CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 104/12
[2013] ZACC 16

In the matter between:

JACOBUS JOHANNES LIEBENBERG N.O.
AND 84 OTHERS — Applicants

and

BERGRIVIER MUNICIPALITY — Respondent

and

MINISTER FOR LOCAL GOVERNMENT,
ENVIRONMENTAL AFFAIRS AND
DEVELOPMENT PLANNING, WESTERN CAPE — Intervening Party

Heard on : 12 March 2013

Decided on : 6 June 2013

JUDGMENT

MHLANTLA AJ (Mogoeng CJ, Moseneke DCJ, Froneman J, Nkabinde J, Skweyiya J and Zondo J concurring):

Introduction

[1] This application was brought by 85 landowners (applicants) who farm within the area of jurisdiction of the Bergrivier Municipality (Municipality). The applicants are all members of the Bergrivier Belastingbetalers-vereniging (BBV), a ratepayers' association.

[2] The respondent, the Municipality, was established on 5 December 2000 as a category B local municipality. Its areas of jurisdiction include the towns of Piketberg, Porterville, Velddrif and other smaller towns. A significant proportion of the areas are rural and nearly 40% of the population lives in rural areas.

[3] The intervening party is the Minister for Local Government, Environmental Affairs and Development Planning, Western Cape, who was admitted by this Court and allowed to make submissions limited to the issue of appropriate redress.

[4] The applicants have brought their application to this Court for leave to appeal against a decision of the Supreme Court of Appeal in terms of which that Court dismissed their appeal against a judgment of the Western Cape High Court, Cape Town (High Court), and upheld a cross-appeal by the Municipality.[1] At issue is the validity of certain

[1] *Liebenberg NO and Others v Bergrivier Municipality* [2012] ZASCA 153; [2012] 4 All SA 626 (SCA) (Supreme Court of Appeal judgment).

municipal rates, which the applicants have refused to pay for a period of some eight years.

Background

[5] Prior to the adoption of the interim Constitution, rural landowners were not required to pay municipal rates.[2] That position changed with the transition to democracy. The new dispensation, built up through a variety of constitutionally mandated legislative instruments, established a framework ensuring that all land, including the rural tracts belonging to the applicants, became subject to the authority of municipalities to impose rates on property.[3]

[6] After 5 December 2000, the Municipality began to impose levies and rates in respect of the applicants' rural land in terms of the Local Government Transition Act[4] (Transition Act) and the Local Government: Municipal Finance Management Act[5] (Finance Act). As from 2001, the applicants refused to pay certain of the levies and rates imposed. They did not approach a court to adjudicate their dispute with the Municipality.

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[2] This was because rural properties were not part of the rateable areas within the area of jurisdiction of municipalities.

[3] Section 151 of the Constitution introduced the notion of "wall-to-wall" local government. See *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC) at para 79; *City of Cape Town and Another v Robertson and Another* [2004] ZACC 21; 2005 (2) SA 323 (CC) (*Robertson*) at para 39; and *African National Congress and Another v Minister of Local Government and Housing, KwaZulu-Natal, and Others* [1998] ZACC 2; 1998 (3) SA 1 (CC); 1998 (4) BCLR 399 (CC) at para 9.

[4] 209 of 1993.

[5] 56 of 2003. Most of the provisions of the Finance Act, excluding section 179, commenced on 1 July 2004. Section 179 came into operation on 1 July 2005.

[7] Starting from 2005, the Municipality launched enforcement proceedings in the Piketberg Magistrate's Court against various landowners to collect outstanding levies and rates. The applicants resisted the enforcement proceedings by disputing the lawfulness and validity of the imposts. Since the Magistrate's Court did not have jurisdiction to determine the validity of such levies and rates, the Municipality eventually agreed that it would abandon the enforcement proceedings in the Magistrate's Court and would seek declaratory orders in the High Court with regard to the validity of the levies and rates.[6]

High Court

[8] In 2010, the Municipality sought declaratory orders from the High Court that the levies and rates imposed by it in the financial years from 2001/2002 to 2008/2009 were lawful and valid.[7] To the extent that the relevant imposts may have been declared valid, the Municipality sought an order against the applicants for the enforcement and payment of the outstanding debts. The applicants opposed the granting of the declaratory order.

[9] The High Court (per Binns-Ward J) concluded that the levies imposed in the 2001/2002 and 2002/2003 financial years were not lawfully imposed, but the rates imposed in the 2003/2004, 2004/2005 and 2005/2006 years were recoverable. The Court also concluded that the Municipality had not complied with statutory requirements when

[6] This agreement was reached between the Municipality and the BBV.

[7] The Municipality's financial year runs from 1 July to 30 June.

it imposed the property rates during the 2006/2007, 2007/2008 and 2008/2009 financial years and that these could not be recovered. The High Court granted the applicants leave to appeal in respect of the 2004/2005 and 2005/2006 years, whilst the Municipality was allowed to cross-appeal in respect of the other years.

Supreme Court of Appeal

[10] By the time the matter reached the Supreme Court of Appeal, the rates imposed in respect of the 2001/2002 and 2003/2004 financial years were no longer in issue.[8] The Supreme Court of Appeal (per Lewis JA) rejected all the applicants' challenges. It consequently dismissed the applicants' appeal and upheld the Municipality's cross-appeal with costs.

[11] I will engage in a more detailed discussion of the reasoning of both the High Court and Supreme Court of Appeal as I deal with the merits of the appeal before us.

Issues

[12] The applicants contend that the Municipality failed to act in accordance with the strictures of the Constitution and statutory prescripts when imposing certain rates and levies. According to the applicants, the Municipality acted *ultra vires*[9] the governing

[8] The Municipality had, by this time, conceded that the levies it had sought to impose in the 2001/2002 financial year were not lawfully imposed and the applicants conceded that the rates imposed in the 2003/2004 financial year were good in law.

[9] Acted beyond the powers in the governing legislation.

legislation and the rates were accordingly invalid. Considering the multiple grounds raised in respect of different financial years, it is useful to outline the issues before this Court, which are as follows:

(a) Leave to appeal.

(b) Condonation.

(c) The approach to assessing a municipality's compliance with statutory prescripts.

(d) The interpretation and application of the relevant statutory provisions relating to rates imposed in the financial years 2006/2007 to 2008/2009.

(e) Other challenges raised in respect of each of the financial years under consideration.

Leave to appeal

[13] As previously indicated, the applicants approach this Court for leave to appeal against the decision of the Supreme Court of Appeal. The applicants submit that their challenges are rooted in the principle of legality and, as such, are constitutional matters. They argue that leave to appeal should be granted as the issues raised are important not only to the present litigants, but also to ratepayers and local government generally. They contend that it is in the public interest that this Court pronounce on these issues since the legality of property rates has been challenged in a number of other cases.

[14] Opposing the granting of leave to appeal, the Municipality emphasises that our constitutional framework establishes reciprocal rights and duties between the political structures of the Municipality and members of the local community.[10] Relying on *Pretoria City Council v Walker*,[11] the Municipality characterises the conduct of the applicants as impermissible self-help. The Municipality has suffered a significant reduction in its income as a result of the unlawful conduct on the part of the farm owners, and it is therefore not able to meet its constitutional obligations to the local community effectively. Further, there is no contention that the Municipality failed to comply with its obligation to provide services, from which the applicants benefitted. The Municipality submits that it would not be in the interests of justice for the current state of affairs to be permitted to continue.

[15] In my view, the matter raises important constitutional issues relating to the principle of legality as well as the interpretation and application of a variety of statutes regulating local government. These issues, which are related to the core aspects of the powers and duties of municipalities, impact not only on the parties before us, but on other ratepayers as well. It is accordingly in the public interest that this Court pronounces on these issues.

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[10] The Municipality has a constitutional right and duty to raise revenue, *inter alia*, by imposing levies and rates on property within its area of jurisdiction, in order to enable it to provide services to the local community. In turn, the members of the community have the right, amongst others, to access municipal services and the duty to pay promptly service fees, rates on property and other taxes, levies and duties imposed by the Municipality.

[11] [1998] ZACC 1; 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) (*Walker*).

[16] It is also significant that the parties agreed that the Municipality would approach the High Court for a declaratory order on the validity of the relevant imposts rather than direct enforcement proceedings. It was within that context – in opposition to the declaratory order – that the applicants raised their challenges and it is those proceedings that are before us now. This is not an instance, therefore, where the Court has to determine whether the applicants have brought a so-called collateral challenge and their entitlement to do so. For these reasons it is in the interests of justice to grant leave to appeal.

Condonation

[17] The applicants were due to file the record in this matter on 10 January 2013. On 20 December 2012 they filed a letter requesting an extension of the filing date to 30 January 2013. The applicants eventually filed the record on 5 February 2013. The explanation offered is that they faced unforeseen logistical and financial constraints in preparation of the record. They submit that the explanation for the delay is reasonable and that minimal prejudice has been suffered by the respondent. In my view, even though this Court had to issue directions to nudge the applicants to comply with relevant timelines, the logistics and costs issues were real and beyond the applicants' immediate control and it is in the interests of justice to grant condonation.

[18] The applicants also failed to meet the deadline for the filing of their written submissions which were due to be filed on 5 February 2013. These were lodged on 8 February 2013. The applicants explain that the delay was caused by an email error as well as transport difficulties. The delay in the filing of the written submissions was only three days and the explanation offered is adequate. There has been no opposition to the condonation sought and it appears that the Municipality did not suffer any substantial prejudice as it was granted an extension for the lodging of its written submissions. It is therefore in the interests of justice to grant condonation for the late filing of the written submissions.

[19] The applicants have, correctly in my view, tendered costs in respect of the condonation applications. A costs order to that effect will be made.

Merits

[20] I turn now to consider the main grounds of the challenge to the Municipality's actions. The applicants contend that the Municipality acted *ultra vires* the governing legislation and the rates were accordingly invalid. A number of grounds were raised in respect of the rates for each financial year.

[21] First, I will outline the broad approach a court should adopt when assessing alleged non-compliance of a municipality with statutory prescripts. Second, I will address the applicants' challenges relating to whether the Municipality relied on the incorrect

legislation when imposing the rates for the financial years from 2006/2007 to 2008/2009. As will be seen, the proper interpretation of the applicable statutory framework regulating local government lies at the heart of much of the applicants' case. Thereafter, I will discuss the merits of the specific challenges raised in respect of each of the financial years under consideration.

Approach to assessing a municipality's compliance with statutory prescripts

[22] The applicants contend that the Municipality failed to comply with various statutory prescripts in respect of the rural levies and property rates imposed. The Municipality submits that should this Court conclude that there were instances of such non-compliance on its part, then this should not necessarily result in the invalidity of the rates imposed. Rather, the test should be whether there has been compliance with the relevant prescripts in such a manner that the objects of the statutory instruments concerned have been achieved.

[23] In *Unlawful Occupiers*, *School Site v City of Johannesburg*,[12] the Supreme Court of Appeal stated:

> "[I]t is clear from the authorities that even where the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that

[12] 2005 (4) SA 199 (SCA).

> event, the question remains whether, in spite of the defects, the object of the statutory provision had been achieved".[13]

[24] This was amplified by the Supreme Court of Appeal in *Nokeng Tsa Taemane Local Municipality v Dinokeng Property Owners Association & Others*[14] where it was stated:

> "It is important to mention that the mere failure to comply with one or other administrative provision does not mean that the whole procedure is necessarily void. It depends in the first instance on whether the Act contemplated that the relevant failure should be visited with nullity and in the second instance on its materiality. . . . To nullify the revenue stream of a local authority merely because of an administrative hiccup appears to me to be so drastic a result that it is unlikely that the Legislature could have intended it."[15]

[25] In *African Christian Democratic Party v Electoral Commission and Others*,[16] this Court, in the context of assessing a local authority's compliance with municipal electoral legislation, held that "[a] narrowly textual and legalistic approach is to be avoided".[17] Rather, the question is whether the steps taken by the local authority are effective when measured against the object of the Legislature, which is ascertained from the language,

[13] Id at para 22. See also further case law as referred to by this Court: *Weenen Transitional Local Council v Van Dyk* 2002 (4) SA 653 (SCA) (*Weenen*) at para 13 and *Nkisimane and Others v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) at 433H – 434B.

[14] [2010] ZASCA 128; [2011] 2 All SA 46 (SCA) (*Nokeng*).

[15] Id at para 14.

[16] [2006] ZACC 1; 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC).

[17] Id at para 25.

scope and purpose of the enactment as a whole and the statutory requirement in particular.[18]

[26] Therefore, a failure by a municipality to comply with relevant statutory provisions does not necessarily lead to the actions under scrutiny being rendered invalid. The question is whether there has been substantial compliance, taking into account the relevant statutory provisions in particular and the legislative scheme as a whole.

The applicable statutory framework for the financial years from 2006/2007 to 2008/2009

[27] The Municipality imposed rates for all of the relevant financial years in terms of section 10G(7) of the Transition Act.[19] It is common cause that this was the source of the

[18] Id citing *Weenen* above n 13 with approval.

[19] Section 10G(7) provides in relevant part as follows:

> "(a) (i) A local council, metropolitan local council and rural council may by resolution,
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> levy and recover property rates in respect of immovable property in the area of jurisdiction of the council concerned: Provided that a common rating system as determined by the metropolitan council shall be applicable within the area of jurisdiction of that metropolitan council: Provided further that the council concerned shall in levying rates take into account the levy referred to in item 1(c) of Schedule 2: Provided further that this subparagraph shall apply to a district council in so far as such council is responsible for the levying and recovery of property rates in respect of immovable property within a remaining area or in the area of jurisdiction of a representative council.
>
> (ii) A municipality may by resolution supported by a majority of the members of the council levy and recover levies, fees, taxes and tariffs in respect of any function or service of the municipality.
>
> (b) In determining property rates, levies, fees, taxes and tariffs (hereinafter referred to as charges) under paragraph (a), a municipality may—
>
> (i) differentiate between different categories of users or property on such grounds as it may deem reasonable;
>
> (ii) in respect of charges referred to in paragraph (a)(ii), from time to time by resolution amend or withdraw such determination and determine a date, not

Municipality's power to impose rates before the 2006/2007 financial year. However, there is a dispute between the parties as to the proper legislation to be applied for that year and the years that followed.

[28] In this regard, the applicants contend that section 10G(7) could not have been the lawful source of the power to impose rates over the 2006/2007 to 2008/2009 periods. They submit that this is because that section was repealed by section 179 of the Finance Act with effect from 2 July 2005. The Municipality, on the other hand, contends that the life of section 10G(7) was extended by the transitional provisions of the Local

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earlier than 30 days from the date of the resolution, on which such determination, amendment or withdrawal shall come into operation; and

(iii) recover any charges so determined or amended, including interest on any outstanding amount.

(c) After a resolution as contemplated in paragraph (a) has been passed, the chief executive officer of the municipality shall forthwith cause to be conspicuously displayed at a place installed for this purpose at the offices of the municipality as well as at such other places within the area of jurisdiction of the municipality as may be determined by the chief executive officer, a notice stating—

(i) the general purport of the resolution;

(ii) the date on which the determination or amendment shall come into operation;

(iii) the date on which the notice is first displayed; and

(iv) that any person who desires to object to such determination or amendment shall do so in writing within 14 days after the date on which the notice is first displayed.

(d) Where—

(i) no objection is lodged within the period referred to in paragraph (c)(iv), the determination or amendment shall come into operation as contemplated in paragraph (b)(ii);

(ii) an objection is lodged within the period referred to in paragraph (c)(iv), the municipality shall consider every objection and may amend or withdraw the determination or amendment and may determine a date other than the date contemplated in paragraph (b)(ii) on which the determination or amendment shall come into operation, whereupon paragraph (c)(i) shall with the necessary changes apply."

Government: Municipal Property Rates Act[20] (Rates Act). One of the key differences between the parties, therefore, is whether section 10G(7) survived the enactment of the Rates Act as a result of these transitional provisions.

[29] Section 179 of the Finance Act, which came into operation from 1 July 2005, provides in relevant part as follows:

> "**Repeal and amendment of legislation**
>
> (1) The legislation referred to in the second column of the Schedule is hereby amended or repealed to the extent indicated in the third column of the Schedule [including section 10G].
>
> (2) Despite the repeal of section 10G of the Local Government Transition Act, 1993 (Act 209 of 1993), by subsection (1) of this section, the provisions contained in subsections (6), (6A) and (7) of section 10G remain in force until the legislation envisaged in section 229(2)(b) of the Constitution is enacted." (Emphasis added.)

[30] Section 179 states that legislation appearing in the second column of the Schedule to the Finance Act is amended or repealed to the extent indicated in the third column of the Schedule. This Schedule reflects three Acts in the second column (including the Transition Act). In the third column, it states: "The repeal of section 10G." Section 179(2), however, delays the coming into force of the repeal of certain parts of

[20] 6 of 2004.

section 10G – more specifically, section 10G(6), (6A) and (7) – until the legislation envisaged in section 229(2)(b) of the Constitution is enacted.[21]

[31] The literal meaning of section 179 is that the provisions of section 10G were, save for section 10G(6), (6A) and (7), repealed with immediate effect. Those three subsections would remain in force until the enactment of legislation in terms of section 229(2)(b) of the Constitution. This legislation later turned out to be the Rates Act, which came into force on 2 July 2005.

[32] The Rates Act includes various transitional provisions. Amongst these are sections 88 and 89, which provide in relevant part as follows:

> "**88. Transitional arrangement: Valuation and rating under prior legislation.**
>
> (1) Municipal valuations and property rating conducted before the commencement of this Act by a municipality in an area in terms of legislation repealed by this Act, may, despite such repeal, continue to be conducted in terms of that legislation until the date on which the valuation roll covering that area prepared in terms of this Act takes effect in terms of section 32(1). (Emphasis added.)
>
> . . .
>
> **89. Transitional arrangement: Use of existing valuation rolls and supplementary valuation rolls.**

[21] Section 229(2) of the Constitution provides as follows:

> "The power of a municipality to impose rates on property, surcharges on fees for services provided by or on behalf of the municipality, or other taxes, levies or duties—
>
> (a) may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across municipal boundaries, or the national mobility of goods, services, capital or labour; and
>
> (b) may be regulated by national legislation."

> (1) Until it prepares a valuation roll in terms of this Act, a municipality may—
>
> (a) continue to use a valuation roll and supplementary valuation roll that was in force in its area before the commencement of this Act; and
>
> (b) levy rates against property values as shown on that roll or supplementary roll.
>
> (2) If a municipality uses valuation rolls and supplementary valuation rolls in terms of subsection (1) that were prepared by different predecessor municipalities, the municipality may impose different rates based on different rolls, so that the amount payable on similarly situated properties is more or less similar.
>
> (3) The operation of this section lapses six years from the date of commencement of this Act, and from that date any valuation roll or supplementary valuation roll that was in force before the commencement of this Act may not be used."[22]

[33] The High Court upheld the argument of the applicants that when the Rates Act came into operation, the plain meaning of section 179 of the Finance Act meant that section 10G(7) ceased to apply and the Municipality was required to levy rates in terms of the Rates Act.

[34] The Supreme Court of Appeal disagreed and reversed the decision of the High Court. It noted that the transitional provisions of the four statutes on municipal governance were "complex and confusing".[23] Nonetheless, the Supreme Court of Appeal held that these statutes showed a clear purpose to empower rating in every municipality through a variety of mechanisms until uniform and permanent systems were put in place.

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[22] The combined effect of these provisions was that a municipality could, in terms of legislation repealed by the Rates Act, continue to conduct property rating based on a valuation roll in force before 2 July 2005 until it had prepared a valuation roll in terms of the Rates Act (which had to be prepared by 30 June 2011).

[23] The four relevant statutes referred to by the Supreme Court of Appeal are the: Local Government: Municipal Structures Act 117 of 1998 (Structures Act); Local Government: Municipal Systems Act 32 of 2000; Finance Act; and Rates Act.

The Court held that the transitional provisions of both the Finance Act and the Rates Act kept the empowering provisions of section 10G(7) alive until the period referred to in section 89(3) had expired and that throughout that period section 10G(7) empowered the Municipality to impose rates. The Court concluded that the interpretation by the High Court would lead to the absurd result that the bridging mechanism in sections 88 and 89 of the Rates Act would be available to municipalities that relied on old-order rating legislation (for example, old-order provincial Ordinances) but it would not avail municipalities which were using section 10G(7).

[35] In this Court, the applicants submit that section 179 of the Finance Act repealed section 10G(7) on 2 July 2005 and the Municipality ought to have complied with the provisions of the Finance Act and the Rates Act when imposing rates in respect of the 2006/2007, 2007/2008 and 2008/2009 financial years respectively.

[36] The Municipality, on the other hand, urges us to adopt the view of the Supreme Court of Appeal. The Municipality argues that the Court correctly interpreted the various statutes which facilitated the transition from the old-order provincial Ordinances to the current rating legislation. It further contends that a purposive approach to interpretation supports reading the phrase "legislation repealed by this Act" in section 88(1) of the Rates Act as not only including legislation specified in the Schedule of repealed legislation, but also referring to legislation repealed by the Rates Act by virtue of the fact of its commencement – such as section 10G(7).

[37] The argument advanced by the applicants cannot be sustained. I recognise that the term "repealed by this Act" could be construed narrowly to mean "in terms of this Act", and this narrow interpretation might have us turn our attention to legislation specifically repealed in terms of the relevant Act.[24] Indeed, had the phrase "in terms of this Act" in fact been used by the Legislature, we may well be straining the text too far to suggest that there could be any other reasonable construction. However, that is not the wording that we are presented with here.

[38] Rather, the ordinary meaning of the phrase "repealed by this Act" does not preclude the possibility of a broader construction as referring to legislation "repealed by the coming into effect of this Act" or "repealed as a result of this Act". Further as I explain below, the narrower interpretation potentially results in absurdity whereas the broader interpretation better meets the purposes of the legislative scheme.

[39] It is established that the ordinary meaning of the words in a statute must be determined in the context of the statute (including its purpose) read in its entirety.[25] It is important when considering the legislative purpose of the Rates Act not only to have regard to the provisions of that Act but also to take into account the broader context

[24] In this case, section 95 of the Rates Act read with the Schedule to that Act.

[25] See *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC) at para 61 and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 90.

within which it was passed and the relationship between the various statutory enactments that have sought to restructure local government.

[40] A municipality's authority to impose rates and levies is derived from section 229 of the Constitution.[26] The purpose of a municipality's revenue-raising powers is to finance a municipality's performance of its constitutional and statutory objects and duties as set out in sections 152(1) and 153 of the Constitution. These include the provision of services to communities in a sustainable manner, promoting social and economic development and providing for the basic needs of the community. These objects are integral in the task of constructing society in the functional areas of local government.[27]

[41] The statutory framework for the transition to democratic local government envisaged a staggered process implemented over several years. The first step in this process was the adoption of the Transition Act. This Court stated in *Executive Council,*

[26] Section 229(1) of the Constitution, under the heading "[m]unicipal fiscal powers and functions", provides:

> "Subject to subsections (2), (3) and (4), a municipality may impose—
>
> (a) rates on property and surcharges on fees for services provided by or on behalf of the municipality; and
>
> (b) if authorised by national legislation, other taxes, levies and duties appropriate to local government or to the category of local government into which that municipality falls, but no municipality may impose income tax, value-added tax, general sales tax or customs duty."

[27] *Democratic Alliance and Another v Masondo NO and Another* [2002] ZACC 28; 2003 (2) SA 413 (CC); 2003 (2) BCLR 128 (CC) at para 17.

Western Cape Legislature, and Others v President of the Republic of South Africa and Others:[28]

> "The Transition Act was intended and drafted to govern the reconstruction of local government from A to Z. . . . Its principles and terms were separately negotiated. It was then passed by the 'old' Parliament as part of the statutory scaffolding agreed upon by the negotiating parties as necessary before, during and after the transition of national and provincial government."[29]

[42] In 1996, a number of provisions were inserted into the Transition Act by the Local Government Transition Act Second Amendment Act.[30] In particular, section 10G(6) and (7) were introduced to regulate the powers of local government to impose rates and levies and conferred a freestanding rate-levying competence on municipalities. The primary purpose of these subsections was "to ensure that every municipality conducts its financial affairs in an effective, economical and efficient manner, with a view to optimising the use of its resources in addressing the needs of the community."[31]

[43] The Transition Act was due to lapse on 30 April 1999. However, the life of its financial provisions was extended on at least two occasions. The first instance was in 1998, by means of a constitutional amendment,[32] which extended the life of the whole of

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[28] [1995] ZACC 8; 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC).

[29] Id at para 162.

[30] 97 of 1996.

[31] *Robertson* above n 3 at para 41.

[32] Constitution of the Republic of South Africa Amendment Act 65 of 1998.

the Transition Act for a limited period. The second was by an amendment to the Structures Act, which kept in place section 10G for an indefinite period.[33] During this period, the old-order legislation in terms of which municipalities could levy rates on property remained in force.[34]

[44] The extension of the life of section 10G demonstrates a recognition that municipalities would need time to develop systems and processes required by the new legislative framework and an intention to assist municipalities with the transition to the new regime. The legislative scheme has been directed at ensuring a facilitated rating mechanism for municipalities until uniform and consistent rating systems have been put in place. As the final step in that process, the Rates Act recognises that it still needs to accommodate for transitional adjustment. It does so through its transitional arrangements relating to valuation and rating[35] and the use of existing valuation rolls.[36]

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[33] Local Government: Municipal Structures Amendment Act 33 of 2000. Section 93(4) was inserted into the Structures Act and provides:

> "Despite anything to the contrary in any other law and as from the date on which a municipal council has been declared elected as contemplated in item 26(1)(a) of Schedule 6 to the Constitution—
>
> (a) section 10G of the Local Government Transition Act, 1993 (Act No. 209 of 1993), read with the necessary changes, apply to such a municipality; and
>
> (b) any regulation made under section 12 of the Local Government Transition Act, 1993 (Act No. 209 of 1993), and which relates to section 10G of that Act, read with the necessary changes, apply to such a municipality."

At the same time as this step was taken, further provisions were inserted in the Transition Act relating to property valuations for the purpose of the imposition of rates.

[34] In this case, the relevant legislation is the Municipal Ordinance (Cape) 20 of 1974.

[35] Section 88 of the Rates Act.

[36] Id section 89.

[45] It is significant that section 179(2) of the Finance Act does not simply provide a date on which the legal force of the repeal would be effected. Rather, the Legislature specifically built a scheme where the legislative trigger for the repeal would lie in one statute (Finance Act), but it would only be the coming to life of another legislative enactment (Rates Act) that would give final legal force to the repeal. Viewed in this manner, it must be accepted that but for the enactment of the Rates Act, the repeal of section 10G(7) would never have taken effect.

[46] Counsel for the applicants persisted with the submission that if the purpose of section 88 of the Rates Act were to keep alive section 10G(7) then its language would have made this clear by listing section 10G(7) under the Schedule to the Act. This, however, misses the point. The Legislature did not have to refer back specifically to section 10G(7) or to the Finance Act, since the very scheme of the transitional legislation already contemplates that they work hand-in-hand. In this unique legislative suite, it is necessary to read the Rates Act and the Finance Act in tandem and to recognise that the various provisions in the different statutes work together in a coordinated scheme.

[47] This principle is aptly captured in *Rates Action Group v City of Cape Town*:[37] "where a particular statute forms part of a suite of statutes, then it is logical to analyse that suite as a whole in order to determine what the overall legislative scheme is."[38]

[37] 2004 (5) SA 545 (CPD) (*Rates Action Group*). This decision was confirmed on appeal in *Rates Action Group v City of Cape Town* 2006 (1) SA 496 (SCA).

[48] The applicants sought to rely on *Rates Action Group*[39] as authority for the view that section 10G(7) was meant to play no further role once the Rates Act came into effect. I see it differently. It is true that in that case the suggestion was made that the relevant provisions of the Transition Act would no longer serve any purpose once the Rates Act came into operation. But one has to recognise that the transitional provisions of the Rates Act – in particular section 88 – were not under consideration there. And therefore the extent to which the Rates Act itself provided for the continuation of the life of section 10G(7), amongst other provisions, was not within that Court's sights.

[49] The recognition that it is only once "the [Rates Act] has been enacted, [that] the relevant provisions of the [Transition Act] will finally fall away"[40] drives home the point that the repeal of section 10G(7) was provided for not only through the Finance Act, but also through the coming into force of the Rates Act. The purpose of the legislative scheme and the Rates Act has been to provide for a facilitated rating mechanism and consistency in the rating process by local government. As the final step in that process, the Rates Act recognises that it still needs to accommodate for transitional adjustment. And it does so through its transitional arrangements relating to valuation and rating, and the use of existing valuation rolls.

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[38] *Rates Action Group* above n 37 at para 41; see also paras 39-45 more generally.

[39] Id.

[40] Id at para 46.

[50] I therefore agree with the Supreme Court of Appeal that it is difficult to comprehend why the Legislature would have intended to allow valuation and rating to continue under the old-order legislation, but to exclude municipalities that were operating under the Transition Act from that benefit. As counsel for the Municipality argued before us, this would be at odds with the broader objectives of trying to help, rather than hinder, the ability of municipalities finally to come into line with the Rates Act. It would also sit uncomfortably with the provisions allowing for the continued use of old valuation rolls by municipalities that had been imposing rates in terms of the Transition Act.

[51] To conclude on this point: on a proper interpretation, section 179(2) of the Finance Act suspended the legal operation of the repeal of section 10G(7) and provided for its continued existence alongside the Finance Act. The repeal of section 10G(7) depended on the enactment of the Rates Act and was subject to the transitional provisions of section 88 of that Act. It follows that section 10G(7) applied throughout the period covering the contested imposts and the applicants' attack on the validity of the rates on the ground described above fails.

[52] I have read the dissenting judgments of my brother Jafta J as well as my sister Khampepe J. Both would conclude that section 10G(7) was repealed by the Finance Act and did not survive the coming into effect of the Rates Act. However, they hold different views as to the construction and effect of the word "enacted" used in section 179(2).

While respectfully differing from Khampepe J on her final conclusion relating to the survival of section 10G(7), I would align myself with the approach she adopts to the interpretation of "enacted" as used in section 179(2) – it cannot have been intended that for 13 months there should be no regulation of the rating of rural properties by municipalities.

[53] The next leg for consideration is whether the Municipality complied with statutory prescripts when it imposed the property rates during the relevant financial years. I consider each challenge in chronological order.

Challenges in respect of each financial year

(a) Unauthorised amendment of rates in the 2002/2003 financial year

[54] On 13 June 2002, the Municipality's Council (Council) approved the budget for the 2002/2003 financial year. It approved a rural levy for properties calculated by means of a sliding scale,[41] as opposed to a calculation based on a valuation roll. This was done because the rural properties had not yet been valuated. On 21 June 2002, the Municipality published notices of its budget, rates and tariffs for the 2002/2003 financial year, including the sliding-scale rural levy, and indicated that written objections must be lodged within 14 days.

[41] This was based on the size of the affected land unit subject to a maximum imposition of R4500, regardless of the number of land units of which the farm might be comprised.

[55] On 29 July 2002, after receiving objections, the Municipality confirmed the sliding-scale determinations but also resolved to obtain a provisional valuation of all properties. This valuation exercise was completed during 2002 and the Municipality published notices in local newspapers advising that a general valuation roll was open for inspection and invited objections in terms of the relevant provincial property valuation ordinance.[42] On 26 May 2003, before the end of the financial year and in accordance with the general valuation, the Council resolved that rural properties would be subject to a property rate of 0.2474c in the Rand for the 2002/2003 year rather than the sliding-scale levy. The amounts paid in terms of the sliding-scale levy would be set off against the payment of the rate in accordance with the valuation roll.

[56] Before turning to an assessment of the complaints raised by the applicants, it is useful to set out the scheme of section 10G(7) insofar as it is relevant to this discussion. Section 10G(7)(a)(i) empowers a municipality to impose, by resolution, property rates in respect of certain immovable property. Section 10G(7)(a)(ii) empowers a municipality, by resolution, to impose levies, fees, taxes and tariffs in respect of any function or service of the municipality. Section 10G(7)(c) provides that, after a resolution as contemplated in sections 10G(7)(a)(i) or 10G(7)(a)(ii) is passed, a notice must be displayed stating the general purport of the resolution, the date on which the resolution shall come into operation, the date on which the notice is first displayed, and inviting objections within 14 days after the date on which the notice is first displayed. Section 10G(7)(b)(ii) allows

[42] Property Valuation Ordinance, 1993 (Cape).

a municipality to amend or withdraw a determination in respect of imposts other than property rates and determine the commencement date of the resolution, which must be at least 30 days after the date on which the resolution was taken. Section 10G(7)(d)(ii) provides that where an objection is lodged, the municipality must consider the objection and may withdraw or amend the determination. It may also determine a date other than that provided for in section 10G(7)(b)(ii) on which the determination or amendment shall come into operation, whereupon a notice must be displayed stating the general purport of the resolution.

[57] The High Court and the Supreme Court of Appeal agreed with the applicants' contention that the sliding-scale levy determined by the Municipality on 29 July 2002 was not in fact a levy, but an unlawfully imposed rate. This is because a levy could only be determined in respect of "any function or service of the municipality." The sliding-scale 'levy' imposed by the Municipality was not based on any such service or function, but rather was based on property ownership. It was therefore truly a property rate.[43]

[58] It has been the applicants' position that the 26 May 2003 resolution amounted to an amendment of the earlier property 'rate'. They argue that—

[43] See *Gerber and Others v Member of the Executive Council for Development Planning and Local Government, Gauteng, and Another* 2003 (2) SA 344 (SCA).

(i) section 10G(7)(b)(ii) confines the power of amendment to charges other than property rates, and therefore the 26 May 2003 resolution amounted to an unauthorised amendment of an earlier property rate and was accordingly *ultra vires*;

(ii) the Municipality failed to publicly give notice of its 26 May 2003 resolution in terms of section 10G(7)(d)(ii); and

(iii) the resolution purported to take effect immediately (ie on 26 May 2003), whereas section 10G(7)(b)(ii) required that it had to determine a date 30 days or more after the date of the resolution on which it would come into operation.[44]

[59] The Supreme Court of Appeal rejected the applicants' first argument. It held that the applicants could not, on the one hand, argue that the levy was invalid as it was in truth a rate and, on the other hand, complain that "when it was replaced by a lawful rate, that it should have been amended as if it were a levy."[45] I agree. The applicants cannot have it both ways and their contention on this score must fail. The Supreme Court of Appeal did not deal with the other complaints of the applicants in respect of this financial year. I do, however, find it necessary to address the other contentions.

[44] This point was not taken in the farm owners' answering affidavit, but was raised in argument before the Supreme Court of Appeal and in their papers in this Court. The Municipality did not object to the point being raised.

[45] Supreme Court of Appeal judgment at para 34.

[60] The High Court found in favour of the applicants that the 26 May 2003 resolution was an amendment of the earlier resolution, and was not authorised by section 10G(7). The High Court's reasoning focused on the concern that the Municipality did not, after amending its determination in the light of objections received and valuations process undertaken, display a notice "stating the general purport of the resolution" as required by section 10G(7)(d)(ii) read with section 10G(7)(c)(i) of the Transition Act. The High Court held that this constituted material non-compliance with the requirements of section 10G(7).

[61] In my view, the High Court failed to properly assess whether the steps taken by the Municipality in relation to that financial year's imposts were, ultimately, substantially effective when measured against the purpose of the relevant provisions and the scheme as a whole. It is true that the Municipality did not display any notice regarding the resolution of 26 May 2003. However, the Legislature could not have envisaged that this non-compliance should void the whole process in circumstances where the Municipality had in fact engaged in a public participation process and was responsive thereto. After receiving objections to the notification of the sliding-scale levy, the Municipality engaged with the public and undertook to complete the valuations process, which it did. It issued notices regarding that valuation and made an amendment in line with the outcome thereof. In line with the approach set out earlier, the measures taken by the Municipality were substantially effective in achieving the objects of section 10G(7) in particular and the legislative scheme as a whole.

[62] In respect of the third contention by the applicants, once again their complaint relies exclusively on provisions relating to the amendment of imposts other than rates (ie section 10G(7)(b)(ii)). For the reasons set out above,[46] it is not open to the applicants to argue both that the levy was invalid as it was in truth a rate and then also complain that it should have been amended as if it were a levy.

(b) Failure to call for objections before the date of commencement of rates for the 2004/2005 financial year

[63] The notice of the resolution levying rates for the 2004/2005 financial year was published in local newspapers on 8 July 2004. The date of commencement of the rates was 1 July 2004. The notice provided for objections by 30 July 2004. It further stated that payment for rates had to be made on or before 30 September 2004 or in 12 monthly payments payable before or on the 25th day of each month.

[64] The applicants contend that the fact that the rates had become due before the commencement of the 14-day objection period provided for by section 10G(7)(c)(iv) was a fatal flaw and effectively amounted to a retrospective imposition of rates. They rely on the minority reasoning in *Kungwini Local Municipality v Silver Lakes Home Owners*

[46] See [59] above.

Association and Another[47] and argue that they were faced with an accomplished fact and, as a result, were in a weaker position to object.[48]

[65] The High Court and the Supreme Court of Appeal rejected the minority opinion in *Kungwini*, concluding that the resolution remained open for amendment and that there was therefore a valid purpose in calling for objections. I agree. The ratepayers were not required to make payment on 1 July 2004. The period afforded for payment allowed sufficient time for reconsideration of the rate in the light of any objections received to the notice and the relevant resolutions could be amended where necessary. There was therefore substantial compliance with the statutory requirements and a meaningful purpose to the objections process. The attack accordingly fails.

(c) The general purport requirement of the rating resolution notices in the 2004/2005 to 2008/2009 financial years

[66] The chief executive officer of the municipality is, in terms of section 10G(7)(c)(i), obliged to cause a notice to be displayed stating the "general purport" of a rates resolution after it has been passed.

[67] The applicants challenge the validity of the notices published by the Municipality in respect of the rates for the 2004/2005 to 2008/2009 financial years, inclusive, in that

[47] 2008 (6) SA 187 (SCA) (*Kungwini*).

[48] Id at para 31.

these notices failed to specify the general rural rebate (that is, the general rebate on ordinary residential rates applying to all farm properties). By failing to specify the general rebate in the notice itself, the applicants submit that the notices did not indicate the general purport of the resolution. The applicants rely on *Kungwini*, where the Supreme Court of Appeal stated that the object of the general purport requirement is that ratepayers "should know what rates they would have to pay, and from when those rates would be payable."[49]

[68] The High Court and the Supreme Court of Appeal held that the notices adequately reflected the general purport of the resolution since interested parties were advised that the resolutions were available for inspection.

[69] I agree that the argument on behalf of the applicants is flawed. Their reliance on *Kungwini* is misplaced as the facts of that case are distinguishable. *Kungwini* was concerned with a notice that itself had contradictory content and which could mislead ratepayers.[50] That is not the situation here. The notices in this case indicated that the rates referred to all rateable properties, although it did not refer to rural properties and mention the rural rebates in particular. It did, however, state that rebates would be applied to certain properties and that the detail of the resolutions was available for

[49] Id at paras 53 and 55.

[50] Id at paras 38 and 55.

inspection. It follows that the information was readily available. Therefore, there was due compliance with the general purport requirement.[51]

(d) Levying rates in terms of the procedures set out in the Finance Act for the 2005/2006 to 2008/2009 financial years

[70] As previously stated, most of the provisions of the Finance Act came into operation on 1 July 2004. For the financial years following the commencement of the Finance Act, the Municipality continued to impose rates on the basis of section 10G(7). There were instances, however, where the Municipality only complied with the requirements of the Finance Act in the manner that it levied the rates.

[71] The applicants contend that, to the extent that the Municipality relied on section 10G(7) as the source of its power, it should have complied with the procedures therein. In this regard the applicants argue that the notices published in respect of the rating resolutions for these years omitted to state that objections could be lodged within 14 days after the date on which the notice is first displayed, which is a requirement set out in section 10G(7)(c)(iv).

[72] The applicants submit that the Finance Act process is not inconsistent with the Transition Act. The former allows for a notice and comment procedure before the

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[51] See also *Nokeng* above n 14 at para 24.

resolution imposing property rates is passed whilst the latter regulates the process after the passing of such resolution. Therefore both should be followed.

[73] This argument is fallacious and I agree with the High Court and the Supreme Court of Appeal. The High Court as well as the Supreme Court of Appeal held that the Municipality was not required to comply with both statutes (Finance Act and Transition Act) at the same time. The Courts stated that Chapter 4 of the Finance Act regulated the manner of levying rates from the date of commencement. The Finance Act imposed requirements inconsistent with the Transition Act and, to the extent that this was so, the provisions of the Finance Act prevailed.

[74] In my view, it would be absurd for the Legislature to have intended the Municipality to perform the notice and comment exercise twice (both before and after the final budget had been adopted). That would place an undue administrative burden on local government. In the result, the Municipality complied with the requirements of the Finance Act and, in any event, substantially complied with the objects of the requirements in section 10G(7). This is because the requisite notices were published, they stated that the documents were available for public inspection, and they called for objections from the public.

(e) Failure to promulgate rates resolutions for the 2006/2007 to 2008/2009 financial years

[75] The applicants submit that the Municipality was obliged, in terms of section 14(2) of the Rates Act, to promulgate resolutions levying rates by publishing the resolution in the *Provincial Gazette*. Furthermore, they contend that the Municipality's failure to promulgate the resolutions for the rates imposed in the years 2006/2007 to 2008/2009 is inconsistent with the rule of law and therefore fatal to those rates. This argument was premised on the contention that section 10G(7) was repealed by section 179 of the Finance Act and the Rates Act therefore applied to the levying of rates after 2005.

[76] The High Court upheld the argument of the applicants. The Supreme Court of Appeal disagreed and held that it was not necessary for the Municipality to comply with the Rates Act since section 10G(7) was still in operation by virtue of the transitional provisions in the Rates Act. It was therefore not necessary to comply with the Rates Act.

[77] I have already dealt with the interpretation of the relevant statutory provisions and have concluded that section 10G(7) survived the commencement of the Rates Act. It follows that the Municipality was not obliged to comply with section 14(2) of the Rates Act. The applicants' argument on this issue must therefore fail.

[78] As has become clear from the above, I find that the applicants' challenges have no merit. The appeal therefore falls to be dismissed. Before proceeding to the order, however, there is one final issue that I find necessary to address.

[79] In the light of the nature of the issues raised in this matter, it is opportune to recall the sentiment of this Court expressed by Langa DP in *Walker*:

> "Local government is as important a tier of public administration as any. It has to continue functioning for the common good; it, however, cannot do so efficiently and effectively if every person who has a grievance about the conduct of a public official or a governmental structure were to take the law into his or her own hands or resort to self-help by withholding payment for services rendered. That conduct carries with it the potential for chaos and anarchy and can therefore not be appropriate. The kind of society envisaged in the Constitution implies also the exercise of responsibility towards the systems and structures of society. A culture of self-help in which people refuse to pay for services they have received is not acceptable. It is pre-eminently for the courts to grant appropriate relief against any public official, institution or government when there are grievances. It is not for the disgruntled individual to decide what the appropriate relief should be and to combine with others or take it upon himself or herself to punish the government structure by withholding payment which is due."[52]

[80] Effective cooperation between citizens and government at local level is a foundational building block of our democracy. The State must of course uphold the rule of law and ensure its obligations are discharged. But, at the same time the culture of non-payment for municipal services has, as this Court has said before, "no place in a

[52] *Walker* above n 11 at para 93.

constitutional State in which the rights of all persons are guaranteed and all have access to the courts to protect their rights."[53]

Order

[81] In the result, the following order is made:

1. Condonation is granted.
2. The applicants are ordered to pay the costs of both condonation applications.
3. Leave to appeal is granted.
4. The appeal is dismissed.
5. There is no order as to costs in the appeal.

JAFTA J:

[82] I have read the judgments prepared by Mhlantla AJ (the main judgment) and Khampepe J. I agree that leave to appeal and condonation should be granted. However, I disagree with the main judgment that the appeal should be dismissed. The difference between us lies in the construction of the word "enacted" used in section 179(2) of the Finance Act and the interpretation of section 88 read with section 95 of the Rates Act.

[53] Id at para 92. See also *Chief Lesapo v North West Agricultural Bank and Another* [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC) at para 11, where this Court stated that "[n]o one is entitled to take the law into her or his own hands. Self help, in this sense, is inimical to a society in which the rule of law prevails".

[83] The main judgment construes section 88 of the Rates Act as preserving and extending the operation of section 10G of the Transition Act to 2 July 2011. I read the Rates Act differently and conclude that the remnants of section 10G were repealed before the Rates Act came into force.

[84] The main judgment interprets the word "enact" in section 179(2) of the Finance Act to mean the date on which the Rates Act came into force. Proceeding from this premise, the main judgment holds that the phrase "repealed by this Act" in section 88 of the Rates Act must be accorded a broader construction which includes "repealed by the coming into effect of this Act".[54] I am unable to agree. In the first place, there is no link, in my view, between section 88 of the Rates Act and section 10G of the Transition Act. As illustrated in this judgment, section 10G was repealed a year before the Rates Act came into operation.

[85] As to the meaning of "enacted", I demonstrate in this judgment that this word has been read and understood by this Court to mean the signing of a Bill into law by the President. Therefore, the date on which a statute is enacted is the date on which the Bill is assented to and signed into law by the President. It is not, in my view, the date on which the statute comes into effect. Having given this summary, it is now convenient to

[54] Main judgment at [38] above.

set out in detail my reasons for reaching a conclusion different to the one arrived at in the main judgment.

Litigation background

[86] The Municipality instituted these proceedings in the High Court for an order declaring that the rural levies it imposed on properties falling within its area of jurisdiction for the financial years 2001/2002 and 2002/2003 were lawful and valid. The properties in respect of which the levies were imposed belong to the applicants (landowners). In addition, the Municipality sought an order declaring that the rates imposed in respect of the same properties for the financial years commencing in July 2003 to June 2009 were lawful and valid. A financial year of a municipality starts on 1 July of each year and ends on 30 June of the following year.

[87] The landowners opposed the application on various grounds, including legality and non-compliance with procedural requirements of a number of statutes. But before the hearing in the High Court, the landowners conceded that rates for the 2003/2004 financial year were lawfully imposed. For its part, the Municipality conceded that levies for the 2001/2002 financial year were not lawfully imposed. This meant that there was no longer a *lis* between the parties in respect of these financial years.

[88] The "levies" for the financial year 2002/2003 were still in dispute. As were the rates for the years 2004/2005, 2005/2006, 2006/2007, 2007/2008 and 2008/2009. The

High Court found that the levies for the 2001/2002 financial year and the rates for the 2002/2003 financial year were not lawfully imposed. This finding was reached despite the fact that the Municipality had conceded unlawfulness in respect of the 2001/2002 financial year. The High Court found that the rates for the 2004/2005 and 2005/2006 years were lawfully imposed and ordered the landowners to pay them. In respect of the years 2006/2007, 2007/2008 and 2008/2009, the High Court held that the rates were not lawfully imposed because statutory requirements were not followed in imposing them.[55]

[89] The High Court granted parties on both sides leave to appeal to the Supreme Court of Appeal. The Supreme Court of Appeal dismissed the appeal by the landowners and upheld the cross-appeal by the Municipality. The Supreme Court of Appeal declared that the rates for 2002/2003 and the other financial years were lawfully imposed and ordered the landowners to pay them.

[90] In this Court the landowners seek leave to appeal against the order of the Supreme Court of Appeal. There can be no doubt that the matter raises constitutional issues. It involves the exercise of public power, and legality was raised as a defence against the exercise of such power. The interests of justice also favour the granting of leave because there are prospects of success.

[55] *Berg River Municipality v Liebenberg NO and Others* [2011] ZAWCHC 371 (High Court Judgment).

Issues

[91] The first issue for determination is the question of legality. I consider this to be the main issue because, on my construction, it covers five of the seven financial years in dispute. These are the 2004/2005, 2005/2006, 2006/2007, 2007/2008 and 2008/2009 financial years. The issue is whether the Municipality was empowered by section 10G(7) to impose the impugned rates. The second issue is whether the rates imposed for the 2002/2003 financial year were invalid because they were not authorised by legislation.

Legality

[92] At the outset it is important to define the content of the legality point raised. The landowners' argument is not that the Municipality had no authority to impose the rates in question. Indeed in respect of the period after 2 July 2005, the Rates Act authorised municipalities to impose rates on rural immovable property. Rather the question is whether the impugned rates were unlawful because the provision on which the Municipality relied for imposing them was no longer in force. In other words, whether the authority for imposing the rates in question existed elsewhere, other than in the provision relied on. It is common cause that the Municipality relied on section 10G(7) as the source of its authority to impose rates for the entire period. Therefore, the issue is whether section 10G(7) was in force at the relevant time.

[93] Before addressing the question, it is useful to make one observation. In our law, administrative functions performed in terms of incorrect provisions are invalid, even if

the functionary is empowered to perform the function concerned by another provision.[56] In accordance with this principle, where a functionary deliberately chooses a provision in terms of which it performs an administrative function but it turns out that the chosen provision does not provide authority, the function cannot be saved from invalidity by the existence of authority in a different provision.

[94] This general rule admits of only one exception. This is where it is clear from the facts that the functionary had elected to rely on the correct provision but mistakenly referred to an incorrect provision.[57]

[95] The general principle was affirmed by this Court in *Minister of Education v Harris.*[58] In issuing a notice preventing children from commencing schooling before the year in which they turned seven, the Minister of Education invoked a provision which did not empower him to issue the notice. Having realised the error, the Minister sought to rely on the right provision. This Court rejected the argument that the reliance on the wrong provision was immaterial because the power was conferred on the Minister by another provision. The Court held that the notice was invalid because the provision in terms of which it was issued did not empower the Minister to issue the notice.

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[56] *Administrateur, Transvaal v Quid Pro Quo Eiendomsmaatskappy (Edms.) Bpk.* 1977 (4) SA 829 (A) at 841.

[57] *Howick District Landowners Association v uMngeni Municipality* 2007 (1) SA 206 (SCA) and *Latib v Administrator, Transvaal* 1969 (3) SA 186 (T).

[58] [2001] ZACC 25; 2001 (4) SA 1297 (CC); 2001 (11) BCLR 1157 (CC).

[96] As mentioned earlier, in this case the Municipality deliberately relied on section 10G(7) as authority for imposing the rates. This is the footing on which the case was pursued in the High Court and the Supreme Court of Appeal. If it turns out that section 10G(7) was no longer in force, it follows that the imposition of the rates must be invalid. The reason being that it was not authorised and consequently amounted to a breach of the principle of legality.

Relying on section 10G

[97] The landowners argued in the other courts and in this Court, that section 10G(7) was repealed on 2 July 2005 when the Rates Act came into operation. They submitted that the rates imposed after that date were invalid because the provision on which the Municipality relied was no longer in force. As appears below the submission is not accurate insofar as it refers to the date on which section 10G(7) was repealed. That section was repealed on the date on which the Rates Act was enacted.

[98] Relying on section 89 of the Rates Act, the Supreme Court of Appeal rejected the argument advanced by the landowners. It held that the construction that says section 10G(7) ceased to operate when the Rates Act came into force fails to give meaning to section 89 of the Rates Act. The Court said:

> "That interpretation fails, in my view, to give meaning to section 89: that section specifically states that a municipality may, until it prepares a valuation roll in terms of the Rates Act, continue to use a valuation roll in force before the commencement of the Act,

> and to levy rates against property values as shown on that roll. The clear implication of this is that the Municipality could continue to levy rates in terms of section 10G(7) of the Transition Act and to use the valuation roll prepared pursuant to that section. The rating provisions of the Transition Act were thus in force until 2 July 2005: and the Transition Act was designed for the very purpose of bridging the period between the operation of the provincial ordinances and the enactment of the legislation envisaged in the Constitution. Moreover, section 10G was introduced to ensure that municipalities conducted their affairs in an effective fashion, using the rating provisions to ensure their financial resources, and to meet their developmental obligations. It would be most odd if its provisions fell away in 2005 whereas those of the Ordinances remained in place. It would be particularly odd as its effect would be to remove the legislation introduced in part to enable rating of rural properties that had fallen outside the rating ordinances, thereby once more excluding those properties from rating. There is nothing to indicate that it had been decided to exclude rural properties from rating and that this was the purpose of this provision."[59]

[99] My first difficulty with the statement by the Supreme Court of Appeal is that the Court read section 89 of the Rates Act[60] as authorising the levying of rates when this is not the position. The heading of section 89 makes it plain that the section is concerned with a transitional arrangement relating to the continued use of existing valuation rolls

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[59] Supreme Court of Appeal judgment above n 1 at para 18.

[60] Section 89 of the Rates Act provides:

> "(1) Until it prepares a valuation roll in terms of this Act, a municipality may—
>
> (a) continue to use a valuation roll and supplementary valuation roll that was in force in its area before the commencement of this Act; and
>
> (b) levy rates against property values as shown on that roll or supplementary roll.
>
> (2) If a municipality uses valuation rolls and supplementary valuation rolls in terms of subsection (1) that were prepared by different predecessor municipalities, the municipality may impose different rates based on the different rolls, so that the amount payable on similarly situated properties is more or less similar.
>
> (3) The operation of this section lapses six years from the date of commencement of this Act, and from that date any valuation roll or supplementary valuation roll that was in force before the commencement of this Act may not be used."

and supplementary valuation rolls. The section authorised municipalities to use existing valuation rolls until one of two events occurred. The one event was until a valuation roll is prepared in terms of the Rates Act and the other was until section 89 lapsed, which occurred on 2 July 2011.

[100] The words "levy rates against property values as shown on that roll or supplementary roll" must be read in the context of the section. That context is the use of existing valuation rolls. Read in this context those words did not empower municipalities to levy rates but indicated the restricted use to which the existing rolls could be put. They could be used for levying rates only and nothing else. It will be recalled that rates may be imposed only on immovable property reflected on a valuation roll. And for a valuation roll to be used in terms of section 89, it must have been in force immediately before the commencement of the Rates Act.

[101] Section 88 is the provision that permitted the continued use of legislation which applied before the Rates Act came into force.[61] I return to this section when dealing with differences between this judgment and the main judgment.

[102] The second difficulty I have with the passage quoted above from the judgment of the Supreme Court of Appeal is that it holds that the Transition Act was "designed for the very purpose of bridging the period between the operation of the provincial ordinances

[61] Section 88(1) is quoted in [106] below.

and the enactment of the legislation envisaged in the Constitution."[62] This is inaccurate and section 179 of the Finance Act illustrates this point. In terms of that section, the Transition Act was repealed but the provincial ordinances were left intact. These ordinances were repealed a year later by the Rates Act.

[103] The Supreme Court of Appeal found it odd that section 10G would have ceased to operate in 2005 whereas the ordinances were kept in operation by the transitional provisions of the Rates Act. Proceeding from this premise the Court said:

> "To hold thus that the Ordinances were operative before 2 July 2005, and were repealed on that date by the coming into operation of the Rates Act, but that their operation continued because of the transitional provisions, whereas section 10G was not covered by the transitional provisions, does give rise to an absurdity. In my view, the transitional provisions of both the Finance Act and the Rates Act clearly kept the empowering provisions of section 10G alive until the period referred to in section 89(3) had expired. Throughout the period in issue, therefore, section 10G(7) empowered the Municipality to impose rates. However, when the Finance Act came into operation it determined the procedures to be followed in the municipal budgetary process including rating."[63]

[104] The finding by the Supreme Court of Appeal in this passage, to the effect that section 10G(7) empowered municipalities to levy rates throughout the period in issue, contradicts the Court's earlier finding. As mentioned before, the Court held that section 89 of the Rates Act empowered municipalities to charge rates. I do not share the absurdity noted by the Supreme Court of Appeal in the construction of the transitional

[62] Supreme Court of Appeal judgment above n 1 at para 18.

[63] Id at para 19.

provisions of the Rates Act that says the ordinances remain in force in circumstances where section 10G(7) is no longer in operation. As is apparent below, section 10G(7) was repealed a year before the Rates Act came into force. Therefore, its operation could not be extended by the Rates Act, no matter how absurd this may be perceived to be. Accordingly I find that none of the bases on which the Supreme Court of Appeal relied, for holding that section 10G(7) applied for the entire period, is valid.

[105] The main judgment holds that section 88 must be interpreted to mean that section 10G(7) continued to apply after the Rates Act had come into force. I have two difficulties with this interpretation. The first is that section 88 extends the operation of legislation repealed by the Rates Act only. An inquiry into whether the Rates Act repealed section 10G(7) reveals that it did not. The second difficulty is that when the Rates Act came into operation, section 10G(7) was no longer in force. I elaborate on each of these below.

Did section 88 of the Rates Act keep section 10G(7) in operation?

[106] The answer to this question lies in the interpretation of section 88(1) read with section 95 of and the Schedule to the Rates Act.[64] Section 88(1) provides:

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[64] Section 95 provides:

> "The legislation specified in the Schedule is—
>
> (a) amended to the extent indicated in the third column of the Schedule; and
>
> (b) repealed to the extent indicated in the third column of the Schedule."

> "Municipal valuations and property rating conducted before the commencement of this Act by a municipality in an area in terms of legislation repealed by this Act, may, despite such repeal, continue to be conducted in terms of that legislation until the date on which the valuation roll covering that area prepared in terms of this Act takes effect in terms of section 32(1)."

[107] The plain reading of this section shows that it retains the use of previous legislation in the valuation of property and also in imposing rates. The section states that municipal valuations may continue to be conducted in terms of the previous legislation. It adds that the rating of property may continue to be conducted in terms of such legislation subject to two conditions. The first condition is that the legislation must have been used to conduct the valuations and rating before the commencement of the Rates Act. The second condition is that the legislation in question must have been repealed by the Rates Act.

[108] Both conditions must be met before section 88(1) may be invoked. This is so because the section merely preserves the use of legislation that was applied before the Rates Act came into operation, provided that such legislation was repealed by the Rates Act. In other words the two conditions are jurisdictional facts which must be present before section 88 can be applied. In this case, the Municipality has not established that it had previously used section 10G(7) to valuate and charge rates on rural immovable property. It was certainly its first attempt to impose rates on the properties which is the subject matter of these proceedings. Initially and for the first two financial years (2001/2002 and 2002/2003), the Municipality imposed levies on the properties in

question and not rates. Yet, section 88 specifically retains the charging of rates under the previous legislation. However, the High Court found that the impost for 2002/2003 constituted a rate and not a levy.

[109] Section 229 of the Constitution[65] distinguishes rates from other levies. In its ordinary meaning the word rates does not include levies.[66] Therefore, the use of

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[65] Section 229 of the Constitution reads:

> "(1) Subject to subsections (2), (3) and (4), a municipality may impose—
>
> (a) rates on property and surcharges on fees for services provided by or on behalf of the municipality; and
>
> (b) if authorised by national legislation, other taxes, levies and duties appropriate to local government or to the category of local government into which that municipality falls, but no municipality may impose income tax, value-added tax, general sales tax or customs duty.
>
> (2) The power of a municipality to impose rates on property, surcharges on fees for services provided by or on behalf of the municipality, or other taxes, levies or duties—
>
> (a) may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across municipal boundaries, or the national mobility of goods, services, capital or labour; and
>
> (b) may be regulated by national legislation.
>
> (3) When two municipalities have the same fiscal powers and functions with regard to the same area, an appropriate division of those powers and functions must be made in terms of national legislation. The division may be made only after taking into account at least the following criteria:
>
> (a) The need to comply with sound principles of taxation.
>
> (b) The powers and functions performed by each municipality.
>
> (c) The fiscal capacity of each municipality.
>
> (d) The effectiveness and efficiency of raising taxes, levies and duties.
>
> (e) Equity.
>
> (4) Nothing in this section precludes the sharing of revenue raised in terms of this section between municipalities that have fiscal power and functions in the same area.
>
> (5) National legislation envisaged in this section may be enacted only after organised local government and the Financial and Fiscal Commission have been consulted, and any recommendations of the Commission have been considered."

[66] *Gerber and Others v Member of the Executive Council for Development Planning and Local Government, Gauteng, and Another* 2003 (2) SA 344 (SCA).

section 10G(7) in charging a levy for the first financial year cannot be taken as proof of the use of the section for purposes of imposing rates before the Rates Act came into operation.

[110] Even if the first requirement were established, the Municipality would still be required to show that section 10G(7) was repealed by the Rates Act. To determine this issue, regard must be had to section 95 of the Rates Act together with the relevant Schedule. Differently put, one must look within the four corners of the Rates Act when determining which legislation it repeals. Section 95 is the only provision in the Rates Act which repeals other legislation.

[111] Section 95 of the Rates Act indicates legislation it repeals by referring to the relevant Schedule where the lists of repealed legislation are contained. An examination of this Schedule reveals that section 10G(7) is not one of the pieces of legislation repealed by section 95. The Schedule does not refer to section 10G(7) at all. And since there is no other provision in the Rates Act which repeals legislation, there can be no basis for holding that the Rates Act repeals legislation that falls outside the list in the Schedule. Nor is there justification for examining other statutes for purposes of determining which legislation is repealed by the Rates Act.

[112] Accordingly, both conditions for applying section 88 of the Rates Act have not been established. This does not, however, show that the Municipality was not

empowered by section 10G(7) to impose the impugned rates. Instead, what this finding means is that section 88 cannot be invoked.

Did section 10G(7) empower the Municipality to impose the impugned rates?

[113] The answer to this question depends on the interpretation of section 179 of the Finance Act. It provides in relevant part:

> "(1) The legislation referred to in the second column of the Schedule is hereby amended or repealed to the extent indicated in the third column of the Schedule.
>
> (2) Despite the repeal of section 10G of the Local Government Transition Act, 1993 . . . by subsection (1) of this section, the provisions contained in subsections (6), (6A) and (7) of section 10G remain in force until the legislation envisaged in section 229(2)(b) of the Constitution is *enacted*." (Emphasis added.)

[114] As at the time the Finance Act came into effect in July 2004, only section 10G of the Transition Act was still in operation. Therefore, the proposition that it would be absurd to interpret the Rates Act as keeping alive the ordinances but not the Transition Act lacks merit. When the Rates Act came into operation, no provision of the Transition Act was still in force. The entire Act had been repealed.

[115] Section 179(1) of the Finance Act repeals one full statute, the Municipal Accountants Act,[67] and two single sections of other statutes. These include section 10G. However, section 179(3) delays the coming into operation of the repeal of the Municipal

[67] 21 of 1988.

Accountants Act to a date to be determined by the Minister of Finance and published in the *Government Gazette*.

[116] Similarly section 179(2) holds in abeyance the repeal of three subsections of section 10G. It lists the saved subsections as subsections (6), (6A) and (7). Section 179(2) stipulates that these subsections would remain in force until a specified event occurred. This event was the enactment of "legislation envisaged in section 229(2)(b) of the Constitution".

[117] What remains to be determined is the date on which the relevant legislation was enacted. The word "enacted" is crucial to this enquiry. But before interpreting this word in the context in which it has been used, it is necessary to point out that it is common cause that the Rates Act amounts to legislation referred to in section 179(2) of the Finance Act. Consequently, it is essential to determine the exact date on which the Rates Act was enacted.

[118] The word "enact" is commonly used in our jurisprudence with reference to the process of passing legislation. It is employed to denote the process of transforming a Bill passed by Parliament into an Act. That transformation occurs when the President assents to and signs a Bill into law. When that happens it is usually said that legislation has been

enacted. In *Khosa*,[68] this Court remarked that a Bill that was passed by Parliament and signed into law by the President constitutes "a duly enacted Act of Parliament".[69] This was stated in circumstances where the Act had not been put into operation. This Court could not have made this statement if the date of enacting was the date on which the Act came into effect.

[119] The principle that when the President assents to and signs a Bill, it becomes an enacted Act of Parliament, was later affirmed by this Court in *Doctors for Life International v Speaker of the National Assembly and Others.*[70] In that case this Court pointed out that a law is enacted when the President signs a Bill into law, but before such law comes into operation. The Court said:

> "There are three identifiable stages in the law-making process, and these are foreshadowed in the questions on which the parties were called upon to submit argument: first, the deliberative stage, when Parliament is deliberating on a Bill before passing it; second, the Presidential stage, that is, after the Bill has been passed by Parliament but while it is under consideration by the President; and third, the period after the President has signed the Bill into law but before the enacted law comes into force."[71]

[120] Consistent with the decisions of this Court in *Khosa* and *Doctors for Life*, the Supreme Court of Appeal in *Howick District Landowners Association* held:

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[68] *Khosa and Others v Minister of Social Development and Others*, *Mahlahule and Others v Minister of Social Development and Others* [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) (*Khosa*).

[69] Id at paras 90-2.

[70] [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) (*Doctors for Life*).

[71] Id at para 40.

> "In 2004 Parliament enacted the final piece of legislation in the set of statutes that gave effect to local government reform, the Local Government: Municipal Property Rates Act 6 of 2004 (the Rates Act). The Constitution gave Parliament power to regulate by statute a municipality's constitutional authority to impose property rates. It was common cause that the Rates Act is such legislation. The statute was assented to on 11 May 2004 and was brought into operation on 2 July 2005. It makes express provision for a category of 'newly rateable properties', on which rates were not levied before. It requires that rates on these properties must be phased in over three financial years (section 21(1)(a)) and provides for rebates for *bona fide* farmers on agricultural properties (section 15(2)(f)). The statute also regulates the transition between its commencement (with repeal of the relevant provisions of the Ordinance) and the eventual implementation of the rating system it embodies (section 88*ff*)."[72] (Footnotes omitted.)

[121] Since the Rates Act was assented to and signed by the President on 11 May 2004, it follows that the Rates Act was enacted on that day. This means that section 10G(7) was repealed with effect from 11 May 2004. This was more than a year before the Rates Act came into force. As a result and as mentioned earlier, the Rates Act cannot be construed as repealing section 10G(7) because the section was no longer in operation when the Rates Act came into force. This is the reason why the relevant part of the Rates Act does not even mention section 10G when listing legislation repealed by it.

[122] Accordingly, the repealed section 10G(7) did not empower the Municipality to charge rates for the financial years commencing in July 2004 to June 2009. This covers

[72] *Howick District Landowners Association* above n 57 at para 5.

five financial years. Since the Municipality relied solely on section 10G(7) in imposing the impugned rates, the declarations it sought for those five financial years must fail.

[123] During argument, it was submitted that the legality ground did not cover the 2004/2005 and 2005/2006 financial years, on the assumption that the Rates Act was enacted on 2 July 2005, when it came into effect. The assumption was based on two mistaken premises. The first is that the Rates Act was enacted in July 2005. It was in fact enacted in May 2004. The second is that when the Municipality took the resolution to charge the impugned rates, section 10G(7) was still in force. It was not. But even if it was in operation when the notice in respect of the 2004/2005 financial year was issued, its repeal with effect from 11 May 2004 would have been fatal to the exercise of the power it conferred, if done after that date or implementing a decision taken on its authority after the date in question. A functionary cannot extend the operation of a statutory provision by taking the necessary decision whilst it is in force, for the decision to take effect after the provision has been repealed. Once repealed, a provision cannot be invoked as authority unless there is a transitional provision preserving its continued operation.

Validity of rates for 2002/2003

[124] The resolution in terms of which the rates for the 2002/2003 financial year were imposed, was challenged on, among others, the ground that section 10G(7)(b)(ii) did not authorise the levying of rates. It was contended that the section dealt with amendment or

withdrawal of levies and other charges. In essence the challenge was, because the Municipality had described this impost as a levy and had originally attempted to impose it in terms of section 10G(7)(b)(ii), it could not amend it into a rate, following objections that it was not a levy but a rate. The Supreme Court of Appeal rejected the challenge for the reason that the landowners could not raise an objection that it was not a levy but in truth a rate and, when it was replaced with a rate, they argue that it should have been amended as a levy.

[125] I am not persuaded that the challenge was wrongly rejected by the Supreme Court of Appeal. But that is not the end of the matter because the applicants challenged the validity of the rates of the relevant year on a further ground. They contended that when imposing the amended rates, the Municipality failed to comply with statutory provisions requiring the facilitation of public participation in processes such as the imposition of rates. Therefore the Supreme Court of Appeal was mistaken in holding that the landowners raised a single ground in challenging the validity of these rates. In its judgment the High Court correctly pointed out that the present challenge was based on a number of grounds, including the failure to give proper notice of the amending resolutions taken by the Municipal Council on 29 July 2002 and 26 May 2003.

[126] In upholding the applicants' contention, the High Court said:

> "The respondents challenged the legality of the council's impost in respect of the 2002/3 budget year on a number of grounds. In view of the conclusion that I have reached it is only necessary to treat with one of them; *viz.* the municipality's failure to publish a notice of its determination made on 29 July 2002 in the context of its reconsideration of the size related sliding scale impost, as required in terms of section 10G(7)(d)(ii) of the [Transition Act]."[73]

[127] I agree with this finding. In passing a resolution that imposes rates, a municipal council does not perform an administrative function but a legislative one.[74] Facilitation of public participation is fundamental to a legislative process in all spheres of government. In respect of the national and provincial legislatures, this requirement is entrenched in the Constitution.[75] In respect of local government, section 152 of the Constitution requires municipalities to "encourage the involvement of communities and community organisations in the matters of local government."[76]

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[73] High Court judgment above n 55 at para 26.

[74] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC).

[75] See sections 59 and 118 of the Constitution.

[76] Section 152 of the Constitution provides:

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

[128] The constitutional obligation to facilitate public participation is given effect to in a number of related statutes. First, the Local Government: Municipal Systems Act[77] (Systems Act) prescribes the manner in which a municipality must communicate with the local community. Whenever a municipality is required to notify the local community of something, section 21 of the Systems Act proclaims that it must be done—

> "(a) in the local newspaper or newspapers of its area;
> (b) in a newspaper or newspapers circulating in its area and determined by the council as a newspaper of record; or
> (c) by means of radio broadcasts covering the area of the municipality."

[129] In addition, the section requires notification in official languages determined by the municipality in accordance with language preferences and usages within the area.[78] More importantly, the invitation for the local community to submit representations or written comments must state that those who cannot write may come to the offices of the Municipality where a staff member named in the invitation will assist in reducing their representations to writing.[79] This makes it clear that a municipality must facilitate participation of even disadvantaged members of the local community.

[77] 32 of 2000.

[78] Id section 21(2).

[79] Id section 21(4).

[130] Section 10G(7), in terms of which the Municipality passed the relevant resolutions, obliged its chief executive officer to display the notice at a designated spot in the offices of the Municipality. The notice was required to state—

> "(i) the general purport of the resolution;
> (ii) the date on which the determination or amendment shall come into operation;
> (iii) the date on which the notice is first displayed; and
> (iv) that any person who desires to object to such determination or amendment shall do so in writing within 14 days after the date on which the notice is first displayed."[80]

[131] The primary purpose of this notice was to facilitate participation of the local community in the process of imposing rates. This was consistent with the constitutional obligation to involve the local community in the affairs of the Municipality. Notably, since the process of imposing rates constitutes a legislative process, a failure to comply with the relevant statutory requirements was fatal to the validity of the rates imposed because the relevant provisions were obligatory.

[132] Moreover, the failure to make the requisite invitation did not only breach the relevant provisions but it also violated the Municipality's constitutional obligation to facilitate public participation in this legislative process. The importance of public participation in a democratic system such as ours which places a premium on the

[80] Section 10G(7)(a) of the Transition Act.

principle of participatory democracy was underscored by this Court in *Doctors for Life*. There the Court said:

> "Therefore our democracy includes, as one of its basic and fundamental principles, the principle of participatory democracy. The democratic government that is contemplated is partly representative and partly participatory, is accountable, responsive and transparent, and makes provision for public participation in the law-making processes. Parliament must therefore function in accordance with the principles of our participatory democracy."[81]

[133] Recently in *South African Property Owners Association v Johannesburg Metropolitan Municipality and Others*[82] the Supreme Court of Appeal held that the imposition of rates in circumstances similar to the present was invalid for failure to comply with the public participation requirement. The Court further declared that in the future the Johannesburg Metropolitan Municipality must comply with the relevant provisions when it amends a proposed budget after it has been advertised for public comment. In that case the dispute was about the amendment of the rates imposed without complying with the provisions requiring facilitation of public participation. The original rates imposed and which were advertised for public comment contained a 10% increase. But when the Municipality realised that there was going to be a shortfall in revenue collection, it amended the rates and imposed an additional increase of 18% on the rates charged.

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[81] Above n 70 at para 116.

[82] 2013 (1) SA 420 (SCA) (*SAPOA*).

[134] The judgment of the Supreme Court of Appeal in *SAPOA* is at variance with its judgment in the present case. Here, although the Supreme Court of Appeal did not deal with the relevant attack because it mistakenly held that only one ground was raised, that Court nonetheless upheld the substantial compliance principle in respect of a similar challenge. But it must be emphasised that the challenge in question related to the inadequacy of the notice issued. Had the Supreme Court of Appeal in the present case considered the failure to issue notices in respect of the amending resolutions of 29 July 2002 and 26 May 2003, it probably would have declared the 2002/2003 rates invalid. I say this because the author of the Supreme Court of Appeal judgment in the present matter was part of the panel which held in *SAPOA* that the failure to give notice, for public comment, of a resolution amending rates was fatal to the rates imposed.

[135] In the present case the landowners' complaint is that the Municipality failed to give notice of not one but two amendments of rates. The first was effected in terms of a resolution of 29 July 2002 and the second was contained in the resolution of 26 May 2003. In these circumstances I agree with the High Court that the rates imposed for the 2002/2003 financial year were ineffectual. It follows that the declarator sought by the Municipality in this regard must also fail.

[136] For these reasons, save for the imposition of rates for 2003/2004 which was not contested, I would uphold the appeal with costs.

KHAMPEPE J:

Introduction

[137] I have had the benefit of reading the judgments prepared by my sister Mhlantla AJ (main judgment) and my brother Jafta J. I agree that both leave to appeal and condonation should be granted. I share my sister Mhlantla AJ's view that the challenges to the imposts for the years 2004/2005 and 2005/2006 should fail. However, I am unable to agree with the conclusion reached in the main judgment that the appeal should be dismissed in its entirety. For the reasons he sets out, I agree with my brother Jafta J that the challenge to the imposts for 2002/2003 should succeed. Like him I also disagree with the interpretation of the various legislative provisions put forward in the main judgment regarding the date of repeal of section 10G(7) of the Transition Act. However, I disagree with the main judgment for somewhat different reasons to those of my brother Jafta J, hence this judgment. On the basis of my understanding of the date and effect of the repeal of section 10G(7), I would uphold the applicants' legality challenges in relation to the imposts for the years 2006/2007 to 2008/2009.

The statutory regime: the repeal of section 10G(7) and the coming into effect of the Rates Act

[138] For the reasons put forward by my brother Jafta J,[83] I am of the opinion that section 10G(7) – the provision that initially authorised the Municipality to impose rates on the applicants' land[84] – did not survive the coming into effect of the Rates Act. To my mind it is clear, upon consideration of section 179 of the Finance Act[85] read with the Schedule to that Act,[86] that the Finance Act repealed section 10G(7). Furthermore, section 10G(7) of the Transition Act was *not* repealed by the Rates Act – neither section 95 of the latter statute nor the Schedule thereto (which, read together, identify the

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[83] At [98] – [107] and [110] – [111] above. For the reasons set out below, however, we disagree on the effective date of the repeal of section 10G(7).

[84] The relevant parts of the provision have been set out in n 19 above.

[85] Section 179 reads as follows:

> "**Repeal and amendment of legislation**
>
> (1) The legislation referred to in the second column of the Schedule is hereby amended or repealed to the extent indicated in the third column of the Schedule.
>
> (2) Despite the repeal of section 10G of the Local Government Transition Act, 1993 (Act No. 209 of 1993), by subsection (1) of this section, the provisions contained in subsections (6), (6A) and (7) of section 10G remain in force until the legislation envisaged in section 229(2)(b) of the Constitution is enacted.
>
> (3) The repeal of the Municipal Accountants Act, 1988 (Act No. 21 of 1988), takes effect on a date determined by the Minister by notice in the *Gazette*."

[86] The Schedule appears as follows:

REPEAL AND AMENDMENT OF LEGISLATION

(Section 179)

No. and year of Act	Short title of Act	Extent of repeal or amendment
Act No. 91 of 1983	Promotion of Local Government Affairs Act, 1983	The repeal of section 17(D).
Act No. 21 of 1988	Municipal Accountants Act, 1988	The repeal of the whole.
Act No. 209 of 1993	Local Government Transition Act, 1993	The repeal of section 10G.

individual items of legislation to be repealed or amended by the Rates Act) makes any mention of section 10G(7). I therefore cannot agree with the interpretation of sections 88 and 89 of the Rates Act advanced by the Municipality and accepted in the main judgment,[87] at least to the extent that the interpretation is used to support the contention that the Rates Act repealed section 10G(7) of the Transition Act.

[139] This notwithstanding, I disagree with my brother Jafta J that section 10G(7) of the Transition Act was repealed with effect from 11 May 2004. He reaches that conclusion because section 179(2) of the Finance Act states that section 10G(7) would remain in force until the enactment of the Rates Act, and the Rates Act was assented to and signed by the President (and therefore enacted) on 11 May 2004.[88] While Jafta J's exposition on the meaning of the word "enact" is correct, in my view that is not the only relevant consideration for present purposes.

[140] Section 180 of the Finance Act empowers the Minister of Finance to determine the date on which the provisions of the Finance Act will take effect, and allows for the possibility of different provisions of that Act having different effective dates.[89] Pursuant

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[87] At [43] – [51] above.

[88] At [113] – [121] above.

[89] Section 180 of the Finance Act reads as follows:

> "**Short title and commencement**
>
> (1) This Act is called the Local Government: Municipal Finance Management Act, 2003, and takes effect on a date determined by the Minister by notice in the *Gazette*.
>
> (2) Different dates may in terms of subsection (1) be determined for different provisions of the Act."

to a notice published in the *Government Gazette*,[90] the Minister of Finance duly exercised his power under section 180 and determined that section 179 of the Finance Act would take effect on 1 July 2005. Because section 179 of the Finance Act only became effective law on 1 July 2005, and because that section is the statutory provision that repealed section 10G(7), I am of the opinion that the repeal of section 10G(7) only took effect on 1 July 2005. Indeed there would have been no reason for suspending the coming into effect of section 179 of the Finance Act other than to delay the repeal of section 10G(7) (and the other legislation referred to in the Schedule) until an appropriate date as determined by the Minister. Thus in *Howick District Landowners Association v uMngeni Municipality and Others*[91] Cameron JA held as follows:

> "The landowners' main argument was based on s 179 of the [Finance Act]. This repealed s 10G of the [Transition Act], but provided that that section's principal provisions would remain in force 'until the legislation envisaged in s 229(2)(b) of the Constitution is enacted'. . . . [T]he landowners contended that the legislation in question (the Rates Act) was 'enacted' in terms of s 179 as soon as it received assent and was published on 11 May 2004 – and not only on the date it was brought into operation on 2 July 2005: with the result that when the council met in December 2004, s 10G had already been repealed. . . . [T]he argument proceeded from the mistaken premise that s 179 was in operation when the council met in December 2004. This was not so. Most of the provisions of the [Finance Act] were brought into operation on 1 July 2004, but the repealing provision took effect only on 1 July 2005. So, when the council passed the resolutions now contested, s 10G was still in force."[92] (Emphasis added; footnotes omitted.)

[90] GN 772 published in *Government Gazette* 26510 of 25 June 2004.

[91] 2007 (1) SA 206 (SCA).

[92] Id at paras 9-10.

[141] I do not think that the purpose of the Finance Act was to impose the repeal envisaged in section 179 with retroactive effect. No rational or legitimate purpose would be served by – and only undesirable consequences would flow from – retroactively invalidating municipalities' conduct in imposing rates and levies over the 13-month period between the date of enactment of the Rates Act and the date on which section 179 came into force. This conclusion regarding the date of repeal accords with the "strong presumption" in our law that new legislation is not meant to "[invalidate] what was previously valid".[93]

[142] Accordingly, in my view, the Municipality was authorised by the Transition Act to impose rates and levies until 30 June 2005.[94] This authorisation was, of course, supplementary to the Municipality's original power, granted by the Constitution, to levy rates on land within its area of jurisdiction.[95]

[143] The President assented to the Rates Act on 11 May 2004. Following a notice published in the *Government Gazette*,[96] the whole of the Act took effect on 2 July 2005.

[93] *S v Mhlungu and Others* [1995] ZACC 4; 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) at para 65.

[94] As set out in [140] above, section 179 of the Finance Act came into force on 1 July 2005. In terms of section 13(2) of the Interpretation Act 33 of 1957, this means that the repeal of section 10G(7), as contained in section 179, occurred "immediately on the expiration of" 30 June 2005.

[95] Section 229(1)(a) of the Constitution provides that "a municipality may impose rates on property". As is evident from a reading of the remaining provisions of section 229, the exercise of this rating power is not dependent on the enactment of further legislation by Parliament – it is an original power vested in municipalities by the Constitution. However, in terms of section 229(2)(b), should Parliament elect to regulate the exercise of that power (as it subsequently did in the form of the Rates Act), municipalities would be obliged to comply with the resultant legislation when levying rates (as they subsequently were).

[96] Proclamation R. 28 published in *Government Gazette* 27720 of 29 June 2005.

From that date onwards the exercise by any municipality of its rate-levying powers under section 229 of the Constitution had to be discharged pursuant to the requirements of the Rates Act, including those set out in section 14:

> "**Promulgation of resolutions levying rates**
>
> (1) A rate is levied by a municipality by resolution passed by the municipal council with a supporting vote of a majority of its members.
>
> (2) A resolution levying rates in a municipality must be promulgated by publishing the resolution in the *Provincial Gazette*.
>
> (3) Whenever a municipality passes a resolution in terms of subsection (1), the municipal manager must, without delay—
>
> (a) conspicuously display the resolution for a period of at least 30 days—
>
> (i) at the municipality's head and satellite offices and libraries; and
>
> (ii) if the municipality has an official website or a website available to it as envisaged in section 21B of the Municipal Systems Act, on that website; and
>
> (b) advertise in the media a notice stating that—
>
> (i) a resolution levying a rate on property has been passed by the council; and
>
> (ii) the resolution is available at the municipality's head and satellite offices and libraries for public inspection during office hours and, if the municipality has an official website or a website available to it, that the resolution is also available on that website."

[144] Thus, from 2 July 2005 onwards, in order for the Municipality to impose rates validly, it had to (a) do so pursuant to a resolution passed by a majority of the members of the Municipal Council; (b) promulgate the resolution by publication in the *Provincial*

Gazette; and (c) undertake the public information and advertising process stipulated in section 14(3).[97]

Did the Municipality comply with its obligations in terms of section 14(2) of the Rates Act for the years 2006/2007 to 2008/2009?

[145] It was not contended that the Municipality promulgated rates resolutions for the years 2006/2007, 2007/2008 and 2008/2009 in the *Provincial Gazette*. Put differently, it was not argued that the Municipality complied with the letter of section 14(2) of the Rates Act.

[146] Nevertheless, with regard to the 2006/2007 year, the Municipality contended that it substantially complied with section 14(2) because: (a) it published a notice in a local newspaper regarding its draft budget in April 2006, which budget presumably included some information regarding the proposed rates for the forthcoming year; (b) it undertook a public participation process regarding the draft budget, including inviting comments from the public and holding public meetings; and (c) in June 2006 it published a second notice in the same local newspaper regarding the rates for the forthcoming year. The Municipality contended that because it had complied substantially with the prescripts of section 14(2) of the Rates Act, the relevant statutory objects had been achieved and therefore the impugned imposts were validly imposed. The Municipality reiterated this

[97] It should be noted that between the repeal of section 10G(7) and the coming into effect of the Rates Act (that is to say, on 1 July 2005) the Municipality retained its constitutional power to levy rates from residents in its area of jurisdiction, pursuant to section 229(1)(a) of the Constitution. See n 95 above.

argument in relation to the years 2007/2008 and 2008/2009, as in those years it also undertook an advertising and participation campaign similar to the one just described. For the reasons set out below I am of the opinion that the substantial compliance argument proffered by the Municipality must fail.

The promulgation of laws

[147] The Constitution empowers municipalities to exercise original legislative powers, including the power of taxation. As explained in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*:[98]

> "Under the interim Constitution (and the 1996 Constitution) a local government is no longer a public body exercising delegated powers. Its council is a deliberative legislative assembly with legislative and executive powers recognised in the Constitution itself. . . . The constitutional status of a local government is thus materially different to what it was when Parliament was supreme, when not only the powers but the very existence of local government depended entirely on superior legislatures. The institution of elected local government could then have been terminated at any time and its functions entrusted to administrators appointed by the central or provincial governments. That is no longer the position. Local governments have a place in the constitutional order, have to be established by the competent authority, and are entitled to certain powers, including the power to make by-laws and impose rates. . . . It seems plain that when a legislature, whether national, provincial or local, exercises the power to raise taxes or rates . . . it is exercising a power that under our Constitution is a power peculiar to elected legislative bodies. It is a power that is exercised by democratically elected representatives after due deliberation."[99]

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[98] [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) (*Fedsure*), per Chaskalson P, Goldstone J and O'Regan J.

[99] Id at paras 26, 38 and 45.

[148] The power of a municipality to impose rates is an exercise of an original legislative power. Legislative acts depend for their legal efficacy on due promulgation. This is an incident of the rule of law that has long been part of South African jurisprudence, as illustrated by the review of a few relevant cases in which I shall now engage.

[149] In *Ismail Amod v Pietersburg Municipality*[100] the Transvaal Supreme Court was faced with an appellant who had been found guilty of contravening certain provisions of a municipal by-law. The appellant challenged his conviction on the basis that the relevant by-law, although it had gone through a public-notification process and had been assented to by the Lieutenant-Governor, was not effective law as it had not been duly promulgated by publication in the *Gazette*. Innes CJ noted that the by-laws under consideration were intended to regulate an important aspect of public life, but was constrained to uphold the appeal. He thus held that, after there had been a proper public-notification process and the Lieutenant-Governor had approved the relevant by-laws—

> "[the] due publication or promulgation [of the by-laws] is necessary before they can have the force of law. Even if the statute had contained no such provision, the common law would have required some publication of such bye-laws. By the Roman-Dutch law, as indeed by any civilised system of jurisprudence, a law before it can take effect requires to be promulgated. The expression of the will of the legislative authority does not acquire the force of law unless and until it has been promulgated in due form for the information of those whom it is to affect. . . . In my opinion there has been no due promulgation of these bye-laws, and on that ground the appeal must be allowed. I regret to have to come

[100] 1904 TS 321 (*Amod*).

> to this conclusion, because the appellant has contravened a very useful provision for the protection of the public health. But proper steps were not taken to legalise that provision, and the Court has therefore no option in the matter. This decision may have wide results, for apparently the same procedure has been followed in a great many other cases. But that is a thing which the Court cannot remedy."[101]

[150] Some years later the position in *Amod* was restated by Innes CJ – by then Chief Justice of a territorially unified South Africa – in *R v Gluck*,[102] namely that "[a] law must be promulgated before it can come into operation. That is a principle well established in our practice and no authority is needed to support it. But it is the enacting instrument, the decree of the law-giver which needs to be promulgated."[103]

[151] In *Byers v Chinn and Another*[104] the Appellate Division had to determine whether certain resolutions and regulations adopted by a Village Management Board under a particular statute needed to be promulgated in order to be effective. The following principles were enunciated by the Court. First, any law, regulation or by-law intended to have the force of law must generally be promulgated, and this promulgation should occur by way of publication in the *Government Gazette*.[105] Second, it is usually "not enough that an individual may have knowledge in some other way of the alleged law, regulations

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[101] Id at 323-6.

[102] 1923 AD 149.

[103] Id at 151.

[104] 1928 AD 322.

[105] Id at 327-9.

or order . . . there must be promulgation”.[106] Third, there are two exceptions to the promulgation requirement: (i) where the statute provides for an alternative to publication in the *Government Gazette* and (ii) where the instrument concerned is “not a ‘law’ within the meaning of the rule requiring promulgation of a law.”[107] The Court held that promulgation via publication in the *Gazette* was not required in the circumstances of that case because the relevant statute contemplated no publication process of the Village Management Board’s decisions, because the decisions would only affect a very small number of people and because the decisions would be taken “upon the spot” in the presence of those affected.[108] In other words, the decisions could be seen as instruments falling outside the category of laws requiring promulgation.[109]

[152] In *R v Busa en Andere*[110] the Appellate Division considered the distinction between formal promulgation requirements and procedural notice-and-comment or public-participation obligations. The Court found that while requirements regarding formal promulgation (such as publication in the *Gazette*) are peremptory such that non-compliance will lead to the law in question never acquiring legal force, a requirement to ensure that the public is informed about its legal obligations may be directory and non-

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[106] Id at 328, quoting Kotze J in *R v Koenig* 1917 CPD 235.

[107] Id at 328 and 330.

[108] Id at 328.

[109] Id at 330.

[110] 1959 (3) SA 385 (A) (*Busa*).

compliance therewith may not affect the legal efficacy of the statute under consideration.[111]

[153] From the above, the position at common law is clear: statutory laws – whether they be Acts of Parliament or municipal by-laws – must be duly promulgated in order to have legal force, and this promulgation occurs by way of publication in the relevant *Gazette*. Of course, Parliament may allow for alternative forms of promulgation, and may impose additional publicity requirements. Courts and organs of state should, however, be wary of any approach to enacting legislation that detracts from the general principle of gazetting statutes as a prerequisite for the legal force thereof.

[154] The Interpretation Act preserves the common-law position and gives it statutory force.[112] Section 13(1) thus provides that a law has legal effect on "the day when the law was first published in the *Gazette* as a law."[113] Ordinarily, therefore, all that is required for a law to come into operation is publication in the appropriate *Gazette*.[114]

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[111] Id at 389-92. See also the discussion of *Busa* in the High Court judgment at n 48.

[112] See *S v Manelis* 1965 (1) SA 748 (AD) at 752G.

[113] Section 2 of the Interpretation Act defines a "law" as "any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law". It should be noted that the Interpretation Act contains an exception to the general rule set out in section 13(1): section 16A(1) provides that, in exceptional circumstances, the President may make rules for the promulgation of laws other than by way of publication in the *Gazette*. See Du Plessis *Re-Interpretation of Statutes* (Butterworths, Durban 2002) at 67.

[114] *Manelis* above n 112 at 753G-H. As the Court noted: "The mere act of promulgation would determine the date of commencement. The common law, and sec. 13(1), by necessary implication, would take care of that."

[155] The position has not changed since the advent of the Constitution. Section 162(1) of the Constitution, for example, provides that a "municipal by-law may be enforced only after it has been published in the official gazette of the relevant province."[115] This promulgation requirement is in addition to and separate from the obligations regarding a public-comment procedure set out in section 160(4) of the Constitution.[116] The Constitution thus enshrines both the promulgation requirement and the importance of due publication with regard to the legal efficacy of legislative acts. The common-law and statutory position set out above is, in my view, wholly consistent with section 162(1) of the Constitution.[117]

[156] In *National Police Service Union and Others v Minister of Safety and Security and Others*[118] the Supreme Court of Appeal had to determine whether a certain scheme for the rationalisation of various police forces (in terms of the interim Constitution) had to be promulgated by publication in the *Government Gazette* in order to have legal force.

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[115] Section 162, entitled "Publication of municipal by-laws", reads as follows:

> "(1) A municipal by-law may be enforced only after it has been published in the official gazette of the relevant province.
>
> (2) A provincial official gazette must publish a municipal by-law upon request by the municipality.
>
> (3) Municipal by-laws must be accessible to the public."

[116] Section 160(4), contained in the provision entitled "Internal procedures", states that "[n]o by-law may be passed by a Municipal Council unless all the members of the Council have been given reasonable notice; and the proposed by-law has been published for public comment."

[117] The applicants put forward no challenge regarding the Municipality's failure to promulgate the rates imposed prior to 2 July 2005. Furthermore, no challenge was raised against section 10G(7) of the Transition Act on the basis of its inconsistency with section 162(1) of the Constitution or pursuant to a more general legality attack. This judgment therefore does not deal with the Municipality's failure to promulgate rates resolutions for the years 2001/2002 to 2005/2006 (the years during which the imposition of rates by municipalities was governed by section 10G(7)).

[118] 2000 (3) SA 371 (SCA) (*NPSU*).

Smalberger JA confirmed the continued applicability under our constitutional dispensation of the common-law and statutory position set out above:

> "It is a requirement of both the common law and statute that subordinate legislation, even if it has been validly enacted, is not of binding force and effect in law until it has been promulgated. The requirement is subject to qualification".[119]

[157] The qualifications referred to are those expressed in *Byers*.[120] In *NPSU* the Supreme Court of Appeal ultimately determined that promulgation was not required in the circumstances of the case because the determination of the scheme was administrative rather than legislative in nature.[121]

[158] What the above discussion establishes is that in South Africa, as a matter of common law and statutory law, and further in terms of the Constitution, legislative enactments must be duly promulgated by publication in the relevant *Gazette* in order to have the force of law. Parliament may impose additional requirements for promulgation, and, in exceptional circumstances, an alternative form of promulgation may be used. Accordingly, close attention must be paid to the applicable statutory regime in order to determine the effects of non-compliance with obligations regarding the publication of a

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[119] Id at para 17. See also *Supreme Gaming CC v Minister of Safety and Security and Others* 2000 (3) SA 608 (SCA).

[120] See [151] above.

[121] *NPSU* above n 118 at para 20. In the alternative the Court concluded (at para 22) that promulgation was not required because the scheme conferred a benefit rather than imposed an obligation and because it affected a limited class of persons who could easily be made aware of the content of the scheme by means of a notification procedure other than publication in the *Gazette*. Thus, as was the case in *Byers*, the scheme could be seen as an instrument falling outside the category of laws requiring promulgation.

law. While there may be less stringent requirements for the effectiveness of administrative acts, the prescribed validity requirements for legislative enactments must be strictly observed.

Did the Municipality lawfully impose the rates during the years 2006/2007 to 2008/2009?

[159] The Municipality claims that it imposed the rates lawfully for the years 2006/2007 to 2008/2009 because it published notices of the relevant rates in local newspapers and therefore substantially complied with the requirements of section 14(2) of the Rates Act. Put differently, the Municipality contends that an organ of state need only substantially comply with its statutory obligations regarding the promulgation of taxes in order for the imposition of those taxes to be lawful. While I accept that the doctrine of substantial compliance as described by my sister Mhlantla AJ[122] has its place in determining the general effects of non-compliance with statutory obligations, in the circumstances of this case I cannot agree with the Municipality's defence, in the light of both the applicable statutory scheme and the relevant general principles. I shall deal with the statutory scheme first, and thereafter consider the general principles.

[160] Section 14 of the Rates Act clearly imposes, in peremptory terms, three distinct requirements for the proper promulgation of rates. Subsection (1) functions to ensure that rating decisions are democratically made by elected representatives. This gives effect to

[122] At [22] – [26] above.

section 160(2)(c) of the Constitution.[123] Subsection (2) is aimed at ensuring that the constitutive act of legality – promulgation by means of publication in the *Provincial Gazette* – is undertaken, in order to give effect to the rates resolution as a source of law for the relevant period. This reflects the general principle of our law that legislative enactments must be duly promulgated by publication in the *Gazette* in order to have the force of law. Finally, subsection (3) sets out a municipality's obligations with regard to informing the public of its rates obligations for the forthcoming year. This, of course, ensures that members of the public are not expected to comply with laws of which they might not ordinarily have knowledge.

[161] In accordance with the jurisprudence set out above, strict compliance with formal promulgation prescripts is required and "substantial compliance" can offer the Municipality no defence. There is, furthermore, no indication in the Rates Act that section 14(2) is merely directory in nature – the requirement it contains is stated in unambiguous and mandatory terms. Publication in a local newspaper was therefore insufficient to discharge the Municipality's obligation to promulgate the rates resolutions by publication in the *Provincial Gazette*.

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[123] Section 160(2) reads as follows:

> "The following functions may not be delegated by a Municipal Council:
>
> (a) The passing of by-laws;
>
> (b) the approval of budgets;
>
> (c) the imposition of rates and other taxes, levies and duties; and
>
> (d) the raising of loans."

[162] Moreover, section 14 clearly imposes discrete and peremptory obligations. Discharge of one such obligation cannot, on its own, constitute discharge of another. Whilst publication in a local newspaper may suffice to satisfy the requirements of section 14(3)(b),[124] it certainly cannot discharge the obligation set out in section 14(2). Similarly, just as notifying the public of rates for the forthcoming year could not satisfy the obligation set out in section 14(1) of the Rates Act,[125] neither could it satisfy the obligation set out in section 14(2). Holding otherwise would contravene the very clear prescripts of the Rates Act.

[163] In addition, even if one were to adopt a "substantial compliance" approach in relation to the section 14(2) obligation, the Municipality's conduct would still be found wanting. The object of that provision is not to inform the public for participation purposes, but to ensure that the rates for a particular year are formally constituted as legislative enactments. Accordingly, publication in a local newspaper would not achieve the purpose of section 14(2) because such a newspaper is not the official and authoritative record of the conduct of the State.

[164] I now turn to consider the general principles that inform my rejection of the Municipality's defence. Where the State purports to extract taxes from its citizens –

[124] As set out in [143] above, section 14(3)(b) stipulates that a duly passed rates resolution must be advertised in the media and the Municipal Manager must, in the advertisement, inform the public that a rates resolution has been passed and that it is available for inspection at specified locations.

[125] As set out in [143] above, subsection (1) prescribes that a rate-levying resolution must be "passed by the municipal council with a supporting vote of a majority of its members."

conduct which goes to the very heart of the social contract between a government and its people – that extraction must be done in a lawful manner. Where a local authority purports to impose rates, that imposition must be done in accordance with the constraints that Parliament has imposed. If we are to give cognisance to the fact that the Constitution now empowers municipalities to exercise original legislative powers, we must also accept that municipal authorities may no longer adopt an informal approach to the exercise of their powers. Similarly, it cannot be the case that municipalities are empowered to extract taxes pursuant to "laws" that they devise, when citizens are unable to find those laws anywhere in the statute books. That is wholly inconsistent with a State founded on the principle of legality. The High Court captured the point well:

> "It seems to me that the provisions of s 14(2) of the [Rates Act] were enacted acknowledging the enhanced executive and legislative status of municipal councils under the new constitutional order. Whereas a less formal approach might have historically characterised the approach to publication of municipal bylaws under the old order, its continuation finds no justification under the current constitutional framework."[126] (Footnotes omitted.)

[165] Indeed, with the principle of legality lying at the heart of our modern constitutional dispensation,[127] I fail to see how we could or should adopt a less exacting standard for the

[126] High Court judgment at para 59.

[127] See *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* [2006] ZACC 9; 2007 (1) SA 343 (CC); 2006 (11) BCLR 1255 (CC) at para 68; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 148; and *Fedsure* above n 98 at paras 56-8.

legality of legislative acts than the standard observed in the Transvaal in 1904 and in the Union in 1922.

[166] In the light of the above it is my view that, because the resolutions in terms of which the Municipality purported to levy rates for the years 2006/2007, 2007/2008 and 2008/2009 were not duly promulgated by publication in the *Provincial Gazette* as required by section 14(2) of the Rates Act, those rates were unlawfully imposed and the Municipality has no entitlement thereto. I would accordingly uphold the legality challenges against the imposts for those years.

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For the Respondent:	Advocate J Heunis SC and Advocate E Van Huyssteen instructed by De Klerk & Van Gend Inc.
For the Intervening Party:	Advocate G Budlender SC and Advocate M Bishop instructed by the State Attorney.