that expanding municipal debt is a significant nation-wide problem. According to one of the deponents, the current national debt in respect of municipal fees for electricity, water, refuse and sewerage charges is estimated at R22 billion. The City of Johannesburg[25] has an outstanding debt in respect of assessment rates, electricity, water, refuse and sewerage charges of R5,9 billion. Government at national, provincial and local levels have taken a variety of steps to address this problem, of which section 118(1) is an example.

[107] The problem of the scale of national municipal debt is an important consideration in evaluating the purpose of section 118(1). I agree with Kondile J who, when considering the constitutionality of section 118(1) in *Geyser and Another v Msunduzi Municipality and Others*, held that:

> "Outstanding debts of this magnitude seriously threaten the continued supply of basic municipal services and demonstrate a need for effective security being put in place in respect of such service. This is a legitimate and important legislative purpose, which is essential for the economic viability and sustainability of municipalities in the country and in the interest of all the inhabitants."[26]

Kondile J is quite correct that the operation of municipalities and the performance of their constitutional obligations will be severely compromised if they are not financially viable.

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[25] The fifth applicant in *Transfer Rights Action Campaign and Others v MEC for Local Government and Housing, Gauteng and Others.*

[26] 2003 (5) SA 18 (N) at 37H-I; 2003 (3) BCLR 235 (N) at 250 G-H.

[108] Another aspect of the purpose of section 118(1) is that it will encourage owners of property to take steps to avoid the accumulation of substantial debts for municipal services provided to their properties. Owners are ordinarily in a better position than municipalities to take steps to avoid the accumulation of such debt in respect of their own properties. Because municipalities are required to provide services to all occupiers who request services, and because of the sheer number of consumers to whom they provide services, they may be less able to take precautionary steps to avoid municipal debt mounting in individual cases.

[109] Owners have a variety of steps they can take to limit the potential for municipal debt in respect of their properties, and therefore have some power to limit the potential deprivation of their rights to transfer their property. First, owners can select tenants carefully with an eye to ensuring that they meet their financial responsibilities. Second, owners can include provisions in lease agreements which will promote the payment of municipal charges. Third, owners can install pre-paid electricity meters on their premises and require occupiers to pay for the use of electricity in advance, thus obviating municipal debt. Fourth, owners can take steps to evict unlawful occupiers who are consuming municipal services.

[110] The purpose of section 118(1) is thus an important one which serves to assist the recovery of local government charges and to promote the creation of a culture of payment of charges.

[111] At the hearing of the matter, those arguing that section 118(1) was unconstitutional argued that its effect was minimal because the amount of money actually recovered as a result of section 118(1) was insignificant in the light of the quantum of overall service charges paid. Although the money actually paid pursuant to requests for section 118(1) certificates is a possible measure of the effectiveness of section 118(1), it does not seem to me to be a reliable measure of its effectiveness. Section 118(1) will have a direct effect of requiring moneys to be paid in order that transfers of property can be effected. Moneys paid pursuant to section 118(1) will measure this direct effect. However, more importantly, section 118(1) will have an indirect effect in terms of which moneys will be paid by tenants or occupiers as they become due because landowners will monitor and require such payments to avoid the consequences of section 118(1). It is far more difficult to measure this indirect effect of section 118(1) than its direct effect. I am not persuaded therefore that evidence of amounts actually paid pursuant to section 118(1) is a reliable measure of the actual impact of its provisions.

Is there sufficient reason for the deprivation?

[112] It is now necessary to consider whether the purpose of section 118(1) constitutes sufficient reason for the deprivation it occasions. There can be no doubt that, to the extent that the certificate relates to rates and to charges for services consumed by the owner, there is sufficient reason for the deprivation of the property

right. In such circumstances, section 118(1) merely constitutes a form of security for charges incurred by owner occupiers.

[113] The key question argued in this case is whether section 118(1) is arbitrary in that it deprives owners of the right to alienate property where tenants have consumed municipal services but have failed to pay consumption charges. In considering this, we must bear in mind that owners are deprived of only one aspect of their rights in property, and that is the right to alienate the property; secondly, that it is not a permanent deprivation, but a deprivation which is limited in time in that it only relates to charges for the two years preceding the certificate; and thirdly, that landowners can regulate their own relationship with occupiers to minimise the scope of the deprivation in a variety of ways. The deprivation in this case is therefore not extensive or drastic. On the other hand, the purpose of section 118(1) is an important one in our current socio-economic context. It provides a form of security to municipalities to recover charges for services actually provided and it encourages landowners to take steps to regulate their affairs in a manner which will induce the payment of service charges by tenants and other occupiers. I conclude that in relation to tenants the provisions of section 118(1) are not arbitrary within the meaning of section 25(1) of the Constitution.

[114] I have concluded that there is a sufficient reason for the deprivation caused by section 118(1) to the extent that the consumption charges are incurred by tenants. The further question that needs consideration is whether the High Court was correct in

concluding that there was not a sufficient reason in relation to the other classes of consumer, and in particular usufructuaries, fiduciaries and unlawful occupiers. In my view, the question to be considered is whether there is a sufficient reason for the deprivation occasioned by section 25(1). The question of usufructuaries, fiduciaries and unlawful occupiers was not thoroughly canvassed in argument before this Court but given the reasoning of the High Court, I consider it necessary briefly to consider the position of such occupiers.

[115] In considering these arguments, it is important to bear in mind that it would be difficult to narrow the scope of section 118(1). Section 118(1) is a simple procedure which requires that in all cases a registrar of deeds may not effect the transfer of immovable property without a certificate from the municipality confirming that all consumption charges and rates incurred in respect of that property in the preceding two years have been paid. It is accordingly the municipality that issues the certificate. It will not always be clear to a municipality, from its records, who has actually consumed the services on that property for the previous two years, nor will it be clear whether that person is the owner or a tenant or an unlawful occupier. Limiting the terms of the certificate to consumption charges incurred by only particular classes of occupier may create substantial difficulties for the efficient conveyancing of the property, as the municipality may not be in a position to determine the class of occupier that in fact incurred the consumption charges. This practical difficulty needs to be borne in mind in determining the sufficiency of the reason for the purposes of section 25(1).

[116] A further consideration to bear in mind is that the purpose and effect of section 118(1) is to encourage owners to ensure that those persons who occupy their property pay the consumption charges they incur. Were section 118(1) to be more narrowly framed, that inducement would fall away. An owner would no longer seek to ensure that consumption charges were paid in order to avoid the consequences of section 118(1). The municipality would also have no form of security for the payment of consumption charges and yet it may have no knowledge that the security is not available because its records may not disclose that fact.

[117] The first category of occupier to consider is unlawful occupiers, which includes two separate classes of occupier – those who originally had permission to occupy, but either because of the termination of the lease or withdrawal of consent by the owner, no longer have permission to occupy, as well as the class of unlawful occupiers who have never had permission to occupy the property. In relation to the first class of occupier, those whose permission to occupy has been withdrawn, as the owner gave permission to the occupiers to be there initially, the owner had a direct connection with the unlawful occupiers. Moreover, the owner will be aware of the identity of the occupier and of the fact that the person is now occupying the property without permission and will be able to take steps to evict the occupier. In my view, given the important purpose of the provision, the difficulty of framing it more narrowly and the fact that owners will be in a position to take steps to limit the potential deprivation

under the section, section 118(1) is not an arbitrary deprivation of the owner's property in relation to this class of occupier.

[118] The circumstances are somewhat different in relation to unlawful occupiers of property who have occupied the property without the consent of the owner. In that case, the owner will not have selected or permitted the occupier to move into the property at any stage. Nevertheless in such circumstances, it is only the owner that can take the necessary steps to prevent the unlawful occupation of his or her premises before it happens. A municipality has no power to do so. An owner may also immediately take steps to evict the unlawful occupiers. A municipality has more limited rights of eviction.[27] Moreover, a municipality cannot know that the occupation is unlawful unless it is informed by the owner. These considerations might not have been sufficient reason were it not for the difficulty of achieving a narrower scope for section 118(1) without losing its overall effectiveness and purpose. The value of section 118(1) lies in its simplicity and straightforward application. Those qualities would be substantially impaired were the certificate not to be required where the charges had been incurred by unlawful occupiers. Such a situation might lead to significant disputes of fact which would be counter-productive. I conclude then that section 118(1) does not constitute an arbitrary deprivation in relation to the consumption charges incurred by unlawful occupiers.

[27] See section 6(1)(a) and (b) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 which requires municipalities who seek eviction to show that buildings have been erected on the land without their necessary permission or that the eviction would otherwise be in the "public interest". The question of whether these requirements were disjunctive or conjunctive was left open in the decision of this Court in *Port Elizabeth Municipality v Various Occupiers* CCT 53/03, 1 October 2004, as yet unreported. See also the discussion of the provisions of that Act in the judgment.

[119] I turn now to consider the question of usufructuaries. Occupiers of this sort enjoy a limited real right to the occupation of the property but the right of ownership vests in another person who will obtain (or recover) the right of occupation upon the termination of the usufruct. The effect of a usufruct on the property also reduces the rights of ownership of the owner who has no rights of occupation or use during the period of the usufruct. Moreover, the rights of an owner to alienate the property are diminished. The bare ownership of the property may not be transferred without the consent of the usufructuary.[28]

[120] In considering the deprivation of property caused by section 118(1) to the rights of an owner of property over which there is a usufruct, one must take into account the fact that the rights of such owners to alienate the property are already diminished as the property may not be alienated without the permission of the usufructuary. One should also take into account the fact that a usufructuary has an obligation to restore the property and may not consume it, destroy it, or impair its value and the fact that an owner may require a usufructuary to provide him or her with security that the property will be restored in proper condition. Given that the accumulation of substantial municipal debt will effectively limit the rights of the owner, it may well be that an owner would be entitled to seek security to avoid this risk. In the circumstances, I am satisfied that section 118(1) does not constitute arbitrary deprivation of property in relation to this class of occupier either.

[28] See *LAWSA* volume 24 at paras 422ff.

[121] Persons who occupy under a right of habitatio, are not in an identical situation to usufructuaries.[29] Nevertheless, habitation constitutes a personal servitude which, if registered,[30] limits the real rights of the owner. Given the limited rights of the owner, the scope of the deprivation occasioned by section 118(1), as in the case of usufruct, is less significant because the owner's real rights are already diminished by the personal servitude. Moreover, the owner of the property is still entitled to take steps to minimise the accumulation of debts by requesting accounts from the Council and also requiring the use of pre-paid electricity. In the circumstances, and given the difficulty of narrowing the purpose of section 118(1) to cater for rights of habitatio, I am satisfied that section 118(1) is not arbitrary in this respect.

[122] In relation to fiduciaries within the context of a fideicommissum, it is not clear to me, nor did we have argument upon it, as to how the provisions of section 118(1) would operate. A fiduciary takes ownership of property subject to a provision that if a certain condition is fulfilled the property will be transferred to a further beneficiary (the fideicommissary).[31] A fiduciary who is residing on the property and incurring consumption charges will be obliged to pay them. The fideicommissary is not the owner of the property and will not become the owner of the property unless the stipulated condition is fulfilled at which stage the rights of the fiduciary to occupy the

[29] Id at para 446. See also Van der Merwe *Sakereg* 2 ed (Butterworths, 1989) at 524.

[30] *Felix en 'n Ander v Nortier NO en Andere (1)* 1994 (4) SA 498 (SE) at 500.

[31] See Corbett, Hahlo and Hofmeyr *The Law of Succession* 2 ed (Juta Law, 2001) at 257ff; *LAWSA* volume 31 at paras 319ff.

property will ordinarily be terminated. In the circumstances, it does not seem to me that section 118(1) constitutes an arbitrary deprivation of property of either the fiduciary or the fideicommissary.

[123] For these reasons, I conclude that section 118(1) does not constitute "arbitrary deprivation of property" within the meaning of section 25(1) of the Constitution. In reaching this conclusion, I have taken note of the warning sounded by Kroon and Leach JJ that a court must take care not to "sacrifice the constitutional rights of landowners on the altar of expediency".[32] In this case the rights of owners are not drastically impaired. One aspect of their right of ownership is limited with the purpose and effect of encouraging owners to take steps to avoid the accumulation of substantial municipal debt in connection with their property. I have no doubt that this is a deprivation of property rights. The purpose of the deprivation is important and legitimate. The scope of the deprivation itself may be limited by owners themselves taking reasonable but not onerous precautions to prevent the accretion of significant municipal debt by occupiers of their property. The very steps that owners take to prevent such accretion will achieve the legitimate government purpose identified. In such circumstances, I do not think it can be said that the interests of owners have been "sacrificed on the altar of expediency". Rather, owners are required to act responsibly in their own interest in a manner which will contribute to the overall benefit of our community.

[32] Above n 21 at para 53.

[124] One further comment need be made. There can be no doubt that municipalities bear an important constitutional obligation and a statutory responsibility to take appropriate steps to ensure the efficient recovery of debt. The facts of some of the cases before this Court raise concern as to the efficiency with which municipalities are carrying out these duties. It does not seem to me, however, that the question of whether municipalities carry out their constitutional duties with due diligence or not can have any direct bearing on the question of the constitutionality of section 118(1). Its constitutionality must be determined objectively in the light of its terms and the provisions of the Constitution.[33] Should a municipality not perform its statutory or constitutional obligations properly, appropriate relief should be sought.

[125] As I have concluded that section 118(1) is not arbitrary in this case, it is not necessary to consider the question, left open in the *First National Bank* case as to whether a deprivation which is arbitrary may nevertheless be justified in terms of section 36 of the Constitution. That question can be left for another day.

[33] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at paras 26-28; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 29; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Othesr* 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) at para 85. See also *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 52.

[126] I agree with the reasoning and conclusions of Yacoob J in relation to the challenges based on sections 9(1), 26 and 34 of the Constitution. For these reasons I concur in the order proposed by Yacoob J.

Mokgoro J concurs in the judgment of O'Regan J.

SACHS J

[127] I concur in the judgment of Yacoob J. The judgment of O'Regan J applies the same basic test for arbitrariness, namely, viewed in its specific context is there sufficient reason for the particular deprivation in question? The one difference of note is that in applying the test, Yacoob J places special emphasis on the fact that there is sufficient connection between the deprivation and ownership not to make it arbitrary. O'Regan J, on the other hand, looks at the matter more broadly. Evaluating the relationship between the means employed, namely, the deprivation in question, and the ends sought to be achieved, namely, the purpose of the law being examined, she finds that the deprivation is not arbitrary. In my view, the latter approach subsumes the former. It does so in a conceptually helpful manner, and facilitates the context-

specific balancing that the notion of arbitrariness implies. I support the jurisprudential gloss it adds to the judgment of Yacoob J, and concur in it as well.

Mkontwana CCT 57/03

For the applicant:	A Beyleveld and R B Laher instructed by Watson & Tucker.
For the first respondent:	R G Buchanan SC instructed by McWilliams & Elliot.
For the second and third respondents:	R G Buchanan SC and V Notshe instructed by the State Attorney, Port Elizabeth.
For the first amicus curiae:	A J Dickson SC and A A Gabriel instructed by Ganie & Co.
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Bissett CCT 61/03

For the first to third applicants:	J T Whitehead SC and T J M Paterson instructed by Bate Chubb & Dickson Inc.
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Transfer Rights Action Campaign CCT 01/04
(Parties are described as represented in the application before the WLD.)

For the first to fourth applicants:	P Kennedy SC and A Dodson instructed by Robert J Martindale Attorneys.
For the first and second respondents and the seventh and eighth respondents:	G Marcus SC and A Cockrell instructed by Moodie & Robertson Attorneys.
For the third and fourth respondents:	D Unterhalter SC and G G Seleka instructed by the State Attorney, Johannesburg.