REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Before the Hon Mr Justice NJ Yekiso

Case No.: 9692/07

In this matter between:

REAL PEOPLE HOUSING (PTY) LIMITED Applicant

And

THE CITY OF CAPE TOWN Respondent

Counsel for Applicant:	**Adv Derek Mitchell**
Attorneys for Applicant:	**Bowman Gilfillan Inc**
Counsel for Respondent:	**Adv E Fagan**
Attorneys for Respondent:	**Fairbridges**
Date of Hearing:	**13 October 2008**
Date of Judgment:	**21 November 2008**

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JUDGMENT DELIVERED ON 21 NOVEMBER 2008

YEKISO, J

[1]The applicant, a limited liability company incorporated in terms of the Company laws of the Republic of South Africa, based in East London, has instituted proceedings out of this Court, on Notice of Motion, for relief, in the form of a declarator, in the following terms:

[1.1.]Declaring that the respondent is obliged, upon request from the applicant, to furnish the applicant with full and itemised particulars of the amounts which became due for payment in respect of municipal service fees,

surcharges on fees, property rates and other municipal taxes, levies and duties (and which remain unpaid) for a period of two years prior to the date of the request in respect of any property owned by the applicant;

[1.2.]Declaring that the respondent is obliged, on receipt of payment of such sum tendered specifically for the purposes of discharging that indebtedness, to issue to the applicant a certificate as contemplated in section 118(1) of the Local Government: Municipal Systems Act, 32 of 2000;

[1.3.]Declaring, more specifically, the respondent's refusal to issue such a certificate to the applicant in respect of erf 23548 Khayelitsha, to be unlawful.

[2]The ancillary relief, contained in paragraphs 4 and 5 of the relief sought, relate to such further or alternative relief that this Court may deem fit to grant and as well as the cost order against the respondent in the event of the issues in dispute being determined in favour of the applicant.

[3]The respondent in these proceedings is the City of Cape Town Metropolitan Municipality, it being a Municipality established in terms of section 12 of the Local Government: Municipal Structures Act, 117 of 1998, having its principal place of business at 12 Hertzog Boulevard, Foreshore, Cape Town.

[4]The application was argued before me on Monday, 13 October 2008. After hearing argument, I reserved judgment and indicated to the parties that I would deliver judgment shortly thereafter. Unfortunately, preparation of this judgment was interrupted by other duties which included circuit work during the week commencing 27 October 2008. In the paragraphs which follow is my judgment in the matter.

FACTUAL BACKGROUND

[5]The background to the relief sought, which is not in dispute in terms of the papers, is succinctly set out in the founding affidavit as follows: The applicant is the owner of several immovable properties situate within the jurisdiction of the respondent. The applicant wishes to transfer some of these properties to the purchasers thereof and, for this purpose, requires a certificate contemplated in section 118(1) of the Local Government: Municipal Systems Act, 32 of 2000 ("Municipal Systems Act") issued by the respondent. The certificate required is what is commonly referred to in conveyancing practice as a 'clearance certificate', it being a certificate of a kind published under Government Notice 686 contained in Government Gazette 24886 dated 23 May 2003.

[6]The particulars of the properties owned by the applicant are fully set out in paragraph 17 of its founding affidavit. All are residential properties situate in such areas as Langa, Crossroads and Khayelitsha, all such areas being within the metropolitan area of the City of Cape Town. The applicant is not, and has never been, the occupier of the relevant properties nor, in respect of all such properties, a landlord in the sense of having concluded lease agreements with persons in occupation of such premises or received rentals from persons in occupation thereof.

[7]In order to be in a position to effect transfer of the properties it has sold, so alleges the applicant in its founding papers, the applicant has since July 2005 engaged the respondent requesting the respondent to furnish it (the applicant), in respect of each such properties, with full and itemised particulars of the amounts which became due for payment in respect of the various charges over the period of two years preceding the date of its application for a clearance certificate, simultaneously tendering to pay for such charges as against issuance, in favour of the applicant, of the required clearance certificates. The respondent refuses to furnish the applicant with the particulars so requested and has steadfastly adopted the position that it will only provide the required certificate once the arrears, even those older than a period of two years preceding the date of its application, shall have been paid in full.

[8]On 18 November 2005 the applicant's attorneys addressed a letter to the respondent requesting clearance figures in respect of properties owned by the applicant, a detailed breakdown in respect of itemised charges simultaneously recording that in the event of the respondent refusing to provide such requested figures, to give full reasons for such refusal. In response to this request, the respondent provided the applicant's attorneys with documents headed "Rates Clearance Schedules" in respect of each of the applicant's properties. The total balances outstanding in terms of such "Rates Clearance Schedules" not only included debts that became due during the two year period preceding the issuing of such "Rates Clearance Schedules" but also included debts that became due more than two years prior to the dates of the "Rates Clearance Schedules". The "Rates Clearance Schedules" are dated 30 January 2006.

[9]The attitude of the respondent as to the amount payable prior to a clearance certificate being issued is reflected in the respondent's letter in response to the applicant's attorneys' letter dated 18 November 2005. The relevant portion of the letter reads: "As to your reference to the two year limitation it is not disputed, however, this Council has a By-Law in terms of which all monies received are always allocated to the oldest debt first. Therefore, in order to pay the last two years' debt, all previous debts have to be settled." Thus, it is evident on basis of the respondent's letter that it (the respondent) bases its refusal to issue a

clearance certificate on its interpretation and the application of the provisions of section 118(1) of the Municipal Systems Act.

[10]In what the applicant describes as a final effort to move forward in regard to the dispute between the applicant and the respondent regarding the amount payable and the issuing of a clearance certificate, the applicant selected one of its properties, it being erf 23548 Khayelitsha as a test case, In respect of this property, and based on the "Rates Clearance Schedules" dated 30 January 2006, the applicant extracted the balance for the two year period preceding the date of the "Rates Clearance Schedule" provided by the respondent in respect of the property selected. The extracted balance amounted to R3,673-48 which is substantially less than the amount of R21,345-10 which the respondent contends is due and payable before it can issue the required clearance certificate.

[11]The aforementioned amount of R3,673-48 was forwarded to the respondent under cover of a letter dated 30 May 2006. The letter was received by the respondent on 2 June 2006. The letter explained the basis of the payment, demanded a clearance certificate and also requested the reasons should the respondent refuse to issue the required clearance certificate. The relevant part of the letter reads: "The above property has reference. We refer to our earlier requests for clearance figures for the purpose of section 118 Clearance Certificate and enclose herewith our cheque for R3,673-48 being the

amount payable in terms of section 118(1)(b) which limits the amount payable to two (2) years.

Please issue the clearance certificate within three (3) days hereof."

[12] The respondent banked the amount paid by the applicant but credited it towards the oldest debt. The respondent did not provide reasons for refusing the issue a clearance certificate. It is under these circumstances that the applicant contends it is faced with the choice of either paying more than it is required to do in terms of section 118(1) of the Municipal Systems Act in order to obtain the required clearance certificate or being unable to transfer the properties that it has sold. Once the applicant did not get satisfaction from the attitude adopted by the respondent, it resorted to these proceedings, instituted out of this Court for the declaratory and the ancillary relief set out in the Notice of Motion.

THE LEGAL MATRIX

[13]The Municipal Systems Act is a sequel to the Local Government: Municipal Systems Bill. It was piloted in both the National Assembly and the National Council of Provinces during the 2000 Parliamentary sittings. Once enacted, it became a third piece of legislation to give effect to the Local Government White Paper, the first two having been the Local Government: Municipal Demarcation Act, 27 of 1998 and the Local Government: Municipal Structures Act, 117 of 1998. While the first two pieces of legislation deal with

the institutional and jurisdictional aspects of local government, the Municipal Systems Act sought to establish the basic principles and mechanisms to give effect to the collective vision of "developmental government". Thus its focus is primarily on the internal systems and administration of the municipality[1]. It was subsequently enacted into law and came into operation on 1 March 2001. It is a transformative piece of legislation designed to represent a complete break with the apartheid system of local government[2].

[14]The Municipal Systems Act was enacted at the backdrop of capacity problems of local government arising from a culture of ungovernability in some metropolitan areas; huge backlogs in recovery of municipal fees and sought to introduce innovations to service delivery in local government which, amongst others, included the empowerment of municipalities to implement tough and effective credit control and debt collection strategies; to deal with non-payment for services while, at the same time, making sure that proper customer management systems are established and that the genuinely indigent receive the targeted relief[3]

[15]Section 118(1) of the Municipal Systems Act places a temporary restriction on the ability of an owner of property to alienate that property if there are outstanding charges owed to the municipality in respect of that

1 Memorandum on the objects of the Local Government: Municipal Systems Bill, 2000
2 Lourens du Plessis: Observations on the (un)constitutionality of section 118(3) of the Local Government: Municipal Systems Act, 32 of 2000. Stellenbosch Law review 2006 3 p505.
3 Memorandum on the objects of the Local Government: Municipal Systems Bill, 2000.

property[4]. In its initial form the section provided as follows under the heading "Restraint of transfer of property":

"Restraint on transfer of property

1) A registrar of deeds or other registration officer of immovable property may not register the transfer of property except on production to that registration officer of a prescribed certificate –

(a) Issued by the municipality in which that property is situated; and

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

(1A) A prescribed certificate issued by a municipality in terms of subsection (1) is valid for a period of 120 days from the date it has been issued.

2) In the case of the transfer of immovable property by a trustee of an insolvent estate, the provisions of this section are subject to section 89 of the Insolvency Act, 1936 (Act 24 of 1936).

3) An amount due for municipal service fees, property rates and other municipal taxes, levies and duties is a charge upon the property in connection with which the amount is owing and enjoys preference over any mortgage bond registered against the property."

[4] Steytler, Nico & de Visser, Jaap: Local Government Law of South Africa p9-54.

[16]Section 118 of the Municipal Systems Act was amended by the Local Government Laws Amendment Act, 51 of 2002. In effect the amendment merely adds two further subsections to the section as it appeared in its initial form. The two subsections provide as follows:

> "(4) Subsection (1) does not apply to –
>
> (a) a transfer from the national government, a provincial government or a municipality of a residential property which was financed with funds or loans made available by the national government, a provincial government or a municipality; and
>
> (b) the vesting of ownership as a result of a conversion of land tenure rights into ownership in terms of Chapter 1 of the Upgrading of Land Tenure Rights Act, 1991 (Act 112 of 1991):
>
> Provided that nothing in this subsection precludes the subsequent collection by a municipality of any amounts owed to it in respect of such property at the time of such transfer or conversion.
>
> (5) Subsection (3) does not apply to any amount referred to in that subsection that became due before a transfer of a residential property or a conversion of land tenure rights into ownership contemplated in subsection (4) took place."

The amendment was assented to on 4 December 2002 and came into operation on 5 December 2002.

[17]The embargo provisions in section 118(1) of the Municipal Systems Act, affording as they do a municipality a right to prevent the transfer of a property until its claim in respect of an outstanding debt for the two years preceding the date of an application for a clearance certificate, is not without precedent. Various provincial Ordinances contained, in the language of Lourens du Plessis[5], veto or embargo provisions similar to those provided for in section 118(1) of the Municipal Systems Act in the sense of providing for a restraint on transfer of properties pending payment of outstanding municipal fees. All these provincial ordinances have, however, since been repealed by the Local Government Laws Amendment Act referred to in paragraph [15] of this judgment. What has been referred to in the preceding paragraphs is the legal matrix within which the provisions of section 118(1) of the Municipal Systems Act has to be interpreted and applied.

MUNICIPAL BY-LAW AND DEBT COLLECTING POLICIES

[18]To complete the picture on the legal matrix it is perhaps convenient, at this stage, to refer to other aspects of the Municipal Systems Act which are referred to in the papers and in argument before me, and as well as By-laws and debt collection policies promulgated by the respondent which may have a bearing on the interpretation of and the application of the provisions of section 118(1) of the Municipal Systems Act. These aspects relate to sections 96 and 98 of the Municipal Systems Act which deal with debt collection

5 *Op cit* at p509

responsibility of municipalities and By-laws to give effect to credit control and debt collecting policies respectively.

[19]Section 96 of the Municipal Systems Act, under heading "Debt collection responsibility of municipalities" provides: "A municipality –

(a) must collect all money that is due and payable to it subject to this Act and any other applicable legislation; and

(b) for this purpose, must adopt, maintain and implement a credit control and debt collection policy which is consistent with its rates and tariff policies and complies with the provisions of this Act."

[20]The respondent's Credit Control and Debt Collection By-law was published in the Provincial Gazette No 6364 dated 15 June 2006. On 30 May 2007 the respondent adopted a Credit Control and Debt Collection Policy. Paragraph 8 of the aforementioned policy document provides, under the heading "Allocation of debt":

> "Payment of any undisputed debt, in terms of section 7 of the City of Cape Town's Credit Control and Debt Collection By-law, will firstly be allocated to the oldest debt first divided equally amongst all amounts outstanding progressing to the latest debt."

It is thus within the legal matrix set out in the preceding paragraphs that I have to determine whether the provisions of section 118(1) of the Municipal Systems Act, properly interpreted, do justify the granting of the relief prayed for in the Notice of Motion.

THE SUBMISSIONS BY THE PARTIES

[21]The crux of the applicant's submissions is simply this: The provisions of section 118(1) of the Municipal Systems Act are clear. The municipality is obliged to issue a clearance certificate if the sums falling due during the two-year period preceding the date of an application for a clearance certificate have been paid. The respondent's refusal to furnish the applicant with precise amounts payable is, in effect, an arbitrary deprivation of one of the incidents of ownership, namely, the ability to alienate the owner's immovable property and, as it were, such refusal falls squarely within the concept of "deprivation" as contemplated in section 25(1) of the Constitution of the Republic of South Africa, 1996. In any event, so it is further submitted on behalf of the applicant, it is the rule of the common law that a debtor may nominate the debt to which his payment has to be applied, provided he does so at the time of payment, citing Christie: *The Law of Contracts in South Africa*, 5th Ed 427-431 and Van der Merwe *et al, Contract: General Principles,* 3rd Ed 518-519 in support of this contention.

[22]On the other hand, the submission on behalf of the respondent is simply this: Section 118(1) of the Municipal Systems Act deals with a legislative restraint on the transfer of the property. It is a restraint that is placed on registration of deeds and, as such, imposes no obligation of any kind on

municipalities. Section 118(4) makes provision for the transfer of property owned by any of the three spheres of government and as well as for the vesting of ownership as a result of the conversion of land tenure rights into ownership. In these instances, no clearance certificate is required. However, there is a proviso which permits the municipalities to collect amounts owed to them subsequent to such transfer. It is thus submitted on behalf of the respondent that the absence of a similar provision to subsection (1) is indicative of the fact that the legislature assumed that all arrears would be paid prior to the transfer of any privately owned property being effected. Lastly, the respondent argues that the interpretation which the applicant seeks to place on the provisions of section 118(1) would undermine, to a considerable degree, the respondent's objectives and functions as contemplated in section 152(1) of the Constitution.

PRINCIPLES OF INTERPRETATION

[23]*Venter v R* 1907 TS 910 is regarded as the *locus classicus* insofar as the approach to interpretation of statutes by the courts is concerned[6]. In that judgment, the then Transvaal Supreme Court as far as the beginning of twentieth century, stated the aim of interpretation as being –

> "to ascertain the intention which the legislature meant to express from the language which it employed. By far the most important rule to guide courts in arriving at that

[6] JR de Ville: Constitutional & Statutory Interpretation p51.

> intention is to take the language of the instrument, or the relevant portion of the instrument as a whole; and, when the words are clear and unambiguous, to place upon them their grammatical construction and to give them their ordinary effect."

This primary rule of interpretation is subject to the following exceptions, as stated by Innes J at p913. According to Innes J, these exceptions –

> "arise from the difficulty – a difficulty inherent in the nature of language – that no matter how carefully words are chosen, there is a difficulty in selecting language which, while on the face of it expressing generally the idea of the framer of the measure, will not, when applied under certain circumstances, go beyond it, and, when applied under other circumstances, fall short of it."

[24]The intention of the legislature is also to be established with reference to the context of the statute, which includes the enactment as a whole, enactments in *pari materia* and the mischief sought to be remedied. In *Hoban v Absa Bank Ltd t/a United Bank & Others*[7] it was held that context is the equivalent of legislative intention:

> "There is no justification for the distinction…… between linguistic context and legislative intention. The moment one has to analyse context in order to determine whether a meaning is to be given which differs from the defined meaning, one is immediately engaged in ascertaining legislative intention. One remains so engaged until the interpretation process is concluded. It is only concluded when legislative intention is established. As remarked by E Cameron '… context does no more

[7] 1999(2) SA 1036 (SCA) 1044-1045.

than reflect legislative meaning which in turn is capable of being expressed only through words in context'." [8]

With these rules of interpretation in mind, I shall now proceed with the analysis and the interpretation of what the provisions of section 118(1) of the Municipal Systems Act were meant to convey.

THE INTERPRETATION OF SECTION 118(1)

[25]A matter of interpretation of section 118(1)(b) of the Municipal Systems Act came before Kondile J in *Geyser & Another v Msunduzi Municipality* 2003(3) BCLR 235(N). In that case a property owner had been indebted to the municipality in an amount of R 37,835-75 from February 1998 and a further amount of R88,098-93 by the time the tenants had left the property on 7 April 2002. In that matter, as is the case in respect of this matter before me, the applicant contended that her liability to the municipality, for purposes of issuing of a clearance certificate, was limited to a period of two years preceding the date of application for a clearance certificate. It appears that, in the instance of that matter, the municipality agreed with the contention of the property owner, that the liability for purposes of issuing the property owner with the clearance certificate was restricted to a period of two years preceding the date of application and also with the exact amount of liability incurred during that period. Consequently, Kondile J was not required to rule

[8] JR de Ville *op cit* p52.

on the declarator sought by the applicant as it was unnecessary for him to make a declaratory order in respect of non-issue (at 245 C-E).

[26]In *BoE Bank Ltd v Tshwane Metropolitan Municipality*[9] the provisions of section 118(1) and the interpretation thereof was not one of the issues in contention. In that case NBS Bank took judgment against the owner of the property for money lent and advanced under the mortgage bonds. In terms of the judgment, the property was declared executable. Judgment was taken during June 2001. Towards the end of October 2001, the attorneys appointed to attend to the transfer of the property pursuant to a sale in execution applied to the municipality for the clearance certificate contemplated in section 118(1) of the Municipal Systems Act. The certificate issued by the municipality showed an amount of R 287,900-29 owing in respect of municipal rates and services for the two years preceding the date of application for the certificate, ie, since October 1999. The same certificate, however, also reflected a further balance outstanding in an amount of R655,273-83 in respect of municipal debts that became due prior to October 1999, ie before the commencement of a two year period preceding the date of the application. In terms of the condition of sale the purchaser undertook pay various amounts apart from the purchase price, including any charges necessary to effect transfer of the property. In respect of this matter, it was accepted as common cause that the purchaser was liable to

9 2005(5) SA 10 (SCA)

pay an amount of R 287,900-29 certified to be owing in respect of the two year period since October 1999. There consequently was no dispute about the latter amount, the dispute having been confined to the historical debt[10].

[27]In *City of Johannesburg v Kaplan NO & Another*[11] Heher JA made the following observation in summarising the operation of section 118(1) and (3) of the Municipal Systems Act in instances where the municipal debtor is not subject to a sequestration or liquidation order:

> "When such a debtor is not subject to such an order –
>
> 1. No property may be transferred unless a certificate is produced to the registrar of deeds that certifies full payment of all municipal debts as described in section 118(1) which have become due during a period of two years before the date of application for the certificate.
> 2. Any amount due for municipal debts (ie 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."[12]

Heher JA thus clearly distinguishes between the amount that became due and payable during the two year period preceding the date of application for a clearance certificate and an amount falling outside the period of two years

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10 BoE Bank Ltd v Tshwane Metropolitan Municipality *supra* at 340 para [3] and [4].
11 2006(5) SA 10 (SCA)
12 City of Johannesburg v Kaplan NO & Another, *supra,* 18 paragraphs [25] and [26].

which, in the instance of the matter before him, was to be secured by the property.

He concludes by making an observation that:

> "(i)n 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 debt secured by a mortgage bond over the property."[13]

[28]What was at issue before the Constitution Court in *Mkontwana v Nelson Mandela Metropolitan Municipality*[14] was the interpretation of the phrase "in connection with that property" in section 118(1)(b) and the constitutional validity of section 118(1) of the Municipal Systems Act. The challenge was based on the contention that the effect of the challenged provisions was to deprive the owner of an immovable property of the right to pass transfer of property to complete the process of alienation and that, therefore, the challenged provisions constitute a deprivation of property as contemplated in section 25(1) of the Constitution of the Republic of South Africa.

[29]The court, in *Mkontwana,* held that the challenged provisions did pass constitutional muster, Yacoob J noting that the deprivation is temporary and that it lasts two years only. Yacoob J[15] further makes an observation that

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13 At p18 para [26].
14 2005(1) SA 530 (CC)
15 At p551 paragraph 44.

whilst it is correct that if there are substantial arrears in respect of outstanding charges and all payments over an extended period are for current charges only (ie, debts incurred subsequent to an application date) and are credited to the amount first owing, the substantial sum may remain outstanding indefinitely and thereby constitute an obstacle to transfer. But, Yacoob J qualifies this observation by stating that if, however, no further obligations are incurred to increase the current indebtedness (ie, indebtedness for a period of two years preceding the application date) of the occupier the limit on the power of the owner to transfer the property will last no more than two years. The remarks of O'Regan J, in a separate but concurring judgment, at p570 paragraph [96], should be read in the context of the observation by Yacoob J above.

[30]The legal writers and commentators seem to accept that the indebtedness that the owner of the property has to discharge for purposes of being issued with a clearance certificate is limited to a period of two years preceding the date of application for the required certificate. Steytler & De Visser[16] note that the Municipal Systems Act places a temporary restriction on the ability of an owner of immovable property to alienate that property if there are outstanding charges owed to the municipality. The authors go on to restate that a registrar of deeds may not register the transfer of property unless the certificate issued by the municipality in which the property is

[16] See footnote 3 above and at p9-54 to p9-55,

situated stating 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 the application for the certificate have been fully paid. So also does Du Plessis[17] citing the remarks by Kondile J in *Geyser*[18] that the two year limitation in section 118 of the Act also reflects reasonableness. It therefore appears to me that all the authorities cited above seem to accept that the amount of indebtedness of the property owner is limited to a two year period preceding the date of application for such a certificate. I have no reason to doubt the correctness of the position as stated in authorities cited above. I accordingly conclude that the amount which the applicant has to pay in discharging its indebtedness to the respondent in order to be issued with a clearance certificate is limited to a period of two years preceding the date of an application for the required certificate. This conclusion is fortified by the remarks of Yacoob in *Mkontwana* where he remarked in paragraph [19] and in response to the initial insistence by the municipality that all outstanding charges had to be paid in full: "Somewhat curiously, the municipality sought payments of amounts that had become due more that two years and up to five years before the date of the statement." For the record, the date of application for the required clearance certificate is 30 January 2006.

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17 See footnote 2 above and at p514.

18 2003(3) BCLR 235(N) at 251

[31]I am perfectly in agreement with *Mr Mitchell SC,* in his submissions and amplified in oral argument in Court that the words of the statute in point, in the context of its interpretation and application, are clear. A clearance certificate must be issued if the sums falling due in the two year period are paid. Any sums which fell due prior to the commencement of the two year period need not be paid as a condition precedent to the issue of the required clearance certificate. This is much more apparent if one has such authorities as *BoE Bank Ltd v Tshwane Metropolitan Municipality*[19] and *City of Johannesburg v Kaplan NO*[20] in mind. The next question that needs to be determined is the question of whether the provisions of section 118(1) of the Municipal Systems Act impose an obligation on a municipality to issue a clearance certificate when applied for and payment for the two year period preceding the application date is tendered..

SECTION 118(1): OBLIGATION ON MUNICIPALITIES

[32] *Mr Fagan,* who appeared for the respondent when the matter was argued before me, raises a pertinent issue in his submissions and this is whether, on a proper interpretation of the provisions of section 118(1) of the Municipal Systems Act, a municipality is obliged to issue a clearance certificate if the following two factual conditions are met: one, the applicant for a certificate pays or tenders to pay all municipal fees owing in respect of the

19 2005(4) SA 336 (SCA)
20 2006(5) SA 10 (SCA)

two year period preceding the date of application for such a certificate; and two, after such payment has been made, there are still municipal fees owing in respect of an earlier period. *Mr Fagan* then goes on to submit that section 118(1) deals with a legislative restraint on the transfer of property; that it is a restraint that is placed on registrars of deeds; and that the relevant provisions impose no obligation of any kind on municipalities. I do not entirely agree.

[33]Whilst it is correct that section 118(1) deals with a legislative restraint on the transfer of property and that it is a restraint that is placed on registrars of deeds, I do not accept that the relevant provision imposes no obligation on municipalities. My disagreement arises out of the values and principles set out in Chapter Three of the Constitution of the Republic of South Africa which sets out principles designed to promote co-ordination rather than competition between the various spheres of government and organs of state. Sections 40 and 41 of the Constitution require that different spheres of government and different organs of state should foster co-operative relations with one another. The fostering of co-operative relations would, amongst other things, entail an obligation not to create obstacles to those who need to comply with the law and not to adopt measures that are obstructive, such as those provisions currently contained in paragraph 8 of the respondent's Credit Control and Debt Collection Policy, to those who need to comply with the law. Paragraph 8 of the respondent's Credit Control and Debt Collection Policy

should thus be aligned to the obligation on municipalities set out in this paragraph, and which alignment should not be inconsistent with those values and principles set out in sections 40 and 41 of the Constitution.

[34]Section 118(1) of the Municipal Systems Act requires of the registrar of deeds not to register the transfer of property except on production of a certificate which certifies that all municipal fees due during the two year period preceding the date of application shall have been paid in full. It may very well be so that after payment of municipal fees due in respect of the two year period preceding the date of application for a certificate there may still be municipal fees due in respect of the earlier period such as was the case in *Geyser*[21], *Kaplan*[22] and *BoE Bank Ltd*[23]. The municipality is not without a remedy should it issue a clearance certificate under such circumstances. Payment by a property owner of indebtedness in an amount contemplated in section 118(1)(b) does not relieve the property owner of any liability of an amount due in respect of an earlier period. The municipality still retains a right to proceed against the previous owner by way of an action to recover the balance outstanding and may even take appropriate steps to attach the proceeds of sale of the property as security for payment of the balance outstanding to be paid once the process of alienating shall have been completed. The obligation on the municipalities arises out of a need not to

21 2003(3) BCLR 235 (N).
22 2006(5) SA 10 (SCA).
23 2005(4) SA 336 (SCA).

create obstacles to those who need to comply with the law, such as compliance with the provisions of section 118(1) of the Municipal Services Act and to foster co-operative relations with other organs of state such as the registration of deeds. There is nothing in the approach I adopt in this paragraph has an effect of compromising the institutional and functional integrity of the respondent nor of compromising those objectives set out in section 152 of the Constitution of the Republic of South Africa.

PROVISO IN SECTION 118(4)

[35]In paragraph [16] of this judgment I cite a proviso to subsection (4) in section 118 of the Municipal Systems Act which makes provision for the transfer of property owned by any of the three spheres of government and as well as for the vesting of ownership which comes about as a result of the conversion of land tenure rights into ownership. In such instances, no clearance certificate is required but the proviso permits municipalities to recover the amount owed from the previous owner. There is no similar proviso to subsection 118(1). *Mr Fagan* makes a point that the absence of a similar proviso to subsection (1) is indicative of the fact that the legislature assumed that all arrears would be paid prior to the transfer of any privately-owned property being effected. I similarly do not agree. I say so because payment of an amount due in respect of the two year period does not automatically relieve the transferring owner of his indebtedness to the municipality in respect of an earlier period as was the case in *City of Johannesburg v Kaplan*, *supra,* where the municipality sought to recover an amount due in respect of an earlier period. In *Kaplan, supra,* the municipality adopted this course of action because there is nothing in the provisions of section 118(1) which justifies a construction in terms of which the transferring owner would be relieved of a liability in respect of an earlier debt once municipal fees in respect of the two year period have been paid. The proviso to subsection (4) was inserted in order to facilitate legitimate

State land distribution and development programs as opposed to transactions of a pure commercial nature. Once again, I am in perfect agreement with *Mr Mitchell* that the proviso to section 118(4) takes the matter no further. Nothing can be read in this subsection as taking the right of the municipality to recover unpaid sums from the pervious owner or from adopting measures to secure payment of any amount outstanding once the process of alienation shall have been completed.

COMPUTER PROGRAM & LACK OF RESOURCES

[36]In paragraph [8] of this judgment I refer to a letter of 18 November 2005 addressed by the applicant's attorneys to the respondent requesting, amongst other things, a detailed breakdown of itemised charges of the amounts that became due during the two years preceding the date of the application for a clearance certificate. The respondent failed to supply the required details the reasons being, first, that its computer program is not programmed to extract the information requested and, secondly, since its computer program is not programmed to extract the required information, such information will have to be extracted manually from the records of the respondent and that the respondent does not have the resources to undertake such task manually. This is not acceptable.

[37]The respondent, as a local sphere of government and an organ of state, renders a service to the public. It is subject to those basic values and principles governing public administration including, amongst other things, a high standard of professional ethics, efficient, economic and effective use of resources as set out in section 195 of the Constitution. To drive this point home I can do no more than to cite the remarks by Yacoob J in *Mkontwana* paragraph [64] where the learned Justice warned municipalities that:

> "It is necessary for all municipalities to ensure that they have reasonably accurate records and that they are able to provide complete, credible, comprehensible and reasonably detailed information in relation to consumption charges that are owing within a reasonable time of being requested to furnish it. Without this, the transfer process is likely to be unduly slowed down. It must be understood by all concerned that municipalities have the obligation to furnish this information to all owners intent upon selling their property. It must also be understood that they can be compelled to provide that information by court proceedings if this should turn out to be necessary."

The respondent has a constitutional duty to discharge and execute its mandate to the public efficiently. It cannot be heard to be lacking to fulfil its mandate due to incomplete computer program or want of resources.

[38]I thus conclude that the respondent is obliged, on request, to furnish the applicant with such itemised particulars as would enable it to determine the amount due in respect of municipal fees due for payment during the two year

period preceding the date of application for the required certificate and to issue the applicant with the required clearance certificate once the amount due has been paid. To the extent that the respondent refuses to supply the applicant with the requested itemised particulars, I record that such refusal is unlawful.

[39]It therefore follows, in my view, that the applicant has made out a proper case for the relief sought in the Notice of Motion. In the event, I make the following order:

[39.1.]It is hereby declared that the respondent is obliged, upon receipt of a request from the applicant, to furnish the applicant with full itemised particulars of the amounts which became due for payment in respect of municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties (and which remain unpaid) for a period of two years prior to the date of the request in respect of any property owned by the applicant;

[39.2.]It is hereby declared that the respondent is obliged, on receipt of payment of such sum tendered specifically for the purpose of discharging that indebtedness, to issue to the Applicant a certificate as contemplated by section 118(1) of the Local Government: Municipal Systems Act, 32 of 2000;

[39.3.]Further, it is hereby declared that the respondent's refusal to issue such a certificate to the applicant in respect of erf 23548 Khayelitsha, is unlawful.

[39.4.]The respondent is ordered to pay applicant's costs as between party and party, duly taxed or as agreed.

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N J Yekiso, J