THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

CASE NO: 220/07
Reportable

In the matter between:

KUNGWINI LOCAL MUNICIPALITY Appellant

and

SILVER LAKES HOME OWNERS ASSOCIATION First Respondent
JAN ROELOF BOOT Second Respondent

Coram**:** Streicher, Mthiyane & Van Heerden JJA et
Snyders & Mhlantla AJJA

Heard: 13 May 2008

Delivered: 2 June 2008

Summary: ***Local authority – rates and taxes – section 10G(7) of Local Government Transition Act 209 of 1993 – whether local authority substantially complied with this section in increasing property rates – validity of municipal council resolution and subsequent local authority notice***

Neutral citation: This judgment may be referred to as *Kungwini Local Municipality v Silver Lakes Homeowners Association* (220/07) [2008] ZSCA 83 (RSA)

VAN HEERDEN JA:

VAN HEERDEN JA:

'*In this world, nothing can be said to be certain, except death and taxes*' – Benjamin Franklin.[1]

Introduction

[1] As is pointed out by Nico Steytler and Jaap de Visser in *Local Government Law of South Africa*:[2]

'Property rates are perhaps the oldest sources of income for local authorities. In England they can be traced back to a statute of 1601 that required the overseers of the poor to raise revenue from the inhabitants and occupiers of land in a parish "to provide material to enable the poor to be set to work and to maintain the lame, impotent, halt and blind". Soon the principle was established that the sum due was linked to the value of the land, which was at first the estimated annual letting value of occupied property.' (Footnotes omitted.)

In this matter, what we are called upon to determine is whether, in increasing the property rates for the 2004/2005 financial year in respect of one of its areas, the appellant, the Kungwini Local Municipality, exercised its powers in a lawful manner.

[2] The first and second respondents, Silver Lakes Home Owners Association and Mr J R Boot, applied to the Pretoria High Court for the following relief:

'1. That the decision by [the Municipality] on 29 June 2004 to approve the assessment rate tariff of R0.054 per Rand value for properties in the Bronberg area of the municipality be declared null and void and be set aside.

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[1] Letter to Jean-Baptiste Leroy, 29 November 1766.
[2] LexisNexis Butterworths 2007 (loose-leaf issue 1), para 1.1.

2. That the promulgation of the assessment rate tariff of R0.054 per Rand value for properties in the Bronberg area of the [Municipality] be declared null and void and be set aside.

3. That the [Municipality] be prohibited from further implementing the assessment rate tariff of R0.054 per Rand value for properties in the Bronberg area from date hereof.

4. That it be declared that the [Municipality] was not lawfully entitled to have levied assessment rates of R0.054c per Rand value for properties in the Bronberg area from 1 August 2004 to date hereof;

5. That the [Municipality] should pay the costs of this application, together with any other respondent opposing this application.'

(I shall henceforth refer to the appellant as 'the Municipality' and to the first and second respondents as 'Silver Lakes' and 'Mr Boot', respectively, or collectively as 'the applicants'.)

[3] The court *a quo* (Legodi J) granted orders substantially in terms of paragraphs 2, 3 and 4, which orders form the basis of the appeal by the Municipality. That appeal comes before us with the leave of this Court. Legodi J refused to grant an order in terms of paragraph 1 and confirmed the Municipality's decision of 29 June 2004. That confirmation is the subject of the cross-appeal by the applicants, for which the High Court granted leave. In respect of costs, the learned judge ordered each party to pay their own costs, which order also forms part of the cross-appeal.

[4] The two main issues on appeal are:

(a) Whether a resolution adopted by the Municipality on 29 June 2004 to approve an increase in the assessment rate for the Bronberg area was lawful, and in particular, whether or not the objections lodged prior to the

adoption of the resolution had been properly considered by the Municipality.

(b) Whether a notice of 28 July 2004 advertising this increase in the assessment rate and inviting objections in respect thereof was *intra vires* the empowering statutes inasmuch as –

(i) such notice did not expressly reflect the date on which the rates increases were to be effective; and

(ii) the increased rates were implemented four days after publication of the notice and before the expiry of the time period envisaged in the notice for the lodging of objections.

Background

[5] In May 2004 the Municipality tabled its proposed budget for 2004/2005. This provided for an increase in the assessment rate for the Bronberg area from R0.02 per rand value of the relevant property to R0.088 per rand value, viz an increase of 340 per cent. A written objection to the budget dated 26 May 2004 by Mr Boot, the councillor for Ward 1 (in the Bronberg area), was sent to the Municipality. The Executive Mayor of the Municipality responded to this objection by letter dated 1 June 2004, under cover of which a memorandum dated 27 May 2004 and addressed to the Executive Mayor by the Director of Finance of the Municipality, was sent to Mr Boot. In this memorandum, the following was stated:

'National Treasury serves as an oversight body, it is still the responsibility of each individual Council to approve or disapprove its budget. Furthermore there is valid reason for this high increase [in the Bronberg rates] because at the end of the day there should be parity within the communities of Kungwini Local Municipality . . . Please see attached the different rates and the respective incomes, which will serve as a guideline.

If we don't agree on 0.088c for 2004/2005 then we should have a clear plan on how to phase in this disparity. Finally I don't see any need to stop tomorrow's meeting, 28 May 2004, because *these rates are not final but rather subject to consultation and agreement between parties*.' (Emphasis added.)

[6] On 7 June 2004 a local authority notice regarding the budget for 2004/2005 was published in the *Pretoria News*. The important part of the notice read as follows:

> 'Notice is hereby given that the Draft 2004/2005 Budget will be open for comments/inspection during office hours for a period of 21 days from date of publication of this notice, at the offices of the Director Finance, Kungwini Local Municipality . . . . Any person who wishes to comment or wants to make any representation, must do so within the above-mentioned period.'

[7] This budget provided for an increase in the Bronberg assessment rate from R0.02 per rand value to R0.054 per rand value and reflected the percentage increase as being 145.45 per cent. A formal written objection, dated 26 June 2004, was lodged with the municipality under the hand of Mr Boot and Mr D J Pretorius, the councillor for Ward 2 (also in the Bronberg area). Mr Boot also addressed a letter dated 16 June 2004 to the Director-General of Finance, in which he set out the reasons why the Ward Committees of both Wards 1 and 2 had on that day resolved to reject the 2004/2005 draft budget. These communications raised inter alia the following issues:

- the increase of the assessment rate for the Bronberg area, and the fact that the draft budget reflected this increase as 145.45 per cent, whereas it was in fact 170 per cent;

- the percentage increase in the Bronberg rates was 170 per cent, whereas the National Treasury guideline (as reflected in the 2004/2005 Budget Circular distributed by National Treasury to all municipalities on 16 March 2004) was only seven per cent.

[8] On 29 June 2004, at a special council meeting of the Municipality, it was resolved that the assessment rate tariff of R0.054 per rand value for properties in the Bronberg area be approved. It was further decided that a percentage tariff increase for the Bronberg area to the tune of 145.45 per cent for the 2004/2005 financial year be approved.

[9] On 28 July 2004 another local authority notice was published, the relevant part of which read as follows:

'NOTICE OF APPROVAL OF THE BUDGET AND TARIFF AMENDMENTS

Notice is hereby given that on 29 June 2004 as per Resolution SKA 180/29-6-2004 the Council resolved to adopt the Budget for the 2004/2005 financial year in accordance with Section 10G of the Local Government Transition Act 209 of 1993 (now repealed), read with Chapter 8 of the Local Government: Municipal Systems Act, (Act 32 of 2000) and Section 229 of the Constitution as set out in the schedule hereunder.

Notice is further given in accordance with the provisions of Section 22 of the Local Government: Municipal Finance Management Act 56 of 2003 that the local community is invited to submit representations in connection with the Budget set out hereunder to the Municipal Manager, P O Box 40, Bronkhorstspruit, 1020. Such representations are to be made not later than 5 working days after the expiry of the inspection period referred to below.

Any person who cannot write, may come during office hours to the Municipal Offices, Muniforum 1, to the office of Mr Jordan Maja, a member of the Staff of this Municipality, who will assist to translate such a person's comments.

The said Council Resolution is available for inspection at the Council Offices, in Bronkhorstspruit, Muniforum 1, Shere Offices, Ekangala Municipal Offices, Zithobeni Municipal Offices, during normal office hours 07:30 to 16:00 from Monday to Friday, for a period of 30 days as from date of publication hereof.

. . . .

5. That the assessment rate tariff of R0.0876 per Rand value be applicable to all properties, other than Ekandustria and Bronberg, within the jurisdiction of Kungwini Local Municipality.

6. That the assessment rate tariff of R0.054 per Rand value for properties in the Bronberg area be approved.

7. . . . .

8. That the following tariff increase for the 2004/2005 Financial Year be approved.

. . . .

d) Assessment Rate Bronberg 146,45%[3]

9. . . . .

10. That the assessment rate tariff of R0.044 per Rand value for properties of Pensioners in the Bronberg area be approved.'

[10] From 1 August 2004 the increased rates were reflected on the accounts of the residents of the Bronberg area and soon thereafter, the Municipality started threatening those residents with action should they fail to pay the increased rates.

[11] On 31 August 2004 Mr Boot wrote a letter to the Municipality in which he stated the following:

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[3] It is common cause that the reference to 14**6**.45 per cent was an error – the assessment rate should clearly have been reflected as 145.45 per cent, as resolved by the council on 29 June. Nothing turns on this, however.

- the council had not considered the objections to the budget received in terms of the notice published on 7 June 2004;
- the notice of 28 July 2004 contained certain errors, in particular in that it incorrectly reflected the percentage tariff increase in the assessment rate for the Bronberg area as 145.45 per cent, while the actual percentage increase was 170 per cent;
- the council had, on 29 June 2004, resolved to adopt the 2004/2005 budget before the notice of 28 July 2004 was published, and before consideration of any of the representations and/or objections arising from either of the notices of 7 June 2004 or 28 July 2004;
- that the new rates for the Bronberg area represented an increase of 170 per cent, which was contrary to the National Treasury guidelines;
- that no services were rendered, or intended to be provided, in the Bronberg area,[4] notwithstanding the increase in the property rates.

[12] On 5 October 2004 a special council meeting of the Municipality was held at which it was decided (inter alia) that the assessment rate percentage increase for the Bronberg area (as reflected in both the resolution of 29 June 2004 and the notice of 28 July 2004) was amended from 145,45 per cent to 170 per cent.

[4] It is not disputed that the Municipality does not provide water or sewerage services to the Silver Lakes development; it has not provided street lights and it does not maintain the roads in the development. The members of Silver Lakes have had to make their own arrangements in this regard. On the other hand, they are not charged anything by the Municipality for the services rendered to them by other service providers.

These amendments made to the original budget, including the reference to 170 per cent (to replace the erroneous reference to 145.45 per cent) were never published by the Municipality.

[13] Finally, on 14 October 2004, there was a further special council Meeting of the Municipality, during which the council resolved:

'1. That cognisance be taken that the closing date for the submission of objections was 2 September 2004.[5]

2. That all the objections received timeously be considered.

3. That the objections be dismissed and that the assessment rates be implemented as published.'

The authority of the municipality to levy property rates and taxes

[14] In a post-constitutional South Africa, the power of a municipality to impose a rate on property is derived from the Constitution itself:[6] the Constitutional Court has described it as an 'original power'[7] and has held that the exercise of this original constitutional power constitutes a legislative – rather than an administrative – act.[8] The principle of legality, an incident of the rule of law,[9] 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.

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[5] This was the expiry date for the submission of the 'representations' invited in terms of the notice of 28 July 2004.
[6] *City of Cape Town v Robertson* 2005 (2) SA 323 (CC) para 62, referring to s 229(1) of the Constitution.
[7] Id para 56.
[8] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) paras 44-45.
[9] In *Fedsure* the Constitutional Court emphasised that local governments are bound by the principle of legality, which it described as 'a fundamental principle of constitutional law' –'[i]t is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful' (para 56). See also paras 57-59 and *Gerber v MEC for Development Planning & Local Government, Gauteng* 2003 (2) SA 344 (SCA) para 35.

[15] Before us it was common cause that s 10G(7) of the Local Government Transition Act 209 of 1993 ('the LGTA')[10] applied at the relevant time to both the resolution and the subsequent notice. The relevant parts of s 10G(7) provide as follows:

'(7)(a)(i) A local council, metropolitan local council and rural council may by resolution, levy and recover property rates in respect of immovable property in the area of jurisdiction of the council concerned . . . .

(ii) A municipality may by resolution supported by a majority of the members of the council levy and recover levies, fees, taxes and tariffs in respect of any function or service of the municipality.

(b) In determining property rates, levies, fees, taxes and tariffs (hereinafter referred to as charges) under paragraph (a), a municipality may –

(i) differentiate between different categories of users or property on such grounds as it may deem reasonable;

(ii) in respect of charges referred to in paragraph (a)(ii), from time to time by resolution amend or withdraw such determination and determine a date, not earlier than 30 days from the date of the resolution, on which such determination, amendment or withdrawal shall come into operation; and

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

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

(i) the general purport of the resolution;

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

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

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[10] For a summary of the 'somewhat unusual history' of the LGTA, see *Rates Action Group v City of Cape Town* 2004 (5) SA 545 (C) paras 25-29 (per Budlender AJ).

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

(d) Where –

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

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

The resolution of 29 June 2004

[16] The applicants contend that the decision of the Municipality taken on 29 June 2004[11] is null and void on the grounds that there was no consideration or discussion of the objections raised by Messrs Boot and Pretorius in respect of the draft budget for 2004/2005 before the decision was taken. These contentions, which are of course vigorously disputed by the Municipality, form the basis of the applicants' cross-appeal.

[17] The Municipality concedes that it received the letters of objection from Messrs Boot and Pretorius dated 26 May 2004 and 26 June 2004. It alleges that there were meetings with the Silver Lakes Board of Trustees in early June 2004 where the draft 2004/2005 budget was discussed at length. The applicants acknowledge that such meetings were indeed held.

[11] See para 8 above.

Moreover, as part of the 'public participation process', public information meetings were arranged in the Bronberg area for 7 June and 8 June 2004.

[18] According to the Municipality:

'The considerations of the budget *would* also have been discussed at length in the mayoral committee of the municipal council and accordingly when one reaches the stage of putting the budget on the table at the municipal council the major debates and negotiations have already taken place. As is the case in Parliament, there is limited debate on the proposed motions in the council sitting itself . . . .' (Emphasis added.)

[19] The applicants dispute that these meetings and that this 'reciprocal exchange of thoughts' constituted proper consultation with the community: according to them, the notice for the public information meetings was given only shortly before the meetings were due to be held, and they were not at all widely advertised. The Municipality, they say, neither provided any further details, nor produced any evidence in respect of the alleged debates and negotiations and, in particular, who were involved in these, what they entailed, and when they were held. No proof was placed before the court that the mayoral committee of the municipal council did in fact consider the objections, or that any of the individual councillors had in fact considered the objections, before publication of the notice on 28 July 2004. Apart from the Executive Mayor, who deposed to the answering affidavit on the Municipality's behalf, not a single councillor confirmed this under oath. In any event, the applicants argue,[12] it is a peremptory requirement that objections be considered, discussed and debated *at council meetings*.

[12] With reference to s 160(2)(c) of the Constitution and s 10G(7)(d)(ii) of the LGTA.

[20] The Municipality contends that it cannot be expected of the municipal council to consider the objections ‘word for word’ during a municipal council session. According to the Municipality, the councillors are under an obligation to consider the issues on the agenda, and the supporting documentation furnished to them in respect thereof, prior to the relevant council meeting, and to take these issues up with the ward committees and other interested parties. Items on the agenda, including objections, are debated beforehand by caucus meetings of the various political parties, and each such party then ‘usually puts its viewpoint in the meeting through one or [more] councillors. The idea of a free-for-all debate, on each issue, by each councillor, is far from the reality of practical governance.’

[21] As proof of the fact that the submissions made and objections lodged prior to the council meeting held on 29 June *were* taken into consideration by the Municipality, it states that the rates increase of R0.088 per rand value initially proposed for the whole of Kungwini (excluding the industrial area of Ekandustria) was ultimately reduced to R0.054 per rand value for the Bronberg area (approximately 38 per cent below the property rates for the other non-industrial areas). This was the increase decided upon by the council on 29 June 2004.

[22] The applicants, on the other hand, argue that a ‘formal’ proposal of R0.088 in respect of the Bronberg area was never tabled or advertised; on the contrary, only the proposal of R0.054 was tabled and subsequently advertised for comment. The objection lodged by Messrs Boot and Pretorius on 26 June 2004 referred to the fact that the rate had been lowered from R0.088 for Kungwini as a whole to R0.054 for the Bronberg

area. Thus, they say, the lowering of the rates for the Bronberg area could not have been done in response to the 'official objections' lodged after the first local authority notice published on 7 June 2004.

[23] It should however be noted that, in Mr Boot's letter to the Director-General of Finance dated 16 June 2004, sent *subsequent* to this first notice of 7 June 2004, the former stated –

'The Draft Budget indicates that property assessment rates in the former Bronberg area are increased from 2c per R of the land value to 8.8c in the R of the land value. THIS REPRESENTS AN INCREASE OF 340 [per cent].'

Furthermore, the content of the Memorandum from the office of the Director of Finance dated 27 May 2004[13] makes it clear that, at that stage, the proposed rates increase that was being debated with Silver Lakes and their representatives *was* an increase to R0.088 per rand value. Between that time and the council resolution of 29 June 2004, the draft budget as tabled and advertised for inspection and comment *was* amended to reduce the proposed rate increase for the Bronberg area to R0.054. It was the amended budget which was put to the council on 29 June 2004. This being so, it cannot be said that the Municipality simply ignored or refused to consider the concerns raised and objections made by or on behalf of the residents of the Bronberg area in the course of the public participation process followed *prior* to the 29 June 2004 resolution.

[24] In my view, the 'scheme' contained in s 10G(7) of the LGTA envisages that interested parties should be given a proper opportunity to make submissions in respect of, inter alia, property rates levied by a

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[13] Referred to in para 5 above.

municipality and that the Municipality is obliged to give their submissions proper consideration. However, s 10G(7) does not appear to necessitate the *formal* consideration of objections and submissions at two different stages of the process, namely both *before* the relevant resolution is taken as well as *after* the publication of the notice required in terms of s 10G(7)(c). The principle of public participation in pursuance of democratic, accountable and effective local government is, to my mind, given effect to by the express provision made for the lodging and consideration of objections after the publication of the resolution in the s 10G(7)(c) notice.

[25] The applicants also argue that the increase in the property rates for the Bronberg area did not comply with the guidelines in the budget circular issued by National Treasury, in terms of which the 'guideline growth rates for 2004/2005, 2005/2006 and 2006/2007, are 7 per cent, 6.5 per cent and 6 per cent, respectively'. However, as the Municipality points out, the budget circular makes it clear that these are only guidelines, not prerequisites for the approval of a municipal budget, and that they apply generally 'to own revenue sources . . . for both the capital and operating budgets', not specifically to property rates increases. According to the Municipality, the apparently steep increase in the Bronberg area property rates was simply due to the fact that, historically, the property rates applicable to this area were exceptionally and unnaturally low. The Bronberg area is one of the most affluent areas in the Municipality, yet the residents pay extremely low rates, much lower that those applicable to the Municipality's less affluent areas. It points out that, even after the increase, the Bronberg property rates are still 38 per cent below the other (non-industrial) property rates for the other areas falling within the jurisdiction of the Municipality.

[26] In the queries raised by National Treasury in relation to the Municipality's 2004/2005 budget during November and December 2004 (copies of which form part of the record), no mention is made of any problem with the rates increases for the Bronberg area or for any other area of Kungwini. The queries related to other aspects of the budget and it seems as if these queries were ultimately dealt with by the Municipality to the satisfaction of National Treasury. I do not think, therefore, that it can be said conclusively, on the papers before us, that the increases approved by the council on 29 June 2004 'materially and unreasonably prejudice national economic policies',[14] as was argued by the applicants.

[27] For the above reasons, I am of the view that the court a quo was correct in its conclusion that the resolution of 29 June 2004 was *intra vires* the enabling legislation and did not fall foul of the principle of legality. It follows that the cross-appeal by the applicants in this regard falls to be dismissed.

The notice of 28 July 2004

[28] As regards the local government notice published by the Municipality on 28 July 2008,[15] the applicants point out that this notice referred to the LGTA as being 'now repealed' and purported to comply with the provisions of s 22 of the Local Government: Municipal Financial Management Act 56 of 2003 ('the MFMA'). Before us it was common cause that the notice was incorrect in that, at that stage, s 10G(7) was still

[14] In terms of s 229(2)(a) of the Constitution.
[15] The relevant part of which is quoted in para 9 above.

of full force and effect.[16] The Municipality argued, however, that there had been substantial compliance with the requirements of s 10G(7).[17] Legodi J disagreed, hence the present appeal.

[29] As indicated above, the notice of 28 July 2004 invited 'the local community' to submit representations in connection with the budget set out in such notice 'not later than 5 working days after the expiry of the [stipulated] inspection period'. The inspection period provided for by the notice was 30 days from the date of publication thereof. However, the increased rates in fact came into operation and were claimed by the Municipality from 1 August 2004, viz only four days after the publication of the notice.

[30] Section 10G(7)(c)(iv) requires that the notice of a council resolution whereby rates or service charges are determined or amended must provide for a period of 14 days within which any objections to such determination or amendment must be lodged. In terms of s 10G(7)(c)(ii), the notice must stipulate the date on which the determination or amendment will come into operation.

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[16] In terms of s 179(1) of the MFMA, s 10G of the LGTA was repealed, but s 179(2) stipulated that despite such repeal ss 10G(6), (6A) and (7) of the LGTA were to 'remain in force until the legislation envisaged in section 229(2)(b) of the Constitution is enacted'. Government Notice No. 772, published on 25 June 2004 in *Government Gazette* No. 26510, provided that s 179 of the LGTA would take effect on 1 July 2005. The same notice provided that most of the other provisions of the MFMA (including s 22 which deals with the publication of annual budgets) would take effect on 1 July 2004. However, in terms of Government Notice No. 773, published on 1 July 2004 in *Government Gazette* No. 26511, medium capacity municipalities (including the Kungwini Local Municipality) were exempted from the provisions of, inter alia, s 22 of the MFMA in respect of their annual budgets for the 2004/2005 financial year.

[17] The mere fact that the notice incorrectly referred to s 10G of the LGTA as having been repealed and purported to have been issued in compliance with the provisions of s 22 of the MFMA does not *per se* invalidate the notice: see, eg, *Howick District Landowners Association v Umngeni Municipality* 2007 (1) SA 206 (SCA) paras 18-22.

[31] To my mind, the object of these provisions is to ensure that residents in the municipal area concerned are 'properly and optimally informed'[18]of what their financial obligations will be, should the published amendments (in this case, the rates increases) take effect, and precisely when such obligations will become enforceable. In the absence of such information, it would be well-nigh impossible for residents timeously to arrange their financial affairs such that they make allowances for any anticipated increased demand upon their purses. Just as financial discipline and advance planning is legitimately required of a municipality, so too can it be expected of ratepayers. For this reason, I agree with the applicants' contention that a procedure whereby residents are in effect presented with a *fait accompli*, in that the rates increases are implemented and enforced prior to the expiry of the period allowed for the lodging of objections to such increases, does not 'encourage the involvement of communities and community organisations in matters of local government', as required by s 152(1)(e) of the Constitution. Nor does it constitute 'democratic and accountable government for local communities' – one of the objects of local government in terms of s 152(1)(a) of the Constitution. The stance of the Municipality in this regard – which amounts to 'pay now and argue later' – can hardly be said to comply with the statutory injunction that '[a] municipality must in the exercise of its executive and legislative authority respect the rights of citizens and those of other persons protected by the Bill of Rights'.[19]

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[18] See *Weenen Transitional Local Council v Van Dyk* 2002 (4) SA 653 (SCA) para 16.
[19] Section 4(3) of the Local Government: Municipal Systems Act 32 of 2000.

[32] It was suggested that the reference in the notice to the tariff increase being 'for the 2004/2005 financial year' was sufficient compliance with the requirement that 'the date on which determination or amendment shall come into operation' be stated in the notice. In this regard, it was pointed out that 'financial year' is defined in s 1 of the MFMA as meaning 'a year ending on 30 June'.[20] Thus, so it was contended, the reference in the notice to the 2004/2005 financial year meant that the rates increases would take effect on 1 July 2004 and that the notice must thus be construed as reflecting the date on which the property rates increases would come into operation.

[33] I cannot agree with this interpretation. The notice was only published 28 days *after* the start of the 2004/2005 financial year. If one were to understand the reference to the financial year as necessarily meaning that the rates increases came into operation on 1 July 2004 – which was not the Municipality's case on the papers – then this would mean that, by the time the notice was published, the ratepayers in the Bronberg area were *already* obliged to pay the increased rates and that, from the very outset, the invitation to lodge objections to the increases within the specified period was an entirely meaningless gesture. It surely cannot be suggested that the object of inviting objections is to place some kind of onus on the ratepayers concerned to persuade the Municipality, *ex post facto*, to reduce rates that have already been charged and in respect of which the ratepayers are thus already in arrears?

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[20] See also s 10G(2)(d)(i) of the LGTA which provides that 'notwithstanding anything to the contrary in any law contained, the financial year of all municipalities shall end on 30 June in each year'.

[34] The Municipality insisted that the objections were also dealt with at the special council meeting held on 14 October 2004. It annexed to its answering affidavit an extract from the transcript of the proceedings at the special council meeting held on 14 October 2004. From the transcript it appears that reference was made to the alleged consideration of the objections having already been finalised at the council meeting on 29 June 2004. The Municipality did not, however, produce any evidence to show that, at the council meeting held on 29 June 2004, the objections were in fact discussed at all. Messrs Boot and Pretorius, both of whom were present at this meeting, stated under oath that the objections were not discussed or considered then.

[35] The applicants described the procedure followed by the council at the meeting held on 14 October 2004 as paying mere lip service to any alleged consideration of the objections lodged. Plainly, when one has regard to the tenor of that resolution,[21] as well as the duration of that meeting,[22] their contention in this regard appears not to be without substance. However, in view of my conclusion in respect of the validity of the notice itself, this point need not be decided one way or the other.

[36] The practical effect of what the Municipality thus achieved was to levy rates with retrospective effect. That indubitably was not authorised by the legislation. It moreover rendered nugatory the process prescribed by s 10G(7)(d)(ii) which envisaged a fresh determination or amendment and a new implementation date should an objection be held to have merit. In

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[21] See para 13 above.
[22] According to the minutes of this meeting, it commenced at 10h14 and finished 15 minutes later at 10h29.

those circumstances the notice could hardly have constituted substantial compliance with the legislation as was contended by the Municipality. It bears noting that the timeframes envisaged in the section after publication of the notice required by s 10G(7)(c) are intended for the benefit of the Municipality as well, particularly as new accounting formulae have to be implemented by their billing section to give effect to the resolution.

[37] In my view, the least that could be expected of the Municipality was to make it clear to the residents within its area of jurisdiction how and *when* the increased property rates would come into operation, with reference to any objections that may be lodged during the specified period and to ensure that the published date of operation was such as to allow the proper consideration of any objections lodged within the time period allowed for such objections. This it did not do. On the contrary, the notice published did *not*, as was required, stipulate any date as that on which the increased rates would come into operation. The Municipality's failure in this regard leads me to the conclusion that the notice of 28 July 2004 did not substantially comply with the requirements of s 10G(7) of the LGTA and that its appeal therefore falls to be dismissed.

[38] I have read the judgment of my colleague Streicher JA and, for the reasons set out by him in para 55 below, I agree with his conclusion that the notice of 28 July 2004 also did not comply with the requirements of s 10G(7)(c) in that it conveyed two contradictory approvals for the Bronberg area.

[39] As indicated above, the applicants also cross-appealed against the costs order made by the court below (viz that each party should pay their own costs). They contended that, as they were substantially successful in

their application to the High Court, the Municipality should have been ordered to pay their costs in that court. Costs are, however, in the discretion of the court making the costs order and, as I am not satisfied that the court below failed to exercise its discretion in this regard in a judicial manner, I see no reason to interfere with the costs order made by it.

Conclusion

[40] For the above reasons, I would dismiss both the appeal and the cross appeal. As to the costs of this appeal, because neither side was successful before us, it would be appropriate to make no order as to costs.

B J VAN HEERDEN
JUDGE OF APPEAL

Concur:
SNYDERS AJA

STREICHER JA:

[41] I agree that both the appeal and the cross appeal should be dismissed. However, as I do so for somewhat different reasons and do not consider it necessary to deal with some of the issues dealt with in the main judgment I shall state my reasons for agreeing with the result.

[42] In terms of s 10G(7)(a)(i) the appellant ('the Municipality') had the power, by resolution, to recover rates in respect of immovable property in

its area of jurisdiction. It also, in terms of subpara (ii), had the power, by resolution, to levy and recover levies, fees, taxes and tariffs ('levies'). As stated in the main judgment the imposition of rates and levies in terms of this power is a legislative rather than an administrative act. In determining the rates a municipality may differentiate between different categories of users or property on such grounds as it may deem reasonable (para (b)(i)).

[43] The procedure to be followed in respect of the imposition and recovery of such rates and charges is set out in the section. It is not suggested that this procedure is in conflict with the Constitution or other legislation. In terms of subsection (7)(a) a resolution is to be passed to levy and recover property rates and/or levies. Subsection (b) then provides that:

'In determining property rates, levies, fees, taxes and tariffs (hereinafter referred to as charges) under paragraph (a) a municipality may –

(i) . . . .

(ii) in respect of charges referred to in paragraph (a)(ii), from time to time by resolution amend or withdraw such determination and determine a date, not earlier than 30 days from the date of the resolution, on which such determination, amendment or withdrawal shall come into operation; and

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

[44] In terms of subsection (7)(c) the chief executive officer of the municipality shall after the resolution has been passed forthwith cause to be conspicuously displayed a notice stating the general purport of the resolution, the date upon which the determination shall come into operation, the date on which the notice is first displayed and that any person who desires to object to such determination or amendment shall do

so in writing within 14 days after the date on which the notice is first displayed. Paragraph (d)(i) provides that where no objection is lodged within the period referred to in para (c)(vi), the determination shall come into operation as contemplated in para (b)(ii). Paragraph (d)(ii) provides that if an objection is lodged within that period, the municipality should consider every objection and may amend or withdraw the determination and may determine a date other than the date contemplated in para (b)(ii) on which the determination shall come into operation, whereupon para (c)(i) shall with the necessary changes apply.

[45] The statement in para d(i) that 'the determination . . . shall come into operation as contemplated in paragraph (b)(ii)' and also the statement in para (d)(ii) that a date 'other than the date contemplated in paragraph (b)(ii)' may be determined, upon a literal construction of the paragraphs, indicate that the date referred to in para (b)(ii) relates to determinations in respect of rates as well as levies. However, the requirement in para (b)(ii) that a date has to be determined 'not earlier than 30 days from the date of the resolution, on which such determination . . . shall come into operation', is prefaced by the phrase 'in respect of charges referred to in paragraph (a)(ii)' whereas those charges do not include rates. In the result, either the second part of paragraph (b)(ii), requiring the determination of a date, was, contrary to the express wording thereof, intended to relate to rates as well as levies or para (d), in so far as it relates to the date upon which the determination or amended determination would come into operation, was, contrary to the express wording thereof, not intended to relate to rates. In the light of the fact that rates are traditionally imposed in respect of the

financial year[23] of a municipality and the fact that para (d)(ii) provides for the determination of a new date after an objection has been received, the latter interpretation was probably the one that was intended by the legislature. Paragraph (b)(ii), therefore, does not require the determination of a date, 30 days from the date of the relevant resolution, upon which a determination of assessment rates would come into operation. Paragraph (c) nevertheless requires that the date upon which the determination in respect of rates would come into operation should be stated in the notice to be displayed in terms of the paragraph.

[46] In the present case the Municipality, on 29 June 2004, adopted a resolution, which in so far as it relates to property rates, reads as follows:

'6 That the assessment rates tariff of R0.054 per Rand value for properties in the Bronberg area be approved.'

'8 That the following tariff increase for the 2004/2005 Financial Year be approved:

. . . .

d) Assessment Rate Bronberg 145.45%.'

[47] The respondents, in their founding papers and before us, contended that the assessment rate tariff had been approved in an amount of R0.054 per rand value of the properties but that the resolution reflects an arithmetical error in that the increase in fact amounted to an increase of 170% and not 145,45%. That interpretation is clearly based on personal knowledge as to how the increase in rates was determined, as the error, if

[23] See Section 18 of the Local Authorities Rating Ordinance 20 of 1933 (Transvaal); Section 91 of the Municipal Ordinance 19 of 1951 (Cape); Section 105 of the Local Government Ordinance 21 of 1942 (Natal); and s 114 of the Local Government Ordinance 8 of 1962 (Orange Free State).

an error was made, may have been made in the calculation of the rate per rand value or there may not have been an error at all. Without such knowledge or the assistance of other circumstantial evidence in interpreting the resolution, para 6 of the resolution is contradicted by para 8 of the resolution. However, as is stated in the main judgment, the respondents attacked the validity of the resolution on other bases which, for reasons that I agree with, are rejected in the main judgment.

[48] The respondents contended that the notice dated 28 July 2004 does not comply with the provisions of subsection (7)(c) in that –

(a) it purported to be given in accordance with s 22 of the Local Government Municipal Finance Act 56 of 2003 and not in terms of subsection (7)(c);
(b) incorrect facts were stated in the notice;
(c) it did not contain the date on which the property rates would come into operation;
(d) it did not indicate the date on which the notice was first displayed; and
(e) it did not require that objections be lodged within 14 days of the date upon which the notice was first displayed but invited representations to be made not later than five days after the expiry of the inspection period in terms of the notice, ie not later than 30 days after 28 July 2004.[24]

[49] As regards the contention in para (e), above the respondents contended that what the notice was intended to achieve was that only after

[24] The notice is dated 28 July 2004, the date upon which it was published, but does not itself indicate when it was first displayed. According to the notice an inspection period of 30 days as from the date of the notice is allowed.

objections had been lodged and considered the newly determined rates would come into force, ie objections had to be considered before the final determination came into operation.

[50] Subsection (7)(c) provides that the notice of the determination has to be displayed forthwith and that objections have to be lodged within 14 days. However, it is not expressly stated that the consideration of the objections have to take place before the date determined as the day on which the new rates would come into operation. Whether such a requirement is to be inferred need not, in the light of the conclusion to which I have come, be decided.

[51] As stated in the main judgement s 10G(7) was still of full force and effect at the time when the notice was published. The notice was, therefore, defective in so far as it purported to be a notice in terms of s 22 of the Local Government Municipal Finance Act 56 of 2003 and in so far as it stated that s 10G, in terms of which the resolution had been passed, had been repealed. It is not a requirement of para (c) that the section in terms of which the resolution is displayed should be mentioned in the notice and the notice at least correctly stated that the resolution had been adopted in terms of s 10G. It was not suggested by the respondents that these errors were material.

[52] The Municipality submitted that the notice substantially complied with the requirements of subsection (7)(c). In this regard it relied on *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) where Brand JA said at 209G-I (para 22):

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

that event, the question remains whether, in spite of the defects, the object of the statutory provision had been achieved (see eg Nkisimane and Others v Santam Insurance Co Ltd 1978 (2) SA 430 (A) at 433H-434B; Weenen Transitional Local Council v Van Dyk 2002 (4) SA 653 (SCA) in para [13]).'

[53] The object of the subsection is in my view that ratepayers should have knowledge of the purport of the resolution, ie they should know what rates they would have to pay, and from when those rates would be payable. They should also know that they may object and within what period they may object. The fact that the notice is required to be published forthwith after the resolution had been passed and that a relatively short period is allowed for objections indicates that the object is also that objections be dealt with relatively expeditiously although, possibly, as stated above, not necessarily before the date upon which the new rates would come into operation.

[54] The court a quo held that the date upon which the increased rates were to come into operation was omitted from the notice and that this omission rendered the notice materially defective. I do not agree with this finding. A reading of the notice makes it quite clear that it relates to the budget for the 2004/2005 financial year of the Municipality and that the rates determined relate to that budget and thus to that financial year. In terms of s 10G(2)(d)(i) the financial year of all municipalities is from 1 July each year to 30 June of the next year. Notice was therefore given that the determination would come into operation on 1 July 2004. The increased rates were only claimed by the Municipality from 1 August 2004 but that cannot detract from the fact that according to the notice the newly determined rates were for the 2004/2005 financial year. Significantly the respondents never pertinently contended that the Municipality had not

complied with the requirement that the date when the increased rates would come into operation had to be stated in the notice. The object of para (c) that ratepayers should know as from when the increased rates would be payable was therefore achieved.

[55] The court a quo also found that those invited to object may 'have been influenced by the percentage increase rather than the increase in rands in deciding whether to lodge objections'. I agree. As stated above, one of the objects of para (c) is that ratepayers should know what rates they would have to pay. The notice could not achieve that object in that, to the general body of ratepayers, the notice would have conveyed two contradictory approvals for the Bronberg area, namely an approval of a rate of R0.054 per rand value and also an approval of a rate of R0.049 (a 146,45% increase)[25] per rand value. Not having achieved what is probably the most important object of para (c) the notice did not comply with the provisions of para (c) and was correctly held by the court a quo to have been invalid.

[56] For these reasons I agree that the appeal and the cross appeal should be dismissed and that no order as to costs should be made.

P E STREICHER
JUDGE OF APPEAL

Concur:
MTHIYANE JA
MHLANTLA AJA

[25] Noting was made of the fact that according to the notice the percentage increase was 146,45% and not 145,45% as per the resolution.