REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA) 4/4/2014

CASE NO:63280/11

DATE HEARD: 29 & 30 October 2013

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

04/04/2014 DATE

SIGNATURE

In the matter between:

BLAIR ATHOLL HOMEOWNERS ASSOCIATION (ASSOCIATION INCORPORATED UNDER SECTION21) 1st Applicant

WRAYPEX (PTY) LTD 2nd Applicant

ROBERT SEAN WRAY 3rd Applicant

and

THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY Respondent

JUDGMENT

MURPHY J

1. The applicants seek an order that the decision of the City of Tshwane Metropolitan Municipality ("the Municipality"), the respondent, to adopt

a draft rates policy and draft by-laws be set aside "as far as the development known as Blair Atholl is concerned".

2. The first applicant is Blair Atholl Homeowners Association ("BAHA"); the second applicant, Wraypex (Pty) Ltd, ("the developer"), is the developer of the Blair Atholl Estate, a residential estate; and the third applicant is Mr Robert Wray ("Wray") a member and director of the BAHA and the developer.

3. The Blair Atholl Estate is an upmarket residential estate with a golf course, located about 50 kilometres west of the city of Pretoria. The recreational facilities in the estate include a restaurant, swimming pool, tennis courts and a wellness centre. The estate is over 600 hectares in size and is comprised of 329 individual stands. The developer was responsible for the development. It applied for approval of the township in terms of the Town Planning and Township Ordinance, 15 of 1986, which approval was granted subject to specific conditions.

4. According to the municipality, when it was called upon to consider the developer's application for the establishment of the Blair Atholl township, the relevant area fell outside its priority areas for the establishment of new townships and had no available water and sewerage services. Accordingly, the approval was granted subject to the condition that the developer would install all the necessary internal and external services. To this end, the developer and the municipality

in February 2006 concluded an "Engineering Services Agreement" ("ESA") in which the developer undertook primary responsibility for the installation of the proposed services scheme, defined to include: "the proposed road, street, stormwater, water, electricity and sewerage reticulation services scheme in and to the township consisting of all internal and external services".

5. Internal services are defined in the ESA as including all the water and sewerage networks and associated installations, stormwater and drainage systems and road infrastructure within the boundaries of the township. While the external services are all road, street, stormwater, water and sewerage services whereto the internal services can be connected for the provision of such services to the township.

6. In accordance with the ESA, the developer developed and erected the external and internal engineering services to the estate, which services are now maintained by the BAHA. The maintenance costs are financed by way of a monthly levy from residents, which levy is managed and controlled by the BAHA. The estate is unusual in this respect and its residents do not benefit directly from the ordinary services provided by the municipality, due primarily to the geographical location of the estate some 50 kilometres from the municipality's core residential areas.

7. Since the completion of the development, several disputes have arisen between the BAHA and the municipality with regard to the use of water,

the municipal rates and payment for the installation of the water pipeline to the estate. Some of the issues are spelt out in detail in the founding affidavit, but strictly speaking are not directly relevant to the present application.

8. As part of the conditions of approval of the township, the developer was obliged to establish the BAHA and the purchasers of erven within the township are required to become members of the BAHA. The developer is also a member of the BAHA. A number of the erven in the township were required to be transferred to the BAHA in order to provide essential engineering services to the homeowners. The BAHA is restricted from selling the erven on which engineering services have been erected and has full responsibility for the functioning and maintenance of the erven and the essential services thereon.

9. The focus of the present dispute between the parties is the adoption of the draft rates policy by the council of the municipality on 4 May 2011.

10. Section 229 of the Constitution governs the fiscal powers and functions of municipalities in our country. The provision recognizes various revenue raising measures available to municipalities, namely: rates on property; surcharges on fees for services provided by the municipalities; and other taxes, levies and duties authorized by national legislation. The provisions relevant to this matter are sections 229(1) and 229(2) which read:

"(1) Subject to subsections (2), (3) and (4), a municipality may impose-

(a) rates on property and surcharges on fees for services provided by or on behalf of the municipality; and

(b) if authorised by national legislation, other taxes, levies and duties appropriate to local government or to the category of local government into which that municipality falls, but no municipality may impose income tax, value added tax, general sales tax or customs duty.

(2) The power of a municipality to impose rates on property, surcharges on fees for services provided by or on behalf of the municipality, or other taxes, levies or duties -

(a) may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across municipal boundaries, or the national mobility of goods, services, capital or labour and

(b) may be regulated by national legislation."

11. The Local Government: Municipal Property Rates Act 6 of 2004 ("the Act") is the relevant legislation. Section 2(1) of the Act provides that a metropolitan or local municipality may levy a rate on property in its area. Section 2(3) of the Act provides:

"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."

12. The relevant provisions of section 3 of the Act read:

" (1) The council of a municipality must adopt a policy consistent with this Act on the levying of rates on rateable property in the municipality.

(2) A rates policy adopted in terms of subsection (1) takes effect on the effective date of the first valuation roll prepared by the municipality in terms of this Act, and must accompany the municipality's budget for the financial year concerned when the budget is tabled in the municipal council in terms of section 16(2) of the Municipal Finance Management Act.

(3) A rates policy must -

(a) treat persons liable for rates equitably;

(b) determine the criteria to be applied by the municipality if it -

(i) levies different rates for different categories of properties;

(ii) exempts a specific category of owners of properties, or owners of a specific category of properties, from payment of a rate on their properties;

(iii) grants to a specific category of owners of properties, or to the owners of a specific

category of properties, a rebate on or a reduction in the rate payable in respect of their properties; or

(iv) increases rates;

(c) determine, or provide criteria for the determination of -

(i) categories of properties for the purpose of levying different rates as contemplated in paragraph (b)(i); and

(ii) categories of owners of properties, or categories of properties, for the purpose of granting exemptions, rebates and reductions as contemplated in paragraph (b)(ii) or (iii);

(d) determine how the municipality's powers in terms of section 9(1) must be exercised in relation to properties used for multiple purposes;

(e) identify and quantify in terms of cost to the municipality and any benefit to the local community-

(i) exemptions, rebates and reductions;

(ii) exclusions referred to in section 17(1)(a), (e), (g), (h) and (i); and

(iii) rates on properties that must be phased in in terms of section 21;

(f) take into account the effect of rates on the poor and include appropriate measures to alleviate the rates burden on them;

(g) take into account the effect of rates on organisations conducting specified public benefit activities and registered in terms of the Income Tax Act for tax reductions because of those activities, in the case of

property owned and used by such organisations for those activities;

(h) take into account the effect of rates on public service infrastructure;

(i) allow the municipality to promote local, social and economic development; and

(j) identify, on a basis as may be prescribed, all rateable properties in the municipality that are not rated in terms of section 7(2)(a)."

13. Section 3(6) of the Act provides that no municipality may grant relief in respect of the payment of a rate to a category of owners of properties or to the owners of a category of properties, other than by way of an exemption, a rebate or a reduction provided for in its rates policy and granted in terms of section 15 of the Act, which section sets out the general powers of municipalities to grant exemptions, reductions and rebates.

14. Section 4 of the Act governs community participation in a municipality's adoption of its rates policy. It provides as follows:

" (1) Before a municipality adopts its rates policy, the municipality must -

(a) follow a process of community participation in accordance with Chapter 4 of the Municipal Systems Act; and

(b) comply with subsection (2).

(2) The municipal manager of the municipality must -

(a) conspicuously display the draft rates policy for a period of at least 30 days -

(i) at the municipality's head and satellite offices and libraries; and

(ii) if the municipality has an official website or a website available to it as envisaged in section 21B of the Municipal Systems Act, on that website; and

(b) advertise in the media a notice -

(i) stating-

(aa) that a draft rates policy has been prepared for submission to the council; and

(bb) that the draft rates policy is available at the municipality's head and satellite offices and libraries for public inspection during office hours and, if the municipality has an official website or a website available to it, that the draft rates policy is also available on that website: and

(ii) inviting the local community to submit comments and representations to the municipality concerned within a period specified in the notice which may not be less than 30 days.

(3) A municipal council must take all comments and representations made to it or received by it into account when it considers the draft rates policy."

15. In terms of section 5 of the Act, the council of a municipality must annually review, and if necessary amend its rates policy, while in terms of section 6 it must adopt by-laws to give effect to the implementation of its rates policy. When levying rates a municipality must levy rates on

all rateable property in its area, but this does not prevent a municipality from granting exemptions, rebates or reductions in terms of section 15 (section 7(2)(b) of the Act).

16. On 1 April 2011, the municipality published a notice in a local newspaper, the Pretoria News, whereby it invited the community to public consultation meetings on its Medium Term Revenue and Expenditure Framework ("MTREF"), its budget, as well as upon its draft property rates policy. The notice informed the public that all written comments and submissions on the draft rates policy had to be submitted by 30 April 2011. Comments and submissions in relation to the MTREF had to be received by 10 April 2011. Details for accessing the relevant documents were provided in the notice, and a schedule of the public consultation meetings was set out in the notice.

17. The applicants obtained a copy of the draft rates policy on 6 April 2011. Their representatives attended one of the public consultation meetings on 7 April 2011 at which they raised the issue of previous litigation between the parties. The applicants responded to the draft rates policy on 29 April 2011 in a 32 page memorandum in which they made various submissions.

18. From the memorandum it appears that the essence of the applicants' objection to the rates policy is that the municipality did not take account

of the unique position of the residents of the Blair Atholl estate. At page 16 of the memorandum it is stated:

> "The purpose of this submission, in respect of the draft Property Rates Policy, references to residential and vacant land categories are relevant. The effect of the aforegoing is that all residential properties throughout the municipal area will attract the same rate and all vacant properties throughout the municipal area will attract the same rate."

19. The memorandum goes on to point out that the developer (and now presumably the BAHA) provides services to the estate which are normally the duty of the municipality and sets out the details of the services, which are the extensive array of external and internal engineering services as provided in the ESA. The memorandum argued that as the municipality did not provide the usual services, it had a duty to determine the Blair Atholl estate as a distinct category of rateable property. Section 8(1) of the Act provides that 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 use of the property; the permitted use of the property; or the geographical area in which the property is situated. Section 8(2) of the Act extends the categories of rateable property that may be determined in terms of section 8(1) by identifying specific categories, for example residential properties; industrial properties, and business and commercial properties. The applicants essentially urged the municipality to consider Blair Atholl to

fall into a category similar to that contemplated in section 8(2)(j) of the Act, namely "private owned towns serviced by the owner".

20. At pages 19-21 of the memorandum, the applicants made the following proposal:

> "Section 8(2) of the MPRA in determining categories of rateable property anticipated and provided for privately owned towns serviced by the owner. It is not unreasonable to expect of the municipality where such circumstances exist to create a specific category for such purpose as many other local authorities have done....
>
> There are rational reasons why there should be different categories of residential properties and vacant land. It is contended that the erven which were created in the Blair Atholl development should fall within a separate category in order to be rated at a lower level in comparison to conventional residential properties in the municipality's jurisdiction...."

The applicants accordingly requested consideration to be given to the creation of a category "in private developed estates, which are similar to the Blair Atholl development, located away from the urban areas where no services or limited services are provided by the municipality". They referred to examples in other municipalities where this had been done and where an additional rebate varying from 20% to 50% is allowed to the estates.

21. The submission concluded with a plea in relation to the residential erven based on equity. At page 22 of the memorandum the applicants state:

> "The plea to the municipality is to recognize that the services constructed by the developer and now maintained by the Blair Atholl Homeowners Association include expenses which are not recognized in a convential residential township. The Blair Atholl Homeowners Association retains through its contractual obligations with the municipality all responsibilities and liabilities to essential services where the municipality bears the burden in the aforegoing context in convential residential townships.
>
> In light hereof it is inequitable that equal rates should be payable by property owners who did not have the expense of constructing the services or maintaining same."

The applicants then proposed a flat rate capped amount per erf of R570 with an annual escalation equivalent to the municipal cost index.

22. In relation to vacant land within the estate, the applicants sought to persuade the municipality that the "concept of vacant land" should be excluded within the Blair Atholl township until such time as it is transferred by the developer to a first time recipient, who should also be given a two year rates holiday until the erf was developed.

23. On 4 May 2011, the council of the municipality adopted a resolution approving the draft property rates policy after taking cognizance of the

written submissions made to it by various interest groups including the BAHA, which were analysed in a report submitted to the council by the Financial Services Department in support of the recommendation that the policy be approved. The report, Annexure FA13 to the founding affidavit, dealt with the applicants' submissions as follows:

> "The demand by Blair Atholl that by the nature of its establishment, the development is a special township that complies with the provisions of section 8(2)(j) of the MPRA, and as such the Municipality should determine the township as a separate category of rateable property in its Rates Policy.
>
> This argument that claims for preferential rates, has been tested on the following grounds, and thus does not succeed in justifying any special consideration of a different category of rateable property that would be eligible for the levying of a different rate as provided for in section 8(2)(j) of the MPRA:
>
> - Although the MPRA has not provided the definition of "privately owned towns serviced by the owner", on the basis that the Blair Atholl development is established under the provisions of the Town-planning and Township Ordinance No 15 of 1986, thus disqualifies it as an exclusively privately owned town;
>
> - In terms of understanding "privately owned town", it must be seen as a township with a single owner, a self-owned township with all developmental, social, functional and infrastructural services self-approved such as, building plans and other town-planning matters, similar to the mining residential townships. Further to this, the owner must have full jurisdictional powers over the township as own-municipality; and

- The conditions of the Engineering Services Agreement entered into by the Municipality and the Developer signed in February 2006 spell it out clearly how the development must be levied, and paragraph 6.17 of the said agreement reads as follows:

> *The Applicant takes notice of the fact that assessment rates as determined in accordance with the policies of the Municipality shall be levied by the municipality on erven in the township as from the date of proclamation of the township. The section 21 Company will become liable upon the proclamation of each separate township (extension).*"

It then concluded:

> "It can be concluded that property tax is not payable upon receiving basic services. The taxpayers do not receive direct or measurable benefits from the payment of property tax and the value of the benefit which an individual derives cannot be quantified. It is the responsibility of an individual property owner to pay property tax irrespective of receiving a direct benefit from making use of collective services. The lesser the number of properties, subject to property rates, the smaller becomes the tax base of the municipality. The more exceptions and rebates granted, the greater the tax burden becomes to the property owners whose properties remain subject to non-discounted rates. Exceptions also create precedents and expectations that could not be afforded by the remaining tax payers."

24. Though it is clear that the applicants challenge both the substance of the decision and the process followed in arriving at it, the grounds of review are not clearly formulated in the founding affidavit.

25. In argument, counsel for the applicants challenged the substance of the decision on the grounds of non-compliance with the constitutional principle of legality. The decision, he submitted, was both irrational and inequitable and hence illegal. Generally, a municipality is obliged to provide external services to a developer and a ratepayer. In this instance the municipality contracted itself out of this obligation, does not provide any services and, so the argument proceeded, is unfairly abusing the situation by failing to exempt the applicants from paying the same rates as other ratepayers.

26. To effectively compel the BAHA to collect levies in respect of services and at the same time to claim rates (normally claimed for services which are not rendered in this case) from the residents, it is contended, is inequitable and thus in contravention of section 3(3) of the Act which requires a rates policy to treat ratepayers equitably. In so far as reliance is placed on the principle of rationality, the submission appears to be that there is no rational relationship between the rates policy, the purpose of the empowering provisions and the factual context. Rates are required in accordance with the law for the provision of municipal services. If no services are provided then there is no rational justification for the levying of rates.

27. The imposition of rates does not constitute administrative action as defined in section 1 of the Promotion of Administrative Justice Act 3 of

2000 ("PAJA). The decision of the council to adopt the rates policy is a legislative decision. It is that decision which is specifically attacked by prayer 1 of the notice of motion. Relief is accordingly not sought in the form of judicial review under PAJA. Hence, as just mentioned, although not clearly formulated in the papers, review is sought under the constitutional principle of legality on grounds of irrationality and the alleged contravention of section 3 of the Act.

28. There is no direct challenge in prayer 1 to any decision of the municipality, as a corporate entity, refusing to determine a distinct category of rateable property and not affording an exemption or rebate for that category. The impugned legislative decision was one taken by the elected members of the council who were no doubt influenced by political considerations for which they are politically accountable to the electorate. As stated recently by the SCA in *City of Tshwane v Blom* [433/12] 88 ZA SCA (31 May 2013), rates policies entail, by definition, policy choices which lie at the core of municipal autonomy, and as long as the rates policy treats ratepayers equitably and is consistent with the provisions of the Constitution and the Act, there can be no basis for questioning the choices it makes with regard to properties that may be differentially rated with respect to different categories of property.

29. More importantly, as submitted on behalf of the municipality, rates are not levied with specific correlation to actual services. The power to levy rates is a limited original taxing power conferred on municipalities by

section 229 of the Constitution, which draws a clear distinction between rates and surcharges. The latter may be imposed only in respect of fees for services provided by a municipality, while the former is subject to no similar constraint. I have been referred to no provision of law, and I know of none, that supports the contention that property rates may be levied only in relation to property owners who consume municipal services. It follows that there is no specific statutory obligation on the municipality in the exercise of its discretion to determine categories of property to create a special category for estates that have contractually agreed with the municipality to erect, install and maintain their own external and internal services.

30. The applicants' claim that the levying of rates upon them is irrational is essentially a contention that there should be a fair relationship between the taxed activity or object and the provision of governmental services. It is predicated upon the notion that citizens should not pay for benefits which they do not receive. In *Commonwealth Edison Co v Montana* 453 US 609 (1981), the United States Supreme Court stated in relation to this kind of reasoning:

> "A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the costs of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes..."

31. As regards the complaint that the rates policy treats the applicants and the residents of the estate inequitably, similar considerations apply, which are reinforced by the peculiar context in which the liability for rates has arisen. A statutory duty to treat people liable to pay rates equitably imposes an obligation on the municipality to act fairly. In deciding whether a body has acted fairly it is necessary to take into account all relevant matters surrounding the particular case and to evaluate and weigh them in a broader policy framework.

32. In the present case, the municipality and the developer entered into a contract on the premise that the township fell "totally outside a priority area with no water and sewerage services available" and as a consequence the municipality was willing to approve the township subject to the services being installed and maintained in a particular way. Clause 6 of the ESA sets out in detail the obligation of the developer to establish the BAHA and the functions of the BAHA in relation to the maintenance of services. Clause 6.12 stipulates that it will be the ongoing responsibility of the BAHA to operate and maintain the services "at the cost of every owner". In recognition of the acceptance of responsibility by the BAHA of the duties normally performed by the municipality, Clause 16.16 provides that the municipality will supply water to the BAHA at the normal rate and will not raise a sewerage charge. No similar concessions were made in relation to property rates. On the contrary, as the Financial Services Department emphasised in its report to the council, clause 6.17 of the

ESA expressly states that rates will be levied on erven in the township as from the date of proclamation of the township.

33. There is accordingly no basis for any supposition on the part of the applicants supporting an equitable claim to exemption from rates in exchange for the provision of services by them. The municipality approved the township on the understanding that it would not be burdened by the increased demand for services while retaining its right to levy rates on the residents of the estate.

34. In the result, there is no merit in the ground of review that the municipality acted irrationally, inequitably and hence illegally in adopting the rates policy.

35. The applicants impugn the decision to adopt the rates policy also on the ground that the municipality did not follow the required process of community participation as contemplated in section 4 of the Act. The complaint, *inter alia*, is that there has not been compliance with section 4(2)(b)(ii) of the Act which provides that the municipal manager must advertise in the media a notice inviting the local community to submit comments and representations to the municipality concerned within a period specified in the notice which may not be less than 30 days. The notice published in the Pretoria News on 1 April 2011 required submissions on the rates policy to be submitted by 30 April 2011. That meant the notice gave only 29 days to make submissions. It

accordingly did not comply with the requirements of section 4. Although the applicants have complained about being placed under time pressure, they nonetheless were able to submit comprehensive, well-reasoned submissions in the memorandum they delivered on 29 April 2011. Their founding affidavit added little of additional substance to the argument made in the memorandum. Hence, it cannot be said that they were prejudiced by any illegality tainting the notice.

36. Even though the notice might have been invalid for want of compliance with the time period, such procedural invalidity, in the face of substantial compliance and no notable prejudice, does not justify a declaration of invalidity with retrospective effect. Illegal acts can have factual consequences which in all other respects are lawful and have no ongoing or prospective illegal effect. Sometimes invalid administrative action, in this case the non-compliance with a statutory procedure, must be allowed to stand in the interests of finality, pragmatism and practicality, especially when non-compliance is not material or prejudicial - *Chairperson, Standing Tender Committee v JFE Sapela Electronics* 2008 (2) SA 638 (SCA) para 28. In such circumstances, a court in its discretion may decline to set aside the invalid action, as I do in this case. I am also satisfied that the scheduled meetings which BAHA attended and the submission of representations to the council, which although submitted late were accepted and placed before the council, constituted sufficient compliance with the required process of community participation.

37. When the applicants filed their supplementary founding affidavit they also filed an amended notice of motion seeking additional relief which they believe will be justified on the basis of information they acquired subsequent to launching the application. In particular, they maintain that the council did not consider their comments and recommendations in respect of the rates policy which served before it on 4 May 2011. They rely in this regard upon a verbatim transcript of the council's meeting. On the assumption that the council did not consider their submissions, the applicants submitted that they are entitled to an order that the owners of the erven are liable to pay rates in the sum of R500 per month from 1 July 2011 until the municipality has created or duly considered the creation of a special category of rateable properties for privately owned townships serviced by the BAHA and the developer. To understand this claim it is necessary to refer to the history of the dispute between the parties.

38. During 2008, the BAHA launched two applications in respect of the properties, one of which sought review of the municipality's 2008 rates policy decision. At some point the municipality acknowledged that it had failed to comply with section 4(3) of the Act by not then taking account of the representations made to it when it considered that draft rates policy. On 19 April 2010, Tuchten J handed down an order in the following terms:

"That all the owners of all properties in the Blair Atholl Township known as Blair Atholl Extensions 1, 2, 3 and 4 are liable to pay property rates in the sum of R500.00 (Five Hundred Rand) per erf per month from 1 July 2008 until the date on which the Applicant's representations (Annexure "E19" to the founding affidavit) and any further written representations which the Applicants wish to make, have been duly and lawfully considered by the Respondent in terms of the Local Government: Municipal Property Rates Act 6 of 2004. It is recorded that the Respondent would not be entitled to charge interest and penalties on the amount of R500.00 per month during the period 1 July 2008 to date of receipt of correct invoices from the Respondent.

The applicants reason that because their representations were allegedly again not considered by the council on 4 May 2011 this order remains effective and they want a declaration to that effect, but one which extends its operation until such time as their desired category of rateable property has been created.

39. The applicants maintain that the record shows that when the council took its decision on 4 May 2014 not all the members had copies of its representations before them, which they believe indicates non-compliance with the duty of a municipal council to take their representations into account.

40. The applicants' allegation based on the transcript of the meeting, that not all the members of the council had full documentation before them when passing the resolution is problematic in more than one respect. Firstly, there is no affidavit certifying the transcript as a complete and

accurate reflection of the proceedings. Secondly, while the transcript makes mention that another 100 copies of certain reports were required, the reports in question are not identified. Thirdly, the speaker adjourned the meeting to afford the members 45 minutes to look at the documents. The meeting was re-convened and appears to have proceeded with acceptance that the problem regarding documentation had been resolved. And finally, perhaps most importantly, the allegation made by the municipality in paragraph 55.6 of its answering affidavit that "a memorandum by the mayoral committee was submitted to respondents council together with all of the public representations received and considered in finalising the memorandum ..... served before council on 4 May 2011" has not been challenged in the replying affidavit. That memorandum is Annexure FA13 to the founding affidavit, being the document prepared by the Financial Services Department to which I referred earlier. It contains within it a clear, succinct and accurate summary and account of the BAHA's submission and the response as set out above. The undisputed fact that this document served before the council leaves no doubt that the representations of the BAHA were taken into account to the extent required by section 4(3) of the Act. The council was properly apprised of the BAHA's representations even if not all members initially had a copy of them.

41. In the premises there is no legal basis to grant the relief sought by the applicants in prayer 6 of the notice of motion in the form of a

declaration limiting the rates of the individual owners to R500 per month until a special category of rateable property is created for them. Their representations were lawfully considered by the municipality as envisaged in the order of Tuchten J. Their entitlement to the special dispensation provided in the court order ended at that time.

42. In prayers 7 and 8 of the amended notice of motion the applicants seek an order compelling the municipality to create a category of rateable properties in privately owned townships serviced by the BAHA and the developer and a further order compelling the municipality to levy differential rates for the properties in the category in the amount of R500 per erf per month, which amount will escalate annually in accordance with the percentage as determined by the Consumer Price Index. The only foundation set out in the supplementary affidavit for this far-reaching relief is the applicants' belief that the municipality is acting unfairly by refusing to give them a special dispensation on account of their providing the internal and external services under the ESA. The argument flounders for the same reason as the more general proposition that taxpayers are entitled to a fair relationship between the taxed activity and the provision of services, but more particularly because it invites the court inappropriately to assume the legislative function of the council solely on the ground that the elected members of the council have imposed a tax, in keeping with the original conditions of the approval of the township, but which the applicants do not like.

43 It is important to note that no case is made out on the papers that the proposed imposition of rates constitutes a disproportional infringement of the applicants' constitutional rights of equality or property. As I have explained, the poorly formulated grounds of review relied upon are the alleged contravention of the principle of legality (rationality) and the statutory duty to treat ratepayers equitably. There is no cogent evidence that the rates will unduly penalize the applicants or impose an unconscionable financial burden in violation of any of the provisions of the Bill of Rights.

44. The municipality's response to the proposal that the court create a new category of rateable property, and impose favourable differential rates in respect of it, is as predictable as it is compelling. The creation of categories of rateable property and the rate or amount of the tax is a legislative power vesting in the council. The exercise of such powers are reviewable on restricted grounds. Courts should not readily assume that disputes regarding their exercise are justiciable. Our Constitution provides a clear indication, a textually demonstrable commitment, of an intention to leave the determination of the incident and rates of municipal taxation to municipal councils. Absent unjustifiable discrimination on proscribed grounds, these matters are inherently political and non-justiciable questions, ordinarily unamenable to resolution by adjudication, practically on account of their attendant polycentric consequences, and doctrinally because of their

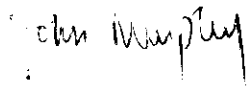
constitutional allocation to the political organs of state. For those reasons, I decline to grant the relief sought in prayer 7 and 8 of the amended notice of motion.

45. Finally, in prayer 5 of the amended notice of motion the applicants seek an interdict prohibiting and restraining the municipality from claiming property rates, as provided for in the Local Authority Rating Ordinance of 1977, from the owners of erven in the Blair Atholl townships for the period prior to 1 July 2008. The dispute relates to whether the individual owners' properties were properly included on a valuation roll for the relevant period between April 2006 and 2008. The issue concerns amounts possibly owing as arrear rates by individual owners in terms of their rates accounts. The liability to pay rates lies with the individual owners. The applicants have no *locus standi* to intervene in the tax relationship between the individual owners and the municipality. Nor have they produced evidence of any authority to act on their behalf in this regard. To the extent that the developer is itself an individual owner and ratepayer, it has not furnished any evidence of the amount in which it has been levied for this period and why an interdict is necessary to protect it from anticipated harm. Any claim by the municipality for rates allegedly owing by the developer can be dealt with on an individualised basis and if need be opposed on legitimate legal grounds. The facts do not justify the grant of a general prohibitory interdict.

46. The municipality has asked for a costs order on a punitive scale. The applicants' pursuit of the matter was not entirely unreasonable. Their position is an unusual one. Their challenge to the equities of the situation was legitimate and worthy of judicial consideration. In the circumstances their conduct was not unreasonable or vexatious such as to warrant a punitive costs order. The complexity of the matter did however justify the employment of two counsel.

47. In the result the following order is made:

> The application in its entirety is dismissed with costs, including the costs of two counsel.



JR MURPHY
JUDGE OF THE HIGH COURT

Representation for the 1st to 3rd 'Applicants

Counsel:	Adv S van Nieuwenhuizen SC
	Adv LGF Putter
Instructed by Attorneys:	Schwartz-North Incorporated

Representation for Respondent:

Counsel:	Adv T Strydom SC
	Adv T Mkhwanazi
Instructed by Attorneys:	Hugo & Ngwenya