THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 648/2011

In the matter between:

SOUTH AFRICAN PROPERTY OWNERS ASSOCIATION **APPELLANT**

and

THE COUNCIL OF THE CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY **FIRST RESPONDENT**

EXECUTIVE MAYOR OF THE CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY **SECOND RESPONDENT**

THE CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY **THIRD RESPONDENT**

THE MEMBER OF THE EXECUTIVE COUNCIL FOR LOCAL GOVERNMENT FOR THE PROVINCE OF GAUTENG **FOURTH RESPONDENT**

THE MEMBER OF THE EXECUTIVE COUNCIL FOR FINANCE FOR THE PROVINCE OF GAUTENG **FIFTH RESPONDENT**

Neutral citation: ***South African Property Owners Association v The Council of the City of Johannesburg*** **(648/2011) [2012] ZASCA 157(8 November 2012)**

Coram: **NAVSA, LEWIS, SHONGWE, PETSE JJA AND SOUTHWOOD AJA**

Heard: **30 AUGUST 2012**
Delivered: **8 NOVEMBER 2012**

Summary: **Constitutional law – municipal budget and imposition of rates – imposition of rates part of budget process - constitutional review based on principle of legality – failure to consult with community - application of Local Government: Municipal Systems Act 32 of 2000, Local Government: Municipal Finance Management Act 56 of 2003 and Local Government: Municipal Property Rates Act 6 of 2004 - interpretation of section 19(1)(b) of Local Government: Municipal Property Rates Act 6 of 2004 – section 172 of the Constitution.**

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Moshidi J sitting as court of first instance):

1 The appeal is upheld with costs, such costs to include the costs of two counsel.

2 The order of the court below is set aside and substituted as follows:

'1 It is declared that the first, second and third respondents failed to comply with the prescribed statutory requirements and procedures in arriving at the decision on 21 May 2009 to impose a rate of R 0.0154 in the rand on the value of business, industrial and commercial properties.

2 It is declared that in the future the first respondent is obliged to comply with the provisions of the Local Government: Municipal Systems Act 32 of 2000, the Local Government: Municipal Finance Management Act 56 of 2003 and the Local Government: Municipal Property Rates Act 6 of 2004 when it materially amends a proposed budget after it has been tabled and advertised for public comment.

3 The first, second and third respondents are ordered to pay the costs of the application, such costs to include the costs of two counsel.'

JUDGMENT

SOUTHWOOD AJA (dissenting as to the order only)

[1] This appeal is concerned with the levying of property rates of 1,54 cents in the rand in terms of the Local Government: Municipal Property Rates Act 6 of 2004 (the Rates Act) on business, commercial and industrial properties (collectively referred to as business properties) by the Council of the City of Johannesburg Metropolitan Municipality (the Council) for the 2009/2010 fi-

nancial year. At the heart of the dispute is the Council's decision, on 21 May 2009, to increase the property rates on business properties by an additional 18% (after it had resolved, on 26 March 2009, to increase the rates generally by 10% and advertised these rates with the proposed budget for public comment) so that, instead of increasing from 1,2 cents in the rand to 1,32 cents in the rand, the rates increased from 1,2 to 1,54 cents in the rand.

[2] The appellant, the South African Property Owners Association (SAPOA), applied to the South Gauteng High Court, to review and set aside, alternatively, declare null and void, the City of Johannesburg Metropolitan Municipality's (the City) budget for 2009/2010, alternatively, the rate of 1,54 cents in the rand on business properties. SAPOA sought this relief on these grounds: firstly, that the levying of the rate contravened section 19(1)(*b*) of the Rates Act because the ratio of the rate levied on business properties (1,54 cents in the rand) to the rate levied on residential properties (0,44 cents in the rand) exceeded the ratio which is permissible under section 19(1)(*b*) of the Rates Act read with the regulations; secondly, that the levying of property rates is an integral part of the budget process in terms of the Rates Act, the Local Government: Municipal Finance Management Act 56 of 2003 (the Finance Act) and the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act) and the decision to increase the rates on business properties by an additional 18% required community participation which did not occur; and, thirdly, the rates imposed on business properties contravened the Rates Act because they unfairly discriminated against the owners of such properties.

[3] The court a quo found that the Council had not contravened section 19(1)(*b*) of the Rates Act; that the levying of property rates is not an integral part of the budget process; that there was no failure of community participation and that the rates imposed on business properties were not discriminatory. The court a quo also found that the grant of the relief sought by SAPOA was not in the public interest because it would probably bankrupt the City and, as a result, the City would not be able to perform its constitutional duties. Accordingly, the court a quo dismissed the application with costs.[1] SAPOA ap-

[1]The judgment is reported as *South African Property Owners Association v Johannesburg Metropolitan Municipality & others* 2012 (3) SA 335 (GSJ).

peals against that order with the leave of that court. At the hearing of the appeal, presumably because of the Department of Finance's view that no ratio between the rates on residential and business property had been prescribed, SAPOA's counsel abandoned reliance on the ground based on section 19(1)(*b*) of the Rates Act and the appeal proceeded on the other grounds. Nevertheless, as the interpretation of section 19(1)(*b*) is of fundamental importance in the levying of property rates it will be considered again in this judgment.

[4] Since there are no material disputes of fact it is clear that final relief may be granted.[2] The relevant events took place during a relatively short period from March to May 2009, the facts are well-documented and for the most part SAPOA's case is based on the City's documents. The facts will be considered later in this judgment.

[5] As the imposition of rates is not administrative action,[3] SAPOA did not seek to review and set aside the Council's budget or the decision to levy an additional 18% rate on business properties in terms of the Promotion of Administrative Justice Act 3 of 2000. Its case is based on the principle of legality in terms of which the Council's decision had to be taken in accordance with the law, failing which it was invalid to the extent that it was inconsistent with the law. In *Affordable Medicines Trust & others v Minister of Health & others*[4] the Constitutional Court summarised the legal position as follows:

'Our constitutional democracy is founded on, among other values, the "(s)upremacy of the Constitution and the rule of law." The very next provision of the Constitution dictates that the "Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid". And to give effect to the supremacy of the Constitution, courts "must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency". This commitment to the supremacy of the Constitution and the rule of law means that the exercise of all public power is now subject to constitutional control.

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[2] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634D-635C; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 26; *Thint (Pty) Ltd v National Director of Public Prosecutions & others; Zuma v National Director of Public Prosecutions & others* 2009 (1) SA 1 (CC) paras 8-10.

[3] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC) para 45.

[4] 2006 (3) SA 247 (CC) paras 48 and 49.

The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive "are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law". In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.'[5]

[6] With regard to the first issue, the appellant contends that the levying of rates constitutes an integral part of the budget process which required that there be community participation in the decision to increase the rates, which did not happen. This is disputed by the respondents. There are therefore two issues to be determined: first, whether the levying of rates constitutes an integral part of the budget process – which is primarily a legal issue - and second, if so, whether the respondents made allowance for community participation in terms of the relevant statutory provisions.

[7] Municipalities such as the City are part of the local sphere of government[6] and must provide services to communities in a sustainable manner and encourage the involvement of communities and community organisations in matters of local government.[7] The City is a category A Municipality: it has, in its area, exclusive municipal executive and legislative authority.[8] With regard to rates on property and surcharges on fees for services rendered, the relevant provisions of s 229 of the Constitution provide:

'(1) Subject to subsections (2) … a municipality may impose –

(a) rates on property and surcharges on fees for services provided by or on behalf of the municipality; and

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[5]See also *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* paras 56 and 58; *Pharmaceutical Manufacturers Association: In re Ex parte President of the Republic of South Africa & others* 2000 (2) SA 674 (CC) para 17 at 687D-E; *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 85; *Gerber & others v MEC for Development Planning and Local Government, Gauteng & another* 2003 (2) SA 344 (SCA) para 35.

[6] Section 151(1) of the Constitution.

[7] Section 152(1)(b) and (2) of the Constitution.

[8] Section 155(1)(a) of the Constitution.

(b) if authorised by national legislation, other taxes, levies and duties appropriate to local government or to the category of local government into which that municipality falls, but no municipality may impose income tax, value-added tax, general sales tax or customs duty.

(2) The power of a municipality to impose rates on property, surcharges on fees for services provided by or on behalf of the municipality, or other taxes, levies or duties –

…

(b) may be regulated by national legislation.'

[8] The relevant national legislation is the Systems Act, the Finance Act and the Rates Act. The three Acts must be read together as they form part of the suite of legislation that gives effect to the new system of local government.[9] It must also be noted that a fundamental aspect of the new local government system is the active engagement of communities in the affairs of municipalities in which they are an integral part, and, in particular, in planning, service delivery and performance management.[10] How this is achieved with regard to the preparation of the budget and levying of rates is dealt with in the following paragraphs.

[9] While the Systems Act provides that a municipality is an organ of state with a separate legal personality,[11] and that the Council has the right to govern the local government affairs of the local community[12] and the right to exercise the municipality's executive and legislative authority, and to do so without improper interference, it also provides that members of the local community have the right 'through mechanisms and in accordance with processes and procedures provided for in terms of this Act or other applicable legislation to contribute to the decision-making processes of the municipality'.[13] Chapter 4 of the Systems Act provides in detail for community participation and em-

[9] See preamble to the Systems Act.
[10] See preamble to the Systems Act.
[11] Section 2 of the Systems Act.
[12] Section 4 of the Systems Act.
[13] Section 5(1)(*a*)(i) of the Systems Act.

phasises the necessity for the community to be apprised effectively of all matters requiring its participation. It is significant that the Act pertinently makes provision for the local community to participate in the preparation of the budget. The relevant provisions read as follows:

'16(1) A municipality must develop a culture of municipal governance that complements formal representative government with a system of participatory governance, and must for this purpose –

(a) encourage, and create conditions for, the local community to participate in the affairs of the municipality, including in –

….

(iv) the preparation of its budget;

….

(b) contribute to building the capacity of –

(i) the local community to enable it to participate in the affairs of the municipality; and

….

(2) Subsection (1) must not be interpreted as permitting interference with a municipal council's right to govern and to exercise the executive and legislative authority of the municipality.

17(1) Participation by the local community in the affairs of the municipality must take place through –

(a) political structures for participation in terms of the Municipal Structures Act;

(b) the mechanisms, processes and procedures for participation in municipal government established in terms of this Act;

(c) other appropriate mechanisms, processes and procedures established by the municipality;

(d) councillors; and

(e) generally applying the provisions for participation as provided for in this Act.

(2) A municipality must establish appropriate mechanisms, processes and procedures to enable the local community to participate in the affairs of the municipality, and must for this purpose provide for –

. . .

(b) notification and public comment procedures, when appropriate;

(c) public meetings and hearings by the municipal council and other political structures and political office bearers of the municipality, when

appropriate

. . .

18(1) A municipality must communicate to its community information concerning –

(a) the available mechanisms, processes and procedures to encourage and facilitate community participation;

(b) the matters with regard to which community participation is encouraged;

(c) the rights and duties of members of the local community;

. . . .

19 The municipal manager of a municipality must give notice to the public, in a manner determined by the municipal council of the time, date and venue of every –

(a) ordinary meeting of the council; and

(b) special or urgent meeting of the council, except when time constraints make this impossible.

20(1) Meetings of a municipal council and those of its committees are open to the public, including the media, and the council or such committee may not exclude the public, including the media, from a meeting, except when –

(a) it is reasonable to do so having regard to the nature of the business being transacted; and

(b) a by-law or a resolution of the council specifying the circumstances in which the council or such committee may close a meeting and which complies with paragraph (a), authorises the council or such committee to close the meeting to the public.

(2) A municipal council, or a committee of the council, may not exclude the public, including the media, when considering or voting on any of the following matters:

. . . .

(b) a budget tabled in the council;

. . . .

21(1) When anything must be notified by a municipality through the media to the local community in terms of this Act or any other applicable legislation, it must be done –

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

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

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

. . . .

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

. . .

21A(1) All documents that must be made public by a municipality in terms of a requirement of this Act, the Municipal Finance Management Act or other applicable legislation, must be conveyed to the local community –

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

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

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

. . . .

21B(1) Each municipality must –

(a) establish its own official website if the municipality decides that it is affordable; and

(b) place on that official website information required to be made public in terms of this Act and the Municipal Finance Management Act.

. . . .

(3) The municipal manager must maintain and regularly update the municipality's official website, if in existence, or provide the relevant information as required by subsection (2).

22(1) The Minister may in terms of section 120 make regulations or issue guidelines concerning –

(a) minimum standards for municipalities, including minimum standards relating to funding, when implementing the provisions of this Chapter; and

(b) any matter that may facilitate –

(i) the participation of the local community in the affairs of the municipality; or

(ii) the application of this Chapter.'

[10] In terms of the Finance Act the financial (or budget) year of municipalities commences on 1 July of each year and ends on 30 June the following year. The Finance Act provides that –

(1) A municipality may incur expenditure only in terms of an approved budget and within the limits of the amounts approved for the different votes in an approved budget;[14]

(2) The council of a municipality must for each financial year approve an annual budget for the municipality before the start of the financial year (1 July);[15]

(3) The mayor of the municipality must table the annual budget at a council meeting at least 90 days before the start of the budget year (on or before the first day of April);[16]

(4) The annual budget must be a schedule in the prescribed format –

(a) setting out realistically anticipated revenue for the budget year from each revenue source;

(b) appropriating expenditure for the budget year under the different votes of the municipality;

(c) setting out indicative revenue per revenue source and projected expenditure by vote for the two financial years following the budget year;

(d) setting out –

(i) estimated revenue and expenditure by vote for the current year; and

(ii) actual revenue and expenditure by vote for the financial year preceding the current year, and

(e) a statement containing any other information required by section 215(3) of the Constitution or as may be prescribed.[17]

(5) When an annual budget is tabled in terms of s 16(2), it must be accompanied by the following documents:

(a) draft resolutions –

(i) approving the budget of the municipality;

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[14] Section 15 of the Finance Act.
[15] Section 16(1) of the Finance Act.
[16] Section 16(2) of the Finance Act.
[17] Section 17(1) of the Finance Act.

(ii) imposing any municipal tax and setting any municipal tariffs as may be required for the budget year; and

(b) measurable performance objectives for revenue from each source and for each vote in the budget, taking into account the municipality's integrated development plan;

(c) a projection of cash flow for the budget year by revenue source, broken down per month;[18]

(6) An annual budget may only be funded from –

(a) realistically anticipated revenues to be collected;

(b) cash-backed accumulated funds from previous years' surpluses not committed for other purposes;

and revenue projections in the budget must be realistic, taking into account –

(a) projected revenue for the current year based on collection levels to date; and

(b) actual revenue collected in previous financial years.[19]

(7) The mayor of a municipality must –

(a) co-ordinate the processes for preparing the annual budget and for reviewing the municipality's integrated development plan and budget-related policies to ensure that the tabled budget and any revisions of the integrated development plan and budget-related policies are mutually consistent and credible;

(b) at least 10 months before the start of the budget year (not later than 31 August), table in the municipal council a time schedule outlining key deadlines for –

(i) the preparation, tabling and approval of the annual budget; and

(iv) any consultative processes forming part of the processes referred to in subparagraphs (i), (ii) and (iii).[20]

(8) Immediately after the annual budget is tabled in the municipal council, the accounting officer of the municipality must –

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

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[18] Section 17(3)(*a*),(*b*) and (*c*) of the Finance Act.
[19] Section 18 of the Finance Act.
[20] Section 21(1) of the Finance Act.

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

(ii) invite the local community to submit representations in connection with the budget;[21] and

(9) When the annual budget has been tabled the Council must consider any views of –

(a) the local community; and

(b) the National Treasury, the relevant provincial treasury and any provincial or national organs of state or municipalities which made submissions on the budget.[22]

(10) After considering all budget submissions, the council must give the mayor an opportunity –

(a) to respond to the submissions; and

(b) if necessary, to revise the budget and table amendments for consideration by the council.[23]

(11) An annual budget –

(a) must be considered for approval by the municipal council at least 30 days before the start of the budget year (not later than 31 May);

(a) must be approved before the start of the budget year (not later than 30 June);

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

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

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

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

(iii) approving measurable performance objectives for revenue from each source and for each vote in the budget.[24]

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[21] Section 22(*a*) of the Finance Act.
[22] Section 23(1) of the Finance Act.
[23] Section 23(2) of the Finance Act.
[24] Section 24(1) and (2)(*a*),(*b*) and (*c*) of the Finance Act.

[11] The Rates Act states clearly that its object is to regulate the power of a municipality to impose rates on property. The preamble confirms: (1) that there is a need to provide local government with access to a 'sufficient and buoyant source of revenue necessary to fulfil its developmental responsibilities'; (2) that income from property rates is a critical source of revenue for municipalities to achieve their constitutional objectives; and (3) that it is essential that municipalities exercise their power to impose rates within a statutory framework that not only enhances certainty, uniformity and simplicity across the nation but also takes into account historical imbalances and the rates burden on the poor.

[12] The relevant provisions of the Rates Act, which commenced on 2 July 2005, stipulate that –

(1) a metropolitan or local municipality may levy a rate on property in its area and must do this subject to –

(a) s 229 and any other applicable provisions of the Constitution;

(b) the provisions of the Rates Act; and

(c) the rates policy it must adopt in terms of s 3.[25]

(2) the council of a municipality must adopt a rates policy consistent with the Rates Act for the levying of rates on rateable property which must –

(a) treat persons liable for rates equitably;

(b) determine the criteria to be applied by the municipality if it –

(i) levies different rates for different categories of properties;

(ii) increases rates;

(c) determine or provide criteria for the determination of –

(i) categories of properties for the purpose of levying different rates as contemplated in paragraph (b)(i);[26]

(3) before a municipality adopts its rates policy it must follow, amongst other things, a process of community participation in accordance with Chapter 4 of the Systems Act which accords with the notice and comment requirements prescribed in s 4(2) of the Rates Act;[27]

[25] Section 2(1) and (3) of the Rates Act.
[26] Section 3(1) and (3) of the Rates Act.
[27] Section 4(1) and (2) of the Rates Act.

(4) a municipality must adopt by-laws to give effect to the implementation of its rates policy and these by-laws may differentiate between different categories of properties and different categories of owners of properties liable for payment of rates;[28]

(5) a municipality may, subject to s 19, in terms of the criteria set out in its rates policy, levy different rates for different categories of rateable property which may include categories determined according to the –

(a) use of the property;

(b) permitted use of the property;

(c) geographical area in which the property is situated;[29]

(6) a municipality may determine categories of rateable property which include –

(a) residential properties;

(b) industrial properties;

(c) business and commercial properties.[30]

(7) a municipality must levy, as a rate on property, an amount in the rand applied to the market value of the property[31] which value is determined in accordance with generally recognised valuation practices, methods and standards and the provisions of the Rates Act.[32] Generally, the market value of the property is the amount the property would have realised if sold on the date of valuation in the open market by a willing seller to a willing buyer;[33]

(8) a municipality must levy a rate for each financial year as the rate lapses at the end of the financial year for which it was levied;[34]

(9) the levying of rates must form part of the municipality's annual budget process as set out in Chapter 4 of the Finance Act and a municipality must, annually, at the time of its budget process review the amount in the Rand of its current rates in line with its annual budget for the next financial year;[35]

(10) a rate becomes payable as from the start of the financial year or, if the municipality's annual budget is not approved by the start of the financial year, as from such later date, when the municipality's annual budget, including a

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[28] Section 6(1) and (2) of the Rates Act.
[29] Section 8(1) of the Rates Act.
[30] Section 8(2) of the Rates Act.
[31] Section 11 of the Rates Act.
[32] Section 45(1) of the Rates Act.
[33] Section 46(1) of the Rates Act.
[34] Section 12(1) of the Rates Act.
[35] Section 12(2) of the Rates Act.

resolution levying rates, is approved by the provincial executive in terms of s 26 of the Finance Act;[36]

(11) a rate is levied by a resolution passed by the municipal council with a supporting vote of a majority of its members after which the resolution must be promulgated in the Provincial Gazette and made known to the public in the prescribed manner;[37]

(12) a municipality may not levy –

(a) different rates on residential properties, except as provided for in ss 11(2), 21 and 89;

(b) a rate on a category of non-residential properties that exceeds a prescribed ratio to the rate on residential properties determined in terms of s 11(1)(a): Provided that different ratios may be set in respect of different categories of non-residential properties;

(c) rates which unreasonably discriminate between categories of non-residential properties; or

(d) additional rates except as provided for in s 22

and the ratio referred to in paragraph (b) may only be prescribed with the concurrence of the Minister of Finance.[38] (Section 19(1)(b) provided the basis for the appellant's principal contention regarding illegality);

(13) a municipality intending to levy a rate on property must, in accordance with the Rates Act, cause a general valuation to be made of all rateable properties and all properties valued must be included in a valuation roll;[39]

(14) valuations of properties on the valuation roll are subject to objection, review and appeal;[40]

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[36] Section 13 of the Rates Act. Section 26 (1) of the Finance Act provides:
'(1) If by the start of the budget year a municipal council has not approved an annual budget or any revenue-raising measures necessary to give effect to the budget, the provincial executive of the relevant province must intervene in the municipality in terms of section 139(4) of the Constitution by taking any appropriate steps to ensure that the budget or those revenue-raising measures are approved, including dissolving the council and –

(a) appointing an administrator until a newly appointed council has been declared elected; and

(b) approving a temporary budget or revenue-raising measures to provide for the continued functioning of the municipality.'

[37] Section 14 of the Rates Act.
[38] Section 19 of the Rates Act.
[39] Section 30 of the Rates Act.
[40] Sections 50, 51, 52 and 54 of the Rates Act.

(15) adjustments made to the valuations must be reflected in the valuation roll or the supplementary valuation roll;[41]

(16) if an adjustment in the valuation of a property affects the amount due for rates payable on that property, the municipal manager must calculate the amount actually paid on the property since the effective date and the amount which should have been paid since that date and recover from or repay to the person liable for payment of the rate the difference determined together with interest at the prescribed rate.[42]

[13] The Council adopted a property rates policy, which came into effect with the first valuation roll on 1 July 2008. It states that it is designed to ensure equitable treatment by the Council of property owners and records that the income from rates must be used to finance in full, or in part, the annual operating expenditure of the Council in the annual operating budget. One of the key objectives of the policy is to set out the criteria to be applied by the Council if it increases rates and levies differentiating between categories of property. Another key objective is to ensure that all persons liable for rates are treated equitably as required by the Act.

[14] As provided in the Rates Act, the policy determines categories of property for levying of differential rates. These include residential property, business property, commercial property and industrial property. The policy provides in Item 6 for the determination of rates during the budget process and purports to set out the criteria to be applied by the municipality if it increases rates and the criteria to be taken into account in determining whether a differential rate should be applied. Item 6 reads as follows:

'Annual operating budget

(6.1) The Council must consider the levying of rates annually during the budget process.

(2) Rate increases must be used to finance the increase in operating costs of municipal services and facilities.

[41] Sections 55, 77, 78 and 79 of the Rates Act.
[42] Section 55(2) of the Rates Act.

(3) In determining the level of increases in the rates the criteria to be applied may include the following:

(a) The inflation rate as indicated by the consumer price index excluding mortgage bonds;
(b) the financing of increased operating expenditure in the budget of the Council;
(c) the financing of additional maintenance expenditure included in the operating budget of the Council;
(d) the financing of additional depreciation charges included in the operating budget of the Council;
(e) the additional cost of servicing debt included in the operating budget of the Council;
(f) the augmentation of any revenue shortfall;
(g) the financing from the annual operating budget of expenditure related to anything the Council is lawfully empowered to do for which provision has to be made in the budget;
(h) take into consideration the medium term budget growth factors as determined by National Treasury.

(4) (a) In terms of section 8 of the Act differential rates may be levied according to the permitted use or actual use where applicable, of the property concerned.

(b) The criteria to be taken into account in determining whether a differential rate should be applied are the criteria specified in sub-item (3) and –

(i) the need to promote economic development;
(ii) any administrative advantages in applying a differential rate; and
(iii) the need to alleviate the rates burden on the owners of any particular category of property specified in item 7.

(5) Rates are levied in accordance with the Act as an amount in the Rand based on the market value of all rateable property as reflected in the valuation roll and any supplementary valuation roll, as contemplated in Chapters 6 and 8, respectively, of the Act.'

(It may be observed that Items 6(3) and (4) confer on the Council the discretion to include the matters listed in determining the level of increases.
This is contrary to section 3(3) of the Rates Act which provides that the rates policy must determine the criteria to be applied by the municipality if it increases rates.)

[15] To briefly summarise the statutory position with regard to the approval of a municipal budget and the imposition of rates on property and the community's right to participate in these matters:

(1) The council of a municipality has the right to govern the affairs of the municipality and exercise the municipality's executive and legislative authority without improper interference. However, these rights are subject to the rights of members of the local community to contribute to the decision-making process of the municipality through mechanisms and procedures prescribed in the Systems Act and other applicable legislation;

(2) A municipality must encourage and create conditions for the local community to participate in the affairs of the municipality, including the preparation of the budget. Accordingly, a municipality must for this purpose provide for appropriate notification and public comment procedures. Notification to the local community with regard to the budget and the imposition of rates must be done as prescribed by sections 21, 21A and 21B of the Systems Act;

(3) The public is entitled to attend meetings of a council and its committees when a budget is tabled and approved and a resolution for the imposition of rates is adopted;

(4) Every municipality must have a budget and impose rates for each financial year which starts on 1 July and ends on 30 June the following year. A budget must be in the prescribed format setting out the prescribed information including realistically anticipated revenue for the financial year from each revenue source. When the budget is tabled it must be accompanied by a number of prescribed documents including draft resolutions approving the budget and imposing rates and municipal tariffs;

(5) The levying of rates must be considered together with the budget as the levying of rates is part of the budget process. A council levies rates by passing a resolution imposing the rates. The resolution must be promulgated and made known to the public in the prescribed manner;

(6) The approved budget and the rates imposed remain in force for one financial year: from 1July to 30 June the following year;

(7) Not later than 31 August in the year before the start of the financial year, the mayor must table in the council a time schedule for the preparation, tabling and approval of the budget and any consultation processes;

(8) The mayor must co-ordinate the processes for preparing the budget;

(9) Not later than 31 March before the start of the financial year, the mayor must table the budget in the council;

(10) Immediately after the budget is tabled in the council, the municipal accounting officer must, in accordance with chapter 4 of the Systems Act, make public the budget and accompanying documents (including the draft resolution to impose the rates) and invite the community to submit representations in connection with the budget;

(11) After the budget has been tabled the council must consider any views of the local community and, after considering all submissions, must give the mayor an opportunity to respond to the submissions and, if necessary, revise the budget and table amendments for consideration by the council;

(12) Not later than 31 May before the start of the financial year, the council must consider the budget for approval;

(13) Not later than 30 June before the start of the financial year, the council must approve the budget;

(14) If the budget is not approved before the start of the financial year, the provincial executive of the relevant province must intervene in terms of s 26 of the Finance Act (read with s 139(4) of the Constitution) to ensure that the budget is approved. The provincial executive may take any appropriate steps, including dissolving the council and appointing an administrator.

[16] The City's budget for 2009/2010 was prepared and approved in accordance with a timetable which provided for the following key events:

> 25 September 2008 - Issuing of budget and tariffs guidelines
>
> 7 November 2008 - Submission of draft tariffs, budgets and business plan templates to budget office
>
> 24 November to 3 December 2008 - Budget panel meetings
>
> 16 March 2009 - Submission of final draft tariffs, budgets and business plans to the Budget Office
>
> 16 March 2009 - Tabling of draft budget, tariffs and IDP reports to Special Mayoral Committee
>
> 26 March 2009 - Tabling of draft budget, tariffs and IDP at Council
>
> April 2009 - Public participation on the tabled budget, tariffs and IDP-objection period 30 days
>
> 7 May 2009 - Approval of final IDP and Budget by Special Mayoral Committee, including public participation report
>
> 20-21 May 2009 - Council approval of final Budget and IDP and Budget day.

[17] No allowance was made for the mayor to table any amendment of the budget or for any further public participation. The timetable assumes that every step will be completed properly in accordance with the timetable.

[18] The preparation and approval of the budget (including the increases in the rates referred to) took place against the background of 22 448 objections to the valuations of the properties on the valuation roll. The new valuation roll had come into effect on 1 July 2008 and the objection process, which commenced in May 2008, was completed in March 2009. The objections were considered and decided between 28 May 2008 and 15 March 2009 and on 16 March 2009 the City's Finance Department knew that as a result of the objections the total value of rateable properties had already been reduced by R34.4 billion and that this must result in a substantial reduction in the revenue from rates, the City's most important source of revenue. The City's Finance Department comprises the following Directorates: Budget Office, Rates and Taxes, Treasury, Valuations, Expenditure and Financial Strategy and Development. The Directorates of Rates and Taxes and Valuations were involved in

the processing of objections to the valuations of properties on the valuation roll and the effect this would have on rates revenue. By 16 March 2009 the Valuations Directorate had prepared a summary of the objections received, objections upheld and consequent reduction in the value of the valuation roll. Pursuant to each successful objection the Valuations Directorate prepares a voucher, which it sends to the Rates and Taxes Directorate, which amends the relevant records. By 2 March 2009, both Directorates knew that the Rates and Taxes Directorate had processed only half of the vouchers.

[19] On 16 March 2009, the mayoral Finance and Economic Development Committee considered and approved the property rates tariff and the rebates for 2009/2010. The differential rating of different categories of property was also considered and it was noted that residential rates would be used as the base rate and the other rates determined in relation to the residential tariff. The committee proposed an increase of 10% in the rates in respect of all categories of property which meant that business property and residential property would be rated in the ratio 3:1: that is, 1,32 cents in the rand on business property and 0,44 cents in the rand on residential property. Despite the effect of the valuation objections (which the Committee was clearly aware of because it referred to 21 021 formal objections and the effect these had on the value of the rateable properties) it was noted that an overall increase of 10% would yield the budgeted income. Accordingly, the Committee recommended that if no objections were received, the amended assessment rates should be published in the Provincial Gazette to be effective from 1 July 2009.

[20] On 26 March 2009 the mayor tabled the budget for 2009/2010 in which a 10% increase in the rates and tariffs for all categories of property was proposed. Once again, there was no suggestion of a revenue shortfall that might result from the large number of successful objections to the property valuations. The respondents have not attempted to explain this omission or the failure to allow for the reduced rates revenue. The respondents' deponent merely says, somewhat disingenuously, that, at the committee meeting on 16 March 2009 and the Council meeting on 26 March 2009, the 'full extent' of the successful objections was not yet known. (Clearly the effect of the successful objections was). The Council approved the proposed budget (with the 10%

increase in rates) for public participation. The effect of the approval was that rates for business properties would be increased from 1,20 cents in the rand to 1,32 cents in the rand whilst residential property rates (the base rate) would increase from 0,4 cents in the rand to 0,44 cents in the rand. The Council also resolved that the accounting officer be directed to publish and make available to the public the tabled budget and accompanying documents, with an invitation to the public to submit objections or representations and, in the event of no comments being received, the proposed property rates be published in the Provincial Gazette to take effect from 1 July 2009.

[21] After the Council meeting, the tabled budget (together with the proposed increases in the property rates) was published in the local media accompanied by an invitation to the local community that it become involved and submit comments on the proposed budget and the proposed increase in property rates. The local community had an opportunity until 30 April 2009 to make representations to the respondents regarding the proposed 10% increase in property rates and tariffs.

[22] On 9 April 2009, during the public participation period, Ms Erika Naudé, the Director of Rates and Taxes, analysed the effect on the rates revenue of the successful objections to the property valuations and prepared a discussion document setting out her conclusions. She pointed out that, although the Council had intended to increase property rates in line with inflation, the funding requirements of the City required that a predetermined
revenue be raised to enable the City to perform its operational activities; that the reduced revenue (as a result of the objections) would result in a shortfall of R336,39 million in the rates revenue of the proposed 2009/2010 budget and that an increase of 20% in all property rates would be required to make up the shortfall. She considered possible solutions -

‘3.1 <u>Adjusting the tariff</u>

Although the proposed tariff increase is currently 10%, it is clear that such an increase will be detrimental to the budget for 2009/2010. In order to accommodate the shortfall a 20% increase is required. This can be argued as an input from the City due to the change in the rates base.

The tariffs are currently open for public comment. If such a change is proposed at Council, without public consultation, it could be considered in contravention of the MFMA [the Finance Act] and Systems Act requirements. In addition, it is considered that such a huge additional increase may not be politically acceptable. It should also be considered that such an increase, in addition to the increases on services could burden the rate-payer to the extent that it is not affordable, possibly leading to a rates boycott, increased loss of property and thus degradation of the built environment.

3.2 Amending ratios between categories

From the impacts of the shift in the rates base, it is clear that the business categories are those that benefit most from the resultant changes. It can thus be considered that the business ratio be increased to 1:4. This must yield some relief although it may not cancel out the full impact. In essence this will have the effect that the increase for the business category is higher than the increases of other categories.

Again, the issue relates to the legal process as the ratios form part of the tariff proposal that is currently subject to public participation. The same arguments apply as for the tariff increases. The ratios and therefore the subsequent tariffs are contained in the tariff report and if a legal means can be established to make amendments to the tariffs at this stage, this could be implemented without amendments to the rates policy.

However, this is a more organised sector that could be engaged in various platforms. It should also be considered that this may be a politically more acceptable method as these businesses also have means to claim these costs from company tax. It does not affect the domestic income of residents, although certain businesses have claimed that the current increases already caused small businesses to close down. This would have a detrimental impact on the economic growth of the City, especially in the small enterprise category.

The principle is also not acceptable in terms of the guidelines of National Treasury, where the intention is to move towards a 1:1 ratio.

If the current ratio of 1:3 for business is to increase to 1:3,5, it would result in a 28% increase on the business tariff as opposed to the 10% on other categories. . . . This potential additional increase on the business category may have a result of an increased rates revenue of R274 669 800.'

She concluded by stating that business should be consulted urgently so that its views could be obtained before the budget was presented to the Council (obviously, for approval).

[23] Despite these clear warnings about the impact of the objections on the rates revenue and the necessity for consulting urgently with business organisations, the respondents do not seem to have taken any steps to do so. They have not attempted to explain this failure.

[24] Ms Naudé distributed her discussion document to, amongst others, Ms Ntshabiseng Mokete, the Director of the Budget Office (the respondents do not say when) and Ms Mokete prepared a further report which highlights the revenue shortfall. (The report is not dated and the respondents do not say when she did this). In her report Ms Mokete emphasised the importance of revenue from property rates ('the most rateable revenue source'); referred to the projected revenue shortfall of R336 million and said this was expected to increase by a further R419 million. She said that this shortfall could not be established at the time of tabling the budget because 'the valuation objections period was still under way'. However, she contradicted herself by saying that all valuation objections were concluded during the first week of March 2009 and the necessary adjustments made to the system. She also adopted Ms Naudé's suggestion of amending the ratios between categories of property and increasing the ratio of rates on residential to business properties from 1:3 to 1:3,5 which would lead to an increase of 28% in the business property rates (with a consequent increase in revenue from the rates on business properties of R274,669 million). With regard to the process of changing the tariff further she observed:

'The tariffs are currently open for public comment. If such a change is proposed at Council, without public consultation, it could be considered in contravention of the MFMA and Systems Act requirements.

Normal legal process

- A new report could be written to Mayoral Committee and Council explaining the proposal of the amendments to the business tariff and its impact on the budget. After the Rates report has been approved by Council, a notice will have to be issued informing the public that the Rates report has to be amended again and is now open for public comments and submission. The residents and all other stakeholders would be given 30 days to comment.

- Final report will be written to Mayoral and Council detailing the comments and how the City has responded. The reports will also seek the approval of the new proposed increase and the amendment of the budget to accommodate the new increase.

- Mayoral Committee members would need to be sensitized on this matter before the report can be signed and submitted to committees. (The process followed here will be flawless it will be as per MFMA and Systems Act).'

She recommended that the property rates tariff be amended: that the current ratio of residential rates to business rates of 1:3 be increased to 1:3,5 which would result in a 28% increase in the business tariff as opposed to 10% on other categories.

[25] On 29 April 2009 the City's Finance Department sent emails to various business organisations inviting them to attend a meeting on 4 May 2009 to 'discuss the proposed property rates/tariff for the business category for the 2009/10 financial year.' However, the emails did not spell out the precise reason for the meeting (to discuss the imposition of an additional increase of 18% in the rate on business properties). They merely said: 'These proposals are not necessarily the same as the draft tariffs published for public comment'. They also did not attach copies of either Ms Naudé's discussion document or Ms Mokete's report. There is no record to indicate that the meeting took place.

[26] On 5 May 2009, Ms L Sonqishe, the Acting Director, Finance, issued a memorandum (prepared by Mr Irvine Florence) explaining the increase in the business property rates entitled 'Alignment of Commercial and Residential Property Rating'. This was to be circulated for comment. The memorandum commenced by saying that it had become necessary to review the alignment

of the commercial and residential property rating structures ‘so as to remain in line with the following key principle embodied in the implementation of the Municipal Property Rates Act, namely the retention of the rates contribution over the various sectors of the economy to the municipal tax base.’ This is the first time that any official in the City’s finance department had referred to this ‘key principle’ and it was used to justify the further increase in business property rates. The memorandum pointed out that, as a result of the objections to the property valuations, the total value of rateable property had decreased by R88 billion which would result in a revenue loss of approximately R603 million.

[27] On 5 and 6 May 2009 finance department officials held meetings with representatives of the Johannesburg Business Forum and the Johannesburg Inner-City Business Coalition – because the city regards the two organisations as representative of the business community - and explained the City’s dilemma and the proposed additional rate on business properties. Because of the misleading invitation to the meeting SAPOA’s representative did not think it was necessary to attend the meeting. The representatives of the two organisations did not accept the proposed additional rate on business property and asked for further particulars about the proposal. At the 6 May 2009 meeting, Ms Sonqishe’s memorandum of 5 May 2009, ‘Alignment of Commercial and Residential Property Rating’, was distributed to those present and on 6 May 2009 the City’s finance department emailed the memorandum to all Johannesburg Business Forum members. The finance department did not send a copy of the memorandum to SAPOA, which fortuitously received a copy from the Johannesburg Chamber of Commerce.

[28] On 6 May 2009 the Finance and Economic Development Committee, apparently in ignorance of the proposed further 18% increase in rates on business properties, confirmed the proposed 10% increase in the rates on all categories of property.

[29] On 8 and 9 May 2009, the Sonqishe proposal to realign the rates on business and residential properties was advertised for comment in a number of Johannesburg newspapers. The deadline for the submission of comment

was 11 May 2009 but in SAPOA's case it was 15 May 2009. SAPOA's request for three more days to enable it to consult with its members was refused (clearly because the respondents wanted to meet their own deadlines). The Mayoral Finance and Economic Development Committee 'Public Participation Report' for the Council meeting to be held on 21 May 2009 records that neither the Johannesburg Business Forum nor the Johannesburg Inner-City Business Coalition accepted the realignment proposal. Both organisations complained about the limited time allowed for responding to the proposal. The Business Forum said: 'The meeting was short notice and the issues discussed here require some analysis therefore proposed that they be given more time to consult their stakeholders before providing final comment'. The Inner-City Business Coalition said: 'Consultation process. The time allowed to interact with the City regarding the proposed tariffs was not sufficient. The process was not inclusive of all parties. The disparity between the proposed rate in the rand applied to residential properties (0,004) and business properties (0,012) could not be discussed or clarified'. Both organisations pointed out that the process of proposing new rates and taxes before the actual 2009 Property Valuation Roll had been finalised was flawed and the Inner-City Business Coalition contended that the rates increase on business properties was unacceptably high when compared to the increase on residential properties. It also expressed concern about the figures used and the calculations made by the respondents.

[30] The Finance and Economic Development Committee adopted the reasoning of the Sonqishe memorandum (that is, that 'it was necessary to review the alignment of the commercial and residential property rating structures so as to remain in line with the 'key principle' embodied in the implementation of the Municipal Property Rates Act, namely the retention of the rates contribution over the various sectors of the economy to the municipal tax base') and recommended to the Council that the rates on business properties be increased from 1,2 cents in the rand to 1,54 cents in the rand.

[31] On 21 May 2009 the Council approved and adopted the annual operating budget together with the amended property rates for business properties, thus incorporating the 28% increase (from 01,20 to 01,54 cents in the rand).

[32] Apart from the fact that the respondents clearly and unambiguously admitted in their answering affidavit that the levying of rates is an integral part of a municipality's annual budget process,[43] the relevant provisions of the Acts and the rates policy referred to in this judgment clearly provide that this is so. The Finance Act provides in Chapter 4 that a municipality must for each financial year approve an annual budget (s 16(1)); that the annual budget must set out realistically anticipated revenue from each revenue source (obviously including rates) (s 17(1)(*a*)); and that when an annual budget is tabled it must be accompanied, *inter alia*, by draft resolutions approving the budget and imposing any municipal tax (that is, rates) and setting any municipal tariffs (s 17(3)). The Rates Act provides that the levying of rates must form part of the municipality's annual budget process set out in Chapter 4 of the Finance Act and that a municipality must at the time of its budget process review the amount in the rand of its current rates in line with its budget for the next financial year (s 12(2)). A rate is levied by a municipality by resolution passed by the Council with a supporting vote of a majority of its members (s 14(1)). The rates policy provides that the Council must approve an annual operating budget prior to the commencement of each financial year and that the income from rates must be used to finance, in full or in part, the annual operating expenditure of the Council as reflected in such budget (Item 3 (3)). The rates policy further provides that the Council must consider the levying of rates annually during the budget process (Item 6 (1)). Furthermore, logic dictates that the approval of the budget must go hand in hand with the determination of the rates, as the revenue from rates is essential to fund the budgeted expenditure. The court *a quo* therefore wrongly concluded that the levying of rates is not an integral part of the budget process.

[33] The next question is whether the respondents complied with their obligations to allow for community participation in the approval of the budget. It is clear that this question relates only to the further increase in the rates to be levied on business properties as the respondents seem to have complied with

[43] SAPOA alleged and the respondents pertinently admitted: 'The determination and levying of rates form an integral part of a municipality's annual budget process and the amount in the rand payable must be considered and if necessary be reviewed annually in order for same to be in line with the requirements and demands of the annual budget for the next financial year.

their statutory obligations up to the time that they finally appreciated that the large number of objections to the property valuations would have a profound effect on the City's revenue from rates. This seems to have been sometime between 16 March and 9 April 2009.

[34] The respondents do not dispute SAPOA's allegations that, after the public participation process had been concluded, the respondents saw fit to introduce fundamental, far-reaching and inappropriate changes to the proposed budget without adequate public participation; that they did so without following the prescribed process, and without properly advising, consulting and considering the views of the local community; that the appellant, because of its role and function as a community organisation, *par excellence*, was entitled to be notified timeously and be provided with all relevant information regarding the budget and that the appellant was entitled to be provided with a reasonable opportunity to respond to these far-reaching amendments to the budget. The respondents simply accepted that it was correct that the City's budget was tabled on 26 March 2009 and alleged that this was for the purpose of public participation and that the other allegations are a matter for argument.

[35] It is clear that the primary error made by the officials in the City's Finance Department was to base the budget and the anticipated rates revenue on the value of the properties on the valuation roll when those values were subject to a very large number of challenges. The Finance Act stipulates that 'an annual budget may only be funded from realistically anticipated revenues to be collected' (s 18(*a*)) and that the annual budget must set out 'realistically anticipated revenue for the budget year from each revenue source' (s 17(1)(*a*)) as well as 'estimated revenue and expenditure by vote for the current year'(s 17(1)(*d*)). The Finance Act also stipulates that when an annual budget is tabled 'it must be accompanied by draft resolutions approving the budget . . . and imposing any municipal tax and setting any municipal tariffs as may be required for the budget year' (s 17(3)(*a*)) as well as 'a projection of cash flow for the budget year by revenue source broken down per month' (s17(3)(*c*).

[36] The second important error which the City's officials made was to persist in using the rates based on those property values even when it was obvious - it would have taken only a moment's reflection - that the values were not reliable because of the objection process which was underway. On 16 March 2009 the analysis of the statistics showed that the total value of rateable property had already diminished by R34.4 billion and that this figure would probably grow (only half of the objection valuation vouchers had been captured by Rates and Taxes). Despite that knowledge the mayoral committee approved a 10% increase in rates in respect of all categories of property and recommended that the rates be increased accordingly. Thereafter the mayor tabled the budget relying on the anticipated revenue from rates on the properties whose values were subject to objection.

[37] The third important error which the officials in the Finance Department made was not to comply with the respondents' statutory community participation obligations to ensure the participation of the local community in the preparation and finalisation of the budget. This could have been done during the consultation period in April 2009 if the officials had reacted with due expedition. In her discussion document of 9 April 2009 Ms Naudé had already identified the problem (a R336.39 million shortfall in the rates revenue for the 2009/10 budget) and the solution to the problem (increase the rates across all categories of property by 20% or increase the rates on business properties by an additional 18%). This document should have been given to the mayor for a decision to be made and then, if the mayor decided that the rates should be amended, the mayor should have provided a statement to explain the necessity for the amendment to the rates and the effect it would have on the budget. Thereafter the proposed amendments to the budget should have been set out in the tabled budget to comply with the relevant sections of the Finance Act and the documents as they were to be amended, together with the mayor's statement, published in the prescribed manner, and the local community invited to submit, within a time, which in the circumstances was reasonable, representations in connection with the amended rates and the amended budget. The Council would then have been obliged to consider the views of the local community and thereafter give the mayor an opportunity to respond to the submissions of the local community and, if necessary, revise the budget

and table amendments for consideration by the Council. The Council would then have approved the budget, with or without the proposed amendments, after having received the views of the local community and properly considered them.

[38] The tabled budget which had been advertised for public participation required substantial amendment. The total value of rateable property had been reduced by some R88 billion with a consequent loss of rates revenue amounting to R603 million and a rates revenue shortfall in the 2009/10 budget year calculated to be R336.39 million. The preparation and finalisation of the budget required the participation of the ratepayers, particularly the ratepayers most likely to be required to make up the shortfall. Although the Finance Act does not specifically provide for such a situation it must obviously be dealt with in terms of the provisions of the Acts governing the preparation and approval of a budget and any other statutory provisions governing participation by the local community. It is significant that both Ms Naudé and Ms Mokete immediately recognised the necessity for the respondents to comply with the public participation requirements of the Finance and Systems Acts and that Ms Mokete considered that a period of 30 days should be allowed for the local community to comment.

[39] To summarise: when the budgeted rates of a municipality must be amended after the budget has been tabled and advertised for comment, the steps to be taken by a mayor and council of a municipality to comply with the statutory requirements for participation by the local community are as follows:

(1) The budget must be amended to set out the realistically anticipated revenue from each revenue source and the indicative revenue per revenue source for the two financial years following the budget year (s 17(1)(*a*) and (*c*) of the Finance Act);

(2) The draft resolutions accompanying the budget approving the budget and imposing the municipal tax and setting the municipal tariffs must be amended to reflect the amended rates (s 17(3)(*a*)(i)and (ii) of the Finance Act);

(3) The measurable performance objectives for revenue from each source and the projection of cash flow for the budget year by revenue source,

broken down per month, accompanying the budget, must be amended to reflect the amended rates (s 17(3)(*b*) and (*c*) of the Finance Act);

(4) The mayor must provide a statement explaining the necessity for amending the rates and demonstrating the effect the amendment of the rates will have on the budget and indicating what aspects of the budget require comment (s 21(1)(*a*) of the Finance Act);

(5) Immediately after the budget and accompanying documents have been amended and the mayor's statement provided, the accounting officer of the municipality must, in accordance with ss 21, 21A and 21B of the Systems Act, make public the amended budget with the amended documents referred to in the previous paragraphs and invite the local community to submit, within a time which, taking into account the relevant circumstances, must be reasonable, representations in connection with the amended budget and accompanying documents and the amended rates proposed (s 22(*a*) of the Finance Act) and provide these documents to the National Treasury and the relevant provincial treasury (s 22(*b*) of the Finance Act);

(6) After the submissions have been received the council must consider them and then give the mayor an opportunity to respond to the submissions and, if necessary, to revise the budget and table the amendments for consideration by the council (s 23(1) and (2)).

[40] It is clear that the respondents did not follow this procedure and adopted their own truncated procedure which was not in accordance with the relevant Acts and which, in any event, was quite inadequate to ensure that the local community could participate in the preparation and approval of the budget. The respondents did not give SAPOA and the rest of the business community proper notice of the new rates proposed and the short period allowed for business organisations to comment on the amended rate for business properties was completely inadequate for any person or body to properly consider the matter, do the necessary research and prepare a meaningful representation. It is clear from the responses received from the business forums that they were not able to consider the matter properly and make substantial representations in the time allowed. The essence of the respondents' case was set out in the answering affidavit as follows:

'. . . at a very late stage, during the notice and comment phase of the annual

budget and rates procedure for 2009/10, an unforeseeable and unavoidableshortfall in rates income on the 2008/09 budget from business properties wasdetected. The shortfall would also occur in the 2009/10 financial year. (I referto “business properties” as shorthand for “business, commercial and industrial properties”.) The only reasonable solution was to propose amending the rate on that particular category of property by increasing the rate by a further 18% over and above the 10% increase already proposed and advertised and to advertise the proposed amendment as widely as possible under the circumstances. The proposal was implemented for the 2009/10 financial year. It is denied that any material breaches of procedure occurred.’

The respondents also claimed that because of the urgency of the matter ‘a less extensive public participation process was followed’.

[41] There is no merit in this explanation. On the respondents’ own documents the problem regarding the reduced rates revenue as a result of the objections to valuations was obvious. By 16 March 2009 the respondents’ officials knew what the impact of the objections was. Their analysis of the statistics showed that there was a very large reduction in the value of the properties (R34.4 billion) which would have an effect on rates revenue. The respondents contradicted themselves as to whether, at that stage, all the records had been updated, but even if they had not been, it was obvious that the problem would only get bigger. By 9 April 2009 Ms Naudé had thought it necessary to do a further analysis of the valuations statistics and this showed that, when compared with the rates income in the proposed 2009/10 budget, there would be a considerable shortfall of rates income. Thereafter, there was an unexplained delay in addressing the problem and seeking the participation of the business community in the decision to impose an additional 18% increase in the rates on business properties. Three weeks were allowed to pass before any steps were taken. The steps taken after that were clearly inadequate and the time allowed for the business community to comment on the proposed increase was unreasonably short. (It is noteworthy that Ms Mokete thought that 30 days should be allowed for comment.) The City officials obviously considered that it was more important for them to meet their deadlines than to get the business community’s comments. It is also noteworthy that the City did not ensure that SAPOA was involved from the outset. It was the most important

organisation to consult as it represents 90% of all business property owners. The respondents were forced to rely on the fact that a member of the SAPOA executive was given notice of meetings in another capacity. This is not compliance with their obligation to inform all interested parties. In my view any urgency was of the respondents' making and they cannot rely on their own failures to excuse their non-compliance with their obligations in terms of the Acts. By imposing the additional 18% in the rate on business properties without complying with the Finance and Systems Acts the respondents acted unlawfully.

[42] During oral argument the question was raised whether there is a rational connection between the facts and the decision to increase the rates on business properties by a further 18% and the respondents' counsel were given leave to file further heads of argument to deal with this issue. In their supplementary heads of argument filed after the hearing the respondents' counsel contended that –

(1) the shortfall that occurred in the rates income for the category 'business properties' was approximately R274 million and the additional 18% increase in the rates on that category served only to recover the lost amount from that category;

(2) the total reduction in revenue as a result of successful objections to property valuations and corrections of wrong categorisation was R603 million;

(3) the total of lost revenue due to successful objections in all categories was R336 million;

(4) the (additional) 18% increase in the rates in business properties did not burden the owners of business properties with any shortfall that occurred in other categories;

(5) the rate on business properties was increased because the percentage contribution from the rates on business properties to the total rates income had declined from what it was in 2007/8 and the purpose of the increase was to restore the percentage contribution from business properties on the total rates income. This 're-alignment' would be restored by increasing the rates on business properties from 1,2 cents in the rand to 1,54 cents in the rand and was intended to be a 'once-off

adjustment in order to restore the previous relative positions of business and residential properties'.

For these contentions the respondents relied on the evidence of their principal deponent, Mr Mankode Moitse, the Executive Director of the City's Finance Department, who relied on the contents of two documents prepared by City officials. The first was the memorandum dated 5 May 2009 issued by L Sonqishe, the Acting Executive Director, Finance and Acting Group Chief Financial Officer. The second, which is undated but was obviously prepared after the first (it used the same figures and the same language) was to be signed by Ms Mokete, the Director, Budget Office, Mr Moitse, as Executive Director Finance Department, and Counsellor Parks Tau, as MMC Finance Strategy and Economic Development.

[43] An analysis of these documents shows that they do not support the first, third and fourth supplementary submissions but that they support the second (that the total reduction in rates revenue as a result of successful objections to the property valuations was R603 million) and particularly the fifth submission (the respondents simply used the fact that the business properties' contribution to total property rates revenue had declined by about 10% to justify the additional 18% increase).[44] This justification is itself problematic. (When dealing with the figures in the two documents I shall use round figures.)

[44] It will be remembered that the Sonqishe memorandum of 5 May 2009 provided the theoretical basis for the additional increase of 18% in business property rates. The memorandum is entitled 'Alignment of Commercial and Residential Property Rating' and commenced with the paragraph:

'It has become necessary to review the alignment of the Commercial and Residential Property Rating Structures so as to remain in line with the following key principle embodied in the implementation of the Municipal Property Rates Act, namely the retention of the Rates Contribution over the various sectors of the economy to the

[44] In para 47.2 and 47.3 of their answering affidavit the respondents' deponent said:
'The rates income from business properties was re-aligned to the income produced by residential properties by increasing the rate on the former category. The rate on business property was increased because the percentage contribution from this category to the total rates income had reduced from what it was in 2007/08. The purpose of the increase in the rate was to restore the percentage contribution from this category to the total rates income.'

municipal tax base.'

It then dealt with the decline in total property valuations as a result of objections to the valuations of the properties on the valuation roll (R88 billion) and the consequent total loss of revenue from rates (R603 million). According to the figures used, the contributions of six categories of properties to the total rates income declined: business (by 12%); mixed use (by 31%); business sectional title (by 32%); vacant (by 35%); residential (by 3%) and residential sectional title (by 2%). These figures do not show by how much (that is, the rand value) rates revenue on business property had declined. The next sections of the memorandum demonstrated how the estimated rates income, primarily from business and residential, had declined, and how the percentage contribution of the rates from business properties had declined from approximately 50% in 2006/07 and 2007/08 to approximately 40% in 2008/09 and how this would continue in 2009/10 if the rates increase of 10% was implemented but would 'be restored' to just under 50% if the additional increase of 18% was imposed. The memorandum stated: 'it was a hallmark of Municipal Property Rates Act implementation process that the rates contribution per category of rate paying sectors should not be unduly distorted'. It said that the purpose of the proposal was to restore the parity that prevailed prior to 1 July 2008 on property rates over the commercial and residential sectors of the tax base. If the business property rates were increased by 28% this would be a 'once-off adjustment in order to restore parity over the affected contributory sectors to the tax base'.

[45] The Sonqishe memorandum simply sought to justify the increase of 28% by reference to the reduced contribution of business property rates as a percentage of the total. No figures were given for the loss of rates income from business properties and how much more income would be received from business property rates after the increase of 28%. However, if the estimated income after the 10% increase is compared with the estimated income after the 28% increase, the total increase in rates income would be R274 million.

[46] Ms Mokete's report for signature by herself, Mr Moitse and Mr Tau dealt with the anticipated shortfall in property rates revenue in the 2008/09 financial year (R421.28 million) and in the 2009/10 financial year (R336.39 mil-

lion). It pointed out that in the 2008/09 financial year the rates income did not grow but in the 2009/10 financial year it was expected to increase by R257.49 million, still leaving a shortfall of R336.39 million. The report made no attempt to attribute the shortfall to any category of property rates. The report included a table showing the changes in the rates base of the City. This reflected a decline of R88 billion in the total market value of rateable properties and a consequent loss of revenue of R603 million from property rates. One hundred and ninety one million rand of this loss was attributed to the loss of revenue from business property rates (31% of the total). The decline in business property rates therefore contributed to 31% of the estimated rates shortfall of R336 million (R104 million). The report then pointed out that if the rates on business properties were increased by another 18% the rates from business properties would increase by R274.669 million (81% of the estimated shortfall in rates revenue of R336 million).

[47] The analysis shows that there is no merit in the contention that there was a shortfall of R274 million in the rates income from the category 'business properties'. The reduced rates from 'business properties' amounted to only R191 million (or 31%) of the total reduction of R603 million. Therefore, it is not correct to say that the additional 18% 'served only to recover the lost amount from that category'. It is also not correct that the total of lost revenue due to successful objections was R336 million. This was not identified as such in the report. The R336 million was the shortfall on total estimated rates income measured against the total rates income in the proposed budget for 2009/10. Finally, it is not correct that the additional 18% increase on business properties did not place a disproportionate burden on the owners of business properties. It clearly did. If the decline in business rates revenue was only 31% of the total decline in property rates then imposing an additional rate of 18% on business properties, to make up 81% of the shortfall, placed a disproportionate burden on the owners of business properties.

[48] The Sonqishe memorandum makes it abundantly clear that the additional increase of 18% was imposed 'in line with the . . . key principle embodied in the implementation of the Municipal Property Rates Act, namely the retention of the rates contribution over the various sectors of the economy

to the municipal tax base'. Apart from the fact that the statement is meaningless because a principle cannot be embodied in the implementation of an Act, there is clearly no such principle in the Rates Act or the City's Rates Policy. Self evidently such a principle would be impossible to implement if the variables involved in the number and value of properties to be rated are taken into account. It is also significant that this 'key principle' is not referred to in the discussion document prepared by Ms Naudé, the Director of Rates and Taxes, or the memorandum prepared by Ms Mokete. If there were such a principle, they would have known about it and used it to justify the additional 18% increase. Significantly both documents refer to the fact that business has benefited the most from the shift in the rates base. While this statement is correct the reduction in rates revenue due to the business sector was still only 31% of the total.

[49] The opening paragraph of the Sonqishe memorandum of 5 May 2009 was repeated in the Mayoral Committee report of 18 May 2009 for the council meeting on 21 May 2009 and is used in support of a re-alignment of business and residential property rates.

[50] The documents relied on by the respondents clearly demonstrate that there is no rational connection between the facts and the decision to impose the additional 18% rate on business properties and that there is no legal basis for the justification of the additional increase. It should be recorded that the respondents' counsel objected strongly to this issue being raised at the hearing on the grounds that it was not part of SAPOA's case in the founding affidavit. In my view this is simply a matter of pleading. The relevant facts appear clearly from the respondents' own documents and SAPOA was entitled to deal with them in argument. In my view, there is no merit in the objection and the court is entitled to take these facts into account in determining whether the respondents acted lawfully in imposing the additional 18% in the rate on business properties.

[51] The court a quo therefore wrongly found that the respondents did not fail to comply with the public participation requirements of the municipal legislation when they imposed the additional 18% rate on the owners of business

properties and that they did not act unlawfully in doing so. In the absence of a factual or legal basis to impose the additional rate on the owners of business properties, the court a quo also wrongly found that the Council did not unfairly discriminate against the owners of business properties when it imposed the additional burden on them.

[52] As pointed out at the beginning of this judgment, it is no longer necessary for this court to decide whether the increase of 28% in the rates on business property was prohibited by s 19(1)(*b*) of the Rates Act because it resulted in a ratio of the residential rate to the business rate of 1:3,5. The appellant contended that the section, read with the regulations, prohibited the City from imposing a rate on any category of non-residential property which would result in the ratio between the rate on residential property and the rate on non-residential property exceeding the prescribed maximum ratio of 1:1. The respondents contended that in terms of s 8 of the Rates Act the Council was entitled to impose differential rates and that the purpose of the proposed amendment of the rates was to restore the parity that prevailed prior to 1 July 2008 on property rates over the commercial and residential centres of the tax base. According to the respondents, to restore this parity a 'once-off' adjustment was required. Accordingly, the Council proposed increasing the ratio between rates for business to residential property from 3:1 to 3,5:1 (by increasing the business rate from 1,2 to 1,54 cents in the rand or, expressed differently, increasing the business rate by 28%).

[53] This dispute about the interpretation of s 19(1)(*b*) and the regulations is obviously of great importance as far as the imposition of rates is concerned. Although both s 19(1)(*b*) and the regulations (which were promulgated to give effect to the section) are inelegantly worded (they show no proper understanding of the meaning of the word 'ratio') they seem to be capable of being understood in the way contended for by SAPOA. In view of the statements in the respondents' documents that it is Treasury's intention that the ratio between the rate on residential property and non-residential property should be 1:1 the matter should obviously receive the urgent attention of the Treasury and the Legislature.

[54] Section 8 of the Rates Act empowers a municipality to levy different rates on different categories of rateable property but clearly provides that this power is subject to s 19 and must be exercised 'in terms of the criteria set out in its rates policy'. Section 19 prohibits 'impermissible differentiation'. The relevant parts of the section read as follows:

'(1) A municipality may not levy –

. . .

(b) a rate on a category of non-residential properties that exceeds a prescribed ratio to the rate on residential properties determined in terms of section 11(1)(*a*): Provided that different ratios may be set in respect of different categories of non-residential properties;

. . .

(2) The ratio referred to in subsection (1)(*b*) may only be prescribed with the concurrence of the Minister of Finance.'

Section 19(1)(*b*) must be read with the regulations promulgated pursuant to s 19(2). These regulations read as follows:

'SCHEDULE

INTERPRETATION

Definitions

1. In these regulations, a word or expression to which a meaning has been assigned in the Act, has that meaning and unless the context indicates otherwise –

"agricultural property" means property envisaged in section 8(2)(d)(i), (e) and (f)(i) of the Act.

REGULATIONS ON THE RATIO BETWEEN THE RESIDENTIAL AND NON-RESIDENTIAL CATEGORIES OF PROPERTY

Rates ratios to be applied

2. The rate on the categories of non-residential property listed in the first column of the table below may not exceed the ratio to the rate on residential properties listed in the second column of the table below, where,

(a) the first number in the second column of the table represents the ratio to the rate on residential properties;

(b) the second number in the second column of the table represents the maximum ratio to the rate on residential property that may be imposed on the non-residential properties listed in the first column of the table:

Categories	Ratio in relation to residential property
Residential property	1:1
Agricultural property	1:0.25
Public Service Infrastructure Property	1:0.25

Commencement

3. The provisions of regulation 2 take effect on 1 July 2009.

Short title

4. These regulations shall be called the Municipal Property Regulations on the rate ration between residential and non-residential categories of property.'

[55] The rules of statutory interpretation require that the words to be construed must be given their ordinary grammatical meaning in the light of their context, where 'context' includes the language of the rest of the statute (which may throw light of a dictionary kind on the words to be interpreted), the matter of the statute, its apparent scope and purpose, and, within limits, its background. The court must, from the outset,[45] consider the language to be interpreted together with the context. Even where the words to be interpreted are (or appear to be) clear and unambiguous, regard must be had to the context.[46]

[45] Id para 89; *Jaga v Dönges NO & another; Bhana v Dönges NO & another* 1950 (4) SA 653 (A) at 662G-663A.
[46] *Thoroughbred Breeders Association v Pricewaterhouse* 2001 (4) SA 551 (SCA) para 12 of concurring judgment of Marais and Farlam JJA and Brand AJA; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* para 90.

[56] Section 19(1)(*b*) prohibits a municipality from levying –

'A rate on a category of non-residential properties that exceeds a prescribed ratio to the rate on residential properties determined in terms of section 11(1)(a)'.

Section 11(1)(*a*) simply provides that a rate must be an amount in the rand and the municipality must apply this rate to the market value of the property. (This accords with the ordinary meaning of 'rate': 'assessment levied by local authorities for local purposes at so much per pound of assessed value of buildings and land area owned': see *Gerber v MEC for Development Planning and Local Government, Gauteng.*[47]) Section19(1)(*b*) uses the word 'ratio', which ordinarily indicates a relationship between two similar magnitudes in respect of quantity, determined by the number of times one contains the other.[48] In s 19(1)(*b*) the magnitudes are the amounts in the rand determined by the Council. Although inelegantly worded, s 19(1)(*b*) indicates that the ratio of the rate on non-residential properties (which obviously includes business, commercial and industrial properties) to the rate on residential properties may not exceed a prescribed ratio. The object of the section is clearly not to limit the rates on either non-residential or residential properties per se. It is to prohibit the relationship between the two rates from exceeding the prescribed relationship. The problem which arises from the wording of the relevant part of s 19(1)(*b*) is resolved if it is interpreted to read:[49]

'A rate on a category of non-residential properties so that the prescribed ratio to the rate on residential properties determined in terms of section 11(1) is exceeded.'

[57] The regulations promulgated in terms of s 19(2) are also inelegantly worded. Their object is obviously to give effect to s 19(1)(*b*) by prescribing ratios of rates on residential property to non-residential properties, which may not be exceeded. They refer to the first figure (the rate) in the second column as the figure for residential properties and the second figure (the rate) in the second column as the figure for non-residential properties referred to in the

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[47] *Gerber v MEC for Development Planning and Local Government, Gauteng* 2003 (2) SA 344 (SCA) paras 23-24.

[48] C T Onions (ed) The Shorter Oxford Dictionary vol 2 at 1750.

[49] See *Durban City Council v Gray* 1951 (3) SA 568 (A) at 580B where the court said: '…it is within the powers of a court to modify the language of a statutory provision where this is necessary to give effect to what was clearly the legislature's intention'. See also *Shenker v The Master & another* 1936 AD 136 at142-143 and *Santy's Wine and Brandy Co (Natal) Ltd v The District Commandant, SA Police* 1945 NPD 115 at 117-118.

first column. Confusion arises from the words ‘residential property’ in the first column. This obviously should have been ‘non-residential properties’ as that is how the properties in that column are described. The maximum ratio of the rate on residential property to the rate on non-residential property would therefore be 1:1: the rates (the amounts in the rand) on the two categories of property may be the same but the rate on non-residential property must not exceed the rate on residential property. This is consistent with the interpretation of s 19(1)(*b*) above (and with the intention of Treasury according to Ms Naude and Ms Mokete).

[58] If this is the proper interpretation, then the Council would have been prohibited from levying a rate on business properties that was 3.5 times as much as the rate on residential property as this would result in a ratio of 3,5:1. The most the Council could have levied was the same amount in the rand as it levied on residential property. The rates levied on business properties in the 2009/2010 budget year would therefore have been unlawful because they were contrary to s 19(1)(*b*). It must be borne in mind that the value of business property will almost always exceed that of residential property and, accordingly, the revenue from rates on business property, even if the rates for business and residential property are the same, will always be greater than the revenue from residential property.

[59] In the light of the finding that the Council did not follow the procedures prescribed in the Acts in imposing the rates in respect of business properties, the question arises as to what relief should be granted.

[60] SAPOA’s counsel does not seek the setting aside of the 2009/2010 budget (prayer 1 of the notice of motion) but persists in seeking relief pertinent to the additional 18% in the rates imposed on business properties (essentially prayers 2 and 3.1 of the notice of motion). If this relief is granted, this court would declare, in effect, that the Council acted unlawfully in imposing the additional 18% on the rates on business properties (because it failed to comply with the prescribed legal requirements and procedures) and, pursuant to that declaration, would set aside the rate imposed in excess of R0,0132 in the rand. Counsel acknowledged that there may be claims for repayment of the

rates paid in excess of what should have been paid and suggested that the court order that the City have three years to repay any such amount. He also acknowledged that the respondents' conduct has created a problem which is too big to be solved by a court order. As he put it, the court cannot unscramble the egg. This concession is clearly correct in so far as it relates to the whole budget for 2009/10.

[61] When the Council imposed the additional 18% rate on business properties the Council intended to make up R274 million of the calculated revenue shortfall of R336 million in the 2009/10 budget. On the strength of this additional revenue of R274 million the Council approved a budget involving expenditure on a large number of essential matters, including the salaries of the City's employees. It must be accepted that the City has spent that revenue and it is no longer available to the City to repay the owners of business properties who were required to pay the increased rate. There is no evidence as to the City's current financial position and the respondents did not say more in their answering affidavit other than make the general statements, unsupported by any substantial evidence, that the order setting aside the rate would put the City in a precarious financial position; that it would not be able to raise the money to repay the rates; that it would have to budget for the repayment in the future and that there would be a problem in identifying the source of such additional income. Alternatively, said the respondents, the City would have to cut back on essential expenditure because of the amount to be repaid which would affect its ability to comply with its constitutional obligations. A further problem not dealt with in the respondent's answering affidavit is the distorting effect the 28% increase in the rates on business properties probably had in the intervening years. The Council has approved budgets for the 2010/11, 2011/12 and 2012/13 budget years. When it approved each budget the Council also imposed rates. If the Council decided to increase rates in each year by a percentage, this would be based on the 'once off' increase in the rates on business properties. The difference in the rates imposed on business properties as a result of this distorting effect could be considerable. Once again, the expenditure in the budget would have been based on this revenue. The question of the legal status of subsequent rates imposed and their possible repayment is not before the court but it is not unreasonable to anticipate this prob-

lem arising in the not too distant future. That is the position as far as the City is concerned. But that is not the end of the matter.

[62] The additional 18% in the rates on business properties was supposed to increase the rates revenue for 2009/10 by R274 million. This additional rate was unlawfully levied on the owners of business properties who should not have been obliged to pay the additional rate to the City. Ordinarily, a person who pays something which is not owed is entitled to repayment of the amount wrongly paid. That is basic fairness and accords with the principle embodied in s 55 of the Rates Act. What is due and owing must be paid and what is paid in excess of what is due and owing must be repaid. It is also consistent with s 3(3) of the Rates Act which stipulates that the rates policy must treat persons liable for rates equitably and the City's Rates Policy itself which states unambiguously in Item 3(1) that the policy is designed to ensure equitable treatment by the Council in the levying of rates on property owners and in Item 4(h) that one of the key objectives of the policy is to ensure that all persons liable for rates are treated equitably as required by the Act.

[63] Section 172 of the Constitution requires that the court must declare conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency and make any make any order that is just and equitable, including (i) an order limiting the retrospective effect of the declaration of invalidity and (ii) an order suspending the declaration for any period and on any conditions, to allow the competent authority to correct the defect.[50] The prejudice suffered by the business property owner ratepayers is manifest – they have been obliged to pay amounts which they do not owe and have been out of pocket for two to three years. As against that the prejudice which would be suffered by the City is, at best on the evidence, theoretical. The court simply does not know because the City did not place the relevant information before the court. In my view there is no good reason not to grant the relief sought by SAPOA and it would not be just and equitable to withhold such relief. One can only speculate as to what will happen once the relief is granted and how the City will deal with the problem but that is obviously a matter for the parties con-

[50] *Bengwenyama Minerals (Pty) Ltd & others v Genorah Resources (Pty) Ltd & others* 2011 (4) SA 102 (CC) paras 84-85.

cerned to resolve. In view of the likelihood of claims being instituted to recover the rates wrongly paid and SAPOA's concession regarding a three year moratorium, it would be just and equitable to order that, in the event of claims being instituted, the City will not be obliged to effect repayment of any rates imposed on the owners of business (business, industrial and commercial) properties in the 2009/10 budget year in excess of R0,0132 in the rand for a period of three years from when the City's liability for repayment is finally determined. It would also be appropriate to make a declaratory order which would remove doubt about the Council's obligation to comply with the Systems, Finance and Rates Acts when the Council wishes to approve its annual budget with property rates different from those in the tabled budget. The City is presently in the process of preparing its annual budget for 2013/14 and this would, it was submitted, be a timeous reminder for the City about its community participation obligations. I agree.

[64] Accordingly I would have made the following order (the prayers have been suitably amended to set out the relief sought more accurately):

1 The appeal is upheld with costs, such costs to include the costs of two counsel.
2 The order of the court a quo dismissing the application with costs, including the costs of two counsel, is set aside and replaced by the following orders:
'(1) It is declared that the first, second and third respondents failed to comply with the prescribed legal requirements and procedures when arriving at their decision on 21 May 2009 to increase the ratio between the rates applicable to business, industrial and commercial properties, on the one hand, and the rates applicable to residential properties, on the other, from 3:1 to 3,5:1;
(2) The promulgation of the assessment rate tariff of R0,0154 in the rand on the value of business, industrial and commercial properties within the third respondent's area of jurisdiction for the 2009/10 budget year is set aside and replaced with a rate of R0,0132 in the rand;
(3) It is ordered that the first and third respondents shall not be obliged to repay to the owners of business, industrial and commercial properties any rates paid by them in excess of R0,0132 in the rand in respect of the 2009/10

budget year, for a period of three years as from the date on which the first and third respondents' liability for repayment of such rates is finally determined;

(4) It is declared that the council of a municipality is obliged to comply with the provisions of the Local Government: Municipal Systems Act 32 of 2000, the Local Government: Municipal Finance Management Act 56 of 2003 and the Local Government: Municipal Property Rates Act 6 of 2004 when it wishes to approve an amended budget with rates which are different from the rates in the budget which was tabled;

(5) The first, second and third respondents, jointly and severally, are ordered to pay the costs of the application, such costs to include the costs of two counsel.

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B R SOUTHWOOD

ACTING JUDGE OF APPEAL

JUDGMENT

NAVSA JA (LEWIS, SHONGWE AND PETSE JJA concurring)

[65] I have read the judgment of my colleague, Southwood AJA, and agree with his reasoning and conclusion that the Council failed, in determining rates for the 2009/2010 financial year and amending its budget, to comply with its statutory obligations in relation to community consultation and participation. I agree that SAPOA is entitled to a declaratory order in that regard, particularly to inform future conduct on the part of Council. I also agree with my colleague concerning the rationality of the decision to impose the rate in question. I disagree with the further orders proposed by my colleague, which in my view are untenable in the circumstances in which the respondents find themselves. My reasons are set out hereafter.

[66] The following was the relief sought by the appellant in its notice of motion:

'1. Reviewing and setting aside the annual budget for the year 2009/2010 as adopted by the first respondent at its meeting held on 21 May 2009.

2. That the promulgation of the assessment rate tariff amounting to R0.0154 in the rand value of business, commercial and industrial properties in the third respondent's area of jurisdiction be declared null and void and be set aside.

3. Alternatively to prayer 1 above:

3.1 Declaring that the first, second and third respondents failed to comply with the prescribed legislative procedures and the principle of legality when taking their decision on 21 May 2009 to increase the rate ratios applicable to business, industrial and commercial property from 3:1 to 3.5:1

3.2 Reviewing and setting aside the decision of the first respondent to increase the rates ration applicable to business, industrial and commercial property from 3:1 to 3.5:1

4. That the first, second and third respondents be directed to pay the costs of the application.'

[67] At the heart of the dispute between the parties was the question whether, in materially amending the budget after the Council belatedly became aware of a substantial revenue shortfall, it was required to follow all the statutory procedures that it was obliged to when it proceeds to adopt a budget in the ordinary course. The parties were in disagreement about the application of the legislation and the extent and manner of public participation. My colleague, with admirable attention to detail, resolved the dispute and rightly answered that question in the affirmative.

[68] It is necessary at the outset to record what appears to be common cause, namely, that at the time that the rate in question was imposed, the valuation roll was in a chaotic state, not only because the objection process was still underway, but also because in relation to some commercial properties there had been a significant degree of undervaluation which, obviously, would not have been revealed by the objection processes. In para 83 of SAPOA's founding affidavit the following appears:

'In essence what had transpired is that the municipal valuer had over-valued a number of properties whilst under-valuing an even greater number of properties.'

Whilst denying that a greater number of properties had been under-valued the following was stated on behalf of the Council:

'I agree that there has been under-valuation of properties. . . It is not known what the extent of the under valuation is.'

In its replying affidavit, SAPOA stated, with reference to reports by valuers:

'On the probabilities - and also having regard to the affidavit deposed to by Mr Myburgh and to the appointment of and the valuations more recently carried out by George Nel which is allegedly premised on a random selection of business properties which proved to be 100% successful – the court, I submit, is entitled to accept that there exist a significant number of business properties which have been undervalued.'

This, of course, reduced the Council's revenue base and contributed to an income shortfall. The Council in more ways than one was the author of its own misfortune, which then became the misfortune of ratepayers.'

[69] Importantly, because of the unknowns, the variables and the imponderables one is unable to say with exactitude, if at all, what the rate on any category of property would have been had the valuation roll been rectified in

time and had the statutory public participation processes been followed. Put differently, a rate to deal with the revenue shortfall had not been lawfully adopted. Thus, in my view, the order proposed by my colleague in relation to the repayment of amounts above the originally proposed rate of 0.0132 is ill-advised. Put simply, the Council's failure to adopt a rate in terms of the applicable legislation to meet the anticipated revenue shortfall does not mean that the prior suggested rate became the lawful rate by default. I will, in due course, deal with the three-year moratorium on repayment proposed by counsel for SAPOA and adopted by my colleague and attempt to show why that is even more ill-advised.

[70] Notionally, an owner of commercial property, aggrieved at the rate improperly imposed, ought to have a claim for a refund. In the present circumstances such an owner might experience difficulty in the formulation of a claim. It is, however, not an issue we are called upon to decide. It is significant, though, that SAPOA did not, in its notice of motion, seek any relief in relation to repayment, nor did the parties engage, on affidavit, on affordability or terms of repayment or the possible future impact on all ratepayers. Even more significantly, SAPOA, even though it represents 90 per cent of commercial property owners, is not the representative of all such owners. The other owners were not party to the present litigation. As stated earlier there is the question of what the proper rate historically would have been. My colleague is, with respect, correct when he states that it was recognized on behalf of SAPOA in so far as the setting aside of the budget is concerned, that the egg could not be unscrambled. And as he pointed out also, s 172 of the Constitution requires that although the court must declare conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency, it may make any order that is just and equitable. In my view it is fair and equitable now, for the reasons I have set out and that follow, not to order the repayment of rates that were not validly imposed.

[71] Although counsel on behalf of SAPOA persisted in having the rate improperly imposed set aside, he advisedly recognized the difficulties of a court even attempting to set aside the 2009/2010 budget, two budgetary periods thereafter. Successive budgets are based on surpluses or deficits from prior

periods. One is built on the outcome of the other. This, in modern language, is called a knock-on effect. The legality of the budgets for the successive periods has not been challenged. Considering the knock-on effect it must be so that any subsequent increase in rates would have owed its genesis to and been premised on the rate presently sought to be impugned.

[72] Another factor militating against the setting aside of the 2009/2010 budget is that, given the historical over-recovery from the commercial sector, the lapse of time - three years hence - will have a harsh impact on struggling individual home-owners who would not in the intervening years have made provision for dealing with the effects of the setting-aside of the budget.

[73] My colleague, in para 32, set out the following, which is impeccable:

'Furthermore, logic dictates that the approval of the budget must go hand in hand with the determination of the rates as the revenue from the rates is essential to fund the budget expenditure. The court a quo therefore wrongly concluded that the levying of the rates is not an integral part of the budget process.'

[74] In not persisting in its prayer to have the budget for the 2009/2010 year set aside, SAPOA must have recognized additional practical and perhaps even jurisprudential difficulties. If the budget were set aside expenditure on items such as libraries and parks, and even on capital expenditure to improve infrastructure, would be called into question.

[75] If, as the parties and my colleague accept, the effluxion of time and the practical realities referred to above dictate that the budget for the 2009/2010 year cannot be set aside, the corollary must be that, the rate in question, which was its principal component, also cannot be set aside. A mathematical equation which proposes that a principal value remains unaltered when its most significant constituent part is deducted has to be flawed. If the present dispute concerning the Council's statutory obligations and the manner and extent of public participation did not have implications for the future conduct of the Council, the application by SAPOA might well have proved academic and liable to be dismissed in terms of s 21A of the Supreme Court Act 59 of

1959.[51] Thus, in my view, the relief sought in paras 2 and 3 of the notice of motion ought not to be granted. It is neither necessary, nor desirable, for us to offer a view as to how a claim for a refund ought to be framed or indeed whether it is in the present circumstances competent at all.

[76] That brings me to the three-year moratorium on the repayment of amounts above the originally proposed rate suggested by my colleague. In this regard reliance was placed on s 172 of the Constitution. The Constitutional Court has, in appropriate circumstances, when declaring legislation unconstitutional, suspended a declaration of invalidity and afforded the legislature an opportunity to remedy the defect.[52] In those circumstances the past and the legitimacy of actions in terms of the impugned legislation is preserved. Sometimes the legislation is declared unconstitutional immediately.[53] On occasion the declaration of invalidity is suspended conditionally.[54] Each case and resultant order is, of course, dependent on that case's facts and circumstances. It should not be forgotten that s 172 of the Constitution gives a court deciding a constitutional matter a wide discretion to make such order as is just and equitable, including but not necessarily obliging an order limiting the retrospective effect of the declaration of invalidity or suspending the declaration of invalidity.

[77] Returning to the present case, in the ordinary course, a creditor may well have an unfettered right to reclaim amounts unlawfully obtained or retained by a debtor. In the present case there was, as stated earlier, no claim for repayment and no engagement on that issue on the affidavits filed on behalf of the parties. In is not inapposite to ask the question: Whence do we acquire the power to restrict parties, particularly non-parties to the litigation, who have not been heard on the issue to reclaim amounts that may be legitimately owing to them?

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[51] *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa* 2005 (4) SA 319 (CC) para 22.
[52] *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) para 251.
[53] *Tongoane v Minister of Agriculture* 2010 (6) SA 214 (CC) para 133.
[54] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC) para 95.

[78] I am not persuaded that due consideration was given to the full import of the suggestion that there be a payment moratorium and all of its ramifications. There is certainly nothing in the affidavits in that regard. On this aspect one needs only to have regard to what was stated, during February 2010, in the founding affidavit on behalf of the SAPOA regarding the global economic crisis and the precarious position of businesses worldwide. The cavalier attitude of the Council might well have caused many businesses to founder and fail. To say to ailing businesses that may be entitled to recover moneys that they have to wait a further three years would be to add insult to injury. Furthermore, the moratorium does not take into account a debtor's right to raise prescription. Is it interrupted by the order proposed or not? From when will it commence to run? The proposed moratorium would be compounding an already confused situation. Counsel did not deal with the questions raised in this and the preceding paragraph, either in their heads or in oral argument.

[79] For all these reasons I would refrain from ordering the undoing of any constituent part of the 2009/2010 budget and adding any additional orders other than the limited ones I propose. Does this mean the Council can continue flagrantly flouting the law with impunity? The short answer based on the principle of legality is no. If it becomes clear that the Council has not rectified or is not willing to deal with the shortcomings in the valuation roll, an application to court for a mandatory interdict would be warranted in advance of the budgetary process. If it becomes clear that the Council intends to continue denying its constituent ratepayers meaningful participation in the budgetary process and that it is resorting to irrational means in the process of determining rates a timeous application to court might well result in a proposed budget or even an adopted one being set aside. It is not inconceivable given the history that offending officials could be ordered to pay litigation costs personally.

[80] The following order is made:

1 The appeal is upheld with costs, such costs to include the costs of two counsel.

2 The order of the court below is set aside and substituted as follows:

'1 It is declared that the first, second and third respondents failed to comply with the prescribed statutory requirements and procedures in arriving at the

decision on 21 May 2009 to impose a rate of R 0.0154 in the rand on the value of business, industrial and commercial properties.

2 It is declared that in the future the first respondent is obliged to comply with the provisions of the Local Government: Municipal Systems Act 32 of 2000, the Local Government: Municipal Finance Management Act 56 of 2003 and the Local Government: Municipal Property Rates Act 6 of 2004 when it materially amends a proposed budget after it has been tabled and advertised for public comment.

3 The first, second and third respondents are ordered to pay the costs of the application, such costs to include the costs of two counsel.'

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M S Navsa

Judge of Appeal

APPEARANCES:

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