THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE
Case No: 210/2014

In the matter between:

PAUL ANTHONY KALIL NO	**FIRST APPELLANT**
WILHELMINA CECILIA KALIL NO	**SECOND APPELLANT**
STEPHANUS ABRAHAM CLOETE BEZUIDENHOUT NO	**THIRD APPELLANT**
BROLL PROPERTY GROUP (PTY) LTD	**FOURTH APPELLANT**
and	
MANGAUNG METROPOLITAN MUNICIPALITY	**FIRST RESPONDENT**
MEMBER OF THE EXECUTIVE COUNCIL FOR LOCAL GOVERNMENT FOR THE FREE STATE PROVINCE	**SECOND RESPONDENT**
EXECUTIVE MAYOR OF THE CITY OF MANGAUNG METROPOLITAN MUNICIPALITY	**THIRD RESPONDENT**
THE MUNICIPAL MANAGER OF THE CITY OF MANGAUNG METROPOLITAN MUNICIPALITY	**FOURTH RESPONDENT**

Neutral citation: *Kalil v Mangaung Metropolitan Municipality* (210/2014) [2014] ZASCA 90 (4 June 2014)

Coram: Mpati P, Brand, Bosielo, Leach and Wallis JJA
Heard: 4 June 2014
Delivered: 4 June 2014

Summary: Municipal rates - public participation in budget process - whether proper notice of rates increase given - municipality empowered to levy higher rates on business properties than on residential properties - duties of municipal officials in public interest litigation.

ORDER

On appeal from: Free State Division, Bloemfontein (Mhlambi AJ sitting as court of first instance):

(a) The order of the court below as to costs is set aside and replaced with the following:

'The first respondent is ordered to pay the applicant's costs.'

(b) Subject to (a) the appeal is dismissed with no order as to costs.

REASONS FOR JUDGMENT

Leach JA (Mpati P, Brand, Bosielo and Wallis JJA concurring)

[1] This appeal relates to a resolution taken by the first respondent, the Mangaung Metropolitan Municipality (the Municipality) at a council meeting on 30 May 2013 in which it approved municipal rates for the budget year of 2013/2014. Shortly before that meeting was scheduled to be held the appellants, who are or represent municipal ratepayers, launched urgent motion proceedings in the high court seeking an order prohibiting the Municipality from adopting the resolution, as well as certain declaratory relief. In addition to the Municipality, its executive mayor, municipal manager and the MEC for local government were cited as respondents but the latter played no part in the proceedings and abided the decision of the court.

[2] The application came before Mhlambi AJ who, on 29 May 2013, dismissed it with costs. Leave to appeal to this court was subsequently granted by Naidoo J on 20 March 2014. The appeal was heard as a matter of urgency on 4 June 2014 as the municipal budget of 2014/2015 was due to be considered by the Municipality a few days later. After hearing argument we issued an order in which, save for altering the order as to costs of the court below, the appeal was dismissed for truncated reasons. In doing so we indicated that our full reasons would follow in due course. These are those reasons.

[3] The resolution that the appellants sought to prohibit the Municipality from adopting on 30 May 2013 (but which was in fact passed after the application was dismissed in the court below) involved the approval of an increased rate to be applied on commercial properties in the municipal area. Both in this court as well as in the court below, the Municipality relied upon the Constitutional Court's warning that courts are to be conscious of the 'vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government' and should not interfere 'in the processes of other branches of government unless to do so is mandated by the Constitution'.[1] I accept that principle unhesitatingly, but it is now axiomatic that the exercise of all public power must comply with the Constitution and the doctrine of legality.[2] And where those in government, whether national, provincial or municipal, act beyond the constraints of the law a court should not hesitate to declare their actions illegal, thereby controlling and regulating public power.[3] As the decision the appellants sought to impugn was not administrative in nature[4] it could not be assailed on the grounds of non-compliance with the Promotion of Administrative Justice Act 3 of 2000. Consequently, in seeking relief, they

[1] See *Glenister v President of the Republic of South Africa &others* 2009 (1) SA 287 (CC) para 34 and the authority there cited.
[2] Per Ngcobo CJ in *Albutt v Centre for the Study of Violence and Reconciliation & others* 2010 (3) SA 293 (CC) para 49. See further *Gauteng Gambling Board & another v MEC for Economic Development, Gauteng* 2013 (5) SA 24 (SCA) para 1.
[3] See eg *Affordable Medicines Trust & others v Minister of Health & others* 2006 (3) SA 247 (CC) paras 48 and 49.
[4] *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others*1999 (1) SA 374 (CC) para 45 .

relied solely upon the legality principle. The matter thus turned on whether the Municipality's 2013/14 budget could lawfully be adopted.

[4] The appellants raised a three-pronged argument in contending that the adoption of the budget would be unlawful. First, they contended that since the levying of property rates was an integral part of the budget process in terms of the Local Government: Municipal Property Rates Act 6 of 2004 (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), the decision to increase the rates on business properties required community participation which had not occurred. Second, they argued that the ratio between the proposed rate for commercial properties and that on residential properties exceeded the permissible ratio prescribed under s 19(1)(*b*) of the Rates Act as read with the regulations promulgated thereunder. The third and final thrust of the appellant's case was that the implementation of the proposed rates would materially and unreasonably prejudice national economic policies, economic activities across municipal boundaries, or the national mobility of goods, services, capital or labour, contrary to s 229 of the Constitution.

[5] The allegations relevant to this third contention were fleetingly made, and the appellant did not persist in its argument on this issue, either in the court below or in this court. Consequently, no more need be said about it and I turn to consider the first two issues, upon which the appellants continued to rely.

[6] Sections 152(1)(*b*) and (2) of the Constitution oblige municipalities to provide services to their communities in a sustainable manner. In order to do so, a municipality is empowered by s 229 of the Constitution to raise funds by imposing rates on property in a process regulated by national legislation – the applicable legislation being the Systems Act, the Finance Act and the Rates Act.

The preamble to the latter records that local government should have a 'sufficient and buoyant source of revenue necessary to fulfil its development responsibilities' and that income 'from property rates is a critical source of revenue for municipalities to achieve their constitutional objectives'.

[7] In *South African Property Owners Association v Johannesburg Metropolitan Municipality*[5] (a decision now commonly known as *SAPOA*) this court held that the process of levying rates was an integral part of a municipality's budget process. The statutory matrix applicable to the assessment of rates and the approval of a municipality's budget was exhaustively set out and analysed in *SAPOA* and it would be superfluous to repeat that exercise here.[6] Suffice it to mention for present purposes that s 16(1)(*a*)(iv) of the Rates Act requires a municipality to 'encourage, and create conditions for, the local community to participate in . . . the preparation of its budget' and that, when the annual municipal budget is tabled, the municipal council is obliged under s 23(1) of the Finance Act to consider the views of the local community. In order to facilitate that process, chapter 4 of the Systems Act provides in detail for community participation and the necessity for the community to be effectively informed of all matters requiring its participation. Inter alia, s 21A(1) of the Systems Act requires all documents which must be 'made public' by a municipality to 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 . . .; and

(c) by notifying the local community . . . of the place, including the website address, where detailed particulars concerning the documents can be obtained.'

[5] *South African Property Owners Association v Johannesburg Metropolitan Municipality and others* 2013 (1) SA 420 (SCA).

[6] A summary of the statutory requirements is set out in *SAPOA* para 15.

[8] Section 17(3) of the Finance Act details numerous documents that are to accompany an annual budget when it is tabled,[7] including draft resolutions approving the budget and imposing any municipal tax, and a projection of cash flow by revenue source. Under s 22 of the Finance Act, after the annual budget is tabled in a municipal council the accounting officer must 'make public' the budget and the documents referred to in s 17(3) which must therefore be conveyed to the local community in the manner required by s 21A of the Systems Act.

[9] Whether the Municipality complied with its statutory obligations in regard to publication and community participation before adopting its budget was a matter of dispute in the court below. As held by this court in *Democratic Alliance v Ethekwini Minicipality*,[8] whether a municipality has satisfied the requirement of public participation is an issue to be determined by the yardstick of reasonableness in the given circumstances of each particular case. I turn thus to the relevant facts.

[10] The appellants' founding affidavit was deposed to by the second appellant, Mr Paul Kalil, a trustee of a trust which owns a number of immovable properties within the municipal area. The material facts upon which he relied are, unfortunately, somewhat tersely set out, probably as a result of the urgent situation in which the appellants' papers were prepared. In any event, he alleged that at some stage municipal officials were asked to provide the formula which the Municipality intended to use to calculate rates in the 2013/2014 budget. Who these persons were and when, in what manner and terms they were requested to provide the information the appellants sought, does not appear from the record. Be that as it may, Mr Kalil alleged that although it was mentioned that the ratio of residential to commercial properties for purposes of rates would be 1:3.8 (ie that the rates payable on a commercial property would be 3.8 times

[7] Under s 16(3) of the Finance Act the budget is to be tabled at least ninety days before the start of the budget year.
[8] *Democratic Alliance v Ethekwini Minicipality* 2012 (2) SA 151 (SCA) para 24.

more than a residential property of the same value) no reliable information was forthcoming and led to the appellants seeking an urgent meeting with the mayor. According to Mr Kalil, it took a month, until 23 May 2013, before the appellants were able to meet with the executive mayor, municipal manager and other officials of the Municipality. He further alleged that the appellants' concern regarding the formula to be applied to calculate the rates on commercial property was discussed at this meeting, and the proposal that the ratio be increased to 1:3.8 was confirmed. At the request of the mayor and his officials, the appellants placed their submissions in regard to the proposed increase in rates in writing, their letter having been delivered to the Municipality on 27 May 2013.

[11] The legality of the Municipality's conduct was impugned not upon a failure to take note of the appellant's representations but, pertinently, upon its alleged failure to properly publish the proposed budget and related documents to the local community. In this regard it was alleged that the appellants 'could not find any publication in the media, printed and broadcast, informing the public of the formula to be applied for commercial properties'. All they chanced upon were articles published in 'Ons Stad' and 'Die Rosestad' on 23 May 2013, mentioning that a decision was due to be taken on the budget a week later. In response, the respondents relied upon the publication of a notice on 13 February 2013 in a newspaper entitled 'Courant', calling for public comment in relation to a new set of policies and bylaws regarding, inter-alia, the Municipality's property rates policy as well as notices in two other newspapers in regard to a 'Budget Conference' to be held at the Bloemfontein City Hall on 17 May 2013. None of these notices contained any reference to the proposed budget.

[12] The court below held that the Municipality had complied with its statutory obligations by publishing these notices. The simple answer to this is, of course, that the proposed budget and related documents envisaged by s 17(3) of the Finance Act were not published for comment by way of these notices and the

requirements in that regard were thus not met. This does not mean that the adoption of the budget resolution is necessarily to be vitiated. In *African Christian Democratic Party v Electoral Commission and Others*[9] the Constitutional Court, in the context of municipal electoral legislation, held that a narrow textual and legalistic approach should be avoided.[10] Applying this rule in the later case of *Liebenberg NO v Bergrivier Municipality*,[11] that court concluded that the enquiry should be as to 'whether the steps taken by the local authority are effective when measured against the object of the legislature, which is ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular'.

[13] However, leading counsel for the respondents, Mr Moerane SC, correctly conceded that on the allegations contained in the papers he could not argue that there had been an effective consultation with the local community – although, as he pointed out, given the skimpy answers of the respondents, it may well be that as a matter of fact further relevant information in regard to the issue was for some reason not disclosed. That may well be so, but it would be idle to speculate thereon. On the papers as they stand, the court below erred in reaching the conclusion it did on this issue, as Mr Moerane further correctly conceded. It ought instead to have found that there had not been proper public participation in the Municipality's budgeting process, and granted appropriate relief.

[14] Of course that does not necessarily mean that this court, a year later, should set aside the budget resolution of 30 May 2013.[12] A great deal of water has flowed under the bridge and the Municipality is now considering its next annual budget. Counsel for the appellants correctly conceded that at this stage he could not ask for the budget to be set aside solely by reason of the lack of proper public participation, and that the outcome of the appeal, in truth, hinged

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[9] *African Christian Democratic Party v Electoral Commission and Others* 2006 (3) SA 305 (CC).
[10] Para 25.
[11] *Liebenberg NO v Bergrivier Municipality* 2013 (5) SA 246 (CC) para 25
[12] See *SAPOA* paras 69-75.

upon a decision on the appellants' principal point, namely, that the determination of a rates ratio of 1:3.8 between residential and commercial properties offended the principle of legality.

[15] As set out specifically in its founding papers, the appellants' case on this latter issue was based squarely on the conclusion of Southwood AJA in *SAPOA*[13] that s 19(1)(*b*) of the Rates Act, as read with the regulations promulgated pursuant to s 19(2), prohibits the imposition of a rate on any category of non-residential property higher than the rate levied on residential property. The learned judge accordingly held that levying a rate on business properties that is 3.5 times the rate on residential properties would be unlawful. Relying upon this, and the allegation that the rate levied by the Municipality in respect of business properties in the present matter was 3.8 times the rate to be levied in respect of residential properties, the appellants alleged that the Municipality was prohibited from determining such a rate in the budget and that, at most, no more than the same rate it intended to apply to residential properties could legally be imposed on commercial properties.

[16] The court a quo evaded the issue, finding there to be no factual basis for the allegation that the proposed ratio of residential to business properties was 1:3.8. The simple answer to this is that the allegation in the founding papers that this was the proposed ratio was not disputed by the respondents' in their answering papers. Accordingly, far from there being no factual basis laid for the allegation, the proposed ratio was common cause (indeed, as pointed out by the appellant before this court, the actual rate between residential and business properties approved by the first respondent on 30 May 2013 and published in the *Provincial Gazette* on 25 October 2013 under s 14(2) of the Rates Act resulted in a higher ratio of 1:4.5).[14] Consequently it becomes necessary to

[13] See paras 52-57.
[14] *PG* 60 25 October 2013, Title No. 2: Council Rates Resolution.

consider whether Southwood AJA was correct in his conclusion in respect of the effect of s 19(1)(*b*) of the Rates Act and the regulations promulgated thereunder.

[17] But before doing so, it is necessary to make a few introductory comments relevant to his conclusion. At the outset, it must be recorded that it formed no part of the *ratio decidendi* of his judgment. Although the other members of this court dissented in regard to the order that should issue, they were unanimous that the municipality, in amending its budget to increase the rates, had failed to comply with the statutory obligations relating to community consultation and participation. They were also unanimous in their finding that the decision to impose the increased rate on business properties had no rational basis. For these two reasons it was held that the appellant was entitled to relief. In respect of the appellants attack upon the impugned decision under s 19(1)(*b*) of the Rates Act, however, Southwood AJA spoke alone and his views on the issue were not endorsed by the majority (there was no comment on the issue in the majority judgement, presumably because it was felt unnecessary). Thus not only was his the sole voice on the issue but, as he himself said, it was not necessary to decide whether the proposed increase in respect of business property rates was prohibited by s 19(1)(*b*) to determine the appeal.[15] In addition, appellant had abandoned any reliance on the point which had therefore not been argued. In these circumstances, the conclusion of the learned judge on the issue was obiter dictum on an issue in respect of which he had not enjoyed the benefit of full argument and which was not supported by any other members of the court. It therefore is of limited persuasive value. And in any event, for the reasons that follow, it was clearly wrong.

[18] Section 11(1)(*a*) of the Rates Act provides that a rate levied by a municipality on property must be an amount in Rand on the market value of the property. Section 19(1)(*b*) goes on to provide that a municipality may not levy a rate on non-residential properties that exceeds a prescribed ratio to the rate on

[15] Para 52.

residential properties (but not that a rate levied on non-residential properties may not exceed that imposed on residential properties). On 27 March 2009 the Minister for Provincial and Local Government promulgated regulations under the Rates Act.[16] Blessed with the so-called short title 'the Municipal Property Rates Regulations on the Rate Ratio between Residential and Non-Residential Properties', it was these regulations that were before the court in *SAPOA*. They were subsequently amended on 12 March 2010 by the 'Amended Municipal Property Rates Regulations on the Rate Ratios between Residential and Non-Residential Properties'.[17] In this amended form, the regulations read as follows:

'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;

"**public benefit organisation property**" means property owned by public benefit organisations and used for any specified public benefit activity listed in item 1 (welfare and humanitarian), item 2 (health care), and item 4 (education and development) of part 1 of the Ninth Schedule to the Income Tax Act.

REGULATIONS ON THE RATE 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:

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[16] GN R363 in GG 32061 of 27 March 2009.
[17] GN R195 in GG 33016 of 12 March 2010.

Categories	Ratio in relation to residential property
Residential property	1:1
Agricultural property	1:0.25
Public service infrastructure property	1:0.25
Public benefit organisation property	1:0.25

Commencement

3. The provisions of regulation 2, as far as they apply to –

(a) Agricultural and public service infrastructure property are deemed to have taken effect from 1 July 2009.

(b) Public benefit organisation property takes effect on 1 July 2010.

Short title

4. These regulations shall be called the Amended Municipal Property Rates Regulations on the Rate Ratios between Residential and Non-Residential Properties.'

The only material difference between these amended regulations and the regulations in their original form is the addition to the table in regulation 2 of the final category 'Public benefit organisation property' in the first column and its ratio to residential property set out in the second column.

[19] These regulations are certainly clumsily and inelegantly drawn. It was the listing of residential properties at the head of the first column above other non-residential properties that Southwood AJA found created confusion. He therefore reasoned:

'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 months 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.'

[20] As a starting point in considering this approach, although it may of course at times be necessary to correct an apparent error in the language used in a

statute or regulation in order to avoid an identified absurdity,[18] courts should be slow to alter the words actually used[19] and must guard against 'the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used',[20] thereby legislating rather than interpreting. With due respect, it is in this latter respect that I feel Southwood AJA erred.

[21] The first column in regulation 2 is headed 'Categories' and not 'Categories of non-residential property'. And whilst, at the commencement of regulation 2, mention is made of the rate on the categories of the non-residential property 'listed in the first column of the table below' it does not follow that only non-residential property will appear in that column. Had it been intended to be a list solely of non-residential properties, it may have been absurd for residential properties to have appeared in that column, particularly if the ratio reflected in the second column had not been 1:1 but some other ratio. But that is the ratio listed, and the ratio between residential properties and residential properties is of course 1:1. The first entry relating to residential property can easily be regarded as being no more than a superfluous illustration of the operation of the ratio formula outlined immediately above the two columns.

[22] Moreover the words used must be interpreted in their context, both statutory and historical. There is nothing in the Rates Act or its related legislation that indicates that the maximum permitted rate on property would be that imposed in respect of residential properties. Significantly, s 8(1) of the Rates Act provides that a municipality may in terms of the criteria contained in its rates policy levy different rates for different categories of property. These may include categories determined according to the use of the property, the permitted use thereof or the geographical area in which the property is situated. Section 8(2) goes on to provide for a host of categories that may be so

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[18] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 25.
[19] *Summit Industrial Corporation v Claimants Against the Fund Comprising the Proceeds of the Sale of the MV Jade Transporter* 1987 (2) SA 583 (SCA) at 597A-B.
[20] *Natal Joint Municipal Pension Fund* (supra) para 18.

determined, including residential properties, industrial properties and business and commercial properties. This list is neither exhaustive nor prescriptive and it is competent for a municipality to determine a category not mentioned in the section.[21] But despite all these detailed provisions, none point to the necessity to apply the highest level of rates to residential property. And, as I have already mentioned, s 19(1)(*b*) provides that a municipality may not levy a rate on non-residential properties that exceeds a prescribed ratio to the rate on residential properties; not that a rate on non-residential properties may not exceed that imposed on residential properties.

[23] Importantly, as a general rule, higher rates have historically been levied against commercial, industrial and business properties than those classified as residential. This is evident from the appellants' papers which include a memorandum from 'a well-known economist and financial expert in national finance and economics', Mr Dawie Roodt, who points out that the rates ratio between residential and business properties was at the time 1:3.5 in the City of Johannesburg, 1:2.267 in Ethekwini Municipality and 1:2 in the City of Cape Town. This is also apparent from the websites of the major municipalities and from the jurisprudence of this court. For example, in *City of Johannesburg Metropolitan Municipality v Chairman of the Valuation Appeal Board for the City of Johannesburg & another*,[22] the debate centred upon whether a municipality had been entitled to levy a higher rate imposed in respect of business properties when most of the property was being used for residential purposes which attracted a lower rate.

[24] The reason for imposing a higher rate on certain properties than on others by reason of their uses is in many cases self-evident. Land used for agricultural purposes has been rated lower than residential properties[23] to encourage the

[21] *City of Tshwane v Marius Blom & GC Germishuizen Inc & another* 2014 (1) SA 341 (SCA).
[22] *City of Johannesburg Metropolitan Municipality v Chairman of the Valuation Appeal Board for the City of Johannesburg & another* [2014] 2 All SA 363 (SCA).
[23] See eg *Mosowitz v Johannesburg City Council* 1957 (4) SA 569 (T).

agricultural sector to produce for the benefit of the public good. On the other hand, vacant or undeveloped land is generally rated substantially higher than residential land in order to encourage landowners to develop their properties. The use to which land is put is of cardinal importance in determining the rate to be levied. Commercial, industrial and business properties are used to generate income while residential properties provide a home and shelter to the domestic ratepayer, many of whom are financially hard-pressed. In these circumstances it is understandable that business, commercial and industrial properties historically have been rated at a higher level than residential properties. As explained in *Municipal Law in the Province of the Cape of Good Hope South Africa*:[24]

'The motivation is that industry and commerce can absorb additional rating burdens by passing them on in the prices of commodities and charges for services they provide ─ thus spreading the load more evenly over all the citizens.'

[25] This motivation applies even more forcefully today in our constitutional democracy in which the right to access to housing[25] and the necessity to respond to people's needs[26] are enshrined. Placing residential properties in the highest rates category would tend to frustrate, rather than encourage, the ownership of housing. In these circumstances, any intention to alter the well-established position of commercial, industrial and business properties being rated at a higher level than residential properties seems improbable. It is not without significance that in *SAPOA* the view of the Department of Finance was that the initial regulations had not prescribed a ratio between the rates on residential and business properties (in other words, that a ratio had been prescribed only in respect of the few categories of non-residential properties mentioned in the regulation).[27]

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[24] Randell and Bax *Municipal Law in the Province of the Cape of Good Hope South Africa* 4th ed at 97.
[25] Section 26 of the Constitution.
[26] Section 95(1)(*c*) of the Constitution.
[27] *SAPOA* para 3.

[26] It seems to me that this must be correct. There is no reason to read 'residential property' in the first column in regulation 2 as meaning 'non-residential property'. The regulation must be construed as providing solely for a ratio in respect of residential property and the other categories of non-residential property mentioned, namely, agricultural property, public service infrastructure property, and public benefit organisation property. Consequently a ratio between residential property and business or commercial property has not been prescribed by the regulations, and the rates to be levied in respect of the latter property is a matter to be determined by municipalities; subject, of course, to the limitations imposed in Part 3 of the Rates Act – including s 16(1) which provides that rates may not be levied that would materially and unreasonably prejudice national economic policies, economic activities or the national mobility of goods, services, capital and labour.

[27] Accordingly, in my respectful view, the conclusion of Southwood AJA in *SAPOA* that s 19(1)(*b*) of the Rates Act, as read with the regulations, prohibited the imposition of a rate on business or commercial properties higher than that imposed on residential properties, was incorrect and the appellant's reliance thereon was misplaced. As a result, the rate which the Municipality sought to impose in respect of business properties in its budget of 30 May 2013 has not been shown to have offended the principle of legality.

[28] To sum up, the high court erred in not finding in favour of the appellants in respect of the issue of public participation but was correct, albeit for the wrong reasons, in not holding the proposed rate for business properties to be unlawful. However, for the reasons already mentioned, it is by now too late for any meaningful declaratory relief to be granted to the appellants.

[29] That brings me to the question of costs. As the appellants ought to have achieved substantial success in the high court, the order of costs granted against them cannot be allowed to stand. It is only to that limited extent that the order of

the high court needs to be altered, and the appeal must otherwise be dismissed. That is of course relevant to the question of costs in this court. Also relevant is the fact that the appellants have failed in their argument relating to the unlawfulness of the rate to be imposed on business properties, which was their principal concern in instigating this litigation.

[30] That having been said, the manner in which the Municipality approached the appellants' application militates against a costs order in its favour. This is public interest litigation in the sense that it examines the lawfulness of the exercise by public officials of the obligations imposed upon them by the Constitution and national legislation. The function of public servants and government officials at national, provincial and municipal levels is to serve the public, and the community at large has the right to insist upon them acting lawfully and within the bounds of their authority. Thus where, as here, the legality of their actions is at stake, it is crucial for public servants to neither be coy nor to play fast and loose with the truth. On the contrary, it is their duty to take the court into their confidence and fully explain the facts so that an informed decision can be taken in the interests of the public and good governance. As this court stressed in *Gauteng Gambling Board and another v MEC for Economic Development, Gauteng,*[28] our present constitutional order imposes a duty upon state officials not to frustrate the enforcement by courts of constitutional rights.

[31] It is bitter to record that the Municipality's officials who deposed to affidavits in the present matter failed to comply with this duty. The first respondent's answering affidavit was deposed to by Mr Willem Boshoff, the acting city manager, who obstructively sought to deny the locus standi of certain of the appellants, a point later abandoned. More importantly, he denied 'as if specifically traversed' (whatever that might mean) the allegations made by Mr

[28] *Gauteng Gambling Board and another v MEC for Economic Development, Gauteng* 2013 (5) SA 24 (SCA) para 52.

Kalil in regard to the initial meeting with municipal officials when the appellants were first informed of the proposed rates ratio for commercial properties, without in any way advancing the factual basis relied on to support that denial. If Mr Boshoff was unaware of the meeting, or if he felt he was unable to meaningfully deal with Mr Kalil's allegations as they were too vague, he should have said so. The recent comments of this court in *The Director-General: The Department of Home Affairs and others v Dekoba*[29] are pertinent. In that matter a chief control immigration officer who had no personal dealings with or knowledge of the facts in a particular case made repeated denials without advancing any facts justifying them. This was deprecated by this court which said:

'There was no appreciation on his part that a deponent, who denies the facts deposed to on oath by witnesses for the other party, accuses those witnesses of lying and lying on oath is a serious criminal offence. One expects greater care on the part of a senior government official when deposing to an affidavit.'

[32] The unsatisfactory aspects of Mr Boshoff's affidavit did not stop there. He also denied the allegation that it had taken a month to arrange a meeting with the mayor but, once again, he failed to advance the factual basis for his denial. Instead he referred to the so-called 'confirmatory affidavits' of the mayor and his personal assistant. They, in turn, each merely referred to Boshoff's affidavit and confirmed 'its contents as true and correct in so far as it relates to me.' Confirmatory affidavits at times may have their place but, by and large, constitute a slothful means of placing evidence before a court which is entitled to expect that the actual witnesses to an event depose to the facts. Be that as it may, when no facts are alleged, either in a respondent's answering affidavit or in a supporting confirmatory affidavit, to substantiate a denial of the version alleged by an applicant, the denial can be disregarded.

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[29] *The Director-General: The Department of Home Affairs and others v Dekoba* (224/2013) [2014] ZASCA 71 (28 May 2014) para 6.

[33] Then there is Mr Boshoff's denial of the appellants' version of the meeting with the mayor when it was eventually held. He denied that the formula to be applied to calculate the rates to be payable on commercial property was discussed. In the light of the fact that the meeting had been requested for that very purpose and that almost immediately thereafter the appellants addressed the letter of 27 May 2013 to the Municipality concerning the issue of commercial rates, this further unsubstantiated denial can be rejected as spurious.

[34] In short, the manner in which the Municipality presented its case in its affidavits is to be deprecated, and fell far short of what was expected from an organ of state, the legality of whose actions was in dispute. This is a meaningful factor relevant to the exercise of discretion as to costs and, in the light thereof, counsel for the respondents, again quite correctly, did not ask for a costs order in their favour. In these circumstances, although the appeal had to fail, save for the costs order in the high court, it is just for there to be no order in regard to the costs of the appeal.

[35] For these reasons the following order was made:

(a) The order of the court below as to costs is set aside and replaced with the following:

'The first respondent is ordered to pay the applicant's costs.'

(b) Subject to (a) the appeal is dismissed with no order as to costs.

L E Leach
Judge of Appeal

Appearances:

For the Appellant:	J Y Claasen SC Instructed by: Matsepes Inc, Bloemfontein
For the Respondent:	MTK Moerane SC (with him T L Manye) Instructed by:
Attorneys for the First, Third and Fourth Respondents:	Moroka Attorneys, Bloemfontein
For the Second Respondent:	The State Attorney, Bloemfontein