THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 303/2001

In the matter between:

WILLIAM FREDERICK GERBER	1st Appellant
JAN ROELOF BOOT	2nd Appellant
SUSANNA GERTRUIDA VAN DER MERWE	3rd Appellant
JACOB COETZER	4th Appellant
LOUIS CORNELIUS MEINTJIES	5th Appellant
JOHANNA CATHARINA BRINK	6th Appellant
LUCAS PETRUS STOLTZ	7th Appellant

and

MEMBER OF THE EXECUTIVE COUNCIL OF THE GAUTENG PROVINCIAL GOVERNMENT, DEVELOPMENT PLANNING & LOCAL GOVERNMENT	1st Respondent
EASTERN GAUTENG SERVICES COUNCIL	2nd Respondent

Coram: ***Hefer AP, Olivier, Farlam, Cameron and Navsa JJA***

Date of hearing: **2 September 2002**

Date of delivery: **26 September 2002**

Summary: **Legality of 'land rate' imposed by local authority without reference to size or valuation.**

JUDGMENT

NAVSA JA:

[1] The issue in this appeal is the legality of ‘land rates’ sought to be imposed by the second respondent, the Eastern Gauteng Services Council ('the Council'), on owners of agricultural land within its area of jurisdiction, for the rating years 1 July 1997 - 30 June 1998 ('the first rating year') and 1 July 1998 to 30 June 1999 ('the second rating year').

[2] Notification of the imposition of the rates in question took place by way of three official notices. The first two notices issued by the Chief Executive Officer ('the CEO') of the Council in respect of the first and second rating years, were published in the Gauteng Provincial Gazette on 6 August 1997 and 8 July 1998 respectively. The third notice, issued by the first respondent who is the Member of the Executive Committee for Gauteng Province responsible for Local Government and the successor to the Administrator of the Province of Transvaal ('the MEC'), appeared in the Provincial Gazette on the 3 March 1999 and relates to the second rating year. The question in this appeal is whether in imposing the rates in question the Council and the MEC acted beyond the powers conferred on them by law.

[3] The appellants who are all affected landowners applied to the Transvaal High Court to have the relevant parts of the three notices set aside on the following bases: First, that the two notices by the CEO were of no force and effect for want of

authority and lack of compliance with the prescripts of section 29 (2) of the Ordinance for the Transvaal Board for the Development of Peri-Urban Areas 20 of 1943 ('the Ordinance'). Secondly, that the notice by the MEC purported to impose a rate retrospectively, which was impermissible. Thirdly, that the rates sought to be imposed by the three notices are discriminatory in that differing amounts are determined for various areas without an acceptable rationale and without reference to objective factors such as size and value, with the result that small landowners are prejudiced by being required to pay the same rate as persons who own large tracts of land. Lastly, that the decisions to impose the rates in question constituted administrative action, which required the responsible authority to consult affected landowners and that this was not done.

[4] The MEC did not oppose the application and gave notice that he would abide the decision of the court. He adopted the same attitude in respect of the appeal. The Council opposed the application. For its authority to impose the land rate the Council relied on a number of provisions of the Constitution, the provisions of the Local Government Transition Act 209 of 1993 ('the LGTA') and the Ordinance. It contended that since a valuation roll in respect of the affected areas was in the process of being compiled it was entitled in the interim to impose a flat rate that applied to landowners in different localities within its area of jurisdiction (the flat rates levied by the Council differ from locality to locality but are standard within a locality, irrespective of the size

or value of land). The Council contended further that collecting revenue of the kind in question was in the public interest, as it provided financing for the delivery of essential services. It was submitted on behalf of the Council that prescribed statutory procedures were followed and in the alternative, that there had been substantial compliance with the applicable statutory provisions.

[5] Swart J in the Court below decided in favour of the Council. It is against that decision that the appellants appeal with the leave of this Court. The learned judge held that the Council's authority to impose rates in respect of land for which a valuation roll had not yet been established was to be found in s 29 (2) of the Ordinance; that the failure of the MEC himself to publish the first two notices in the Provincial Gazette as required by s 29 (2) did not prejudice any landowner, as there had been a considered and valid decision by the Council to impose the rates in question and that it could not be in the public interest that rates were not recoverable from the appellants and others who fell in the same category.

[6] After the judgment in the Court below the Council was statutorily disestablished and replaced by a number of distinct local authorities. During its existence the Council was a local authority as contemplated in the Constitution and the LGTA. It was an overarching local authority, which had a number of representative and rural councils operating within its area of jurisdiction. For present purposes it is

not necessary to deal with the Council's history and the legislative measures and provisions that led to its being established.

[7] Before turning to the contents of the three notices I consider it necessary to set out the relevant particulars of each of the appellants in relation to the land owned by them and the rates they were required to pay. The *first* appellant who is a member of the Bronberg Representative Council owns land in Bronberg, 170 hectares in extent, for which the Council has in terms of the notices in question imposed a land rate of R 660-00 per year for the first and second rating years. The *second* appellant owns land in Bronberg comprising 8,3 hectares (approximately one-twentieth the size of the first appellant's land) for which he was also required to pay an amount of R 660-00 per annum for the first rating year which was changed to R 64-90 per month for the second rating year. The *third* appellant owns seven tracts of land in Bronberg, four of which are 21,4 hectares in size. The other three are respectively 29,8, 26,2 and 31,2 hectares in size. For each tract of land she is required to pay an annual amount of R 660-00. The *fourth* appellant owns two farms in Blesbokspruit each of which is 368 hectares in extent and for each of which he is required by the Council to pay an annual amount of R 270-00. The *fifth* appellant owns a farm in Elandsrivier, which is 21,4 hectares in extent and is required to pay a land rate of R 270-00 per annum. The *sixth* appellant is the owner of two smallholdings in Eikenhof, which are 2,1413 and 2,1456 hectares in size respectively and is required to pay an amount of R 732-00 annually for

each. These particulars illustrate the appellants' complaints in respect of land size and value and the unfairness of a flat uniform rate.

[8] I turn to deal with the contents of the three notices. The relevant part of the first notice appears below:

'PROVINSIALE KOERANT, 6 AUGUSTUS 1997 No. 378

PLAASLIKE BESTUURSKENNISGEWING 1665

OOSTELIKE GAUTENG DIENSTERAAD

KENNISGEWING AANGAANDE ALGEMENE EIENDOMSBELASTING, GRONDBELASTING, BASIESE EN DIENSHEFFINGS

Kennis word hiermee gegee ingevolge artikel 10G (7) van die Oorgangswet op Plaaslike Bestuur (Wet No. 209 van 1993) saamgelees met artikel 26 (2), van die Ordonnansie op Eiendomsbelasting van Plaaslike Besture (Ordonnansie No. 11 van 1977), dat die Raad vir die boekjaar 1 Julie 1997 tot 30 Junie 1998 die volgende gehef het:

A. …

B. …

C. **Grondbelasting binne die dorpsgebiede en landbouhoewes hieronder genoem in die regsgebied van die Verteenwoordigende Oorgangsrade en Eikenhof Plaaslike Gebiedskomitee**

Ingevolge die bepalings van artikel 29 (2) van Ordonnansie No. 20 van 1943, word grondbelasting vir die boekjaar 1 Julie 1997 tot 30 Junie 1998 in die volgende dorpe, landbouhoewes en plaasgedeeltes geleë binne die regsgebied van die verteenwoordigende Oorgangsrade en Eikenhof Plaaslike Gebiedskomitee:

Bronberg: R660,00 per erf per jaar.
Blesbokspruit: R270,00 per erf per jaar.
Elandsrivier: R270,00 per erf per jaar.
Pienaarsrivier: R180,00 per erf per jaar
Suikerbosrandrivier: R270,00 per erf per jaar
Bronberg-Olympus en Shere-landbouhoewes: R1 800 per erf per jaar.
Eikenhof: R720,00 per erf per jaar.

Die bedrag verskuldig vir eiendomsbelasting vir die gebiede Blesbokspruit, Elandsrivier, Suikerbosrandrivier en Pienaarsrivier sal verskuldig en betaalbaar wees op 28 November 1997 (die vasgestelde datum), maar belastingbetalers mag die bedrag verskuldig aan belasting in twee (2) gelyke paaiemente op 28 November 1997 en 30 April 1998 betaal met dien verstande dat die *pro rata* bedrag gehef, ingevolge die bepalings van artikel 40 van Ordonnansie No. 11 van 1977, verskuldig en betaalbaar sal wees op die dag soos beoog in artikel 41 (2) van bogenoemde Ordonnansie.'

[9] The relevant part of the second notice is set out below and is in almost identical terms:

'No. 504 PROVINCIAL GAZETTE, 8 JULY 1998

PLAASLIKE BESTUURSKENNISGEWING 1558

OOSTELIKE GAUTENG DIENSTERAAD

KENNISGEWING AANGAANDE ALGEMENE EIENDOMSBELASTING, GRONDBELASTING, BASIESE EN DIENSHEFFINGS

Kennis word hiermee gegee ingevolge Artikel 10G (7) van die Oorgangswet op Plaaslike Bestuur Tweede Wysigingswet 1996 saamgelees met Artikel 26 (2) van die Ordonnansie op Eiendomsbelasting van Plaaslike Besture (Ordonnansie 11 van 1997) dat die Raad vir die boekjaar 1 Julie 1998 tot 30 Junie 1999 die volgende gehef het:

A. …

B. …

C. Grondbelasting binne die Dorpsgebiede en Landbouhoewes hieronder genoem in die Regsgebied van die Verteenwoordigende Oorgangsrade en Eikenhof Plaaslike Gebiedskomitee.

Bronberg: R660,00 per erf per jaar.	Pienaarsrivier: R207,00 per erf per jaar.
Blesbokspruit: R270,00 per erf per jaar.	Suikerbosrandrivier: R270,00 per erf per jaar.
Elandsrivier: R 270,00 per erf per jaar.	Bronberg-Olympus en Share-landbouhoewes: R1 800,00 per erf per jaar.

Eikenhof: R732,00 per erf per jaar.

Die bedrag verskuldig vir eiendomsbelasting vir die gebiede Blesbokspruit, Elandsrivier, Suikerbosrandrivier, en Pienaarsriveir sal verskuldig en betaalbaar wees op 30 November 1998 (die vasgestelde datum), maar belastingbetalers mag die bedrag verskuldig aan belasting in twee (2) gelyke paaiemente op 30 November 1998 en 30 April 1999 betaal met dien verstande dat die pro-rata bedrag gehef, ingevolge die bepalings van Artikel 40 van Ordonnansie 11 van 1977, verskuldig en betaalbaar sal wees op die dag soos beoog in Artikel 41 (2) van bogenoemde Ordonnansie.

Die bedrag verskuldig vir eiendomsbelasting in Bronberg en Eikenhof Plaaslike Gebiedskomitee sal in twaalf (12) gelyke paaiemente gehef word en sal verskuldig en betaalbaar wees op die volgende datums: 1998-07-31, 1998-08-31, 1998-09-30, 1998-10-30, 1998-11-30, 1998-12-31, 1999-01-29, 1999-02-26, 1999-03-31, 1999-04-30, 1999-05-31 en 1999-06-30, met dien verstande dat die pro-rata bedrag gehef word ingevolge die bepalings van Artikel 40 van Ordonnansie 11 van 1977 in soveel paaiemente as wat oorbly in die boekjaar na die dag soos beoog in Artikel 41 (2) van bogenoemde Ordonnansie.'

Section 50 (1) of Ordinance 11 of 1977 referred to in the second sentence of the notice introduced s 29 (2) of the Ordinance in its present form. The reference is therefore in fact to s 29 (2) of the Ordinance.

[10] The third notice reads as follows:

NOTICE 1120 OF 1999

NOTICE IN TERMS OF SECTION 29(2) OF ORDINANCE 20 OF 1943 (TRANSVAAL BOARD FOR THE DEVELOPMENT OF PERI-URBAN AREAS ORDINANCE) AS AMENDED AND READ WITH SECTION 50(1) OF THE ORDINANCE 11 OF 1977 (LOCAL AUTHORITIES RATING ORDINANCE) AS AMENDED

It is hereby declared in terms of section 29(2) of Ordinance 20 of 1943 (Transvaal Board for the Development of Peri-Urban Areas Ordinance) as amended and read with section 50(1) of Ordinance 11 of 1977 (Local Authorities Rating Ordinance) as amended that for the financial year 1 July 1998 to 30 June 1999 the provisions of Ordinance 11, of 1977 (Local Authorities Rating Ordinance) shall not apply in the portion of the area under the jurisdiction of the under-mentioned Representative Councils and Rural Council and that for the said period and respect of the portions afore-said, a land rate is approved as indicated hereunder and shall be levied and collected:

Representative Council	Land Rate
1a. Bronberg	R 660
1b. Bronberg-Agricultural Holdings of Olympus and Shere	R1 800
2. Blesbokspruit	R 270
3. Elands River	R 270
4. Pienaars River	R 270
5. Suikerbosrand River	R 270
Rural Council	**Land Rate**
1. Eikenhhof	R 732

S. SHICEKA, MEC, Development Planning and Local Government

2733565—D

[11] In addition to the three notices the facts against which this appeal is to be decided are set out in brief in this and the following four paragraphs. Before the first two notices, and preceding a formal resolution in this regard, members of the Council discussed the imposition of a land rate in the representative and rural council areas within the Council's area of jurisdiction. The Council approved budgets for the two rating years from the rural and representative councils within its area of jurisdiction, which included the land rates in question.

[12] The Council determined the amounts of the rates by considering the operating expenses for each subordinate council within its area of jurisdiction and then calculated a rate per property in each area in order to meet those expenses. In other words it divided the operating expenses by the number of erven in each area and thus arrived at a land rate per erf. In his affidavit opposing the application the CEO states that the rates were thus calculated in the 'best available, objective and reasonable manner'.

[13] In each of the two rating years the Council wrote to the MEC, seeking approval from him for the imposition of the land rate, stating that the approval was being sought in terms of s 29 (2) of the Ordinance. In each year the MEC granted written approval, stating however in the authorising letter that the Council was being authorized to impose rates in terms of s 29 (8) of the Ordinance. In response to correspondence from the appellants' attorney the Council wrote to the MEC during the last quarter of 1998 bringing it to his attention that his authorizing letter for the second rating year wrongly referred to s 29 (8) of the Ordinance. The latter provision applies only when properties have been valued. This led to the third notice, which was an attempt to put right what the Council submits is merely a typographical error.

[14] At the time of the application in the Court below the Council was in the process of compiling a valuation roll and anticipated that it would be in a position to impose rates based on valuation of properties during the 2000/2001 rating year.

[15] In each of the two rating years the Council posted notices at its various offices informing the public about the rate and stating that the rate was being imposed in terms of s 29 (2) of the Ordinance. At about the same time each year, corresponding notices in the form in which the first two notices appeared in the Provincial Gazette were published in the ***Citizen*** and ***Beeld*** newspapers.

[16] Before us the case for the Council was argued within the following confines. It was contended that s 229 (1)(a) of the Constitution, which grants local authorities the power to impose rates on property, was the primary source of its power to impose the rates in question. The Council disavowed any reliance on s 229 (1)(b) of the Constitution, which permits local authorities to impose 'other taxes, levies, and duties appropriate to local government' if authorised thereto by national legislation. It was submitted that s 10 G (6) of the LGTA (dealt with in detail later in this judgment), which sets conditions for the imposition of a property rate, did not apply as the jurisdictional facts for its operation were absent, namely, valuation and measurement. It was submitted, however, that in any event, the introductory words of s 10 G (6) of the LGTA made it clear that the provisions of that subsection were 'subject to any other law' and that this meant that the Council

could rely on s 29 (2) of the Ordinance. It was contended further that the Council had the power to impose the land rate as envisaged in s 29 (2) of the Ordinance and that, having regard to s 229 (1)(a) of the Constitution, it was strictly speaking not necessary for the MEC to grant approval or publish the first two notices, as required by this provision of the Ordinance, and that the MEC should be seen as merely having been a rubber stamp for the decision properly made by the Council.

[17] The appellants on the other hand submitted that the provisions of the Constitution and the LGTA were binding on the Council and that the rate had to be determined with reference to size or value of property and in such a manner as does not result in unequal treatment of property owners. It was contended that it was abundantly clear that the Council failed to appreciate the nature of its functions and powers.

[18] It is necessary at this stage to examine section 229 (1)(a) of the Constitution, section 10 G (6) of the LGTA and s 29 (2) of the Ordinance and then to consider whether the rates were determined in accordance with constitutional and statutory prescripts.

[19] Section 229 (1)(a) of the Constitution entitled **Municipal fiscal powers and functions** provides:

'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;'

The Council relies on this provision as the source of its authority to impose the rates in question. I pause at this point to note that in terms of section 160 (2) of the Constitution a local authority may not delegate its function of imposing rates.

[20] Item 26 of Schedule 6 of the Constitution provides that the provisions of the LGTA remain in force in respect of a municipal council until a municipal council replacing that council has been declared elected as a result of the first municipal election of municipal councils after the commencement of the Constitution. It is not disputed that the LGTA was in force at material times.

[21] The LGTA, as its preamble declares, is an enactment that provided interim measures to promote the restructuring of local government.

[22] Section 10 G (6) of the LGTA provides:

> 'A local council, metropolitan local council and rural council shall, subject to any other law, ensure that –
>
> (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 shall be determined ***shall be as prescribed***: Provided further that the provisions of this subsection shall be 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.'
>
> (Emphasis added).

In terms of section 10B of the LGTA 'prescribed' means prescribed by regulation under that Act. It is common cause that property rates were not prescribed in terms of the proviso to this subsection.

[23] It has not been suggested that s 10G (6) of the LGTA is unconstitutional. Read with s 10G (7) it provides a mechanism historically accepted as a proper basis for the 'rating' of property by local authorities, namely measurement or valuation. This was the position in the pre-constitutional era and no reason has been suggested why this should not be so. The original power granted to municipalities in terms of section 229 (1)(a) of the Constitution is to impose a 'property rate'. The ordinary meaning of 'rate' is well established. The ***Concise Oxford Dictionary*** (7th ed) defines it as follows:

> '…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; (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 …'
>
> (Emphasis added).

[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.

[25] The proviso in section 10G (6) states in peremptory terms that in the event of its not being feasible to value or measure property, rates are to be determined 'as prescribed'. It was not part of the Council's case that it was not feasible to value or measure the properties in question. The respondent sought to impose the rate in the interim whilst it was in the process of valuing properties within its area of jurisdiction. However, the appellants all supplied measurements of their properties. Furthermore, there is no reason to assume that the measurements of erven within the Council's area of jurisdiction were not available on a general plan and that the

deeds registry could not have provided the necessary data to impose a rate relative to the size of properties.

[26] The basis of calculation used by the Council as set out in paragraph [12] of this judgment was not to determine a rate as a percentage of or in proportion to value or size of property or indeed in accordance with any tariff but rather to determine each sub-local authority's expenses and then to divide it by the number of erven in the area. That there is no correlation between the size of the property and the rate is clearly illustrated in paragraph [7] of this judgment.

[27] In ***Pretoria City Council v Walker*** **1998(2) SA 363 (CC)** the Constitutional Court dealt with a local authority's power to levy a tariff for services rendered. In that case the power was based on s 178 (2) of the interim Constitution, which provided that within each local government tariffs and property rates shall be based on a uniform structure for its area of jurisdiction. The following at 397 H - 398 B is instructive:

> 'In my view, this requirement compels local governments to have a clear set of tariffs applicable to users within their areas. The tariffs themselves may vary from user to user, depending on the type of user and the quality of service provided. As long as there is a clear structure established, and differentiation within that structure is rationally related to the quality of service and type or circumstances of the user, the obligation imposed by s 178(2) will have been met. If the differentiation is alleged to be discriminatory the remedy of aggrieved persons is to challenge the validity of the tariff under s 8(2) of the interim Constitution. As

> the High Court held in its judgment, there was no challenge to the tariff in the present case and its validity must be assumed.'

[28] The rates imposed in the present case had the effect of treating unequally landowners who in all material respects were identically situated. This is not countenanced by the Constitution. Owners of a smaller piece of land were paying as much as people who owned large tracts of land within the same area. The rationale for drawing a distinction between residents of Atteridgeville and Mamelodi on the one hand and residents of what was described as 'Old Pretoria' in the ***Walker*** case does not apply in the present circumstances. The Council's reliance on section 229 (1)(a) of the Constitution is thus misplaced. By determining the rate on the basis referred to earlier in this judgment the Council was not exercising its power to determine a property rate. It was in fact imposing a levy on property, which it is entitled to do only in terms of s 229 (1)(b) of the Constitution. It did not however act within the terms of that section of the Constitution. The levy sought to be imposed was not, as described by the CEO, the most reasonable and objective manner of determining a property rate. On the contrary, the basis of calculation is irrational and unfair.

[29] Section 29 (2) of the Ordinance, on which reliance was placed by the Court below, provides as follows:

> 'The Administrator may from time to time by notice in the Provincial Gazette declare that, for a period of not less than one financial year, the provisions of the

> Local Authorities Rating Ordinance, 1977, shall not apply in such portion of the area under the jurisdiction of the board as the Administrator may by like notice specify, and that for the period and in the portion aforesaid, there shall be levied and collected in respect of every erf or other division of land shown on a general plan as defined in section 102 of the Deeds Registries Act, 1937, a rate (hereinafter referred to as a land rate) in accordance with a tariff approved by the Administrator.'

For reasons that follow Swart J's reliance on this section of the Ordinance was misplaced.

[30] It was submitted on behalf of the Council that the words 'subject to any other law', in the introductory part of s 10G (6) of the LGTA, enabled it to rely on the provisions of s 29 (2) of the Ordinance for the imposition of the land rate. The provisions of s 10G (6) of the LGTA are consistent with the Constitutional scheme and provide a basis on which the original power, which is not delegable, may be exercised. It clearly applies to the imposition of a property rate by a local authority. On the facts of the present case there is no reason why these provisions should not have applied.

[31] Even the assumption that the words ‘subject to any other law’ may be read to refer to s 29 (2) of the Ordinance would not assist the Council. The Ordinance authorizes the Administrator ***not*** the Council to approve a land rate. This is not the Council’s original power set out in s 229 (1)(a) of the Constitution being exercised. The first respondent did not file an affidavit stating on what basis and information

he purported to approve the rate. He did not explain why the Local Authorities Rating Ordinance 11 of 1977 (referred to in s 29 (2) of the Ordinance) should not apply. The rate submitted to him, which he approved, was the rate decided on by the Council and was based on a calculation neither sanctioned by law nor grounded on any recognised basis of rating property. In fact it flies in the face of the meaning of a 'property rate', as the property being rated did not serve as the basis of the calculation of the rate.

[32] It will be recalled that the Council contended that it made the decision to impose the rate and that the MEC merely served as a rubber stamp. This appears to be borne out by the MEC's responses to the Council's requests in respect of the rates and the related notices. The Council's decision determining the rates is flawed as set out in the preceding paragraphs. It cannot be cured by a process that purported to be but was not in fact in line with s 29 (2) of the Ordinance. The Council's reliance on s 29 (2) of the Ordinance is therefore misplaced. It is the MEC who, in terms of s 29 (2), is required to bring ***his*** mind to bear on the question of a land rate. It is clear that he must consider why his power should be exercised and should do so on an informed basis. The MEC did not depose to an affidavit setting out why he exercised his power as set out in s 29 (2) and explain why the Local Ratings Ordinance 11 of 1977 should not apply. It is thus not possible to conclude that he applied his mind properly to the issues.

[33] Furthermore, the first and second notices ought in terms of s 29 (2) of the Ordinance to have been issued by the MEC before the Council introduced the rates. This was not done. The approvals followed after the rates were introduced. The third notice was issued by the MEC within the second rating year but given the fallacious underlying premise (set out in the preceding paragraphs) none of the three notices can be sustained. The convoluted legislative path that the Council chose in an attempt to validate its actions can thus be seen to lead to a *cul-de –sac*.

[34] It is abundantly clear from:

(a) the introductory words to the notices in question, referring interchangeably to s 10G(6) and s 29(2) of the Ordinance:

(b) the correspondence between the MEC and the Council in which there is reference to s 29(8) of the Ordinance;

(c) the failure by the first respondent himself to publish the first two notices;

(d) the request by the Council to the first respondent to correct this by issuing a third notice;

(e) the failure by the first respondent to approve the rates before they were introduced;

(f) the issuing of the third notice;

(g) the Council's present insistence that it was acting in terms of s 229(1)(a) of the Constitution ; and

(h) its fall-back reliance on s 29(2) of the Ordinance

that the Council and the MEC failed to properly appreciate their functions and powers. The Council cannot be heard to say that the wrong reference to legislation is cured by the fact that it has original powers to impose property rates. The question is whether it had the power to act in the manner complained of and to impose the rates in question. See ***Administrateur, Transvaal v Quid Pro Quo Eiendoms Bpk.*** **1977 (4) SA 829 (A)** at **841 A - G** and ***Minister of Education v Harris*** **2001 (4) SA 1297 (CC)** at **1307 E - 1308 A** (para [17]).

[35] The Republic of South Africa is a Constitutional state. Local authorities and other state institutions may act only in accordance with powers conferred on them by law. This is the principle of legality, an incident of the rule of law. See ***Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council and Others*** **1999 (1) 374 (CC)** at **399 D - E** (para [56]) and **400 D – E** (para [58]). See also ***Pharmaceutical Manufacturers of South Africa: In Re ex parte President of the Republic of South Africa*** **2000 (2) SA 674 (CC)** at **687 D – E** (para [17]).

[36] In my view, it is abundantly clear that the rates in question were not imposed as required by law. The classification of the land rate as a 'flat rate' is a misnomer especially when it is suggested, as the Council does in the present appeal, that it is a uniform rate fair and consistent in its application. As demonstrated earlier the rates are unfair and discriminatory. It is clear that there is no constitutional or statutory warrant for the rates sought to be imposed. On the contrary, the rates have been imposed in conflict with statutory prescripts and have to be set aside.

[37] It is not necessary for present purposes to consider the general validity of provincial legislation in relation to the Constitution or to examine every legislative path open to local authorities seeking to impose rates or other levies on residents within their area of jurisdiction. It is regrettable that revenue will be lost because of the Council's failure to exercise its powers and functions within the law. It is clear that this will be a setback to the now distinct local authorities that succeeded the Council. However, we must not lose sight of principles that underlie our democracy. All, especially institutions of State, must respect the principle of legality. It is clear that the process and reasoning resorted to by the Council was fundamentally flawed and that it acted outside its powers and functions. In line with this conclusion the appeal must succeed.

[38] It was submitted on behalf of the Council that because the appellants' case as formulated on appeal differed from the basis on which it was argued in the Court below they should, in the event of being successful, be deprived of part of their costs. The appellants maintained consistently during the course of litigation and in preceding correspondence that the rates in question were not determined according to law. There is, in my view, no reason why the usual costs order should not follow success in the appeal.

[39] In light of the foregoing conclusions the following order is made:

1. The appeal is upheld with costs;
2. The orders made by the Court below are set aside and replaced by the following:

'1. It is declared that:

1.1 paragraph C of Local Government Notice 1665 issued by the Chief Executive Officer of the second respondent, published in Provincial Gazette no. 378 of 6 August 1997, purporting to impose a rate on land in areas referred to therein for the period 1 July 1997 to 30 June 1998, is invalid and of no force and effect;

1.2 paragraph C of Local Government Notice 1558 issued by the Chief Executive Officer of the second respondent, published in Provincial Gazette no. 504 of 8 July 1998, purporting to impose a rate on land in areas referred

to therein for the period 1 July 1998 to 30 June 1999 is invalid and of no force and effect;

1.3 Notice 1120 of 1999 issued by the first respondent and published in the Provincial Gazette no. 13 of 3 March 1999 purporting to impose a rate in areas referred to therein 1 July 1998 to 30 June 1999 is invalid and of no force and effect;

2. The second respondent is ordered to pay the applicants' costs.'

MS NAVSA
JUDGE OF APPEAL

CONCUR:

Hefer AP
Olivier JA
Farlam JA
Cameron JA