THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 20634/2014

In the matter between:

BLAIR ATHOLL HOMEOWNERS ASSOCIATION	**FIRST APPELLANT**
WRAYPEX (PTY) LIMITED	**SECOND APPELLANT**
ROBERT SEAN WRAY	**THIRD APPELLANT**

and

THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY	**RESPONDENT**

Neutral Citation: *Blair Atholl Homeowners Association v The City of Tshwane Metropolitan Municipality* (20634/2014) [2015] ZASCA 195 (1 December 2015)

Coram: Lewis, Cachalia, Tshiqi, Pillay and Dambuza JJA

Heard: 13 November 2015

Delivered: 1 December 2015

Summary: Review – Section 3(3)*(a)* of Local Government: Municipal Property Rates Act 6 of 2004 – council resolution not to exempt ratepayers, who provide their own services, from paying rates – whether equitable.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Murphy J sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Cachalia JA (Lewis, Tshiqi, Pillay and Dambuza JJA concurring)

[1] This is an appeal against a judgment of the Gauteng Division of the High Court (Murphy J) dismissing an application to review and set aside a rates policy of the City of Tshwane Municipality (the City) for a private residential complex known as the Blair Atholl Estate. The policy was adopted by way of a council resolution on 4 May 2011.

[2] The three applicants in the high court were the Blair Atholl Homeowners Association, of which all the individual property owners are members, Wraypex (Pty) Ltd, the developer and 'township owner' of the estate as well as a member of the Homeowners Association, and Mr Robert Wray, who was a member of the Homeowners Association (but no longer is) and is a director of the developer. They were granted leave to appeal to this court against the dismissal of their application. On the day before the appeal was heard, the Homeowners Association delivered a notice withdrawing its appeal. Senior and junior counsel, who had been briefed in the matter and had prepared written submissions, had to withdraw.

[3] Mr Theron and Ms Freese were then instructed to argue the appeal. They were placed in an invidious position having had virtually no time to prepare, but adopted their predecessors' main submission and soldiered on for the two remaining appellants. When the hearing commenced Mr Theron explained that Mr Wray, the third appellant, was no longer a member of the Homeowners Association and did not own any property on the Estate. He thus had no standing to continue with the appeal in his personal capacity. The developer, however, persists in the appeal as the sole remaining appellant. As it is no longer a member of the Homeowners Association, the only basis upon which it now claims to have standing is as the township owner, an issue to which I shall later return. It is convenient to refer to the appellants collectively.

[4] The appellants' complaint is that the City's rates policy is inequitable, and thus unlawful, because it imposes the same liability for rates on property owners of the estate as for other differently situated ratepayers. They believe that they are entitled to be treated differently from other property owners in the City's jurisdiction because they provide and maintain their own services and thus qualify for an exemption, a reduction, or a rebate in rates. Section 3(3) of the Local Government: Municipal Property Rates Act 6 of 2004 (the Rates Act), which calls for rates policies to be equitable, and envisages a rates differentiation for different categories of properties (determined under s 8), is the focus of this dispute.

[5] The facts, which were fully set out in the judgment of the high court, are briefly these: The Blair Atholl Estate is an upmarket residential development with a golf course, located 50 kilometres west of Pretoria. It is some 600 hectares in size and has 329 stands. The estate's recreational facilities include a restaurant, swimming pool, tennis courts and a wellness centre.

[6] The development was approved as a township, subject to specific conditions, under the Town-Planning and Townships Ordinance 15 of 1986. This was because the relevant area fell outside the City's priority areas for the establishment of new

townships, and had no water and sewerage services. So, approval was given on condition that the developer installed these services.

[7] To this end, in 2006, the developer and the City concluded an 'Engineering Services Agreement' (ESA), so styled because the developer undertook to install all engineering services for which municipalities are usually responsible. The services included water, electricity, sewerage networks, storm water drainage systems, and road infrastructure. The Homeowners Association, whose establishment was one of the conditions in the ESA, became responsible for the maintenance of the services inside the estate. The residents, who are obliged to be members of the association, pay a monthly levy to it to cover these costs. The City maintains the services outside the estate, including the supply of water, for which the residents pay, but it does not raise sewerage charges.

[8] It is of some significance that the ESA specifically provided for rates to be levied according to the City's policies once the township was proclaimed. It made no provision for, nor did it expressly envisage, the township to be treated as a different category of rateable property. In fact on any fair reading of the relevant clauses of the ESA, the contrary was envisaged – rates would be levied as usual, as with other residential property. I shall return to this question.

[9] In April 2011 the City published a draft rates policy inviting the public to comment on it. The appellants made written representations in response to the City's invitation running into some thirty pages. In summary, they made the following argument:

(a) The rates policy recognises only one category of residential property and one category of vacant land. In regard to residential property this means that all properties in this category attract the same rates. But, this does not take into account Blair Atholl's unique position of being located a distance from the urban area and not having to rely on the City for its internal services. Its property owners pay levies to

the Homeowners Association for the maintenance of essential services. So, the additional rates the City demands for the same services are inequitable because the property owners pay, but do not benefit from, these rates in the same way that other property owners located close to the City's amenities do. The rates therefore constitute an improperly imposed double tax.

(b) In regard to vacant land inside the estate, ie land the developer has not yet transferred to a first time recipient, there should also be a separate category for which the developer is exempt from paying rates, and first time recipients should likewise not have to pay rates for the first two years, while they are developing it. This is to give recognition to the important role of developers in township development.

(c) Section 3 of the Rates Act compels a municipality to adopt a rates policy that is equitable, meaning that geographic locality and the provision of engineering services must be taken into account. The City is obliged to create a specific category for 'privately owned towns serviced by the owner' such as Blair Atholl as provided for in s 8(2)*(j)* of the Rates Act.[1] It should have a capped property tax of R570.50 per erf, escalated annually at the municipal cost index.

[10] On 4 May 2011 the City's Council, an elected body, met to approve the draft rates policy and draft by-laws, and after considering the appellants' oral and written submissions resolved to reject the appellants' demand for a separate category of rateable property in its rates policy. The city's documentation, placed before council, noted that the Rates Act did not define the category of 'privately owned towns serviced by the owner'. It stated, however, that the conventional understanding of this concept is a township with a single owner that provides all developmental, social, functional and infrastructural services, including approving building plans. It also attends to its own town-planning as mining residential townships do. Importantly, it has full jurisdictional powers over the township as an 'own-municipality'. The basis of how Blair Atholl came to be developed, underpinned by

[1] In 2011, s 8(2)*(j)* of the Rates Act provided for a category of 'privately owned towns serviced by the owner'. Section 8 was repealed and substituted by s 6 of Act 29 of 2014. The section no longer provides specifically for this category of rateable property.

the ESA, which explicitly recognised that the City would levy assessment rates in accordance with its policies, therefore precluded this estate from being understood as falling within this concept.

[11] As to the appellants' main complaint, that it was inequitable to have to pay the same rates as other property owners who rely on the municipality for services, the documents before council explained the policy rationale for rejecting the linkage between rates and services: rates, it stated, are a property tax. They are imposed on all rateable property in a municipality and are not linked to services, such as water, waste removal and electricity that property owners pay in respect of the property. Unlike the costs for services, there are no measurable benefits from the payment of property taxes. There may be indirect benefits such as the use of parks, libraries, public health and law enforcement services, which may be referred to as collective goods and services. For these services everyone pays, whether or not they are used. Rates policy is also based on affordability and the principle of a progressive sliding scale; the higher the value of the property the more the owner pays.

[12] The resolution concluded thus:

'[P]roperty tax is not payable upon receiving basic services. The taxpayers do not receive direct or measurable benefits from the payment of property tax and the value of the benefit, which an individual derives, cannot be quantified. It is the responsibility of an individual property owner to pay property tax irrespective of receiving a direct benefit from making use of collective services. The lesser the number of properties, subject to property rates, the smaller becomes the tax base of the municipality. The more exceptions and rebates granted, the greater the tax burden becomes to the property owners whose properties remain subject to non-discounted rates. Exceptions also create precedents and expectations that could not be afforded by the remaining tax payers . . . [T]he Blair Atholl Development is not entitled to any reduction on rates and taxes or any preferential treatment.'

[13] Aggrieved by this outcome the appellants instituted review proceedings against the City in the court below to set aside the resolution. They asserted that the

decision was reviewable under s 6 of Promotion of Administrative Justice Act 3 of 2000 (PAJA) as an administrative action because the council did not follow the proper procedure prescribed by the Rates Act and that: it failed to properly consider their representations; the decision not to create a separate category of rateable property was irrational because it failed to take into account the link between property rates and services; and it was inequitable because it levied the same rates against Blair Atholl's property owners as it did against other property owners, who also live in high income areas, despite the fact they do not provide their own services.

[14] The learned judge, however, correctly pointed out that a council resolution on rates policy was a legislative decision taken by an elected body. It was therefore reviewable, not as an administrative action under PAJA, but only under the principle of legality on the grounds of irrationality. He therefore approached the review application on this basis. And he also considered the appellants' new contention – not properly or clearly advanced on the papers – that the rates policy was inequitable and contravened s 3(3)(a) of the Rates Act. The procedural challenges, which failed before the court below, have now been abandoned and need not be further considered.

[15] The appellants also abandoned the specific relief they sought compelling the City to create a category of rateable property for 'privately owned towns serviced by the owner' and a category of 'vacant land' owned by developers that would be exempt from rates. In this regard they accepted that a municipality may determine a category of rateable property from the list of categories identified in s 8(2) of the Rates Act for the purposes of determining differential rates and the amount it wishes to levy.[2] And also, that in making this determination the council has a wide discretion. Put simply, it exercises a policy choice, which a court will be slow to second-guess.

[2] *City of Tshwane v Marius Blom & G C Germishuizen Inc & another* [2013] ZASCA 88; 2014 (1) SA 341 (SCA) paras 16-18.

[16] So, while the appellants accept that courts may not impose their own preferences on a municipality regarding the choice of category of rateable property, its case now is that the rates policy adopted on 4 May 2011 did not meet the threshold requirement of equitability in s 3(3)*(a)* of the Rates Act. This is because it imposed a rates burden on the property owners of Blair Atholl that other differently situated ratepayers do not bear. The policy, they contend, therefore falls to be set aside on this basis.

[17] Furthermore, it is contended that the imposition of this additional burden is irrational because it is not rationally connected to the objectives of the Rates Act. The appellants' papers confusingly attempt to draw a distinction between their inequitably and irrationality challenges; they are effectively one and the same. And I shall deal with them as such.

[18] The power of municipalities to levy rates on property is an original power derived from s 229(1)*(a)* of the Constitution. Rates are levied on the value of property to cover the running costs of a municipality, and to achieve its objects.[3] The statute regulating the exercise of this power is the Rates Act.

[19] Section 3 regulates the adoption and content of rates policy. Section 3(1) imposes a duty on the council of a municipality to adopt a rates policy, and s 3(3)*(a)*, which is at the centre of this dispute, requires the policy to be equitable; fair, in other words. The principle underlying an equitable rates policy is that similarly situated ratepayers are liable for the same rates; and, where a policy differentiates between ratepayers, it must do so fairly.

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[3] Section 152(1) of the Constitution says that the objects of local government are:
'*(a)* to provide democratic and accountable government for local communities;
(b) to ensure the provision of services to communities in a sustainable manner;
(c) to promote social and economic development;
(d) to promote a safe and healthy environment; and
(e) to encourage the involvement of communities and community organisations in the matters of local government.'

[20] To this end a rates policy must determine criteria if the council levies differential rates for categories of properties; exempts, reduces or grants a rebate to any category; or increases or decreases rates.[4] It must also provide criteria for determining categories of properties liable for different rates.[5] Fairness also entails any exemptions, rebates or reductions to be justified by reasons.[6] The importance of stated criteria and the obligation to provide reasons is that they are open to legal challenge – albeit on narrow grounds, because they involve policy questions. It must also be borne in mind that municipalities are not obliged to levy differential rates for different categories of rateable property or create different categories for this purpose.

[21] Another aspect of the equitability principle is that rates policy must take into account its effects: on the poor and include measures to alleviate them;[7] on organisations that conduct public benefit activities that are exempted from income tax;[8] and on public service infrastructure.[9] The policy must also allow the municipality to promote local social and economic development.[10] This necessarily implies that some ratepayers – those who have the means to own more valuable properties – must perforce shoulder a heavier burden for these taxes.

[22] Another injunction in the Rates Act is that a rates policy providing for exemptions, rebates or reductions must comply with a national framework as may be prescribed after consultation with organised local government.[11] This is to avoid the knock-on effect that a policy, which allows exemptions, reductions or rebates in one municipality, may have on other municipalities.

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[4] Section 3*(b)*.
[5] Section 3*(c)*.
[6] Section 3*(e)*.
[7] Section 3*(f)*.
[8] Section 3*(g)*.
[9] Section 3*(h)*.
[10] Section 3*(i)*.
[11] Section 3(5).

[23] The adoption of a rates policy is therefore quintessentially a political decision that involves balancing the interests of various parties. It is underpinned by the principle of equitability in s 3(3)*(a)*. And even though the adoption of a rates policy is subject to legal challenge for failure to adhere to this principle, the judicial branch of government will be circumspect before it interferes with a council's assessment of what is equitable.[12]

[24] I turn to consider the appellant's equitably complaint. As I have mentioned earlier, this case was not made out pertinently on the papers. The appellants' representations to the City were aimed at securing the creation of two categories of rateable property that would qualify for a rates reduction and exemption: a privately owned town serviced by the owner and vacant land. The impugned resolution rejected the submission for the reasons mentioned. That was the case they brought to court; hence the orders sought were to compel the City to establish a different category of rateable property for Blair Atholl. That relief has now been abandoned and what remains is only the prayer for the resolution to be set aside.

[25] The case now made out, as I understand it, is that Blair Atholl's property owners were treated inequitably since: their particular circumstances and peculiar context were not factored into the rates imposed; their geographic location was ignored; and their interests were not appropriately balanced with those of differently situated communities, who pay equivalent rates and enjoy access to municipal services that Blair Atholl residents do not.

[26] Stripped of the verbiage the essential complaint is that property owners in Blair Atholl should not be made to pay equivalent rates to other differently situated communities as they provide and pay for their own basic services, while not having access to other communal services because of its geographic location.

[12] See generally N Steytler & J de Visser *Local Government in South Africa* (Issue 8, October 2014) Chapter 13, para 2.1.3.

[27] But this challenge fails at its first hurdle, for it assumes there is, or ought to be, a fair relationship between the services a municipality provides its ratepayers and the rates they are liable to pay. In this regard the court a quo observed correctly that s 229(1)*(a)*[13] of the Constitution distinguishes between rates and surcharges: the latter may be imposed for services the municipality provides, while the former bears no such constraint. In addition we were referred to no provision in the Rates Act that supports the appellants' contention. In fact, the contrary is true. Ratepayers who have the means are required to bear an additional burden to subsidise those who cannot afford to pay for their services. Rates also support local social and economic development, unrelated to the provision of services.

[28] The City's policy document, to which I have referred earlier, explicitly eschews any link between rates and services. That policy was not challenged. What is contested is the application of the policy to Blair Atholl. In this regard the reasons given in the council resolution for refusing to create a policy exception for Blair Atholl are persuasive.[14] It follows that the appellant's attempt to link services with rates must founder.

[29] In regard to the specific complaint that the resolution does not factor in the peculiar context and geographic location of the Blair Atholl development, the short answer is that it does. The court below – again correctly – observed that the City and the developer entered into the EAS on the premise that the development would provide its own services as it fell beyond the reach of municipal services. The City agreed to supply water at the normal rate, and not to levy a sewerage charge, but made no similar concessions for property rates. On the contrary, the agreement explicitly provided for rates to be levied from the date of the proclamation of the township.

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[13] Section 229(1)*(a)* of the Constitution provides as follows:
'(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; . . . .'

[14] See para 12 above.

[30] Murphy J was thus correct in concluding that:

'There is accordingly no basis for any supposition on the part of the applicants supporting an equitable claim to exemption from (or reduction of) rates in exchange for the provision of services by them. The municipality approved the township on the understanding that it would not be burdened by an increased demand for services while retaining its right to levy rates on the residents of the estate.'

[31] The appellants also sought to interdict the City from claiming property rates from property owners of Blair Atholl for the period before 1 July 2008, a matter entirely unrelated to the present dispute. The court below refused this relief on the grounds that neither the requirements for an interdict, nor their standing to claim this relief, had been established. Counsel for the appellants did not press this issue, for good reason.

[32] I mentioned at the outset that the sole basis upon which the developer asserted a legal interest in the relief claimed was as township owner. But this case is about an equitable claim by the property owners of Blair Atholl, who as ratepayers belong to the Homeowners Association, to be treated differently as a group. This is because they are required to pay the association for services for which they are liable and rates to the City in accordance with the City's rates policy. The developer, on the other hand, is no longer a member of the association, and has no claim as owner of the remaining extent of the township to be treated differently. It will be recalled that its claim for an exemption from rates as the owner of 'vacant land', made in the representations to the City, was not part of relief sought in this case.

[33] In regard to the claim that the property owners were entitled to a prohibitory interdict against the City regarding the rates for the period preceding July 2008, there is no case made out that the developer, as owner only of the remaining extent of the township, was entitled to claim this relief. So, in regard to both the main and additional relief the developer alone seeks, it does not appear to have any legal

interest. However, in view of the conclusion to which I have come on the merits of the dispute, it is not necessary to decide this issue.

[34] The Homeowners Association withdrew its appeal belatedly, on the day before the hearing. It cannot avoid liability for the costs of the appeal. In the result the following order is made:

'The appeal is dismissed with costs, including the costs of two counsel.'

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A Cachalia

Judge of Appeal

APPEARANCES

For Second and Third Appellant:	E L Theron SC (with S Freese) (heads of argument prepared by LGF Putter SC and H Varney) Instructed by: Schwartz-North Incorporated c/o A L Maree Incorporated, Pretoria Martins Attorneys, Bloemfontein
For Respondent:	T Strydom SC (with T Mkhwanazi) Instructed by: Hugo & Ngwenya Attorneys, Pretoria Phatshoane Henney Attorneys, Bloemfontein