IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: 74195/2013

In the matter between:

CHANTELLE JORDAAN	1st Applicant
NEW VENTURES CONSULTING & SERVICES (PTY) LTD	2nd Applicant

and

THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY	1st Respondent
THE MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	2nd Respondent

Case No: 13039/2014

In the matter between:

NEW VENTURES CONSULTING & SERVICES (PTY) LTD	1st Applicant
CLASS OF AFFECTED MUNICIPAL SERVICE CONSUMERS	2nd Applicant
F M KEKANA	3rd Applicant
M R MALEBOLOA	4th Applicant
S R MALEBOLOA	5th Applicant
M MAMOTSAU	6th Applicant

and

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THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY 1st Respondent

THE MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS 2nd Respondent

Case No: 13040/2014

In the matter between:

BILLIE ANN LIVANOS 1st Applicant

LEAH HENDERSON 2nd Applicant

NEW VENTURES CONSULTING & SERVICES (PTY) LTD 3rd Applicant

CLIFTON DUNES INVESTMENTS 317 (PTY) LTD 4th Applicant

and

THE EKURHULENI METROPOLITAN MUNICIPALITY 1st Respondent

THE MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS 2nd Respondent

Case No: 19552/2015

In the matter between:

GEMMA DIAMONDS (PTY) LTD 1st Applicant

NEW VENTURES CONSULTING & SERVICES (PTY) LTD 2nd Applicant

and

THE EKURHULENI METROPOLITAN MUNICIPALITY 1st Respondent

THE MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS 2nd Respondent

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Case No: 23826/2014

In the matter between:

OAK PLANT RENTALS (PTY) LTD	1st Applicant
STEPPING THE WORLD (PTY) LTD	2nd Applicant
NEW VENTURES CONSULTING & SERVICES (PTY) LTD	3rd Applicant

and

THE EKURHULENI METROPOLITAN MUNICIPALITY	Respondent

(1) REPORTABLE: (YES) ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: (YES) ~~NO~~
(3) REVISED. ✓

7/11/16
DATE

SIGNATURE

JUDGMENT

D S FOURIE, J:

(1) This matter concerns five applications, the first two against the City of Tshwane Metropolitan Municipality and the remaining three against the Ekurhuleni Metropolitan Municipality. Similar relief is sought in the first four applications (except that in case number 4 additional relief is also sought), namely a declaratory order relating to the municipality's alleged obligation to render municipal services and to open a services account under circumstances where there is a debt outstanding in respect of the property concerned beyond the two year period provided for in section 118(1) of the

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Local Government:Municipal Systems Act No 32 of 2000. There is, furthermore, a constitutional attack against the provisions of section 118(3) of the said Act. The applicants in case number 5 are not proceeding with their application and the only issue relates to costs. There is also a counter-application brought by the Ekurhuleni Municipality, but it has been abandoned.

(2) The parties have agreed that all the applications should be heard together, but no order for consolidation should be granted. The main reason why this extraordinary procedure is followed is mainly because of the considerable overlap in the type of relief sought. This arrangement was agreed upon for purposes of costs and/or any possible application for leave to appeal and was authorised by the Deputy Judge President of this Division. I have been given the assurance by counsel acting for the applicants that there was proper compliance with the provisions of Rule 16A(1) in respect of all the applications where a constitutional issue has been raised.

BACKGROUND

(3) The applicants in the first three applications (Ms Jordaan, Ms Kekana, Mr and Mrs Maleboloa, Ms Livanos and Clifton Dunes) each bought an immovable property at a sale in execution. The applicant in the fourth application (Gemma Diamonds (Pty) Ltd) bought an immovable property from a company in liquidation, the sale having been accepted and approved by the liquidators. In all cases the applicants took transfer of the

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immovable properties after a certificate in terms of section 118(1) of the Municipal Systems Act had been issued by the municipality concerned. In terms thereof the municipality where the property is situated certified that all amounts that became due in connection with that property for municipal service fees as well as property rates and taxes during the two years preceding the date of application for the certificate, have been fully paid.

(4) In all the cases there are historical debts outstanding with regard to each of the properties. These are debts which had been incurred by previous owners and/or occupiers prior to the two year period envisaged by section 118(1) of the Act. The City of Tshwane was relying, *inter alia,* on its policy to demand that all historical debts in respect of a property be paid before entering into a service agreement with a new consumer. It therefore adopted the approach that it has the right to refuse municipal services to the applicants when municipal debts in respect of the property concerned, remain outstanding. It has been contended that it is entitled to do so, because the historical debts, as "a charge upon the property" as contemplated in section 118(3), survived transfer of ownership and were therefore enforceable against the applicants and their successors in title.

(5) As far as the other two applications are concerned (Ms Livanos and Gemma Diamonds) there appears to be a dispute regarding the question whether or not the Ekurhuleni Municipality had also refused to enter into agreements with the applicants for the supply of municipal services. In one of the applications (Ms Livanos) it is alleged that the municipality refused to

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enter into a consumer agreement because of the outstanding historical debt incurred by a former owner. This is disputed by the Ekurhuleni Municipality. It is alleged that the applicant (Ms Livanos) was advised to approach the correct department and to comply with certain administrative requirements in order for a consumer account to be opened, which the applicant failed to comply with. It is further alleged that if she had complied with the neccessary administrative requirements, a consumer account would have been opened. I shall later again refer to these issues.

(6) Due to the dispute with regard to the payment of historical debts and the allegation that the municipalities had refused to enter into service agreements, some of the applicants applied for interim relief in this regard. On 10 December 2013 an order was granted in favour of Ms Jordaan against the City of Tshwane for the rendering of municipal services pending the finalisation of the other relief claimed in Part B of the application. A similar order was granted on 18 February 2014 against the City of Tshwane in favour of Kekana, Maleboloa and Mamotsau in the second application. On the same day and by agreement (without admission of liability) similar relief was granted in favour of Ms Livanos against the Ekurhuleni Municipality. In the fourth application it was confirmed by Gemma Diamonds that it did not require water and electricity to the property and that it would only be responsible for municipal rates and basic services.

(7) The main issue to be decided relates to the constitutionality of section 118(3) of the Municipal Systems Act. I shall therefore first consider

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the issue with regard to section 118(3) and thereafter the other issues relating to the other relief sought.

SECTION 118 OF THE MUNICIPAL SYSTEMS ACT

(8) Section 118, in so far it is relevant, provides as follows:

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

(a) issued by the municipality or municipalities in which that property is situated; and

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

(1A) A prescribed certificate issued by a municipality in terms of subsection (1) is valid for a period of 60 days from the date it has been issued.

(2) In the case of the transfer of property by a trustee of an insolvent estate, the provisions of this section are subject to section 89 of the Insolvency Act, 1936 (Act No. 24 of 1936).

(3) An amount due for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties is a charge upon the property in connection with which the amount is

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owing and enjoys preference over any mortgage bond registered against the property."

(9) Broadly stated, section 118(1) of the Act provides for an embargo against the transfer of a rateable property, unless the municipality concerned certifies that all debts have been settled in respect thereof for a period of two years preceding the date of application for the certificate. Section 118(3) provides a municipality with security for repayment of the debt and enjoys preference over any mortgage bond registered against the property. The principal elements of section 118 are accordingly an embargo provision with a time limit and a security provision without a time limit (*City of Tshwane Metropolitan Municipality v Mathabathe & Another* 2013 (4) SA 319 (SCA) par 9). It is also important to bear in mind that section 118(3) is on its own wording an independent, self-contained provision. It does not require the incorporation of the time limit in section 118(1) to make it comprehensible or workable (*BOE Bank Ltd v Tshwane Metropolitan Municipality* 2005 (4) SA 336 (SCA) par 8).

(10) Furthermore, as no time limit exists with regard to the security provision contained in section 118(3), this right (or statutory hypothec) is not extinguished by the transfer of the property from one owner to another whilst there is still a debt outstanding with regard to that property (*Mathabathe*, *supra*, par 12). It also does not matter whether such transfer follows upon a sale in the ordinary course of business or by a sale in execution *(Tshwane City v Mitchell* 2016 (3) SA 231 (SCA)). However, it should also be pointed

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out that the security provision contained in section 118(3) (or statutory hypothec with specific reference to the words "charge upon the property") signifies only that it is security for the payment of a debt. Put differently, a statutory hypothec as a form of real security should not be confused with the principal debt. Notwithstanding this position, nothing would prevent a municipality (subject to compliance with its own by-laws relating to liability for municipal debts) from perfecting its security over the property, should it wish to do so, to ensure payment of an outstanding historical debt. Perfecting its security would involve obtaining a court order, selling the property in execution and applying the proceeds to pay off the outstanding historical debt, notwithstanding the fact that the property was transferred into the name of a new owner. It was explained by Baartman AJA in Mitchell (par 23) that *"it is in that sense that the respondent, as owner of the property, could be said to be liable for the historical debt"*. (See also in this regard *City of Johannesburg v Kaplan N.O. & Another* 2006 (5) SA 10 (SCA) par 26.)

THE CONSTITUTIONAL CHALLENGE

(11) Paragraph 4 of Part B of the Jordaan application (case no 74195/2013) reads as follows:

> *"In the alternative to paragraph 3 above, and in the event that this honourable court finds that section 118(3) of the Local Government: Municipal Systems Act 32 of 2000 … imposes a charge on the new owner of property in relation to historic debts incurred by previous owners, consumers or tenants, declaring that*

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section 118(3) is invalid and unconstitutional to the extent that it burdens the new owner with the municipal debts incurred by the previous owner, consumer or tenant."

(12) I have already indicated above that the security provision contained in section 118(3) survives transfer of ownership and that nothing would prevent a municipality from perfecting its security over the property to ensure payment of an outstanding historical debt. It is in that sense that the new owner of the property could be said to be liable for the historical debt. The practical effect of this conclusion means that the relief sought in paragraph 4 of Part B of the Jordaan application constitutes a direct attack on the constitutionality of section 118(3).

(13) Similar relief is sought in paragraph 5 of Part B in the application of Kekana, Maleboloa and Mamotsau (case no 13039/2014) as well as in the application of Livanos (case no 13040/2014). The relief sought by Gemma Diamonds (Pty) Ltd (case no 19552/2013) with regard to the constitutional issue is not formulated in the alternative. It reads as follows:

"Setting aside section 118(3) of the Act as unconstitutional and invalid to the extent that it burdens the new owners of properties with the municipal debts incurred by previous owners, or tenants of previous owners;".

(14) It was contended on behalf of the City of Tshwane that the constitutional challenge has been prematurely invoked in proceedings where the municipality does not seek to perfect its security. It was further argued

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that in the event that the applicants are aggrieved by administrative decisions of the municipality not to provide services, they should take the decision on review linked with appropriate interdictory relief, i.e. a *mandamus*. Counsel acting on behalf of the Ekurhuleni Municipality conceded that the question with regard to the constitutionality of section 118(3) is indeed one of the issues to be decided. In reply counsel for the applicants pointed out that in all the cases (except for the application by Stepping the World (Pty) Ltd – case no 23826/2014) interim prohibitory and/or mandatory relief was already sought in addition to the constitutional challenge. He also contended, having regard to the facts of the matters, that an interim order was already granted in favour of Jordaan, Kekana, Maleboloa and Mamotsau for the rendering of municipal services pending the finalisation of the other relief, including the constitutional issue, claimed in Part B of those applications. In any event, so it was contended, the issues with regard to the other relief claimed, i.e. the rendering of municipal services to the new owners notwithstanding outstanding historical debts incurred by previous owners and/or occupiers, are directly linked to the constitutional issue regarding section 118(3).

(15) It is settled *jurisprudence* that a court should not ordinarily decide a constitutional issue unless it is necessary to do so. A court should also not decide a constitutional issue which is moot or when a right has not been infringed or threatened. The doctrine of "ripeness for hearing" prevents a party from obtaining relief prematurely when he or she has not been subject to prejudice as a result of the legislation or conduct alleged to be

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unconstitutional. In *S v Mhlungu & Others* 1995 (3) SA 867 (CC) at 895E Kentridge AJ laid down, as a general principle, that where it is possible to decide any case without reaching a constitutional issue, that is the course which should be followed.

(16) Having regard to these general principles, I have to take into account that a constitutional issue with regard to section 118(3) has been raised in four of the applications before me. Furthermore, in three of those applications interim relief has already been granted with regard to the provision of essential municipal services such as water, electricity and sewerage disposal pending finalisation of these applications. It is also important to bear in mind the position taken by the City of Tshwane in this regard. It has been admitted that the City of Tshwane refused to enter into agreements with the applicants for the supply of municipal services, unless the historical debts have been paid. It was contended that the City of Tshwane is entitled to do so because the historical debts, as "a charge upon the property" as contemplated in section 118(3), have survived transfer of ownership and were therefore enforceable against the applicants and their successors in title. No doubt, by following this approach, the constitutionality of section 118(3) has been drawn into the arena and it can therefore hardly be said that this issue is moot or has been prematurely raised. It would therefore be wrong, in my view, to avoid deciding this issue.

(17) It was contended on behalf of the applicants that historical debts incurred by a former property owner may not be transferred to a new property

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owner, unless there is a specific agreement between them to this effect. The substance of their argument is that section 118(3) provides for a charge upon the property only in relation to the amount owing by a specific property owner, which may not be applied against subsequent property owners as it would constitute a violation of the right to property which is not supported by sufficient reason.

(18) It was submitted on behalf of the City of Tshwane that section 118(3) is concerned, amongst other things, with the question whether the respondent may collect a debt from the estate of the current owner of property for the unpaid debt of an erstwhile owner and/or occupier of that property. It was contended that the purpose of the provision is to secure payment of municipal debts, by using the property as security, notwithstanding who the current owner of that property is and notwithstanding the fact that the current owner could at no stage be held liable for payment of those debts.

(19) Counsel for the Ekurhuleni Municipality argued that section 118(3) creates a tacit hypothec in favour of a municipality which renders outstanding debts in respect of municipal rates and service charges a charge upon the property concerned. This hypothec survives transfer of such property and permits the municipality, as a matter of general principle, to recover such debt by way of an appropriate court order from the new owner to the extent of the security value of the property in question. Although it was conceded that the provisions of this section amount to a deprivation, it was contended that such

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deprivation is not arbitrary and exists for good reason, being to enable municipalities to recover municipal debts in the interests of the community as a whole.

DEPRIVATION OF PROPERTY

(20) Section 25 of the Constitution distinguishes between deprivation of property and expropriation of property. In *First National Bank of SA v Commissioner, SARS* 2002 (4) SA 768 (CC) par 57 it was pointed out that expropriation is a particular form, in the narrow sense, of deprivation. Generally speaking, expropriation (as a specie of deprivation) takes place when ownership (usually with regard to immovable property) is terminated by the State and the expropriated property is then acquired by the State for a public purpose against payment of compensation (*Cf Harksen v Lane* 1998 (1) SA 300 (CC) par 32). Viewed from this perspective, the purpose of section 118(3) of the Municipal Systems Act is to provide security for the payment of outstanding municipal charges and not to authorise expropriation.

(21) Section 25(1) of the Constitution provides that *no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.* Assuming (without deciding) that section 118(3) is a law of general application (in the sense that it applies generally, impersonally and not to specific individuals), the question is whether it permits arbitrary deprivation of property. In *First National Bank of SA* (par 57) it was held that, in a certain sense, any interference with the use,

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enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned. It was pointed out by Ackermann J (in par 58) that if the deprivation infringes or limits section 25(1) and cannot be justified under section 36, that is the end of the matter. The provision is unconstitutional.

(22) In terms of section 118(3) of the Municipal Systems Act an amount due for municipal service fees, property rates and other municipal taxes is a charge upon the property in connection with which the amount is being owed and enjoys preference over any mortgage bond registered against the property. This is a security provision without a time limit and operates irrespective of who the present owner is. It enables a municipality to perfect its security (subject to compliance with its own by-laws) over the property to ensure payment of an outstanding municipal debt, not only with regard to a person who is the owner of the property when the debt is incurred, but also with regard to subsequent or new owners of the same property who took transfer thereof after these debts (historical debts) had been incurred. This does not mean that section 118(3) turns subsequent or new owners into co-principal debtors, but it does provide an execution process for the recovery of historical debts.

(23) Section 118(1) contains a time limit of only two years. It was decided by the Constitutional Court in *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) that section 118(1) is not unconstitutional. However, the Court refrained from considering the

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constitutional validity of section 118(3) and this question was left open (par 13). The absence of any time limit in section 118(3) is important, because in practice it means that a subsequent or new owner of the property could be "held liable" for historical debts not covered by the two year time-period referred to in section 118(1). What would be the position if that new owner refuses or is unable to settle the historical debt? Relying on the provisions of section 118(3), a municipality would be entitled to perfect its security (subject to compliance with its own by-laws) by obtaining a court order, selling the property in execution and applying the proceeds to pay off the historical debt. This process was explained as follows in *City of Johannesburg v Kaplan*, *supra*, par 26:

> *"Any amount due for municipal debts (i.e. not limited by the aforesaid period of two years) that have not prescribed is secured by the property and, if not paid and an appropriate order of Court is obtained, the property may be sold in execution and the proceeds applied in payment of the debts. In such event, the proceeds will be applied to payment of the municipal debts in full. Only after satisfaction of such debts will the remainder, if any, be available for payment of the debt secured by a mortgage bond over the property."*

(24) This means that section 118(3) could result in a loss of ownership for new or subsequent owners and consequently a loss of the ability to use, enjoy or exploit the property. Even in the absence of actual loss, the mere existence of such a drastic remedy as a security provision constitutes a severe limitation of a new owner's property rights in terms of sec 25(1). I

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therefore conclude that this infringement or limitation of rights constitutes a deprivation for the purposes of section 25(1) of the Constitution (see also in this regard the minority judgment of O'Regan J in *Mkontwana v Nelson Mandela Metropolitan Municipality, supra* par 86).

ARBITRARINESS

(25) The next question to be considered is whether the deprivation is arbitrary? A deprivation will be arbitrary when the "law" referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair (*First National Bank of SA v Commissioner, SARS, supra*, 810 par 100). In *Mkontwana* Yacoob J pointed out (in par 65) that procedural fairness, in the context of section 25(1), 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. I shall assume (without deciding) that the deprivation contemplated in section 118(3) is not procedurally unfair as it arises from legislation (as opposed to, for instance, administrative action) which requires a municipality to follow a due process of law as referred to in par 23 above.

(26) In addition to procedural considerations, a deprivation of property is arbitrary when the law concerned does not provide sufficient reason for the deprivation in question. It was held by Ackerman J in *First National Bank of SA* (par 100) that sufficient reason is to be established as follows:

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"(a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question and ends sought to be achieved, namely the purpose of the law in question.

(b) A complexity of relationships has to be considered.

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

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

(e) Generally speaking, where the property in question is ownership of land or a corporal movable, 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

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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."

(27) In his comment on this dictum, Yacoob J who was writing for the majority, pointed out in *Mkontwana* (par 34 and 35) that if the purpose of the law bears no relation to the property and its owner, the provision is arbitrary. On the other hand, if there is a connection between the purpose of the deprivation and the property or its owner, there must be sufficient reason for the deprivation otherwise the deprivation is arbitrary. 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.

(28) It was pointed out in the *First National Bank* case, sufficient reason will depend, *inter alia*, on the extent of the deprivation, the nature of the property concerned, the relationship between the purpose for the deprivation and the person whose property is affected as well as the relevant facts of

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each particular case. Taking into account these considerations, I turn now to consider, as a first step, the extent of the deprivation caused by section 118(3), then to evaluate the purpose of the deprivation and finally to decide whether there is sufficient reason for the deprivation.

The extent of the deprivation

(29) The question regarding the extent of the deprivation is closely related to the nature of the property concerned. In this case we are not concerned with the deprivation of a single incident of ownership (as was the case in *Mkontwana*, par 45), but with a deprivation that can result in the complete removal or loss of ownership of land in the event of the section 118(3) security being perfected. Ownership is potentially the most extensive private right that a person can have with regard to property. In principle, it entitles the owner to deal with his or her property as he or she pleases within the limits set by law. The comprehensive right of ownership embraces not only the power to use and to enjoy the fruits, but also the power to possess, to dispose of and to resist any unlawful invasion of property (*Wille's Principles of South African Law,* 9th Ed, 470).

(30) In *Mkontwana* Yacoob J pointed out, with reference to section 118(1), that the deprivation is temporary as it "lasts for two years only" (par 45). In the present case we are not dealing with a similar situation. The section 118(3) deprivation is not a temporary interference with ownership, but one that can result in a complete and permanent removal of

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ownership. Upon completion of the process contemplated by section 118(3) with regard to a subsequent or new owner of the property, that person will be completely and permanently divested of all his or her rights of ownership.

(31) What is the connection between the (historical) debt, the property and the owner? This question was also considered with regard to section 118(1) by Yacoob and O'Regan JJ in the case of *Mkontwana.* It was decided (par 41) that there is a level at which the owner and the debt are usually connected or related regardless of the nature of the relationship between the owner and the occupier of the property. This is because the owner is bound to the property by reason of the fact of ownership which entails certain rights and responsibilities. It was also pointed out that, in relation to tenants, landowners can limit the potential effect of section 118(1) in several ways through contractual arrangements and they can also reduce their risk by requesting municipalities to furnish them with regular statements of account (par 100 and 101).

(32) I do not understand that judgment, when reference was made to the owner of property, to mean that it should also include successors in title as far as historical debts are concerned. It would be very difficult, if not impossible, for subsequent owners to guard against the accumulation of outstanding consumption charges through contractual arrangements or to reduce their risk in relation to the consumption of services by tenants and other occupiers, during a period when another person was the owner and/or lessor of the property. The point is that it will not be reasonably possible for

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subsequent or new owners to reduce the risk with regard to historical debts by taking responsible action at a time when there is no connection or relationship between them, the property and the debt. On the other hand, it is not only possible but also desirable for a municipality to prevent the accumulation of historical debts by taking responsible action before the property is transferred into the name of a subsequent or new owner. Nothing would prevent a municipality from demanding payment, issuing summons and if the current owner then fails to pay, to perfect its security in terms of an order of Court to ensure payment of *all outstanding debts*. As a matter of fact, in terms of section 96 of the Municipal Systems Act a municipality is obliged to collect all money "that is due and payable to it", subject to any applicable law. No doubt, having regard to all these considerations, I have to conclude that the extent of the deprivation is substantial.

The purpose of the deprivation

(33) It is clear from its provisions that the overall purpose of section 118(3) is to ensure payment of municipal claims that fall within the stipulated category (*BoE Bank Ltd v Tshwane Metropolitan Municipality* 2005 (4) SA 336 (SCA) par 7). The manner in which this purpose is achieved is by providing security for the payment of outstanding municipal debts in the form of a statutory hypothec and to afford municipalities a preference over any mortgage bond registered against the property. Although this form of security relates to the property concerned, it not only affects the present owner, but also subsequent owners if the municipal debt remains unpaid. In other

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words, it also gives a municipality a security right over that property after it has been transferred into the name of a new owner who is not necessarily a debtor of the municipality.

(34) It is important to bear in mind that transfer of a property into the name of a new owner (when there are historical debts outstanding with regard to that property) does not cause the new owner to become a co-principal debtor. A statutory hypothec as a form of real security is not in law the same concept as the principal obligation. The one is a debt and the other security for payment of the debt. It provides an execution mechanism for the recovery of a debt. In the absence of an agreement to that effect, it does not make the new or subsequent owner a debtor of the municipality (*cf First National Bank of SA v Commissioner, SARS, supra*, 789D-E). However, this raises the question why should a municipality be entitled to visit the sins of a predecessor in title upon innocent third parties when there is no relationship or connection between that party and the debts in question? A new owner, who has no connection to historical debts, is in no position to prevent or minimise any delinquency on the part of former owners or tenants who incurred these debts. They have no way of ensuring responsible behaviour by previous owners and tenants. They have no say in the choosing of tenants by former owners. They cannot ensure that earlier agreements of tenancy were appropriately drafted. In other words, they were in no position whatsoever to manage and control the indebtedness of their predecessors in

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title, whereas, in the ordinary course of business, a municipality is (and also was) in a position to do so.

(35) In *Geyser & Another v Msunduzi Municipality & Others* 2003 (5) SA 18 (N) at 37H-I Kondile J, when considering the purpose to be achieved by the deprivation in section 118, said the following:

> *"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. There is therefore a rational connection between the means employed and the legitimate legislative purpose designed to be achieved."*

(36) I deem it necessary to make a few observations about this dictum. First, the Court in that case was essentially seized with a section 118(1) issue. Although reference was made to section 118(1) and (3), it was pointed out by Yacoob J in *Mkontwana* (in par 13) that very little is said in the *Geyser* judgment about the meaning and effect of section 118(3), nor was the constitutionality of section 118(3) considered separately from the constitutionality of section 118(1). Therefore, section 118(3) was not really in issue. Second, there is a vast difference between the embargo provision in section 118(1) and the security provision in section 118(3). The former only concerns a temporary interference with a single incident of ownership with

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regard to immovable property whilst it is still registered in the name of the current owner, whereas the latter can result in a complete and permanent deprivation of ownership whilst the property is registered, not only in the name of the current owner, but also in the name of a subsequent owner who has no connection with any of the historical debts. Third, section 118(1) and (3) clearly provides a municipality with sufficient and effective security for the payment of *all outstanding municipal debts* against the current owner who does have a connection with all the outstanding municipal debts whilst the property is still registered in his or her name. The legislative purpose, as described in the *Geyser* judgment, can therefore still be achieved, without being thwarted in any manner, whilst the property is still registered in the name of the current owner without extending it to new or subsequent owners. Taking into account all these considerations, it appears to me that the purpose of the deprivation, as the section now reads, has been indiscriminately extended far beyond what is necessary.

Is there sufficient reason for the deprivation?

(37) In the present case we are not dealing with a deprivation of property in the hands of the current owner who has a connection with all the outstanding municipal debts. This case concerns the deprivation of immovable property in the hands of a subsequent owner who has no connection with any of the outstanding historical debts. This statutory "transfer of historical debts" from the current owner to a new or subsequent owner appears to be an open-ended process without any limitation regarding

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the quantum of municipal debts that have not yet prescribed and the number of consecutive transfers into the name of new owners in future. Even if there is a connection between the purpose of the deprivation and the property concerned, there must still be sufficient reason for the deprivation, otherwise the deprivation is arbitrary. Moreover, the greater the extent of the deprivation the more compelling the purpose and the closer the relationship between means and ends must be.

(38) No doubt, there is a legitimate and important legislative purpose, essential for the economic viability and sustainability of municipalities. It however does not justify forcing a property owner to pay the municipal debts of his predecessor in title, or to forfeit his ownership if he refuses to do so, no matter how important the objective is. Put differently, the purpose of the deprivation has been indiscriminately extended far beyond what is necessary. In short, section 118(3) "casts the net far too wide". The means employed sanctions the total deprivation of a subsequent owner's immovable property under circumstances where such owner has no connection with the transaction giving rise to the municipal debt or the debt itself. The new or subsequent owner is neither a debtor of the municipality with regard to these debts, nor was he or she in a position to prevent the accumulation of historical debts before transfer is effected (*cf. First National Bank v Minister of Finance*, *supra*, par 108).

(39) In the absence of any such relevant relationship between the purpose for the deprivation and the person whose property is affected (i.e.

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the new or subsequent owner), no sufficient reason exists for section 118(3) to deprive new or subsequent owners (other than the current owner before transfer takes place) of their title in the property concerned. I therefore conclude that the deprivation with regard to new or subsequent owners is arbitrary for purposes of section 25(1) of the Constitution.

Justification

(40) Once it is established that a law infringes a right protected by the Bill of Rights, it should then be considered whether the infringement can be justified as a permissible limitation of that right. Section 36 of the Constitution provides as follows in this regard:

> *"(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including*
>
> *(a) the nature of the right;*
>
> *(b) the importance of the purpose of the limitation;*
>
> *(c) the nature and extent of the limitation;*
>
> *(d) the relation between the limitation and its purpose; and*
>
> *(e) less restrictive means to achieve the purpose.*

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> *(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."*

(41) I have already assumed (without deciding) that section 118(3) is a law of general application (par 21 above). I have also concluded that this section constitutes a deprivation with regard to new or subsequent owners of the property concerned and that it is arbitrary for purposes of section 25(1) of the Constitution (par 39 above). The question now to be considered is whether the limitation caused by such deprivation is reasonable and justifiable in an open and democratic society, taking into account the factors referred to in section 36(1) of the Constitution.

(42) The learned authors Currie & De Waal, *The Bill of Rights Handbook* (6th Ed 162 and 163) explain the limitation test to be applied as follows:

> *"Put at its simplest, this part of the limitation test requires a law that restricts a fundamental right to do so for reasons that are acceptable to an open and democratic society based on human dignity, equality and freedom. In addition, the law must be reasonable in the sense that it should not invade rights any further than its needs to in order to achieve its purpose. To satisfy the limitation test then, it must be shown that the law in question serves a constitutionally acceptable purpose and that there is sufficient proportionality between the harm done by the law (the infringement of fundamental rights) and the benefits it is designed to achieve (the purpose of the law)."*

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(43) The weighing up of competing values (and ultimately an assessment based on proportionality) was explained as follows by O'Regan J in *S v Gwadiso* 1996 (1) SA 388 (CC) in par 18:

> *"In sum, therefore, the Court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be."*
>
> (See also: *S v Makwanyane* 1995 (3) SA 391 (CC) par 104).

(44) I do not deem it necessary, on the facts of the present case, the considerations referred to above and the conclusions which I have already reached, to embark in any detail on a section 36(1) justification analysis. Section 36 contains a set of relevant factors to be taken into account when considering the reasonableness and justifiability of a limitation. These factors have already been considered, either by specific reference or by necessary implication. A conclusion that section 118(3) constitutes a deprivation, that no sufficient reason exists for such deprivation and that it is arbitrary with regard to new or subsequent owners of the property concerned, should be sufficient to also conclude that this deprivation or limitation is not reasonable and justifiable in an open and democratic society. Put differently, I am unable to find that the infringement serves a purpose that is considered legitimate by reasonable citizens in a constitutional democracy that values human dignity,

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equality and freedom above all other considerations. (*Cf. The Bill of Rights Handbook*, *supra*, 171 and 172).

THE OTHER RELIEF SOUGHT

(45) I shall first consider the other relief sought by the applicants against the City of Tshwane and thereafter against the Ekurhuleni Municipality. The City of Tshwane is a respondent in the first two applications (Ms Jordaan in case number 74195/2013 and Ms Kekana, Mr and Mrs Maleboloa in case number 13039/2014). The Ekurhuleni Municipality is a respondent in the remaining three applications (Ms Livanos in case number 13040/2014, Gemma Diamonds in case number 19552/2015 and Stepping the World in case number 23826/2014). However, the applicants in case number 5 (Stepping the World) are not proceeding with their application and the only issue relates to costs.

APPLICATIONS AGAINST CITY OF TSHWANE

(46) As was pointed out above, on 10 December 2013 an order was granted in favour of the applicants in the first application and on 18 February 2014 in favour of the applicants in the second application against the City of Tshwane for the rendering of municipal services pending the finalisation of the other relief claimed in Part B of the applications. There is to a certain extent an overlap between the different kinds of relief sought. However, they can for practical purposes be regarded to fall into two main categories:

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- a declaratory order that the municipality is obliged, upon request from a property owner or his or her duly authorised representative, to render municipal services within the jurisdiction of the municipality where no debt exists in respect of municipal services between the municipality and such an owner;

- a declaratory order that the municipality is precluded from claiming amounts from any consumer within its jurisdiction who has no debt relationship with the municipality insofar as municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties are concerned.

(47) According to the applicants (Jordaan and Kekana) they were informed by a representative of the municipality that the historical debts must be paid first before a consumer agreement can be concluded. The municipality maintains that it has the right to demand that all historical debts in respect of a property be paid before entering into a service agreement with a new consumer. The municipality maintains that it has the right to refuse municipal services to the applicants when municipal debts in respect of the properties concerned, remain outstanding. In addition to section 118(3) of the Municipal Systems Act, the municipality was also relying on certain by-laws to justify this approach. Copies of these by-laws were made available to me by the attorneys of record acting for the City of Tshwane. I shall therefore accept that these are the by-laws applicable to the issues concerned.

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Electricity Supply By-Laws

(48) Reference was made to the Standard Electricity Supply By-Laws published by Local Authority Notice 1132 in the Provincial Gazette Extraordinary No 234 of 25 June 2003. It was contended that in terms of these by-laws subsequent owners remain liable for the historical debts of predecessors in title.

(49) These by-laws make provision for an application to use an electricity supply which has to be approved by the municipality. Section 18(1) provides that the "consumer" is liable for all electricity supplied to his or her premises. It also provides that the municipality must render an account for the amount payable on a regular basis to the consumer. A "consumer" is defined to mean the occupier of any premises to which the municipality has agreed to supply or is actually supplying electricity, or, if there is no occupier, the person who has entered into a current valid agreement with the municipality for the supply of electricity to the premises, or, if such a person does not exist or cannot be traced or has absconded or for whatever reason is not able to pay, the owner of the premises. The "owner" in relation to immovable property means the "person registered" in the office of the Register of Deeds.

(50) Section 18(6) provides that after a consumer's electricity supply has been disconnected owing to non-payment of an account, the consumer must pay the prescribed fees and any amounts due before a reconnection

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can be made. Section 21 also refers to a right to disconnect supply. It provides that the municipality has the right to disconnect the electricity supply to any premises if the person liable for payment for the supply fails to pay any charge due to the municipality. A "person" is defined to include a customer, occupier or owner "who receives the beneficial use of the electricity supply to a specific premise". Subsection (4) stipulates that the registered owner of a property remains liable "for any electricity consumed on the premises".

Water Supply By-Laws

(51) The City of Tshwane Water Supply By-Laws were published by Local Authority Notice 2267 in the Provincial Gazette Extraordinary No 470 of 5 November 2003. It was contended that in terms of these by-laws the municipality may, where water supply services have been discontinued in terms of the provisions of these by-laws, restore the water supply services only when the applicable charge for the discontinuation and reconnection of the water supply services has been paid.

(52) These by-laws also make provision for an application for water supply services which has to be approved by the municipality. Section 7 refers to the payment for these services. It provides that in respect of water supply services provided for any premises, the owner, occupier and customer are, in accordance with the municipality's by-laws relating to credit control and debt collection, jointly and severally liable for the payment of all applicable charges.

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(53) Section 9 permits the restriction and discontinuation of water supply services. It provides in subsection (1) that the engineer may restrict or discontinue water supply services if "the customer has failed to pay" the applicable charges on the date specified. Subsection (3) thereof provides that the engineer may, where water supply services have been discontinued in terms of the provisions of these by-laws, restore the water supply services only when the applicable charge for the discontinuation and reconnection of the water supply services has been paid. Section 10 makes provision for the restoration of water supply services when a customer enters into an agreement for the payment "of his or her arrears", after the restriction or disconnection of his or her water supply services.

(54) A "consumer" is defined as any end-user who receives water supply services and a "customer" means a person with whom the municipality has concluded an agreement for the provision of a municipal service. To the extent that the definition of "owner" is relevant, it means the person in whom, from time to time, is vested the legal title to the premises.

Credit Control and Debt Collection By-Laws

(55) The Credit Control and Debt Collection By-Laws were published by Local Authority Notice 226 in the Provincial Gazette Extraordinary No 44 of 27 February 2002. It was pointed out that in terms of these by-laws the council shall reconnect the supply of any of the restricted or discontinued services only after the full amount outstanding, including the costs of such

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disconnection and reconnection (if any) have been paid in full and any other condition of the council as it may deem fit, have been complied with. It was suggested, as I understood the argument, that on a proper construction of these by-laws the municipality has a right to refuse the reconnection of municipal services if the full amount outstanding has not been paid and that this right of refusal is also applicable to subsequent owners.

(56) These by-laws provide that no supply of services shall be given unless and until application has been made, a service agreement has been entered into and a deposit as security as determined by the council, has been paid. Section 5 deals with "arrears collection". Subsection (2) thereof provides that the council may restrict or disconnect the supply of municipal services to any premises "whenever a user of any service" fails to make full payment on the due date. It further provides that the council shall reconnect and/or restore the supply of services "only after the full amount outstanding and due, including the costs of such disconnection and reconnection, if any, have been paid in full". Subsection (4) makes provision for arrangements to pay outstanding amounts in consecutive instalments. It provides that "a debtor may enter into a written agreement" with the council to repay any outstanding amount to the council under certain conditions.

(57) In these by-laws a "user" is not described, but a "customer" is defined to mean any occupier of premises to which the council has agreed to supply services, or if there is no occupier, then the owner of the premises. To

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the extent that the definition of "owner" is relevant, it means the person in whom from time to time is vested the legal title to the premises.

Credit Control and Debt Collection Policy

(58) Reference was also made in the answering affidavit to the first application (Chantelle Jordaan) to the municipality's Credit Control and Debt Collection Policy (annexure "PP01", document "A"). In this policy document a "client" is defined to mean a consumer and/or debtor with whom the municipality establishes a legal relationship through a formal agreement for the delivery of municipal services. A "consumer" means a resident who makes use of the municipality's services. A "debtor" is defined to include, insofar it is relevant, a person liable for payment of the account and the owner referred to in clause 5(2) of the Credit Control and Debt Collection By-Law. It also provides that an owner will be jointly and severally liable for municipal service charges "not older than 90 days in respect of a premises occupied by a third person, consumer or debtor".

(59) This policy also provides in clause 5.1 that legal steps should be taken to collect arrears on all accounts that are more than 90 days in arrears. Clause 5.3 deals with clearance certificates. It provides, before any property can be transferred from one owner to another, that all outstanding amounts "associated with the relevant property are payable" whereafter a certificate in terms of section 118(1) of the Municipal Systems Act will be issued.

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(60) It further provides that, notwithstanding payments by the applicant of the outstanding amounts for the preceding two years as provided for in section 118(1), the clearance certificate "will be withheld until the applicant or transferring attorney, as the case may be, has provided sufficient security" to the effect that upon the day of registration of transfer the outstanding amount will be paid.

Solid Waste By-Laws

(61) The City of Tshwane also relied on certain Solid Waste By-laws published by Local Authority Notices 1091 in the Provincial Gazette Extraordinary No 209 of 25 May 2005 and No 110 in the Provincial Gazette No 6167 of 24 May 2005. In terms of these by-laws the municipality must provide or ensure a service for the collection and removal of domestic waste from premises at the applicable tariff. It was contended that these by-laws declare the owner jointly and severally liable with the consumer and that the municipality has the right to refuse municipal services to the applicants or their successors in title when municipal debts in respect of their properties remain outstanding. It was further submitted that this legislation permits the refusal to provide services to a property if municipal accounts are in arrears, irrespective whether the debts were incurred by a current owner or a predecessor in title.

(62) Section 29 relates to charges. It provides in subsection (1) that, except where otherwise provided for in these by-laws, the owner and the

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occupier of premises "in respect of which services are rendered", are jointly and severally liable to the municipality for payment of these services. An "occupier" is defined to mean (insofar it is relevant) any person, including the owner, "in actual occupation of the premises" without regard to the title under which he or she occupies the premises. The relevant part of the definition of an "owner" refers to any person who receives the rent or profits of the premises from any tenant or occupier of the premises or who would receive the rent or profits if the premises were let, whether for his or her own account or as an agent for any person entitled to the rent or profits.

Sanitation By-Laws

(63) The Sanitation By-Laws were published by Local Authority Notice 1753 in the Provincial Gazette Extraordinary No 361 of 10 September 2003. Section 5 thereof provides that no person is entitled to access to water services unless an application has been made to and approved by the municipality. Section 37 deals with payment for sanitation services. It provides that the owner or occupier of any premises with whom an agreement for water services has been entered into, is liable for payment of all sanitation charges in accordance with the municipality's by-laws relating to credit control and debt collection. Section 38 stipulates that the operation and maintenance of on-site sanitation systems and all costs pertaining to such operation and maintenance, remain the responsibility and liability of the owner of the premises.

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(64) Section 40 is concerned with the volume and composition of industrial effluent. Subsection (7) thereof provides that the occupier of the property or, where charges are concerned, the owner and occupier are jointly and severally liable for the charges, but the municipality shall in the first instance levy the charge against the occupier. It also provides that the owner remains liable for all actions on his or her property. The "owner" is defined (insofar it is relevant) to mean the person in whom from time to time is vested the legal title to the premises and/or a person who receives the rent or profit from a tenant or occupier of the premises.

Property Rates By-Laws

(65) The City of Tshwane also referred to the Property Rate By-Laws promulgated in terms of section 6(1) of the Local Government: Municipal Property Rates Act, No 6 of 2004 and which came into effect on 1 July 2008. Section 3 deals with liability for rates. In terms of subsection (1) thereof the levying of rates will be effected in terms of the municipality's rates policy as amended from time to time. Subsection (4) thereof provides that if an amount due for rates on property is unpaid "by the owner of the property", the municipality may recover the amount from the tenant, occupier of the property or the agent of the owner. The "owner" is circumscribed to mean the owner as defined in section 1 of the Municipal Property Rates Act. In section 1 of that Act "owner" is defined (insofar it is relevant) as the person in whose name ownership of the property is registered.

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Property Rates Policy

(66) Reference was also made in the answering affidavit to the second application (p 284, par 47.2.10) to a property rates policy, a copy of which is attached to the papers (annexure "SS16"). The effective date is 1 July 2008 and although an update was confirmed by a council resolution on 24 June 2010, no amendment with regard to the issues in question was effected.

(67) This policy provides in clause 6.2.3 that rates levied by the municipality on a property must be paid by the owner of the property. It further stipulates that rates will be levied monthly and if an amount due for rates levied is unpaid by the owner of the property, the amount may be recovered from the tenant or occupier of the property or from the agent of the owner. The "owner" is defined by reference to the Local Government: Municipal Property Rates Act (see par 65 above).

Interpretation and Conclusion

(68) When interpreting these by-laws and policy documents I should, as a first step, ascertain what the main issue is. From the evidence it appears to be twofold:

- whether the municipality has the right to refuse municipal services to a new or subsequent owner who has no

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connection with any of the outstanding municipal debts (historical debts) in respect of the property concerned; and

- whether the municipality has the right to demand that all historical debts in respect of a property be paid before entering into a service agreement with a new or subsequent owner.

Counsel for the municipality was unable to refer me to a provision in any of these by-laws or policy documents dealing specifically with these issues as far as a subsequent owner is concerned. I was also unable to find any. I should therefore endeavour to find an answer by means of interpretation.

(69) In *Manyasha v Minister of Law and Order* 1999 (2) SA 179 (SCA) at 185A-C Smalberger JA said the following with regard to statutory interpretation:

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

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In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at 604 par 19 Wallis JA pointed out that from the outset one considers the context and the language together, with neither predominating over the other. He also observed that this is the approach that Courts in South Africa should now follow.

(70) When considering the context I should take into account that all the by-laws referred to above (as well as the policy documents) came into operation long after the date of commencement (4 February 1997) of the Constitution. The constitutional context is therefore important. It relates specifically to the supremacy of the Constitution and the rule of law as entrenched in section 1 of the Constitution. The exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law (*Pharmaceutical Manufacturers' Association of SA & Another: In re ex parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC) par 20). This means that if public power is exercised without legal authority that organ of State is acting unlawfully.

(71) Furthermore, a municipality has a constitutional duty to ensure the provision of services. Section 152(1)(b) of the Constitution provides that it is an object of local government "to ensure the provision of services to communities in a sustainable manner". Subsection (2) makes it obligatory for a municipality to strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1). Section 4(2) of the Municipal

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Systems Act provides that the council of a municipality must give members of the local community equitable access to the municipal services to which they are entitled.

(72) In addition to the constitutional context, I also have to take into account the general purpose of these by-laws and policy documents. It is to provide for and to regulate the supply of municipal services to the community, to lay down tariffs and fees payable for these services and to ensure payment of municipal accounts. Generally speaking, if a person responsible for payment fails to pay, a municipality would be entitled to refuse the supply of services to that person (*Rademan v Moqhaka Local Municipality* 2013 (4) SA 225 (CC)). However, the general purpose of these by-laws must be achieved within the constitutional framework referred to above.

(73) It appears, according to the ordinary grammatical meaning of the language used in these by-laws and policy documents, that the person liable for payment of services rendered is the customer, consumer, occupier or owner of the property, depending on the wording of the by-law concerned. There appears to be an interrelationship between these persons as they are all linked to the same property as far as payment for services is concerned. Put differently, they are all debtors liable for payment, either because they received the beneficial use of these services or, in the case of the owner who is not also a consumer, by reason of the fact of ownership *when these services are rendered.*

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(74) This intention is clearly indicated, for instance, when one takes into account the definition of "consumer" read with that of "person" in the Electricity Supply By-Laws where specific reference is made to the consumer, occupier or owner "who receives the beneficial use" of the electricity supplied to a specific premises. Another example is to be found in section 29(1) of the Solid Waste By-Laws where reference is made to the owner and the occupier of premises "in respect of which services are rendered". Any attempt to include a new or subsequent owner who was not the occupier, customer, consumer or the owner when these services were rendered, would result in such a person being held liable for payment in the absence of a transaction or underlying cause giving rise to liability.

(75) This intention is also evident from the Credit Control and Debt Collection Policy. There is no indication that the definition of "owner" also includes a successor in title with regard to outstanding debts. No doubt, if the intention were that the supply of services to the new or subsequent owner may be refused as long as there is a historical debt outstanding, this was an opportune moment to have included such a stipulation when reference was made in clause 5.3 to the clearance certificates. The fact of the matter is, there is no such provision.

(76) The By-Laws and Property Rates Policy referred to above also do not contain a provision, either expressly or by necessary implication, that a successor in title who is not a debtor of the municipality with regard to the property concerned, shall be liable for the payment of historical debts. They

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refer, by implication, to the person who is the consumer, customer, occupier or owner of the property when the debt was incurred. A new or subsequent owner, who is not a debtor in this regard, can therefore not be held liable for the payment of these debts, neither should the municipality be entitled to refuse the rendering of services to such a person. Doing so would mean that the municipality is not only disregarding its constitutional duty to ensure the provision of services to a member of the community who is entitled thereto, but is also exercising a public power without any legal authority.

(77) It would also not serve the general purpose of these by-laws to hold a person liable for the payment of historical debts who is not a debtor of the municipality. In the absence of an agreement to that effect, a new or subsequent owner does not become a co-debtor with regard to the principal debt and is not liable for the payment of historical debts incurred by previous owners or occupiers. To hold otherwise would strain the language in order to read something else into it which the Legislature could not have contemplated. I therefore conclude that the City of Tshwane has no right to refuse the rendering of municipal services to a new or subsequent owner because of historical debts still outstanding with regard to the property concerned, or to demand payment thereof before entering into a service agreement for the rendering of services.

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APPLICATIONS AGAINST EKURHULENI MUNICIPALITY

Relief claimed in the third application

(78) As was pointed out above, on 18 February 2014 and by agreement (without admission of liability) an order was granted in favour of Ms Livanos in the third application (case number 13040/2014) against the Ekurhuleni Municipality for the rendering of municipal services pending the finalisation of the other relief claimed in Part B of that application. The other relief claimed in Part B, when reduced to its essential features, can for practical purposes be regarded to fall into two main categories:

- a declaratory order that the municipality is obliged, upon request from a property owner or his or her duly authorised representative, to render municipal services within the jurisdiction of the municipality where no debt exists in respect of municipal services between the municipality and such an owner; and

- a declaratory order that the municipality is precluded from claiming amounts from any consumer within its jurisdiction who has no debt relationship with the municipality insofar as municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties are concerned.

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(79) According to Ms Livanos she took transfer of her property on 11 December 2013. She rented the property out to her daughter, the second applicant. When both these applicants endeavoured to enter into a consumer agreement with the municipality, it refused to do so because of the outstanding historical debts incurred by a former owner. On 4 February 2014 the electricity supply to the property was terminated. In support of the allegation that the municipality refused to enter into a consumer agreement because of outstanding historical debts, the first and second applicants rely, *inter alia*, on a note dated 6 February 2014 which was made by an official of the municipality. This note states "you must now make a new arrangement to settle the old & new debt".

(80) The fourth applicant, Clifton Dunes Investments 317 (Pty) Ltd became the registered owner of the property concerned during November 2013. On 26 November 2013 the fourth applicant addressed a letter to the municipality in which it applied for a new municipal consumer agreement relating to this property. Subsequent to this application a new consumer agreement was entered into. However, on 11 February 2014 a disconnection notice was served. According to the applicants the fourth applicant was threatened that its electricity and water supply would be terminated if payment of a previous outstanding debt was not effected.

(81) The municipality's defence appears to be that as a matter of policy it does not refuse to enter into consumer agreements with new owners of properties where a historical debt exists. The allegation that the municipality

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refused to open a consumer account as alleged by the first and second applicants, is therefore denied in the answering affidavit. It is asserted that on 15 January 2014 a rates account had been opened in respect of the property and the first and second applicants were advised to approach the correct department and submit an affidavit pertaining to the second applicant's marital status in order for a consumer account to be opened, which the second applicant failed to comply with. It is further alleged that, had they complied with the aforementioned requirement, a consumer account would have been opened.

(82) It was contended on behalf of the municipality that this dispute is the result of two mutually destructive versions, neither of which is supported by the objective facts or the probabilities arising from the affidavits. I cannot agree with this submission. The note by an official dated 6 February 2014 clearly indicates that the applicants had to make new arrangements in order to settle the "old and new debt", referring to the historical debt of the previous occupier and a new debt which accrued after transfer of the property had taken place. This note supports the version of the applicants. Furthermore, why would an owner or consumer who is in need of municipal services, refuse or neglect to comply with a formal request? The explanation given by the municipality in this regard is nonsensical. I therefore accept that the outstanding historical debt was also a relevant consideration taken into account by the municipality for refusing to open a consumer account.

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(83) Reference was made by the municipality to its electricity by-laws and credit control and debt collection policy. This was not done to justify a refusal to open a consumer account, but to explain in general terms that the administrative core of the municipality are obliged to fulfil their functions in accordance with the Municipal Systems Act, debt collecting policy and by-laws. It was also emphasised that the municipality is not refusing to open consumer accounts, provided that the applicant complies with certain formal requirements. However, it has also been explained on behalf of the municipality (by Mr Frank, the Executive Manager: Legal and Corporate Services in annexure "BRA6" par 30) that the municipality holds a *sui generis* lien over the property concerned in respect of an amount due "or any historical debt regardless of the applicant's ownership of the property" which right is enforceable against "any person".

(84) Taking into account these explanations, I am not convinced that the policy of the municipality (i.e. not to refuse the opening of a consumer account when there are historical debts outstanding) is consistently applied in practice. The applicant's case, with specific reference to the note dated 6 February 2014, is a clear indication in this regard. Having regard to all these considerations, I am satisfied that there is a live and real issue before me which is also of public importance. I therefore have to consider it.

(85) I have already concluded that section 118(3) of the Municipal Systems Act is unconstitutional to the extent that it also applies to new or subsequent owners of the property concerned. It was also pointed out that in

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terms of section 152(1)(b) of the Constitution it is an object of local government "to ensure the provision of services to communities in a sustainable manner". In addition thereto, section 4(2) of the Municipal Systems Act provides that the council of a municipality must give members of the local community equitable access to the municipal services to which they are entitled. I therefore conclude that the Ekurhuleni Municipality has no right to refuse the rendering of municipal services to a new or subsequent owner only because of historical debts still outstanding with regard to the property concerned, or to demand payment thereof before entering into a service agreement for the rendering of services.

Relief claimed in the fourth application

(86) The relief claimed in the fourth application (Gemma Diamonds in case number 19552/2015) is not divided into a Part A and Part B. There is to a certain extent also an overlap between the different kinds of relief sought, but they can for practical purposes be regarded to fall into two main categories, namely interdictory and declaratory relief. They are essentially the following:

- an interdict restraining the municipality from claiming from the first applicant the amount of R6 439 599.53 in respect of historical rates and taxes owed by Rietfontein General Galvanisers in liquidation, the previous owner of Portion 40, Farm Rietfontein 63 IR situated at 4 Kraft Road, Germiston;

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- an interdict restraining the municipality from claiming from the first applicant the amount of R6 728 240.48 in respect of historical municipal consumption charges owed by a previous tenant of the previous owner of the aforesaid property;

- ordering the municipality, on receipt of the amount payable in terms of section 118(1)(b) of the Municipal Systems Act (No 32 of 2000) in respect of the aforesaid property, to issue the prescribed certificate in terms of section 118(1) of the Act;

- declaring that the practice of the municipality in holding new owners of properties liable for the historical debts of previous owners, or tenants of previous owners, to be unconstitutional and invalid; and

- declaring that the disconnection, suspension, restriction or withdrawal of municipal services as defined in section 1 of the Municipal Systems Act and/or the refusal to provide or resume such services to a customer, where no debt exists in respect of municipal services between the municipality and the said customer constitutes conduct that is un-constitutional and invalid.

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(87) Gemma Diamonds bought an immovable property from a company in liquidation, the sale having been accepted and approved by the liquidators. Transfer took place on 20 May 2010 after the municipality had issued a clearance certificate in terms of section 118(1) of the Municipal Systems Act. Gemma Diamonds confirmed to the municipality that it did not require water and electricity to the property and that it would only be responsible for municipal rates and basic services. On 2 September 2014 Gemma Diamonds requested the municipality to confirm that it (account No 2606170700) is responsible for municipal rates from date of registration and to state the amount that is due and owing by Gemma Diamonds. It also stated that it was not responsible for payment of the previous owner's debts.

(88) On 5 September 2014 the municipality confirmed that Gemma Diamonds owed the municipality R132 859.78 for rates and taxes. It also confirmed that the previous owner of the property concerned owed the municipality R6 439 599.53 and R2 879.77 for rates and taxes.

(89) Thereafter, having accepted an offer from a third party to purchase the property, Gemma Diamonds applied for clearance figures on this property. On 11 December 2014 the municipality issued clearance information in a document which consists of five pages (annexure "FA23" to the founding affidavit). Page 1 of this document indicates that an amount of R180 828.72 and an amount of R6 736 657.19, totalling R6 917 685.91, are outstanding. The former amount relates to Gemma Diamonds and the latter to the previous owner of the property. Gemma Diamonds maintains that this

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amount is owed by a previous tenant of the former owner for "consumption charges".

(90) In its answering affidavit the municipality denies that the said amount is for consumption charges and explains that the amount claimed consists of rates, taxes, refuse removal and sanitary charges, all subject to a prescription period of 30 years. It then states that the municipality is entitled to, and will in compliance with its statutory duties, where there is an on-sale by a party that bound itself in terms of the conditions of sale, claim all arrears, including that of a previous owner whereto the new owner bound itself in terms of such conditions of sale. It was then pointed out that the first applicant bound itself for the payment of all the arrears in terms of clauses 5.3 and 5.4 of the agreement of sale (annexure "FA11" to the founding affidavit).

(91) On a proper reading it appears that both these clauses are qualified. They both provide that the purchaser (Gemma Diamonds) shall be responsible for the payment of all outstanding rates, taxes and any other amounts, including arrear amounts, "that are necessary to obtain transfer of the property". It was contended on behalf of the applicants that this qualification exonerated Gemma Diamonds from paying historical debts due to the fact that it was only obliged to pay amounts that became due in connection with that property for municipal services, taxes and property rates which would be required to obtain a clearance certificate in terms of section 118(1) of the Municipal Systems Act. I agree with this submission.

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The inclusion of all other debts, beyond the two year period provided for in section 118(1), would simply mean that one should disregard the said qualification for no good reason. The defence that Gemma Diamonds agreed to also pay historical debts beyond the two year period is therefore without any merit.

(92) Even if I have misdirected myself in this regard, there is another reason why the alleged entitlement to claim payment of historical debts is bad in law. According to the answering affidavit the municipality would be entitled to claim payment of all arrears "where there is an on-sale by a party that bound itself in terms of the conditions of sale" for the payment of those debts. This implies that the municipality is relying on a contract for the benefit of third parties (*stipulatio alteri*), as the municipality was not a party to that agreement of sale. If the municipality wishes to rely on such a contract, it must allege and prove, *inter alia*, acceptance of the benefit (*Jurgens Eiendomsagente v Share* 1990 (4) SA 664 (SCA) at 673D). The acceptance must also have been communicated to the party who undertook to make the payment (Gemma Diamonds). It is common cause that the agreement of sale was entered into prior to 20 May 2010. There is no indication that any benefit flowing from that agreement was accepted by the municipality. On the contrary, on 5 September 2014 the municipality clearly distinguished between two separate debts, the one owing by Gemma Diamonds and the other by the previous owner. It was approximately four years later, during December 2014, that these two debts were consolidated to reflect the total

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amount of R6 917 685.91. That was done after Gemma Diamonds had informed the municipality on 2 September 2014 that it was not responsible for the debts of the previous owner. The defence of entitlement based on an undertaking or an agreement can therefore not succeed.

(93) I therefore conclude that the Ekurhuleni Municipality has no right to claim payment of historical debts (owed by a previous owner or other person responsible for the payment thereof) from Gemma Diamonds in respect of the property concerned. Having regard to this conclusion, it is not necessary to consider the other relief sought, i.e. an interdict restraining the municipality to claim these amounts or to compel the municipality to issue the prescribed certificate in terms of section 118(1) of the Municipal Systems Act. A declaratory order will have the same effect as it also addresses the essence of the dispute between the parties.

(94) As far as the other relief is concerned (declaring the disconnection or suspension of services to be unconstitutional and invalid where no debt exists in respect of municipal services between the municipality and a new customer or owner), it is also not necessary to consider it. The new owner (subsequent to Gemma Diamonds) is not a party to this litigation and Gemma Diamonds (whilst it is still the owner) does not require (as indicated above) the usual municipal services, such as water and electricity, to the property.

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The Fifth Application

(95) As indicated above, the applicants in case number five (23826/2014) are not proceeding with their application and the only issue relates to costs. According to the applicants this was an urgent application launched for the reconnection of electricity supply to the property belonging to the first and second applicants. Consequent thereupon, an order was made by agreement in terms of which the Ekurhuleni Municipality was ordered to reconnect and re-establish the electricity supply to the properties. The costs of this application have been reserved.

(96) According to the applicants the municipality failed to reconnect the electricity supply as a result whereof the applicants were forced to bring another urgent application on 13 June 2014. The costs relating to this application have also been reserved. It was contended on behalf of the applicants that there is no reason why the municipality should not be ordered to pay the costs of both applications.

(97) It was pointed out by counsel for the municipality that this application purports to have been brought by three corporate entities, none of which has shown to have *locus standi*. No resolution by either the first or the second applicant, in terms of which a decision by each entity to bring the application is authorised, has been filed or attached to the founding affidavit. It was also argued that the third applicant is, at best, an agent and as such lacks the requisite *locus standi* to claim the relief sought in the notice of

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motion on behalf of the first and second applicants. Therefore, so it was argued, no cause of action was disclosed in the founding papers and therefore the applicants should not be granted costs of these applications.

(98) It was also pointed out on behalf of the municipality that the second application brought on 13 June 2014 deals exclusively with the allegation that the consent order granted on 9 June 2014 was not obeyed by the municipality. This was disputed by the municipality in an answering affidavit by its attorneys of record whereafter the matter was removed from the roll by an order of the court.

(99) When considering the issue of costs, I take into account the usual rule that the successful party is entitled to his costs unless the Court for good reason, in the exercise of its discretion, deprives him of these costs. In determining who is the successful party, the Court should look to the substance of the judgment or order and not merely its form. Having regard to these principles, it appears to me that the applicants should be regarded as the successful party in the first application where an order was granted in their favour on 9 June 2014, albeit by consent and notwithstanding the defences raised by the municipality. As far as the second application is concerned, there appears to be no successful party. I therefore conclude that, save for the costs of the first application which should be paid by the municipality, there should be no order for costs with regard to all the other instances where costs have been reserved.

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REMEDIES

(100) The relief sought by the applicants fall into two main categories, namely a constitutional and declaratory remedy. In case number four additional relief, namely interdictory relief is also applied for. I have already indicated that the real issue is not the granting of an interdict, but the question whether the municipality is entitled to claim payment of historical debts. By means of a declaration of rights the municipality will be compelled to take appropriate steps as soon as possible to avoid or prevent a breach of that right (*Pretoria City Council v Walker* 1998 (2) SA 363 (CC) par 96B-D). As a declaratory order will address the essence of the dispute between the parties, the granting of an interdict will be unnecessary and perhaps even premature.

(101) I also take into account that a declaration of rights differs from a declaration of constitutional invalidity. The purpose of the former is limited to an order that will be binding on the litigants, while the latter is binding on all (*National Director of Public Prosecutions v Mohamed* 2003 (4) SA 1 (CC) par 58). It would therefore not be competent, when a declaration of rights is applied for, to include in the order a new or subsequent owner who is not a party to the litigation. (*Cf Stadsraad van Randburg v Ludorf* 1984 (3) SA 469 (WLD) at 477C-E). This should also apply, in my view, to applicants who litigate in a representative capacity and who are not themselves involved or affected by the conduct or decision of the other party, i.e. the municipality in these applications.

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(102) As far as the declaration of invalidity is concerned, section 172(1)(a) of the Constitution provides that a Court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of the inconsistency. This requires a Court to declare invalid only those parts of a law that are unconstitutional. In *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC), Kriegler J said the following in this regard (par 16):

> *"Although severability in the context of constitutional law may often require special treatment, in the present case the trite test can properly be applied: if the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main object of the statute. The test has two parts: first, is it possible to sever the invalid provisions and, second, if so, is what remains giving effect to the purpose of the legislative scheme?"*

(103) To the extent that it is not possible textually to sever the good from the bad in section 118(3) of the Municipal Systems Act (without rewriting the section), the appropriate remedy would be an order analogous to the order made in *First National Bank*. The appropriate remedy would therefore be an order declaring the provisions of section 118(3) to be constitutionally invalid to the extent only that the security provision "a charge upon the property" survives transfer of ownership into the name of a new or subsequent owner who is not a debtor of the municipality with regard to debts incurred prior to

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transfer. I have to stress that this declaration of invalidity does not affect the security provision with regard to municipal debts incurred by the owner, or by another person during the period of his/her ownership, prior to transfer of the property into the name of a new or subsequent owner.

ORDER

The following orders are accordingly made:

A. **Case No 74195/2013:** Chantelle Jordaan & Others v The City of Tshwane Metropolitan Municipality & Others;

Case No 13039/2014: New Ventures Consulting & Services (Pty) Ltd & Others v City of Tshwane Metropolitan Municipality & Others;

Case No 13040/2014: Billie Ann Livanos & Others v The Ekurhuleni Metropolitan Municipality & Others; and

Case No 19552/2015: Gemma Diamonds (Pty) Ltd & Others v The Ekurhuleni Metropolitan Municipality & Others:

(1) The provisions of section 118(3) of the Local Government:Municipal Systems Act No 32 of 2000 are declared to be constitutionally invalid to the extent only that the security provision "a charge upon the property" survives transfer of ownership into the name of a new or subsequent owner who is not a debtor of the municipality with regard to municipal debts incurred prior to such transfer;

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(2) This order must be brought to the attention of the Registrar of this Court to enable him/her to comply with the provisions of Rule 16(1) of the Rules of the Constitutional Court.

B. **Case No 74195/2013**: Chantelle Jordaan & Others v The City of Tshwane Metropolitan Municipality & Others:

(1) Condonation for the filing of further affidavits by all parties concerned, is granted;

(2) It is declared that the City of Tshwane Metropolitan Municipality:

(a) is obliged, upon request from the first applicant or his/her duly authorised representative, to render municipal services within the jurisdiction of the municipality and with regard to the property concerned, where no debt exists in respect of municipal services between the municipality and the first applicant;

(b) is not entitled to claim payment of outstanding amounts from the first applicant in respect of the property concerned, under circumstances where the first applicant has no debt relationship with the municipality insofar as municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties are concerned.

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(3) The City of Tshwane Metropolitan Municipality is ordered to pay the applicants' costs of the application, including the costs of three counsel, two of which are to be taxed at the senior counsel scale.

C. **Case No 13039/2014:** New Ventures Consulting & Services (Pty) Ltd & Others v The City of Tshwane Metropolitan Municipality & Others:

(1) Condonation for the filing of further affidavits by all parties concerned, is granted;

(2) It is declared that the City of Tshwane Metropolitan Municipality:

(a) is obliged, upon request from the third to sixth applicants, or their duly authorised representative, to render municipal services within the jurisdiction of the municipality and with regard to the property concerned, where no debt exists in respect of municipal services between the municipality and the said applicants;

(b) is not entitled to claim payment of outstanding amounts from the third to sixth applicants in respect of the property concerned, under circumstances where the third to sixth applicants have no debt relationship with the municipality insofar as municipal service fees, surcharges on fees, property

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rates and other municipal taxes, levies and duties are concerned.

(3) The City of Tshwane Metropolitan Municipality is ordered to pay the applicants' costs of the application, including the costs of three counsel, two of which are to be taxed at the senior counsel scale.

D. **Case No 13040/2014**: Billie Ann Livanos & Others v The Ekurhuleni Metropolitan Municipality & Others:

(1) Condonation for the filing of further affidavits by all parties concerned, is granted;

(2) It is declared that the Ekurhuleni Metropolitan Municipality:

(a) is obliged, upon request from the first, second and fourth applicants or their duly authorised representative, to render municipal services within the jurisdiction of the municipality and with regard to the property concerned, where no debt exists in respect of municipal services between the municipality and the first, second and fourth applicants;

(b) is not entitled to claim payment of outstanding amounts from the first, second and fourth applicants in respect of the property concerned, under circumstances where the first, second and

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fourth applicants have no debt relationship with the municipality insofar as municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties are concerned.

(3) The Ekurhuleni Metropolitan Municipality is ordered to pay the applicants' costs of the application, including the costs of three counsel, two of which are to be taxed at the senior counsel scale.

E. **Case No 19552/2015**: Gemma Diamonds (Pty) Ltd & Others v The Ekurhuleni Metropolitan Municipality & Others:

(1) It is declared that the practice of the Ekurhuleni Metropolitan Municipality in holding the first applicant liable, with regard to the property concerned, for the payment of historical debts of previous owners, or tenants of previous owners, is unlawful and invalid;

(2) The Ekurhuleni Metropolitan Municipality is ordered to pay the applicants' costs of the application, including the costs of three counsel, two of which are to be taxed at the senior counsel scale.

F. **Case No 23826/2014**: Oak Plant Rentals (Pty) Ltd & Others v The Ekurhuleni Metropolitan Municipality:

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(1) The Ekurhuleni Metropolitan Municipality is ordered to pay the costs of the applicants, including the costs reserved on 9 June 2014, such costs to also include the costs of three counsel, two of which are to be taxed at the senior counsel scale;

(2) There shall be no order for costs with regard to all other instances where costs have been reserved.

D S FOURIE
JUDGE OF THE HIGH COURT
PRETORIA

Date: 7 November 2016

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