Republic of South Africa

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

CASE NO: 26078/2010

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

BERG RIVER MUNICIPALITY Applicant

and

JACOBUS JOHANNES LIEBENBERG N.O.
AND 86 OTHER PARTIES Respondents

JUDGMENT DELIVERED: 25 AUGUST 2011

BINNS-WARD J:

[1] The applicant, which is a municipality established in terms of the Local Government: Municipal Structures Act 117 of 1998 ('the Structures Act'), has applied for eight declaratory orders. If granted, the *declarators* sought would be to the effect that the 'rural levies' imposed by it in respect of properties in its area in the 2001/2 and 2002/3 financial years were lawfully and validly imposed, as were the rates levied by it on rural property within its area in the 2003/4, 2004/5, 2005/6, 2006/7, 2007/8 and 2008/9 financial years. (In terms of the applicable statutory provisions, a municipality's financial year has, during the entire period concerned, run between

1 July in each year and 30 June of the succeeding year.[1]) The orders are sought because it has been contended by the respondents, who make up a significant number of the owners of rural property within the municipal area, that the aforementioned imposts are invalid.

[2] The respondents have declined to make payment of the assessed rural levies and rates and have defended enforcement proceedings instituted against them by the municipality in various magistrates' courts in the municipal area. Both sides in the disputes have agreed that the current proceedings might afford a convenient means of cutting the Gordian knot; in particular, because they are also agreed that a determination of the alleged invalidity of the imposts is a matter beyond the jurisdiction of a magistrate's court. Indeed, I was asked by counsel for both sides to make orders sounding in money against the respondents in the amounts in which it is now agreed they would be liable in such event, together with appropriate costs orders, should the application be decided in favour of the applicant - effectively determining all matters in issue between the parties in the magistrates' courts, and thereby superseding those proceedings. Thus it is apparent that what have been cast as proceedings for declaratory relief are in fact enforcement proceedings.[2] So recognised, it is also apparent that the respondents' opposition to the application is founded on a number of collateral challenges to the validity of the imposts[3] which

[1] In terms of s 10G(2)(d)(i) of the Local Government Transition Act 209 of 1993, and after the repeal of that provision with effect from 1 July 2005, in terms of the definition of 'financial year' in s 1(1) of the Local Government: Municipal Finance Management Act 56 of 2003.

[2] The notice of motion indeed contained prayers for orders against the individual respondents to pay their outstanding rates in amounts set out in annexure B to the notice and for costs orders to be made by this court in the magistrate's court actions.

[3] Cf. *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA); [2004] 3 All SA 1, at para 32-36. The concept of collateral challenge was discussed in *Oudekraal* in the context of administrative action. Under our constitutional system, which is based on the rule of law, with the Constitution as the supreme law, and thus different from systems characterised by parliamentary supremacy, I am unable to conceive of any reason in principle why collateral challenge should not, in general, also be available as a defence by the citizen in proceedings in which he or she is subject to

had been imposed by the municipality in terms of decisions which were legislative in character.[4] (That, no doubt, explains why there is no counter-application by the respondents for an order declaring the imposts unlawful.)

[3] In the circumstances it has been appropriate to decide the application with regard to its true, rather than ostensible, character; the result being determined not by whether the municipality has positively established that the imposition of the rates and levies concerned was validly effected, but by whether the challenges raised by the respondents are good or not. By the time of the hearing the respondents had abandoned their challenge to the rates imposed in respect of the 2003/4 financial year.

[4] The applicant was established in the final phase of local government restructuring regulated in terms of the Local Government Transition Act 209 of 1993 ('the LGTA'). The Structures Act and the Local Government: Municipal Systems Act 32 of 2000 (the 'Systems Act'), which came into effect on 1 February 1999 and 1 March 2001, respectively, were the first major components of the legislative framework contemplated in terms of the Constitution that were put in place to

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coercive action by an organ of state to enforce compliance with obligations purportedly imposed in terms of legislative action. Bearing in mind that rule of law principles are the determinant, the position might arguably be different, however, in respect of a ratepayer questioning the validity of a rates impost. Factors that might support such a distinction include (i) the ratepayer's position as an integral part of the municipality (s 2(b) of the Local Government: Municipal Systems Act 32 of 2000); (ii) the responsibilities that attend the ratepayer's right to participate in the governance of municipal affairs (s 5 of Act 32 of 2000); and (iii) the positively obligationary import of the statutory duty on a ratepayer to make the necessary enquiries from the municipality if he/she/it does not receive a rates account (s 27(2) of the Local Government: Municipal Property Rates Act 6 of 2004). These factors, amongst others, suggest some degree of responsibility on ratepayers as constituent components of a municipality to be proactive, if needs be, in ensuring the institution and maintenance of an effective rating system. The appropriateness of drawing the distinction was insufficiently canvassed in the evidence and in the argument to make this a suitable case to decide the matter. Certainly, the applicant did not contend on the papers that the respondents' collateral challenge was incompetent on those grounds.

[4] See *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at para 31-38 and 45 (a matter decided in the context of the Interim Constitution) and *City of Cape Town and another v Robertson and another* 2005 (2) SA 323 (CC) at para 53-60, read with s 229(1) and s 160(2)(c) of the Constitution.

regulate local government upon the completion of the constitutional restructuring at which the LGTA had been directed. Two further major components were, however, required to complete that framework. Those components, the Local Government: Municipal Finance Management Act 56 of 2003 ('the MFMA') and the Local Government: Municipal Property Rates Act 6 of 2004 ('the MPRA'), were enacted some years after the establishment, in late 2000, of municipalities, such as the applicant, in the manner envisaged by chap 7 of the Constitution.

[5] Pending the completion of the required legislative framework by the introduction of the MFMA and MPRA, certain provisions of the LGTA continued to operate, as indeed did some provisions of the old order provincial ordinances, such as (in the Western Cape) the Property Valuation Ordinance, 1993 (Cape), and the Municipal Ordinance 20 of 1974 (Cape). Ascertaining precisely which legislation applied in particular areas of municipal governance at various stages during the restructuring process is further complicated by the fact that the continuation of the operation of some old order legislation for many years into the post-constitutional era in some instances had the consequence that discrete, but equivalent, legislative schemes operated side by side, with the result that a municipality had a choice which to use.[5] To give but one example of this situation, a municipality could avail of chap 8 of the Municipal Ordinance[6] or s 10G(7) of the

[5] Graphically described by Cameron JA in *Howick District Landowners Association v Umngeni Municipality and Others* 2007 (1) SA 206 (SCA) at para 3 as '*a dense legislative setting that entwines a pre-constitutional provincial ordinance, the legislation straddling the transition to the Constitution of the Republic of South Africa, 1996, and the set of statutes Parliament enacted between 1998 and 2004 to restructure local government*'.

[6] The provisions of the Municipal Ordinance had residual force because of the effect of s 16(2) of the LGTA, which provided: '*Subject to the provisions of this Act and any proclamation issued thereunder, the provisions of the laws applying to local authorities in the province concerned shall mutatis mutandis apply to any transitional council or transitional metropolitan substructure referred to in subsection (1)'* read with s 14 of the Structures Act. Those provisions were '*national legislation'* within the meaning of s 229(2)(b) of the Constitution, quoted below, at para [7]. In *Rates Action Group v City of Cape Town* 2004 (5) SA 545 (C); 2004 (12) BCLR 1328; [2004] 3 All SA 368 it was held that

LGTA[7] for rating purposes; and in certain respects both pieces of legislation could be applied together. An added complication arises from the transitional provisions in the MFMA[8] and the MPRA,[9] which extended the working life of some provisions of preceding legislation further into the constitutional era.

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the provisions of s 75A of the Systems Act (which was inserted into the Act in terms of s 39 of Act 51 of 2000, before the Systems Act came into operation on 1 March 2001) co-existed alongside the equivalent provisions of s 10G(7) of the LGTA for so long as the latter remained in effect and that it was open to a municipality, when imposing fees for services provided, to elect which of the provisions to use. At para 48 of the judgment, Budlender AJ (Moosa J concurring) observed '*The implication … is that there are two mechanisms which are open to municipalities for imposing fees and charges - the LGTA mechanism and the Systems Act mechanism. The municipality may elect which of those it is to use, and must then follow the procedure stipulated in that statute.*' Section 75A of the Systems Act provides:

> ***75A General power to levy and recover fees, charges and tariffs***
>
> *(1) A municipality may-*
>
> *(a) levy and recover fees, charges or tariffs in respect of any function or service of the municipality; and*
>
> *(b) recover collection charges and interest on any outstanding amount.*
>
> *(2) The fees, charges or tariffs referred to in subsection (1) are levied by a municipality by resolution passed by the municipal council with a supporting vote of a majority of its members.*
>
> *(3) After a resolution contemplated in subsection (2) has been passed, the municipal manager must, without delay-*
>
> *(a) conspicuously display a copy of the resolution for a period of at least 30 days at the main administrative office of the municipality and at such other places within the municipality to which the public has access as the municipal manager may determine;*
>
> *(b) publish in a newspaper of general circulation in the municipality a notice stating-*
>
> *(i) that a resolution as contemplated in subsection (2) has been passed by the council;*
>
> *(ii) that a copy of the resolution is available for public inspection during office hours at the main administrative office of the municipality and at the other places specified in the notice; and*
>
> *(iii) the date on which the determination will come into operation; and*
>
> *(c) seek to convey the information referred to in paragraph (b) to the local community by means of radio broadcasts covering the area of the municipality.*
>
> *(4) The municipal manager must forthwith send a copy of the notice referred to in subsection (3)(b) to the MEC for local government concerned.*

[7] The provisions of which are set out in full at para [9], below.

[8] Section 179; as to which see para [10], below.

[9] Sections 88-89. Sections 88 and 89 of the MPRA provide:

> *88* ***Transitional arrangement: Valuation and rating under prior legislation***
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> *(1) Municipal valuations and property rating conducted before the commencement of this Act by a municipality in an area in terms of legislation repealed by this Act, may, despite such repeal, continue to be conducted in terms of that legislation until the date on which the valuation roll covering that area prepared in terms of this Act takes effect in terms of section 32 (1).*
>
> *(2) For purposes of subsection (1), any reference in such repealed legislation to a 'local authority', 'local council', 'metropolitan local council', 'rural council' or 'other unit' of local government must-*

[6] An appreciation of the incidence of the aforementioned legislative history in respect of the powers of municipalities to impose rates, levies and other charges during the 2000 to 2009 financial years is necessary in order to understand the issues underlying the disputes between the parties. At the outset it needs observing, however, that a common thread characterised the exercise of the powers under all the applicable legislative schemes throughout the transition: the determination of rates and tariffs has always been attended by an opportunity for ratepayers and other interested persons to participate, by way of the right to make representations and to submit objections, before any rate or tariff is finally or effectively fixed by a municipal council. The statutory provision of the aforementioned opportunity manifests in its various guises a mechanism to achieve the objects of local government in terms of s 152 of the Constitution, including the provision of democratic and accountable government for local communities and the encouragement of the involvement of communities in the matters of local government. The proper approach to construing and applying the aforementioned

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(a) in relation to an area situated within a metropolitan municipality, be regarded as referring to that metropolitan municipality;
(b) in relation to an area situated within a local municipality, be regarded as referring to that local municipality; and
(c) in relation to an area situated within a district management area, be regarded as referring to the district municipality in which that district management area falls.

Transitional arrangement: Use of existing valuation rolls and supplementary valuation rolls

(1) Until it prepares a valuation roll in terms of this Act, a municipality may-
(a) continue to use a valuation roll and supplementary valuation roll that was in force in its area before the commencement of this Act; and
(b) levy rates against property values as shown on that roll or supplementary roll.
(2) If a municipality uses valuation rolls and supplementary valuation rolls in terms of subsection (1) that were prepared by different predecessor municipalities, the municipality may impose different rates based on the different rolls, so that the amount payable on similarly situated properties is more or less similar.
(3) The operation of this section lapses six years from the date of commencement of this Act, and from that date any valuation roll or supplementary valuation roll that was in force before the commencement of this Act may not be used.

constitutional legislation is to do so, where plausible, purposively, in harmony with its objects and values.[10]

[7] The original power of municipalities to impose rates, levies and charges is founded on the provisions of s 229 of the Constitution, which provides in relevant part:

> 229 **Municipal fiscal powers and functions**
>
> (1) Subject to subsections (2), (3) and (4), a municipality may impose-
>
> (a) rates on property and surcharges on fees for services provided by or on behalf of the municipality; and
>
> (b) if authorised by national legislation, other taxes, levies and duties appropriate to local government or to the category of local government into which that municipality falls, but no municipality may impose income tax, value-added tax, general sales tax or customs duty.
>
> (2) The power of a municipality to impose rates on property, surcharges on fees for services provided by or on behalf of the municipality, or other taxes, levies or duties-
>
> (a) ….; and
>
> (b) may be regulated by national legislation.

[8] It is immediately apparent that the Constitution makes a distinction between '*rates on property*' and '*other taxes, levies and duties*' and between 'rates' and charges or 'surcharges for services provided by or on behalf of the municipality'. The word '*rates*' is not specially defined and bears its ordinary meaning in the context of s 229.[11] In *Gerber and Others v Member of the Executive Council for Development Planning and Local Government, Gauteng, and Another* 2003 (2) SA 344 (SCA); [2002] 4 All SA 518,[12] the Supreme Court of Appeal ('the SCA') treated with the relevant meaning of the word as follows:

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[10] Cf. *City of Cape Town and another v Robertson and another* supra, at para 52.

[11] This interpretation now falls to be qualified in a limited respect by reason of the effect of s 11(2) of the MPRA, which contemplates the levying of rates in a uniform fixed amount on properties with a market value below a prescribed 'valuation level'.

[12] At para 23-24.

> The ordinary meaning of 'rate' is well established. The Concise Oxford Dictionary 7th ed defines it as follows:
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> > "….stated value of numerical proportion prevailing or to prevail between two sets of things . . . amount etc mentioned for application to all comparable cases; standard or way of reckoning; A (measure of) value, tariff charge, (rate of exchange, of interest); speed (travelling at a great rate; prices increasing at a dreadful rate); . . . 2. **assessment levied by local authorities for local purposes at so much per pound of assessed value of buildings and land owned**; (in pl) amount thus paid by householder etc . . .".
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> (Bold emphasis added [in the original].)
>
> [24] This meaning which I have emphasised accords with the tried and trusted practice of calculating property rates in relation to size or value of properties. There is nothing to suggest that the power given by s 229(1)(a) of the Constitution to local authorities to impose property rates was a power to depart from this established meaning. Certainly the scheme for imposing a property rate set out in s 10G(6) of the LGTA is consistent with the way in which the words 'property rate' have always been understood and thus accords well with its usage in the Constitution.

[9] At the time of the establishment of the applicant municipality, in December 2000, the power of municipalities to impose rates was (ignoring for present purposes chap 8 of the Municipal Ordinance 20 of 1974 (Cape)) regulated by the provisions of s 10G(6), (6A) and (7) of the LGTA, which provided as follows:

> (6) A local council, metropolitan local council and rural council shall, subject to any other law, ensure that-
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> (a) properties within its area of jurisdiction are valued or measured at intervals prescribed by law;
>
> (b) a single valuation roll of all properties so valued or measured is compiled and is open for public inspection; and
>
> (c) all procedures prescribed by law regarding the valuation or measurement of properties are complied with:
>
> Provided that if, in the case of any property or category of properties, it is not feasible to value or measure such property, the basis on which the property rates thereof shall be determined, shall be as prescribed[13]: Provided further that the provisions of this subsection shall be

[13] In *Gerber*, supra, it was common cause between the parties that nothing had been prescribed as contemplated by the first proviso to s 10G(6) to the LGTA. Counsel in the current matter were also unable to identify that anything had been prescribed under the provision, and nor could the court's researchers. I consider that it is reasonable to conclude therefore that no alternative basis for rating was in fact prescribed.

applicable to district councils in so far as such councils are responsible for the valuation or measurement of property within a remaining area or within the areas of jurisdiction of representative councils.

(6A)(a) Despite anything to the contrary in any other law, a municipality must value property for purposes of imposing rates on property in accordance with generally recognised valuation practices, methods and standards.

(b) For purposes of paragraph (a) -

(i) physical inspection of the property to be valued, is optional; and

(ii) in lieu of valuation by a valuer, or in addition thereto, comparative, analytical and other systems or techniques may be used, including-

(aa) aerial photography;

(bb) information technology;

(cc) computer applications and software; and

(dd) computer assisted mass appraisal systems or techniques.

(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: Provided that a common rating system as determined by the metropolitan council shall be applicable within the area of jurisdiction of that metropolitan council: Provided further that the council concerned shall in levying rates take into account the levy referred to in item 1(c) of Schedule 2: Provided further that this subparagraph shall apply to a district council in so far as such council is responsible for the levying and recovery of property rates in respect of immovable property within a remaining area or in the area of jurisdiction of a representative council.

(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

(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.

(e) The chief executive officer shall forthwith send a copy of the notice referred to in paragraph (c) to the MEC and cause a copy thereof to be published in the manner determined by the council.

(f) Nothing in this section contained shall derogate from section 9 of the Electricity Act, 1987 (Act 41 of 1987).

[10] Section 10G of the LGTA was repealed in terms of s 179(1) of the MFMA, which came into operation with effect from 1 July 2005.[14] In terms of s 179(2) of the MFMA, however, '*the provisions contained in subsections (6), (6A) and (7) of section 10G of the Local Government Transition Act, 1993…remain in force until the legislation envisaged in section 229(2)(b) of the Constitution is enacted*'. The expression '*the legislation envisaged in s 229(2)(b)*' was plainly an intended reference to the legislation that manifested by way of the MPRA (which, although it was enacted only in 2004, was before the national assembly in draft form as a Bill

[14] Most of the other provisions of the MFMA came into operation on 1 July 2004.

during 2003[15]). In terms of s 81 of the Constitution, parliamentary legislation is enacted once a Bill approved by the legislature is assented to by the President.[16] Having regard, however, to the apparent object of s 179(2) of the MFMA, which was to keep the transitional provisions of subsections (6), (6A) and (7) of s 10G of the LGTA in place until they were replaced by the then still missing component of the legislation necessary to completely replace the transitional fiscal governance framework which had subsisted in terms of s 10G of the LGTA, I consider that, save to the extent that they were incompatible with provisions of the MFMA that came into effect on 1 July 2004, the residual provisions of s 10G therefore remained in operation until the MPRA came into operation, that is until 2 July 2005.[17]

[11] Mention was made above that equivalent legislation to s 10G(7) of the LGTA had continued to operate alongside the provision in the form of Part 2 of chap 8 of the Municipal Ordinance. The MPRA repealed that part of the Ordinance, but, in terms of s 88(1) of the Act,[18] municipalities which were using the provisions of the Ordinance for rating purposes were permitted to continue doing so until the implementation in terms of s 32(1) of the Act of a valuation roll for their area prepared in terms of the Act. The applicant municipality at no stage expressly purported to rely in its relevant decision-making on chap 8 of the Ordinance; nevertheless, as will be described later, there are indications in the evidence that

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[15] Local Government: Property Rates Bill [B 19-2003] published in Government Gazette No. 24589 of 18 March 2003. The MFMA received Presidential assent on 9 February 2004; see GN 176 published in Government Gazette No. 26019 of 13 February 2004. In *Howick District Landowners Association v Umngeni Municipality and Others* supra, at para 6, it was observed that it had been expected and indeed announced that the MPRA would come into effect on the same day as the MFMA, but that did not happen.

[16] Cf. *Khosa v Minister of Social Development and others; Mahlaule v Minister of Social Development and others* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 at para 90.

[17] The President gave his assent to the MPRA in May 2004. In terms of s 96 of the Act it was to come into operation on a date to be proclaimed by the President in the Gazette. The required commencement notice was published in a Proclamation signed by the President on 21 June 2005, which was published in Government Gazette No. 27720 on 29 June 2005.

[18] Section 88(1) of the MPRA is quoted in note 9, above.

some provisions of the Ordinance continued to guide its rating process. The contention in the applicant's heads of argument that the transitional provisions in ss 88-89 of the MPRA had the effect of postponing the effect of the repeal of the residual provisions of s 10G of the LGTA in terms of s 179 of the MFMA rested on an incorrect apprehension of the import of those provisions. Section 10G(7) of the LGTA was not legislation repealed in terms of the MPRA, and therefore not legislation comprehended by s 88(1) of the MPRA. The transitional provisions of s 89 of the MPRA are directed only at permitting municipalities during the transitional period to levy rates on the basis of valuation rolls prepared under previous legislation superseded by the MPRA. On the facts of the current matter they do not arise for consideration.

[12] In his oral argument, Mr *Heunis* SC, who (together with Ms *van Huyssteen*) appeared for the applicant, accepted that the MPRA, and not the LGTA, was the governing legislation in respect of the rates imposed in the 2006/7 and succeeding years. He submitted, however, that the municipality's purported reliance on s 10G(7) of the LGTA during those years did not render its rating decisions invalid because what was in fact done purportedly under the LGTA substantially gave effect to the requirements of the MPRA. I shall treat with that argument later. An alternative argument that a reference to s 10G(7) of the LGTA should be read in, either in s 88(1), or in the schedule to the MPRA, has no merit. Such a reading-in might be supported only if it were necessary to avoid absurdity, or to give effect to object of the provision; cf. *Rennie NO v Gordon and Another NNO* 1988 (1) SA 1 (A) 22E-F; *Palvie v Motale Bus Service (Pty) Ltd* 1993 (4) SA 742 (A) 749B-C and *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC) para 105. It is not.

[13] Certain provisions of the MFMA (ss 15-22) which came into effect on 1 July 2004 regulate the procedure to be followed by municipal councils in the adoption of their annual budgets. These provisions of the MFMA, which are described in some detail below, do so in a different manner to the equivalent provisions of s 10G(7) of the LGTA, which nevertheless remained in effect until 2 July 2005.

[14] Section 16 of the MFMA requires a municipality to adopt a budget for the forthcoming financial year prior to the commencement of such year. The mayor is required to table a draft budget at least 90 days before the start of the budget year. The purpose of the 90 day minimum requirement is expressly to facilitate the approval by the municipal council of an annual budget before the start of the financial year in which it is to pertain.[19] In terms of s 15 of the MFMA, a municipality, except where otherwise provided in terms of the Act, may not incur any expenditure other than in accordance with the provisions of an approved budget.

[15] In terms of s 17(3) of the MFMA, when the draft budget is tabled in terms of s 16, it must be supported by a number of documents and a variety of information of the nature set forth in paragraphs (a) to (m) of the subsection. The prescribed accompanying documents include '*draft resolutions imposing any municipal tax and setting any municipal tariffs as may be required for the budget year*'.[20] It should be apparent from the material that is tabled in terms of s 17(3) of the MFMA what the sources of municipal revenue are intended to be in the forthcoming budget year and how this is intended to be appropriated in respect of the municipality's anticipated capital and operating expenditure. The requirement that there be a draft rates resolution falls to be understood in that context.

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[19] Section 16(1) of the MFMA.
[20] Section 17(3)(a)(ii) of the MFMA.

[16] Sections 22 -24 of the MFMA provide as follows:

22 **Publication of annual budgets**

Immediately after an annual budget is tabled in a municipal council, the accounting officer of the municipality must-

(a) in accordance with Chapter 4 of the Municipal Systems Act-

(i) make public the annual budget and the documents referred to in section 17 (3); and

(ii) invite the local community to submit representations in connection with the budget; and

(b) submit the annual budget-

(i) in both printed and electronic formats to the National Treasury and the relevant provincial treasury; and

(ii) in either format to any prescribed national or provincial organs of state and to other municipalities affected by the budget.

23 **Consultations on tabled budgets**

(1) When the annual budget has been tabled, the municipal council must consider any views of-

(a) the local community; and

(b) the National Treasury, the relevant provincial treasury and any provincial or national organs of state or municipalities which made submissions on the budget.

(2) After considering all budget submissions, the council must give the mayor an opportunity-

(a) to respond to the submissions; and

(b) if necessary, to revise the budget and table amendments for consideration by the council.

(3) The National Treasury may issue guidelines on the manner in which municipal councils should process their annual budgets, including guidelines on the formation of a committee of the council to consider the budget and to hold public hearings.

(4) No guidelines issued in terms of subsection (3) are binding on a municipal council unless adopted by the council.

24 **Approval of annual budgets**

(1) The municipal council must at least 30 days before the start of the budget year consider approval of the annual budget.

(2) An annual budget-

(a) must be approved before the start of the budget year;

(b) is approved by the adoption by the council of a resolution referred to in section 17(3)(a)(i); and

(c) must be approved together with the adoption of resolutions as may be necessary-

(i) imposing any municipal tax for the budget year;

(ii) setting any municipal tariffs for the budget year;

(iii) approving measurable performance objectives for revenue from each source and for each vote in the budget;

(iv) approving any changes to the municipality's integrated development plan; and

(v) approving any changes to the municipality's budget-related policies.

(3) The accounting officer of a municipality must submit the approved annual budget to the National Treasury and the relevant provincial treasury.

Section 24(2)(c)(i) of the MFMA thus makes it clear that the imposition of rates is an integral part of the adoption of the budget. This much is reiterated in the provisions of s 12(2) of the MPRA.[21]

[17] Section 22 of the MFMA cross-references to chap 4 of the Systems Act. The object of chap 4 of the Systems Act (which comprises ss 16-22 of the Act) is to regulate the manner in which a municipality must fulfil its obligation of community participation. The origin of the obligation lies in s 152(2) read with s 152(1)(a) and (e) of the Constitution. Of particular relevance in the current matter are ss 21 and 21A, which provide:

21 **Communications to local community**

(1) When anything must be notified by a municipality through the media to the local community in terms of this Act or any other applicable legislation, it must be done-

(a) in the local newspaper or newspapers of its area;

(b) in a newspaper or newspapers circulating in its area and determined by the council as a newspaper of record; or

(c) by means of radio broadcasts covering the area of the municipality.

(2) Any such notification must be in the official languages determined by the council, having regard to language preferences and usage within its area.

[21] Section 12(2) of the MPRA provides: '*The levying of rates must form part of a municipality's annual budget process as set out in Chapter 4 of the Municipal Finance Management Act. A municipality must annually at the time of its budget process review the amount in the Rand of its current rates in line with its annual budget for the next financial year.*'

(3) A copy of every notice that must be published in the *Provincial Gazette* or the media in terms of this Act or any other applicable legislation, must be displayed at the municipal offices.

(4) When the municipality invites the local community to submit written comments or representations on any matter before the council, it must be stated in the invitation that any person who cannot write may come during office hours to a place where a staff member of the municipality named in the invitation, will assist that person to transcribe that person's comments or representations.

(5) (a) When a municipality requires a form to be completed by a member of the local community, a staff member of the municipality must give reasonable assistance to persons who cannot read or write, to enable such persons to understand and complete the form.

(b) If the form relates to the payment of money to the municipality or to the provision of any service, the assistance must include an explanation of its terms and conditions.

21A **Documents to be made public**

(1) All documents that must be made public by a municipality in terms of a requirement of this Act, the Municipal Finance Management Act or other applicable legislation, must be conveyed to the local community-

(a) by displaying the documents at the municipality's head and satellite offices and libraries;

(b) by displaying the documents on the municipality's official website, if the municipality has a website as envisaged by section 21B; and

(c) by notifying the local community, in accordance with section 21, of the place, including the website address, where detailed particulars concerning the documents can be obtained.

(2) If appropriate, any notification in terms of subsection (1) (c) must invite the local community to submit written comments or representations to the municipality in respect of the relevant documents.

(Section 21A was inserted into the Systems Act in terms of s 5 of the Local Government: Municipal Systems Amendment Act 44 of 2003, with effect from 1 August 2004.)

[18] It is impossible to reconcile certain parts of s 10G(7) of the LGTA with the provisions of chap 4 of the MFMA (in particular ss 16-24) concerning the imposition of rates by a municipal council on a co-existent basis. The effect of this impossibility leads to two possible conclusions. The first is that, notwithstanding the provisions of s 179 of the MFMA, those parts of s 10G(7) of the LGTA which were incompatible

with the provisions of chap 4 of the MFMA must be taken to have been repealed with effect from the commencement of chap 4 of the MFMA; cf. *Government of the Republic of South Africa and another v Government of KwaZulu and another* 1983 (1) SA 164 (A) at 200-201. The second is that during the period that the relevant provisions of the two statutes remained on the statute book side by side, municipalities could elect which of the two schemes to utilise for the imposition of rates. In my view it would offend against the express provisions of s 179(2) of the MFMA to hold that s 10G(7) had been impliedly repealed before 2 July 2005, and accordingly, the second of the aforementioned possible conclusions is the correct one. Only the 2005/6 budget year is affected by this coincidence of legislation.

[19] In the context of the applicable statutory regime just reviewed, it is time now to examine the imposts concerned individually.

[20] In respect of the 2001/2 and 2003/3 financial years the applicant purported to impose a tax on rural landowners, which it labelled a 'rural levy' (*Afr.* 'landelike heffing'). It is plain on the evidence that the levy was imposed because of the unamenability of rural land to rating because it had not been valued. Prior to the introduction of what Mr *Heunis* referred to as 'wall-to-wall local government'[22] in South Africa most rural land fell outside municipal jurisdictions and thus had not been subject to valuation for rating purposes. The practical difficulties with which this situation confronted local authorities seeking to establish an equitable municipal tax system across their entire territorial jurisdiction gave rise to litigation in a number

[22] Cf. *African National Congress and Another v Minister of Local Government and Housing, Kwwazulu-Natal and Others* 1998 (3) SA 1 (CC) at para 9 and *City of Cape Town and another v Robertson and another* supra at para 39.

of areas as manifested, amongst others, in *Gerber*[23] and *Howick District Landowners Association v Umgeni Municipality and Others* 2007 (1) SA 206 (SCA).

2001/2 financial year

[21] In the 2001/2 financial year the rural levy imposed by the municipality was determined at an amount of R1000 per registered land unit, subject to a maximum liability of R4000 per owner per farm. On its face this approach was invalid for exactly the same reasons found by the SCA in respect of the flat rate imposed by the Eastern Gauteng Services Council in *Gerber*.[24] In other words, because it was not a 'rate' within the meaning of the word in s 229(1)(a) of the Constitution. Recognising as much, Mr *Heunis* sought to characterise the impost rather as a levy imposed in terms of s 229(1)(b) of the Constitution read with 10G(7)(a)(ii) of the LGTA, instead of a property rate as envisaged in terms of s 10G(7)(a)(i).

[22] Counsel's characterisation was at odds with the evidence in the founding papers as to how the municipality itself saw the impost. It is evident, both from the founding affidavit deposed to by the Director: Financial Services of the municipality, as also from the contemporaneous documentation, that the flat rate tax on rural property in the municipal area which had not been valued for rating purposes was imposed as a practical measure to tax all property in the municipality; and to avoid any allegations of an unfairly discriminatory treatment of property owners for purposes of rates liability. The proper characterisation of the levy is, however, a question of law. As the only criterion for the liability to pay it was property ownership, the levy was undoubtedly a property rate, and not a charge for a municipal function or service as contemplated by s 10G(7)(a)(ii). In order for a levy to qualify as one

[23] Above para [8].
[24] Ibid.

imposed in terms of s 10G(7)(a)(ii) of the LGTA, its imposition would have to be connected with an identified function or service of the municipality; it would need to be recognisable by its express provisions as a charge for the execution of such function or the provision of such service, with the criterion for a liability to pay it being established by being a beneficiary or user of the function or service in question irrespective of property ownership. When it is intended that the charge for such functions or services is to be recovered indiscriminately by means of a property tax, without direct regard to the measure of benefit of the municipal function to, or utilisation of the service concerned by, the municipal taxpayer, the only mechanism available to a municipality is by rating. A flat rate property tax would be a tax that could be levied only if authorised by national legislation; see s 229(1)(b) of the Constitution. Section 10G(7)(a)(ii) of the LGTA did not provide such authority.

[23] The collateral challenge by the respondents against the validity of the imposition of the rural land levy in the 2001/2 financial year is therefore sustained.

2002/3 financial year

[24] In respect of the 2002/3 financial year, the municipal council resolved to impose a 'levy' on rural property on a sliding scale based on the size of the affected land unit, subject to a maximum liability of R4500 per farm per owner irrespective of the number of land units of which the farm might be comprised. Upon considering the objections received after the rating resolution had been advertised in terms of s 10G(7)(c) of the LGTA, the council resolved on 29 July 2002 to confirm the sliding scale determination. The confirmation was qualified, however, by a resolution to undertake an interim valuation of the properties concerned during the financial year and to adjust the rates payable on the properties upwards or downwards as the case

might be in relation to the outcome of the valuation exercise. After the completion of the valuation exercise, the municipal council resolved on 26 May 2003 to write off 'the rates' reflected on the rates accounts to be printed on that day as due in terms of the aforementioned sliding scale and to levy a rate of 0,2474c/Rand on the May accounts. It was also resolved that interest would be charged at the standard rate on all amounts in respect of the rural levy, thus adjusted, which had not been paid by 25 June 2003. On a reading of the papers as a whole it would appear that the effect of the aforementioned resolutions was that the sliding scale size related 'rates' initially imposed were recovered provisionally pending the determination later in the financial year of a value based rate. Adjustments were then effected which resulted in the rate for the year for which the affected property owners were actually liable being determined on a rate in the Rand based on the value of their properties.

[25] Before turning to discuss the challenge by the respondents to the taxation of their property by the municipality in the 2002/3 financial year, let me make it clear that I have found no merit in the characterisation by the council in its papers of the impost as a levy imposed in terms of s 10G(7)(a)(ii) of the LGTA. My reasons for this conclusion are essentially the same as those set out in para [22], above in the discussion of the flat rate impost imposed by the municipal council in the preceding year.

[26] The respondents challenged the legality of the council's impost in respect of the 2002/3 budget year on a number of grounds. In view of the conclusion that I have reached it is only necessary to treat with one of them; *viz*. the municipality's failure to publish a notice of its determination made on 29 July 2002 in the context of

its reconsideration of the size related sliding scale impost, as required in terms of s 10G(7)(d)(ii) of the LGTA.

[27] In my view the challenge described in the preceding paragraph is well made. The position was not assisted by the local authority's apparent failure also to publically give notice of the further amending resolution adopted at its meeting on 26 May 2003. It is clear that in levying the rate in respect of the 2002/3 financial year the council intended to act in terms of s 10G(7) of LGTA. The provisions of the subsection with regard to publication of the general purport of the relevant rating resolutions adopted under that provision afford an essential element of effective lawmaking under the subsection (see the discussion below on promulgation[25]). Material non-compliance therewith, as happened in the current case, renders the rate imposed legally ineffective.

[28] In the result the respondents' challenge to the rural levy impost in respect of the 2002/3 year is upheld.[26]

2004/5 financial year

[29] The respondents' challenges to the validity of the imposition of rates on rural property in the 2004/5 financial year are premised in part on the notice given by the municipality in terms of s 10G(7)(c)(iv) of the LGTA having been given on a date after the rates in question had become payable. It was contended in this regard

[25] At para [55]-[60].

[26] I might add that although the respondents conceded that the sliding scale size-related levy on rural property was a 'rate', I do not consider that the concession was legally sound. A rate determined with regard to the size of a property only qualifies as such in my view if it is determined with reference to a consistent measure of size, e.g. so many cents per square metre, or per hectare etc. Only in that manner does the charge correspond with the essential feature of rates being an amount determined by a stated value of numerical proportion prevailing or to prevail between two sets of things. It does not so qualify if the charge is determined with regard to a number of different total size categories as was done in the current case.

(I quote from the summary handed in of the respondents' counsel's oral address) that '*a procedure* [by] *which ratepayers are presented with a fait accompli, in that rates increases are implemented and enforced before the start or expiry or the 14-day period allowed for objections by s 10G(7)(c)(iv) of the LGTA, is inconsistent with the scheme of s 10G(7) (which is to levy rates with prospective effect) and the object of local government in s 152(1)(e) of the Constitution (which is to encourage the involvement of communities and community organisations in matters of local government)*'. In support of this argument, Mr *Breitenbach* SC, who (together with Mr *Schreuder*) appeared for the respondents, relied on the minority judgment of van Heerden JA (Snyders AJA concurring) in *Kungwini Local Municipality v Silver Lakes Home Owners Association and Another* 2008 (6) SA 187 (SCA) at para 29-31, 33 and 36. In the minority judgment it was held that the effect of publishing a notice, as required in terms of s 10G(7)(c) of the LGTA, after the date on which the rates were to come into effect constituted the imposition of rates with retrospective effect, something not authorised by the legislation It was held further that such a notice presented residents of a municipality with a *fait accompli*, in effect discouraging their involvement in matters of local government. Ms Justice van Heerden regarded such conduct by a municipality as amounting to taking a stance of 'pay now and argue later'. (It is evident from the language used in the relevant part of the principal answering affidavit deposed to on behalf of all the respondents that the deponent drew heavily on the language of the aforementioned passages of the minority judgment in formulating their collateral challenge to the rates imposed in the year in question.) Mr Justice Streicher, who wrote the majority judgment, found it unnecessary to decide the point and left it open.[27]

[27] See *Kungwini* at para 50.

[30] The notice in question was published in the *Cape Times* newspaper on 7 July 2004 and, on the following day, in *Die Burger*. It went as follows in the relevant part:

> **2004/2005**
>
> **BERGRIVIER-MUNISIPALITEIT**
>
> **Begroting: Vasstelling van eiendomsbelagtingtariewe en fooie: 2004/2005-boekjaar**
>
> Kennisgewing geskied hiermee kragtens die bepalings van Artikel 10G(7) van die 2de Wysigingswet op die Oorgangswet op Plaaslike Regering (Wet 97/1996) [*sic*] en Artikel 75A van die Wet op Plaaslike Regering: Munisipale Stelselswet (Wet 32/2000) dat:
>
> 1. 'n Opsomming van die Begroting vir die 2004/2005-boekjaar gedurende normale kantoorure ter insae lê by die ondergetekende.
> 2. 'n Eiendomsbelastingkoers van 1,35c/R op alle belasbare eiendomme gehef word met korting aan sekere kategorieë eiendomsbelastingsbetalers. Eiendomsbelasting is verskuldig op 1 Julie 2004 en rentevry betaalbaar voor of op 30 September 2004 of in twaalf gelyke maandelikse paaiemente rentevry betaalbaar voor of op die 25ste dag van elke maand.
> 3. 'n Spesiale belastingskoers van 0,311c/R op die waarde van grond alleen gehef word in die dorpsgebied Port Owen.
> 4. Tariewe en gelde vir die voorsiening van elektrisiteit, water, riolering, sanitasie, vullisverwydering, vakansie-oorde en ander diverse fooie met betrekking tot die werksaamhede van Raad, gewysig is.
>
> Bogenoemde eiendomsbelasting, tariewe en gelde in werking tree op 1 Julie 2004 en vanaf die Julie 2004-lesing van meters. Volledige besonderhede lê by die ondergetekende ter insae gedurende kantoorure en besware, indien enige, teen die tariewe moet skriftelik (met opgaaf van redes) by die ondergetekende ingedien word voor of teen 12:00 op Vrydag 30 Junie 2004.

It is evident that the notice informed the reader that its content pertained to the budget and determination of rates and tariffs for the 2004/2005 financial year. According to its tenor, it purported to have been given in terms of s 10G(7) of the

LGTA (albeit misdescribed[28]) and s 75A of the Systems Act. It conveyed that a summary of the budget was available for inspection at the office of the municipal manager at Church Street, Piketberg. It also furnished a postal address for the municipal manager. The notice gave the general rate in the rand (1,35c/R) determined in respect of rateable property and indicated that rebates applied in respect of certain categories of ratepayers. These categories were not specified in the notice, nor was the extent of the applicable rebates. The notice indicated that the rates became due on 1 July 2004 and that they were payable, interest free, on or before 30 September 2004, or in twelve equal instalments, payable monthly on or before the 25th day of every month. The notice advised that full particulars of the rates and tariffs were available for inspection at the office of the municipal manager and that reasoned objections thereto[29], if any, had to be submitted before noon on Friday, 30 July 2004.

[31] In my judgment there is no merit in the contentions that the notice effectively resulted in the retrospective imposition of rates, or that it presented ratepayers with a *fait accompli*. The notice identifiably referred to s 10G(7) of the LGTA, and any reader of the notice sufficiently interested in the determination of rates and taxes could ascertain by reference to the statutory provision that the initial determination of rates and tariffs under that provision was provisional and subject to confirmation after consideration of any objections or representations received in response to a notice in terms of s 10G(7)(c) of the Act. Furthermore, it is well known that property rates are

[28] Act 97 of 1996 was the amending statute in terms of which s 10G(7) was inserted into the LGTA.
[29] Paragraph 4 of the notice might be read on a strictly literal approach as having invited objections only to the tariffs and not to the determined rates, but Mr *Breitenbach*, for the respondents, fairly and properly, in my view, indicated that he did not wish to rely on such a reading.

an annual tax imposed in each year.[30] That characteristic of the tax is indeed evident from the terms of the notice. Its incidence is in any event confirmed by the provisions of s 10G(3) of the LGTA - which required municipalities to prepare annual budgets ahead of each financial year, including provision for rates - read together with s 10G(7), which makes it clear that any property rate finally determined in terms of the provision cannot later be withdrawn or amended. In my view the indication that the rates fell due on 1 July 2004 would thus be understood by the reasonable reader to connote no more than that they were payable in respect of the municipality's financial year commencing on that date. It was in any event evident from the notice that ratepayers were not required to make payment before 30 September, which allowed ample time for a reconsideration and final determination by the council of the rate as contemplated in terms of s 10G(7)(d)(ii) in the event of any representations or objections being received in response to the notice.[31]

[32] Read contextually, it was thus evident from the notice that the rate advised therein had been provisionally determined in accordance with the applicable provision of the LGTA. Ratepayers who had elected (presumably in the manner contemplated in s 90 of the Municipal Ordinance) to pay their rates in monthly instalments would understand that the instalments might have to be adjusted to take account of any amendments to their rates liability consequent upon the council's consideration of any objections or representations received in response to the notice.

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[30] Cf. the observation in the majority judgment in *Kungwini* at para 45 'that rates are traditionally imposed in respect of the financial year of a municipality'. The observation was supported by reference to the various old order provincial ordinances. The reference to the 1951 Cape Municipal Ordinance was *per incuriam*. The applicable provision in the Cape was in fact s 82(1)(a) of the Municipal Ordinance 20 of 1974, which remained in force until repealed in terms of s 95 of the MPRA.

[31] The date of 30 September, which is the completion date of the first three month period after the commencement of the municipal financial year, corresponds with the date after which a municipality was enjoined in terms of s 87(2) of the Municipal Ordinance 20 of 1974 to demand payment of any outstanding rates within 14 days.

The concept of adjustments to rates dependant on determinations made after the incidence of the initial liability to pay them is nothing novel or unusual. It has always been a feature in respect of the liability of property owners who have objected to the valuation of their properties for rates purposes, or who are involved in appeals in respect of such matters.[32] The invitation to interested persons to submit objections by 30 July 2004 is wholly inconsistent with any conception of the advertised rate as constituting a *fait accompli*. The reasonable reader of the notice would understand from its content that a consideration by the council of any objections received would follow after 30 July, and that the result of such consideration might entail an adjustment of the provisionally determined rates. Acknowledging that it would not have been a determinant factor, it is nevertheless notable that not one of the respondents felt able to say that he or she had not submitted any objection or representation because he or she had been brought under the impression that the rates and tariffs in question had been finally determined.

[33] The respondents further complained that there was no indication in the notice that the relevant resolution of the council and the other relevant documents were available for inspection at the municipal libraries. Notwithstanding the absence of any suggestion that any of the respondents is unable to write, they also complained that the notice contained no indication that persons who were unable to write could approach a nominated municipal official for assistance in submitting their

[32] In *City of Cape Town and Another v Robertson and Another* supra, at para 64-71, the Constitutional Court found nothing constitutionally incompatible about the use by municipalities of provisional valuation rolls for rating purposes and thereby implicitly found nothing exceptionable about a municipality exacting payment of a sum in rates which might be subject to readjustment in favour of the ratepayer dependent upon the outcome of a related but discrete reconsideration of matter pertinent to the calculation of the rates liability.

representations or objections. In this regard the respondents contended that the notice fell fatally short of compliance with ss 21(4) and 21A of the Systems Act.[33]

[34] The provisions of s 21A(1)(a) of the Systems Act provide for the display of documents at the municipality's head and satellite offices and libraries. As already mentioned,[34] the provision was inserted into the statute by s 5 of Act 44 of 2003 with effect from 1 August 2004. Its requirements thus did not apply to the notice under consideration.

[35] Although the language of s 21(4) of the Systems Act, which states the requirement that a municipal invitation for comments or representations must state that a person who cannot write may obtain assistance from a named staff member of the municipality, is cast in peremptory language, I do not consider that the provision was intended to bear the import that a municipality's failure to comply with it would mechanically invalidate the council's decision on the matter before it to which the notice or invitation in question pertained. As observed in an illuminating *discursus* by Combrink J in *Weenen Transitional Local Council v Van Dyk* 2000 (3) SA 435 (N); 2000 (4) BCLR 445 (at 442B-444J (SA); 451E-454B BCLR), usefully supported by extensive reference to South African and English authority, it is clear that the categorisation of legislative language as peremptory or permissive (directory) is a secondary tool in achieving the primary object of statutory interpretation, which is to determine the legislature's intention; the categorisation is a means to an end and not an end in itself. With reference to a number of pertinent and well-known judgments such as *Sutter v Scheepers* 1932 AD 165 at 173-4; *Leibrandt v SA Railways* 1946 AD 9 at 12-13; *Maharaj and Others v Rampersad* 1964 (4) SA 638 (A) at 645-6 and

[33] These provisions have been quoted in full at para [17], above.
[34] At para [17], above.

Nkisimane and Others v Santam Insurance Co Ltd 1978 (2) SA 430 (A) at 433-4, the learned judge noted '*a recognition on the part of the Judges that the validity of actions in purported compliance of a statutory injunction cannot be determined by a mere label such as 'peremptory' or 'directory' without proper regard being had to the intention of the legislator derived from the enactment as a whole'*. This is exemplified in the following statement by Trollip JA in *Nkisimane* supra, at 433 *in fin* – 434:

> Preliminarily I should say that statutory requirements are often categorized as "peremptory" or "directory". They are well-known, concise, and convenient labels to use for the purpose of differentiating between the two categories. But the earlier clear-cut distinction between them (the former requiring exact compliance and the latter merely substantial compliance) now seems to have become somewhat blurred. Care must therefore be exercised not to infer merely from the use of such labels what degree of compliance is necessary and what the consequences are of non or defective compliance. These must ultimately depend upon the proper construction of the statutory provision in question, or, in other words, upon the intention of the lawgiver as ascertained from the language, scope, and purpose of the enactment as a whole and the statutory requirement in particular (see the remarks of Van den Heever J in *Lion Match Co Ltd v Wessels* 1946 OPD 376 at 380[35]).

Cf. also *ABSA Insurance Brokers (Pty) Ltd v Luttig and Another* NNO 1997 (4) SA 229 (SCA) at 238-239; *Weenen Transitional Local Council v Van Dyk* 2000 (4) SA 653 (SCA) at para 13 and *Lupacchini NO and Another v Minister of Safety and Security* 2010 (6) SA 457 (SCA) at para 8, where the *dicta* of Corbett AJA in *Swart v Smuts* 1971 (1) SA 819 (A) at 829C – G are quoted, and other Appellate Division

[35] Van den Heever J had remarked loc cit: '*We have a number of decisions in which the question is discussed whether statutory provisions are "peremptory" or "directory". In this connection those are unfortunate expressions; we are not concerned with the quality of the command but with the unexpressed consequences flowing from it.*
It is now generally accepted that much learning has been wasted on the spurious classification of laws into ***perfectae****,* ***minus quam perfectae*** *and* ***imperfectae*** *and that the rescript of Theodosius and Valentinian recorded in C 1.12.5 has no bearing on modern statutes. Ultimately the problem resolves itself into the question which was the intention of the legislature, and this intention must be derived from the words of the statute itself, its general plan and its objects*'.

and SCA authority is cited. See also LC Steyn *Die Uitleg van Wette*, 5de uitgawe, p.196-201, especially the examples discussed at (5) and (7) at p.198.

[36] As mentioned, the provisions of s 21(4) of the Systems Act are directed at promoting the achievement by municipalities of the objects in s 152(1)(a) and (e) of the Constitution. They fall within a statute which has expressly aspirational objects and which must be understood in its historical context as part of the constitutional blueprint for a transformed system of local governance in South Africa. The long title of and the preamble to the Systems Act point to the developmental character of some of the statute's provisions directed, amongst other matters, at the establishment of '*a simple and enabling framework for the core processes of planning, performance management, resource mobilisation and organisational change which underpin the notion of developmental local government*' and acknowledging the '*need to develop a strong system of local government capable of exercising the functions and powers assigned to it*'. The Act falls to be understood as a component part of the suite of local government legislation mentioned earlier.

[37] A holistic consideration of the applicable legislation makes it clear that one of the important objects of the enactments is to provide a broad range of norms and standards to which municipalities are required to conform. This is achieved by the stipulation of a substantial volume of prescriptive injunctions to municipalities in three of the four main statutes, almost without exception expressed in peremptory language. Having regard to the well-known capacity constraints that characterise local government in this country - a feature acknowledged in the injunctions to municipalities in the statutes themselves to devote themselves to the development and improvement of their capacity and efficiency – it cannot have been the intention

of the national legislature that a failure by a municipality to comply with each and every one of these prescripts should result in the failure of municipal action. To interpret the legislation indiscriminately to that effect would undoubtedly result in the paralysis of local government and be inimical to the achievement of the evident objects of the legislation read broadly. That is not to suggest, however, that the failure by a municipality to comply faithfully with each and every one of the legislative prescripts which bind them would go without consequences. The performance of local government is subject to a wide range of monitoring and support mechanisms by other organs of state (such as the Auditor-General) and by the provincial and national spheres of government. A failure by a municipality to comply adequately with the provisions of s 21 or s 21A of the Systems Act could thus give rise to a directive from the MEC responsible for local government in terms of s 139(1)(a) of the Constitution pointing out the nature of the municipality's non-compliance with the statute and giving instructions for the remediation of the situation. Why else the provision in s 10G(7)(e) that a copy of the notice in terms of s 10G(7)(c) be sent to the MEC? (Similar oversight provisions exist in terms of the MFMA and the MPRA; see e.g. s 27(5) of the MFMA and s 81 of the MPRA.)

[38] Bearing in mind that the determination of the property rates to be levied in every financial year constitutes a vital and integral part of the determination of a municipality's annual budget, and remembering that a municipality may not lawfully incur any expenditure other than in terms of an adopted budget, could it have been the intention of Parliament that the determination by a municipal council of its annual rates would be nullified if it were ascertained that a public notice issued in the course of the adoption process did not contain a statement as required in terms of s 21(4) of the Systems Act? The result and its knock-on consequences have only to be

postulated for the idea of such a legislative intention to be dismissed as most unlikely. There is, moreover, no indication in the respondents' papers that the non-compliance with the statutory requirement had any material effect. I have therefore concluded that although the municipality's non-compliance with the provision is to be deprecated, it did not vitiate the process of the imposition of the property rates in the 2004/5 year.

[39] It was also contended by the respondents that the imposition of rates on their properties was invalid because the notice in terms of s 10G(7)(c)(iv) of the LGTA did not specify the actual rate applicable. In this regard Mr *Breitenbach* called in aid para 53 and 55 of the majority judgment in *Kungwini*, in which Streicher JA held that the object of the notice required in terms of s 10G(7)(c) was that ratepayers should have knowledge of the purport of the resolution; namely that 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 learned judge of appeal found that as the relevant notice contained two mutually contradictory indications in respect of the calculation of the rates liability of property owners in the subject area it did not serve the statutory object and was thus legally ineffectual.

[40] On the other hand a unanimous bench of the SCA (per Bosielo JA; Harms DP, and Heher, Shongwe and Tshiqi JJA concurring) subsequently held in *Nokeng Tsa Taemane Local Municipality v Dinokeng Property Owners Association and Others* [2011] 2 All SA 46 (SCA), at para 22, that '*It is clear that the section does not require details of the resolution and assessment to be published. Contrary to the submission by the* [ratepayers'] *association that the notice must set out, amongst*

others, the rates, areas affected, rebates applicable and the real and true effect of the increases of the rates, I hold the view that this does not accord with the ordinary grammatical meaning of the phrase 'general purport.' Bosielo JA proceeded, at para 24 of *Nokeng*, to explain '*The adjective "general" qualifies the noun "purport." The conjunction was not accidental but deliberately intended to make clear that specific details are not required*'.

[41] Inasmuch as these passages in the two judgments might, on their face, look to be in conflict with each other on the point, it is necessary to consider their import closely to ascertain whether this is indeed the case. The court in *Nokeng* was certainly conscious of the earlier judgment in *Kungwini*, as apparent from the reference thereto at para 29 of *Nokeng*.

[42] On my reading of the majority judgment in *Kungwini*, the essential basis of Streicher JA's finding against the compliance of the notice in issue in that case with the requirements of the statute was the potentially misleading effect of its contradictory content. The contradictions, and their potential effect, were described in the following terms at para 46-47 of the judgment:

> [46] In the present case the Municipality, on 29 June 2004, adopted a resolution, which insofar as it relates to property rates, reads as follows:
>
> *6. That the assessment rate 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 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.

The contradictions in the resolution had been replicated in the notice published by the municipality in terms of s 10G(7)(c) of the LGTA. The importance of their effect on the conclusion reached by Streicher JA is particularly evident from the content of para 55 of the judgment in which the learned judge of appeal stated:

> 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)[36] 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.

The fact that it was the contradictory indications in the notice as to the property rates applicable in the Bronberg area that was the feature of the notice that made it non-compliant with the legislation in the judgment of the majority in *Kungwini* is underscored when regard is had to portion of the notice set out in para 9 of the minority judgment, from which it appears that apart from the areas of Ekandustria and Bronberg the applicable rate was expressly set out in the notice. The determinant feature in the majority judgment therefore was not the failure of the

[36] The learned judge of appeal dealt with the difference between the 145,45% referred to in the resolution and the 146,45% referred to in the notice in a footnote to para 55 as follows: '*Nothing was made of the fact that according to the notice the percentage increase was 146,45% and not 145,45% as per the resolution.*'

municipality to expressly refer to the rate in the notice, but rather the effect of its having given contradictory indications of the special rate applicable in respect of the area in which the respondent's members' properties were situated.

[43] The notice in *Nokeng* is set out in para 18 of the judgment. It contained no reference to a rating resolution at all. It advised only that, at a meeting in May 2003, the council concerned had '*resolved to adopt the Operating and Capital budget for the 2003/2004 financial year, and that the tariffs determined in the budget will be implemented with effect from 1 July 2003*'. The notice further advised, in general terms, of the places at which and during which hours the relevant resolution could be inspected. It concluded by stating that any persons who desired to object to the resolution should do so in writing within 14 days. In my view there is indeed a relevant conflict between the two judgments in respect of the point in issue in the current matter. Mr *Breitenbach* submitted, albeit with diffidence, that the conflicting matter in the *Nokeng* judgment was *obiter* because of the finding made at para 15 of the judgment that the inordinate delay by the applicant in instituting the proceedings to challenge the rates imposts in that case impelled the conclusion that '*irrespective of the merits it would be impracticable to reverse the entire process'*. The court nevertheless dealt with the merits in *Nokeng* and would appear to have reversed the decision of the court *a quo*, which had upheld the challenge to the rates, on the basis that the court of first instance had been incorrect on the merits. I am thus unable to find that the matter in *Nokeng* which is in conflict with the part of the majority judgment in *Kungwini* discussed above was *obiter*.

[44] On the approach taken in *Nokeng* there can be no doubt that the notice published by the municipality was adequate for the purpose of compliance with

s 10G(7) of the LGTA. Assuming that it is open to me in the context of the identified conflict between the two judgments of the SCA to determine which to follow (cf. *R v Sillas* 1959 (4) SA 305 (A);[37] *Makambi v MEC for Education, Eastern Cape* 2008 (5) SA 449 (SCA); [2008] 4 All SA 57[38] and *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another* 2011 (2) BCLR 121 (CC)[39]), I do not think that the facts require me to do so in respect of the notice currently in issue.

[45] Having regard to the content of the notice currently in issue, the majority judgment in *Kungwini* does not, in my view, stand in the way of arriving at the same conclusion as I would have done applying *Nokeng*. The notice did inform the reader of the general rate that had been determined upon in the council's resolution. It also informed the reader that certain rebates applied, with the effect that owners of certain categories of property would pay less than the general rate. Thus, unlike the case in the notice given in *Nokeng*, ratepayers were informed of the general purport of the rates resolution itself. If the requirement were that the notice set out fully not only the general rate, but also particulars of each every rebate allowed thereon, it would not be 'general purport' of the resolution that would have to be set out in the notice, but rather the entire body of the rates resolution. Nothing in the judgment in *Kungwini* held that the entire rates table had to be set out. There was no discussion at all in *Kungwini* as to the meaning and effect of the term '*general purport*' (*Afr*. 'algemene strekking'). There would be no sense in the employment of the term if the legislative intention was that the complete resolution had to be published.

[46] In my view, consistently with the approach of Streicher JA in *Kungwini,* the object of the notice is to alert ratepayers in general terms of the nature of the

[37] At 311A.
[38] At para 28.
[39] At para 30.

property rates that have been resolved upon by the council to apply in the forthcoming financial year, and to give them the opportunity to submit any objections. I consider that a notice that informs the reader of the generally applicable rate, and that the only exceptions thereto will be by way of rebates, is sufficient to alert any person who might be interested in a submitting an objection or representation. The notice furthermore informs any party who might be interested of the place at which full particulars of the resolution may be inspected. I am thus satisfied that the notice sufficiently achieved the objects of s 10G(7) of the LGTA.

[47] The respondents' collateral challenges to the validity of the municipality's rating resolution in respect of the 2004/5 financial year can therefore not be sustained.

2005/6 financial year

[48] In respect of the 2005/6 financial year, the municipality, as required in terms of the relevant provisions of the MFMA, caused a draft budget to be tabled before the municipal council. As discussed above, with reference to s 17(3)(a)(ii) of the MFMA, it may be assumed, in the absence of evidence to the contrary, that the material tabled together with the draft budget would have included a draft rates resolution.

[49] On 5 May 2005, in purported compliance with the requirements of s 22 of the MFMA, the municipality placed the following notice in a newspaper circulated in its area of jurisdiction:

BERGRIVIER MUNICIPALITY

NOTICE

BUDGET, INTEGRATED DEVELOPMENT PLANNING AND PERFORMANCE MANAGEMENT BERGRIVIER MUNICIPAL AREA: PERIOD 2005/2006

In terms of the provisions of section 22 of the Municipal Finance Management Act (Act 56, 2003) the draft budget in terms of the abovementioned period, as well as the draft reviewed integrated development plan (IDP), compiled in terms of section 34 of the Municipal Systems Act (Act 32, 2000) are open for inspection.

The performance indicators and goals form part of the abovementioned process, thus a complete performance management system in terms of section 44 of the Municipal Systems Act (Act 32,2000) is open for inspection.

The complete documents may be viewed at all libraries within the area of jurisdiction of Bergrivier Municipality.

The draft documents will be discussed with the public and the details are as follows:

TOWN	**DATE**	**TIME**	**VENUE**
Porterville	23 May 2005	19:00	Monte Bertha Civic Hall
Wittewater & Goedverwacht	20 May 2005	19:00	Church Hall, Goedverwacht
Piketberg	19 May 2005	19:00	Allan Boesak, Civic Hall
Velddrift	24 May 2005	19:00	Civic Hall Noordhoek
Aurora	25 May 2005	19:00	Civic Hall Aurora
Redelinghuys	26 May 2005	19:00	Civic Hall Redelinghuys
Eendekuil	27 May 2005	19:00	Civic Hall Eendekuil

Written objections or comments, if any, should be lodged in writing with the Municipal Manager, 13 Church Street, Piketberg (PO Box 60, Piketberg, 7320) or fax (022) 913 1380 by no later than **12:00** on **27 May 2005.**

AJ BREDENHANN

Municipal Manager
PO Box 60
Piketberg
7320

After a series of public meetings between representatives of the municipal government and the local community were held, as advertised in the notice, the

municipal council adopted the budget for the 2005/6 financial year at a meeting of the municipal council held on 31 May 2005. It was apparent from the mayor's speech to the council in support of the motion that a number of written objections to the draft budget had been received, including 22 complaints about the proposed increase in the water tariff. The mayor also noted that there had been a number orally made complaints that owners of properties used for agricultural purposes within the urban areas would not enjoy the 76% rebate proposed in respect of rural agricultural properties. It is apparent from the minutes of the council meeting that after some discussion the draft budget was adopted with some amendments, which, amongst other matters, directly addressed the aforementioned objections and complaints. This affords a measure of evidence indicating that an effective public participation process had preceded the adoption of the budget.

[50] It is common ground between the parties that s 10G(7) of the LGTA was still on the statute book in May 2005. It is also not in dispute (i) that the adoption of the rates resolution in respect of the 2005/6 financial year occurred not in terms of the dichotomous procedure provided in terms of s 10G(7)(a) and (d) of the LGTA, but instead in terms of the integrated process provided in terms of ss 16-24 of the MFMA, the provisions of which were also in operation in May 2005 and (ii) that no resolution as contemplated by s 10G(7)(a)(i) had been adopted, and that consequently, no notice within the meaning of s 10G(7)(c) had been given by the municipality.

[51] I remarked earlier in this judgment that I find it impossible to sensibly reconcile certain parts of s 10G(7) of the LGTA with the contemporaneously applicable provisions of ss 16-24 of the MFMA. In my view it would only have been possible for

a municipality which continued to avail of the also contemporaneously operating provisions of part 2 of chap 8 of the Municipal Ordinance to coherently implement all of the provisions of s 10G(7) of the LGTA in respect of the adoption of a rates resolution for the 2005/6 year.[40] It seems to me to follow that a municipality, such as the applicant, which elected to utilise the provisions of chap 4 of the MFMA for the purposes of the preparation and adoption of its budget for the 2005/6 financial year, was not required to comply with s 10G(7) in respect of the imposition of rates. It was required, instead, to follow only the procedures for that purpose entailed in complying with chap 4. The complaint that the notice, dated 23 June 2005, published by the local authority in the press in which the rates and tariffs adopted as part of the budget were set out did not comply with the requirement in terms of s 10G(7) of the LGTA that the adopted rates be published for comment and objection is therefore misplaced. The procedure followed by the municipality in terms of the MFMA offered the public the opportunity to comment and object to the draft rates resolution before its adoption. I reject the argument on behalf of the respondents that the municipality was required to publish a draft rates resolution in terms of the MFMA for comment and objection before its adoption and then, after its adoption as part of the annual budget as required in terms of the MFMA, thereafter advertise the adopted resolution in terms of s 10G(7)(c) of the LGTA for further consideration and objection by interested members of the public. The notion that a rates resolution adopted in terms of the MFMA process could be revisited after its adoption is entirely inconsistent with the provisions of the MFMA which envisage the final adoption of a budget before the commencement of the relevant financial year. The provisional

[40] That the legislature accepted that there were, or might be, municipalities which continued to use the Ordinance for rating purposes is recognised in the provisions of s 88(1) of the MPRA - which, although they came into effect only on 2 July 2005, had been unaltered in form since the presentation to the National Assembly of the Local Government: Municipal Property Rates Bill 19B-2003 during 2003.

nature of the initial adoption of a rating resolution under s 10G(7) is fundamentally inconsistent with the MFMA's scheme. The MFMA makes the adoption of a rating resolution an integral function of the adoption of the annual budget. The MFMA does not in any manner contemplate a provisional adoption by the municipal council of an annual budget.

[52] In my judgment, save that there was non-compliance with the requirements of s 21(4) of the Systems Act, the notice published by the municipality on 5 May 2005 was sufficient to achieve substantial compliance by the municipality with the provisions of s 22 of the MFMA. The effect of non-compliance with s 21(4) of the Systems Act is an issue already dealt with above.[41]

[53] The respondents' collateral challenges to the validity of the municipality's rating resolution in respect of the 2005/6 financial year are therefore dismissed.

2006/7 financial year

[54] In respect of the 2006/7 financial year, the municipality again adopted a rating resolution in the context of utilising the procedures under chap 4 of the MFMA. A notice inviting attention to the draft budget was published in the local press on 13 April 2006. The notice indicated that full particulars of the draft budget were available at the offices of the municipal manager and at libraries throughout the municipality. Objections and representations were invited from the public, such to be received by the municipal manager on or before 15 May 2006. On this occasion the notice included a paragraph substantially compliant with the provisions of s 21(4) of the Systems Act for the benefit of persons who might wish to submit representations, but who were unable to write. A number of public meetings to be convened by the

[41] At para [35]-[38].

municipality to discuss the draft budget and related matters at various venues in the municipal area were also advertised on 20 April. A single objection to the proposed rates was received. It was submitted by the Bergrivier Distrik Landbouvereniging. The budget, including a resolution imposing property rates, was approved at a council meeting on 30 May 2006. It included an imposition of a general property rate of 1,61c/Rand, with a 76% rebate for 'rural properties'. The adoption of the budget, including a reference to the general property rate, was advertised by the municipality on 8 June 2006. The advertisement, which according to its tenor purported to have been given in terms of s 75A(3) of the Systems Act, indicated that details of the approved budget was available for inspection at the municipal offices during office hours.

[55] The respondents raised a number of collateral challenges to the imposition of the rates on rural property in respect of the 2006/7 year. I find it necessary to consider only one of them, *viz*. that the resolution levying rates was not promulgated by publication of the resolution in the *Provincial Gazette* as required in terms of s 14(2) of the MPRA. Section 14 of the MPRA provides:

> 14 **Promulgation of resolutions levying rates**
>
> (1) A rate is levied by a municipality by resolution passed by the municipal council with a supporting vote of a majority of its members.
>
> (2) A resolution levying rates in a municipality must be promulgated by publishing the resolution in the *Provincial Gazette*.
>
> (3) Whenever a municipality passes a resolution in terms of subsection (1), the municipal manager must, without delay-
>
> (a) conspicuously display the resolution for a period of at least 30 days-
>
> (i) at the municipality's head and satellite offices and libraries; and
>
> (ii) if the municipality has an official website or a website available to it as envisaged in section 21B of the Municipal Systems Act, on that website; and

> (b) advertise in the media a notice stating that-
>
> (i) a resolution levying a rate on property has been passed by the council; and
>
> (ii) the resolution is available at the municipality's head and satellite offices and libraries for public inspection during office hours and, if the municipality has an official website or a website available to it, that the resolution is also available on that website.

The municipality sought to explain its failure to promulgate the rates resolution by publishing it in the *Provincial Gazette* by averring that it was still availing of the provisions of the LGTA, which it contended it was permitted to do under the transitional provisions of the MPRA. This contention was ill-founded on both legs. Section 10G of the LGTA did not apply in respect of the 2006/7 budget year, having been repealed in terms of s 179 of the MFMA with effect from the commencement of the MPRA. Furthermore, as discussed earlier, the transitional provisions of s 88(1) of the MPRA did not extend the life of s 10G(7) of the LGTA as contended on behalf of the municipality.

[56] In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458[42] the Constitutional Court held that when a legislature, whether national, provincial or local, exercises the power to raise taxes or rates, or determines appropriations to be made out of public funds, it is exercising a power that under our Constitution is a power peculiar to elected legislative bodies. It is a power that is exercised by democratically elected representatives after due deliberation. Although the statement was made in the context of characterising the imposition of a levy by a local authority as legislative, and not administrative, action, it nevertheless highlights

[42] At para 45.

the character of a resolution by a municipal council to impose rates as legislation intended to be generally binding as such.

[57] The provisions of s 14(2) of the MPRA have the effect of bringing the requirements of the promulgation of a municipality's legislated rating imposts into line with those which apply in respect of a municipality's bylaws in general. In terms of s 13(a) of the Systems Act, a by-law passed by a municipal council must be published promptly in the *Provincial Gazette*, and, when feasible, also in a local newspaper or in any other practical way to bring the contents of the by-law to the attention of the local community. This requirement is consistent with the principle of the rule of law which requires the law to be certain, and accessible to those on whom it is intended to be binding.

[58] As stated by Innes CJ in *Ismail Amod v Pietersburg Municipality* 1904 TS 323 '*By the Roman-Dutch law, as indeed by any civilised system of jurisprudence, a law before it can take effect requires to be promulgated. The expression of the will of the legislative authority does not acquire the force of law unless and until it has been promulgated in due form for the information of those whom it is to effect.*' In *Van Rooy v Law Society (OFS) and Another* 1953 (3) SA 580 (O), Horwitz J rejected an argument that s 16 of Act 5 of 1910 (the Interpretation Act) which, in a manner equivalent to s 16 of the current Interpretation Act 33 of 1957, required ('subject to the provisions relative to the force and effect thereof in any law') a rule or regulation made by a public body under authority of statute to be published in the *Gazette* was merely directory in character, saying (at pp. 584-5) '*I deem it proper to bear in mind on this aspect of the case that sec. 16 of the Interpretation Act has been added* ***adjuvandi causa*** *the common law. For, by the common law, regulations or by-laws*

*having the effect of law must be duly promulgated. (**R v Tatton**, 1915 CPD 390; **R v Koenig**, 1917 CPD 225; **Ismail Amod v Pietersburg Municipality**, 1904 T.S. 323; **R v Schaper**, 1945 AD 716 at p. 720; **Byers v Chinn and Another**, 1928 AD 322 at p. 328.)….. It would seem, therefore, that unless the authorising statute dispenses, expressly or by necessary implication, with the requirement of promulgation, or authorises a mode of notification other than that laid down in the section, the common law requires, and sec. 16 enjoins, promulgation in order to vest the regulation, by-law, etc., with legal force and effect.*'

[59] It seems to me that the provisions of s 14(2) of the MPRA were enacted acknowledging the enhanced executive and legislative status of municipal councils under the new constitutional order. Whereas a less formal approach might have historically characterised the approach to publication of municipal bylaws under the old order,[43] its continuation finds no justification under the current constitutional framework.[44]

[60] In my view the provisions of s 14(2) of the MPRA are peremptory. The ordinary meaning of the word '*promulgate*' in the context in which it is employed is to '*put (a law or decree) into effect by official proclamation*'.[45] Whereas it would appear from the provisions of ss 13 and 14 of the MPRA that a rate becomes payable from the beginning of the financial year, or, if the budget has not been approved by then,

[43] The Municipal Ordinance 20 of 1974 (Cape) provided for the annual publication of the rates imposed in terms of the annual budget to be published in the press (s 74(3)(b) of the Ordinance). Cf. also *R v Schaper* , supra, in which Davis AJA, observing that at common law promulgation occurred *secundum eam formam quae solita est observari*, found that the publication of a municipal bylaw in only the English language, as was then customary in the Province of Natal, and not also in Afrikaans which was then the other official language, did not offend against the requirement of s 137 of the South Africa Act that '*all records, journals, and proceedings of Parliament shall be kept in both languages, and all Bills, Acts, and notices of general public importance or interest issued by the Government of the Union shall be in both languages*', holding that a municipality was '*neither Parliament not the Government'*.

[44] Cf. *CDA Boerdery (Edms) Bpk and Others v Nelson Mandela Metropolitan Municipality and Others* 2007 (4) SA 276 (SCA) at para 33-38.

[45] *Concise Oxford English Dictionary* 10th ed revised.

from the later date on which it is so approved, an amount payable in terms of a rating resolution would, however, not be exigible at the instance of the municipality until and unless the resolution was duly promulgated.[46] Similarly, by reason of the requirement that the resolution be formally promulgated, displaying copies of the resolution and advertising it as required by s 14(3) of the MPRA would, by themselves, not be sufficient to permit the municipality to enforce payment under the resolution.[47] The provision that the effectiveness of promulgation of a law be assisted by additional publicity such as the display of notices in prominently visible locations, as required by s 14(3), is not unprecedented - the regulations in issue in *R v Busa en andere* 1959 (3) SA 385 (A) afford an example.[48]

[61] In the circumstances of the municipality's failure to promulgate the rates resolution by publication in the *Provincial Gazette* the respondents' collateral challenge to the imposition of rates by the applicant municipality in respect of the 2006/7 budget year is upheld.

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[46] Cf. *Weenen Transitional Local Council v Van Dyk* 2000 (4) SA 653 (SCA) at para 17; and *Weenen Transitional Local Council v Van Dyk* 2000 (3) SA 435 (N) at 448J-449E. In the latter judgment the court, applying pre-constitutional principles, characterised the levying of rates by a local council as administrative action. Accepting the legislative nature of the action, the requirement of promulgation for effectiveness of the action applies *a fortiori*.

[47] In LC Steyn *Uitleg van Wette* 5de uitgawe at 180 the point is expressed thus : '*Ons skrywers wat die saak behandel* [commencement of laws]*, is dit eens dat wette afgekondig moet word alvorens hulle die ingesettenes bind. Cocceius wys daarop dat promulgasie geen essentiële vereiste vir die totstandkoming van die wet self is nie, maar slegs 'n voorwaarde vir gebondenheid deur die wet: "**non pertinent ad essentiam legis, sed ad effectum obligationis**". Vir bedoelde gebondenheid is dit nie voldoende dat 'n person wat deur die wet getref word, bekend is met sy inhoud nie. 'n Formele bekendmaking deur die soewerein is noodsaaklik.*'

[48] In *Busa*, the promulgation of the regulations in the *Gazette* was found to be effective, notwithstanding the failure of the local authority also to post translated copies of the regulation in the affected area as required in terms of s 38(6) of Act 25 of 1945. The judgment of Steyn CJ pertinently distinguishes acts of formal promulgation, which are necessary to give a law effect, from ancillary actions statutorily prescribed to specially inform the affected section of the public of the existence of the law so as promote informed compliance. In the context of the matter under consideration in *Busa*, while the requirement of promulgation was imperative, the requirement of additional advertisement was held to be directory.

2007/8 and 2008/9 financial years

[62] The rating resolutions in respect of these financial years were also not promulgated in the manner prescribed by s 14(2) of the MPRA. The respondents' collateral challenges to the rates imposed in respect of those years are therefore also sustained.

Consequent orders sounding in money

[63] As a consequence of the aforestated dismissal of some of their collateral challenges, and their concession of the validity of the imposts in the 2003/4 financial year, the respondents are liable to make payment of the rates levied on their properties in the 2003/4, 2004/5 and 2005/6 financial years. The amounts involved, although initially in dispute in some cases, have been agreed between the parties. An order will be made directing the respondent ratepayers to make payment to the applicant municipality forthwith of the amounts set out against each of their names[49] and corresponding municipal account numbers on the annexure to this judgment. Lest any of the amounts set out in the annexure be incorrect in any respect - which is quite conceivable having regard to the arithmetical exercises entailed - the parties are given leave to apply to me in chambers, if necessary, within 10 days of the date of the delivery of this judgment for the correction thereof.[50]

Costs

[64] As mentioned in the introduction to this judgment, the parties agreed that this court should determine not only the costs in these proceedings, but also those in

[49] In matters in which the properties are owned by trusts I have used the name of the trust rather than those of the relevant trustees who were individually cited as respondents.
[50] Cf. *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A).

respect of the matters pending between them in the magistrate's court, which have, in effect, been decided by these proceedings. While I am, in principle, somewhat diffident about the propriety of making costs orders in respect of matters before another court, save where those might have been reserved by such court to be determined elsewhere, the circumstances show that acceding to the parties' request would be eminently practicable in achieving finality to the litigation at a saving of unnecessary further costs. The proceedings in the magistrate's court are simply actions for payment of monies allegedly due. It is not suggested that there is anything about them, apart from the incidence of the constitutional issues raised by the defendants' collateral challenge defences, that would justify a departure from the ordinary principle that costs follow the result.

[65] As to the aforementioned incidence of constitutional issues, Mr *Breitenbach* submitted that because of the constitutional character of the litigation the respondents should not be held liable in costs even if they were unsuccessful. In this respect he relied on the approach to costs in constitutional litigation summarised in *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014.

[66] The principle that a private party who litigates against the state to protect or advance a constitutional right should, in general, not be held liable for the state's costs if unsuccessful does not seem to me to apply here. The respondents did not litigate to advance or protect their perceived rights. They raised a plethora of constitutional issues, some good and some bad, virtually all of them dependent on statutory technicality, to resist the municipality's claims for payment of municipal taxes. Had these points been conscientiously taken in advance by the respondents,

and proactively by means of direct challenge, so that the validity of the rates imposts could have been determined in the years to which they pertained and any attendant illegality corrected, if necessary (as happened in the earlier litigation in the *Howick District Landowners' Association* cases, for example), they may have assisted in the improvement of local governance in the applicant municipality to the benefit of all, and there would have been merit in the approach contended for by their counsel. However, in the context of the true character of the litigation, both in this forum and in the lower court, that is enforcement proceedings for payment of rates, I consider that there is no reason why costs should not follow the result. A further factor that weighs in the balance in regard to costs is the need to avoid encouraging a too technical or indiscriminate a reliance by municipal taxpayers on any number of the myriad prescriptions in the legislative framework on local government to defend claims made against them by municipalities for payment of outstanding rates. As observed in *Nokeng* supra, at para 32, municipalities should, as far as reasonably possible, be able to devote their resources in an efficient and cost effective manner for the benefit of their communities and in promoting social and economic development rather than on litigation to recover rates and tariff charges. It is notable that, as far as can be discerned from the papers, the respondents did not in any correspondence with the municipality raise extracurially any of the numerous issues of statutory non-compliance that were eventually relied upon when they were sued for payment. The objections to the payment of rates raised extracurially by the respondents went to the issue of their being rendered liable for municipal rates when, so they contended, they did not receive municipal services. That issue, which seems to have fundamentally underpinned the respondents' refusal to pay rates, is one of policy, and not one of law.

[67] It will be directed that the costs of the recovery proceedings in the magistrates' courts should follow the result. Those respondents who are found liable for any part of the municipality's claim must pay the municipality's costs of suit on the applicable magistrate's court scale of tariffs. In matters in which the municipality's claims in the magistrates' courts are limited to amounts allegedly due in respect of rates imposts that have been found to be invalid or ineffectual, the municipality must pay the defendant's costs on the applicable magistrate's court scale of tariffs.

[68] With regard to the costs of proceedings in this court, I think it is appropriate to approach the question treating the respondents indiscriminately as a body as they all stood together on all issues as united front. Notwithstanding my treatment of the proceedings as monetary enforcement proceedings, in which the applicant has achieved a substantial measure of success, the costs order to be made should reflect that the respondents' contention that the rates imposts were invalid was upheld in respect of five of the eight financial years in issue. In the circumstances I consider that it would be just, fair and equitable for the respondents, jointly and severally, to be held liable for 40% of the applicants' High Court costs of suit, such costs to include the costs of two counsel.

Orders

1. The respondents' collateral challenges to the validity of the imposition of rural levies by the applicant municipality in the 2001/2 and 2002/3 financial years and to the imposition by the municipality of rates on rural property in the 2006/7, 2007/8 and 2008/9 financial years are upheld.

2. The respondents' collateral challenges to the validity of the imposition by the applicant municipality of rates on rural property in the 2003/4, 2004/5 and 2005/6 financial years are dismissed.

3. The respondents are directed to make payment to the applicant municipality forthwith of the amounts set out against each of their names[51] and corresponding municipal account numbers on the annexure to this judgment, together with interest thereon *a tempore morae* as provided in terms of the applicant's credit control policy.

4. The parties are given leave to apply to the presiding judge in chambers, if necessary, within 10 days of the date of the delivery of this judgment for the clerical correction of any amount set out in the annexure to this judgment.

5. The costs of the recovery proceedings instituted by the applicant against the individual respondents in the magistrates' courts shall follow on the financial consequences of the order made in terms of paragraph 3, above, in the manner explained in paragraph [67] of the judgment, and shall be taxable on the applicable magistrates' court scale of tariffs.

6. The respondents are ordered, jointly and severally, the one paying the others being absolved, to pay 40% of the applicant's costs of suit in the High Court proceedings as between party and party, such costs to include the costs of two counsel.

A.G. BINNS-WARD
Judge of the High Court

[51] See note 49, above.

Matter heard:	1O and 11 August 2011
Judgment delivered:	25 August 2011
Appearances:	
For the applicant:	J.C. Heunis SC and E.F. van Huyssteen
Instructed by:	De Klerk & Van Gend, *Cape Town*
For the respondents	A.M. Breitenbach SC and H.C Shreuder
Instructed by:	Millers Inc, *Cape Town*; Malan Lourens Lemmer Viljoen Inc, *Strand*

ANNEXURE TO JUDGMENT

RESPONDENTS	AMOUNT
MATJIESFONTEIN TRUST	**R7 707,72**
Mun Account no: 62889	
Piketberg Case No.: 343/09	
MATJIESFONTEIN TRUST	**R5 308,78**
Mun Account no: 68487	
Piketberg Case No.: 624/09	
MATJIESFONTEIN TRUST	**R4 252,98**

Mun Account No: 62455	
Piketberg Case No.: 673/09	
KATRIVIER FAMILIETRUST	**R4 863,59**
Mun Account No: 56116/6072080	
Piketberg Case No.: 517/09	
KATRIVIER FAMILIETRUST	**R5 284,85**
Mun Account no: 55987	
Piketberg Case No.: 502/09	

KATRIVIER FAMILIETRUST	**R19 090,56**
Mun Account no: 55955	
Piketberg Case No.: 516/09	
KATRIVIER FAMILIETRUST	**R7 036,89**
Mun Account No: 56243	
Piketberg Case No.: 501/09	
KATRIVIER FAMILIETRUST	**R13 384,45**
Mun Account no: 55000	

Piketberg Case No.: 500/09	
OMATAKO FAMILIETRUST	**R8 922,97**
Mun Account No: 62991	
Piketberg Case No.: 361/09	
RIVIERA TRUST	**R5 794,53**
Mun Account no: 54768	
Piketberg Case No.: 311/09	

VRUGBAAR TRUST	**R12 395,47**
Mun Account No: 63949	
Piketberg Case No.: 567/09	
VRUGBAAR TRUST	**R18 573,56**
Mun Account No: 63931	
Piketberg Case No.: 568/09	
KEURBOS TRUST	**R4 605,09**
Mun Account No: 57293	

Piketberg Case No.: 629/09	
WINDHEUWEL TRUST	**R2 769,04**
Mun Account No: 54736	
Piketberg Case No.: 628/09	
KOTZE FAMILIETRUST	**R3 408,34**
Mun Account No: 54334	
Piketberg Case No.: 599/09	
VERCUIEL FAMILIETRUST	

Mun Account No: 63890	
Piketberg Case No.: 625/09	
PAPKUILSFONTEIN BOERDERY TRUST	**R3 943,73**
Mun Account No: 54006	
Piketberg Case No.: 627/09	
DIE PONT TRUST	**R2 980,85**
Mun Account No: 63265	

Piketberg Case No.: 766/09	
DIE PONT TRUST	**R7 955,99**
Mun Account No: 63268	
Piketberg Case No.: 771/09	
ROSSOUW TRUST	**R9 009,13**
Mun Account No: 55289	
Piketberg Case No.: 786/09	
ROSSOUW TRUST	**R5 236,98**

Mun Account No: 55017	
Piketberg Case No.: 764/09	
DASKLIP FAMILIETRUST	
Mun Account No: 60850	
Porterville Case No.: 272/09	
DAC SMIT FAMILIE TRUST	**R7 323,98**
Mun Account No: 56532	
Piketberg Case No.: 762/09	

ST HELENAFONTEIN FAMILIETRUST	**R9 516,57**
Mun Account No: 53806	
Piketberg Case No.: 523/2009	
ST HELENAFONTEIN FAMILIETRUST	
Mun Account No: 6029000	
Piketberg Case No.: 456/07	
KELLERMAN FAMILIE TRUST	**R4 818,62**

Mun Account No: 62575	
Geen Case No.mmer	
WILMAR FAMILIETRUST	**R10 301,62**
Mun Account no: 55296	
Geen Case No.mmer	
WILMAR FAMILIETRUST	**R8 720,86**
Mun Account No: 5553	
Geen Case No.mmer	

GIDEON LIEBENBERG FAMILIETRUST	**R9 637,18**
Mun Account No: 61606	
Geen Case No.mmer	
LIEBENBERG BOERDERY TRUST	
Mun Account No: 62462	
Geen Case No.mmer	
PORSELEINKLOOF FAMILIE	**R7 310,50**

TRUST	
Mun Account No: 60627	
Geen Case No.mmer	
PORSELEINKLOOF FAMILIE TRUST	**?**
Mun Account No: 60401	
Geen Case No.mmer	
PORSELEINKLOOF FAMILIE TRUST	**R7 027,32**
Mun Account No: 60708	

Geen Case No.mmer	
SONKWASKLOOF BOERDERY	**R4 988,05**
Mun Account No: 64043	
(Frans vd Merwe Coetzee)	
Piketberg Case No.: 522/09	
H A VAN NIEKERK AND SONS (PTY) LTD	
Mun Account no: 56194	
Hendrik Andries van Niekerk	

Piketberg Case No.: 560/2009	
KROMRIVIER BOERDERY CC	**R4 031,46**
Mun Account No: 55112	
(Hugo De Waal)	
Piketberg Case No.: 472/09	
MICHIEL ADRIAAN JACOBUS VISSER	**R8 671,31**
Mun Account No: 61204	

Piketberg Case No.: 358/09	
ABRAHAM ISAAC COETZEE	**R2 336,06**
Mun Account No: 58297	
Piketberg Case No.: 476/09	
ABRAHAM ISAAC COETZEE	**R1 309,96**
Mun Account No: 58339	
Piketberg Case No.: 503/09	
JOHANNES COETZEE	**R651,03**

Mun Account No: 56581	
Piketberg Case No.: 592/09	
JOHANNES COETZEE	**R7 391,13**
Mun Account No: 56444	
Piketberg Case No.: 730/09	
JOHANNES COETZEE	**R5 399,74**
Mun Account No: 54775	
Piketberg Case No.: 595/09	

HERMANUS BOONZAAIER ROSSOUW	**R7 764,51**
Mun Account No: 55264	
Piketberg Saak No: 601/09	
HERMANUS BOONZAAIER ROSSOUW	**R718,05**
Mun Account No: 55056	
Piketberg Case No.: 515/09	
HERMANUS BOONZAAIER	**R6 596,49**

ROSSOUW	
Mun Account No. 55063	
Piketberg Case No.: 754/09	
STEPHANUS PAULUS GEORGE MOUTON	**R5 179,53**
Mun Account No: 55419	
Piketberg Case No.: 618/09	
STEPHANUS PAULUS GEORGE MOUTON	
Mun Account No: 55458	

Piketberg Case No.: 511/09	
ALEXANDER FLORIS SMIT	**R5 013,96**
Mun Account No: 56204	
Piketberg Saak No: 729/09	
HENRIK FREDERIK PETRUS BRAND	**R2 661,57**
Mun Account No: 57141	
Piketberg Case No.: 514/09	

HENDRIK FREDERIK PETRUS BRAND	**R3 427,49**
Mun Account No: 53956	
Piketberg Saak no: 510/09	
HENDRIK FREDERIK PETRUS BRAND	**R3 058,64**
Mun Account No; 57215	
Piketberg Case No.: 473/09	
WILLEM JOHANNES VAN ZYL	**R2 776,46**

BRAND	
Mun Account No: 57247	
Piketberg Saak No: 521/09	
FREDERIK BINNEMAN DE WAAL	**R4 451,84**
Mun Account No: 54976	
Piketberg Case No.: 504/09	
FREDERIK BINNEMAN DE WAAL	**R1 686,00**
Mun Account No: 55144	

Piketberg Case No.: 534/09	
FREDERIK BINNEMAN DE WAAL	**R5 265,70**
Mun Account No: 55024	
Piketberg Case No.: 534/09	
DANIëL MARTHINUS TREDOUX	**R1 153,17**
Mun Account no: 58353	
Piketberg Case No.: 474/09	

DANIëL MARTHINUS TREDOUX	**R978,58**
Mun Account No: 68272	
Piketberg Case No.: 475/2009	
JOHANNES HERMANUS DU PREEZ	**R4 419,02**
Mun Account no: 55360	
Piketberg Case No.: 518/09	
JAKOBUS JOHANNES SMIT	**R6 260,90**

Mun Account NO: 54729	
Piketberg Case No.: 519/09	
DIRK ALBERTUS JOHANNES BRAND	**R6 068,26**
Mun Account No: 57173	
Piketberg Case No.: 506/09	
HUGO DE WAAL	**R2 337,38**
Mun Account No: 55176	

Piketberg Case No.: 477/09	
HUGO DE WAAL	**R1 922,04**
Mun Account No: 55105	
Piketberg Case No.: 478/09	
HUGO DE WAAL	**R2 690,86**
Mun Account No: 54937	
Piketberg Case No.:	
JOHANNES NICOLAAS SMIT	

Mun Account No: 53732	
Piketberg Case No.: 622/09	
STEPHANUS FRANCOIS VISSER VAN GEEMS	**R3 823,96**
Mun Account NO: 54013	
Piketberg Case No.: 594/09	
STEPHANUS FRANCOIS VISSER VAN GEEMS	**R4 633,06**
Mun Account No: 53980	

Piketberg Saak No: 594/09	
FREDERIK WILLEM GEORGE KELLERMAN	
Mun Account No: 63515	
Porterville Saak No: 240/09	
FREDERIK WILLEM GEORGE KELLERMAN	
Mun Account no: 63160	
BAREND RUDOLF KELLERMAN	**R1 884,50**
Mun Account No: 62582	

Porterville Case No.: 255/09	
HERMANUS ENGELBRECHT SMIT	**R1 219,39**
Mun Account No: 56388	
Piketberg Case No.: 513/09	
HERMANUS ENGELBRECHT SMIT	
Mun Account No: 6076000	
Piketberg Saak no: 635/09	

MARTHINUS PIETER KRIEL	**R24 461,57**
Mun Account No: 62952	
Piketberg Case No.: 466/07	
MARTHINUS PIETER KRIEL	**R24 540,89**
Mun Account No: 62952	
Piketberg Case No.: 465/07	
JOHAN CAREL BRINK	
Mun Account No: 6253000	

Piketberg Case No.: 380/06	
JOHAN CAREL BRINK	
Mun Account No: 6253010	
Piketberg Case No.: 382/06	
JOHAN CAREL BRINK	**R8 672,05**
Mun Account No: 59163	
Piketberg Saak No: 617/09	

JOHAN CAREL BRINK	
Mun account No: 58811	
Piketberg Case No.: 623/09	
JOHAN CAREL BRINK	**R4 950,93**
Mun Account No: 64075	
Piketberg Saak No: 470/09	
JOHAN CAREL BRINK	
Mun Account No: 6253020	

Piketberg Case No.: 383/06	
JOHANNES HENDRIK VISSER	**R9 937,81**
Mun Account No: 62840	
Geen Case No.mmer	
DANIëEL JOHANNES IMMELMAN	**R41 532,23**
Mun Account No: 64195	
Geen Case No.mmer	

DANIëL JOHANNES IMMELMAN	**R7 870,94**
Mun Account No: 63561	
Geen Case No.mmer	