THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 737/2021

In the matter between:

THE THABA CHWEU RURAL FORUM **First Appellant**

APPELLANTS LISTED IN ANNEXURE "A"
TO THE NOTICE OF APPEAL **Second and Further Appellants**

and

THE THABA CHWEU LOCAL MUNICIPALITY **First Respondent**

THE SPEAKER OF THE MUNICIPAL COUNCIL
OF THE THABA CHWEU LOCAL MUNICIPALITY **Second Respondent**

THE MUNICIPAL MANAGER OF
THE THABA CHWEU LOCAL MUNICIPALITY **Third Respondent**

Neutral Citation:	*The Thaba Chweu Rural Forum & Others v The Thaba Chweu Local Municipality and others* (737/2021) [2023] ZASCA 25 (14 March 2023)
Coram:	MOLEMELA, NICHOLLS and MOTHLE JJA and MALI and SIWENDU AJJA
Heard:	15 November 2022
Delivered:	14 March 2023

Summary: Constitutional Law – local government – Municipal Property Rates Act 6 of 2004 – whether the impugned rates notices ought to be declared invalid – what appropriate order should be made in terms of s 172(1)*(b)* of the Constitution – whether the appellants were entitled to the interdictory relief claimed.

ORDER

On appeal from: Mpumalanga Division of the High Court, Mbombela (Legodi JP with Sigogo and Greyling-Coetzer AJJ concurring, sitting as a court of appeal):

1. The appeal succeeds.

2. The order of the Full Court of the Mpumalanga Division of the High Court is set aside and substituted by the following order:

'2.1 The rate notices published by the respondents in terms of s 14(2) of the Local Government: Municipal Property Rates Act 6 of 2004 in the Mpumalanga Provincial Gazette of 10 July 2009, 9 July 2010; 27 May 2011, 29 August 2012; 19 August 2013, 22 July 2015; 22 July 2016; 25 August 2017 and 6 October 2018, as well as the further rates notice published by the respondents dated July 2014 in respect of the 2014/2015 financial year, including the resolutions of the municipal council on which all such rates notices were based, where applicable, are hereby declared unlawful and invalid to the extent that they relate to agricultural properties used or permitted to be used for crop and/or animal farming (agricultural property);

2.2 The respondents may recover from the members of the appellants, only the amounts of the agricultural property rates calculated based on the Local Government: Municipal Property Rates Act 6 of 2004 and the Regulations promulgated in terms thereof, less any amount in excess of the legally permissible limit, in respect of each financial year from 2009 to 2018;

2.3 The respondents are further liable to credit the accounts of the appellants' members who were levied and paid municipal rates, only to

the extent of the amounts in excess of the legally permissible limit of the rates chargeable to the agricultural properties in its municipal jurisdiction in respect of each financial year from 2009 to 2018; and

2.4 On recovery of arrear municipal rates due, the respondents may charge the rate of interest as published in terms of section 96 read with section 97(1)*(e)* of the Local Government: Municipal Systems Act 32 of 2000 in respect of each financial year from 2009 to 2018.

3. The respondents are ordered in future not to levy property rates on any agricultural property in its municipal jurisdiction at a rate that exceeds that legally prescribed and, such rate must be determined in terms of the procedures prescribed by law.

4. The first respondent is ordered to pay the appellants the costs of the appeal, including costs of two counsel, but excluding the costs of delivering the heads of argument after the hearing of the appeal. The costs against the first respondent shall include the costs in the high court and those on appeal in the full court of the Mpumalanga Division of the High Court.

JUDGMENT

Mothle JA (Molemela and Nicholls JJA and Mali and Siwendu AJJA concurring)

[1] At the heart of the dispute that triggered the litigation which resulted in this appeal, is a challenge by the first, second and further appellants to the lawfulness and validity of the municipal rates imposed on their properties, through resolutions and notices published by the Thaba Chweu Local Municipality, cited as the first respondent, (the municipality). The municipality was established for the area of Lydenburg/Mashishing in Mpumalanga. The municipal rates at issue in this appeal were levied on farm properties, (as

opposed to urban or residential properties) during the period 1 July 2009 to 1 June 2017.

[2] The factual background is briefly that prior to the advent of Constitutional democracy in South Africa in 1994, farms in general were excluded from the rateable properties within the jurisdiction of municipalities. Consequently, the farm owners were not levied municipal rates for their properties. In establishing the local sphere of government, the Constitution[1] put paid to that arrangement. Section 151(1) of the Constitution provides that 'The local sphere of government consists of municipalities which must be established for the whole of the territory of the Republic.' As a result, every patch of land in the Republic, including farms, fell under one or other municipality. For the first time, the farm owners became liable for payment of municipal rates levied on their properties, as a source of revenue for the municipality.

[3] This development, compounded by the fact that the levying of the municipal rates was unlawfully implemented by the municipality, caused discontent on the part of the farmers whose properties fell under its jurisdiction. In 2008, and in anticipation of the municipal rates being levied, the farm owners resolved to establish a voluntary association named the Thaba Chweu Rural Forum (the appellants). The appellants' purpose was, amongst others, to represent the farmers in their engagement with the municipality, mainly on the issue of levying of municipal rates. Some of the farmers have been refusing to pay the rates levied since inception in July 2009.

[4] The legal framework for the levying of municipal rates has its genesis in s 229 of the Constitution, which empowers a municipality to impose rates on property and surcharges on fees for services provided by or on behalf of the municipality and, if authorised by national legislation, other taxes, levies and duties appropriate to local government. The national legislation is the Local Government: Municipal Property Rates Act 6 of 2004 (the Rates Act). Section

[1] The Constitution of the Republic of South Africa, 1996.

3 of the Rates Act provides that a municipality must exercise its powers to levy rates, subject to the other sections of the same statute, including the Regulations promulgated by the Minister for Provincial and Local Government (Minister) in terms of s 19 of the Rates Act, as well as the policy resolutions adopted by the municipal council in terms of s 14 of the Rates Act.

[5] Section 8 of the Rates Act authorises the municipality to levy different rates for different categories of properties. The categories of properties for levying rates are determined according to the actual or permitted use of that property and its location within the municipality. The Regulations as published by the Minister in terms of s 19 of the Rates Act, determined that the effective rate to be levied on agricultural properties conducting crop and/or animal farming, may not exceed 25% of the effective rate levied on residential properties. The rates are generally determined as the amount in a Rand, calculated on the market value of the property, which market value is in turn determined by a valuer appointed by a municipality. The valuation of the properties are published in the valuation roll in terms of sections 30; 33(1) and 49(1) of the Rates Act.

[6] The appellants allege that between 2009 and 2017, the respondents failed to meaningfully comply with the provisions of the Rates Act, the Regulations and the municipal councils' policy concerning the levying of property rates and granting of rebates. The appellants further contended that in determining the rates payable, the respondents failed to consult with the population in the area, as prescribed by law. Each financial year, they levied excessive rates above the 25% prescribed ratio for agricultural properties and failed to comply with the process allowing objections to the valuations in terms of s 49 of the Rates Act, specifically in respect of the compilation of the 2014/2015 second valuation roll. As a result, there are recorded examples of farm properties that experienced sudden massive increases in market value, such as a company known as Moon Cloud 25 (Pty) Ltd, whose property's market value appreciated from R1 170 000 since the 2009 initial valuation, to R12 180 000 in the 2014/2015 second valuation roll. That increase in market value of the property translated in the levied rates of that property escalating

from R1 432.08 levied in the 2013/2014 financial year to R149 448.60 levied from the 2014/2015 and subsequent financial years.

[7] For each of the years between 2009 and 2017, the appellants attempted, without success, to persuade the respondents to enable public participation in the process. In 2017, the appellants turned to the Gauteng Division of the High Court Pretoria, functioning as the Mpumalanga Circuit Court in Mbombela, Mpumalanga (the high court), for appropriate relief.

[8] The following is a brief trajectory of the litigation that ensued, resulting in the appeal before this Court. On 7 June 2017, the appellants launched an application in the high court which had two parts: A and B. In part A, they essentially sought relief against the municipality, the Speaker of the Municipal Council (the second respondent) and the Municipal Manager of the municipality (the third respondent), (in this judgment collectively referred to as 'the respondents'). The respondents include the previous officials of the municipality as the predecessors who were in office at the time the impugned rates were levied. The relief sought against the respondents was that they be ordered to deliver to the appellants, their members' property rates accounts for the period 1 July 2009 to 1 June 2017, including the notices published and resolutions adopted by the municipal council concerning the determination of the rates, as well as copies of minutes of meetings held concerning the rates, and ancillary relief.

[9] The relief sought in part A was granted by Basson J on 20 August 2018. After receiving some of the documents from the respondents, it became evident that not all the appellants' members were conducting agricultural farming in crops and/or animals as defined, and therefore some of them did not qualify for the rates determined for that category of properties. Some of these excluded members' farms fell under categories of properties conducting business in game-farming, hospitality and residence. These categories were not levied the rates which are the subject of the review in this case.

[10] Part B of the application, which became opposed by the respondents as successors in title of the erstwhile municipal office bearers, was placed under case management. On 2 October 2018, the Judge President of the high court, following a case management meeting, decided on a truncated period of exchanging affidavits and documents between the parties, and scheduled the date of hearing as 10 June 2019. In part B the appellants sought relief, in essence that the rates published annually in the Mpumalanga Provincial Gazette in terms of s 14(2) and (3) the Rates Act, as well as publication of further rates notices in newspapers and the resolutions of the municipality's council, authorising the publication of such rates notices, be declared unlawful and be set aside. Further, that the municipality be directed not to levy property rates on any farm or agricultural property in its municipal area at a rate exceeding the prescribed ratio of 1:025, i.e. 25% of the effective rate applicable to the residential property, as contemplated in s 8 of the Act, unless the Regulations providing for the effective rates are repealed or amended by the Minister in terms of s 83 read with s 19(1)*(b)* of the Rates Act.

[11] The respondents in their answering affidavit conceded that at all relevant times mentioned in the founding affidavit, the levying of property rates on agricultural farms, the adoption of resolutions by the municipal council concerning the rates as well as the published notices concerning the impugned rates, were inconsistent with the Rates Act, and therefore unlawful and invalid. The records of the municipal council including notices and minutes of meetings evidencing the determination of the second valuation roll for the 2014/2015 and subsequent years, went missing. The significance of these missing documents means that there is no evidence in support of the determination of the municipality's second valuation roll. It is this second evaluation roll adopted in the 2014/2015 financial year, which caused massive increases in property values, resulting in the determination and levying of inflated municipal rates.

[12] All these factual allegations were not disputed. In fact, the respondents concede that much. However, though the respondents do not dispute that their predecessors acted unlawfully, they remain opposed to the order sought

by the appellants to have the impugned property rates set aside. The basis of opposing the relief is that the appellants delayed instituting the litigation. The respondents further contend that consequent to such delay, a retrospective invalidation of the rates levied will impact on the budgets approved in the previous years, resulting in prejudice to the municipality. The prejudice lies in the fact that the subsequent budgets, of which the municipal rates were an integral part, were determined and are reliant on the basis of the budgets of the preceding financial years. As such, it will not be feasible to turn the clock back, as it were.

[13] The judgment of the high court on part B was delivered by Jansen van Rensburg AJ on 4 July 2020. The high court declined to grant an order declaring the conduct of the respondents unlawful and therefore invalid, and also declined to set aside the impugned rates, as a consequence of the invalidity. The court essentially ordered the respondents that in future, they must comply with the statutory prescripts applicable to Local Government in regard to tabling, amending and publication of future budgets, and awarded costs against the respondents.

[14] The appellants, aggrieved by the failure of the high court to order a declaration of constitutional invalidity and setting aside of the impugned rates, turned to the Full Court of the Mpumalanga Division of the High Court (the full court). The respondents lodged a cross-appeal, also contending that the high court erred in failing to issue a declaration of invalidity, but requested the full court, for reasons stated in para 11 of this judgment, not to grant an order setting aside the unlawful and invalid conduct of the respondents. The respondent also challenged the order of the high court awarding costs to the appellants.

[15] The full court's judgment was delivered by Legodi JP on 26 March 2020. Although the full court judgment accepted that the high court had erred in not declaring the unlawful actions of the municipality invalid, the full court refrained from granting any order setting aside the invalid conduct of the respondents, mainly because the appellants had delayed in approaching

the high court. The full court, as had the high court, included an order to the respondents, in a form of what was no more than an admonition to the effect that in future, the respondents should comply with the legal prescripts.

[16] The appellants, still aggrieved that the full court did not set aside the unlawful conduct of the respondents, successfully approached this Court on petition. Initially in their papers, the appellants sought relief in this Court that the unlawful and invalid municipal rates be set aside. At the commencement of the hearing of the appeal, the appellants' counsel indicated that the appellants who are yet to pay the municipal rates, are willing to pay the amount owing minus the portion which exceeded the prescribed ratio of 1:025 of the effective rate applicable to the residential property, as contemplated in s 8(2)*(b)* of the Rates Act. The appellants no longer pressed for the relief from the Court setting aside the impugned conduct. The respondents declined that offer and insisted on their demand to recover the full amount of the impugned rates levied, including the rates unlawfully imposed in excess of the legally prescribed limit for agricultural properties.

[17] The appellants' contention is based on s 172(1) of the Constitution which provides:

'When deciding a constitutional matter within its power, a court—

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including-

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'

[18] The respondents having conceded the appellants' request for the declaration of invalidity in terms of s 172(1)*(a)* of the Constitution, the crisp issue in this appeal is therefore, whether this Court should grant an order that is just and equitable in terms of s 172(1)*(b)* of the Constitution. This form of relief is discretionary. The Court may, for reasons of equity and in the interest

of justice, invoke such relief where circumstances of the case cry out for justice to be served.

[19] The judgment of the full court relied on this Court's majority decision in *South African Property Owners Association v Johannesburg Metropolitan Municipality and others*[2] (*SAPOA*). In *SAPOA*, the members of the property-owners association, who were business property owners in Johannesburg, applied to have the court review and set aside, alternatively to declare null and void, the 2009/2010 budget determined on the property rate of 1,54 cents in the Rand, levied by the Johannesburg Metropolitan Municipality in contravention of s 19 of the Rates Act. The high court had found that the levying of property rates is not an integral part of the budget process. Consequently, the high court concluded thus: '. . . the grant of the relief sought by *SAPOA* was not in the public interest because it would probably bankrupt the City and, as a result, the City would not be able to perform its constitutional duties.' As a result, SAPOA's contention that the City of Johannesburg failed to comply with the prescribed statutory requirements and procedures in imposing the impugned rates, was dismissed. SAPOA turned to this Court on appeal.

[20] The majority[3] in this Court upheld the appeal. In doing so, the Court, contrary to the high court, declared that the City of Johannesburg in fact and in law, failed to comply with the prescribed statutory requirements and procedures in imposing the impugned rates. The impugned rates were, however, not set aside. Instead, this Court further declared that in future, the first respondent was obliged to comply with the provisions of the Rates Act and other listed legal prescripts. Further and contrary to the finding by the high court, the majority in this Court also concluded that the municipal rates are an integral part of the budget process. The majority reasoned in para 71 and 72 as follows:

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[2] *South African Property Owners Association v Johannesburg Metropolitan Municipality and others* [2012] ZASCA 157; 2013 (1) SA 420 (SCA).
[3] The honourable Mr. Justice Southwood AJA, dissented as to the order only.

'Although counsel on behalf of SAPOA persisted in having the rate improperly imposed set aside, he advisedly recognised the difficulties of a court even attempting to set aside the 2009/2010 budget, two budgetary periods thereafter. Successive budgets are based on surpluses or deficits from prior periods. One is built on the outcome of the other. This, in modern language, is called a knock-on effect. The legality of the budgets for the successive periods has not been challenged. Considering the knock-on effect it must be so that any subsequent increase in rates would have owed its genesis to and been premised on the rate presently sought to be impugned.

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

[21] The full court in the present appeal declined to set aside the unlawful rates levied by the respondents or grant some form of just and equitable relief to the appellants. Likewise, it grounded its reasoning on the delay by the appellants in launching the litigation against the respondents. It is common cause that the appellants made their objections and disapproval on the unlawfulness of the imposition of the rates known to the respondents' predecessors since 2009, with the view to achieve meaningful participation and consultation as prescribed by law. I will return to this aspect later in this judgment. For the record, the impugned rates were levied from the 2009/2010 financial year. I turn to deal with the full court's finding that the appellants delayed instituting the litigation against the respondents.

[22] In the case of a review which is based on the grounds stated in s 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), s 7(1) thereof, prescribes the period within which such review has to be instituted, which is

180 days.[4] The subject of delay when instituting a review becomes more complex where the grounds of review are based on the principle of legality or rationality, as in such instance, there is no statutorily prescribed period within which a party may institute a review challenge.

[23] The appellants' application was launched in 2017, attacking the rates imposed from 2009/2010 financial year. The respondents in this Court, as before in the full court, argued on authority of *SAPOA*, that the delay by appellants instituting litigation would have 'a knock-on effect' and result in the retrospective invalidation of the municipality's previous annual budgets. Such invalidation was expressed metaphorically as an exercise similar to 'unscrambling an egg'. The subject of delay in instituting proceedings has been considered by our courts over the years. The approach in dealing with the delay in review applications has somewhat crystallised.

[24] In *Khumalo and Another v MEC for Education, KwaZulu-Natal*[5] *(Khumalo),* the Constitutional Court considering the significance of delay in instituting proceedings, wrote:

'(A) court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power. But that does not mean that the Constitution has dispensed with the basic procedural requirement that review proceedings are to be brought without undue delay or with a court's discretion to overlook a delay.'

[25] In 2017, the same Court in *Merafong City v AngloGold Ashanti Ltd*[6] (*Merafong*), addressing the question of delay when instituting review proceedings, stated thus:

'The rule against delay in instituting review exists for a good reason: to curb the potential prejudice that would ensue if the lawfulness of the decision remains

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[4] *Aurecon South Africa (Pty) Ltd v Cape Town City* [2015] ZASCA 209; 2016 (2) SA 199 (SCA).
[5] *Khumalo and another v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC) (2014) (3) BCLR 333; [2013] ZACC 49 para 45.
[6] *Merafong City v AngloGold Ashanti Ltd* [2016] ZACC 35; 2017 (2) SA 211 (CC).

uncertain. Protracted delays could give rise to calamitous effects. Not just for those who rely upon the decision but also for the efficient functioning of the decision-making body itself.'[7]

[26] In *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd*[8] (*Gijima*), the Constitutional Court wrote:

'The reason for requiring reviews to be instituted without undue delay is thus to ensure certainty and promote legality: time is of outmost importance.' and

'… Here it must count for quite a lot that SITA has delayed for just under 22 months before seeking to have the decision reviewed. Also, from the outset, Gijima was concerned whether the award of the contract complied with legal prescripts. As a result, it raised the issue with Sita repeatedly. Sita assured it that a proper procurement process had been followed.'

[27] *Gijima* was followed by *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*[9] (*Buffalo City*), where the Constitutional Court, formulating an approach on the question of delay in bringing a legality review, was, firstly, to examine whether the delay was reasonable. This was to be answered by considering the explanation proffered. If, indeed, the delay was reasonable, the matter could be heard. But, if the delay was unreasonable, the second enquiry was whether the interests of justice required it to be overlooked, and the matter be heard. That would be decided by considering four factors: (a) the consequences of setting the decision side; (b) the decision and the challenge to it (the asserted illegality); (c) the applicant's conduct; and (d) the court's duty to declare the unlawful decision invalid. The Court found that the explanation for the delay was insufficient to declare it reasonable but supported overlooking the delay due to the clear illegality of the decision.

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[7] Ibid para 73.

[8] *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* [2017] ZACC 40 (CC); 2018 (2) SA 23 (CC) (*Gijima*) paras 44 and 53

[9] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (6) BCLR 661 (CC) (*Buffalo City*) paras 43 to 66.

[28] In May 2018, this Court in the *City of Tshwane Metropolitan Municipality v Lombardy Development (Pty) Ltd & others*[10] (*Lombardy*), was seized with the issue of a municipality which failed to comply with s 49 of the Rates Act, in compiling a supplementary valuation roll. Lombardy instituted litigation some 22 months late. The Court accepted the delay as reasonable due to the extent of illegality in the manner the supplementary valuation roll was determined by the City of Tshwane. The Court upheld the high court's *order invalidating and setting aside* the supplementary roll of 2012, the effect of the order being that until the causes of invalidity are addressed by the City, the subsequent valuation rolls are consequentially invalid. Thus, the impediment to granting a just and equitable relief resulting in a possible '*knock-on effect on the budget'* as stated in *SAPOA*, was not followed in *Lombardy*. In any event, nothing in *SAPOA* suggests that in all such matters, any just and equitable relief would be untenable. *SAPOA's* order was considered and fashioned on the relief in the form of an attack on the budget. The relief sought in this appeal is to have the rates set aside. (Own emphasis)

[29] The period of delay in instituting litigation in *SAPOA* was three years, while in *Lombardy* the delay was about 22 months, as in *Gijima.* In this appeal, the appellants delayed for a period of about 7 (seven) years. Applying the approach in *Buffalo City*, the first inquiry is to determine whether the delay was reasonable or unreasonable. If it was reasonable, this Court will consider the merits forthwith. If the delay was unreasonable, the second inquiry to be conducted will be whether the interest of justice requires the delay to be overlooked. This latter phase of the inquiry has to consider the four factors referred to in *Buffalo City*.

[30] The conspectus of the evidence in this appeal, succinctly stated, reveals the following objective facts:

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[10] *City of Tshwane Metropolitan Municipality v Lombardy Development (Pty) Ltd & Others* [2018] ZASCA 77; [2018] 3 All SA 605 (SCA) (*Lombardy*).

(a) The respondents, being a local sphere of government, blatantly and repeatedly flouted the applicable legal provisions, specifically by non-compliance with the provisions of the Rates Act in regard to public participation. In levying some rates and determining the second valuation roll there is no evidence of public participation on record. This conduct deprived aggrieved ratepayers the right to raise objections, should they elect to do so as provided in s 49 of the Rates Act. Further, the respondents disregarded the Regulations when determining the rates of various categories of properties, in particular, that of the agricultural farming;

(b) As distinct from other cases, here the respondents contravened the law not as a once off event such as unlawful awarding of a tender, but were engaged in unlawful conduct repeatedly in every financial year from 2009 to 2017, for the duration of the delay. The unlawful conduct continued, even when the appellants, as in *Gijima,* were vociferous in consistently questioning the illegality of the respondents' conduct. The warnings were ignored;

(c) The language of the applicable legislative instruments was unambiguous. There was thus no question of legal uncertainties which required to be cleared through litigation. The respondents simply refused to implement the clear letter of the law. There is no explanation for this conduct. As in *Lombardy,* the respondents offered no alternative relief to correct the excessive municipal rates they imposed on the appellants.

(d) Some members of the appellants have, since 2009, misguidedly refused to pay any rebates, including what they, on their own, determined to be the correct applicable rate. At the time of the hearing of this appeal, some were still withholding payment, regardless of the decision of the full court;

(e) Apart from the fact that the appellants had continuously made representations to the respondents in an attempt to resolve the excessive levying of rates, there was no explanation on the papers as to the cause of the delay in instituting this litigation; and

(f) Should this Court grant any order setting the impugned rates aside, the consequence of such relief would be a retrospective invalidation of the budgets of the previous financial years, on which the current budgets are reliant. It is not disputed that the rates levied in a particular financial year are an integral part of the budget of that financial year.

[31] There are two reasons which stand out from the objective facts above, which militate against a finding that the delay was reasonable. First, the appellants have not provided cogent reasons or some explanation for the delay in instituting this litigation. Second, the seven-year delay was inordinate and, as a result, the retrospective setting aside of the impugned rates will render void the approved and finalised budgets for the previous financial years. For these two reasons, I conclude that the delay by appellants in commencing with this litigation was unreasonable. However, that is not the end of the matter. The second inquiry as formulated in *Buffalo City* has to be conducted. That is, whether the interest of justice dictate that the delay be overlooked.

[32] Before considering the second phase of the inquiry, it is apposite to address the argument that by refusing to pay, the appellants initially set out to defy the authority of the municipality to levy rates on their properties. This argument is, in my view, irrelevant to the determination of the issues in this appeal. For starters, and assuming that the appellants had such motive initially, which must be said, seriously borders on sedition, the futility of such a misguided stance became evident and was wisely abandoned in this Court. Not only have some of the appellants' members since decided to pay the rates as levied, those still holding out have also, through their counsel in this Court, indicated their intention to pay. It needs to be said, however, that whatever motive that caused the appellants' initial resolve not to pay, such motive does not justify or confer any authority on the respondents to levy municipal rates in excess of the legally prescribed limit, as some form of retribution. This contention by the respondents concerning the appellants' initial intent not to pay municipal rates, is not relevant to the determination of the issues in this appeal.

[33] Returning to the issue of the unreasonable delay in instituting this litigation, this appeal is in two instances distinguishable from other cases where the conduct of the municipality is under review. First, that the conduct of the respondents in over-charging the municipal rates was not a once off contravention of the law, but was repeated over successive financial years for the duration of the delay, in spite of objections from appellants. Second, the respondents are yet to recover from some of the appellants' members, the municipality's unpaid rates for the duration of the delay. These unpaid rates for agricultural properties from the previous financial years, would be reflected in the current municipality budget as book debts.

[34] The appellants' members have indicated their preparedness to pay the rates due. That would remedy the default of having created a shortfall on the budgets of the municipality. However, the municipality cannot seriously argue that it is entitled to claim the spoils of unlawfully overcharging the ratepayers. A balance must be struck between the two. The recovery of such municipal rates due for the past financial years, has to be limited to the rate chargeable in terms of the law that was applicable during that financial year. Conversely, those members of the appellants who have paid rates levied by the municipality in excess of the limit imposed by law, should be credited the amount that was in excess of the rate permissible by law, in each financial year. The scales of justice and equity must be balanced, and the principle of legality must be vindicated. It is thus in the interest of justice that the unreasonableness of the delay, under these circumstances, must be overlooked.

[35] The practical difficulties attendant upon retrospectively setting aside of the municipal rates and by implication, the annual budgets, was considered and acknowledged by this Court in *SAPOA*. However, in this appeal, such difficulties do not impede the consideration of any order that would be just and equitable for the appellants. This would be so because the favourable municipal rate determined for the category of agricultural properties, serves the public interest, in that it is intended to ensure the continuous supply of food, a factor vital for the nation's food security. Therefore the delay in

instituting litigation in this case cannot impede the consideration of just and equitable relief for the appellants, which subject I turn to deal with.

[36] In Gijima the Constitutional Court held[11]*:* 'However, under s 172(1)*(b)* of the Constitution, a court deciding a constitutional matter has a wide remedial power. It is empowered to make "any order that is just and equitable". So wide is that power that it is bounded only by considerations of justice and equity.'… In fashioning appropriate just and equitable relief, the approach in *Lombardy* finds application whereby this Court has to weigh the consequences of retrospectively invalidating the impugned municipality rates against the imperative to vindicate the principle of legality. Should matters be left as they are, the respondents stand to unjustifiably claim the unlawfully imposed excessive portion of the municipal rates, levied on the agricultural properties of the ratepayers. The scale of justice will be tilted.

[37] It is important to bear in mind that in the fabric of our Constitution, the first respondent is a sphere of government and the second and third respondents are organs of state. Our constitutional democracy is based on the rule of law. As stated by this Court in *Kalil N.O. and Others v Mangaung Metropolitan Municipality and Others*:[12] ' . . . 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 . . .'.[13] The municipalities are thus expected not only to be conversant with the law applicable to their sphere of government, but also to conduct their affairs within the confines of the law. Should they fail to do so, the courts should not be impeded from considering and granting an appropriate order that would have the effect of vindicating the principle of legality. A trend should not develop, or precedent established, where there would be no consequences when municipalities

[11] Ibid para 53
[12] *Kalil N.O. and Others v Mangaung Metropolitan Municipality and others* [2014] ZASCA 90; 2014 (5) SA 123 (SCA).
[13] Ibid para 30.

function outside the parameters of the law. In *Lombardy*, this Court cautioned against the implications of such practice when it commented as follows:

'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.'

[38] In order to mitigate the impact of the recovery of unpaid rates on the appellants and also the respondents crediting the accounts of the appellants who paid in excess of the legal limit, the parties may agree to reciprocally arrange the payments to be effected over a reasonable period, concurrent with the payment of the current rates, or make other suitable arrangements. Just as the process of agricultural food production by the taxpayers has to be protected, the inflow of revenue for the municipality must also not be disrupted.

[39] After hearing argument from counsel in Court, a request was directed to the parties to deliver supplementary heads of argument specifically on *Lombardy* and its implication to the question of the relief in terms of s 172 of the Constitution in this appeal. The counsel for both parties delivered the supplementary heads of argument. Regrettably, the submissions as regards *Lombardy* were scant and unhelpful. The parties took the opportunity to instead rehash the arguments as presented in Court. I am of the view that the supplementary heads of argument should be excluded from any costs to be awarded. The costs shall follow the result.

[40] I accordingly make the following order:

1. The Appeal succeeds.

2. The order of the Full Court of the Mpumalanga Division of the High Court is set aside and substituted by the following order:

2.1 ‘The rate notices published by the respondents in terms of s 14(2) of the Local Government: Municipal Property Rates Act 6 of 2004 in the Mpumalanga Provincial Gazette of 10 July 2009, 9 July 2010; 27 May 2011, 29 August 2012; 19 August 2013, 22 July 2015; 22 July 2016; 25 August 2017 and 6 October 2018, as well as the further rates notice published by the respondents dated July 2014 in respect of the 2014/2015 financial year, including resolutions of the municipal council on which all such rates notices were based, where applicable, are hereby declared unlawful and invalid to the extent that they relate to agricultural properties used or permitted to be used for crop and/or animal farming (agricultural property);

2.2 The respondents may recover from the members of the appellants, only the amounts of the agricultural property rates calculated based on the Local Government: Municipal Property Rates Act 6 of 2004 and the Regulations promulgated in terms thereof, less any amount in excess of the legally permissible limit, in respect of each financial year from 2009 to 2018;

2.3 The respondents are further liable to credit the accounts of the appellants’ members who were levied and paid municipal rates, only to the extent of the amounts in excess of the legally permissible limit of the rates chargeable to the agricultural properties in respect of each financial year from 2009 to 2018; and

2.4 On recovery of arrear municipal rates due, the respondents may charge the rate of interest as published in terms of section 96 read with section 97(1)*(e)* of the Local Government: Municipal Systems Act 32 of 2000 in respect of each financial year from 2009 to 2018.

3. The respondents are ordered in future not to levy property rates on any agricultural property in its municipal jurisdiction at a rate that exceeds

that legally prescribed and, such rate must be determined in terms of the procedures prescribed by law.'

4. The first respondent is ordered to pay to the appellants the costs of the appeal, including costs of two counsel, but excluding the costs of delivering the heads of argument after the hearing of the appeal. The costs against the first respondent shall include the costs in the high court and those on appeal in the full court of the Mpumalanga Division of the High Court.

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SP MOTHLE

JUDGE OF APPEAL

APPEARANCES:

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