REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2010/06597

DATE:24/05/2011

REPORTABLE

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

....
DATE SIGNATURE

In the matter between:

SOUTH AFRICAN PROPERTY OWNERS ASSOCIATION Applicant

and

THE COUNCIL OF THE CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY First Respondent

THE EXECUTIVE MAYOR OF THE CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY Second Respondent

THE CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY Third Respondent

THE MEMBER OF THE EXECUTIVE COUNCIL

FOR LOCAL GOVERNMENT FOR THE PROVINCE OF GAUTENG Fourth Respondent

THE MEMBER OF THE EXECUTIVE COUNCIL FOR FINANCE FOR THE PROVINCE OF GAUTENG Fifth Respondent

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J U D G M E N T

MOSHIDI, J:

INTRODUCTION

[1] The applicant seeks an order firstly, to review and set aside the first respondent's annual budget for the year 2009/2010 as adopted by the first respondent at its meeting held on 21 May 2009. Second, an order declaring null and void and rescission of the promulgation of the assessment rate tariff amounting to R0,0154 in the Rand value of business, commercial and industrial properties. The latter properties are situated in the third respondent's area of jurisdiction. In the alternative, to the first prayer, the applicant seeks two further orders. First, declaring that the first, second and third respondents failed to comply with the prescribed legislative procedures and the principles of legality when taking their decision on 21 May 2009 to increase the rate ratios applicable to business, commercial and industrial properties from 3:1 to 3.5:1. The second alternative is an order reviewing and setting aside the decision of the first respondent to increase the rates ratio applicable to business, commercial and industrial property from 3:1 to 3.5:1.

THE PARTIES

[2] There is virtually no dispute regarding the capacities of the respective parties to partake in the present proceedings. The same applies to their functions, interests and roles in the matter. The applicant is the South African Property Owners Association ("*SAPOA*"), an association incorporated not for gain in accordance with the provisions of section 21 of the Companies Act 61 of 1973. In the founding papers, applicant's chief executive officer, Mr N A Gopal, describes the objectives of the applicant. These objectives, in the main include to actively represent, promote and protect the commercial interests and activities of its members within the property industry. He says that fundamental to such protection is the desire to obtain and foster recognition in all the facets of governmental governance of the principles relevant to a free and democratic system. The bottom line in the context of the present matter is that the applicant seeks to ensure that the business and industrial property sector's rights are recognised, and that the role-players in that sector be treated fairly. The applicant, with a membership representing approximately 90% of the commercial and industrial property owners in South Africa, has regional committees across the country. The membership of the applicant therefore predominantly consists of property-owning entities who, in

the main, are owners of commercial and industrial properties in the Republic of South Africa.

2.1 The first respondent is THE COUNCIL OF THE CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY, a body duly elected in terms of, *inter alia*, section 22 of the Local Government: Municipal Structures Act, 117 of 1998 ('*Municipal Structures Act*'), and having as its objectives those set out in section 19 of the Municipal Structures Act. The first respondent is also the body responsible for the approval of the third respondent's annual budget.

2.2 The second respondent is THE EXECUTIVE MAYOR OF THE CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY. The second respondent is enjoined to exercise those functions and powers as set out in section 56 of the Municipal Structures Act. The second respondent is cited herein in his representative capacity as head of the first respondent and being the person responsible for the tabling of the third respondent's annual budget and any adjustments to the annual budget.

2.3 The third respondent is THE CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY. The third respondent is a

category A municipality as envisaged in section 155(1) of the Constitution of the Republic of South Africa, 108 of 1996 ('*the Constitution*').

2.4 The fourth respondent is THE MEMBER OF THE EXECUTIVE COUNCIL FOR LOCAL GOVERNMENT FOR THE PROVINCE OF GAUTENG, who is cited herein in her representative capacity as the person responsible for Local Government in the Province of Gauteng.

2.5 The fifth respondent is THE MEMBER OF THE EXECUTIVE COUNCIL FOR FINANCE FOR THE PROVINCE OF GAUTENG, who is cited herein in his/her representative capacity as a person responsible for Local Government in the Province of Gauteng.

2.6 No relief is claimed against both the fourth respondent and the fifth respondent.

2.7 For the sake of convenience, and unless specified where necessary, the first, second and third respondents are referred to henceforth, collectively as, "*The City of Johannesburg*".

THE ISSUES

[3] At the heart of the matter are the events and processes followed by the first respondent leading to its meeting held on 21 May 2009. It is common cause that at this meeting the first respondent adopted its annual budget for the financial year 2009/2010. The crisp issue in this regard is whether the City of Johannesburg when they increased the rate ratio where, firstly, required to comply with the legislative requirements relied upon; and secondly, if so, whether they complied with the relevant legislative requirements.

[4] I must complete the nature of the applicant's relief by adding the following. At the end of January 2011, the applicant gave notice of an amendment of its original notice of motion which incorporated a new prayer 1. The new prayer seeks a declaratory order that the first, second and third respondents be precluded in terms of section 19(1)(b) of the Local Government: Municipal Property Rates Act 6 of 2004, read with the Municipal Property Rates Regulations on the Rate Ratio between Residential and Non-Residential Properties published in Government Notice R636, Government Gazette 32061, from imposing property rates on business, commercial and industrial properties which exceeds a rate ratio of 1:1. The amendment was not objected to and therefore falls to be considered together with the rest of the relief claimed.

[5] For the purposes of this judgment, and henceforth, the term "*business properties*" will be used to indicate the category comprising business, industrial, commercial, mixed use and "*business sectional title*" properties.

This accords with the categories as defined in the City of Johannesburg's Rates Policy contained in Annexure "FA3", and referred to later herein.

THE BUDGET PROCESS

[6] It is not in dispute that the Municipal Council must at least 30 days prior to the commencement of the budget year approve the annual budget. In the context of the instant matter, the annual budget is required to be approved by no later than 31 May of each year. In this instance the City of Johannesburg tabled the annual budget (2009/2010) on 26 March 2009. As required, it contained a chapter specifically dealing with the budget process. The chapter contains time frames for the approval of the annual budget set out in accordance with the requirements of section 21 of the Local Government: Municipal Finance Management Act 56 of 2003 ("*the MFMA*"). The applicant has no qualms with the public participation process followed up to this stage. However, the applicant contends that the subsequent events, with far-reaching changes to the proposed budget, occurred with inadequate public participation and without consultation with particularly the applicant. These contentions, as well as the City of Johannesburg's response thereto, are dealt with later.

[7] The applicant equally has no complaints regarding the City of Johannesburg's proposal and adoption of a 10% increase in rates, across all categories of properties in the budget, which occurred as follows. After the

meeting of the City of Johannesburg on 26 March 2009, the accounting officer of the City of Johannesburg published and made available the tabled budgets to the public, and invited the local community to submit objections or representations. At the same time, the accounting officer was further instructed to submit the annual budgets to the National and Provincial Treasury and other organs of state. Thereafter the budgets, together with such objections and representations received had to be presented to the City of Johannesburg, in particular, the first respondent, for its consideration and approval. The City of Johannesburg admit that the accounting officer indeed submitted the annual budget to the National Treasury.

[8] At the same meeting of 26 March 2009, and prior to the tabling and noting of the annual operating budget, the property rates and rebates for the financial year 2009/2010 were tabled. The minutes of the City of Johannesburg show that at this meeting it was resolved to accept the proposed property rates and rebates (10% across all categories of properties). This meant that the rate in the Rand for business properties would increase from 0,0120 cents in the Rand to 0,0132 cents in the Rand, whilst residential property, which reflected the same base rate, would be increased from 0,004 cents in the Rand to 0,0044 cents in the Rand. It is also not in dispute that in terms of the applicable legislative requirements, the tabled budget together with the proposed increases in the property rates were published in the local media inviting the local community to become involved and submit comments. It was also resolved at the meeting that in the event of no comments being received, that the proposed property rates be published in

the Provincial Gazette with effect from 1 July 2009. The closing date for objections and representations was the end of April 2009. The City of Johannesburg's meeting to adopt the budget for 2009/2010 was 21 May 2009.

[9] On 6 May 2009, pursuant to the completion of the public participation process (30/4/2009), the Finance and Economic Development Committee of the City of Johannesburg was held. At this meeting the proposed 10% increase in property rates was considered and confirmed.

[10] What follows, and leading up to the City of Johannesburg's meeting held on 21 May 2009 (forming the subject-matter of the present proceedings), is in dispute. The applicant contends that during the meeting of 6 May 2009 no mention at all was made by the City of Johannesburg of the proposal to increase the rates on business property by an additional 18% over and above the aforesaid 10%. The applicant contends that the meeting of 6 May 2009 (meeting of the Finance and Economic Development Committee) was held after the City of Johannesburg had already considered, discussed and agreed upon the contested and additional increase on business property rates. In support of its contentions, the applicant refers to what became known as "*the 5 May Memorandum*", which I deal with instantly below.

[11] The May 5 Memorandum is entitled, "*Alignment of Commercial and Residential Property Rating*", and dated 5 May 2009. It is Annexure "FA11" to the founding papers. The applicant contends it received a copy of this document fortuitously from the Johannesburg Chamber of Commerce on 7

May 2009. In the view of the applicant, the Memorandum was rather revealing and contains important statements which attempt to explain and substantiate the alignment strategy therein contained.

11.1 In the first paragraph of the Memorandum, its purpose is stated as:

> "*… to review the alignment of the commercial and industrial property rating structures so as to remain in line with the following key principle embodied in the implementation of the Municipal Property Rates Act, namely the retention of the rates contribution over the various sectors of the economy to the municipal tax base*".

It explains that although the Property Rates Act was implemented on 1 July 2008:

> "*… it was necessary for the Council to set its tariffs in advance of the implementation of the Act. Accordingly, the rates tariffs for the period 1 July 2008 to 30 June 2009 were premised on the valuation roll that was prepared but had not yet been subject to the valuations objection process*".

Further that:

> "*The tariffs for 2009/2010 were also premised on the valuation roll prior to the objections being finalized. On this basis, a ten percent increase in the rates tariff across all categories of property was proposed to Council at its March 2009 meeting*".

The fifth paragraph of the Memorandum states:

"*The valuation roll was opened for objection during the period 27 February 2008 to 27 May 2008. The outcome of the objections only finally became evident at the end of April 2009 with the final revised property valuations being entered into the Council's Billing system. In total, a reduction in property valuations of some R88 billion was recorded. This equates to a revenue forfeiture of approximately R603 million.*"

11.2 The City of Johannesburg in the Memorandum then proceeds to compare the property tax revenue per category for the year. The comparison appears in the two tables reproduced as follows:

Sector	Modeled contribution to Property Rates	Anticipated contribution after Objection process	Variance in contribution to total property rates
Business	R1,534,638,606	R1,343,250,124	-12%
Mixed Use	R127,870,323	R88,342,223	-31%
Business Sectional Title	R134,619,666	R91,855,637	-32%
Vacant	R867,905,351	R566,188,142	-35%
Residential	R1,056,245,027	R1,026,391,821	-3%
Residential Sectional Title	R252,066,820	R249,935,729	-1%

Sector	2006/2007	2007/2008	July 2008 to March 2009	Estimate 2009/2010 per March 2009 Tariffs Proposal	Estimate 2009/2010 if Rates Ratio Revised
Business	1,532,622,000	1,671,102,000	1,144,647,000	1,678,537,669	1,953,207,470
Residential	1,134,865,000	1,075,112,000	1,241,399,000	1,410,527,855	1,410,527,855
Vacant	269,459,000	317,621,000	476,348,000	622,806,957	622,806,957
Other	191,873,000	395,874,000	99,896,000	110,741,948	110,741,948
Total	**3,128,819,000**	**3,459,709,000**	**2,962,290,000**	**3,822,614,429**	**4,097,284,230**

CATEGORY	2006/2007	2007/2008	9 MONTHS TO MARCH 2009	BUDGET 2009/2010	PROPOSAL 2009/2010
Business	49%	48%	39%	41%	48%
Residential	36%	31%	42%	37%	34%
Vacant	9%	9%	16%	16%	15%
Other	6%	12%	3%	6%	3%
Total	100%	100%	100%	100%	100%

11.3 The Memorandum, in the reproduced table below, then sets out a process in terms of which it calculates the percentage contribution which the various categories of property owners previously contributed to the annual budget. The table is reproduced as follows below:

Business	48%
Residential	34%
Vacant	15%
Other	3%
Total	100%

11.4 The Memorandum then proceeds to explain that the total contribution by business properties had reduced during the nine month period ending March 2009. The explanation in this regard seems to be that the City of Johannesburg regards the ratio in respect of business properties to be disproportionate to the other categories of property. On this basis, the motivation and the reason is put forward for the City of Johannesburg's proposal to increase the ratio rate from 3:1 to a ratio of 3:5:1 in respect of business property. (There is indeed a sharp contrast in argument about the ratio issue as seen later.)

11.5 The Memorandum proceeds to state that:

> "*The impact of such a change in the ratio's is that the business property rates tariff would increase from the prevailing 1,2 cents in the Rand to 1,54 cents in the Rand. This is an increase of 28%. This however, has to*

be a once off adjustment in order to restore parity over the affected contributing sectors to the tax base. Future changes to the rates tariffs will be related to the Council's growth strategy, the Integrated Development Program and will be implemented across all categories of property.

…

In conclusion:

It will be necessary for the City to make changes to the tariff structure to ensure that it will be able to meet its ongoing expenditure and therefore service delivery requirements;

Amend the ratio's as related to property rates is one instrument amongst other initiatives.

This will necessitate that the rates tariff report will have to be amended and presented to Mayoral Committee and Council on 21 May 2009, for final approval. The tariffs will have to be promulgated during June 2009 for implementation on 1 July 2009. This Memorandum is to solicit comments from members of the business community since the submission is a proposal. Comments should reach our offices not later than 12h00 on Monday 11 May 2009."

11.6 The applicant, besides complaining that the Memorandum was not sent to it as an important role-player in the property industry, attacks the document and its handling by the City of Johannesburg on several grounds. Firstly, that the City of Johannesburg on realising that there would be a significant shortfall of revenue as explained above, pursued an ill-conceived exercise in terms of which they sought ways and means to implement the apparent deficit which had manifested itself. That such solution and approach is not only flawed and unjust, but also discriminates against the property owners who

hold property in the same category of property. Further, the applicant complains that the Memorandum was also selectively and inadequately published, that it did not enjoy the wide distribution and publication as required in terms of the Constitution and other relevant legislative provisions. That the City of Johannesburg paid lip service to their obligation to seek and obtain comments from members of the business community.

11.7 The applicant also attacks the contents of the Memorandum on the basis that the recorded reduction in contribution by way of rates from 48% to 39% by business property, is not related to nor does it arise from the ratio which had been previously determined at 3:1. In this regard, the applicant contends, rather strongly, that the reduction in revenue to be derived from business property arises from the fact that a vast majority of business properties have been significantly under-valued by the municipal valuer whilst others are incorrectly categorised for rating purposes in the records of the City of Johannesburg. That, as a consequence, for as long as a property is under-valued, the owner of that property will continue to enjoy an unfair advantage in comparison to the property owner whose property has been correctly valued. I deal in more detail later with the controversy regarding valuation of properties.

11.8 The applicant's main bone of contention is that the Memorandum was not sent to it as a main role-player in the business property industry. That the applicant was excluded from the participation process. Further that the fact that the draft budget and amendments to the City of Johannesburg's Rates Policy had already been published and that comments thereon had already been invited, received and considered further resulted therein that the community, including the applicant, did not anticipated further deliberations being invited. The applicant suggests that it would have expected the City of Johannesburg to at least adhere to the same publication procedures in regard to the Memorandum which they had followed during the earlier process when the draft budget had been published for public comment. The applicant also contends that the City of Johannesburg ought to have foreseen the shortfall in revenue but due to incompetent management failed to do so.

[12] The City of Johannesburg contend that once the initial public participation process ended on 30 April 2009, its then director of Rates and Taxes, Ms Erika Naudé, performed a calculation of the impact of the successful objections on the rates income for the 2008/2009 financial year in order to make a projection for the 2009/2010 financial year. She prepared a report entitled "*Discussion Document*" based on her findings. She found that the effect of the corrections to the valuation roll through successful objections resulted in a predicted revenue shortfall from property rates in the amount of

R336 million. Ms Naudé's report was distributed to other officials of the City of Johannesburg, who prepared a further report entitled "*2009/10 Draft Budget-Pressures*". The total revenue shortfall was approximately R603 million. The figure of R336 million mentioned above represented only the shortfall due to the successful objections, namely, corrections of market-value. The City of Johannesburg then set about to consider various options to close the gap for the 2009/2010 budget. These options included, reviewing the Rates Policy; correcting sectional title addresses, and further increases in the property rate tariffs. The report then recommended that the business property rates tariff be increased to result in an increased ratio of 1:3.5 which would result in 28% increase in the business tariff as opposed to 10% in other categories. All of this occurred whilst the public consultations were in progress during April 2009 based on the budget as tabled.

12.1 The City of Johannesburg say that on 29 April 2009 invitations were sent to members of the Johannesburg Business Forum and a representative of the applicant to a meeting on 5 May 2009 to discuss a possible change in the tariff on business properties. The email invitation read:

> "*You are highly invited to a special meeting with Business re the property Rates Tariff for 2009/10. The intention is to discuss the proposed property rates tariffs for the business category for the 2009/10 financial year. These proposals are not necessarily the same as the draft tariffs published for public comment.*"

The applicant did not attend the meeting.

12.2 The applicant has criticised Ms Naudé, and questions her *bona fides* in the manner in which the invitation was sent out as well as the lateness thereof. Further that the details of the proposed increase were not specified. The City of Johannesburg say that at that stage no firm decision had been taken on the additional increase. It was only at the Mayoral Committee meeting on 7 May 2009, that a formal proposal with regard to the additional increase was made. At such meeting of 7 May 2009, it was resolved, *inter alia*, as follow:

> "*1. That the proposed Property Rates tariff be amended, that the business current ratio of 1:3 for business is to increase to 1:3.5, it would result in 28% increase on the business tariff as opposed to the 10% on other categories.*
>
> *2. That the approval be granted to start the public participation process, in terms of section 21 of Municipal Systems Act read together with the Municipal Finance Management Act, on the specific issues covered by the report.*"

12.3 After the meeting of 5 May 2009, and on the same date, the City of Johannesburg's Deputy Director of Rates and Taxes, Mr Florence, drafted the May 5 Memorandum, quoted above. The latter document was distributed by email to various addresses representing the business community. On 6 May 2009, a

meeting was held with the Johannesburg Inner-City Business Coalition, at which Mr Florence again addressed the audience. The May 5 Memorandum was circulated. The officials of the City of Johannesburg say that they regarded the applicant as represented by Mr Richard Bennet because he was an executive member of the National Council of the applicant. I must point out that there is a sharp contrast in versions on this aspect as Mr Bennet in the replying affidavit disputes that he in fact represented the applicant at this meeting.

12.4 The City of Johannesburg advertised the proposal to re-align the rates on business properties on 8 and 9 May 2009 in the Beeld newspaper, The Star, The Sowetan and The Citizen newspapers. Copies of the adverts are attached to the answering papers. The notices invited submissions by 15 May 2009.

12.5 Several days before the adoption of the budget, and on 15 May 2009, the City of Johannesburg held a further meeting with the Johannesburg Business Forum. The attendance register contains the name of Mr Richard Bennet on which basis the City of Johannesburg contend that the applicant was represented thereat. Once more, the applicant, supported by Mr Richard Bennet, disputes that Mr Bennet represented it or had a mandate to do so. The applicant contends that Mr Bennet

attended the meeting as a representative of iProp. Mr Bennet, does however, serve on one of the applicant's forums. In any event, at the meeting the alignment of business and residential property rates were discussed. The intention with the deadline mentioned above, the City of Johannesburg say, was to receive comments early enough to prepare a response for its council meeting which was scheduled for 21 May 2009.

12.6 The City of Johannesburg, as a consequence, received numerous comments to the proposed budget from the local community. There were comments arising from the Business Forum meeting and the Johannesburg Inner-City Business Coalition on the additional 18% increase.

12.7 It is common cause that on 21 May 2009 the City of Johannesburg approved the 2009/2010 budget forming the subject-matter of the instant proceedings. The City of Johannesburg at the same time levied the rate for business properties. This incorporated the 28% increase from 0,0121 to 0,0154 cents in the Rand. The rates were later published in the Provincial Gazette on 28 August 2009, as required by the Rates Act.

[13] I need to deal briefly with certain events after the 5 May Memorandum, and before the adoption of the budget on 21 May 2009. On receipt of the 5

May Memorandum, the issues advanced therein were considered by the Board of the applicant. It was decided to request an extension for the submission of objections and comments. On 8 May 2009, the applicant's Legal Services Manager, Mr T R Shilubane, sent an email to the City of Johannesburg, requesting such extension. He was informed by Mr V Hlophe of the City of Johannesburg that the cut-off date (15 May 2009) had been agreed, and that no extension of time would be afforded to the applicant.

13.1 On 15 May 2009 the applicant, through its attorneys of record, dispatched a further letter to the City of Johannesburg requesting an extension of time in order to properly consider the proposal and possibly comment thereon. On 15 May 2009, the applicant addressed a letter to the City of Johannesburg which read, *inter alia*, that:

> "*SAPOA has a membership database of over 900 members and we hereby request an extension of the period afforded for comments in the abovementioned notice, as insufficient time has been provided to properly circulate and assess the proposal and to submit appropriate comments to the COJ. As the proposal relates to the increase in property rates, the council is obliged to follow a process of Public Participation in terms of section 4 and 5 of the Municipal Property Rates Act 2004. In this regard the general public must be provided with <u>not less than 30 days</u> wherein comments and representation can be made to the council. After consultation with our attorneys, we wish to advise you that your proposal and/or various aspects thereof are impermissible as there is no legal justification or basis therefor. We would have expected the COJ to base its budget on a valuation roll that has been settled after the objection process. We are currently considering these aspects and it is imperative that a properly considered*

and well-reasoned opinion be obtained for submission to the council."

This letter evoked no response from the City of Johannesburg. The applicant contends that it was not party to the agreement regarding the cut-off date of 15 May 2009. The City of Johannesburg submit that the letter was not responded to because it would have served no useful purpose to meet a representative of the applicant.

13.2 The applicant addressed several letters to the City of Johannesburg, all resulting in no tangible response. In August 2009 various members of the applicant reported to the applicant that the proposal in the 5 May Memorandum had been implemented, and that the business property rates had been increased by 28%. The applicant contends that the City of Johannesburg failed to properly advertise and publish the contents of the 5 May Memorandum, and also failed to afford members of the public sufficient opportunity to comment on the proposals made and their failure to consider and allow debate on the proposed increase of 28%. The applicant contends that the fact that the draft budget and amendments to the Rates Policy had already been published, and that the comments thereon had already been invited, received, probably

considered, the applicant could not be expected to anticipate any further publication regarding further invitations for comments. Further that, in any event, as the budgetary process for 2009/2010 had substantially run its course, with the community having provided its comments on the draft budget as tabled and published, it was not reasonable for the City of Johannesburg to spring such a grave matter on the community, and the applicant, at such late stage with little or no time to appropriately consider and comment thereon. Although the applicant and its members were contend to accept the original 10% increase on business property rates, it did not expect an additional 18% increase, resulting in a total 28% increase on rates in respect of business property.

[14] Having dealt rather extensively with the factual allegations of the respective parties, I proceed to deal with the procedure to be followed by the City of Johannesburg when adopting an annual budget, as well as the public participation process. In this regard, various legislative requirements come into play. The City of Johannesburg's Rates Policy also finds application.

[15] The Constitution bestows local government with original powers to impose rates and taxes. In this regard, section 229 of the Constitution provides:

"*(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 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 any way that materially and unreasonably prejudices national economic policies, economic activities across municipality boundaries, or the national mobility of goods, services, capital or labour; and*

(b) may be regulated by national legislation.

(3 and 4) (Not directly applicable).

(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."

In *Fedsure Life Assurance v Greater Johannesburg TMC* 1999 (1) SA 374 (CC) at para [45] the Court said:

"*[45] It seems plain that when a legislature, whether national, provincial or local, exercises the power to raise taxes or rates, or determines appropriations to be made out of public funds, 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. There is no dispute that the rate, the levy and the subsidy under consideration in this case were determined in such a way. It does not seem to us that such action of the municipal legislatures, in resolving to set the rates, to levy the contribution and to pay a subsidy out of public funds, can be classed as administrative action as contemplated by s 24 of the interim Constitution. In the past, of course, the action of a municipal council in setting rates was considered to be an action that was subject to judicial review on the principles of administrative law, but the principles upon which that jurisprudence was based are no longer applicable as we*

have outlined above. It follows that the imposition of the rates and the A levies and the payment of the subsidies did not constitute 'administrative action' under s 24 of the interim Constitution."

In *City of Cape Town v Robertson* 2005 (2) SA 323 (CC), the powers of municipalities in matters of this nature, were further set out at para [59] as follows:

"*… The Constitution expressly precludes the national or a provincial government from impeding the proper exercise of powers and functions of municipalities. Thus a municipality has the right to govern the local government affairs of its area and community.*
However, the duties, powers and rights of municipalities have to be exercised subject to national or provincial legislation as provided for in the Constitution."

15.1 From the above decisions, it follows that the relief sought by the applicant, namely to review and set aside the City of Johannesburg's decision to levy the rate on business properties, is therefore not governed by the provisions of the Promotion of Administration Justice Act 3 of 2000. The main enquiry by this Court is therefore limited to the question whether the legislative requirements and the Rates Policy of the City of Johannesburg have been complied with by the City of Johannesburg.

15.2 In the main, two pieces of legislation come into play. The first is the Local Government: Municipal Property Rates Act 6 of 2004 ("*the Rates Act*"), also referred to as such earlier in this judgment. The other is the MFMA. In the heads of argument

counsel for the applicant has correctly and chronologically set out the provisions of the Rates Act on which applicant relies. I find it convenient to follow such approach.

15.3 Section 1 of the Rates Act defines "*rate*" as "*means a municipal rate on property envisaged in section 229(1)(a) of the Constitution*", whilst rateable property denotes "*property on which a municipality may in terms of section 2 levy a rate*". In dealing with the powers of a municipality to impose rates, section 2 of the Rates Act provides as follows:

> "*(1) A metropolitan or local municipality may levy a rate on property in its area.*
>
> *(2)* (Not applicable)
>
> *(3) A municipality must exercise its power to levy a rate on property subject to –*
>
> *(a) section 229 and any other applicable provisions of the Constitution;*
>
> *(b) the provisions of this Act; and*
>
> *(c) the rates policy it must adopt in terms of section 3.*"

Relevant to the present matter are subsections (1) and (2)(a)-(d), of section 8 which provide that:

> "*(1) Subject to section 19, a municipality may in terms of the criteria set out in its rates policy levy different rates for different categories of rateable property, which may include categories determined according to the –*
>
> *(a) use of the property;*

(b) *permitted use of the property; or*

(c) geographical area in which the property is situated.

(2) Categories of rateable property that may be determined in terms of subsection (1) include the following:

(a) *Residential properties;*

(b) industrial properties;

(c) business and commercial properties;

(d) farm properties used for –

(i) agricultural purposes;

(ii) other business and commercial purposes;

(iii) residential purposes; or

(iv) purposes other than those specified in subparagraphs (i) to (ii) …"

Rates are expressed, imposed and recovered by means of cents in the Rand value which the city valuer has ascribed to a property. The rate will be referred to as the base rate, where necessary, being the cents in the Rand value. Residential properties is required to be equal to the base rate and appears always to be at the rate ratio of 1:1.

15.2 In furthering its contentions, the applicant continues to rely on various other provisions of the Rates Act. Section 12 provides that the rate adopted by the municipality shall be levied for that particular year only. This ensures that the municipality

determines what amount of revenue is required in order to meet its expenses for the year; once the demand has been established the municipality will revise, and consider possible increases to the base rate; in doing so, the municipality determines the base rate it should apply for the next financial year in order to generate sufficient revenue to enable it to meet its budgeted expenditure; and for this reason, so the argument proceeds, section 12(2) of the Rates Act enjoins a municipality to annually review its base rate in conjunction with the annual budget. The applicant places great emphasis on the provision that the municipality must, "*review the amount in the Rand of its current rates in line with its annual budget for the next financial year*".

[16] The applicant's main attack, albeit somewhat belated, is that the City of Johannesburg is precluded by the Rates Act from imposing a rate ratio on non-residential properties which exceeds the rate ratio imposed upon residential property. Section 19 of the Rates Act provides as follows:

"*19.* ***Impermissible differentiation***

(1) *A municipality may not levy –*

(a) different rates on residential properties, except as provided for in sections 11(2), 21 and 89;

(b) *a rate on a category of non-residential properties that exceeds a prescribed ratio to the rate on residential properties determined in terms of section 11(1)(a): Provided that different rates may*

be set in respect of different categories of non-residential properties;

(c) rates which unreasonably discriminate between categories of non-residential properties; or

(d) additional rates except as provided for in section 22.

(2) The ratio referred to in subsection (1)(b) may only be prescribed with the concurrence of the Minister of Finance."

It is not in dispute that the imposition and determination of property rates has over the recent past years been the subject of radical and fundamental changes. The most important of which is arguably the manner in which the rateable property is to be valued. As opposed to valuations based on the land value section 11 of the Rates Act now provides that a rate levied by a municipality on a property must be an amount in the Rand, "*on the market-value of the property*".

[17] The applicant argues that in terms of section 8(1) of the Rates Act, a municipality may, subject to section 19, and in terms of the criteria set out in the City of Johannesburg's Rates Policy levy different rates for different categories of rateable property. The categories may be determined according to the use of the property, the permitted use of the property or the geographical area in which the property is situated.

[18] The applicant further argues that in interpreting the above provisions, the true intention of the legislature should be established. Such intention is to be found in the ordinary, literal and grammatical meaning of the words used in

the statute. This approach is indeed correct. See *inter alia, Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at para [89], where regard was also had to the broader context of the legislation concerned, the purpose, scope, and even the background of the legislation, (section 18 of the Marine Living Resources Act 18 of 1998).

[19] Further that in terms of section 19(2) of the Rates Act, the ratio referred to in section 19(1)(b), only be prescribed with the concurrence of the Minister of Finance. Save for the determination of a ratio in the Municipal Property Rates Regulations on the Rate Ratio between Residential and Non-Residential Properties which the applicant contends clearly shows a prescription with the concurrence of the Minister of Finance. The latter published the Regulations in GN R363 in Government Gazette 32061 of 27 March 2009 in which the rate ratio for residential property was fixed at a ratio of 1:1 and agricultural property at 1:0.25 with public service infrastructure property at 1:0.25. The rate ratio for residential property, as above, the applicant calls the base ratio. This, together with other ratios for other property categories, the applicant argues is in line with the provisions of section 19(1)(b) of the Rates Act.

[20] In the context of the present matter, the applicant argues further that the City of Johannesburg have determined and fixed the ratio for business properties, notwithstanding their understanding of section 19(1)(b), at the rate ratio of 1:3.5. The applicant argues therefore that the ratio fixed for the business property clearly and substantially exceeds that of residential

property, which offends not only the provisions of section 19(1)(b) of the Rates Act, but also the very essence of equality enshrined in the Constitution. The applicant submits on these grounds that the determination and the fixing of the rate ratio for business property at a rate of 1:3.5 is in fact not permitted by the applicable legislation, and is thus *ultra vires* and unlawful, with the result that it calls to be set aside by this Court. It is, at this stage, significant to note without proceeding into detail, that the City of Johannesburg's response to this argument in the answering papers is as follows:

> "*I also point out that what is determined by the municipality in terms of the Rates Act is a rate in the Rand and not a ratio. The latter is an inference from two rates. It has its origin and function (as a cap on differential rates) in section 19(1)(b) of the Rates Act.*"

[21] I deal with the applicant's alternative attack. This is that the decision by the City of Johannesburg to increase the rate ratio to business properties from 1:3 to 1:3.5 is null and void. This submission is based on what the applicant contends to be the non-compliance by the City of Johannesburg with the requirements of sections 20 and 21 of the Local Government: Municipal Systems Act 32 of 2000 ("*the Systems Act*"). It is appropriate to reproduce these sections. Section 20 provides:

> "*20.* ***Admission of public to meetings*** *- (1) Meetings of a municipal council and those of its committees are open to the public, including the media, and the council or such committee may not exclude the public, including the media, from a meeting, except when –*
>
> *(a) it is reasonable to do so having regard to the nature of the business being transacted; and*

(b) a by-law or a resolution of the council specifying the circumstances in which the council or such committee may close a meeting and which complies with paragraph (a), authorises the council or such committee to close a meeting to the public.

(2) A municipal council, or a committee of the council, may not exclude the public, including the media, when considering or voting on any of the following matters:

(a) Draft by-law in the council;

(b) a budget tabled in the council;

(c) a municipality's draft integrated development plan, or any amendment of the plan, tabled in the council;

(d) the municipality's draft performance management system, or any amendment of the system, tabled in the council;

(e) *the decision to enter into a service delivery agreement referred to in section 76(b); or*

(f) any other matter prescribed by regulation.

(3) An executive committee mentioned in section 42 of the Municipal Structures Act and a mayoral committee mentioned in section 60 of the that Act may, subject to subsection (1)(a), close any or all of its meetings to the public, including the media.

(4) A municipal council -

(a) within the financial and administrative capacity of the municipality, must provide space for the public in the chambers and places where the council and its committees meet; and

(b) may take reasonable steps to regulate public access to, and public conduct at, meetings of the council and committees."

[22] From the above provisions it is plain that meetings of the City of Johannesburg and its committees whereat issues such as a draft by-law or a tabled budged are discussed are open to the public and the media. There are, however, exceptions where the public and the media may be excluded if

it is, in the view of the council, reasonable to do so, taking into account the nature of the business to be discussed. An executive committee of the council also has the discretion to close any or all of its meetings to the public and the media. Once more, there must be reasonable grounds for doing so as envisaged in subsection (1)(a) quoted above. What is of particular significance are the provisions of subsection (4)(b) which provide that the council "*may take reasonable steps to regulate public access to, and public conduct at, meetings of the council and its subcommittees*".

[23] Section 21 of the Systems Act provides as follows:

> "*21.* ***Communications to local community****. - (1) When anything must be notified by a municipality through the media to the local community in terms of this Act or any other applicable legislation, 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.*
>
> *(2) Any such notification must be in the official languages determined by the council, having regard to the language preferences and usage within its area.*
>
> *(3) A copy of every notice that must be published in the Provincial Gazette or the media in terms of this Act or any other applicable legislation, must be displayed at the municipal offices.*
>
> *(4) When the municipality invites the local community to submit written comments or representations on any matter before the council, it must be stated in the invitation that any person who cannot write may come during working hours to a place where a staff member or the municipality named in the invitation, will assist that person to transcribe that person's comments or representations.*

> *(5) (a) When a municipality requires a form to be completed by a member of the local community, a staff member of the municipality must give reasonable assistance to persons who cannot read or write, to enable such persons to understand and complete the form.*
>
> *(b) If the form relates to the payment of money to the municipality or to the provision of any service, the assistance must include an explanation of its terms and conditions.*"

These provisions, *inter alia*, emphasise the mode of communication with local communities, the publication thereof in newspapers or radio broadcasts and Provincial Gazette. It also, very importantly, obliges the municipality when it invites the local community to submit written comments or representations on any matter before the council, to ensure that assistance is available to illiterate persons.

[24] The above provisions clearly deal with the community participation process. The applicant, argues that section 16 of the Systems Act requires a municipality to develop a culture of community participation in its affairs. Section 17 of the Systems Act sets out the mechanisms, processes and procedures, being the means by which community participation may be established. The applicant argues that the right of members of the local community to be involved in and to participate in the affairs of the municipality is expressly recognised in section 5 of the Systems Act.

[25] As mentioned before, the applicant is plainly not unhappy with the publication of the public participation process followed by the City of Johannesburg in announcing the original 10% increase in respect of rates for all property categories. The 30/4/2009 was the date when comments,

following upon the public participation process were due. The comments received consequent to the public participation process indicated that in most instances a 10% increase, albeit on the high side, was generally acceptable to the public. It is indeed what followed after 30 April 2009, leading to the City of Johannesburg's decision to levy a further 18% increase rate on property in the business category, that is the bone of contention. The applicant contends that the process was unfair, not adequately publicised, discriminatory, and prejudicial towards business property owners. Further that prescribed requirements in the applicable legislation was not followed by the City of Johannesburg in reaching the decision. The applicant emphasises and argues that the rates and taxes are not a bottomless pit from which the authorities can unreservedly draw revenue. In reference to *Mercian Investments (Pty) Ltd v Johannesburg City Council* 1990 (1) SA 560 (W), the applicant argues that the funds received in the form of rates and taxes equate to trust money. That a statutory body is obliged to recover "*and to apply in accordance with its statutory powers and duties*" the revenue received. Further that in terms of section 195 of the Constitution a municipality is enjoined to apply its resources in an efficient, economic and effective manner.

[26] The applicant's grouse is that whilst the process leading to the initial announced increase of 10% in rates and taxes across the board, as described above, was underway, objections to the valuation roll were being considered and finalised. That it was a known fact to the City of Johannesburg that the values had been or would be increased substantially. A reduction of approximately R34 billion in total on business property values had been

conceded by the City of Johannesburg valuer by 16 March 2009. This, according to the applicant, resulted in a substantial reduction in the anticipated income to be derived from rates and taxes. Based hereon, the applicant submits that it must have been patently obvious to all that the reduction in income stream of the City of Johannesburg would be substantial with dire consequences in the event of no swift remedial action being taken. That notwithstanding such knowledge, the City of Johannesburg, on 26 March 2009 approved its operating budget with no proposed remedial action. The applicant has serious concerns about the City of Johannesburg's valuation roll as well as the supplementary valuation roll at the time.

[27] The 5 May 2009 Memorandum was discussed earlier in this judgment. The applicant contends that it was only after the completion of the public participation process that the Memorandum was published. Further that in the Memorandum the City of Johannesburg makes no mention of an intention to increase the rate ratio applicable to business properties. That if it is accepted that a differentiation in rates is permitted above the base ratio of 1:1, in that a re-alignment is permissible, as contended by the City of Johannesburg, then one would have expected the ratio between business properties and/or residential properties to have been addressed at a much earlier date, prior to the commencement of the budgetary process. It was surprising, says the applicant, that at the meeting of 6 May 2009 a committee of the City of Johannesburg met in order to consider the annual draft budget. At such meeting the committee considered the results from the public participation

process, and proceeded to approve and adopt a draft budget for submission and final approval by the City of Johannesburg on 21 May 2009.

[28] Based on the above, the applicant argues that the conduct of the City of Johannesburg is not only grossly irresponsible but negated the rights of the public to be consulted. That by the very latest on 9 April 2009, when Ms Naudé prepared and published her discussion document, the public participation process should have been halted and the public informed of the discovery made (the deficit). The discussion document, "FA10" to the founding papers, is entitled, "*Determination of Property Rates and Rebates For 2009/10*". In terms of this document, the Finance and Economic Development Committee of the City of Johannesburg, resolved to recommend to the City of Johannesburg that the rates for business properties and residential properties be 0,0132, and 0,0044, respectively, for the financial year 2009/2010. The applicant argues that the discussion document should have been accompanied by a clear and unambiguous indication that the budgetary process would have to be adjusted for consideration. The City of Johannesburg therefore failed to inform the public timeously resulting in the public being lulled into a false sense of security and satisfaction pertaining to their future obligations with reference to the payment of rates and taxes.

[29] It is not in dispute, as contended by the City of Johannesburg, that the proposed amendments to the property rates tariffs for 2009/2010, were handed out by Mr Florence of the City of Johannesburg at the Business Forum meeting on 5 May 2009. This is the proposal for a 28% increase in

respect of business properties. It is Annexure “M15” to the answering papers. The proposed increase contained in Annexure “FA11”, entitled “*Alignment of Commercial and Residential Property Rating*” as stated above, was also drafted by Mr Florence on 5 May 2009 after the meeting referred to above. There was also a meeting called by the Johannesburg Inner-City Business Coalition on 6 May 2009 whereat Annexure “FA11” was distributed. Annexure “FA11” was also distributed by email to various addresses representing the business community. The mailing list shows that Annexure “FA11” was also forwarded to Mr R Bennet who is a member of the National Council of the applicant. However, as indicated previously, both the applicant and Mr Bennet deny that Mr Bennet was mandated to represent the applicant at any meeting to discuss the proposed increase in business property rates ratio. The applicant contends that the distribution and circulation of Annexure “FA11”, by the City of Johannesburg was a half-hearted attempt if compared to the earlier public participation process. It is consequently, the applicant’s contention that the City of Johannesburg even though they have so-called original powers to impose and recover rates, have not complied with the applicable prescriptive legislation and procedures. The increase to 1:3.5 of the rate ratio to business properties resulted in a total increase equalling 28% in the rates and taxed payable by business property owners.

[30] The City of Johannesburg, on the other hand, counters extensively, and in my view, persuasively, the contentions of the applicant as detailed above. As seen hereunder, they also introduce the argument that the applicant in fact misinterprets the provisions of section 19(1) of the Rates Act.

In the view of the City of Johannesburg, the current proceedings instituted by the applicant against their decision can only be subject to a review to test the legality of the decision taken on 21 May 2009 under the Constitution. See *Fedsure Life Assurance v Greater Johannesburg TMC (supra)*, at paras [45] and [59]. As a consequence, the City of Johannesburg contend that the inquiry to be conducted by the Court is directed solely at the question whether the requirements of the MFMA and the Rates Act have been complied with. Since I agree with this approach, I proceed to conduct such inquiry.

[31] The Rates Act, quoted extensively in the applicant's argument, came into operation on 2 July 2005. It changed the basis of valuation of property fundamentally, as indicated earlier in this judgment. The City of Johannesburg had to compile a new valuation roll. At that stage there were approximately 800,00,00, properties in Johannesburg. All properties had to be re-valued. Under the Rates Act there are different rates for different property categories. Rates on individual sectional title units for which unit owners are liable were levied for the first time under the Rates Act. The preliminary, first valuation roll prepared under the Rates Act was open for an unofficial inspection period from September to October 2007. That valuation roll became effective on 1 July 2008. It had additionally been open for inspection for 90 days from 27 February 2008 to 27 May 2008. As a result of the innovation brought about by the Rates Act, the financial year 1 July 2008 to 30 June 2009 was the first year during which rates were levied on values in the new valuation roll. This is not in dispute.

[32] The following contentions of the City of Johannesburg are equally not seriously disputed. When the period for objections expired, some 22 448 objections to properties had been received, which objections had to be processed in terms of section 51 of the Rates Act by the municipal valuer. There were successful objections by property owners. The process was only completed in March 2009, less than two months before the City of Johannesburg approved the 2009/2010 budget now under discussion. The City of Johannesburg contend that at that stage, the full effect of such objections could not have been known before. They had service capacity problems. However, the applicant disputes this and instead contends that all the alleged challenges were caused by mismanagement and incompetence on the part of the City of Johannesburg.

[33] The City of Johannesburg say that based on the above delayed process, the 2009/2010 budget was based on rates income derived from the 2008 valuation roll which was still largely untested. The 2008/2009 budget and rates income were used as a starting-point for the compilation of the 2009/2010 budget. The theoretical calculation of income based on various rates and tariffs for purposes of the 2009/2010 budget had to be undertaken already in January 2009 because of the lead time for the submission of reports to the Mayoral Committee and council's Committee.

[34] The City of Johannesburg argue that on a proper interpretation of the MFMA and the Rates Act, public participation is indeed required in respect of the proposed or tabled budget but not the levying of the rates. This presents

a fundamental difference in the interpretation of the applicable legislation adopted by the respective parties. There is a difference between the "*approval of an annual budget*" which is regulated by section 24 of the MFMA, and the decision to levy a rate which is taken by a municipal council in terms of section 14(1) of the Rates Act.

[35] Section 24 of the MFMA provides as follows:

> "*(1) A municipal council must at least 30 days before the start of the budget year consider approval of the annual budget.*
>
> *(2) An annual budget -*
>
> *(a) must be approved before the start of the budget year;*
>
> *(b) is approved by the adoption by the council of a resolution referred to in section 17(3)(a)(i); and*
>
> *(c) must be approved together with the adoption of resolutions as may be necessary –*
>
> *(i) imposing any municipal tax for the budget year;*
>
> (ii) *setting any municipal tariffs for the budget year;*
>
> (iii) *approving measurable performance objectives for revenue from each source and for each vote in the budget;*
>
> *(iv) approving any changes to the municipality's integrated development plan; and*
>
> (v) *approving any changes to the municipality's budget-related policies.*
>
> *(3) The accounting officer of a municipality must submit the approved annual budget to the National Treasury and the relevant provincial treasury.*"

Emphasis is placed on "*together with*" in subsection (2)(c) quoted above. In terms of section 1 of the MFMA, "*municipal tax*" means property rates or other rates, levies or duties that a municipality may impose. It is clear that a "*tax*" includes property rates. For example, in *City Treasurer and Rates Collector, Newcastle Town Council v Shaikjee and Others* 1983 (1) SA 506 (N), Kumleben J at 507F-G said:

> "*The crisp question to be decided is whether such 'rates' are a form of 'taxation imposed or levied' within the meaning of this phrase in the said subsection. I have no doubt that they are.*"

On the other hand, a "*tariff*" is the remuneration for municipal services. See sections 73 and 86A of the Systems Act.

[36] The wording of section 24(c) of the MFMA, quoted above, shows the intention that the imposition of rates is not a part of the budget. So too does section 17(3), under Chapter 4, which deals with "*municipal budgets*". Section 17(3) of the MFMA prescribes the documents which should accompany the annual budget when it is tabled in terms of section 16(2) which provides:

> "*In order for a municipality to comply with subsection (1), the mayor of the municipality must table the annual budget at the council meeting at least 90 days before the start of the budget year.*"

The documents include draft resolutions "*imposing any municipal tax and setting out municipal tariffs as may be required for the budget year*".

[37] Further provisions of the Rates Act come into play. Section 12 provides:

> "*(1) When levying rates, a municipality must levy the rate for a financial year. A rate lapses at the end of the financial year for which it was levied.*
>
> *(2) The levying of rates must form part of a municipality's annual budget process as set out in Chapter 4 of the Municipal Finance Management Act. A municipality must annually at the time of its budget process review the amount in the Rand of its current rates in line with its annual budget for the next financial year.*
>
> *(3) A rate levied for a financial year may be increased during the financial year only as provided for in section 28(6) of the Municipal Finance Management Act.*"

It is clear that the levying of a rate is for a single financial year (in the context of the present matter 2009/2010), and that a rate, once levied, lapses at the end of the relevant financial year. Further that the levying of rates must form part of a municipality's annual budget process. Section 14 of the Rates Act provides as follows:

> "*(1) A rate is levied by a municipality by resolution passed by a 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 web site or a web site available to it as envisaged in section 21B of the Municipal Systems Act, on that web site; 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 web site or a web site available to it, that resolution is also available on that web site."

From these provisions, it is plain that a rate is levied by a municipality by a resolution passed by it. It is obligatory that such resolution be promulgated by publication in the Provincial Gazette. It is equally obligatory that such a resolution be, not only conspicuously displayed as indicated in subsection (3), by the municipal manager, but also advertised in the media. It is rather significant to note that in the context of the present matter, there is no corresponding requirement for the annual budget. There is also no public participation requirement save for the publication and advertisement of the resolution. Publication is required after the resolution has been passed. The resolution to levy a rate is part of the budget process but it is not a budget decision. The municipality must in terms of subsection (12)(2) of the Rates Act, annually at the time of its budget process review the amount in the Rand of its current rates in line with its annual budget for the next financial year. Section 160 of the Constitution equally distinguishes between the approval of budgets and the imposition of rates by a municipality council.

[38] The City of Johannesburg argue that in order to interpret the words "*in line with*" contained in subsection 12(2) of the Rates Act, according to the purpose the section says, it is necessary to determine what part of the budget process the rates are. It contends that the budget is the estimate of the expenditure for the next financial year as envisaged in section 18 of the MFMA which deals with the funding of expenditure. Section 18(1)(a) of the MFMA provides that:

> "*An annual budget may only be funded from –*
>
> *(a) realistically anticipated revenues to be allocated*",

while section 18(2) provides that:

> "*Revenue projections in the budget must be realistic, taking into account –*
>
> *(a) projected revenue for the current year based on collection levels to date; and*
>
> *(b) actual revenue collected in previous financial years.*"

[39] Section 17 of MFMA, deals with the contents of annual budgets and supporting documents. It provides that an annual budget of a municipality must be a schedule in the prescribed format:

> "*(a) setting out realistically anticipated revenue for the budget year from each revenue source;*
>
> *(b) appropriating expenditure for the budget year under different votes of the municipality;*

(c) setting out indicative revenue for revenue source and projected expenditure by vote for the two financial years following the budget year;

(d) setting out -

(i) estimated revenue and expenditure by vote for the current year; and

(ii) actual revenue and expenditure by vote for the financial year preceding the current year; and

(e) a statement containing any other information required by section 215(3) of the Constitution or as may be prescribed."

Subsection (3) then proceeds to list various documents that must accompany an annual budget when it is tabled.

[40] Based on the above, the City of Johannesburg, correctly in the view of the Court, argue that:

(1) the revenue which is available for funding the expenditure is determined, not with public participation, but by objective standards, namely that which can realistically be anticipated, and will be collected;

(2) how the anticipated income is to be expended and the nature of the priorities of the expenditure are indeed matters for public participation in contrast to the amount of the available revenue, which is not;

(3) property rates, which are a form of taxation, have never been a topic for debate with the taxpayers. On the other hand, the formulation of the Rates Policy is suitable for public participation;

(4) where the Rates Act requires public participation its says so. Public participation is significantly not mentioned in section 2(3) of the Rates Act. In terms of section 87 of the same Act:

> "*This Act prevails in the event of any inconsistency between this Act and any other legislation regulating the levying of municipal rates*."

[41] The gist of the argument of the City of Johannesburg, based on the above, and as understood by the Court, is that section 22 of the Rates Act does not prescribe any particular requirements for the public participation process. Instead, the section refers to Chapter 4 of the Municipal Systems Act, which also does not prescribe any detail. Further that where a reduction in rates revenue occurs, as in the present matter, there is no requirement in either the MFMA or the Rates Act that it should be the subject matter for public debate. If the resultant shortfall in revenue were to be augmented by a method that required an alteration or amendment of the Rates Policy that would have required public participation. In present matter the method of augmentation was expressly provided for by the Rates Policy.

[42] The City of Johannesburg submit, in the alternative, that section 23(2) of the MFMA provides for an opportunity for the Mayor to make such revisions to the budget, after it has been tabled, and after such public participation as may be required. Further that the use of the words "*all budget submissions*" is wide enough, particularly contrast with "*views*" in section 23(1) of the MFMA, to include submissions by municipal departments. For the sake of completeness, section 23 of the MFMA provides:

> "*(1) When the annual budget has been tabled, the municipal council must consider any views of –*
>
> *(a) the local community; and*
>
> (b) *the National Treasury, the relevant provincial treasury and any provincial or national organs of state or municipalities which made submissions on the budget.*
>
> *(2) After considering all budget submissions, the council must give the mayor an opportunity -*
>
> *(a) to respond to the submissions; and*
>
> (b) *if necessary, to revise the budget and table amendments for consideration by the council.*
>
> *(3) The National Treasury may issue guidelines on the manner in which municipal councils should process their annual budgets, including guidelines on the formation of a committee of the council to consider the budget and to hold public hearings.*
>
> *(4) No guidelines issued in terms of subsection (3) are binding on a municipal council unless adopted by the council.*"

From the above, it is clear that the consideration by the council of the views of both the local community and the National Treasury is obligatory. Thereafter the council is equally obliged to afford the Mayor an opportunity to respond to the submissions, and if necessary to revise the budget and table amendments

for consideration by the council. In the present matter, the City of Johannesburg argue that the members of the public were given an opportunity to respond, and did respond to the proposed additional 18% increase. Their views were put to council officials at the meetings of 5, 6 and 15 May 2009. The report of the Mayoral Committee and the meeting of the City of Johannesburg on 21 May 2009 referred to the views of the public. The Mayor's response in terms of section 23(2) of the MFMA was to revise the budget as tabled by increasing the rate on business properties as recommended by the Mayoral Committee since that is the category where the bulk of the shortfall arose.

THE APPLICANT'S OTHER COMPLAINTS

[43] The applicant's complaint under discussion is mirrored in paragraph 3 of the founding affidavit in the following terms:

> "*The basis upon which the applicant seeks the relief set out in the notice of motion is, in the main, premised thereon that the first, second and the third respondents ('the respondents') have failed to follow and adhere to the prescribed procedures and other legislative provisions, leading up to and including the adoption of the annual budget. More particularly it is the applicant's case that the respondents firstly failed to adequately publish the draft budget and a proposed increase in the rates ratio to the local community in order to allow the members of the community to pass comment on or object to the proposed budget and increase.*"

The second basis is, as indicated, that the decision of the City of Johannesburg taken on 21 May 2009 in levying an additional increase amounting to 18% over and above the original proposed increase of 10% in

the rates applicable to business properties discriminated against the owners of such properties, and treating the owners of business properties unequally. It is significant that the applicant states that the City of Johannesburg "*failed to adequately publish a draft budget*". The applicant clearly does not complain about the public participation process followed by the City of Johannesburg with regard to the budget as a whole. Its grouse is directed rather at the process followed with regard to the additional 18% which forms the basis of the accusations of discrimination and illegality.

[44] In *Kungwini Local Municipality and Silver Lakes Home Owners Association* 2008 (6) SA 187 (SCA) para [14], Van Heerden JA said:

> "*In a post-constitutional South Africa, the power of a municipality to impose a rate on property is derived from the Constitution itself: the Constitutional Court has described it as an 'original power' and has held that the exercise of this original constitutional power constitutes a legislative - rather than an administrative - act. The principle of legality, an incident of the rule of law, dictates that in levying, recovering and increasing property rates, a municipality must follow the procedure prescribed by the applicable national or provincial legislation in this regard.*" See also *Rates Action Group of Cape Town* 2006 (1) SA 496 (SCA) para [10]. In regard to public participation in legislative process and in *Merafong Demarcation Forum v President of the RSA* 2008 (5) SA 171 (CC), para [27], Van der Westhuizen J said:
>
> > "*The obligation to facilitate public involvement may be fulfilled in different ways. It is open to innovation. Legislatures have discretion to determine how to fulfil the obligation. Citizens must, however, have a meaningful opportunity to be heard. The question for a court to determine is whether a legislature has done what is reasonable in all the circumstances. In determining whether the legislature acted reasonably, this court will pay respect to what the legislature assessed as being the appropriate method. The method and degree of public participation that is reasonable in a given case depends on a number of factors, including the nature and importance of the legislation and the intensity of its impact on the public. …*"

[45] In the present matter, it is not disputed that the applicant received the 5 May Memorandum proposing the increase to rates in respect of business properties on 7 May 2009. It is however, in dispute whether Mr Richard Bennet, an executive on the National Council of the applicant, who attended previous meetings where the proposed increase was discussed, in fact represented the applicant. It however appears unlikely that Mr Bennet would have omitted to convey such crucial and vital information to the applicant. On receipt of the 5 May Memorandum on 7 May 2009, the applicant engaged an official of the City of Johannesburg merely to seek an extension of the deadline for making submissions. This was some 14 days before the meeting of the City of Johannesburg on 21 May 2009 whereat the increase to rates in respect of business property was adopted. The applicant, in the view of the Court, clearly had adequate opportunity to prevent the adoption of the 2009/2010 budget. In any event, the credible evidence is that the proposal to re-align the rates on business properties was advertised extensively by the City of Johannesburg in various newspapers as far back as 8 and 9 May 2009. The notices invited submissions by 15 May 2009. On the latter date, a further meeting of the Johannesburg Business Forum was held where the proposed increase was discussed. The version of the City of Johannesburg is once more that the applicant was represented at this meeting by Mr Bennet. There was plainly adequate publication and notification for the applicant to make submissions. In my view, the applicant has not succeeded to prove any substantial deviation on the part of the City of Johannesburg from the

prescribed procedure. In any event whatever the deviation that may have occurred does not necessarily mean that the whole process should be impugned. See *Nokeng Tsa Taemane Local Municipality v Dinokeng Property Owners Association and Others* [2010] ZA SCA 128. The City of Johannesburg's interpretation of the applicable legislative requirements and submissions has considerable merit.

THE APPLICANT'S CLAIM OF DISCRIMINATION

[46] I deal with the applicant's contention that the approval of the 2009/2010 budget which levied the rates for business properties discriminates against the owners of business properties. The contention is similarly articulated in paragraph 3 of the founding papers. The applicant contends that the discrimination is firstly against owners of business properties, and secondly, amongst such owners. It is indeed extremely difficult to fully appreciate the applicant's complaint on this subject. It is not adequately set out in the founding papers. In paragraph 92 of the founding affidavit the applicant refers to a supporting affidavit of Mr D S Ogbu, the Chief Executive Officer of Liberty Properties. Based on the supporting affidavit, the applicant proceeds to allege that:

> "*It is clear from the affidavit that the property owners who own property in the same category are being discriminated against and are not being treated in accordance with the principles of equality as provided for in the applicable municipal legislation.*"

In the heads of argument reference is made to "*section 16 of the Rates Act echoes and builds onto the provisions of section 229 of the Constitution, whilst section 19 of the Act echoes the principle of equality enshrined for in the Constitution*". It is argued that, the City of Johannesburg, by increasing the rates ratio applicable to business property and not the base rate, which would equally have affected all property owners, offended the principle of equality enshrined in the Constitution.

46.1 Section 19 of the Rates Act, contains a prohibition against "*impermissible differentiation*". Section 19(1)(c), in particular, prohibits rates which "*unreasonably discriminate between categories of non-residential properties*". The crisp issue is whether the rate levied on business properties of 0,0154 cents in the Rand discriminates against the owners of business properties.

46.2 The City of Johannesburg argue that the mere differentiation with regard to rates levied between one category and other categories does not establish discrimination or impermissible differentiation. Further that mere differentiation that is not discriminatory need not be fair. Its validity is tested by the rationality standard. In *Rates Action Group v City of Cape Town (supra)* para [85]:

> "*The Constitutional Court has summarised in Harksen v Lane NO and Others 1998 (1) SA (CC) (1997 (11) BCLR*

1489) at para [54] how a Court is to inquire into an allegation of unfair discrimination inconsistent with the Constitution. In the context of this case, the questions which have to be answered are the following:

(1) Does the provision differentiate between people or categories of people? If so:

(2) *Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:*

(a) Does the differentiation amount to 'discrimination'? As it is on a specified ground (race), discrimination has been established.

(b) Does it amount to 'unfair' discrimination? As a discrimination is on a specified ground, unfairness is presumed, and the onus is on the City to prove the contrary. The test of unfairness focuses primarily on the impact of the discrimination on the complainants and others in their situation.

(3) If unfair discrimination is found, can the provision be justified under the limitations clause, s 36 of the Constitution?"

The mere differentiation in respect of rates levied between one and the other categories would not be discriminatory. The other issue whether the rate is rational depends, in the present matter, on the reason for the rate of R0,0154 in the Rand. The question therefore is, whether the rate can be rationally connected to a legitimate governmental purpose of the City of Johannesburg. See *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) para [22]. The credible evidence in the instant matter by the City of

Johannesburg is that the increased rate was levied on business properties in order to augment the shortfall in revenue. The latter in turn, was caused by the successful objections to the over-valuations of properties on the valuation roll and the re-categorization of properties. The City of Johannesburg say that the method used was to increase the rate on business properties. The reason why this category was chosen was because it produced the largest reduction in the rates revenue. The City of Johannesburg by so doing intended to restore the percentage of rates income from business properties to total rates income to what it was before. In the view of the Court, these are perfectly acceptable reasons. There was no unfairness or discrimination. The argument of the applicant to the contrary, including that the City of Johannesburg had other options available to them, has no merit at all. The supporting affidavit of Mr D S Ogbu on which the applicant relies largely for its contention, is not helpful, and somewhat irrelevant to the matter under discussion.

46.3 The complaint of the applicant that there is discrimination amongst owners of business properties, falls to fail for the same reasons advanced above. The applicant contends that the real reason for the shortfall in revenue is the under-valuation of a very large number of properties. There is, however, no conclusive evidence on this aspect. There is similarly no

> persuasive evidence, as alleged by the applicant, that the owners of business properties whose properties are correctly valued are required to pay a higher rate than those not. The problem faced by the applicant in this regard is that until a valuation is corrected as described by section 32(1) of the Rates Act, the value of a property as contained in the valuation roll is the only relevant value. See in this regard *Salandia (Pty) Ltd v Vredenburg-Saldanha Municipality* 1988 (1) SA 523 (A) 535C-F.

THE SHORTFALL

[47] Heavy weather was made in argument on two other issues. The applicant contends that not only was the shortfall foreseeable at an early stage, but was also avoidable. The applicant submits that the deficit could have been remedied during the budget process. Further that the City of Johannesburg is non-suited to rely on the shortfall because it was foreseeable. The Rates Policy of the City of Johannesburg, implemented from 1 July 2008, provides that the Council may, *inter alia*, levy rates on property to finance operational expenditure of Council. Clause 2(3) of the Rates Policy provides that the Council, must annually review, and may, if necessary, amend the policy and proposals for reviewing the policy and be considered by the Council in conjunction with the annual operating budget. Furthermore, clause 2(4) of the Rates Policy provides that, the Council may levy an additional rate on property in a special rating area and in doing so, may differentiate between categories of property. More significantly, in the context

of the present matter, clause 6 of the Rates Policy, which deals with the "*annual operating budget*", deals with the criteria to be applied in determining the level of increases in rates, one of these criteria is "*the augmentation of any revenue shortfall*". See clause 6(3)(f). The criteria to be considered in determining whether a differential rate should be applied, include the need to promote economic development; any administrative advantages; and the need to alleviate the rates burden on the owners of any particular category of property.

[48] Whilst the applicant correctly contends that by 16 March 2009 it was known that the reduction in property values amounted to some R34 billion, the contention whether or not the shortfall was foreseeable appears irrelevant in the light of the express provisions of the Rates Policy referred to in the preceding paragraph. There are several other reasons against the contention of the applicant. The City of Johannesburg's Department of Rates and Taxes still had to process the vouchers to determine the effect on the rates income, particularly to determine what category of property was most affected; there were admittedly thousands of objections; and the process leading up to the tabling of the preliminary budget is a long one commencing in the previous year. For these reasons, the effect on the rates income cannot be said, as the City of Johannesburg contend, to have been foreseeable. Neither can it be said to have been avoidable for a number of compelling reasons.

[49] The applicant argues, strongly and consistently for that matter, that the cause of the shortfall is the under-valuation of properties. This, the applicant

ascribes to the City of Johannesburg's failure to carry out their work in a professional and responsible manner. For its contention, the applicant relies on several sources. The first is the valuation it contends was carryied out by an independent valuer, Mr George Nel, of 50 major commercial properties. The applicant then proceeds to rely on what another independent valuer, Mr N R Griffiths, states in his supporting affidavit what Mr George Nel's conclusion was. However, it turned out that Mr Griffiths's understanding of Mr Nel's mandate and duties was incorrect. Mr Nel was mandated to investigate the values of some 22 properties and prepare appeals to the Valuation Appeals Board against the decision of the municipal valuer. One of the business properties on the list of Mr Nel was the Sandton City property. The City of Johannesburg point out that the latter property was erroneously on the list as no objection had been noted against its valuation. This contention is not controverted. Mr Nel nevertheless proceeded to value the Sandton City property. He came to the conclusion that it was under-valued. This property is currently included in the supplementary valuation roll, and lay open for inspection. The City of Johannesburg, however, do not dispute that the Sandton City property was under-valued. However, in the bigger scheme of things, this does not validate the contention that there is a large scale of under-valued properties. As indicated earlier in this judgment, the applicant also relies mostly on the supporting affidavit of Mr D S Ogbu of Liberty Properties. I have already dealt with the veracity of this affidavit. The applicant also relies on the supporting affidavit of Mr Christo Myburgh, the managing member of Utility Administration Services CC, which attends to the management and administration of a large number of property owners'-

accounts, as well as related affairs with the City of Johannesburg. The supporting affidavit of Mr Myburgh is somewhat unhelpful. The names or descriptions of the properties which his company manages have been deleted from the affidavit. The City of Johannesburg, in my view, correctly adopt the attitude that it is impossible to respond to the allegations contained in Mr Myburgh's affidavit.

[50] From the above, the evidence on the alleged under-valuation of properties, it must be accepted that Mr Nel's mandate had nothing to do with the under-valuation of properties. There is no concrete evidence of a general under-valuation of properties save for the Sandton City Property. The shortfall caused by the successful objections, which the City of Johannesburg were obliged to deal with, would have existed whether there was a general under-valuation or not. The contentions of the applicant in this regard have not been proved convincingly.

SUPPLEMENTARY HEADS OF ARGUMENT

[51] Subsequent to the hearing of the matter, the parties filed supplementary heads of argument, mainly on the question of the interpretation of section 19(1) of the Rates Act. I am grateful to both parties in this regard. I have already dealt with this aspect earlier in this judgment. In short, the applicant, for the interpretation it contends, relies on the Municipal Property Rates Regulations ("*the Regulations*"). The Regulations were published in terms of section 19(1)(b) of the Rates Act. On this basis the

applicant contends that the Minister for Provincial and Local Government has made it impermissible for a municipality to levy a rate on non-residential property which exceeds the rate levied on residential property. The Regulations were published under GN R363 in GG 32061 on 27 March 2009, as indicated above, and entitled, "*Municipal Property Rates Regulations on the Rate Ratio Between Residential and Non-Residential Properties*". It is Annexure "FA2".

[52]

52.1 The applicant contends that section 19(1) of the Rates Act deals not with the maximum ratios, but rather with impermissible differentiation which requires that a municipality may not levy a rate on a category of non-residential property which exceeds any ratio prescribed, as determined by the Minister by way of regulation, in respect of residential properties. The argument proceeds that the moment when a prescribed ratio has been determined by the Minister with reference to residential property, a municipality will be barred from levying a rate on categories of non-residential properties which exceeds that prescribed ratio. The applicant argues that the fact that the legislature in section 19(1) of the Rates Act views the issue as an impermissible differentiation, rather than the mere placing of an upper-limit, considered with the fact that National Treasury, prior to the promulgation of the Regulations, requires of local municipalities to move towards and attempt not to exceed a ratio of 1:1, being

the base rate, is indicative, that historical imbalances and principle of equality were being addressed rather than the mere prescription of an upper-limit.

52.2 In my view, the interpretation contended for by the City of Johannesburg is the more reasonable one. In terms of the '*golden rule*' of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument. The mode of construction should never be to interpret the particular word or phrase in isolation by itself. See *Coopers and Lybrand and Others v Bryant* 1995 (3) SA 761 (A) at 767E-8768E. In the present matter the Regulations clearly purported to prescribe a maximum ratio between residential property and two particularly specified categories of non-residential property, namely, agricultural property and the public service infrastructure property, listed in the table. There is no mention in the table of any other category of non-residential property. In addition, the Regulations did not at all purport to impose any limitation on the levying of rates in relation to any other category of non-residential properties. Furthermore, in paragraph 2(b) entitled "*Rates ratios to be applied*", the Regulation reads:

> "*The second number in the second column of the table represents the maximum ratio to the rate on residential*

> *property that may be imposed on the non-residential properties listed in the first column of the table.*"

The table then lists the three properties categories and rates, respectively, as follows, Residential 1:1, Agricultural 1:0.25, and Public Service Infrastructure 1:0.25.

Once more, there are only two categories of non-residential properties listed. The interpretation contended for by the City of Johannesburg is plainly the one intended when regard is had to the notice of approval granted by the Minister of Finance for the commencement of the Regulations in Government Notice No. 364 published on 27 March 2009. The body of the Notice reads:

> "*… the Minister of Finance has granted approval in terms of section 43(2) of the Local Government: Municipal Finance Management Act, 2003 (Act No. 56 of 2003), for the upper limits with respect to the rate ratios between residential and non-residential properties as they relate to agricultural properties and public service infrastructure properties, as prescribed in the Government Notice No. 363 issued by the Minister for Provincial and Local Government, (Annexure 'FA2'), with my concurrence, in terms of sections 19(1)(b) and (2) of the Local Government Municipal Property Rates Act, 2004 (Act No. 6 of 2004), to become effective for municipalities as from 1 July 2009.*" (my insertion)

From this, it is clear that the Minister of Finance recognised that the Regulations only related to two categories of non-residential properties. There could never have been a different intention from the interpretation of the Regulations in terms of the '*golden rule*' of interpretation enunciated above. There are clearly other

reasons discernible from the provisions of section 19(1) and the Regulations in question which satisfy the Court that the interpretation advanced by the applicant is untenable in the circumstances of the matter. It requires no elaboration, save to emphasise that neither section 19(1)(b) of the Rates Act, nor the Government Notice aforementioned prescribed a "*base rate*", or a "*base ratio*" or any other limitation on rates for business properties, as the City of Johannesburg correctly contend.

ALTERNATIVE SOLUTIONS SUGGESTED BY THE APPLICANT

[53] The applicant proposes alternative methods open to the City of Johannesburg instead of increasing the rates payable by owners of business properties. In the light of the finding made above, it becomes unnecessary to deal extensively with such proposed alternative solutions. This, for the simple reason that most, if not all, of the proposals are either long-term or forming part of inherent ongoing administration and management. The first proposal is that the City of Johannesburg should rather recover revenue from their large debtors' books in respect of which substantial amounts have already been written off. The short answer to this is that debt recovery is a slow and expensive process faced by numerous other municipalities. The second alternative proposal is that since the records of the City of Johannesburg, more specifically with reference to the owners of townhouses, are in a chaotic state, it is impossible or difficult to recover successfully rates and taxes due to the council in respect of townhouses. Indeed, in the answering papers, the

City of Johannesburg recognise the problems. The council say that after the Rates Act came into operation, they embarked on a project to establish the addresses of sectional title units. Previously, under the applicable Ordinance, sectional title units were not rated separately. However, despite all efforts by the council, there are presently a large number of personal postal addresses of owners of sectional title units unknown. Once more, the City of Johannesburg say the process to establish the addresses is ongoing. In my view, this is not an unreasonable explanation. The applicant also proposes that the City of Johannesburg could have saved on its non-essential expenditure. In this regard an example is given of the City of Johannesburg hosting a Miss World Pageant during the recent Soccer World Cup at a significant loss to the coffers of the council. This, notwithstanding that the expenditure had not been properly and fully provided for in the 2009/2010 budget. The amount involved is some R60 m. The short answer to this contention is that it is irrelevant to the present problem. It is also suggested that when the City of Johannesburg became aware of the predicament in the budget process, they should have resorted to and acted in terms of the provisions of section 28 of the Finance Management Act. The latter section provides for those situations where an approved budget needs to be revised or adjusted. Instead, so the argument proceeds, it was perceived by the City of Johannesburg to be far easier to burden a soft target with additional tax, increasing its rates and taxes imposed by 28%, which is iniquitous, unheard of, and not to be tolerated. Once more, and regrettably, no factual basis has been laid to sustain this allegation. It too, must fail. The rest of the suggested alternative solutions, especially based on what the applicant terms

mismanagement and incompetent cooperative governance on the part of officials of the City of Johannesburg, have not been proved persuasively. In my view, this is certainly not a situation as described in *Sehume v Atteridgeville City Council and Another* 1992 (1) SA 41 (A) at 57F, namely:

> "*To penalise virtue is unreasonable. The enabling statute contains no indication that a black local authority can lawfully treat those under its jurisdiction in such an unreasonably unequal manner.*"

THE ESSENCE OF THE APPLICANT'S RELIEF

[54] The applicant seeks the setting aside of the whole budget for the year 2009/2010. The applicant's grumble is the resolution levying the rate on business properties and more specifically the additional 18% increase, not the original proposed 10% increase across the board. The allegations levelled against the City of Johannesburg of an inadequate public participation programme as well as the allegations of discrimination and inequality all refer to the additional 18% increase in the rate in respect of business properties. In paragraph 4 of the notice of motion alternative remedies are suggested, directed at what the applicant calls "*rates ratio*". In this regard, the City of Johannesburg has demonstrated credibly that the resolution of the council is to levy a certain rate in the Rand, not a certain ratio. Indeed, in the documentation motivating the proposed additional increase of 18% there is, as the City of Johannesburg argue, references to an increase in the ratio between residential properties and business properties. This is simply a convenient manner of expressing the intention of increasing the rate. A ratio

can plainly not be levied. There is no evidence of any procedural defect, notwithstanding. As a consequence, the relief claimed in paragraph 4 of the notice of motion ought to be denied.

[55] The City of Johannesburg, in the answering affidavit, allude to the disastrous consequences for their finances, and the City, should the rate on business properties be set aside now on any basis or the basis advanced by the applicant. The most obvious result is that the City of Johannesburg would be bankrupt. It would not be able to perform its constitutional functions as imposed by sections 152, 153 and 156 of the Constitution. The declaration of invalidity of the promulgation of the rate is government by section 172(1)(a) of the Constitution. Whilst a court "*must declare*" that the conduct of the Council is unlawful in the sense of being inconsistent with the Constitution, if so proven, section 172(1)(b), however, requires the court to make "*any order that is just and equitable*".

[56] In the context of the present matter, and based on the established facts, it would plainly not be just and equitable, in effect, as the City of Johannesburg argue, to absolve the owners of business properties of all liability to pay rates for the year 2009/2010. There is simply no denial on the part of the applicant that such owners of business properties received services from the City of Johannesburg for that year, even if the prescribed procedure was not fully complied with or there was a measure of discrimination. In this regard reference has already been made to *Nokeng Tsa Taemane Local Municipality v Dinokeng Property Owners*

Association and Others para [14]. See also *Pretoria City Council v Walker* 1998 (2) SA 363 (A), paras [93] to [97].

[57] As stated earlier in this judgment, there was a delay in launching the current proceedings. The 2009/2010 budget is in any event no longer in operation, and the relief now sought in any form, is somewhat academic. Indeed, in *Sebenza Kahle Trade v Emalahleni Local Municipality Council* [2003] 2 All SA 340 (T) at 350, the Court said:

> "*Where the issue is abstract, hypothetical or academic the courts will not adjudicate upon a declaration of rights. This principle has been entrenched by the Constitutional Court in JT Publishing (Pty) Ltd v Minister of Safety and Security 1997 (3) SA 514 (CC) at 525A-B where Didcott J said the following:*
>
> > *"… A declaratory order is a discretionary remedy, in the sense that the claim lodged by an interested party for such an order does not in itself oblige the Court handling the matter to respond to the question which it poses, even when that looks like being capable of a ready answer. A corollary is the judicial policy governing the discretion thus vested in the Courts, a well-established and uniformly observed policy which directs them not to exercise it in favour of deciding points that are merely abstract, academic or hypothetical ones. I see no reason why this new Court of ours should not adhere in turn to a rule that sounds so sensible."*"

[58] In the present matter, the City of Johannesburg advance credible reasons why it would in any event not be in the interests of good government to set aside, retro-actively, the rate of R0,0154 in the Rand. They say, for example, if the rate is set aside, it means that all payments for the 2009/2010 financial year received in respect of the rate from the owners of business properties will have to be repaid. However, the amount received as income on the budget under this heading clearly will have been spent on current

expenditure during the 2009/2010 financial year (or now even later). An order setting aside the rate will therefore put the City of Johannesburg in a precarious financial position. It will have to budget for an additional amount for the repayment of any loan capital in a future financial year. The question will inevitably arise from which source the income will be derived. Alternatively, the Council will have to cut back its expenditure in the said amount which will leave it in a position where it cannot deliver all the essential services in terms of its constitutional obligations. This is clearly untenable. It will clearly not be in the public interest or in the interests of good governance to set aside the City of Johannesburg's decision to levy the rate of R0,0154 in the Rand. In any event on the credible evidence, no such case has been made out by the applicant. The applicant has equally not demonstrated that the rate was levied unlawfully. What exacerbates the applicant's contention further is that the disputed rate no longer exists as it lapsed when the new financial year commenced on 1 July 2010. The various alternative relief sought by the applicant is unquestionably and profoundly unjustified.

CONCLUSION

[59] I conclude that for all the aforegoing reasons the application, although intended to protect the interests of numerous business property owners, who may be profoundly unhappy, calls to be dismissed.

COSTS

[60] I deal with the issue of costs. This matter is fairly complicated. The factual issues presented are not capable of easy resolution. There are several pieces of legislation involved. It was wise and prudent for both parties involved to brief senior counsel. There is no reason why the costs should not follow the result.

ORDER

[61] The following order is made:

1. The application is dismissed with costs, including the costs of two counsel.

_____

D S S MOSHIDI
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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DATE OF HEARING	22 FEBRUARY 2011
DATE OF JUDGMENT	24 MAY 2011