THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no**: 737/11**

In the matter between:

JACOBUS JOHANNES LIEBENBERG NO
AND 86 OTHERS **Appellants**

and

BERGRIVIER MUNICIPALITY **Respondent**

Neutral citation: ***JJ Liebenberg NO v Bergrivier Municipality*** **(737/11) [2012] ZASCA 153 (1 October 2012)**

Coram: Nugent, Lewis, Bosielo, Theron and Wallis JJA

Heard: 7 September 2012

Delivered 1 October 2012

Summary: Rates imposed on rural landowners by the Municipality in the years from 2002 to 2009 were lawfully imposed under s 10G(7) of the Local Government Transition Act 209 of 1993 and under the Local Government: Municipal Finance Management Act 56 of 2003.

ORDER

On appeal from Western Cape High Court (Cape Town) (Binns-Ward J sitting as court of first instance):

1 The appeal is dismissed with costs, including those of two counsel, to be paid by the appellants jointly and severally.

2 The cross appeal succeeds with costs, including those of two counsel. Those costs and the costs of the application for leave to cross appeal in the high court are to be paid by the appellants jointly and severally.

3 The orders of the high court are set aside. The following orders are substituted:

'a The imposition of rates by the applicant on the respondents in the financial years from 2002/2003 to 2008/2009 was lawful.

b The respondents are ordered to make payment to the applicant of the amounts set out against their names, and corresponding municipal account numbers, on the schedule headed "Uitstaande Belastings", deposited with the Registrar of the Supreme Court of Appeal, together with interest *a tempore morae*, as provided in the applicant's credit control policy.

c The defendant or defendants in each action in the magistrates' courts are ordered to pay to the applicant the costs of the proceedings for recovery of the amounts owed by them in the magistrates' courts.

d The respondents are ordered, jointly and severally, to pay the applicant's costs including the costs of two counsel.'

JUDGMENT

LEWIS JA (NUGENT, BOSIELO, THERON AND WALLIS JJA concurring)

[1] The appellants are rural landowners who farm within the area of the Bergrivier Municipality, the respondent. I shall refer to them as the farm owners. Their dispute is about rates levied by the Municipality over a number of years in the last decade, in terms of the new Constitutional and legislative

dispensation that has brought all land in South Africa within the jurisdiction of municipalities. The Municipality was established pursuant to the Local Government: Municipal Structures Act 117 of 1998. This is one of the four statutes that now regulate municipal governance throughout the country.

[2] Prior to the adoption of the interim Constitution of 1993, rural landowners were not affected by the provincial ordinances that governed the payment of municipal rates. They did not, therefore, pay municipal rates. That dispensation changed with the introduction of the Local Government Transition Act 209 of 1993 (the Transition Act),[1] designed to provide uniformity in local government throughout the Republic and to establish new municipal structures, and with the enactment of the legislation that eventually replaced it.

[3] The long title to the Transition Act indicated that one of its purposes was to establish transitional rural local structures, and part VA dealt with 'rural local government'. Section 9D provided for a framework for rural local government based on the principle that the whole of an area of a province should fall within the jurisdiction of a council, of which there were a variety including transitional councils. The very name of the Transition Act indicates that it was intended to apply in the period between the passage of the interim Constitution and the time when permanent municipal structures and systems were put in place. As it happened, the Transition Act was amended on numerous occasions and remained operative, at least in part, until 2011. I shall deal with its application in due course.

[4] The farm owners refused to pay amounts claimed from them by the Municipality over several years, commencing in 2001. Eventually the Municipality brought actions against them in various magistrates' courts in the Western Cape for payment of arrear levies and rates. It became apparent during the course of these proceedings that the farm owners were defending the actions on the basis that the levies and rates were not imposed in accordance with the strictures of the Constitution and the statutes then

[1] It came into operation on 2 February 1994.

applicable. The parties thus agreed that the actions in the magistrates' courts would be abandoned, and instead, the Municipality would seek declaratory orders in the high court as to the validity or otherwise of the levies and rates.

[5] In October 2010 the Municipality sought declaratory orders that the levies and rates imposed by it in the financial years (which ran from 1 July to 30 June each year) from 2001/2002 to 2008/2009 were lawful and valid, and if so, for an order that the farm owners pay the amounts claimed, set out in a schedule to the notice of motion. By the time of the hearing in the high court the farm owners had conceded that rates imposed in the 2003/2004 year were lawfully imposed and the Municipality conceded that the levies it had sought to impose in the 2001/2002 year were not lawfully imposed. The Western Cape High Court, Cape Town (per Binns-Ward J) found that the levies imposed in the 2001/2002 financial year were not lawfully imposed although that had been conceded); that the 2002/2003 rates were not lawfully imposed; that the rates imposed in 2004/2005 and 2005/2006 were lawfully imposed and that the Municipality could recover the amounts payable from the farm owners; but that the Municipality had not complied with statutory requirements in imposing rates in the 2006/2007, 2007/2008 and 2008/2009 years and could thus not recover them. The high court granted leave to the farm owners to appeal in respect of the 2004/2005 and 2005/2006 years, and to the Municipality to cross appeal in respect of the other years.

[6] About six weeks before the hearing of the appeal the Minister for Local Government, Environmental Affairs and Development Planning, Western Cape sought leave to intervene as a party in the appeal, or to make representations as an amicus curiae. The court allowed the Minister to argue whether he had a direct interest entitling him to intervene, or to act as an amicus. I shall deal with the application after considering the issues on appeal.

[7] A number of issues are common to all the years under discussion. I shall thus deal first with the general statutory framework, the continued application of s 10G(7) of the Transition Act, the pertinent authorities on which

the parties rely and the general principles applicable. I shall then turn to consider the lawfulness of the imposition of rates in each year under consideration.

The legislative framework

[8] First, the Constitution itself provides for the objects (s 152) and duties (s 153) of local government. It requires that national legislation be enacted for the establishment of municipalities, the determination of the criteria for distinguishing between different kinds of municipality (s 155), and lays down the powers and functions of municipalities (s 156). In s 229 the Constitution enables a municipality to impose rates and levies, and states that the power to do so may be regulated by national legislation. Where national legislation is in place, as it was throughout the relevant years, the power to levy rates is derived from and exercised in terms of that national legislation. Initially the relevant national legislation was the Transition Act, in particular s 10G(7). Some of the problems arising in this case stem from the transition from the Transition Act to the national legislation referred to in the following paragraph.

[9] The national legislation enacted pursuant to s 229 is now to be found in four statutes. The Local Government: Municipal Structures Act 117 of 1998 (the Structures Act), in terms of which the Municipality was established, was enacted in 1998. Then followed the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act), the Local Government: Municipal Finance Management Act 56 of 2003 (the Finance Act) (which came into operation on 1 July 2004) and lastly the Local Government: Municipal Property Rates Act 6 of 2004 (the Rates Act) (which came into operation on 2 July 2005).

[10] The farm owners contended that the Municipality failed to comply with a number of provisions of the Transition Act, the Systems Act, the Finance Act and the Rates Act. They rely on the principle of legality that has formed the backbone of several decisions of this court and the Constitutional Court in the last decade.[2] The principle is not in issue and I propose to say no more about

[2] See for example *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC); *Gerber v Member of the Executive Council for Development Planning and Local Government, Gauteng* 2003 (2) SA 344 (SCA) and

it: it is accepted that when imposing rates and levies a municipality must comply with the provisions of the statutes that govern their powers and duties. The Municipality argued, however, that it acted at all times in compliance with the provisions of the statutes then in operation. In the alternative it contended that there had been substantial compliance with the requirements of the legislation and that any shortcomings did not invalidate the imposition of rates.

[11] There is, however, an important difference between the parties as to whether s 10G(7) of the Transition Act survived the enactment of the Rates Act, and thus whether the Municipality could rely on its provisions as the source of its power to levy rates in the years after 2 July 2005. The high court held that s 10G(7) was repealed by the enactment of the Rates Act, and I turn first to whether this finding was correct.

The continued application of s 10G(7) of the Transition Act

[12] The Municipality contended that the provisions of this section applied throughout the period over which the contested rates were imposed. The provisions pertinent to this matter read:

'(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:

. . . .

(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

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Kungwini Local Municipality v Silver Lakes Home Owners Association 2008 (6) SA 187 (SCA).

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.'

[13] The farm owners do not dispute that these provisions were applicable in the 2003/2004 and 2004/2005 financial years: they contend, however, that the Municipality did not comply with the requirements of the section in the latter year. I shall return to that argument when dealing with those years. But they argue that when the Rates Act came into operation on 2 July 2005, s 10G(7) of the Transition Act ceased to apply, and that the Municipality was required to levy rates in terms of s 14 of the Rates Act. As I have said, the high court upheld that argument.

[14] The transitional provisions of the four statutes regulating municipal governance are complex and confusing. On analysis, however, I consider that they show a clear purpose: to empower rating in every municipality through a variety of mechanisms until uniform and permanent systems were put in place.

[15] The Finance Act, in operation from 1 July 2004, dealt with the repeal of a number of the rating provisions previously in force (the relevant provisions here were in the Municipal Ordinance 20 of 1974 (C)), as well as s 10G(7) of the Transition Act. Section 179 of the Finance Act reads:

'Repeal and amendment of legislation

(1) The legislation referred to in the second column of the Schedule [including s 10G(7)] is hereby amended or repealed to the extent indicated in the third column of the Schedule

(2) Despite the repeal of section 10G of the Local Government Transition Act, 1993 (Act 209 of 1993), by subsection (1) of this section, the provisions contained in subsections (6), (6A) and (7) of section 10G remain in force until the legislation envisaged in section 229(2)(*b*) of the Constitution is enacted.

. . . .'

[16] The legislation envisaged by s 229(2)(*b*) was, of course, the Rates Act. That Act came into operation on 2 July 2005. The farm owners argued thus that s 10G(7) was repealed by s 179 of the Finance Act with effect from the date of commencement of the Rates Act. But the argument does not take into account the transitional provisions of that Act. These provide:

'Transitional arrangement: Valuation and rating under prior legislation

88(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).

. . . .'

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

89 (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 different rolls, so that the amount payable on similarly situated properties is more or less similar.
(3) This section lapses four 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 the Act may not be used.'

[17] The period of four years referred to in s 89(3) was extended to six years. The Municipality argued therefore that the provisions of s 10G(7) of the Transition Act continued to apply until 2 July 2011. But the high court found that when the Rates Act came into operation, s 10G(7) was repealed. Rating provisions of the ordinances previously in force were not. This is because the Rates Act repealed the Ordinances but did not itself repeal s 10G(7). That section was repealed by s 179 of the Finance Act, cited above. Section 88(1) of the Rates Act thus did not keep s 10G(7) alive. The high court found that one should not read in a reference (in s 88(1)) to s 10G(7) unless failure to do so resulted in an absurdity.

[18] That interpretation fails, in my view, to give meaning to s 89: that section specifically states that a municipality may, until it prepares a valuation roll in terms of the Rates Act, continue to use a valuation roll in force before the commencement of the Act, and to levy rates against property values as shown on that roll. The clear implication of this is that the Municipality could continue to levy rates in terms of s 10G(7) of the Transition Act and to use the valuation roll prepared pursuant to that section. The rating provisions of the Transition Act were thus in force until 2 July 2005: and the Transition Act was designed for the very purpose of bridging the period between the operation of the provincial ordinances and the enactment of the legislation envisaged in the Constitution. Moreover, s 10G was introduced to ensure that municipalities conducted their affairs in an effective fashion, using the rating provisions to ensure their financial resources, and to meet their

developmental obligations. It would be most odd if its provisions fell away in 2005 whereas those of the Ordinances remained in place. It would be particularly odd as its effect would be to remove the legislation introduced in part to enable rating of rural properties that had fallen outside the rating ordinances, thereby once more excluding those properties from rating. There is nothing to indicate that it had been decided to exclude rural properties from rating and that this was the purpose of this provision.

[19] To hold thus that the Ordinances were operative before 2 July 2005, and were repealed on that date by the coming into operation of the Rates Act, but that their operation continued because of the transitional provisions, whereas s 10G was not covered by the transitional provisions, does give rise to an absurdity. In my view, the transitional provisions of both the Finance Act and the Rates Act clearly kept the empowering provisions of s 10G alive until the period referred to in s 89(3) had expired. Throughout the period in issue, therefore, s 10G(7) empowered the Municipality to impose rates. However, when the Finance Act came into operation it determined the procedures to be followed in the municipal budgetary process including rating. I turn to these now.

Application of the Finance Act

[20] Chapter 4 of the Finance Act regulates the manner of levying of rates from the date of its commencement – 1 July 2004. After that date the Municipality determined the rates payable in terms of the provisions of ss 22 to 24 of the Finance Act. Section 22 makes provision for the publication of a municipality's annual budget, and requires a municipality to invite the 'local community' to submit representations in connection with the budget (s 22(*a*)(ii)). Section 23 requires a municipality to consider the views of the local community and various bodies, such as the National Treasury. The municipal council must give the mayor an opportunity to respond to the submissions and to revise the budget if necessary. Section 24 requires the municipality to consider approval of the budget at least 30 days before the start of the budget year (1 July in each year). And the municipal council must approve the budget before the start of the budget year.

[21] Section 25 regulates the position where a municipal council has failed to approve a budget 'including revenue-raising measures necessary to give effect to the budget'. Clearly rates payable by property owners within its jurisdiction are the chief source of revenue for any municipality. Non-compliance with the procedures required to levy rates could thus have serious consequences for the budget of a municipality. However, in the event of non-compliance with a provision of chapter 4 of the Act, s 27(4) provides that the budget for the year is not invalidated. Mechanisms are, however, put in place to ensure compliance. The provincial government and the national treasury must be informed of any non-compliance by the mayor, and the provincial executive may intervene under s 139 of the Constitution in that event.

[22] The Municipality contended that it had complied with all these provisions in the years post 1 July 2005. It also submitted that there had been compliance with the provisions of s 10G(7)(*c)* of the Transition Act. But that section imposed requirements that are not consistent with the process determined by the Finance Act, and to the extent that this is so, the later provisions of the general enactment must prevail.[3] This must be especially so where the provisions of an Act are designedly interim and transitional. The power to levy rates is thus to be found in s 10G of the Transition Act until 2011, whereas the manner of doing so was regulated by the provisions of the Finance Act once it had come into operation. Before turning to the specific years in issue I shall deal with compliance with s 10G(7), in force in the financial years 2002/2003 and 2004/ 2005.

Compliance with s 10G(7) generally

General purport

[23] One of the attacks on the process followed by the Municipality in all the years in question (but as I have held, only relevant until the procedural requirements of the Finance Act were introduced) was that it did not publish a notice setting out the general purport of the rating resolution adopted by its

[3] See, for example, *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) para 67 referring to *Government of the Republic of South Africa v Government of KwaZulu* 1983 (1) SA 164 (A) at 200C-H.

council. Section 10G(7)(*a*)(i), set out above, provided that a municipality may by resolution levy and recover property rates in respect of immovable property within its jurisdiction. After such a resolution was passed a notice had to be 'conspicuously displayed' at the offices of the municipality as well as at other places stating, amongst other things, the 'general purport of the resolution' and that any person who desired to do so could object in writing to such 'determination' (of the rate) within 14 days of the date on which the notice was first displayed.

[24] The farm owners argued that the Municipality had not published a notice setting out the general purport of the resolution. The meaning of this phrase has been considered in two decisions of this court recently, and, according to the high court in this matter, were, at least to some extent, in conflict with one another. In *Kungwini Local Municipality v Silver Lakes Home Owners Association*[4] this court held that the object of s 10G(7)(*c*) – that the notice set out the general purport of the resolution – was that ratepayers should 'know what rates they would have to pay, and from when those rates would be payable'. They should also know that they could object to the rate determination. In that case the notice had referred to two different rates, thus providing conflicting information. It was held not to have set out the general purport of the resolution.

[26] On the other hand, in *Nokeng Tsa Taemane Local Municipality v Dinokeng Property Owners Association*[5] this court held that the phrase 'general purport' meant that details of the rates resolution did not have to be set out in the notice. It stated:[6]

'The adjective "general" qualifies the noun "purport". The conjunction was not accidental but deliberately intended to make clear that specific details are not required. In this case the requirement was satisfied because interested parties were advised that the resolutions were available for inspection. This accords with what

[4] *Kungwini Local Municipality v Silver Lakes Home Owners Association* 2008 (6) SA 187 (SCA) paras 53 and 55.
[5] *Nokeng Tsa Taemane Local Municipality v Dinokeng Property Owners Association* [2011] 2 All SA 46 (SCA).
[6] Para 24.

Alexander J stated about this phrase in *Rampersad v Tongaat Town Board* 1990 (4) SA 32 (D) at 37G:

" . . . 'general purport' then involves an intimation that what follows broadly covers a specific topic."'

[27] It was enough, therefore, for the notice to state that the details could be scrutinised elsewhere. This court thus held, in *Nokeng*, that where notices of a rates resolution advised that the resolution was available for inspection at the town council offices during normal office hours, this was sufficient to meet the requirement of s 10G(7)(*c*) of the Transition Act that the general purport of the resolution be displayed.

[28] The high court in this matter considered that the decision of *Nokeng* in this regard is in conflict with *Kungwini* (to which it referred). But I consider not. *Kungwini* turned on specific facts, where the notice contained a contradiction. It is true that the notice also advised that the resolution was available for inspection. But given the confusion that may have followed the notice, I think that the notice in *Kungwini* is to be distinguished from one that does not set out details of the rates resolution. It is true that the court there said that ratepayers are entitled to know what rates they have to pay and from when. But that they can establish from an inspection of the resolution, as *Nokeng* held. In *Kungwini* an inspection of the resolution may not have clarified the confusion caused by the notice. The high court in this matter thus correctly held that where a notice did state that the resolution could be inspected elsewhere, that was sufficient to indicate the general purport of the resolution.

Substantial compliance

[29] The Municipality argued that in the event of any notice not being fully compliant with s 10G(7)(*c*), there had at least been substantial compliance. It relied on the decision in *Nokeng* in this regard as well.[7] This court, referring to *Nkisimane v Santam Insurance Co Ltd*,[8] held that 'mere failure to comply with one or other administrative provision does not mean that the whole procedure

[7] Para 14.
[8] *Nkisimane v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) 433H-434E.

is necessarily void'. In determining whether a failure should be 'visited with nullity' one must look to whether the legislation in question contemplates that failure strictly to comply with the requirement should result in the process being invalidated. The court said, in this regard, that '[t]o nullify the revenue stream of a local authority merely because of an administrative hiccup appears to me to be so drastic a result that it is unlikely that the Legislature could have intended it.'

[30] The farm owners' argument that there had not been substantial compliance with any of the provisions of the statutes applicable at the relevant time must be examined in relation to each of the years under consideration. It should be noted, however, that they have several complaints about all of the notices, and procedures adopted, in every year.

The 2002/2003 financial year: the cross appeal by the Municipality

[31] On 13 June 2002 the Municipality's council resolved to impose what it termed a levy on properties, which was based on the size of the land owned: the amount levied varied from R300 for properties of less than 75 hectares to R4 500 for properties of more than 1000 hectares. A maximum of R4 500 was payable by each owner, irrespective of the number of registered properties comprising the farm.

[32] A notice setting out the sliding scale with the rates payable in respect of different property sizes was published in terms of s 10G(7) of the Transition Act. It called for objections within a two-week period. After considering objections the council, on 29 July 2002, confirmed the determination but undertook to conduct valuations in the year and to adjust the amounts payable on the basis of the valuations. Although described as a levy, this was clearly a rate and was not lawfully raised or levied: *Gerber v Member of the Executive Council for Development Planning and Local Government, Gauteng*.[9] The attempt, in argument, to justify it as a levy foundered on the fact that it was not, as required by s10G(7)*(a)*(ii) levied 'in respect of any function or service of the municipality'.

[9] *Gerber v Member of the Executive Council for Development Planning and Local Government, Gauteng* 2003 (2) SA 344 (SCA).

[33] On 26 May 2003, before the financial year end, the council resolved to levy a true rate of .2474 cents in the rand on the properties, plus interest on amounts not paid by 25 June 2003, and to set off against the rate whatever had been paid earlier in the year. In effect, then, amounts claimed pursuant to the sliding scale were recovered only provisionally. Adjustments, based on actual values, were made subsequently.

[34] The high court found that the initial 'levy' was a rate: it was based on land ownership and was not permitted by s 10G. The subsequent resolution to levy a rate on 26 May 2003 for that year was in effect an amendment of the earlier resolution, for which s 10G(7) did not provide. It was thus ultra vires. Moreover, no notice was given of the later resolution, nor was there any call for objections. There was therefore material non-compliance.

[35] The Municipality argued, however, that the valuations were done pursuant to the objections made to the sliding scale by farm owners. The second resolution was taken as a result of those objections. The only basis upon which the farm owners challenged the validity of that resolution was that it was ultra vires in terms of s 10G(7)(*b*)(ii). However, that section deals with amendment or withdrawal of levies and other charges, not rates. The farm owners cannot, on the one hand, argue that the levy was in truth a rate, and on the other hand complain, when it was replaced by a lawful rate, that it should have been amended as if it were a levy. That challenge must accordingly fail.

[36] I consider that the high court accordingly erred in concluding that the rates levied on 26 May 2003 were not validly imposed. The Municipality is entitled to recover the amounts owed in the 2002/2003 financial year and the cross appeal in respect of this order must be upheld.

<u>The 2004/2005 financial year: appeal by the farm owners</u>

[38] The high court found that the rates levied in terms of s 10G(7) of the Transition Act were lawfully imposed and that the requirements of publication

were met. The farm owners argued that the rates were payable before the expiry of the 14-day period for objections. Rates should be imposed prospectively, not retrospectively. The notice of the resolution was published in the *Cape Times* on 7 July 2004, and in *Die Burger* on 8 July. It set out the general rate in the rand, stated that rebates were applicable and that the rates were payable before 30 September 2004 or in monthly instalments. The notice also stated that a summary of the budget was available for inspection at the office of the municipal manager. The high court rejected the argument that ratepayers were faced with a *fait accompli*. The notice called for objections and it was thus clear that the resolution was subject to amendment. Any rates accounts sent out before the final decision was made in respect of the rates for the year would accordingly be provisional and susceptible to adjustment in the light of the final decision as to the rates that would be payable.

[39] I do not agree with the minority judgment in *Kungwini*[10] that the publication of a notice advising of a draft rates resolution, and calling for objections, amounts to a *fait accompli*. The resolution is obviously open to amendment – otherwise there would be no purpose in calling for objections.

[40] The high court also found that there was no merit in the argument that the notice was defective because it did not state (as it was required to do in terms of ss 21(4) and 21A of the Systems Act) that persons who could not read or write could request assistance from a staff member of the municipality. It could not have been the intention of the legislature that this feature of non-compliance rendered the whole rates process invalid. The high court invoked *Nkisimane*[11] in holding that substantial compliance was sufficient. In that case Trollip JA said that in determining whether exact compliance with a peremptory provision of a statute was necessary a court must construe the provision – 'ascertain the intention of the lawgiver' – by having regard to the 'language, scope and purpose of the enactment as a whole'. Compliance with a statutory provision might in some cases be desirable, but not necessary to give effect to the object of the statute. In my

[10] *Kungwini Local Municipality v Silver Lakes Home Owners Association* 2008 (6) SA 187 (SCA) para 31. The majority left open the question whether the levying of a rate before notice was given was permissible.
[11] Above, 433-434.

view, while a municipality should do all it can to ensure effective communication with its ratepayers, an administrative omission of this kind should not undermine the entire rates base on which its budget rests. That cannot have been intended by the legislature.

[41] The appeal against the order that the farm owners pay the rates imposed in this year must thus fail.

The 2005/2006 financial year: the farm owners' appeal

[42] In this year the provisions of ss 22 to 24 of the Finance Act were operative. On 5 May 2005 the Municipality published a notice in terms of s 22 of the Finance Act stating that the draft budget, as well as the draft reviewed integrated development plan, were open for inspection. Dates, times and places where these drafts would be discussed were also advertised. On 31 May 2005 the council met and resolved to approve the budget, including, of course, the rates. On 23 June 2006 a further notice was published setting out the rates and rebates for rural properties. The high court found that there had been compliance with the provisions of the Finance Act.

[43] The farm owners argued that the provisions of the Finance Act dealt not with the levying of rates and the procedures to be followed after the resolution had been adopted, but with the 'run-up' to the adoption of the budget. They submitted that s 10G(7), on the other hand, laid down the procedures to be followed after the adoption of the resolution. That section required an additional notice and comment procedure after the notice of the draft budget had been given, they argued, and this was still necessary. That cannot be so. The Finance Act did not impose any requirement other than the publication, in the prescribed manner, of the draft budget. Its provisions are in this respect quite different from those of s 10G(7), which they superseded.

[44] The notice complied with the provisions of ss 22 to 24 of the Finance Act. It stated that the draft budget was open for inspection and that written objections should be lodged with the municipal manager by 27 May 2005. Moreover, on 31 May 2005, the mayor described the public participation

process and noted the objections. As the Municipality adhered to the provisions of the Finance Act –and it was not suggested that it had not done so – the rates were lawfully determined and levied.

[45] The high court correctly found, thus, that the proper procedures were followed in imposing the rates in the 2005/2006 financial year. The appeal against the order that the farm owners pay the rates for this year must fail.

The 2006/2007 financial year: the Municipality's cross appeal

[46] The principal objection to the process of imposing rates in this and subsequent financial years was that s 14(2) of the Rates Act, in force from 2 July 2005, required promulgation of the rates resolution in the provincial gazette. Section 14(1) provides that a rate is levied by resolution passed by the municipal council. Section 14(2) states that the resolution must be promulgated, and s 14(3) requires that it be displayed in specified places and advertised in the media.

[47] The Municipality did not comply with the requirement of promulgation. Instead, it published a notice in the press on 13 April 2006 stating what the rates resolution provided, in broad terms, where it was to be found, and that objections could be made before 15 May 2006. (The notice also stated that persons who could not write could request assistance from the municipal staff, thus complying with s 21(4) of the Systems Act.) The notice was published in terms of s 22 of the Finance Act.

[48] The high court held that promulgation was necessary and that the Municipality, having failed to ensure promulgation in the provincial gazette, was not entitled to claim in respect of the rates in this year. I have already found that s10G was not repealed (save to the extent that it was incompatible with the provisions of the Finance Act) until July 2011 (s 89(3) of the Rates Act). It therefore continued to apply in this and subsequent years until 2 July 2011. That section, and not the Rates Act, was accordingly the source of the power to levy rates and it was therefore unnecessary for the Municipality to satisfy the requirements of the Rates Act in order to set a rate and levy it.

Promulgation was thus not necessary for the rates to have been validly imposed. The farm owners nonetheless argued that the notice had still to comply with the provisions of s 10G(7) of the Transition Act. In my view, for the reasons already discussed, it did not have to.

[49] One further objection made by the farm owners was that the notice stated that the executive mayor would consider the objections, not the council itself. Section 23 of the Finance Act provides that the council must consider submissions and if necessary revise the budget. But the mayor reported to the council and it took the final decision. There is no merit in the objection.

[50] The high court thus erred in finding that the rates were not validly imposed, and the appeal against this order must be upheld.

The 2007/2008 and 2008/2009 financial years: the Municipality's cross appeal

[51] The objections to the rating processes and the principles applicable to the 2006/2007 year are the same in these years as those in the previous one. Again, s 10G of the Transition Act (in so far as it conferred the power on the Municipality to levy rates) and the provisions of the Finance Act dealing with procedures applied. Notices were published under the Finance Act, the draft budget and rates resolutions were available for inspection and objections were called for. The council of the Municipality met representatives of the farmers to discuss the budgets and little or no objection was made to their substance. The council approved the respective budgets at its meetings. In my view, the Municipality complied with the provisions of the Finance Act and the rates were lawfully imposed.

[52] The farm owners' challenges to the imposition of rates in these years must also be rejected and the Municipality's appeal against the orders for these years upheld.

The Minister's application for leave to intervene or to be admitted as an amicus curiae

[53] The Minister for Local Government, Environmental Affairs and Development Planning, Western Cape applied for leave to intervene, or to advance submissions as an amicus curiae at the hearing of the appeal. The farm owners opposed the application. The Municipality did not. The court heard argument on the application, and has decided to grant leave to the Minister to act as an amicus curiae.

[54] The essence of the argument on the right to intervene was that the provincial government would, in the event of the Municipality not being financially sustainable because of the farm owners' refusal to pay the rates in the years in question, be required to fund the Municipality itself. That obligation arises from s 139(*b*) of the Constitution. The primary response of the farm owners was that the Municipality was not in financial difficulty. It sought to adduce evidence to this effect and the Minister responded with other evidence. The farm owners' response – to the effect that the Municipality was financially sound despite their refusal and failure to pay rates (on purely technical objections to the rating processes) – is cynical.

[55] The Minister argued also that should it be found that the rates had not been lawfully imposed (as to which he made no argument) then the court should grant an order in terms of s 172(1) of the Constitution on the basis that the Municipality's conduct was inconsistent with the Constitution, but that a just and equitable order should be imposed rather than declaring that the rates were not payable. That order might have had the consequence that the rates paid by other property owners in the jurisdiction of the Municipality, in the years under consideration, were repayable, or could be set off against future rates imposed.

[56] In view of the conclusions that I have reached, it is not necessary to consider the evidence sought to be adduced. And the consequence of this court's decision is that the provincial government will not be the funder of last resort. Should that not have been the case, however, it is my view that the Minister's submissions as to the kind of order that this court could have made

were in the public interest and of assistance to the court. Hence the decision to admit the Minister as an amicus.

The Municipality's schedule of debtors

[57] The Municipality attached to its notice of motion a schedule of debtors – the farm owners who had failed to pay rates over the years in question – reflecting the details of the owners, their municipal account numbers and the amounts they owed. In making its orders the high court gave the parties the opportunity to correct any errors in the schedule. The Municipality has attached a corrected schedule in respect of all the years in question to its heads of argument on appeal. That schedule is accepted as correct and the order that is made on appeal refers to it.

Costs

[58] The Municipality has had complete success in this appeal. There is no reason to deprive it of its costs either in this court or that of the high court where it should not have been non-suited in respect of several years.

Order

[59] 1 The appeal is dismissed with costs, including those of two counsel, to be paid by the appellants jointly and severally.

2 The cross appeal succeeds with costs, including those of two counsel. Those costs and the costs of the application for leave to cross appeal in the high court are to be paid by the appellants, jointly and severally.

3 The orders of the high court are set aside. The following orders are substituted:

'a The imposition of rates by the applicant on the respondents in the financial years from 2002/2003 to 2008/2009 was lawful.

b The respondents are ordered to make payment to the applicant of the amounts set out against their names, and corresponding municipal account numbers, on the schedule headed "Uitstaande Belastings", deposited with the Registrar of the Supreme Court of Appeal, together with interest *a tempore morae*, as provided in the applicant's credit control policy.

c The defendant or defendants in each action in the magistrates' courts are ordered to pay to the applicant the costs of the proceedings for recovery of the amounts owed by them in the magistrates' courts.

d The respondents are ordered, jointly and severally, to pay the applicant's costs including the costs of two counsel.'

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C H Lewis
Judge of Appeal

APPEARANCES:

For Appellant:	A M Breitenbach SC (with him M Schreuder), Instructed by Malan Lourens Lemmer Viljoen Inc, Cape Town, Webbers Attorneys, Bloemfontein.
For Respondent:	J C Heunis (with him EF van Huysteen), Instructed by De Klerk & van Gend, Cape Town, McIntyre and van der Post Attorneys, Bloemfontein.
For the Amicus Curiae :	G Budlender SC (with him M Bishop), Instructed by State Attorney CJ Benkenstein, Cape Town.