IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO: 2943/09

In the matter between:

KWAZULU-NATAL AGRICULTURAL UNION Applicant

and

THE MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS First Respondent
And 27 other Respondents

JUDGMENT

PLOOS VAN AMSTEL J

[1] This application concerns the levying of rates on agricultural property in KwaZulu-Natal. The applicant, who claims to represent the agricultural sector in the province, seeks to review a refusal by the Minister of Provincial and Local Government Affairs to limit the rates imposed by municipalities on agricultural properties in the province, in accordance with the powers given to him in s 16(2) of the Local Government: Municipal Property Rates Act, No 6 of 2004 (the MPRA). His portfolio has since been

renamed and with the consent of the parties his citation was amended to *"The Minister of Co-operative Governance and Traditional Affairs".*

[2] S 16(2) (a) of the MPRA provides that if a rate on a specific category of properties, or a rate on a specific category of properties above a specific amount in the Rand, is materially and unreasonably prejudicing any of the matters listed in ss (1), the Minister must, by notice in the Gazette, give notice to the relevant municipality or municipalities that the rate must be limited to an amount in the Rand specified in the notice.

[3] S 16(1) refers to a constitutional limitation on the power of a municipality to levy rates. It records that in terms of s 229(2)(a) of the Constitution[1] a municipality may not exercise its power to levy rates on property in a way that would materially and unreasonably prejudice national economic policies, economic activities across its boundaries or the national mobility of goods, services, capital or labour.

[4] S 16(3) provides that if the Minister is convinced by

1 The Constitution of the Republic of South Africa, 1996

evidence evaluated by him at the request of any sector of the community, through its organised structures, that a rate on any specific category of properties, or a rate on any specific category of properties above a specific amount in the Rand, is materially and unreasonably prejudicing any of the matters listed in ss (1), he must act in terms of ss (2).

[5] On 14 April 2008 the applicant's attorney wrote to the Minister[2] and requested him in terms of s 16(3)(a) to evaluate the evidence which accompanied the letter, which was said to be to the effect that the rate on the agricultural sector was materially and unreasonably prejudicing the matters listed in s 16(1). The Minister was requested in the letter to publish a notice in the Government Gazette limiting the amount in the Rand for the eight municipalities who had implemented the MPRA from the 1st July 2007, and further that he should make a determination limiting the rate on the Rand to a maximum of 0.5 cent in the Rand on properties used for agricultural purposes.

[6] Counsel for the applicant submitted that the request

2 P 250

in the letter related to all the municipalities in the province and not only to the specified eight. This was also the approach which the applicant adopted in the papers. Counsel made it clear that the relief sought in paragraphs 1 and 4[3] of the amended notice of motion relates to all the municipalities in the province and not only to some of them. The same stance was taken in the applicant's supplementary founding affidavit and in its replying affidavit, where the deponent said in paragraph 9:[4]

> *"Applicant's case is based upon the universality of the principle it seeks to establish. It does not seek the Minister to take action against any particular municipality. The position of any particular municipality is merely illustrative."*

[7] This is not how the Minister understood the request. His decision was conveyed to the applicants' attorney in a letter dated 23 March 2009[5]. In the first paragraph he said the following: *"Pursuant to the application made by the KwaZulu-Natal Agricultural Union … I hereby inform you that I have taken a decision not to limit the rate imposed by any of the eight municipalities cited in your submission."*

[8] The applicant's letter did not expressly state that

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3 I was told in argument that the applicant no longer pursued the relief in paragraphs 2 and 3.
4 P644
5 P434

the request related to all municipalities in the province. It is perfectly clear from the Minister's letter that he understood the request to relate to the specific eight municipalities and that his decision likewise related to them only. He did not consider a request which related to every municipality in the province. I do not consider that the Minister's interpretation of the letter was unreasonable or that he misdirected himself in this regard. The evidence which the Minister was asked to evaluate related to specific case studies and a number of specific municipalities, but did not deal with every municipality in the province. If the applicant wanted the Minister to consider the position relating to the whole of the province it should have said so in clear and unequivocal terms.

[9] The Minister's decision related to the eight municipalities referred to in the applicant's request. That is however not the decision which the applicant seeks to review. It seeks to review a decision relating to the whole of the province but, as I endeavoured to demonstrate, no such decision was asked for or taken.

[10] In case I am wrong, I proceed to consider whether it would have been competent for the Minister, pursuant to the

applicant's letter of 14 April 2008, to impose a limit as contemplated in s 16(2)(a) on every municipality in the province. His powers in this regard must be considered in the context of the applicable legislation.

[11] The MPRA came into effect on the 2nd July 2005 and repealed the whole or part of the Ordinances in terms of which rates were previously levied, subject to the transitional provisions in the Act. The power of municipalities to levy rates is now derived from section 229 of the Constitution. Ss 229(1) and (2) read as follows:[6]

> "*(1) Subject to sub-sections (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*

6 The other subsections are not relevant for current purposes.

> *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."*

[12] The MPRA is the national legislation contemplated in s 229(2)(b). S 2 thereof provides for the levying of a rate by a municipality on property in its area. S 2(3) provides that a municipality must exercise its power to levy a rate on property subject to s 229 and any other applicable provisions of the Constitution, the provisions of the MPRA and the rates policy which such municipality must adopt in terms of s 3.

[13] S 11(1) provides that a rate levied by a municipality on property must be an amount in the Rand on the market value of the property, subject to the adjustments referred to in ss (1) (b) and (c).

[14] S 15 provides for exemptions and rebates in accordance with criteria set out in the municipality's rates policy. Specific reference is made in ss (2) (f) to owners of agricultural properties who are *bona fide* farmers.

[15] It is instructive to have regard to the legislative framework which determines the role of the different spheres of government with regard to the levying of rates on property. Chapter 3 of the Constitution deals with *"Co-operative governance"*. S 40(1) constitutes government in the Republic as national, provincial and local spheres of government which are distinctive, interdependent and interrelated. S 40(2) requires all spheres of government to observe and adhere to the principles in chapter 3 and to conduct their activities within the parameters that the chapter provides. The principles of co-operative government and intergovernmental relations are set out in s 41, which requires all spheres of government and all organs of State within each sphere, *inter alia*, to respect the constitutional status, institutions, powers and functions of government in the other sphere, not to assume any power or function except those conferred on them in terms of the Constitution, and to exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere. The Constitution[7] establishes municipalities as the local sphere of government. S 229 confers the power to levy rates on municipalities. S

7 section 151(1)

151(4) provides that the national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions. S 139 provides for provincial intervention in local government in the following circumstances:

> "*(1) When a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation …*
>
> *(2) ….*
>
> *3) ….*
>
> *4) If a municipality cannot or does not fulfil an obligation in terms of the Constitution or legislation to approve a budget or any revenue- raising measures necessary to give effect to the budget …*
>
> *5) If a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments …".*

[16] It follows from the aforegoing that the Minister's power to interfere in the levying of rates by municipalities is limited. He cannot prescribe what rates they should levy, and if he is of the view that the rates which they have levied are too high he cannot interfere. The extent to which he can interfere (ignoring for the

moment section 139 of the Constitution) is the imposition of a limit on the rates in accordance with s 16 of the MPRA. He can only do so if he is convinced by the evidence that *"a rate on any specific category of properties … is materially and unreasonably prejudicing any of the matters listed in sub-section (1) …"*[8]

[17] It is in this context that one should consider the submission that the Minister, on an evaluation of the evidence presented to him, should have given notice in the Gazette stipulating the maximum rate in the Rand applicable to all properties used for agricultural purposes in the province.[9]

[18] The order sought does not seem to me to be in accordance with s 16(3)(b). The jurisdictional facts which are required for the Minister's power and obligation to act in terms of ss (2) pursuant to an approach by a sector of the economy in terms of ss (3) (a) are the following. He must be convinced by the evidence referred to in ss(3)(a) that a rate on any specific category of properties, or a rate on any specific category of properties above a specific amount in the Rand, is materially and unreasonably

8 Section 16(3)(b)
9 Para 4 of the amended notice of motion

prejudicing any of the matters listed in ss(1). To paraphrase, there must be a rate which is causing the specified prejudice. That is, an existing rate which "is" (present tense) causing prejudice. Further, s16(4) provides that a notice issued in terms of ss(2) must give the reasons why such a rate "is materially and unreasonably prejudicing" a matter listed in ss(1).

[19] It seems to me to follow that the Minister does not have the power to issue a notice in terms of ss (2) (a) in respect of a particular municipality unless he is convinced that a current rate in that municipality is causing the prejudice referred to in s16. In other words, he cannot impose a blanket limitation on every municipality in the province, as the applicant wants him to do, including municipalities which have not yet implemented the MPRA and municipalities which have levied rates on agricultural properties which are not causing the prejudice referred to. It also does not make sense to subject every municipality to the same limitation without having regard to the specific circumstances and policy considerations pertaining to each of them. Why should the same limitation apply to a municipality which consists mainly of agricultural property and another which has some agricultural property but

consists mainly of residential, commercial and industrial property?

[20] It was submitted on behalf of the applicant that such an interpretation will render the mechanism in s16 illusory because it will not be possible to get the Minister to impose the limit timeously. This is not necessarily so. A body which wishes to approach the Minister with evidence such as is referred to in ss (3) (a) should do so as soon as possible. In this case the applicant wrote to the Minister some 10 weeks before the end of the financial year. This is not meant as a criticism as there may have been valid reasons for doing so. Further, ss2 (b) provides that a municipality affected by a notice referred to in ss (2) (a) must give effect to the notice and, if necessary, adjust its budget for the next financial year accordingly. The word "accordingly" suggests an adjustment to give effect to the notice. In other words, if the Minister imposes a limit in accordance with ss (2) (a) that limit will not fall away at the end of the financial year. It will continue to apply, presumably until the notice is withdrawn.

[21] I conclude that the Minister does not have the power

to do what the applicant contends he should have done.

[22] The position therefore is that the decision which the applicant wants to review is one which the Minister was not asked to make, did not make and could not have made.

[23] I would like to add a comment about the role of the courts as far as the levying of municipal rates is concerned.

[24] In Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others[10] the Constitutional Court held that when a legislature, whether national, provincial or local, exercises the power to raise taxes or rates, it is exercising a power that under our constitution is a power peculiar to elected legislative bodies. It is a power that is exercised by democratically elected representatives after due deliberation. The Court held that the imposition of rates and levies did not constitute *"administrative action"* under section 24 of the interim Constitution and was therefore as such no longer subject to judicial review (paragraph 45). It can however be challenged if it offends against the

10 1999 (1) SA 374 CC

principle of legality (paragraph 53 to 59).

[25] In Nokeng Tsa Taemane Local Municipality v Dinokeng Property Owners Association & Others[11] Bosielo JA said the following in paragraphs 8 to 10:

> "*The obligation of a municipality not materially and unreasonably to prejudice national economic policies by its rates is juridically of the same kind as two other provisions on which the association relied, namely section 152(1) (c) and section 195(1) (d). The first provides that an object of local government is to promote social and economic development and the second deals with the basic value of public administration which requires that the efficient, economic and effective use of resources must be promoted. These provisions are, as submitted by the municipality, not justiciable by Courts … The same view was expressed by this Court (per Cameron JA) who echoed the misgivings of Froneman J (in CDA Boerdery (Edms) Beperk v Nelson Mandela Metropolitan Municipality 2007 (4) SA 276 SCA, paragraphs 45 to 46). The provisions concern political and inter-governmental issues, evidently specialist areas involving policy issues and a consideration of a host of other issues in respect whereof the Court does not have the necessary expertise. It would be wrong for the Courts to usurp the powers of municipalities and determine rates and taxes for them. The best course for a Court is to show judicial deference to the decisions taken by democratically elected municipal councils … In Doctors for Life International v Speaker of the National Assembly & Others 2006 (6) SA 416 CC Ngcobo J stated in this regard (at paragraph 37): 'Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the other branches of government unless to do so is mandated by the Constitution.' In view of this conclusion it will be unnecessary to*

11 (518/09) [2010] ZASCA 128

> *revert to the contention on behalf of the association that the new tariffs offended section 229(2)(a) of the Constitution in that they unreasonably prejudiced national economic policies."*

[26] The provisions of section 16 of the MPRA were not considered in the Nokeng Tsa Taemane Local Municipality case because it related to decisions taken by the municipality before the MPRA came into effect.

[27] The reservations expressed by Froneman J to which Bosielo JA referred were expressed by him as follows in CDA Boerdery (Edms) Bpk & Another v Nelson Mandela Metropolitaanse Munisipaliteit & Others[12]:

> *"Die tweede rede vir versigtigheid is dat die Howe in die algemeen nie goed toegerus is om die aangeleenthede vermeld in artikel 229(2)(a) van die Grondwet, naamlik die wesenlike en onredelike benadeling van nasionale ekonomiese doelwitte, behoorlik te beoordeel nie. Net soos daar in gewone administratiefregtelike gedinge aangeleenthede is waar die Howe nie 'n oordeel oor die meriete van administratiewe beslissings behoort te vel nie, uit hoofde van die grondwetlike skeiding van magte, so ook is die beoordeling van die aangeleenthede vermeld in artikel 229(2)(a) ook nie die soort vraag waarmee die Howe hul behoort in te meng nie. Geen skending van regte is direk ter sprake by hierdie soort beoordeling nie. Onwyse beoordelings van wat ekonomies goed vir die land is mag weliswaar nadelige gevolge vir die burgery inhou, maar ter regstelling daarvan is die ander middele tot beskikking in ons demokrasie, naamlik dié vervat in hoofstuk 3 van die Grondwet self, en demokratiese verkiesings op die verskillende regeringsvlakke, moontlik eerder toepaslik."*

12 2006(4) AllSA 56 at 63b-d

[28] The position may well be that the Minister's decision pursuant to s16 (3) (b) is not justiciable by the Courts either, for the reasons referred to by Froneman J. This aspect of the matter was not argued before me and the parties approached the matter on the basis that the Minister's decision was reviewable under section 6 of the Promotion of Administrative Justice Act, 53 of 2002.

[29] In the light of the conclusion to which I have come it is unnecessary to deal with the grounds of review. Suffice it to say that I do not believe that the Minister's approach to the question of the prejudice allegedly caused by the rates was irrational in that he considered the effect of the rates in the light of the rebates allowed in terms of the MPRA. The applicant contended (and this was the main ground for the review) that this approach is wrong in law because it is the rate as such which should be under scrutiny. I do not think this is correct. It is the prejudice referred to in s16 (1) which is under scrutiny. A rate which in itself is excessive in this context may not cause the kind of prejudice referred to in s16 (1) if it does not have to be paid in full because of rebates. It is the effect of the rate which is relevant. It will be

artificial to ignore the rebates. Counsel for the applicant protested that the rebates are temporary and should therefore be ignored. I think the simple answer to this is that a rate which is inoffensive in the light of a rebate may become offensive when the rebate is scrapped and then the mechanism in s16 may be invoked.

[30] I conclude, for the reasons which I have mentioned, that the application cannot succeed.

[31] Counsel for the applicant submitted that if I find against the applicant I should not award costs against it, on the approach adopted in Biowatch Trust v Registrar, Genetic Resources[13] to costs in constitutional litigation. In Affordable Medicines Trust v Minister of Health[14] Ngcobo J (as he then was) referred[15] to the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs. He said the rationale for this rule is that an award of costs might have a chilling effect on the litigants who might wish to vindicate their constitutional rights. But this is not an inflexible rule. There may be circumstances that justify

13 2009(6) SA 232 CC
14 2006(3) SA 247 CC
15 at 297A

departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the court which may influence the court to order an unsuccessful litigant to pay costs. The ultimate goal is to do that which is just having regard to the facts and circumstances of the case.

[32] In the Biowatch-case[16] the court said that merely labelling the litigation as constitutional and dragging in specious references to sections of the constitution would, of course, not be enough in itself to invoke the general rule referred to in the Affordable Medicines case. The issues must be genuine and substantive, and truly raise constitutional considerations relevant to the adjudication.

[33] The dispute in this matter related primarily to the proper interpretation of s16 of the MPRA, which gives effect to the constitutional injunction relating to municipal rates in s 229(2) of the Constitution. The purpose of the application was to protect the constitutional rights of farmers in the context of s229. Although s229(2) refers to the national interests it stands

16 Supra, at 247C

to reason that municipal rates which offend against those interests also offend against the constitutional rights of those who have to pay them and whose livelihood may be at stake. In the circumstances I believe that the required constitutional context is present and that I should follow the approach to which I have referred.

[34] The applicant asked for a costs order in its favour relating to the postponement of the matter after the delivery of an affidavit by the Minister one day before the previous hearing. The matter was postponed so as to enable the applicant to respond to the Minister's affidavit. It seems fair that the Minister should pay the wasted costs occasioned by that postponement. That will include the wasted costs incurred by the seventh and nineteenth respondents.

[35] In the result the application is dismissed. There will be no order as to costs, save that the first respondent is ordered to pay the wasted costs incurred by the applicant and the seventh and nineteenth respondents pursuant to the postponement of the matter on 3 December 2010.

……

Application heard on:	15 April 2011
Counsel for the applicant:	Mr AJ Dickson SC with Ms A Gabriel SC Instructed by: J Leslie Smith & Co
Counsel for the 1st respondent:	Mr R Bedhesi SC with Ms S Yacoob
Instructed by:	S Naidoo Deputy State Attorney)
Counsel for the 7th respondent:	Mr KJ Kemp SC
Instructed by:	Venn Nemeth & Hart Inc
Counsel for the 19th respondent:	Mr A Rall SC
Instructed by:	Steenkamp Weakly Ngwane
Judgment handed down on:	16 May 2011