IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No 14190/2010

In the matter between:

BRITANNIA BEACH ESTATE (PTY) LTD	**First Applicant**
BRITANNIA BAY DEVELOPERS (PTY) LTD	**Second Applicant**
SANDY POINT BEACH PROPERTIES (PTY) LTD	**Third Applicant**
WEST COAST MIRACLES (PTY) LTD	**Fourth Applicant**

and

THE SALDANHA BAY MUNICIPALITY	**Respondent**

Court:	CLOETE, AJ
Heard:	25 and 26 May 2011
Delivered:	6 June 2011

JUDGMENT

CLOETE AJ:

INTRODUCTION

[1] The applicants seek orders: (a) directing the respondent to account to them in respect of certain sums which they allege were overpaid by them in respect of capital contributions (as contemplated in s 42 of the Land Use Planning Ordinance 15 of 1985, "*LUPO*") unlawfully levied by the respondent in accordance with the respondent's resolution R43/12/07 ("*R43*") dated 4 December 2007; and (b) declaring that the tariff for the calculation of capital contributions as set out in R43, read with resolution R35/6/07 ("*R35*") dated 26 June 2007 is of no force and effect. In the alternative, the applicants seek orders (a) condoning their non-compliance with the 180-day period prescribed in s 7(1) of the Promotion of Administrative Justice Act 3 of 2000 ("*PAJA*") for the institution of proceedings for review; (b) reviewing and setting aside R35; and (c) declaring that the tariff for calculation of capital contributions as set out in R43 read with R35 is of no force and effect. In the further alternative, the applicants seek an order declaring that the tariff for the calculation of capital contributions as set out in R35 is of no force and effect. The applicants also claim costs as a consequence of the respondent's opposition to the relief sought.

[2] The applicants initially approached court on an urgent basis but such urgency was mitigated when the parties made interim arrangements in respect of the further conduct of the matter.

BACKGROUND

[3] The applicants are companies that have been involved in a number of so-called seaside property developments within the area of jurisdiction of the respondent over many years.

[4] The respondent is a municipality established in terms of the provisions of s 12 and 14 of the Local Government: Municipal Structures Act 117 of 1998 ("*the Structures Act*"). It is a "local" municipality. As such, it shares

municipal executive and legislative authority with the West Coast District Municipality. Its jurisdiction extends over the municipal areas of Saldanha Bay, Vredenburg, Langebaan, St Helena Bay, Hopefield, Paternoster and Jacobsbaai.

[5] The developments in respect of which the applicants have taken issue are all located in St Helena Bay and involve applications for the rezoning and subdivision of land which were approved by the respondent's council (and its predecessor in title) subject to certain conditions which were imposed. These conditions included conditions imposed in terms of s 42 of LUPO.

[6] Sections 42(1) and (2) of LUPO provide as follows:

'42. (1) When the Administrator or a council grants authorization, exemption or an application or adjudicates upon an appeal under this Ordinance, he may do so subject to such conditions as he may think fit.

(2) Such conditions may, having regard to –

(a) the community needs and public expenditure which in his or its opinion may arise from the authorization, exemption, application or appeal concerned and the public expenditure incurred in the past which in his or its opinion facilitates the said authorization, exemption, application or appeal; and

(b) the various rates and levies paid in the past or to be paid in the future by the owner of the land concerned,

include conditions in relation to the cession of land or the payment of money which is directly related to requirements resulting from the said authorization, exemption, application or appeal in respect of the provision of necessary services or amenities to the land concerned.'

[7] "Capital contributions" is a commonly used description for the sum or sums of money payable under conditions imposed in terms of s 42(2) of LUPO, which sum or sums are determined to cater for the requirements

resulting from the approval of development applications in respect of the provision of necessary services or amenities to the land concerned. The contributions are levied in terms of a tariff calculated and adopted by a local authority and are payable upon the grant of rates clearance applications made in respect of the individual erven comprising the relevant township development.

[8] The term "capital contributions" derives from the adoption thereof by the respondent's predecessor in title in September 1997, when it passed resolution R55/09-97 (*"R55"*). It has since been used by the respondent and its predecessor in title in subsequent resolutions that dealt with the issue of monetary contributions to be paid as a condition for the approval of rezoning and/or subdivision applications, including the resolutions that are in issue in the present matter.

[9] The use of the term "capital contributions" is somewhat misleading, as s 42 of LUPO provides for the payment of monetary contributions in regard to both the provision of *"amenities"* (which would ordinarily pertain to capital expenditure) and the provision of *"services"* which may pertain to both operating and capital expenditure.

[10] The purpose of imposing conditions for the payment of capital contributions is to allow a municipality to recoup the costs associated with the provision of so-called *"bulk services"* such as water, sewerage, refuse removal and electricity to the proposed developments in respect of which approval is granted, on a *pro rata* basis.

[11] Each of the applicants has in recent years successfully applied to the respondent in terms of LUPO for the rezoning or subdivision (or in some instances, both rezoning and subdivision) of land. The approval of such applications gave rise to the creation of certain land use rights entitling the applicants to develop the land to which such applications pertained subject *inter alia* to the payment of capital contributions.

[12] On 23 September 1997 the respondent's predecessor in title adopted (by way of R55) a policy for the calculation of these capital contributions. The policy proceeded from the premise that, whereas developers were responsible for the installation and financing of all so-called *"internal"* services for their proposed developments, the local authority was responsible for the installation and financing of all external bulk services, the cost of which should be partially recouped from developers by the collection of levies. The bulk services envisaged included the provision of roads and storm water drainage, sewerage, "waterworks" (including both fresh and waste-water) and electrical reticulation.

[13] The policy attempted to set out a basis for a fair apportionment of the cost of these services between ratepayers and developers. In doing so, it relied upon a complex formula which pro-rated the impact that a proposed development would have on service infrastructure for each of the bulk services referred to against the cost of the provision of such infrastructure. The formula took account of a number of variables, including the past and future cost of services which were to be rendered as also past public expenditure and future revenue that were to be derived from ratepayers in connection therewith in accordance with the provisions of s 42(2) of LUPO.

[14] Utilising this formula, a set of tariffs (*"the old tariff"*) was calculated. R55 adopted the old tariff and provided that it would escalate annually on 1 August in accordance with the annual increase in the Index for Civil Engineering Services (the *"Index"*) as at 31 May in each year.

[15] Although the old tariff was set and adopted for the provision of water, sewerage, road and storm water services, no tariffs were set for the provision of refuse removal (i.e. so-called *"solid waste"* services) although the policy provided for this.

[16] It is common cause that in the formulation of the policy adopted by R55 due and proper regard was taken of all of the relevant considerations that are

set out in s 42(2) of LUPO. The effect of the adoption of the old tariff in R55 was to drastically increase then existing capital contributions. For residential erven of 1 000m² in extent there was a 38,5% increase (the applicants refer to it as a 40% increase) and for smaller erven this increase was approximately 24%.

[17] The purpose of providing for annual escalation in accordance with the Index was to try and maintain a proper ratio between actual costs in the light of inflation and capital contributions levied upon developments.

[18] The applicants' dispute with the respondent relates to two "categories" of development application approvals, namely those approved prior to 1 July 2007 and those approved after 1 July 2007 (but including applications which had been submitted prior to 1 July 2007).

[19] The category of approvals granted prior to 1 July 2007 each contained a condition that the capital contributions per erf in each development were to be levied in accordance with the method set out in R55, subject to an annual escalation in accordance with the Index.

[20] The category of approvals granted after 1 July 2007 each contained a condition that the capital contributions per erf in each development were to be levied in accordance with the method set out in R35 of 26 June 2007, subject to an annual escalation in accordance with the Index. R35 is dealt with hereinbelow.

[21] In June 2007 the then Municipal Engineer, Mr M Victor (*"Victor"*) reported to the respondent's council that actual costs had increased considerably and that there was a disparity between these costs and the amounts recouped by way of capital contributions. He accordingly recalculated the base-line value of each of the bulk services and included a calculation in respect of the provision of solid waste which until then was not included in the services in respect of which contributions were levied.

[22] On 26 June 2007 the respondent adopted Victor's proposals and recommendations as well as his new tariffs by way of R35 and similarly provided (as had its predecessor in 1997) that the newly recalculated values would be subject to annual escalation on 1 August in accordance with the Index. The stated purpose and effect of R35 was to *"adjust the Policy"* for the calculation of capital contributions which had previously been adopted in 1997 by the adoption of higher tariffs and the introduction of a new tariff for the provision of solid waste services. R35 provided that the higher tariffs (*"the new tariff"*) would be applicable from 1 July 2007.

[23] The effect of the new tariff adopted by way of R35 was to again drastically increase the capital contributions payable in respect of water, sewerage, roads and electricity services on residential erven. The applicants allege that it constituted a 200% increase; the respondent contends that because the implementation of the capital contributions payable in terms of approvals granted prior to 1 July 2007 was (a) not in accordance with the official escalation indexes; and (b) the official indexes did not *"keep trend"* with the actual increases applicable to the real calculation of contributions which should have been recovered, the applicants (and other developers) in fact contributed far less than they should have and the net result is to all intents and purposes insignificant.

[24] Following the adoption of R35 notice thereof was published by the respondent on 12 July 2007, purportedly in terms of the provisions of s 75A(3) of the Local Government: Municipal Systems Act 32 of 2000 (*"the Systems Act"*). The relevant part of the notice reads as follows:

'Notice is hereby given in terms of the provisions of Section 75A(3) of the Local Government: Municipal Systems Act (No. 32 of 2000) that at a Council meeting held on 26 June 2007, Council resolved also to include capital contributions with regard to solid waste in its policy and to fix monies with effect from 1 July 2007. All capital contributions will escalate annually on 1 July. ... Objections in writing, must

be lodged to the Municipal Manager at the address below, on or before **16 August 2007**.'

[25] The applicants took issue with the new tariff right away and made various submissions to the respondent about it.

[26] During August 2007 Victor reported to the respondent's council that he had received a request from a developer (not one of the applicants) that the old tariff incorporated in R55 remain applicable to its development which had been completed in April 2007 i.e. prior to the adoption of R35. This request led Victor to form the view that the wording adopted in R35 as to the effective date of the new tariff was ambiguous and liable to cause confusion. In his opinion, this wording was capable of being understood either to mean that the new tariff was applicable to applications across the board (i.e. even those approved prior to R35) or only to new applications submitted and approved after R35 was adopted. He recommended that respondent's council should make the new tariff applicable to all applications, i.e. both those approved or submitted before 1 July 2007 as well as all new applications submitted and approved thereafter.

[27] The respondent's council did not accept Victor's recommendation and subsequently resolved on 9 October 2007 by way of resolution R50/8-07 (*"R50"*) that the old (1997) tariff for contributions as incorporated in R55 would continue to apply in respect of development applications approved before 1 July 2007. It also resolved that a follow-up report in respect of the new tariff which had been introduced by way of R35 should be presented, and a meeting should be held with all major developers.

[28] Over the same period (i.e. August to October 2007) various informal meetings took place between the applicants and representatives of the respondent. At one of the meetings held on 24 October 2007 the then executive mayor, Mr O de Beer, assured the applicants that the new tariff would only be applicable to new developments, i.e. developments in respect

of which plans were submitted and approved after 1 July 2007. The applicants state that they were also assured that all developments in respect of which plans had been submitted for approval prior to 1 July 2007 but which had not yet been approved at that date would be excluded from the new tariff. The regime in place in terms of R55 of 1997 (the old tariff) would therefore continue to apply to all development applications submitted to the respondent or approved by it before 1 July 2007. The only relevance of these assurances is to the evidence as a whole, since the applicants do not seek to found a cause of action on the basis of any representations made by the executive mayor. What seems clear however is that the applicants proceeded with their developments on the basis of the respondent's assurances that the increased tariffs would not be applicable to either applications approved or submitted for approval prior to 1 July 2007.

[29] Pursuant to the resolution contained in R50 of 9 October 2007 (i.e. that a follow-up report should be presented in respect of the new tariff introduced by R35) Victor made a further presentation to the respondent's council in November 2007. Subsequently, by way of resolution R37/11-07 (*"R37"*) the respondent referred the matter to a workshop for further discussion and eventually, on 4 December 2007, the respondent's council considered the matter and on that date dealt with it by way of resolution R43.

[30] Resolution R43 reads as follows:

'RESOLVED:

(i) that the report be noted;

(ii) that Council's decision R50/8-07 (ii) of 9 October 2007, be revoked;

(iii) that the capital contributions be payable on the earliest of (a) by issuing a clearance certificate or (b) when the building plans are to be approved and

that the tariff on the aforementioned date, be applicable in applying the amount payable;

(iv) that the capital contributions, contained in Annexure "B" and "C" to the report, with the inclusion of solid waste, as calculated and submitted to Council per item R35/6-07 dated 26 June 2007 be reconfirmed to be applicable on all developments approved as from 1 July 2007;

(v) that, if Council is of the opinion that developers must also be responsible for a social contribution, this requirement be dealt with as an additional contribution to be made after a legal opinion for the enforcement of such a contribution has been obtained;

(vi) that a discount of 25% on the tariffs contained in Annexure "B" and "C" to the report, rounded off to the nearest R10, be made applicable on all developments approved prior to 1 July 2007, which discount will be terminated as from 1 July 2008;

(vii) that all developers be invited for a discussion to explain the rational (*sic*) of Council's decision by the Spatial Planning & Development Department;

(viii) that all effected (*sic*) developers be informed in writing pertaining to (vi) above by the Spatial Planning & Development Department.'

[31] The effect of this resolution was thus the following. Firstly, R50 of 9 October 2007 which provided *inter alia* that the old (1997) tariff for contributions in terms of R55 would continue to apply in respect of development applications approved before 1 July 2007 was revoked. Secondly, it was *"reconfirmed"* that the capital contributions as calculated and submitted to the respondent's council in terms of R35 dated 26 June 2007 would be applicable on all developments approved as from 1 July 2007. Thirdly, a discount of 25% on the new tariff as contained in R35 would be made applicable to all developments approved prior to 1 July 2007 which discount would terminate as from 1 July 2008.

[32] On 12 December 2007 the respondent notified all developers within its area of jurisdiction, including the applicants, of the contents of R43.

[33] This notification was followed by an exchange of correspondence between the parties and/or their legal representatives over the period 10 March 2008 until 16 April 2009 in which *inter alia* the applicants voiced their objections to the tariff provisions in R43. The respondent complains that the applicants are guilty of unreasonable delay in pursuing remedies against it over this period, and it is so that there were intervals when the applicants did not promptly follow up the respondent. However, it is my view that nothing much turns on this in light of the respondent's attitude to the application thereafter launched by the applicants in July 2009.

[34] On 20 July 2009 the applicants instituted proceedings against the respondent for the review and setting aside of the decision taken by the respondent on 4 December 2007 by way of R43 *"in terms of which the method for the calculation of capital contributions ... be made applicable to all developments approved as from 1 July 2007"*. It was alleged that the attempt to vary capital contributions relating to approvals granted before 4 December 2007 was invalid, and that in any event the respondent's approach in determining the new capital contribution method was legally defective. The application was thus directed at an attack on the tariff itself in addition to which the applicants contended that the decision taken by the respondent reflected in R43 constituted *"administrative action"* within the meaning of PAJA since it entailed the exercise of a public power in terms of the relevant legislation and was thus reviewable in terms of s 6(1) of that Act. As ancillary relief the applicants sought condonation for the institution of the proceedings after the expiry of the 180-day period referred to in s 7(1) of PAJA.

[35] The respondent initially opposed the application but did not deliver any answering affidavits and subsequently withdrew its opposition and tendered costs. This occurred after the respondent had taken legal advice and had rescinded R43 on 2 February 2010 by way of resolution R105/1-10 (*"R105"*).

It must thus be accepted that any challenge to the application instituted by the applicants on the basis of unreasonable delay on their part was not considered by the respondent to have been worthy of being proffered at that stage. It must also be accepted that the attack by the applicants on the tariff contained in R43 was considered by the respondent to have merit which was sufficient to result in the respondent rescinding R43 (albeit some seven months later) on 2 February 2010.

[36] On 4 February 2010 the applicants' attorney wrote to the respondent's attorney pointing out that the rescission of R43 had particular consequences and that the applicants urgently required the respondent to indicate how such consequences were to be dealt with. The applicants' attorney also referred to a previous letter of 13 January 2010 which he had written to the respondent's attorney setting out proposals to resolve the dispute, predicated on the basis that the new tariff was unlawful and that there would have to be an accounting in respect of all contributions paid by the applicants on the basis of the new tariff. It was also proposed that all contributions paid by the applicants to date be calculated on the basis of the old tariff as adjusted by the Index. The proposals contained in the letter of 13 January 2010 pre-dated the rescission of R43 by the respondent. The respondent's attorney was requested to obtain instructions as to the proposals made by the applicants in the letter of 13 January 2010.

[37] On 5 February 2010 the respondent's attorney advised that the consequences of the rescission of R43 were *"nie werklik regsaangeleenthede nie maar prakties van aard. Synde 'n openbare instelling is u kliënt natuurlik geregtig om die Munisipaliteit enige tyd direk te kontak"*.

[38] Accordingly on 18 February 2010 the first applicant wrote to the respondent's municipal manager, calling for a meeting to discuss how the question of capital contributions was to be dealt with in the period pending a valid determination thereof and the process for determining what the correct

capital contributions should have been, including arrangements for repayment of any over-payments. It is clear from this letter that the applicants were proceeding on the basis that the respondent had accepted the merits of their attack on the new tariff, and that the new tariff had fallen away as a result of the rescission of R43.

[39] There was no response to this letter. On 22 February 2010 the applicants' attorney wrote to the respondent's municipal manager calling for discussion on the procedure to be instituted by the respondent for the calculation of correct capital contributions with retrospective effect from September 2007, and the management and payment of contributions pending the calculation of correct capital contributions.

[40] On 25 February 2010 the respondent's attorney advised that the respondent *"het reeds 'n proses begin ter wysiging/herberekening van kapitaal bydraes en 'n finale besluit sal eersdaags in die verband geneem word ... Kliënt is voornemens om wysigings van kapitaal bydraes insoverre dit op u kliënte van toepassing is ingevolge Artikel 42(3) van die Ordonnansie op Grondgebruik Beplanning te doen ... Kliënt deel u kliënt se besorgdheid rakende uitklarings sertifikate en die verantwoordelike amptenare is reeds besig om te kyk na 'n manier om u kliënt in die verband te akkommodeer"*. The applicants were also advised that the respondent's representatives were willing to meet with them and that it was felt that the matter was capable of settlement without further litigation.

[41] On 26 February 2010 the applicants' attorney attempted to arrange a meeting with the respondent's representatives on 2 March 2010. On 1 March 2010 the respondent's attorney advised that the earliest date that the meeting could take place would be 5 March 2010, alternatively 10 March 2010. The parties met on 5 March 2010.

[42] Thereafter on 9 March 2010 the respondent's council met and adopted resolution R107/3-10 (*"R107"*), the relevant portion of which reads as follows:

'R107/3-10 CAPITAL CONTRIBUTIONS

(Report of the Municipal Manager)

RESOLVED

(i) that the report be noted;

(ii) that Council adopts the interim policy on development contributions attached hereto as Annexure A;

(iii) that the responsible and accountable municipal officials utilize the following formula as a basis of calculating development contributions in terms of Land Use Planning Ordinance 15 of 1985:

DC = A/B(C-D)
Where DC = Development Contributions
A = Impact of Proposed Development
B = Impact of existing Development
C = Replacement value of existing Bulk Services Infrastructure
D = Outstanding loans on existing Bulk Services Infrastructure;

(iv) that Council's policy *"Beleid vir die berekening van bydraes vir die installering van ingenieursdienste tydens aansoek om dorpstigting hersonering en onderverdeling"* be re-affirmed as in Annexure B; and

(v) that the Manager: Spatial Planning and Development be instructed to re-submit to Council all those developments (Annexure C) affected by resolution 105/2-10.'

[43] Unfortunately, neither the report to respondent's council (referred to in paragraph (i) of the resolution) nor Annexure C to the resolution (referred to in paragraph (v)) were annexed to the respondent's answering affidavit. However the following aspects of R107 are important. Firstly, it specifically records that the respondent's council was adopting an interim policy on development contributions (which the parties accept to mean capital contributions). Secondly, a particular formula was set out as a basis for

calculating capital contributions in terms of LUPO. Thirdly, it reaffirmed the old 1997 policy for the calculation of capital contributions (in paragraph (iv) thereof read with Annexure B thereto) despite the respondent's previous attempt in 2007 to *"adapt"* the policy. Lastly, the Manager: Spatial Planning and Development was instructed to re-submit to respondent's council all those developments (contained in Annexure C to R107) affected by R105 of 2 February 2010 in terms of which R43 had been rescinded.

[44] The interim policy document itself (Annexure A to R107) commences with the words *"In the interim and until such time as the legislative framework confers the appropriate empowering provisions, the following procedure/policy is suggested in order to mitigate the difficulties experienced at present"*. The interim policy provides that a particular agreement is to be concluded between the respondent and new applicants for development approvals. The respondent did not attach a copy of the draft agreement to its answering affidavit, but the applicants received copies thereof for future use. The preamble to the draft agreement includes the following:

'AND WHEREAS the basis for the calculation of the capital contributions which the Municipality has until recently used has fallen away as a result of Resolution R43/12-07 having being revoked by the Council of the Municipality;

AND WHEREAS the Municipality is in the process of establishing a revised basis to calculate Capital Contributions (which proceeds (*sic*) has not been completed).'

[45] The respondent itself thus regarded the 2007 tariff for the calculation of capital contributions to have fallen away consequent upon the rescission of R43. It could not have been referring to the 1997 tariff, i.e. the old tariff as having been used "*until recently*" because this, on the respondent's version, had been replaced by the new (2007) tariff on 1 July 2007.

[46] On 31 March 2010 the applicants' attorney wrote to the respondent's attorney again asserting that no steps had been taken to address the need to

make arrangements for the levying of capital contributions pending a formal resolution by respondent's council in respect of a new tariff. The applicants also complained that notwithstanding the rescission of R43 by way of R105 on 2 February 2010 the respondent was still levying capital contributions as calculated in accordance with the rescinded tariff. It is for this reason that the applicants claim an accounting by the respondent. The respondent's answer to this complaint can best be described as vague and unsatisfactory and boils down to the following. Firstly, it is denied that *"as a general principle"* respondent's officials have ignored the conditions of approval imposed in the approvals granted to the applicants prior to 1 July 2007 or that they have sought to extract monies from the applicants in excess of that to which respondent was entitled. Secondly, the respondent contends that, rather than the applicants having overpaid, it would appear from *"preliminary investigations which have been carried out, that they benefited unfairly over many years and may in fact owe a considerable sum of money to the respondent, for and in respect of underlevied s 42 contributions"*. This refers to the respondent's allegation that (as a result of its own error) the capital contributions payable in terms of approvals granted prior to 1 July 2007 had not been calculated in accordance with the official escalation indexes, and that these indexes in any event did not keep pace with the actual increases applicable to the *"real calculations"* of contributions which should have been recovered.

[47] On 6 April 2010 the respondent's attorney wrote to the applicants' attorney advising that he would be taking instructions from the respondent and would report back as soon as possible thereafter.

[48] On 9 April 2010 the applicants' attorney again wrote to the respondent's attorney, repeating the complaint that capital contributions were still being levied in accordance with the rescinded R43 and advising that in all the circumstances the applicants felt that they had no option but to approach court for relief.

[49] The present application was launched on 2 July 2010.

[50] It is common cause that the respondent has still not implemented a *"final policy"* for the redetermination or recalculation of capital contributions.

ISSUES FOR DETERMINATION

[51] The crux of the dispute between the parties is the applicants' allegation that despite rescinding R43, the respondent has continued to levy contributions in accordance with the tariff set out therein, both in respect of approvals granted and applications submitted before 1 July 2007 and approvals granted thereafter. The applicants thus contend that the respondent has unlawfully extracted payment in accordance with the new tariff from them.

[52] The applicants do not seek an order declaring that R43 is of no force and effect; they seek an order declaring that the tariff for the calculation of contributions underlying that resolution, read with R35, is of no force and effect.

[53] The applicants argue that the tariff set out in R35 was effectively implemented only by R43 which has subsequently been revoked. Accordingly the respondent is not entitled to demand or extract payment of contributions in accordance with that tariff. The applicants contend that it is evident from the events leading up to R43 that the new (2007) tariff's only right of existence flowed from R43 itself. The new tariff was only implemented pursuant to R43. While R35 purported to implement the tariff on 1 July 2007, its very essence was contradicted by follow-up resolutions in October 2007 (i.e. R50) and November 2007 (i.e. R37). The applicants argue that R43 did not refer to R35 itself but to the tariff set out in the item submitted to the council under the reference number R35. The applicants accordingly contend that the revocation of R43 meant that the tariff implemented in accordance with that resolution was revoked.

[54] The applicants' main relief is thus sought on the basis that R105 which was adopted by the respondent's council in the wake of the withdrawal of the respondent's opposition to the first review application in July 2009 also rescinded the previous resolutions which adopted or considered the new tariff. The new tariff is thus no longer of any force and effect as a basis for the imposition of capital contributions.

[55] It is for this reason that the applicants also seek an order that the respondent must account to them for the sums overpaid in respect of capital contributions levied by the respondent in accordance with R43.

[56] The alternative relief claimed by the applicants for the review and setting aside of R35, alternatively that the tariff for the calculation of capital contributions as set out in R43 as read with R35, alternatively as set out in R35 is of no force and effect, only needs to be considered in the event that the applicants do not succeed in the main relief. It is in respect of the alternative relief claimed that considerations of valid administrative action, condonation for any delay in pursuing the relief sought and any challenge to the legality of R35 are applicable.

[57] The respondent argues that the main relief sought by the applicants is misconceived since the applicants seek to attack R35 without attacking the conditions imposed in development approvals as a result of the adoption and implementation of R35. The respondent contends that the failure to attack the conditions imposed in development approvals for capital contributions under the new tariff adopted in R35 is fatal to the applicants' case not only in respect of unreasonable delay on the applicants' part in pursuing their remedies but also in respect of valid administrative action and any challenge to the legality of R35 itself. The respondent denies that the revocation of R43 implied the rescission or revocation of either R35 or the tariff adopted by it.

[58] The respondent submits that when the applicants instituted proceedings for the review of R43 in July 2009 they elected not to seek a simultaneous

review of R35. The applicants therefore accepted the conditions that were imposed upon their development approvals in terms of R35. The respondent contends that the applicants did so deliberately and on the basis of their perception of their own commercial interests. In particular, they elected to do so in order to proceed with the sales and transfers of the various erven in their developments. In each approval, the attention of the relevant applicant was drawn to its right to appeal against the conditions of approval in terms of s 62 of the Systems Act. None of the applicants at any stage exercised its right of appeal against the imposition of such conditions. On the contrary, albeit that the applicants *"from time to time"* expressed their dissatisfaction with payment of the capital contributions in question, they accepted the commercial benefits of the approvals granted to them, received clearance certificates in respect of erven from the respondent, and since 2007 and until these proceedings were pending made the payments on the basis of the conditions imposed by the respondent in terms of R35.

[59] The respondent also argues that the applicants have failed to establish a claim for the rendering and/or debatement of an account in that there is no fiduciary relationship between the parties, the applicants have no contractual entitlement to an account, and the respondent has no statutory obligation to provide an account.

THE *"IMPLIED REVOCATION"* OF R35 BY WAY OF R105

[60] I am in agreement with the respondent's submission that whether or not the adoption of R105 constituted not only an act of express revocation of R43, but also an implied revocation of R35, is a matter to be determined by interpreting the terms of R105 within the context of the facts and the surrounding circumstances. The enquiry is not limited to what was intended by the respondent only, as was the case in *Club Mykonos Langebaan Limited v Langebaan Country Estate Joint Venture and Others* 2009 (3) SA 546 (WCC) where the court was called upon to interpret conditions imposed by the local authority which were attached to approval of the subdivision of

land in terms of s 42 of LUPO. Koen AJ found that when interpreting those conditions what mattered was the intention of the local authority and not the intention of the developer or objector.

[61] The respondent submits that a reading of R105 does not support the contention advanced by the applicants since R105 plainly stated that R43 was being revoked and set aside. The respondent argues that had its council intended to revoke both R43 and R35 or the tariff incorporated and adopted by them it would have said so in express terms. The respondent concedes that both R35 and R43 essentially adopted the same tariff in respect of capital contributions but argues that because these resolutions were not identical in terms, the express revocation of R43 by R105 cannot mean that R105 impliedly revoked R35.

[62] The respondent points out that it is not only the applicants who were granted approvals in terms of R35. Numerous development applications from other applicants were also approved in terms thereof. The respondent accordingly contends that it was at no stage understood or intended by the respondent's council that by revoking R43 it would also revoke, by implication, R35. In support of this contention the municipal manager states that had it intended to do so it would only have taken a decision in this regard and would only have passed R105 after ensuring that "*something*" was put in place to deal with the *lacuna* that would have been caused by the removal of both resolutions that sought to introduce the new tariff in 2007.

[63] In my view the stance now adopted by the respondent is at odds with the evidence as a whole. R35 incorporated a new tariff for the payment of capital contributions. R50 of October 2007 and R37 of November 2007 put a *"holding operation"* in place in respect of the implementation of the new tariff contained in R35. It was only on 4 December 2007 when R43 was adopted that the new tariff incorporated in R35 was in fact implemented. There would have been no other reason for the respondent's council to have *"reconfirmed"*

the new tariff to be applicable on all developments approved as from 1 July 2007. The new tariff's only right of existence thus flowed from R43.

[64] It is clear that the applicants took issue with the implementation of the new tariff which culminated in the launching of the first review application on 20 July 2009 and which was directed at an attack on the tariff itself.

[65] After initially opposing the application the respondent rescinded R43 on 2 February 2010 by way of R105. It subsequently withdrew its opposition to the application and tendered costs. In adopting R105 the respondent not only revoked R43, it revoked the content of R43 including the new tariff for capital contributions which it had *"reconfirmed to be applicable"* in R43 itself.

[66] Had R105 not rescinded the new tariff there would have been no reason for the respondent (through its attorney) to advise the applicants (through their attorney) on 25 February 2010 that the respondent had commenced a process *"ter wysiging/herberekening van kapitaal bydraes"* . It would also not have been necessary for the respondent's council to adopt R107 on 9 March 2010 in which it (a) adopted an interim policy on capital contributions; (b) adopted a specific formula as a basis for calculating capital contributions; (c) re-adopted the old tariff from 1997; and (d) instructed its Manager: Spatial Planning and Development to re-submit all those developments affected by R105.

[67] If as the respondent contends the rescission of R43 by R105 did not in any way affect the new tariff incorporated in R35 there would have been no need for the respondent to go to the lengths which it did in R107. There would have been no need for an interim policy since, on the respondent's version, a policy was already in place, namely that contained in R35. There would have been no need for the respondent to instruct its municipal officials to utilise a particular formula as a basis for calculating capital contributions. There would have been no need to *"re-affirm"* the old tariff. There would have been no need to instruct the Manager of Spatial Planning and Development

to re-submit to the respondent all developments affected by R105. And there would have been no need to include in the preamble to the draft agreement incorporated in the interim policy that *"the basis for the calculation of the capital contributions which the Municipality until recently used has fallen away ... the Municipality is in the process of establishing a revised basis to calculate Capital Contributions ..."*.

[68] Applying the well known test for final relief in motion proceedings set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C it is clear from the evidence as a whole that the tariff for the calculation of capital contributions as set out in R43, read with R35, was rescinded by R105 of 2 February 2010. The new tariff is thus of no force and effect.

[69] Since I have found that the new tariff is of no force and effect it is not necessary to consider the alternative relief claimed by the applicants.

ACCOUNTING TO THE APPLICANTS

[70] The applicants submit that an accounting to them in respect of all overpayments made to date - taking into account the respondent's own miscalculations of the contributions payable under the 1997 tariff – is a simple arithmetical exercise, and the respondent should have no difficulty in executing the task. They emphasise that (at least until the present litigation was pending) they have always paid such sums as were demanded from them. They are making additional payments in respect of all of the contributions that have been *"underlevied"* in terms of an arrangement with the respondent but in any event the contributions due under the old (1997) tariff are still only half of what the respondent demanded under the new (2007) tariff. They contend that the respondent's schedule of revised calculations (in respect of the *"underlevied"* contributions) is still incorrect insofar as the applicants' residential erven are concerned, since the applicants' erven are all less than 1 000m² in extent while the escalations

per the respondent's schedule are applicable to erven of 1 000m² or greater. Further, despite this being reflected on the respondent's schedule as owing by them, they do not pay contributions in respect of electricity to the respondent, and never have, as they purchase their electricity directly from Eskom.

[71] The applicants have set out the evidence upon which they rely, including a spreadsheet reflecting the sums paid to the respondent by all of them for capital contributions. Attached to the spreadsheet are supporting invoices from the respondent. The spreadsheet also reflects what should have been paid to the respondent in terms of the old (1997) tariff duly escalated in accordance with the Index as per the respondent's own calculations. From the spreadsheet it is evident that on the basis of the comparisons set out therein the applicants calculate that as at 17 September 2010 (i.e. the date upon which the schedule was prepared) they had overpaid R8 768 723.00 to the respondent.

[72] The applicants contend that given the respondent's position as a local authority responsible for the determination of capital contributions and the enforcement thereof there is a fiduciary relationship between the respondent and the applicants as ratepayers. They are thus entitled to a proper account from the respondent based upon a lawful tariff in respect of what they should have paid and what is owing to them as a result of any overpayment.

[73] As to the respondent's contention that on its calculations the applicants in fact contributed far less than they should have and the nett result is to all intents and purposes insignificant, the applicants argue (correctly in my view) that this does not justify a refusal to account in circumstances in which the respondent has unlawfully extracted payment of capital contributions from the applicants.

[74] The applicants appear to concede that they have no contractual entitlement to an account, nor is there any statutory obligation on the part of

the respondent to provide the account. The applicants contend that it is *"the fiduciary relationship"* between the parties which obliges the respondent to provide the account. The applicants rely on the case of *Kempton Park/Tembisa Metropolitan Substructure v Kelder* 2000 (2) SA 980 (SCA) in support of this contention.

[75] In that case the enquiry was whether the appellant (a local government structure) could be compelled by a *mandamus* to carry into effect certain resolutions passed by its council. The respondent was a resident and ratepayer within the appellant's jurisdictional area. The purpose of the respondent's application was to force the council to cut off the supply of electricity to persons who failed to pay the charges therefor and to maintain such discontinuation until all outstanding debts and fines had in such cases been paid by the defaulters, it having been alleged by the respondent that the council had by resolution adopted a credit control procedure which directed that it follow this course in cases of non-payment. The court *a quo* found that the council stood in a fiduciary position in relation to its ratepayers because *"the recognition and maintenance of a fiduciary relationship is at the heart of representative local government in an open and democratic society"*. It found as a consequence that *"other duties culled from those recognised as attaching to a trustee"* were imposed on the council. Certain duties derived from the private law of trusts were then identified and relied upon in order to justify a *mandamus*.

[76] The Supreme Court of Appeal disagreed that the finding of a *"fiduciary relationship"* resulted in the attribution to the council of private law duties derived from the law of trusts. It stated the following at 986A-F:

'That there is in a broad sense a fiduciary relationship between the council and its ratepayers is plainly correct. As Feetham AJA explained in *Sinovich v Hercules Municipal Council* 1946 AD 783 at 820.

'(i)t may, I think, be safely affirmed that the main object of establishing municipal councils and similar bodies for purposes of municipal government, as understood and carried on in the Union of South Africa ..., is to enable representatives of the inhabitants of given areas to administer, subject to some degree of control by a central authority, the local affairs of those areas in the general interests of their respective communities; and, in order to make such administration adequate and effective, it has now become a common practice to give to each municipal council wide powers to decide according to its discretion, subject to certain checks and safeguards, what measure will or will not serve "a useful civic or municipal purpose" in its own area.'

That local government should be representative of the inhabitants of its area of jurisdiction and that its actions should be open and transparent can certainly not be doubted. No one would, in this day and age, question these propositions. But I do not subscribe to the attribution to the council of private law duties derived from the law of trusts. The council, as has been stated, owes its existence to the provisions of the Local Government Transition Act 209 of 1993 and the proclamations made in terms thereof. Its powers and duties are conferred by the Constitution, by other statutes and the relevant principles of public and administrative law. To impose upon it additional duties in accordance with the principles of private law seems to me to negate its function as an organ of State and a branch of government.'

[77] The respondent argues that there is no basis for a conclusion that *"the necessary fiduciary relationship"* exists between the parties. It contends that a perusal of the *Kempton Park* case shows that the Supreme Court of Appeal accepted that there was *"in a broad sense a fiduciary relationship between the council and its ratepayers ..."*. This arose from the fact that local government should be representative of the inhabitants of its area of jurisdiction and that its actions should be open and transparent. But this categorisation of a relationship between a local authority and its ratepayers cannot be elevated, as the applicants seek to do in this case, to a conclusion that the fiduciary relationship is of the kind which requires the rendering of an account in the circumstances in question i.e. where a party alleges that there has been an overpayment by it to a local authority.

[78] In my view, the fiduciary relationship *"in a broad sense"* between the applicants and the respondent has as one of its fundamental elements an obligation on the respondent to ensure that its actions are *"open and transparent"*. The accounting called for by the applicants falls squarely within the obligation on the respondent to be open and transparent with them. The account which the applicants seek is confined to what is essentially an answer by the respondent to a query by the applicants for clarification as to the manner and extent to which the capital contributions (a statutory debt) have been calculated, and how payments made have been appropriated in respect of the statutory debt so calculated.

[79] The claim is limited to the furnishing of an account and does not include a claim for payment pursuant to the furnishing of that account: see *Doyle and Another v Fleet Motors P E (Pty) Ltd* 1971 (3) SA 760 AD at 762F-763D. Once the account is provided the applicants are at liberty to pursue their remedies should it be found that any overpayment must be repaid to them.

[80] Support for the view that the furnishing of an account falls squarely within the respondent's obligation to be open and transparent is to be found in sections 5 and 6 of the Systems Act. Section 5(1)(a) entitles the applicants to prompt responses from their local authority to their communications, including complaints, and to regular disclosure of the state of affairs of the local authority, including its finances. Section 6 confirms that a local authority's administration is governed by the democratic values and principles embodied in s 195(1) of the Constitution in terms of which *inter alia* services must be provided fairly and public administration must be accountable. Section 6(2)(d) imposes an obligation on the respondent to *"establish clear relationships and facilitate co-operation and communication between it and the local community"*. The vague and unsatisfactory answer of the respondent to the applicants' claims of overpayment of capital contributions necessitates an accounting to the applicants in accordance with the respondent's obligation to be open and transparent with them.

[81] It now becomes necessary to consider the time period to which the account should apply. The respondent has given no detail as to how its finances and administration will be affected by a finding that the tariff contained in R43 as read with R35 is of no force and effect. It has also not provided details as to the extent to which the new tariff has been implemented, but the rescission of R43 must surely have impacted on several developments. My finding that the new tariff is of no force and effect should also have such an impact, unless the respondent's assertion that it will have an insignificant impact on it due to *"underpayments"* by the applicants is to be accepted. In arriving at what is a just and equitable order I must also have regard to the drastic increase in tariffs imposed upon the applicants, even in respect of approvals prior to 1 July 2007

[82] To my mind a just and equitable order would be to direct the respondent to account to the applicants in respect of all of the sums overpaid by them as capital contributions which were unlawfully levied by the respondent in accordance with R43 as read with R35, both in respect of development applications either submitted or approved prior to 1 July 2007, and development applications approved since that date. Such an order would result in the respondent having to fulfil its obligation to be open and transparent with the applicants, a fundamental element of the fiduciary relationship which exists *"in a broad sense"* between them.

CONCLUSION

[83] I accordingly make the following order:

(1) **The tariff for the calculation of capital contributions as set out in the respondent's resolution R43/12/07 dated 4 December 2007, read with the respondent's resolution R35/6/07 dated 26 June 2007 is declared to be of no force and effect.**

(2) **The respondent shall within a period of 3 months from the date of this order account to the applicants in respect of the sums**

overpaid by them in respect of capital contributions (as contemplated in section 42 of the Land Use Planning Ordinance 15 of 1985) unlawfully levied by the respondent in accordance with resolution R43/12/07 read with resolution R35/6/07 both in respect of development applications submitted and/or approved prior to 1 July 2007 and development applications approved since that date.

(3) The respondent shall effect payment of the costs of this application including the costs of two counsel.

J I CLOETE