THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 724/2017

In the matter between:

CITY OF TSHWANE METROPOLITAN MUNICIPALITY	**APPELLANT**

and

LOMBARDY DEVELOPMENT (PTY) LTD	**FIRST RESPONDENT**
KARIN GELDENHUYS	**SECOND RESPONDENT**
JOHANNES FREDERIK GELDENHUYS	**THIRD RESPONDENT**
CECILIA LOOTS	**FOURTH RESPONDENT**
LISA HOPKINSON	**FIFTH RESPONDENT**
LYN CHER CALLE	**SIXTH RESPONDENT**
EMILY MATHILDA BEZUIDENHOUT	**SEVENTH RESPONDENT**
NICOLAAS WYNAND BEZUIDENHOUT	**EIGHTH RESPONDENT**
LIZ HAMMAN	**NINTH RESPONDENT**
HUGH ARUNDEL VAN DER WESTHUIZEN	**TENTH RESPONDENT**
JOHAN SIEBERT VAN ONSELEN	**ELEVENTH RESPONDENT**
MARION GRASSINI	**TWELFTH RESPONDENT**
CARLOS ARTURO GRASSINI	**THIRTEENTH RESPONDENT**
MARKOS ARTURO GRASSINI	**FOURTEENTH RESPONDENT**

Neutral citation: *City of Tshwane Metropolitan Municipality v Lombardy Development (Pty) Ltd & others* (724/2017) [2018] ZASCA 77 (31 May 2018)

Bench: Ponnan, Majiedt and Seriti JJA and Pillay D and Makgoka AJJA

Heard: 11 May 2018

Delivered: 31 May 2018

Summary: Local Government: Municipal Property Rates Act 6 of 2004 – failure by Municipality to comply with s 49 in compiling supplementary valuation roll – such roll invalid – subsequent valuation rolls relying on re-categorisation of properties in earlier invalid supplementary roll also invalid to the extent of such reliance.

ORDER

On appeal from: Gauteng Division, Pretoria (Tuchten J sitting as court of first instance):

Save for setting aside paragraphs 5 and 6 of the order of the court below, the appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Ponnan JA (Majiedt and Seriti JJA and Pillay D and Makgoka AJJA concurring):

[1] Municipal property rates are an amount in the Rand levied on the market value of immovable property (ie land and buildings).[1] Section 229 of the Constitution provides that a municipality may impose rates on property and that this power may be regulated by national legislation. The Local Government: Municipal Property Rates Act No 6 of 2004 (the MPRA) is the national legislation envisaged by section 229 of the

[1] Section 11 of the MPRA.

Constitution.[2] In terms of s 3(1) of the MPRA, the council of a municipality must adopt a policy on the levying of rates on rateable property. Section 8 of the MPRA permits a municipality to levy different rates for different categories of property and requires it to specify the rates and the categories in its rates policy. The criteria for levying different rates for different categories of rateable property is determined according to the actual use of the property, permitted use of the property or the geographical area in which the relevant property is located.[3] The Act does not specify that a category of 'vacant land' is permissible, but the list in s 8(2) is not exhaustive and it is competent for a municipality to add categories to that list.[4]

[2] The power to impose and collect rates from an individual property owner turns on the existence and the validity of a valuation roll reflecting the market value of that property. Section 30 of the MPRA provides that a municipality, intending to levy rates on properties within its jurisdictional area, has to value such properties and prepare a valuation roll reflecting the valuations. The valuation roll must contain the market value of the property. In terms of s 33(1) of the MPRA the municipality must, before the date of valuation, designate a person as municipal valuer. Section 49(1) of the MPRA provides:

'(1) The valuer of a municipality must submit the certified valuation roll to the municipal manager, and the municipal manager must within 21 days of receipt of the roll –

(a) publish in the prescribed form in the provincial Gazette, and once a week for two consecutive weeks advertise in the media, a notice –

(i) stating that the roll is open for public inspection for a period stated in the notice, which may not be less than 30 days from the date of publication of the last notice; and

(ii) inviting every person who wishes to lodge an objection in respect of any matter in, or omitted from, the roll to do so in the prescribed manner within the stated period;

---

[2] *MEC for Local Government and Traditional Affairs, KwaZulu-Natal v Botha NO and others* [2014] ZASCA 211; 2015 (2) SA 405 (SCA) para 6.

[3] Section 8(1).

[4] *City of Tshwane v Marius Blom & GC Germishuizen Inc and another* [2013] ZASCA 88; 2014 (1) SA 341 (SCA) para 16.

(b) disseminate the substance of the notice referred to in paragraph (a) to the local community in terms of Chapter 4 of the Municipal Systems Act; and

(c) serve, by ordinary mail or, if appropriate, in accordance with section 115 of the Municipal Systems Act, on every owner of property listed in the valuation roll a copy of the notice referred to in paragraph (a) together with an extract of the valuation roll pertaining to that owner's property.'

If the municipality has an official website or another website available to it, the notice and the valuation roll must also be published on that website.[5] A property owner may then lodge an objection within the period stipulated in s 49(1)*(a)(i)* against any matter reflected in, or omitted from, the valuation roll.

[3] A valuation roll takes effect from the start of the financial year following completion of the public inspection period required by s 49 and remains valid for that financial year or for one or more subsequent financial years as the municipality may decide but in total not for more than four financial years.[6] A municipality must cause a supplementary valuation roll to be prepared in respect of any rateable property which has come to be included in the municipality after the last general valuation.[7] In terms of s 78(2)*(b)* of the MPRA the supplementary valuation roll takes effect on the first day of the month following completion of the public inspection period contemplated by s 49 and remains valid for the duration of the municipality's current valuation roll.

[4] The respondents are owners of vacant stands in Lombardy Estate and Health Spa, a privately owned housing development in the municipal area of the former Kungwini Local Municipality (Kungwini). With effect from 1 July 2011 Kungwini, together with the neighbouring Nokeng Tsa Taemane Local Municipality and Metsweding District Municipality, was disestablished and absorbed into the appellant, the City of Tshwane Metropolitan Municipality (the City). Despite provision having been made in the policy of the Kungwini Municipality for a rateable category of 'vacant land', the municipality never applied the category. Whilst under the administration of Kungwini, the respondents' properties were categorised as 'residential'. For a year or more following the

[5] Section 49(2).
[6] Section 32(1)(*a) and (b)*.
[7] Section 78(1)*(b)*.

disestablishment of Kungwini, rates were levied on the respondents' properties at the rate charged by the City for 'residential' properties. The practical effect was that there were only marginal increases in the respondents' rates upon incorporation into the City.

[5] About a year later that changed when the respondents began to receive invoices from the City reflecting massive increases in their liability for rates. Moreover, those drastic increases were retrospectively imposed to July 2011. By way of example: in May 2012 the property belonging to the Bezuidenhouts (the seventh and eighth respondents), which was categorised as 'residential', was reflected as having a market value of R1,2 m, being the same value that had been reflected on the corresponding Kungwini invoices. For the whole of the 2011-12 financial year the rates payable by the Bezuidenhouts was R753.11 per month after rebates were taken into account, which compared favourably with the R600 levied by Kungwini during the previous financial year. For the months of July and August 2012, being the first two months of the 2012-13 financial year, the Bezuidenhouts were invoiced an amount of R843.43 monthly, being the new increased rate of 1,354 c/R then applicable by the City to a property categorised as residential. However, in September 2012 the Bezuidenhouts received an invoice from the City, which reflected a monthly charge for rates of R6014. That represented an increase of some 700% over the amount previously charged. The experience of the Bezuidenhouts was not unique to them, but repeated throughout the Lombardy Estate development and, indeed, the former Kungwinini.

[6] Following receipt of those invoices, many of the respondents sought clarification from the City as to why their rates had increased so drastically. In response, each received a standard letter from the City that went thus:

'A rate levied on this category of property, is determined by the Municipality during its budgeting process for the financial year concerned. Public participation process for the adoption of the Medium Term Revenue and Expenditure Framework was undertaken in terms of the relevant legislation... held at various venues identified by the municipality and the community and stakeholders were afforded an opportunity to make and submit their representations regarding the Medium Term Revenue and Expenditure Framework and draft Property Rates Policy. The venues for public participation were more central to make them accessible to all ratepayers and stakeholders. The mentioned legislation makes provisions for community consultation/public

participation and not to consult individual ratepayers. It should be noted that not all ratepayers attended the community participation sessions due to reasons beyond the municipality's control. The notices for public consultation meetings were published in various newspapers. . . . The council had considered all comments and presentations submitted to it by the community and stakeholders during the public participation process. The approved tariffs were published in the extraordinary Provincial Gazette to afford the community and individual ratepayers the second opportunity to make final comments and representations to the municipality.'

[7] The uniform experience of the respondents was that the increases took them completely by surprise. During October 2012 a number of the respondents engaged the services of Adams & Adams Attorneys. On the 26th of that month Adams and Adams wrote to the City. After setting out the relevant background, the letter noted that notwithstanding numerous queries having been lodged with the City, it had failed to meaningfully engage with their clients and other members of the community. The letter identified a number of concerns about the legality and enforceability of the rates increases and requested the City to provide reasons for its decision. The City did not respond. Nor did it respond to several further letters written by Adams & Adams.

[8] Appreciating that their attempts at engaging with the City had come to naught, on 28 June 2013 the respondents approached the North Gauteng High Court, Pretoria to review and set aside 'four decisions' of the City. It was stated in the founding affidavit: 'I have no further information about these decisions. I do not know who took them or when they were taken. My efforts, and those of other residents, to obtain reasons from the [City] and an explanation for these decisions have drawn a blank'. The City was also called upon in terms of Rule 53(1)*(b)* of the Uniform Rules of Court to despatch to the Registrar of the high court the record of the decisions sought to be reviewed and set aside. On 27 August 2013 the City's attorney delivered a copy of the record to the respondents' attorney. On 26 September 2013 the latter pointed out that there appeared to be certain omissions from the record furnished. On 21 November 2013 the former filed a further bundle of documents described as '[City's] supplementary record: full and final'.

[9] On 16 July 2014 the respondents filed their replying affidavit. It was there stated that: (i) for the reasons set out in the founding affidavit they were unable to be specific in their original notice of motion as to the particular decisions that they sought to impugn; (ii) the Rule 53 record shed little further light on the matter; and (iii) it was only when the City set out its case in its answering affidavit that it was possible to establish with the proper degree of precision the source of the steep increases in rates to which the respondents had objected. Thus, so stated the respondents, this necessitated an amendment to their notice of motion. In response, the City intimated that it would oppose any proposed amendment. The respondents were accordingly obliged to formally apply to amend their notice of motion.

[10] Both the amendment application and the main application succeeded before Tuchten J who, on 12 June 2017, issued the following order:

‘1 To the extent necessary, any lateness in bringing these review proceedings is condoned under s 9(2) of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA) and the period of 180 days provided for in s 7(1) of PAJA is concomitantly extended.

2 The respondent’s 2012 supplementary valuation roll is declared invalid and set aside to the extent that it recategorises as "Vacant" properties situated in the municipal area of the former Kungwini local municipality formerly categorised as "Residential" (the affected properties).

3 The respondent’s 2013 general valuation roll and all subsequent valuation rolls of the respondent are declared invalid and set aside to the extent that they categorise the affected properties as "Vacant" unless and until the affected properties are lawfully re-categorised as such. The imposition by the respondent of the assessment rate applicable to vacant land on those of the affected properties which belonged to the applicants on 28 June 2013, the date upon which this review application was instituted, is declared invalid and set aside.

4 The imposition by the respondent of the assessment rate applicable to vacant land on those of the affected properties which belonged to the applicants on 28 June 2013, the date upon which this review application was instituted, is declared invalid and set aside.

5 Item 5.1.5(d) of the respondent’s rates policy with effective date 1 July 2011, as amended (pp784-799 of the record) is declared invalid and set aside.

6 The respondent is prohibited from further implementing any of the decisions mentioned above in this order to the extent that they have been set aside.

7 Pursuant to the applicants' tender made through counsel, the applicants are directed to pay rates to the respondent in respect of the affected properties owned by them at the rate applicable to such properties immediately preceding the coming into operation of the respondent's 2012 supplementary valuation roll until the rate applicable to such properties is changed according to law.

8 The decision to implement the 2013 general valuation roll is remitted to the respondent to consider afresh the appropriate categorisation of the affected properties and the rate which should be levied upon the affected properties, with due regard to the provisions of the Municipal Property Rates Act, 6 of 2004, to other applicable legislation and to this judgment.

9 Except as expressly stated in this order, decisions taken and acts performed under and pursuant to any of the valuation rolls mentioned in this order are not invalid merely because of the invalidity of such valuation rolls themselves.

10 The respondent must pay the applicants' costs, including the costs consequent upon the employment of both senior and junior counsel.'

Tuchten J subsequently granted leave to the City to appeal against paragraph 5 of his order. The appeal against the further orders of the learned judge is with the leave of this court.

[11] When the application was launched, little was known about the underlying decisions that had led to the rates increases. Remarkably, almost five years later this remains the case. This is because the City's case is characterised by a failure to provide a frank and comprehensive account of its conduct. It seeks in this appeal to make a virtue of its silence on matters on which it owes a duty to account.[8] The principal focus of the appeal is thus on the issues of: (a) the lateness of the respondents' application to the high court; (b) the grant by the high court of the amendment sought by the respondents; and (c) whether the orders of the high court should have been confined to the respondents.

[8] *Kalil NO and others v Mangaung Metropolitan Municipality and others* [2014] ZASCA 90; 2014 (5) SA 123 (SCA) para 30 put it thus: 'the function of public servants . . . is to serve the public, and the community at large has the right to insist upon them to act lawfully and within the bounds of their authority. They should neither be coy nor play fast and loose with the truth . . . 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'.

[12] The City says that the respondents' application was too late, in circumstances where it remains unclear when the relevant decisions were taken, by whom and why. The application establishes that the City failed to follow the statutory procedures prescribed by the MPRA when it re-categorised the respondents' properties in 2012. The City has however declined to specify the extent to which it omitted to do so. It has also pointedly declined to say whether it has ever attempted to subsequently cure its omissions. With effect from July 2012, the City changed the category of the vacant properties in the disestablished areas from 'residential' to 'vacant' in a 2012 supplementary valuation roll that was published on 4 July 2012 and took effect on 1 September 2012. It then charged the owners of the re-categorised properties the vacant land rate (which is some 4.5 times higher than the residential rate) and applied the higher rate retrospectively to July 2011, resulting in substantial arrear charges. The City did all of this without complying with the requirements of the MPRA. Those provisions are intended precisely to avoid a situation such as this, where ratepayers are blindsided by changes to their rates without notice and consultation. The City now accepts, as it somewhat euphemistically put it in its heads of argument in the appeal, that it 'did not comply fully with the provisions of section 49 [of the MPRA]'. The extent of the non-compliance is not however specified. It also says that it 'accepts . . . that the Respondents did not, contrary to the mandatory provisions thereof, receive notices in terms of Section 49(1)(c)'.

[13] The City's belated concession drastically understates the extent of the City's non-compliance. The respondents' case was that the City did not comply with the requirement to provide individual owners with notice of the re-categorisation of their properties in terms of section 49(1)(c) of the MPRA. Though this is now an undeniable fact, the City was initially coy in its response. In its answering affidavit the City asserted that it 'is not in a position to demonstrate that its officials complied with the material requirements for which provision is made in section 49(1)(c) of the Rates Act'. This implies that all that is lacking is proof of compliance rather than the absence of compliance. The City describes the absence of proof as an 'oversight' that is excusable because of 'the enormity of the task given the numbers of owners of property in the area of the erstwhile Kungwini to whom section 49(1)(c) notices had to be served' and the

short time within which the absorption of the Kungwini, Nokeng and Metsweding municipalities had to take place. The City ought not to have prevaricated in that fashion. The fact that it has not been able to find evidence of service of a single notice, together with the fact that none of the respondents ever received notice leads inescapably to the conclusion that the City did not trouble to send any such notices. It ought to have candidly said so and also said why it chose not to do so.

[14] Moreover, not having satisfied the individual service requirements prescribed by the MPRA, the City made no real attempt to communicate by any other means to individual owners. Nor, for that matter, did it take any steps to ensure that owners might otherwise be made aware of the fact of the re-categorisation of their properties and the implications that this would carry for their rates liability. There is no hint in the record that, in the City's public participation processes concerning its budget, it informed citizens about its re-categorisation plans and advised them of the fact of the changes that were to be effected to the supplementary roll and urged them to inspect it and to exercise their right to object. The omission is particularly egregious given that the City must have realised the impact that the re-categorisation and the consequent levying of the vacant land rate would have for affected ratepayers.

[15] The omissions go further. The City alleged that it had substantially complied with the requirements of s 49 of the MPRA. Precisely how is unclear. The only evidence of any compliance by the City with the notice requirements of s 49 is the two notices in the Provincial Gazette that were annexed to the answering affidavit. There is no evidence that the City published the notice in local newspapers as required by section 49(1)*(a)*. It asserts that it did so but does not annex proof of such publication. Indeed, there is no document anywhere in the record proving publication in the media as required by the MPRA. The notice in the Provincial Gazette omits the most critical fact, namely that the City had re-categorised the vacant Kungwini properties, thereby defeating the core purpose of the notice requirement. Such evidence of compliance as may exist is solely within the City's knowledge, but it has failed to provide it.[9]

[9] *Wightman t/a JW Construction (Pty) Ltd v Headfour (Pty) Ltd and another* [2008] ZASCA 6; 2008 (3) SA 371 (SCA) para 13.

[16] The City argues that the application should have been brought within 180 days of July 2012, which is when some of the respondents received invoices reflecting the higher charges. The premise of the argument is that the application entails the review of administrative action. However, the application was aimed at the exercise by the City of its constitutional powers to impose rates on property in terms of s 229(1) of the Constitution.[10] Arguably, the exercise of such power could perhaps be categorised as either an executive or legislative function of a municipal council and thus exempted from PAJA. Given the lack of candour on the part of the City, it remains unclear even at this stage, which one it is. The City has simply declined to say who (ie which organ of the City) decided that it was too onerous to follow the prescribed procedures and that, in consequence, the 2012 supplementary valuation roll would be produced and implemented without following those procedures. It is thus difficult to properly characterise the power exercised by the City.

[17] At best for the City, the only function that could perhaps constitute administrative action is the valuation and categorisation of each property on the roll. This is principally the function of the municipal valuer. The City denied in its answering affidavit that this is administrative action.[11] The respondents did not challenge the decisions of the municipal valuer. Their opportunity to do so would have been during the objection process to the roll, an opportunity that they were denied. The challenge was instead to the validity of the 2012 supplementary valuation roll on the basis that the requirements of the MPRA for the preparation of a valid valuation roll were not complied with. The precise origins of the failure of the City so to comply remain obscure. One imagines that such a decision could only plausibly have been made at the highest executive or legislative levels by the City's policy-making organs or by its Council.

[18] However, it seems to me that I can pass over the characterisation issue, because on the assumption that some of the decisions impugned in the original notice of motion might constitute administrative action under the Promotion of Administrative Justice Act

[10] *City of Cape Town and another v Robertson and another* [2004] ZACC 21; 2005 (2) SA 323 (CC) para 62.
[11] *Gillyfrost 54 (Pty) Ltd v Nelson Mandela Bay Municipality* [2015] 4 All SA 58 (ECP).

3 of 2000 (PAJA), the respondents sought an extension of the 180-day time bar to the extent necessary. The high court took the view that when the application had been launched by the respondents the City had yet to furnish adequate reasons for its decisions, hence, the application was not late. And, even were the matter to have been approached on the basis that the respondents had accumulated sufficient information by mid-October 2012, it granted condonation for the two or three-month delay in launching the application. In my view, neither the approach nor the conclusion of the high court can be faulted. For, while it is correct that some of the affected owners would have become aware that something had changed when they began receiving drastically inflated invoices from the beginning of July 2012, there was nothing in those invoices that would have informed them of the underlying reasons for the change. The City provided no other form of notification to the ratepayers other than the invoices. Those invoices themselves provided no explanation. They simply reflected the properties as having been re-categorised as vacant and reflected the rate payable as the City's rate for vacant land and included an 'adjustment' reflecting the back-dating of this categorisation and the associated rate to 1 July 2011.

[19] The core of the City's case in relation to delay is that the respondents were in possession of all the relevant facts to enable them to launch the application by October 2012 at the latest, being the date of the letter from Adams & Adams to the City. However, that letter specifically requested reasons from the City for its decision to apply the vacant land tariff to the affected properties, a clear indication that as at that date the respondents were not aware of the underlying reasons for the re-categorisation of their properties. The letter also requested information regarding the internal remedies available to the respondents to challenge the re-categorisation; an indicator in itself that the matter could not have been ripe for a review. The letter further requested a copy of the record of the decision and attached a Promotion of Access to Information Act 2 of 2000 (PAIA) request in this regard. The respondents thus proceeded to launch their review application, even though, as the high court found, they had still not been furnished with any of the requested information. Accordingly, the original notice of motion was couched in very broad terms. Further, whilst there are generalised references to the fact that the properties could only have been re-categorised by way of

a supplementary valuation roll (which required proper notice in terms of section 49 of the MPRA), there was no reference to the 2012 Supplementary Valuation Roll in the founding affidavit. The information requested was furnished for the first time in rather elliptical terms in the Rule 53 record dated 22 August 2012. This was the first mention by the City of the actual cause of the increases, namely that the properties had been reclassified in the 2012 supplementary valuation roll. The previous correspondence from the City dealing with requests to explain the drastic increase in rates did not mention this crucial fact. Properly considered therefore, it is only from that date (22 August 2012) that the 'clock starts ticking' in relation to the 180-day period.[12]

[20] It is for the City to show that in granting the extension in terms of s 9(2) of PAJA the high court failed to exercise a proper judicial discretion. That the City has failed to do. In levying, recovering and increasing property rates, a City has to comply (at least substantially) with the procedures prescribed by national legislation. A failure to do so is in conflict with the principle of legality.[13] This is so, particularly in circumstances in which the true underlying facts concerning that failure became evident only as a result of the launch of the application. Although late in coming, the City has finally admitted on appeal that it did not comply fully with s 49 of the MPRA. It bears emphasis that the City failed to comply with s 49 of the MPRA almost in its entirety. The purpose of the publication and notice requirements of s 49 of the MRPA is self-evident. They are intended to ensure that the persons directly and individually affected by the changes to the valuation roll are given reasonable notice of the changes and an opportunity to respond to them by exercising the right of objection provided for in the MPRA. Notwithstanding its belated admission, the City nonetheless persists in its contention that the delay should not be condoned. But, once the admitted illegality goes into the scales it ought to tip it against the City. For, in declining to grant condonation in a case such as this and thereby not entering into the substantive merits of the matter, a court would be countenancing a continuing illegality.

---

[12] *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd* [2013] 4 All SA 639 (SCA); [2013] ZASCA 148 para 28.
[13] *Kalil NO* (above) 3.

[21] The procedures set out in the MPRA for the compilation of a valuation roll are a jurisdictional prerequisite for the exercise by the City of its power to collect rates. The reference in any law to any action or conduct is presumed to be a reference to a lawful or valid action or conduct.[14] If, as here, those procedures were not followed, the result is that the consequent collection of rates by the City premised on the valuation roll is invalid. The high court's declaration of invalidity of the 2012 roll is thus unassailable. And, as it was put in *City of Johannesburg v AD Outpost* 2012 (4) SA 325 (SCA) para 20 'an administrative decision declared to have been invalid is to be retrospectively regarded as if it had never been made.' The City contends however that the roll should not have been set aside or that some other just and equitable order short of setting aside the roll should have been made. In that regard it is important to emphasise that a litigant seeking a just and equitable remedy limiting the impact of the mandatory remedy of a declaration of invalidity must make out such a case. In particular, facts should be adduced as to the deleterious consequences for the public interest of setting aside a decision that has been declared invalid. This is to enable the Court to weigh up those consequences against the imperative to vindicate the principle of legality.[15] No such case has been made out by the City in its papers. If anything, the City has been aware of the vociferous objections by its residents since it first implemented the massive rates increases in July 2012. It could thus hardly be said that the delay between July 2012 and June 2013 has caused any prejudice to it, in the sense that relevant evidence has been forgotten or proof destroyed. It cannot plausibly be so that the City proceeded to arrange its affairs in the confident expectation that ratepayers would not challenge its conduct. Indeed, the City does not even attempt to suggest what other remedy might be preferable from the standpoint of justice and equity other than that the court should decline to set aside the 2012 valuation roll.

[22] The City says that this is a case where 'effluxion of time, practicalities, pragmatism and public interest in the finality of administrative decisions' dictate that the invalid act should be permitted to stand. It cites *Chairperson: Standing Tender*

---

[14] *S v Mapheele* 1963 (2) SA 651 (A) at 655D-E; *MTN International (Mauritius) v CSARS [2014]* ZASCA 8; 2014 (5) SA 225 (SCA) para 10.

[15] *Bengwenyama Minerals (Pty) Ltd and others v Genorah Resources and others (Pty) Ltd and others* [2010] ZACC 26; 2011 (4) SA 113 (CC) para 84-85.

Committee and others v JFE Sapela Electronics 2008 (2) SA 638 (SCA) as authority for this contention. That case was concerned with a tender. And, as is often the case in matters of that kind, where third parties have in good faith altered their position in reliance on the conviction that the administrative action is valid, they consequently would be prejudiced if it were to be set aside. Those considerations have no relevance in a case where an organ of state itself seeks to avoid the consequences of its unlawful conduct. Here, the City is not an innocent third party, but the author of the illegality. And, the City's lack of candour detracts from the perception that it was acting in good faith. The state of mind of the City or what motivated it to act as it did is simply unknown. There is moreover no evidence concerning the consequences of setting aside the 2012 valuation roll. The City pertinently declined to give any evidence at all about the preparation and compilation of its successor, the 2013 general roll.

[23] The City purported to re-categorise the affected properties in 2012. But, as the high court correctly held, that was invalid and hence ineffective. In order validly to apply the vacant land rate to the affected properties, those properties had to have been validly re-categorised by moving them from the residential to the vacant category thereby complying with the requirements of the MPRA for effecting a valid re-categorisation. Whilst the 2013 general valuation roll could possibly have accomplished this, it is plain that it could not have done so if it simply relied on the fact that the re-categorisation had already been effected by the 2012 supplementary valuation roll. The invalidity and setting aside of the 2012 roll has the consequence that a subsequent roll that relied on it for its validity would be invalid to the extent of such reliance (*Seale v Van Rooyen NO* 2008 (4) SA 43 (SCA) para 13).

[24] This is the basis of paragraph 3 of the high court’s order. The principal complaint in this appeal against that order is that a challenge to the valuation rolls subsequent to 2012 should not have been allowed to be introduced by way of an amendment to the notice of motion. The application should have been confined to the original attack on the 2012 roll, so suggests the City, because that is the case that it had to meet and it confined itself to that case. It was under no obligation, so the suggestion goes, to adduce evidence to deal with a challenge outside the parameters originally set in the

application and ought not to be prejudiced in that regard. By the date of the filing of the answering affidavit, the 2012 supplementary roll had been superseded by the 2013 general valuation roll. The City said: 'The rateable properties, which had previously been located within the erstwhile Kungwini Municipality, have also accordingly been included [in] the Respondent's General Valuation Roll of 2013'. Simply relying on the re-categorisation in the 2012 valuation, as the basis for the 2013 general valuation roll, without any steps having been taken to cure the defects in the process of re-categorisation, rendered the latter vulnerable to invalidity (*Seale v Van Rooyen*).

[25] The respondents sought to amend their notice of motion and on 25 July 2014 filed a formal notice in terms of Rule 28. The City objected to the amendment. Affidavits were exchanged and it was agreed between the parties that the amendment would be heard at the same time as the main application. The high court allowed the amendment. The City's contends that it erred in doing so. I am by no means persuaded that the high court's order on that score is appealable.[16] However, on the assumption in the City's favour that it is, it seems to me that, here as well, the approach of the high court cannot be faulted. The City says that it was prejudiced because it did not have an opportunity to address the 'new case'. The City was indeed afforded an opportunity to file a further affidavit dealing with the challenge to the 2013 general valuation roll. Initially, the City indicated that it intended to file '[a]ffidavits in support of its case regarding the invalidity of the General Valuation Roll and the prejudice to our client's application' and it requested an indulgence to do so. But, no further affidavit was filed by the City and no explanation for the failure to do so was provided.

[26] The challenge to the 2013 general valuation roll was a narrow one. It was expressly confined to the application of the legal principle enunciated in *Seale v Van Rooyen* namely, that if a second act depends for its validity on a prior act, the invalidity of the prior act has the effect that the second act is also invalid. The challenge was also based on the assumption that the City had not taken any steps to correct its failure to comply with the notification requirements and had simply issued the 2013 roll on the

[16] *Webber Wentzel v Batstone and another* [1994] 3 All SA 400 (T).

basis of the categorisations in the prior 2012 supplementary valuation roll. That assumption could easily have been defeated. It would have been a relatively simple matter for the City to have filed a further affidavit stating that the new rolls were not based on the re-categorisation in the 2012 roll and what further steps had been taken to cure the failure to comply with the MPRA in 2012. Had the City done so, that would have put the matter to bed.

[27] The City had a further opportunity to adduce such evidence when the amendment application was granted. It could, at that point, have sought a postponement to allow it to file a further affidavit. This was explicitly dealt with when the matter was heard. The high court indicates in its judgment that it anticipated such an application and that it was surprised when none was brought. The inference is thus inescapable that the City, despite being given every opportunity to do so, never sought to adduce further evidence as to how it cured the defects in the 2012 roll, simply because there was no such evidence to adduce. In these circumstances, the City cannot rely on a complaint that it has been unfairly treated because the issue was not sufficiently ventilated in the evidence. The City says in argument that the *Seale* principle does not apply because the establishment of the 2013 general valuation roll was a 'hermetically sealed' and 'independent" procedure'. That submission is not based on any evidence. The City deliberately declined to put up any evidence about the procedure adopted that might have established a basis for the submission. Challenged to respond to the allegation that it simply relied on the invalid 2012 re-categorisations in its subsequent valuation rolls and that it had never set about a fresh process, the City chose to hide behind technical objections to the effect that the rules of civil procedure did not compel it to say anything. The City thus cannot complain that it is unfair for the high court to have drawn the obvious inference from its silence on this issue. The legal effect of the order of invalidity and setting-aside of the 2012 supplementary roll is that, until the causes of invalidity are addressed by the City, the subsequent valuation rolls are consequentially invalid.

[28] The City says that there is no basis for the high court to have made a declaration of invalidity with general effect and that the judgment of the high court should have been

confined to the respondents. It was the respondents' case from the outset that the problems that they experienced were caused by a general failure by the City to comply with the MPRA and therefore with the principle of legality in respect of all vacant property in the former Kungwini. Thus, although they did not purport to represent the public at large, the relief sought and granted by the high court recognised that proceedings 'against the state assume a public character which necessarily widens the reach of orders issued to cover persons who were not privy to a particular litigation'.[17] What is more, the City's complaint misconstrues the nature and effect of the high court's judgment. For, whilst a judgment in personam relates only to the rights inter se the parties before the court and binds only the parties to the proceedings, one in rem fixes the status of the matter in the litigation. A judgment in rem has effect against the whole world – inter omnes and not merely as between parties to the litigation before the court. As the judgment pronounced upon the status of the particular subject-matter of the litigation in this case, it is one in rem and is conclusive against all persons whether parties or strangers to the litigation.[18]

[29] It follows that paragraphs 1 to 4 of the high court's order cannot be assailed. Insofar as paragraphs 5 and 6 are concerned, the respondents accepted that those orders were not strictly necessary and accordingly conceded that they be set aside. The City says it is difficult to understand and implement paragraphs 8 and 9 of the high court's order and, as a consequence, they should be set aside on appeal. The high court's order must be interpreted contextually and not by peering at words in a paragraph of the order in isolation. The context includes the application papers and the judgment of the court as a whole. Such an approach solves any ostensible difficulties in interpreting and implementing paragraph 7 of the order. It is plain from the context that the respondents' grievance was not concerned with the particular level of the rate levied against their properties (in the sense of the rate of cents in the rand made applicable to vacant property) but with the re-categorisation of those properties as 'vacant', thereby attracting the higher vacant land rate. Until properly re-categorised, the respondents contend that the City's residential rate should be charged in respect of their properties

[17] *Mukaddam v Pioneer Foods (Pty) Ltd and others* [2013] ZACC 23; 2013 (5) SA 89 (CC) para 40.
[18] *Tshabalala v Johannesburg City Council* 1962 (4) SA 367 (T) at 368H-369A; *Pattni v Ali* [2007] 2 AC 85 para 21.

and they tendered to pay that rate. That, as the judgment makes clear, is what the high court means by its order that the 'rate' previously applicable must be levied in the former Kungwini area until the City remedies the defects in its process of re-categorisation. In other words, the Kungwini vacant properties must be rated at the rate that in terms of the City's current rates resolution is applicable to residential properties, whatever that rate is from time to time.

[30] As to paragraph 8 of the order: Understood contextually, the order requires the City to undertake a valid process of re-categorisation of the Kungwini vacant properties, thereby complying with the MPRA. Put another way, if the City wishes to apply its vacant land rate to those properties it must first properly re-categorise them as vacant. This does not require the retrospective compiling of a valuation roll. Rather it is for the City to issue, following the procedures prescribed in the MPRA, a general or supplementary valuation roll that validly re-categorises the Kungwini properties as vacant. Once it has done that it would be free to apply the vacant land rate to those properties. The respondents did not challenge the validity of the rate applicable to vacant land and it is plain that the high court does not mean by its order that the City must reconsider this rate or that the rate has been declared invalid.

[31] In the result, save for setting aside paragraphs 5 and 6 of the order of the court below, the appeal is dismissed with costs, including the costs of two counsel.

_____

V M Ponnan

Judge of Appeal

APPEARANCES:

For Appellants:	T Strydom SC (with him T Mkhwanazi)
	Instructed by: Ndobela & Lamola Incorporated, Pretoria Honey Attorneys, Bloemfontein
For Respondent:	GJ Marcus SC (with him JB Currie)
	Instructed by: Adams & Adams, Pretoria Phatshoane Henney Attorneys, Bloemfontein