THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 234/2020

In the matter between:

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY **APPELLANT**

and

ZIBI YANGA **FIRST RESPONDENT**

ZIBI LINDIZWE **SECOND RESPONDENT**

Neutral citation: *City of Johannesburg Metropolitan Municipality v Zibi and Another* (234/2020) [2021] ZASCA 97 (09 July 2021)

Coram: SALDULKER, MBHA, and SCHIPPERS JJA and CARELSE and POYO- DLWATI AJJA

Heard: 05 May 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 09 July 2021.

Summary: Municipal law – Local Government: Municipal Property Rates Act 6 of 2004 – municipality within its powers to impose a penalty tariff in the instance of illegal or unauthorised use of property within its jurisdiction – such action not *ultra vires* if it is in terms of a validly adopted municipal property rates policy – appeal upheld.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Fourie AJ sitting as the court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel where so employed.

2 The order of the high court is set aside in *toto*, and replaced with the following order:

'The application is dismissed with costs.'

JUDGMENT

Mbha JA (Saldulker JA and Poyo-Dlwati AJA concurring)

[1] The central issue in this appeal is whether a municipality is entitled to levy a rate in the form of a penalty on residential property for illegal or unauthorised use, without first changing the category of the property on its valuation roll or supplementary roll, from 'residential' to 'illegal or unauthorised' use.

[2] The appellant, City of Johannesburg Metropolitan Municipality (the municipality), established in terms of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act) and other related legislation governing local authorities, appeals against the judgment and order of the Gauteng High Court Division, Johannesburg (per Fourie AJ) (the high court), handed down on 9 October 2019. In terms of this judgment, the municipality was ordered to apply the residential category reflected on its valuation roll, when levying property rates against erf 671 Auckland Park 1, the property of Mr and Mrs Zibi (the property) from '1 October 2015 to date of implementation of a replacement valuation roll pertaining to the property'. The municipality was also ordered to rectify, within thirty days, the relevant municipal account for the respondents' property and change the rating tariff from 'illegal or unauthorised use' to 'residential', and to replace the tariff charge with a residential category rating. This appeal is with leave of the high court.

[3] At the core of this entire dispute, is the respondents' complaint that since October 2015, the municipality has levied rates on the respondents' immovable

property, in accordance with the category of ‘illegal’ or ‘unauthorised’ use of the property. This, so the respondents contend, despite the fact that the zoning category of the property remained ‘Residential 1’ on the municipality’s 2013 and 2018 valuation rolls.

[4] It bears mentioning that until October 2015, the municipality had levied a property rate of R898.01 monthly on the property, which at all relevant times has been zoned ‘Residential 1’. However, from October 2015 onwards, such rate as reflected on the municipality’s account number 552060383, has escalated to R3 592. 05. As appears from the tax invoice dated 23 October 2015, under the heading ‘Property Rates’, this penalty tariff for the higher amount of R3 592. 05 was debited, which incorporates the amount charged in respect of property rates. Thereafter, the penalty tariff was claimed monthly as per the tariff provided for in the appellant’s rates policy. This penalty tariff was calculated based on the market valuation of the property, being the amount of R1 650 000.

[5] The nub of the dispute, from the municipality’s point of view, is that the aforementioned levied rate of R3 592, 05 represents a penalty for the respondents’ unlawful or unauthorised use of the property. On the other hand, the respondents contend that the municipality ought to have first re-categorised the property from ‘Residential 1’ to ‘illegal or unauthorised’ use on the municipality’s valuation roll, before the municipality could impose the escalated levy.

[6] It is necessary to set out the relevant background facts, which are largely common cause, in order to have a better understanding of the context in which the dispute arose. The respondents took transfer of the property in their names on 24 June 2013. The property is a free-standing erf with a house consisting of 5 bedrooms,

2 bathrooms, a living room, a laundry room, a double garage, and an outside room with a toilet. In addition to residing in the property with their two minor children, the respondents aver that from January 2015 they started renting out 2 bedrooms to students and young professionals, thus using the property as a commune, a commercial concern. It is common cause that no authorisation was first sought and obtained from the municipality for such use.

[7] On 28 October 2016, the municipality sent a letter to the respondents through its attorneys, notifying them of their wrongful and unlawful use of the property as a student commune, in contravention of the town planning scheme and zoning thereof without the necessary authorisation. Importantly, the respondents were notified of their contraventions since 2013 based on several site inspections conducted by officials of the municipality, which resulted in a contravention notice, referred to as a TP19 Notice, which was sent to them on 4 September 2013. This notice called upon the respondents to terminate their unauthorised use of the property by no later than 4 October 2013.

[8] In the same correspondence it was also stated that further site inspections were conducted on the property on 3 August 2014, 16 November 2014, 31 January 2015, 20 June 2015 and 9 October 2016. These site inspections confirmed that the unauthorised use of the property by the respondents continued unabated.

[9] From October 2015 to date, the municipality has levied rates on the property in the form of a penalty for the illegal and unauthorised use of the property. It transpired that, on 22 September 2015, the municipality's town planning law enforcement section instructed the property rates policy finance and compliance division to impose a penalty tariff as contemplated in the municipality's policy.

[10] Aggrieved by the increased penalty tariff imposed by the municipality, on 11 December 2017, the respondents approached the City of Johannesburg Ombudsman (the Ombudsman), to investigate what according to them, was the incorrect billing on the property. On 31 January 2018, the Ombudsman responded and informed the respondents that the municipality's records indicated that the respondents were advised that the increase in their account was a result of the implementation of a penalty tariff in terms of the municipality's policy. The said penalty, the Ombudsman explained further, was imposed due to the fact that the property was being used in contradiction to its zoning.

[11] On 10 October 2018, the municipality obtained an order in the Johannesburg High Court, per Meyer J, interdicting the respondents from using the property in contravention to its residential zoning within 30 days of the date of the order. Significantly, no appeal has been made against Meyer J's order, and it remains in force. On 26 November 2018, the respondents launched an application challenging the municipality's penalty tariff, which forms the subject matter of this appeal.

[12] In finding in favour of the respondents, the high court relied on the decision in *Smit v The City of Johannesburg Metropolitan Municipality*[1] and reasoned that the municipality was constrained to levy a penalty rate without first re-classifying the property as an 'unauthorised category'. Its failure to follow this prescribed procedure, the high court held further, amounted to a contravention of its rates policy which in turn contravened s 3 of the Local Government: Municipal Property Rates Act 6 of 2004 (the MPRA).

[1] *Smit v The City of Johannesburg Metropolitan Municipality* [2017] ZAGPJHC 386.

[13] The high court concluded that the municipality was only authorised to levy rates on the property based on the categorisation thereof namely, in accordance with its 'Residential 1' zoning. If the municipality wished to charge the punitive rate, the high court reasoned, it was required to first amend the valuation roll or issue a supplementary roll, and comply with the relevant legislative requirements that are designed to ensure compliance with the *audi alteram* principle, in order to protect ratepayers like the respondents, against arbitrary increases before imposing any penalty rates. Accordingly, the high court held that the municipality's failure to do so, rendered its conduct invalid.

[14] It is necessary to examine the legislative provisions governing the powers and ability of municipalities to impose rates and tariffs. The municipalities' power to levy rates on properties within their jurisdiction is an original power conferred in terms of s 229 (1)*(a).*of the Constitution of the Republic of South Africa (the Constitution).[2] The MPRA[3] is the national legislation envisaged in s 229 (2)(*b*)[4] of

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[2] The Constitution of the Republic of South Africa, 1996. Section 229(1)*(a)* of the Constitution provides:
'(1) Subject to sections (2), (3) and (4), a municipality may impose –
(a). rates on property and surcharges on fees for services provided by or on behalf of the municipality.'

[3] Sections 2 and 3 of the MPRA read in relevant parts as follows:
'**2 Power to levy rates**
(1) A metropolitan local municipality may levy a rate on a property in its area.
3 Adoption and contents of rates policy
(1) The council of a municipality must adopt a policy consistent with this Act on the levying of rates on rateable property in the municipality.
(2) A rates policy adopted in terms of subsection (1) takes effect on the effective date of the first valuation roll prepared by the municipality in terms of this Act, and must accompany the municipality's budget for the financial year concerned when the budget is tabled in the municipal council in terms of section 16(2) of the Municipal Finance Management Act.
(3) A rates policy 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 determined in terms of section 8;
(ii) exempt a specific category of owners of properties, or the owners of a specific category of properties, from payment of a rate on their properties;
(iii) grant to a specific category of owners of properties, or to the owners of a specific category of properties, a rebate on or a reduction in the rate payable in respect of their properties; or
(iv) increases or decreases 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); and
(ii) . . . .'

[4] Section 229(2)*(b)* of the Constitution provides:

the Constitution, enacted to regulate the imposition of rates by municipalities. This legislation, read together with the Systems Act, and the Local Government: Municipal Finance Management Act 56 of 2003 (the Finance Act), form part of a suite of legislation that gives effect to the new system of local government established in terms of the Constitution.

[15] Section 2 of the Systems Act provides that a municipality is an organ of state with a separate legal personality, whilst s 4(1)*(b)* provides that 'the council of a municipality has the right to govern on its own initiative the local government affairs of the local community'. The object of the Finance Act is to secure sound and sustainable management of the financial affairs of municipalities by establishing norms and standards for, *inter alia*, ensuring accountability and appropriate lines of responsibility in the financial affairs of municipalities, budgeting and financial planning processes.

[16] The power of a municipality to raise a surcharge over and above a rate it levies in respect of a property, is guaranteed by s 156(5) of the Constitution, which provides that '[a] municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions'. It immediately becomes evident that the consequence of having an original power is that a municipality's power to levy rates is not dependant on enabling national legislation as it is derived directly from the Constitution.[5] It follows therefore that the imposition of a penalty against property owners, as has happened in this case, is necessary and incidental to the effective performance of the municipality's functions and services.

'(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 –
(a) . . .
(b) may be regulated by national legislation.'

[5] *City of Cape Town and Another v Robertson and Another* 2005 (3) BCLR 199 (CC); 2005 (2) SA 323 (CC) para 60.

[17] Nonetheless, s 75A(1)*(a)* of the Systems Act bestows a general power upon a municipality to 'levy and recover fees, charges and tariffs in respect of any function or service of the municipality'. In terms of s 75A(2) the fees, charges or tariffs are levied by a municipality by a resolution passed by the municipal council, with a supporting vote of a majority of its members.

[18] A municipality is obliged in terms of s 74 of the Systems Act, to 'adopt and implement a tariff policy on the levying of fees for municipal services provided by the municipality itself or by way of service delivery agreements, and which complies with the provisions of this Act . . . and any other applicable legislation.' This provision must be read together with subsecs 3(1) and (2) of the MPRA, which obliges a municipality to adopt a rates policy on the levying of rates on rateable property which takes effect on the effective date of the first valuation roll prepared by the municipality, and which must accompany the municipality's budget for the financial year concerned.

[19] In *Kungwini Local Municipality v Silver Lakes Homeowners Association and Another*,[6] this Court held that the adoption of a rates policy and the levying, recovering and increasing of property rates is a legislative rather than an administrative act. The effect being that a municipality's action in this regard can only be challenged on the principle of legality, an incidence of the rule of law.

[20] Based on the various legislative provisions and established principles I have referred to above, it is beyond any doubt that a municipality's powers to levy a

[6] *Kungwini Local Municipality v Silver Lakes Home Owners Association* [2008] ZASCA 83; [2008] 4 All SA 314 (SCA); 2008 (6) SA 187 (SCA) para 14.

penalty in respect of the use of any property within its jurisdiction, is not *ultra vires* its powers, provided it does so as part of a validly adopted property rates policy. It is common cause that, in *casu*, the respondents did not impugn the validity of the relevant municipality's property rates policy, but its application. The respondents' attack is only directed at the validity of the impugned tariff. Neither did the high court assail the validity of the property rates policy in question in any manner whatsoever.

[21] In developing their case, the respondents submitted that in terms of the MPRA and the rates policy, the rating of the property is done in accordance with the category of the property as set out in the municipality's valuation roll. It therefore followed, the respondents argued further, that before an illegal or unauthorised tariff can be levied, the municipality was obliged to first update the category of the property on its valuation roll. To the contrary, the municipality contended that the property rates policy was properly applied and there was no requirement that there should first be a re-categorisation before the application for a penalty tariff.

[22] The municipality in this matter validly adopted and implemented a property rates policy in accordance with the provisions of subsecs 8(1) to (3) of the MPRA. Applying that policy, the municipality then levied different rates for different properties for the relevant period of 2015-2016. Clause 5 of the policy reads as follows:

'5. CATEGORIES OF PROPERTY FOR LEVYING OF DIFFERENTIAL RATES

(1) The Council levies different rates for different categories of rateable property in terms of section 8 of the Act. All rateable property will be classified in a category and will be rated based on the category of the property from the valuation roll which is based on the primary permitted use of the property, unless otherwise stated. For purposes of levying differential

rates in terms of section 8, the following categories of property are determined, in terms of sections 3(3)*(b)* and 3(3)*(c)* of the Act. . . .'

The above clause is repeated in the municipality's 2016/2017, 2017/2018 and 2018/2019 property rates policies.

[23] Clause 5(2) of the policy contains a list of the various categories of rateable property in respect of which different rates are levied. Twenty-three different categories are listed based on the primary permitted use of the property, unless, otherwise stated. For example *(a)* is for business and commercial property, *(b)* is for sectional title business and *(i)* is for farming and so forth. The last item on the list under *(w)* is for 'illegal use', with which we are concerned in this case. The municipality's 2016/2017 property rates policy has the same number of categories, save that under item *(w)*, it has listed 'unauthorised use' in contrast to 'illegal use' that is found in the 2015/2016 rates policy.

[24] The municipality's property rates policy, for 2015/2016, explains, *inter alia*, under Clause 6 bearing the heading '6 Clarification of Categories of Property', the primary permitted use of the rateable property, the reasons for the zoning of the specific property and how each particular category of property would be rated. The clarification given in respect of the 'Illegal use', in Clause 6.1, is particularly important. It reads as follows:

'6.1 Illegal use

(i) This category comprises all properties that are used for a purpose (land use) not permitted by the zoning thereof in terms of any applicable Town Planning Scheme or Land Use Scheme; abandoned properties and any properties used in contravention of any of the Council's By-laws and regulations. . .

(ii) The rate applicable to this category will be determined by the City on an annual basis. The City reserves the right to increase this penalty tariff higher than any other tariffs'. (My emphasis.)

It bears mentioning that the 'unauthorised use' category is explained in similar terms in the municipality's 2017/2018 and 2018/2019 property rates policies. This is clearly not without significance.

[25] The approach to the interpretation of any legal document, be it legislation, any statutory instrument or contract, is now trite and has been affirmed in various judgments of this Court and the Constitutional Court. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*,[7] this Court outlined the approach to the judicial interpretive exercise as the process of attributing meaning to the words used in legal documents, taking into account the context in which they were used by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence.[8]

[26] A simple reading of the penalty tariff in Clause 6, read together with the rest of the municipality's property and rates policy, reveals that it is plainly not applied as a 'category', although it is listed under the heading 'Categories of Property for levying of Differential Rates'. From a mere interpretation of the MRPA, read with the policy, it is clear that the penalty charges levied under 'illegal use' or 'unauthorised use' are directed against a landowner's illegal conduct, and not the property.

[27] The municipality's property rates policy states unequivocally, that the 'illegal use' or 'unauthorised use' tariff will be imposed in respect of all properties that are used for a purpose (land use) not permitted by the zoning thereof. The 'illegal use'

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[7] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.

[8] *Bothma-Batho Transport (edms) Bpk v S Bothma & Seun Transport* [2013] ZASCA 176, [2014] 1 All SA 517 (SCA); 2014 (2) 494 (SCA) para 12; *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others* [2018] ZACC 33;2019 (2) BCLR 165 (CC); 2019 (5) SA 1 (CC) para 29.

or ‘unauthorised use’ category is thus clearly defined with reference to the zoning categories, and not the categories as contemplated in the valuation roll.

[28] The respondents’ reliance on the fact that the penalty tariff is referred under the heading of ‘Categories’ in Clauses 5, is misconceived. The penalty tariff and how it is applied forms part of the concept of the tariff and charges against the property as informed by the municipality’s validly adopted property rates policy. A reading of this policy reveals a clear distinction between the general property rate for lawful use and a charge for the penalty tariff which is founded on illegal conduct.

[29] I have already alluded to the various enabling legislative provisions in terms of which the municipality validly adopted and implemented a property rates policy. Clearly, the municipality validly reserved to itself the right to claim a higher charge and tariff against landowners who deliberately refuse to bind themselves to the municipality’s land use scheme, as set out in its municipal property rates policy. This is in my view, the only sensible conclusion that can be reached if the penalty provisions, tariffs and charges referred to in the policy, are interpreted in the context in which they appear therein, taken together with the purpose to which the policy is directed, and the object of the enabling suite of legislation referred to earlier.

[30] The respondents’ argument that the municipality must first update the valuation roll whenever it wishes to charge an ‘illegal use’ or ‘unauthorised use’ tariff is based on the fallacy that such a valuation roll or supplementary roll must always reflect actual use. This argument completely misconstrues the lawful purpose of a valuation roll, which is to determine the value of the property in a specified category. As a matter of common sense, it follows that unauthorised use or a use for a non-permitted purpose can therefore only reflect the permitted use of the property.

[31] Section 77 of the MPRA obliges the municipality to update the valuation roll annually, either through a supplementary valuation roll under s 78, or an amendment of the valuation roll under s 79. The object of updating the valuation roll is merely to correct objective errors in the category which is indicated in the roll, for example, errors or omissions in relation to rateable property.

[32] Sections 77 to 79, read simply, do not deal with the changes or variation to rates. In *casu*, no such error or omission in respect of the value of the respondents' property exists. It is common cause that the permitted use of their property was always residential. It accordingly follows that no amendment or supplementary valuation roll is required as the respondents suggest.

[33] In the light of what I have stated above, I am in agreement with the municipality that the imposition of a higher tariff regarding rates payable on residential property, which is used for a purpose other than its authorised purpose, as has happened in this case, does not require a re-categorisation. The penalty or higher tariff the municipality validly imposed in respect of the respondents' property, only seeks to address the current situation to the extent and for the duration of the illegal land use in operation. Clearly, the high court failed to appreciate the unreasonable administrative burden that would be placed on the municipality if a supplementary valuation roll had to be published in respect of every unlawful use of a property.

[34] The high court however acknowledged, rightly in my view, that the respondents were acting in contravention of the appellant's land use scheme and importantly, that they were acting in contempt of the order by Meyer J issued on 18

October 2018, interdicting them from using the property as an accommodation establishment as long as the property remained zoned as 'Residential 1'. In my view, the respondents' aforesaid unlawful conduct are clear jurisdictional facts for the application of the municipality's policy of the penalty tariff. Furthermore, the application of the penalty tariff and charge to the respondents' property is competent in terms of the policy.

[35] As I have stated earlier, the policy was validly adopted and applied. It, together with the relevant valuation rolls, were published and subjected to a normal public participation process. It follows that the complaint of an alleged breach of the respondents' right to the *audi alteram* procedure cannot be sustained. Clearly the high court erred in this respect. I must also point out that the respondents' reliance on the *Blom*[9] case is misconceived. That case concerned a municipality's power to add categories of rateable property in terms of s 8 of the MPRA. *Blom* accordingly concerned a totally different issue.

[36] In light of what has been stated above, I find that the high court misdirected itself in various manners already described above, and its order falls to be set aside. It has not been demonstrated why the costs order should not follow the result.

[37] In the circumstances, I make the following order:

1 The appeal is upheld with costs, including the costs of two counsel where so employed.

2 The order of the high court is set aside in *toto*, and replaced with the following order:

[9] *City of Tshwane v Marius Blom & GC Germishuizen Inc. and Another* [2013] ZASCA 88; 2014 (1) SA 341 (SCA); [2013] 3 All SA 481 (SCA).

‘The application is dismissed with costs.’

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B.H MBHA

JUDGE OF APPEAL

Schippers JA (Carelse AJA concurring):

[38] I am grateful to my colleague, Mbha JA, for setting out the circumstances in which the municipality's claim to payment of a penalty tariff or higher rates arose. Unfortunately, however, I find myself in disagreement with the majority on the outcome of the appeal. In my respectful opinion, the municipality was not empowered under s 8 of the Local Government: Municipal Property Rates Act 6 of 2004 (the Rates Act) to determine 'illegal use' as a category of rateable property, nor to include such category in its rates policies.

[39] The respondents' use of their property for an illegal or unauthorised purpose is beyond question, hence the order issued by Meyer J in the Gauteng Division of the High Court, Johannesburg (high court) on 10 October 2018. In terms of that order the respondents were directed to cease using the property or permitting it to be used as an accommodation establishment, or for any purpose other than a dwelling house in conformity with the 'Residential 1' zoning of the property in terms of the Johannesburg Town Planning Scheme, 1979. However, the sanction for the respondents' illegal use of their property must be sought elsewhere: it cannot be sourced in the Rates Act.

[40] It is common ground that for the purpose of levying rates, the property has been categorised as a residential property in terms of s 8(2) of the Rates Act and valued at R 1 650 000. Based on this value the rates levied on the property for the 2015/2016 year was R898 per month. For the same period the municipality imposed a penalty tariff founded on an 'illegal use' category of rateable property, contained in the City of Johannesburg Property Rates Policy 2015/2016 (the Rates Policy). This category includes the use of property contrary to its zoning as defined in the

relevant town planning scheme. The rate levied for the illegal use of the property was R3592 – four times higher than the monthly rates (the penalty tariff). Both tariffs used in the calculation of residential rates and the penalty were incorporated in the Rates Policy, following a public participation process before the Policy was adopted.

[41] In 2018 the appellants applied to the high court for an order that the municipality: (1) apply the residential category reflected on its valuation roll in levying property rates on the property from 1 October 2015 to date of implementation of a replacement valuation roll; and (2) that it rectify the relevant municipal account within 30 days of the order to reflect that the rates levied on the property, based on an illegal or unauthorised use category since October 2015, have been replaced by property rates based on the residential category.

[42] The grounds for the relief sought were these. The municipality had levied penalty tariffs for the illegal use of the property despite the fact that it remained categorised as a residential property on the municipality's 2013 and 2018 valuation rolls. The municipality failed to comply with the Rates Act in that it 'did not cause a supplementary valuation roll to be issued in relation to the property before it commenced levying illegal/unauthorised use rates tariffs on the property', and did not change the category of the property when it published its 2018 valuation roll.

[43] The answering affidavit states the 'central issue' in the case involves the interpretation and application of s 8(1) and (2) of the Rates Act. The municipality claimed that in terms of s8 (1) it was authorised to levy different rates for different categories of rateable property according to specified criteria set out in s 8(2) of the Rates Act. Then it referred to s 156(2) of the Constitution which empowers

municipalities to make and administer by-laws to give effect to the functional areas in which they are authorised to govern, and s 156(5) which grants a municipality incidental powers for the effective performance of its functions.[10] The municipality also cited s 229(1)*(a)* of the Constitution, which expressly authorises a municipality to impose 'rates on property and surcharges on fees for services provided by or on behalf of the municipality'. Next, the municipality referred to s 3 of the Rates Act which enjoins the council of a municipality to adopt a policy consistent with the Act, for the levying of rates on rateable property in the municipality; and prescribes the contents of a rates policy.

[44] Ultimately the municipality contended that its rates policies contained an express provision for an unauthorised, alternatively, illegal use category of rateable property. This category, so it was contended, comprised all properties used for a purpose (land use) not permitted by their zoning in terms of the applicable town planning scheme. The rate applicable to this category was determined by the municipality on an annual basis. Thus, the empowering provisions upon which the municipality relied for the imposition of the penalty tariff were s 8(1) and (2) of the Rates Act and the Rates Policy.

[45] The relevant provisions of the Rates Policy are the following:

'**5. CATEGORIES OF PROPERTY FOR LEVYING OF DIFFERENTIAL RATES**

(1) The Council levies different rates for different categories of rateable property in terms of section 8 of the Act. All rateable property will be classified in a category and will be rated based on the category of the property from the valuation roll which is based on the primary permitted

[10] Section 156(5) of the Constitution provides:
' **Powers and functions of municipalities** . . .
(5) A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.'

use of the property, unless otherwise stated. For purposes of levying differential rates in terms of section 8, the following categories of property are determined in terms of sections 3(3)(b) and 3(3)(c) of the Act:

(2) The categories are as follows:

. . .

(e) Residential Property

. . .

(w) Illegal use

. . .

6.1 Illegal use

(i) This category comprises all properties that are used for a purpose (land use) not permitted by the zoning thereof in terms of any applicable Town Planning Scheme or Land Use Scheme, abandoned properties and properties used in contravention of the Council's By-laws and regulations, which include the National Building Regulations and Building Standards Rates Act, 103 of 1977, and any Regulations made in terms thereof.

(ii) The rate applicable to this category will be determined by the City on an annual basis. The city reserves the right to increase this penalty tariff higher than other tariffs.'

[46] The high court (Fourie AJ) followed *Smit v City of Johannesburg*,[11] a similar case in which De Villiers AJ held that the municipality could not apply an illegal use tariff to property used in contravention of a town planning scheme. The court in *Smit* held that the municipality had levied the illegal use tariff in breach of its rates policy, contrary to the provisions of s 2(3) of the Rates Act.[12] The high court concluded that the municipality was only authorised to levy rates on the property based on its categorisation, ie residential property. If it wished to levy the punitive rate, it was required to amend the valuation roll or issue a supplementary one, and comply with the relevant legislative requirements, which included the *audi* principle to protect ratepayers against arbitrary increases.

[11] *Smit v City of Johannesburg Metropolitan Municipality* [2017] ZAGPJHC 386.
[12] Smit fn 11 paras 11-14.

[47] Consequently, the high court made an order directing the municipality to apply the residential category reflected on its valuation roll for the applicable period in levying property rates on the property, for the period 1 October 2015 to the date of implementation of the replacement valuation roll relating to the property. The municipality was also ordered to rectify the relevant municipal account within 30 days of the date of the order, to reflect that the rates levied on the property under the illegal or unauthorised use category since October 2015, had been replaced with rates levied based on the residential category. The parties were ordered to pay their own costs. Although the penalty tariffs were imposed for the period 2015 to 2019, the high court's order dealt only with the 2015/2016 Rates Policy and the October 2015 account in respect of the property.

[48] Before us the argument by counsel for the municipality, in summary, was this. The municipality was entitled to impose the penalty tariff in terms of the Rates Policy, which had been included in the Policy in order to deter landowners from contravening the municipality's land use scheme. The penalty tariff is also authorised under ss 156(2), 156(5) and 229(1)*(a)* of the Constitution. Further, in terms of the s 75A of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act) the municipality is given a general power 'to levy and recover fees, charges or tariffs in respect of any function or service of the municipality'.

[49] An analysis of these constitutional and statutory provisions however reveals that the argument does not bear scrutiny. At the outset it should be noted that s 75A of the Systems Act is inapplicable for the simple reason that the municipality did not act under that provision when it determined the illegal use category and imposed the penalty tariff. Instead, and as is clear from the provisions of the Rates Policy quoted above, the municipality purported to act in terms of ss 3 and 8 of the Rates Act. A

decision deliberately and consciously taken under the wrong statutory provision cannot be validated by the existence of another statutory provision authorising that action.[13]

[50] The starting point therefore, is whether the municipality was authorised to determine 'illegal use' as a category of rateable property in terms of s 8(1) of the Rates Act, as it purported to do. Sections 8(1) to 8(3) read:

'**Differential rates-**

(1) Subject to section 19, a municipality may, in terms of the criteria set out in its rates policy, levy different rates for different categories of rateable property, determined in subsections (2) and (3), which must be determined according to the–

(a) use of the property;

(b) permitted use of the property; or

(c) a combination of *(a)* and *(b)*.

(2) A municipality must determine the following categories of rateable property in terms of subsection (1): Provided such property category exists within the municipal jurisdiction:

(a) Residential properties;

(b) industrial properties;

(c) business and commercial properties;

(d) agricultural properties;

(e) mining properties;

(f) properties owned by an organ of state and used for public service purposes;

(g) public service infrastructure properties;

(h) properties owned by public benefit organisations and used for specified public benefit activities;

(i) properties used for multiple purposes, subject to section 9; or

(j) any other category of property as may be determined by the Minister, with the concurrence of the Minister of Finance, by notice in the *Gazette*.

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[13] *Minister of Education v Harris* [2001] ZACC 25; 2001 (4) SA 1297 (CC) paras 16-18; *Howick District Landowners' Association v Umgeni Municipality and Others* [2006] ZASCA 153; 2007 (1) SA 206 (SCA) paras 21-22.

(3) In addition to the categories of rateable property determined in terms of subsection (2), a municipality may determine additional categories of rateable property, including vacant land: Provided that, with the exception of vacant land, the determination of such property categories does not circumvent the categories of rateable property that must be determined in terms of subsection (2).'

[51] Section 8(1) requires rates to be determined according to the 'use of the property' ie the actual use, 'the permitted use of the property' (the limited purposes for which the property may be used)[14] or a combination of actual and permitted use. A category of 'vacant land' is acceptable because it is based on actual use and the value determined is the undeveloped land value given the uses to which it could be put if developed. Mixed uses are the same.

[52] In my opinion, the Rates Act does not permit 'illegal use' as a category of rateable property, for a number of reasons. First, 'illegal use', is not a use as such. This so-called category is not determined according to the *use* of the property. Instead, the category is determined, and the penalty tariff imposed, on the basis of the *conduct* of property owners who use their properties contrary to town planning or land use schemes, or contravene by-laws and regulations. Even owners who abandon their properties, or erect a building or structure in contravention of the National Building Regulations and Building Standards Act 103 of 1977 (the Building Standards Act), are subject to the penalty tariff. Indeed, it was submitted on behalf of the municipality that 'the charge for the penalty is founded

[14] The **Local Government: Municipal Property Rates Act 6 Of 2004** (Rates Act) defines 'permitted use' as follows: ' "**permitted use**" in relation to a property, means the limited purposes for which the property may be used in terms of–

(a) any restrictions imposed by–
  (i) a condition of title;
  (ii) provision of a town planning or land use scheme; or
  (iii) any legislation applicable to any specific property or properties; or

(b) any alleviation of any such restrictions.'

on illegal conduct.' It is the use itself, not the lawfulness of the use that determines the category of rateable property in s 8(1) of the Rates Act.

[53] Second, the uses of property in s 8(1) plainly constitute lawful uses. This is buttressed by the immediate context – all the categories of rateable property listed in s 8(2) are lawful uses of property. Illegal, unauthorised or non-permitted uses of property cannot be categorised for the purpose of levying rates in terms of the Rates Act. In my view, a municipality cannot grant its imprimatur to the illegal use of property by levying a rate on such property. This, when in terms of the Rates Act, rates levied by a municipality on a property must be paid by the owner of that property.[15] It seems to me that an interpretation that the Rates Act permits the determination of 'illegal use' as a category of rateable property, produces a manifest absurdity.[16]

[54] Third, it is impossible to determine a value for illegal use. The procedure set out in the Rates Act for the preparation of a valuation roll is a jurisdictional prerequisite for the exercise by a municipality of its power to collect rates.[17] One cannot, for example, value a property or part of a property built in contravention of the Building Standards Act, in order to levy a rate on it. Neither can a property be valued on the basis of an owner's non-compliance with a by-law or town planning scheme. It was rightly conceded by counsel for the municipality that 'a property cannot be categorised on the basis of a non-permitted or illegal use', and that a valuer could therefore not create such a category. Thus, the failure to prepare

[15] Section 24(1) of the Rates Act.
[16] *Shenker v The Master and Another* 1936 AD 136 at 142-143.
[17] *City of Tshwane Metropolitan Municipality v Lombardy Development (Pty) Ltd and Others* [2018] ZASCA 77; [2018] 3 All SA 605 (SCA) para 21.

a valuation roll as required by the Rates Act, 'without first reclassifying the property as unauthorised use', as the high court found, does not even arise.

[55] Fourth, the penalty tariff is not a 'rate'. The Rates Act defines 'rate' as follows: 'a municipal rate on property envisaged in s 229(1)*(a)* of the Constitution'. The latter provision authorises a municipality to impose *rates* on property. In *Gerber*,[18] Navsa JA said that the ordinary meaning of 'rate' is well established and referred to the Concise Oxford Dictionary meaning of the term which includes, an 'assessment levied by local authorities for local purposes at so much per pound of assessed value of buildings and land owned'. Navsa JA went on to say that this meaning 'accords with the tried and trusted practice of calculating property rates in relation to size or value of properties', and that 'there is nothing to suggest that the power given by s 229(1)*(a)* of the Constitution to local authorities to impose property rates was a power to depart from this established meaning'.[19]

[56] In this case the municipality determined the category of the property as 'Residential' as contemplated in s 8(2)*(a)* of the Rates Act, and calculated the municipal rate according to the value of the property. In terms of the Rates Policy, the tariff for 2015/2016 for the residential category was 0.006531 cents in the Rand and the penalty tariff for illegal use, 0.026124 cents in the Rand. And as is evident from the Rates Policy, the penalty tariff is four times higher than the amount levied for rates. However, the penalty tariff is neither a 'rate' as defined in the Rates Act nor does it conform to the established meaning of that term.

[18] *Gerber and Others v Member of the Executive Council for Development Planning and Local Government, Gauteng, and Another* [2002] ZASCA 128; 2003 (2) SA 344 (SCA) para 23.
[19] *Gerber* fn 18 para 24.

[57] The penalty tariff is not a municipal charge but a sanction directed solely at the conduct of property owners. It is trite that the words of a statute 'should be read in the light of the subject-matter with which they are concerned . . . and it is only when that is done that one can arrive at the true intention of the legislature'.[20] There is nothing in the Rates Act which authorises a municipality to levy a rate to deter landowners from contravening a statute, by-law, or land use scheme; or to impose a penalty tariff 'for as long as the property does not conform with the town planning scheme', as stated in the answering affidavit. This is a case of using a power – the power to levy rates – as a means of punishment of those who use their properties unlawfully. It is impermissible.[21] And it is directly at odds with the purpose in the long title of the Rates Act – to regulate the power of a municipality to impose rates on property, and 'its power to levy a rate on property' in s 2(3) thereof.[22]

[58] Fifth, the illegal use category cannot be applied equitably. Section 3(3)*(a)* of the Rates Act provides that a rates policy 'must treat persons liable for rates equitably'. In this case the property is not being rated on the same basis as other properties used for the same purpose ie 'accommodation establishments'. If it were and it was rated on that basis, there could be no complaint because the respondents would be treated the same as all other operators of such establishments. The municipality recognised the inequity. It submitted that the 'category remains

[20] *University of Cape Town v Cape Bar Council and Another* 1986 (4) SA 903 (A) at 914D-E, affirmed in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC) para 90 and *Democratic Alliance v Speaker, National Assembly and Others* [2016] ZACC 8; 2016 (3) SA 487 (CC) para 28.
[21] *Van Eck, N O, and Van Rensburg, N O v Etna Stores* 1947 (2) SA 984 (A) at 997.
[22] Section 2(3) of the Rates Act reads:
'A municipality must exercise its power to levy a rate on property subject to–
(a) section 229 and any other applicable provisions of the Constitution;
(b) the provisions of this Act; and
(c) the rates policy it must adopt in terms of section 3.'

Residential for all purposes except in circumstances where a penalty tariff is imposed, as in this instance'.

[59] Finally, in determining the illegal use category and imposing the penalty tariff, the municipality acted contrary to the prohibition in s 19(1) of the Rates Act, to which s 8(1) is expressly rendered subject. Section 19(1) reads:

'**Impermissible differentiation**

(1) a municipality may not levy-

(a) different rates on residential properties, except as provided for in sections 11 (2), 21 and 89A: Provided that this paragraph does not apply to residential property which is vacant;

. . .

(d) additional rates except as provided for in section 22.'

[60] Sections 11(2), 21 and 89A do not apply in this case.[23] As already stated, in respect of the residential category the municipality levied rates of 0.006531 cents in the Rand on the property, as well as 0.026124 cents in the Rand as a penalty tariff in the illegal use category, calculated on the basis of four times the amount of the rates levied in the residential category. The penalty tariff is inextricably linked to the rates levied in the residential category. For this reason, the submission on behalf of the municipality that it 'did not rely on a category of "unauthorised use" or "illegal" use for its imposition of a penalty tariff' and that the 'penalty tariff is independent of the general property rate for lawful uses', is wrong. On the plain wording of s 19(1) of the Rates Act, the levying of residential rates by the municipality, together with the penalty tariff founded on the illegal use category, is prohibited.

[23] In terms of s 11(2), a 'rate levied by a municipality on residential properties with a market value below a prescribed valuation level may, instead of a rate determined in terms of subsection (1), be a uniform fixed amount per property'. Section 21 deals with the compulsory phasing-in of certain rates in relation to newly rateable property. Section 89A concerns transitional arrangements relating to the redetermination of municipal boundaries.

[61] The penalty tariff further does not constitute an additional rate within the meaning of s 19(1)*(d)* read with s 22(1) of the Rates Act, for two reasons. It is firstly, not an additional rate on property levied for the purpose of raising funds for improving or upgrading an area determined as a special rating area.[24] Secondly, the municipality did not act in terms of s 22(1) of the Rates Act.

[62] In *Fedsure*,[25] the Constitutional Court stated that the principle of legality, an aspect of the rule of law, requires that a body exercising a public power (in that case a municipality exercising original legislative power in the form of budgetary resolutions) must act within the powers lawfully conferred on it. In *Pharmaceutical Manufacturers Association*,[26] the principle required that the exercise of public power should not be arbitrary or irrational. Chaskalson P said:

'It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.'

[63] In my view, the action by the municipality in determining an illegal use category of rateable property and imposing the penalty tariff, ostensibly in terms of ss 3 and 8 of the Rates Act, violates the principle of legality in both respects. The

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[24] Section 22(1) of the Rates Act provides:
'**Special rating areas**
(1) a municipality may by resolution of its council–
(a) determine an area within that municipality as a special rating area;
(b) levy an additional rate on property in that area for the purpose of raising funds for improving or upgrading that area; and
(c) differentiate between categories of properties when levying an additional rate referred to in paragraph *(b)*.'

[25] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) paras 56 and 58.

[26] *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) para 85.

action is beyond the powers conferred on the municipality. It is also arbitrary because it is not rationally related to the purpose for which the power to levy rates was given.

[64] Finally, I should point out that the decision of this Court in *Blom*,[27] is to the contrary. The issue in that case was whether, in terms of the Rates Act, the relevant municipality could determine 'illegal use' or 'non-permitted use' as a category of rateable property under the Rates Act, in order to levy a higher rate on property than it levied on properties used for the purpose permitted. The property had been zoned for use as 'residential' and was being used as attorneys' offices, contrary to the appellant's town planning scheme.[28] The high court decided that the power to create additional categories of rateable property was not unfettered; that it was confined to lawful categories since all the categories listed in s 8(2) of the Rates Act are lawful; and that the levying of a higher rate than the normal rate on a property because it was being used for non-permitted purposes amounted to the imposition of a penalty without due process.[29]

[65] The decision was reversed on appeal. It was held that when the words 'use of the property' and 'permitted use of property' in s 8(1) of the Rates Act were considered in the light of the ordinary rules of grammar and syntax, the context in which they appear and the apparent purpose to which they are directed, the word 'use' was 'wide enough to include "non-permitted use"'. The Court concluded that it was 'competent for the municipality to include in its rates policy a 'non-permitted use category for the purposes of determining applicable rates'[30] and that 'once the

[27] *City of Tshwane v Marius Blom & GC Germishuizen Inc and Another* [2013] ZASCA 88; 2014 (1) SA 341 (SCA); [2013] 3 All SA 481 (SCA) para 17.
[28] *Blom* fn 27 paras 1 and 5.
[29] *Blom* fn 27 para 4.
[30] *Blom* fn 27 para 17.

determination of different categories of rateable property in terms of s 8 is completed the valuation process begins'.[31] In my respectful opinion, the correctness of these findings is doubtful, for the reasons advanced above.

[66] I would dismiss the appeal with costs.

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A SCHIPPERS

JUDGE OF APPEAL

[31] *Blom* fn 27 para 21.

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