

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, PORT ELIZABETH**

**CASE NO: 3751/2011
Date Heard: 29 August 2013
Date Delivered: 3 June 2014
REPORTABLE**

In the matter between

BORBET SOUTH AFRICA (PTY) LTD	First Applicant
HALBERG GUSS SOUTH AFRICA (PTY) LTD	Second Applicant
PG GROUP (PTY) LTD t/a SHATTERPRUFE	Third Applicant
XMECO (PTY) LTD	Fourth Applicant
CROWN CHICKENS (PTY) LTD t/a SOVEREIGN FOODS	Fifth Applicant
and	
NELSON MANDELA BAY MUNICIPALITY	Respondent

JUDGMENT

GOOSEN, J.

Introduction

[1] This application raises important questions concerning local democracy. It concerns the nature and extent of the obligation upon a municipal council to ensure public participation in its decision-making processes, in particular in the preparation and

adoption of a municipal budget. It also concerns the legality of the proceedings of a local council in approving a budget and related revenue raising resolutions. The Constitution has fundamentally transformed the landscape of public participation in local governance. Organs of local government are not only required to conduct themselves lawfully and in accordance with the principle of legality they are also, as will be seen, required to extend the reach of local participatory democratic processes by actively incorporating effective public participation in their decision-making.

[2] The applicants are five large corporations that have their principal places of business within the respondent's municipal area and carry on business, primarily, within the territory of the respondent. They are substantial consumers of goods and services provided by the respondent, in particular water and sanitation services and electricity. All of the applicants are ratepayers within the respondent's metropolitan area.

[3] The application is one in which the applicants seek a declaration to the effect that the decision(s) by the respondent's municipal Council, on 28 June 2011, adopting a municipal budget determining rates, tariffs and surcharges on tariffs for the financial year 2011/2012 be declared to be unlawful and of no force and effect. The applicants also seek certain ancillary and alternative relief. Principally the ancillary relief sought is to the effect that the respondent is precluded from recovering from the applicants such portion of the costs of the electricity consumption incurred during the 2011/2012 financial year as exceeds the costs which would have been due in terms of the tariff applicable in the 2010/2011 financial year. The alternative relief sought was to suspend the operation of a declaration of invalidity for a period of 12 months to enable the Executive Council of the Province of the Eastern Cape to take such steps as may be necessary to remedy the defects giving rise to the declaration of invalidity.

[4] The applicants' challenge to the legality of the municipal budget on 28 June 2011 is founded on the following allegations, namely:

- 4.1. that the process of adoption of the budget did not comply with the requirements stipulated in the Constitution and the Local Government: Municipal Systems Act 32 of 2000 (hereinafter “the Systems Act”) in respect of public participation in decision-making;
- 4.2. that the process of adoption of the budget did not comply with the provisions of sections 16 (1), 24 (1) and 25 (1) of the Local Government: Municipal Finance Management Act 56 of 2003 (hereinafter “the MFMA”);
- 4.3. that the respondent failed to comply with the peremptory provisions of section 30(5) of the Local Government: Municipal Structures Act, Act 1998 (hereinafter “the Structures Act”); and
- 4.4. that the resolution in terms of which the budget was approved did not comply with the provisions of section 160 of the Constitution.

[5] The circumstances in which the 2011/2012 municipal budget came to be approved are not in dispute. Such disputes of fact as are disclosed on the papers concern the actions taken by the respondent in respect of public participation and the particular circumstances in which the resolution approving the municipal budget was passed. I shall deal with those issues later in this judgement.

[6] National municipal elections were scheduled to take place on 18 May 2011. Prior to the elections the National Treasury presented the respondent with two options in the light of the election date. The first was to adopt the municipal budget prior to the scheduled elections. The second was for the newly elected municipal council to do so after the elections. It is common cause that the respondent elected to finalise and adopt its municipal budget in the period available after the national municipal elections.

[7] Before dealing with the manner in which the 2010/2011 budget came to be approved and the particular challenges raised by the applicants it is necessary to set out the Constitutional and statutory framework dealing with the process of budget approval in some depth and to consider the nature and extent of the respondent's obligation to ensure public participation in its decision-making.

The obligation to encourage public involvement in matters of local government

[8] Chapter 7 of the Constitution deals with the status, powers and functions of local government as a sphere of government. Section 152 (1) provides, *inter-alia*, that the objects of local government are to provide democratic and accountable government for local communities. Subsection (e) specifically provides that the object of local government is "to encourage the involvement of communities and community organisations in the matters of local government".

[9] Those "matters" refer to the functional areas of responsibility as defined by section 156 read with the relevant Schedules. In other words the obligation to encourage the involvement of communities extends to all facets of the functioning of the local sphere of government. This accords with the nature of the constitutional democracy which the Constitution establishes, namely one that is both representative and participatory. It also accords with the particular role played by the local sphere of government. In this regard local government is established as an autonomous sphere¹ which is imperatively required to provide democratic and accountable government "for local communities"² and "to give priority to the basic needs of the community"³.

¹Constitution s151(3)

²*Ibid* s152(1)(a)

³*Ibid* s153(a)

[10] The nature and extent of the obligation to encourage involvement of local communities in the matters of local government must be considered against this backdrop. So too must the particular provisions of the Structures Act; the Systems Act and the MFMA, each of which give expression to the Constitutional obligations of the local sphere of government and reflect the means by which national government ensures “the effective performance by municipalities of the functions” of local government.⁴

[11] Section 4 of the Systems Act sets out the rights and duties of municipal councils. In terms of this section, the council of a municipality has the right to govern the affairs of the local community on its own initiative, exercise the municipality’s executive and legislative authority and to finance the affairs of the municipality by charging fees for services and imposing surcharges on fees, rates on property and, where authorised, other taxes, levies and duties.⁵ Subsection (2) provides that:

The Council of a municipality, within the municipality’s financial and administrative capacity and having regard to practical considerations, has the duty to –

- (a) exercise the municipality’s executive and legislative authority and use the resources of the municipality in the best interests of the local community;
- (b) provide, without favour or prejudice, democratic and accountable government;
- (c) encourage the involvement of the local community;
- (d)...
- (e) consult the local community about –
 - (i) the level, quality, range and impact of municipal services provided by the municipality, either directly or through another service provider; and
 - (ii) the available options for service delivery;....

[12] Section 5 defines the rights and duties of members of the local community. It provides that members of the local community have the right:

- (a) through mechanisms and in accordance with processes and procedures provided for in terms of this Act or other applicable legislation to –
 - (i) contribute to the decision making processes of the municipality; and
 - (ii) submit written or oral recommendations, representations and complaints to the municipal counsel or to another political structure or a political office bearer or the administration of the municipality;...

⁴*Ibid* s155(7)

⁵ Systems Act s4(1)

[13] There is therefore a set of reciprocal rights and duties. Section 5 gives expression to the participatory nature of local democracy.

[14] Chapter 4 of the Systems Act provides in detail for community participation. It is appropriate to quote the relevant sections in detail. Sections 16 and 17 provide as follows:

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

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

(i) the preparation, implementation and review of its integrated development plan in terms of Chapter 5;

(ii) the establishment, implementation and review of its performance management system in terms of Chapter 6;

(iii) the monitoring and review of its performance, including the outcomes and impact of such performance;

(iv) the preparation of its budget; and

(v) strategic decisions relating to the provision of municipal services in terms of Chapter 8;

(b) contribute to building the capacity of –

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

(ii) councillors and staff to foster community participation; and

(c) use its resources, and annually allocate funds in its budget, as may be appropriate for the purpose of implementing paragraphs (a) and (b).

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

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

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

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

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

(d) councillors; and

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

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

(a) the receipt, processing and consideration of petitions and complaints lodged by members of the local community;

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

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

(d) consultative sessions with locally recognised community organisations and, where appropriate, traditional authorities; and

(e) report back to the local community.

[15] The obligations set out in section 16 and 17 above are extensive. The use of the phrase “develop a culture of municipal governance” suggests that a municipal council is obliged to take steps to extend and deepen its democratic processes. It must “create conditions”, “build capacity” and, most importantly allocate resources to comply with its obligations. It is required to take these steps in relation to encouraging public participation in the preparation and implementation of its Integrated Development Plan (IDP) and the preparation of its budget. It is also obliged to communicate information concerning the available mechanisms, processes and procedures to encourage and facilitate community participation in terms of section 18.

[16] The theme of community consultation and community participation is further addressed in Chapter 5 of the Act which deals with Integrated Development Planning by a municipal council. The chapter imposes the obligation upon a municipal Council to be developmentally oriented in its planning and seeks to achieve that object by providing for the adoption of Integrated Development Plans. An IDP is defined as an inclusive and strategic plan for the development of the municipality which, *inter-alia*, links, integrates and co-ordinates plans and takes into account proposals for the development of the municipality; aligns the resources and capacity of the municipality with the implementation of the plan; and forms the policy framework and general basis on which annual budgets must be based.

[17] The procedure to be followed in adopting and reviewing an IDP is dealt with in s29 of the Systems Act. Subsection (1)(b) provides that the process must allow for:

- “(i) the local community to be consulted on its development needs and priorities;
- (ii) the local community to participate in the drafting of the integrated development plan; and
- (iii) organs of state, including traditional authorities, and other role players to be identified and consulted on the drafting of the integrated development plan;...”

[18] These provisions of the Systems Act define the nature and extent of public participation of local communities in decision-making. The Structures Act in turn sets out the essential organs and structures through which such participation is to occur, although participation is not confined to such structures. It envisages the creation of ward committees for particular types of municipal councils. These ward committees are to comprise the ward councillor plus 10 other persons to be elected in accordance with election guidelines established by the municipal council.⁶ The composition of ward committees must take into consideration issues of diversity. A municipal council must make provision to meet the out of pocket expenses of persons involved in the work of the ward committees and may make financial provision to enable the ward committees to function. The function of a ward committee is defined by s74 of the Structures Act as being to make recommendations to the councillor or through the councillor to the municipal council. An indication of the legislature’s intention to extend the degree of democratic participation in the affairs of local government is to be found in s74 (2) which entitles a council to delegate functions to a ward committee in terms of s59 of the Systems Act. These provisions suggest that municipal councils are to function as the primary spheres of active engagement with members of the community and as the basis upon which participatory democracy is to be founded.

[19] As is indicated by s17 of the Systems Act, participation of the local community must occur through the political structures, i.e. through engagement with the council and its executive committees. It must also occur via the structures and mechanisms

⁶Structures Act s 73(2) & (4). The election of ward committees provides for a more locally centered level of representation in the structures of local government

established by the Act, most notably ward committees. However, the obligation to encourage public participation and to provide appropriate mechanisms is not confined to these structures. The section does not establish a closed list of mechanisms. The obligation is an open ended one. The Constitution envisages the extension and expansion of involvement of communities as a guiding principle. It envisages a dynamic and evolving participation of communities in the affairs of local authorities. The Constitutional Court refers to “a continuum that ranges from providing information and building awareness, to partnering in decision-making”.⁷ The obligation to encourage public participation at local government level goes beyond a mere formalism in which public meetings are convened and information shared. The concept of “participatory democracy” as envisaged by the Constitution requires that the interplay between the elected representative structures and the participating community is addressed by means of appropriate mechanisms. It is this relationship to which the Constitutional Court speaks when it states that there must not only be meaningful opportunities for participation, but that steps must be taken to ensure that people have the ability and capacity to take advantage of those opportunities.⁸

[20] Section 16 of the Systems Act addresses this requirement directly. It requires that a municipal council to “build capacity” and to “allocate resources” to ensure that meaningful participation can occur. It is also addressed specifically in the provisions of the Systems Act relating to the adoption or annual review of the IDP⁹, and in the process of the adoption of the budget.¹⁰

The procedures for the adoption of a municipal budget

[21] Section 160 of the Constitution deals with the internal procedures of organs of local government. Subsection (2) provides, *inter-alia*, that the “approval of budgets” and

⁷*Doctors for Life International v Speaker of the National Assembly* 2006 (6) 416 (CC) at par 129

⁸*Ibid* par 129

⁹Systems Act s28(2) & (3), s29(1)(b)

¹⁰MFMA s23

the “imposition of rates and other taxes, levies and duties” are functions that may not be delegated by a municipal council. Subsection (3) (b) provides:

All questions concerning the matters mentioned in subsection (2) are determined by a decision taken by a Municipal Council with a supporting vote of a majority of its members.

- [22] Chapter 4 of the MFMA deals with the content and approval process applicable to municipal budgets. Section 16 provides that the Council of the municipality must for each financial year approve an annual budget for the municipality “before the start of that financial year” and, in order to ensure compliance with this requirement imposes upon the municipality the obligation to table the annual budget at a council meeting at least 90 days before the start of the budget year.¹¹
- [23] The budget preparation process is regulated by s21 of the MFMA. Overall responsibility is placed on the Mayor of a municipality to coordinate the processes for the preparation of the annual budget and for reviewing the municipality’s IDP. In terms of subsection (1) (b) the Mayor is obliged at least 10 months before the start of the budget year to table a time schedule outlining key deadlines for the preparation, tabling and approval of the annual budget; the annual review of the integrated development plan and any consultative processes forming part of the process of budget preparation and/or review of the integrated development plan. Section 22 provides that immediately after the tabling of an annual budget in a municipal Council the accounting officer of the municipality must make public the annual budget and invite the local community to submit representations in connection with the budget.
- [24] Section 23 sets out the consultative process to be followed in relation to a budget that has been tabled. It requires a council, *inter alia*, to consider any submissions received from the public or national treasury and to give the mayor an opportunity to respond to such submissions. It envisages a notice and comment procedure for any amendments to a tabled budget.

¹¹This means in effect that the last day upon which an annual budget may be tabled is 31 March.

[25] Sections 24 and 25 regulate the procedure for the adoption of a budget. They provide as follows:

24 (1) The municipal Council must at least 30 days before the start of the budget year consider approval of the annual budget.

(2) An annual budget –

(a) must be approved before the start of the budget year;

(b) is approved by the adoption by the Council of the resolution referred to in sections 17 (3) (a) (i); and

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

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

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

(iii) approving measurable performance objectives for revenue from each source and for each vote in the budget;

(iv) approving any changes to the municipality's integrated development plan; and

(v) approving any changes to the municipality's budget related policies.

25 (1) If a municipal Council fails to approve an annual budget, including revenue-raising measures necessary to give effect to the budget, the council must reconsider the budget and against vote on the budget, or on an amended version thereof, within seven days of the Council meeting that failed to approve the budget.

(2) The process provided for in subsection (1) must be repeated until a budget, including revenue-raising measures necessary to give effect to the budget, is approved.

(3) If a municipality has not approved an annual budget, including revenue-raising measures necessary to give effect to the budget, on the first day of the budget year, the mayor must immediately comply with section 55.

[26] It is clear from consideration of the statutory framework set out above that the obligation upon a municipal Council to encourage public participation is extensive and far-reaching. A key arena in which public participation must be encouraged is in the preparation and review of the IDP and the annual municipal budget. The adoption and implementation of an IDP and the preparation of an annual budget is at the heart of efforts made by a municipal council to fulfil its Constitutional obligations as are set out in s152 and s153 of the Constitution. The IDP represents the strategic plan of a municipality and the annual budget the means by which that plan is to be funded. As such the IDP and the budget form the essential policy framework for the achievement

of the developmental objectives of a municipality. And these are the matters upon which the Constitution requires effective public participation of the local community.

[27] A careful assessment of the budget processes of a municipality indicates three distinct phases in which public participation must occur.

[28] The first phase concerns budget preparation. It commences with the publication by the Mayor of a timetable for the preparation, tabling and adoption of the budget and the notification of consultative processes to be followed¹² and extends up to the tabling of the budget¹³. The formal tabling of a proposed budget, with which must be published proposed resolutions to be adopted for revenue generating measures, including rates, taxes and tariffs marks a second distinct phase in the public participation process. Once a draft budget, which is necessarily the product of the preparation phase, has been tabled the accounting officer is obliged to publish it and to call for comments and submissions. This “notice and comment” phase of public participation is regulated by s23 of the MFMA.¹⁴

¹²MFMA s 21(1)(b)

¹³MFMA s16 (1) provides that this must occur at least 90 days before the commencement of the financial year.

¹⁴ The nature of the notice and comment procedure was considered in *South African Property Owners Association v The Council of the City of Johannesburg* [2012] ZASCA 157 (8 November 2012). There the court was dealing with the levying of rates on immovable property in the context of the adoption of municipal budget. The court was called upon to consider the requirements for meaningful public participation where significant amendments to the tabled budget were made prior to the adoption of the budget. With reference to the provisions of the MFMA and the Systems Act the court stated that:

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

- (1) The budget must be amended to set out the realistically anticipated revenue from each revenue source and the indicative revenue per revenue source for the two financial years. Following the budget (s 17 (1) (a) and (c) of the Finance Act);
- (2) The draft resolutions accompanying the budget approving the budget and imposing the municipal tax and setting the municipal tariffs must be amended to reflect the amended rates (s 17 (3) (a)(i) and (ii) of the Finance Act);
- (3) The measurable performance objectives for revenue from each source and the projection of cash flow for the budget year by revenue source, broken down per month, accompanying the budget, must be amended to reflect the amended rates (s 17 (3) (b) and (c) of the Finance Act);
- (4) The Mayor must provide a statement explaining the necessity for amending the rates and demonstrating the effect of amendment of the rates will have on the budget and indicating what aspects of the budget require comment (s 21)(1)(a) of the Finance Act);
- (5) Immediately after the budget and accompanying documents have been amended and the statement provided, the accounting officer of the municipality must, in accordance with its case 21, 21A and 21B of the Systems Act, make public the amended budget with the amended

[29] During this phase, where amendments to or adjustments of the proposed budget are made as a result of the consultative process or otherwise, a council is obliged to publish such amendments and again call for comment.¹⁵ This suggests that the public participation process is one conducted by successive episodes of notice and comment in the context of consideration of the budget as a whole.

[30] The notice and comment phase is concluded when the tabled budget, whether in its original or amended form, is placed before the municipal council for consideration as provided by section 24(1) of the MFMA. This is the adoption phase of the budget process during which the primacy of the democratically elected council comes to the fore. It is a phase when direct public participation is necessarily more limited. Executive authority vests in the municipal council and it is required to consider and decide upon the product of an inclusive budget preparation and consultative process.¹⁶

[31] In each of the three phases the general obligation to ensure public participation will require that specific steps be taken to ensure that public participation is effective. Although these are not spelt out in the legislation it is not difficult to conceive that in the phase of preparation of the budget the mechanisms employed to foster public participation will need to be based on the provision of information to communities and the identification of needs via formally established structures and such other mechanisms as the council may put in place.

documents referred to in the previous paragraphs and invite the local community to submit, within a time which, taking into account the relevant circumstances, must be reasonable, representations in connection with the amended budget and accompanying documents and the amended rates proposed (s 22 (a) of the Finance Act) and provide these documents to the National Treasury and the relevant provincial treasury (s 22 (b) of the Finance Act);
 (6) After the submissions have been received the council must consider them and then give the mayor an opportunity to respond to the submissions and, if necessary, to revise the budget and table the amendments for consideration by the council (s 23 (1) and (2)).

¹⁵See SAPOA supra

¹⁶ A consideration of the requirements of s24 read with s25 indicates that the adoption process is regulated by specified time periods. These time periods do not readily permit of the sort of notice and comment procedures that precede consideration of the budget by the council.

- [32] Once the budget has been prepared, it provides a proposed framework for addressing the needs of communities. This, as was stated in the *SAPOA* judgment¹⁷, will occur through successive notice and comment procedures. During the adoption phase the municipal council is engaged as a deliberative body which exercises its authority in a public forum to which members of the public have access.
- [33] In summary: the Constitution and the legislation enacted to give effect to it clearly envisage an ever deepening democratic process at local government level. The Systems Act envisages that strategic and integrated planning should inform municipal budgets and that the planning and budget process is central to the fulfilment of a municipal council's developmental responsibilities. Public participation in these processes is mandatory. It is in the light of this imperative that the process of adoption of the 2011/2012 municipal budget must be considered.

The process of adoption of the Municipal Budget 2011/2012

- [34] The municipal budget for 2011/2012 was tabled at a municipal council meeting on 31 March 2011. This is not in dispute although, as will be seen hereunder, the issues regarding public participation prior to the tabling and consideration of the budget are in dispute. It is common cause that the municipal council meeting held on 31 March was the final council meeting of the outgoing municipal council. Councillors thereafter were on "recess" to enable election canvassing to occur. The respondent's papers do not set out what functions, if any, were fulfilled by councillors in relation to council business during this recess period.
- [35] It is not in dispute that a municipal council meeting was convened on 31 May 2011. This was the first meeting of the municipal council following the municipal elections held on 18 May. At this meeting newly elected councillors were sworn-in and elections were conducted for the appointment of a Speaker, Executive Mayor,

¹⁷ fn 15 above

Deputy Mayor and other Executive office-bearers. The agenda of the meeting also envisaged consideration of the 2011/2012 municipal budget and related resolutions for the raising of revenue. It is not in dispute that a resolution was adopted to defer consideration of the budget to a council meeting to be held on 7 June 2011. On each of 7 June, 14 June and 21 June 2011 similar resolutions were adopted. The overall effect was that a council meeting was finally convened on 28 June 2011. At that meeting the budget for 2011/2012 was adopted and resolutions taken to impose certain tariffs and surcharges by way of revenue generating measures. In respect of this meeting the applicants contend that the provisions of s160 of the Constitution were not complied with.

[36] In the light of the dispute as to the legal effect of what occurred at the aforesaid meetings it is necessary to set out in some detail the record of proceedings on each of those occasions, with reference to the official minutes of the council meetings and the transcript of those proceedings as presented by the respondent.

[37] The minutes of the council meeting on 31 May record the following in relation to consideration of the budget.

ITEM 17 – Annual review and amendment of the Integrated Development Plan (IDP) – Deferred

The Acting Municipal Manager explained that there was a statutory requirement to submit to the IDP and Draft Budgets to the Council by 31 May each year, and suggested that –

- (i) consideration of same be deferred in order for it to be re-prioritised and that the Executive Mayor in the interim establishes a political task team to work with Officials during this process; and
- (ii) the Council's meeting be reconvened within 7 days to consider the IDP and Draft Budgets.

The Executive Mayor indicated that the Acting Municipal Manager's suggestion was supported, and Councillor T H Ngcolomba stated that the task team to be established by the Executive Mayor should be able to engage at all levels throughout the institution.

.....

RESOLVED:

- (a) That consideration of the IDP and Draft Budgets be deferred in order for it to be re-prioritised and be subjected to further consultation processes and that the

Executive Mayor in the interim establishes a political task team to work with all Officials during this process.

(b) That the Council's meeting be reconvened within seven days in terms of Section 25 of the Local Government: Municipal Finance Management Act, Act 56 of 2003, to consider the IDP and Draft Budgets.

[38] As a result of the adoption of this resolution the further items relating to the Draft Operating and Capital Budgets, property rates, proposed water and sanitation tariff increases, electricity tariff increases and miscellaneous fees and charges were also deferred for consideration to the next council meeting.

[39] The municipal council meeting reconvened on 7 June 2011. At this meeting the Executive Mayor presented a Process Plan to facilitate the adoption of the Revised IDP and municipal budget. The minute of that meeting records the following.

ITEM 17 – Annual review and amendment of the Integrated Development Plan (IDP) – Deferred

The Executive Mayor explained that the IDP and Budget in its present form could not be adopted and that further engagements with social partners should take place in the first instance, and pointed out that there was some Wards that have been marginalised in the budget whilst more affluent wards were receiving benefits, and that the Council should ensure the Integrated Development Plan should directed (sic) the Budget. The point was made that the 80:20 principle would be continued and that the Budgets were consciously bias towards marginalised and poverty stricken areas, and the Executive Mayor pointed out that the Municipality faced revenue challenges and that the Council should ensure that the Budgets were cash-backed and within affordability levels.

The Executive Mayor stated that his office consulted with COGTA, DBSA , SA Cities Network and National Treasury, in order to obtain as many comments, contributions and inputs on the IDP and Budgets possible, and pointed out that a number of civil society sectors have indicated that they also wanted to engage the municipality in this regard. It was also pointed out that once the IDP and 2011/12 Budgets were adopted, the Service Delivery and Budget Implementation Plan (SDBIP) would take effect and that all officials and Directorates would be evaluated according to the implementation thereof.

The Executive Mayor presented a Process Plan for the IDP and Budgets as set out in Annexure "B" to these Minutes, and encouraged all social partners and stakeholders, including opposition parties, to make constructive and meaningful contributions in respect of the IDP and Budgets. The Speaker pointed out that the Council was required by law to reconvene on 14 June 2011 to consider the Budgets.

- [40] It is not necessary to set out the content of the Process Plan. It suffices to state that the plan envisaged the adoption of the revised IDP and Budget 2011/12 to take place at a Council meeting to be convened on 21 June 2011.
- [41] A further municipal council meeting was convened on 14 June 2011. At that meeting the Executive Mayor presented a Progress Report on the 2011/12 IDP and Budget Review. The Progress Report contained a detailed exposition of the background and context in which the report was presented and recorded progress made in terms of the Process Plan adopted at the municipal council meeting of 7 June 2011. It also contained reference to priorities and considerations to be taken into account when finalising the IDP and Budget. The report made the following recommendations:
- (i) That the Executive Mayor's progress report on the 2011/12 IDP/Budget Review Process Plan be accepted.
 - (ii) That the Non--Negotiable Priorities as mentioned above be endorsed.
 - (iii) That the NERSA decision be factored into the final 2011/12 Budget.
 - (iv) That a Communications Plan for allowing and soliciting all submissions must begin immediately.
 - (v) That all submissions must be considered by the Executive Mayoral IDP/Budget Task Team.
 - (vi) That the revised IDP and Budget be circulated for comment from Monday, 20 June 2011.
 - (vii) That the final Revised 2011/12 IDP & budget be adopted by latest 28 June 2011.
- [42] The minute of the meeting of 14 June records that the Executive Mayor's recommendations as per the Progress Report were adopted. The further items relating to the adoption of the Operating and Capital Budgets and related resolutions were also deferred to the meeting to be convened on 21 June 2011.
- [43] A further meeting of the municipal council was convened on 21 June 2011. The minute of that meeting records that the Executive Mayor made a statement at the commencement of the meeting during which he tabled a revised Process Plan for the finalisation and adoption of the revised IDP and Budget 2011 2012. The revised

Process Plan outlined the further process of consultation that was envisaged and indicated the intention to adopt the final draft IDP/Budget 2011/2012 on 28 June 2011. The minute of the meeting records that the Executive Mayor's Progress Report and the Revised Process Plan were adopted by resolution of the Council.

- [44] The respondent's version on the process of adoption of the municipal budget 2011/2012 is that the draft budget was tabled before the council by the Executive Mayor on the 31 March 2011, in accordance with section 16 (1) of the MFMA. Prior to this a public participation process was commenced in October 2010. In support of its contentions in this regard a schedule of IDP/Budget public participation meetings was provided. Following the tabling of the Budget on 31 March 2011 it was placed on the respondent's website. According to Williams, the respondent's Director of Communications further consultations and public participation meetings were held in May 2011. Eleven meetings were held at several venues across the city. These meetings, according to Mtati, followed the same format as the five meetings held in October and November 2010, prior to the tabling of the budget.
- [45] According to the Executive Mayor the Budget "was considered by the Council but not approved" on 31 May 2011. It was also "considered by Council" at the meetings of 7 June, 14 June, 21 June and was approved on 28 June. Although the Executive Mayor was not present at the meeting of 28 June 2011, since he was at the time abroad on council business, he says that the report that was submitted to council on that date was his report. The report was submitted on his behalf by the Acting Municipal Manager. The respondent accordingly denies that it did not comply with the provisions of section 30 (5) of the Structures Act.
- [46] At the meeting of 31 May the council, acting on the recommendation of the Executive Mayor, appointed a Budget Task Team to revise the draft IDP and Budget and to engage in consultations with various interest groups and stakeholders in relation to the content of the IDP and Budget. The Budget Task Team convened its first meeting on 7 June 2011 and on that occasion adopted a plan of action. That

plan of action was the same as the Process Plan which was approved by council at its meeting of 7 June 2011.

- [47] The Task Team held meetings with organised business, political parties, community-based organisations and all of the Directorates within the respondent. These meetings were held on 8, 10 and 15 June. As a result of submissions received during these meetings the draft Budget was adjusted. According to Williams the adjustments were made to the proposed property rates, water, sanitation and refused tariff increases. These were reduced from those originally proposed in the draft Budget which had been tabled in March 2011. In consequence of the reduction in revenue the Operating Budget was also adjusted.
- [48] Based upon this consultation process undertaken by the Budget Task Team the respondent submitted that it had complied with its statutory obligations in respect of public participation.
- [49] The respondent's Speaker, Mrs Hermans, who was elected to that position at the Council meeting of 31 May 2011 also deposed to an affidavit setting out what occurred at the relevant Council meetings. According to her the council resolved, at the meeting of 31 May by unanimous decision "not to approve the Budget and IDP at that stage". The Speaker points out that there is an established convention that applies at council meetings that "if there is no objection to an item such item is not put to the vote by show of hands but there will be a mere recordal of such decision". This convention it is submitted, does not offend the provisions of s160 (3) of the Constitution.
- [50] The Speaker further states that at the meetings of the council on 7 June, 14 June and 21 June the Budget was considered but not approved. This, according to her, is borne out by the transcript of the council meetings. I shall return to this hereunder.

[51] At the meeting of 28 June 2011 the Acting Executive Mayor presented the 2010/2012 IDP and Budgets and recommended their approval. In regard to the process of approval of the budget Hermans states the following in her affidavit:

19. There were 117 Councillors that attended this meeting. I must further state that there are 120 Councillors in the Respondent. In addition, in the Council Chamber there are only 119 seats (I occupy a separate seat) and if there is a Councillor who is absent, I would have been advised of that in advance and in any event I will be able to see from the open seats as to the exact number of Councillors that are not in the meeting.

20. As I have indicated, there were 117 Councillors that attended the meeting, it follows therefore that in front of me in the Council Chambers there were only two seats that were open. In order to approve the budget, sixty-one votes were required.

21. The item on the budget was deliberated and voted on by a raising of hands. Sixty-one Councillors voted in favour of the approval of the budget and the IDP. The transcript of the Council meeting held on 28 of June 2011 is attached hereto, marked "MH 5".

22. The votes were counted by the secretary it is an additional check to my own observations. If there had been no counting of the votes and/or if they were insufficient votes to carry the motion, I have no doubt in my mind that the opposition parties will have contested that. The Honourable Court will note from the transcript of the meeting that the Democratic Alliance ("DA") proposed that the budget not be approved and that motion was also put to a vote, but was defeated. Accordingly the budgets and the tariff increases were duly approved."

[52] On the question of public participation prior to the tabling of the Budget on 31 March 2011, an affidavit was deposed to by Mr Mtati, who describes himself as a Ward Committee Practitioner within the Constituency Directorate of the respondent. According him the Constituency Directorate is responsible for arranging and facilitating public participation meetings. He states that the public participation process regarding the formulation and preparation of the respondents IDP and draft 2011/2012 budget commenced in October 2010. He confirms that a number of meetings were convened between October 2010 and May 2011. He attended seven of the sixteen meetings. The Constituency Directorate arranged these meetings. This included issuing notices to the public in the form of posters, flyers and/or newspaper advertisements. In addition loudhailers were used to inform the public of certain meetings. Prior to each meeting the Constituency Directorate notified all Directorates of the meetings. The purpose was to allow each of the Directorates to

send a representative to the meetings. According to Mtati in addition to councillors and municipal officials who attended the meetings, officials from the IDP office and/or Constituency Services attended all of the meetings.

[53] He further states that the issues raised at the public participation meetings were compared with existing ward priority plans in order to consider whether any issue should be incorporated in the IDP and/or Budget. The majority of submissions however were not based on IDP and budget issues but were more general comments regarding service delivery in the relevant wards. He also states that copies of the draft budget documents were placed in all 22 public libraries, at all customer centres, all institutions of higher learning and all of the clinics in the respondent's area.

[54] The applicants alleged that the respondent failed to comply with its obligations to ensure effective public participation in a number of respects. The applicants accept that the Mayor complied with the obligation to publish a timetable for the consultative process as envisaged by s 21(1). This timetable was however not followed. They denied that the respondent devised appropriate mechanisms for public participation in the preparation of the budget and in this regard allege that the respondent should have held public meetings and other forms of consultative meetings prior to the tabling of the municipal budget. It was contended that no public input whatsoever was obtained in the preparation of the budget.

[55] In respect of the period after the tabling of the budget the applicants alleged that the respondent failed to comply with the obligations imposed by s22 which require that a copy of the budget, together with supporting documentation be published on the respondent's website and made available for public comment. The allegation is made that the documents were only published on the website during April 2011. It is also alleged that the Ratepayers Association as well as the applicants attempted on numerous occasions to communicate with the office of the Mayor in an endeavour to

engage in consultations with the respondent in respect of the budget. These efforts were apparently unsuccessful.

[56] It is the applicant's contention that the only significant public consultation process was that initiated during the period of June 2011, after consideration of the budget had been deferred. This, the applicant submitted, does not constitute effective and meaningful public participation as is required and accordingly that the respondents had failed to meet their public participation obligations.

[57] Before considering whether this is indeed so, it is necessary to set out the principles applicable in deciding whether the respondent has complied with its constitutional and statutory obligations relating to public participation.

[58] The case of *King v Attorneys Fidelity Fund Board of Control and another*¹⁸ concerned a challenge to the validity of a statute of Parliament based upon the alleged failure of Parliament to "facilitate public involvement" as required by section 59 of the Constitution. The case was decided upon a jurisdictional point, the Supreme Court of Appeal having come to the conclusion that since the claim of invalidity of the statute was based on an alleged failure by Parliament to fulfil an obligation in terms of the Constitution, the determination of that issue falls within the exclusive jurisdiction of the Constitutional Court. The SCA nevertheless expressed the view that:

"Public involvement" is necessarily an inexact concept, with many possible facets, and the duty to "facilitate" it can be fulfilled not in one, but in many different ways. Public involvement might include public participation through the submission of commentary and representations: but that is neither definitive nor exhaustive of its content. The public may become "involved" in the business of the National 's Assembly as much by understanding and being informed of what it is doing as by participating directly in those processes. It is plain that by imposing on Parliament the obligation to facilitate public involvement in its processes, the Constitution sets of base standard, but then leaves Parliaments significant leeway in fulfilling it. Whether or not the National Assembly has fulfilled its obligation cannot be assessed by examining only one aspect of "public involvement" in isolation of others, as the appellants have sought to do here. Nor are the various obligations section 59 (1) imposes to be viewed as if

¹⁸2006(1) SA 474 (SCA)

they are independent of one another, with the result that the failure of one necessarily divests the National Assembly of its legislative authority.¹⁹

[59] The court went on to state that it is only where Parliament has so renounced its constitutional obligations to facilitate public participation that it ceases to be or to act as the body the Constitution envisages and thus ceases to have legislative authority that its purported enactments will be invalid. That question it decided was one that only the Constitutional Court is empowered to adjudicate.

[60] For present purposes the jurisdictional question is not relevant. What is relevant is the approach to be adopted to the question of whether or not a particular body has fulfilled its obligations in respect of public participation. The approach appears to be that the body enjoined to facilitate or engage in public participation is to be accorded significant leeway in fulfilling its obligations.

[61] In *Doctors for Life International v Speaker of the National Assembly*²⁰ the Constitutional Court considered the nature of our constitutional democracy as well as the meaning and scope of the duty to facilitate public involvement in the legislative processes of Parliament and the National Council of Provinces. The court noted that:

The nature of our democracy must be understood in the context of our history. As has been observed, during the struggle against apartheid, a system that denied the majority of the people a say in the making of the laws which govern them, the people developed the concept of the People's Power as an alternative to the undemocratic system of apartheid. This concept ensured that the people took part in community structures set up to fight the system of apartheid. But as has been observed, the significance of these "organs of People's Power" went beyond their intended purpose:

They were also seen as crucial in laying the foundation for the future participatory democracy that [the people] were fighting for and that we are operating under. This emphasis on democratic participation that was born in the struggle against injustices is strongly reflected in our new Democratic Constitution and the entrenchment of public participation in Parliament and the legislatures.²¹

¹⁹*King* at par 22

²⁰2006 (6) SA 416 (CC)

²¹At par 112

[62] The Constitutional Court went on to conclude that our democracy includes, as one of its basic and fundamental principles, the principle of participatory democracy. In this regard the Court noted that: “The democratic government that is contemplated is partly representative and partly participatory, is accountable, responsive and transparent, and makes provision for public participation in the law-making processes. Parliament must therefore function in accordance with the principles of our participatory democracy.”²²

[63] In examining the meaning and scope of the duty to facilitate public involvement the court noted that the expression “facilitate public involvement” is a broad concept which according to the plain and ordinary meaning of the phrase refers to the process by which the public participates in something. Facilitation of public involvement means taking steps to ensure that the public participate in the process. The court went on to state that our constitutional framework requires the achievement of a balanced relationship between representative and participatory elements in our democracy. The obligations imposed by the Constitution upon Parliament and the National Council of Provinces impose a special duty upon the legislature and presupposes that the legislature will have considerable discretion in determining how best to achieve the balanced relationship between representative and participatory elements in our democracy. In this regard Parliament and the provincial legislatures would have considerable discretion to determine how best to fulfil their duty to facilitate public involvement.

[64] A court would nevertheless be entitled to determine whether there has been a degree of public involvement such as is required by the Constitution. In this regard the court would apply a standard of reasonableness which is an objective standard which is sensitive to the facts and circumstances of the particular case.²³ The Court reiterated that: “(i)n dealing with the issue of reasonableness context is all-important”.²⁴ In

²²At par 116

²³*Minister of Health and another NO v New Clicks South Africa Pty Ltd and others (Treatment Action Campaigns amicus curiae)* 2006 (2) SA 311 (CC) par 630

²⁴*Doctors for Life at par 127 referring to Khosa and others v Minister of Social Development and others; Mahlaule and others v Minister of Social Development and others* 2006 (6) SA 505 (CC)

applying the test of reasonableness appropriate account would have to be taken of practicalities such as time and expense as well as questions relating to the efficiency of the law-making process. The Court said:

What is ultimately important is that the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process. Thus construed, there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided. In this sense, public involvement may be seen as “a continuum that ranges from providing information and building awareness, to partnering in decision-making”. This construction of the duty to facilitate public involvement is not only consistent with our participative democracy, but it is consistent with the international law right to political participation. As pointed out, that right not only guarantees the positive right to participate in public affairs, but it’s simultaneously imposes a duty on the State to facilitate public participation in the conduct of public affairs by ensuring that this right can be realised. It will be convenient here to consider each of these aspects, beginning with the broader duty to take steps to ensure that people have the capacity to participate.²⁵

[65] The Court then considered aspects related to the giving of notice of and information about legislation under consideration as well as the opportunities for participation that are available. In this regard it would be desirable to provide public education that builds capacity for such participation. Public involvement in the legislative process requires access to information and the facilitation of learning and understanding in order to achieve meaningful involvement by ordinary citizens.

[66] The Constitutional Court again had an opportunity to consider the ambit of the duty imposed upon a provincial legislature to facilitate public involvement in its legislative and other processes in *Matatiele Municipality v President of the Republic of South Africa (No 2)*.²⁶ The Court rejected an argument that the duty to facilitate public involvement must be given a restrictive meaning. The court noted that: “to uphold the government’s submission would therefore be contrary to the conception of our democracy, which contemplates an additional and more direct role for the people of

²⁵At par 129

²⁶2007 (6) SA 477 (CC)

the provinces in the functioning of a provincial legislature than simply through the electoral process. The government's argument that the provisions of section 118(1)(a) are met by having a proposed constitutional amendment considered only by elected representatives must therefore be rejected."²⁷

[67] The Court emphasised that the Preamble of the Constitution sets as a goal the establishment of a "society based on democratic values [and] social justice" and declares that the constitution lays down "the foundations for a democratic and open society in which government is based on the will of the people". The requirement that public participation be facilitated is consistent with our constitutional commitment to human dignity and self-respect. The court observed that a commitment to a right to public participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from sense that participation is necessary to preserve human dignity and self-respect.²⁸

[68] The court went on to observe that:

The nature and the degree of public participation that is reasonable in a given case will depend on a number of factors. These include the nature and the importance of the legislation and the intensity of its impact on the public. The more discreet and identifiable the potentially affected section of the population, and the more intense the possible effect on the interests, the more reasonable it would be to expect the Legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say. In addition, in evaluating the reasonableness of the conduct of the provincial legislatures, the Court will have regard to what the Legislatures themselves considered to be appropriate in fulfilling the obligation to facilitate public participation in the light of the content, importance and urgency of the legislation.²⁹

[69] This approach, based upon reasonableness was again confirmed by the Constitutional Court in *Merafong Demarcation Forum v President of the Republic of South Africa*.³⁰ It is not necessary for present purposes to consider the further import of

²⁷At par 63

²⁸At par 66

²⁹At par 68

³⁰2008 (5) SA 171 (CC)

this judgement in respect of the application of a rationality test in respect of the adoption of the particular legislation.

[70] In *Democratic Alliance v Ethekwini Municipality*³¹ the court stated that:

It stands to reason, I think, that the yardstick as to whether, in given circumstances, the requirement of public participation had been satisfied by a municipal council cannot be different from the one applied with reference to the constitutional obligations imposed on the Houses of Parliament.

[71] That yardstick the court noted was succinctly formulated by the Constitutional Court in *Doctors for Life International* where it said:

The duty to facilitate public involvement must be construed in the context of our constitutional democracy, which embraces the principle of participation and consultation. Parliament and the provincial legislatures have broad discretion to determine how best to fulfil the constitutional obligation to facilitate public involvement in a given case, so long as they act reasonably. Undoubtedly, this obligation may be fulfilled in different ways and is open to innovation on the part of the legislatures.³²

[72] Although the yardstick to be applied in determining compliance with the obligation is undoubtedly the same, the nature of the obligation to facilitate public participation in decision-making at the local sphere of government is, as is clear from the discussion above, more extensive and far reaching at local government level than it is at provincial and national government levels. This is consistent with the scheme of different spheres of government as provided by the Constitution and is also consistent with the concept of participatory democracy that the Constitution is founded upon. It is, after all, at the local level that the scope for participation by members of the public is greatest. It is also at that level that the interests of directly affected communities can more readily be taken into account and promoted in the process of decision-making. The Constitutional Court's reference in *Doctors for Life International* to the historical context which animates our constitution, namely the involvement of communities in organs of people's power in the struggle against apartheid is instructive. These organs of people's power found most significant expression in struggles at a local community

³¹2012(2) SA 151 (SCA) at par 24

³²*Doctors for Life* par 145

level. Indeed it is those struggles and the mechanisms employed to conduct those local struggles that informed the very system of local government now provided for in our Constitution.³³

[73] In this instance the respondent states that the public participation process commenced in relation to the annual review of the IDP “during October 2010”. It points to a schedule of meetings which were convened. According to Williams the draft budget was placed on the municipality’s website and copies of the budget were also placed in the public libraries.

[74] I have already set out the allegations made by the respondent in respect of its compliance with its public participation obligations, namely the steps taken to hold public meetings after October 2010. It was the applicants’ case that no steps were taken at all. This dispute of fact must be resolved on the basis of the well-known test set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*³⁴. It must therefore be accepted that the respondent, during this phase of the budget preparation process, did take steps to facilitate public meetings at which the IDP review and budget was considered. Having said that, it is nevertheless troubling that the respondent chose to set out only the barest of facts relating to its conduct on so important a matter. Nothing is said of the role, if any, played by ward committees in the budget preparation process. Yet it is these structures which are the primary vehicle for direct public participation in the affairs of local councils. The paucity of evidence relating to steps taken to comply with its obligations is compounded when it comes to the period after the tabling of the budget

[75] The respondent stated that after the budget was tabled, a copy of the budget was published together with supporting documentation and calls were made for comment and the submission of representations. This must be accepted. The respondent does not however address the issue as to whether during this period any submissions were received by the council and what steps, other than the publication of the budget, were

³³*Robertson v City of Cape Town* 2004 (5) SA 412 (C)

³⁴1984 (3) SA 623 (A)

taken to engage in consultative public participation. On a proper reading of the respondent's affidavit, the respondent undertook very limited steps to ensure effective public engagement in the period between 31 March when the budget was tabled and 31 May when the council "considered" the budget. During this period public meetings related to the budget and IDP process were held between 9 and 12 May (at a time when the municipal elections were at their height). No details regarding these meetings are provided. Mtati deals with these meetings on the same basis as those that were held during October and November 2010 prior to the tabling of the budget. It is not clear whether the meetings in May dealt with submissions relating to the tabled budget and whether such submissions were considered by the council. It appears that the respondent did not, during this period, identify any particular interest groups and communities nor did it facilitate the establishment of consultative fora to consider submissions made in respect of the tabled budget. The respondent's papers are silent as to what mechanisms, other than the publication of the budget, were put in place during this period and what resources were allocated to the task or what steps were taken to build capacity in communities to participate in the budget process. The applicants allege that they and others, in the form of the Ratepayers Association, sought to engage the council on aspects of the budget but to no avail.

[76] A reading of the transcripts of the council meetings held between 31 May and 21 June reflect a clear concern on the part of the Mayor and other elected councillors that a further opportunity for consultation and engagement with stakeholders had to be held in order to arrive at a budget which could be presented to the council for its consideration and adoption. Implicit in this is recognition that the process of consultation prior to the 31 May had been inadequate. The respondent makes it clear in its papers that the scheduling of the national elections had impacted the notice and comment phase of the budget process adversely and that further consultations were also necessary in order to bring newly elected councillors into a position where they could meaningfully contribute to the budget process.

- [77] It was suggested in argument that once the municipal council had been inaugurated after the elections that it immediately set about a further consultation process. This much is common cause. It was argued that these steps were effective inasmuch as they gave rise to significant adjustments and amendments to the proposed budget. What is clear from the description of the consultative process initiated after 31 May is that it was based on targeted consultations with identified interest groups and stakeholders. It did not involve a public consultation process in the form of a notice and comment procedure. It is also common cause that the adjustments and amendments to the tabled budget and the amended revenue raising resolutions were not published.
- [78] It was argued, on behalf of the respondent, that there was no need to publish these amendments since their effect was to reduce the proposed tariffs and rates. No prejudice flowed from the failure to publish the amended budget prior to its adoption. The argument, in my view, is premised on a misconception of the nature of public participation that is required. Public participation is not premised upon potential prejudice or upon the notion of legal interest. Public participation is a necessary feature of the democratic process at local government level.
- [79] I accept, for the reasons already set out above, that ordinarily the obligation to ensure public participation at the phase of adoption of the budget may not require a notice and comment procedure given the limited time available. The fact that no notice could be given of the proposed amendments and adjustments is illustrative of the general failure to comply with the obligation to ensure public participation. It is no excuse to say that the municipal council did what it could to enable public participation in the limited time available to it. In my view, the belated efforts to consult, commendable as they may be, cannot mask the fact that there was a failure to comply with the Constitutional obligation to take reasonable steps to ensure that local communities participate in the decision-making of the council, particularly in relation to budget preparation.

[80] In the context of local government more is required than public meetings and the publication of information. A local council is required to put in place mechanisms that create conditions for public participation and that build the capacity of communities to participate. It is required to allocate resources to the task and to ensure that the political and other structures established by the legislation are employed too meet the objectives of effective public participation. The respondent says nothing about the fulfilment of these obligations. It relies only on the fact that public meetings were convened relating to the review of the IDP. It relies too on a series of high level meetings with opposition parties and officials of the respondent as well two meetings involving community based organisations and a business chamber. Significant adjustments were made to the budget, both in respect of income and expenditure, following these meetings. These were not published and members of the public were not afforded an opportunity to comment on these changes. The respondent could not follow a notice and comment procedure because of the limited time period within which the budget had to be approved in terms of s25 of the MFMA.

[81] I accept that the determination of the election date was outside of the control of the municipality and that the elections contributed to the limited time available to the respondent. What was not outside of the control of the council however was the determination of an appropriate and effective public participation process taking into account the constraints brought about by the election. This it plainly did not do. The result was a belated effort to address shortcomings in its public participation process.

[82] The authorities referred to above require the adoption of an objective standard of reasonableness in evaluating the conduct of the respondent in this regard. What is strikingly absent is any suggestion by the respondent that it was constrained either by resources or by practical considerations in the nature and extent of public participation it could engage in prior to municipal elections. I am mindful that “significant leeway” must be afforded to the respondent to determine the nature of mechanisms to be employed in encouraging public participation and that its choices in this regard must guide consideration of what is reasonable. However when consideration is given to the

centrality of the budget in all efforts by a municipal council to meet its development obligations and the belated efforts made by the respondent in this instance, I am of the view that the steps taken, objectively considered and viewed in their entirety, did not meet the requirements for effective public participation in the budget process. I shall deal hereunder with the consequences of this finding.

[83] I turn now to deal with the applicants' challenge to the legality of the adoption of the budget based on alleged non-compliance with sections 24 and 25 of the MFMA.

[84] The applicants' case is that the respondent failed to comply with the peremptory provisions of section 24 (1) of the MFMA in that the respondent's municipal council, on 31 May 2011 did not "consider approval" of the budget within the meaning prescribed to the term by the section. It is further contended that the resolution adopted on 31 May and the subsequent resolutions adopted on 7 June, 14 June and 21 June 2011 do not fall within the ambit of resolutions permitted by section 25 (1) and (2) of the MFMA. On this basis it is submitted that the process of adoption of the municipal budget is tainted by illegality and that it must be declared to be of no force and effect.

[85] The thrust of the applicants' argument is that the municipal council did not, as a matter of fact, consider approval of the municipal budget at its meeting on 31 May. Instead, on that occasion consideration of approval of the budget was deferred pending the appointment of a Task Team and further consultations to be undertaken in regard to the content of the budget. The applicants' argument is further that the minutes of the council meeting establish unequivocally that councillors were not required, nor did they, give consideration to the budget as tabled before the council meeting. At the subsequent meetings held on 7, 14 and 21 June the content of the budget was again not considered by the council and no vote upon the budget was taken on each of those occasions as is required by the provisions of section 25 (1) of the Systems Act. That this is so is borne out both by the contents of the minutes of the meetings and the transcript of proceedings submitted as an annexure to the affidavit filed by the

Speaker of the council, contrary to the averments made by the Speaker asserting that councillors voted not to approve the budget on each of those occasions.

[86] It was argued on behalf of the applicants that sections 24 and 25 have as their purpose the objective of ensuring that the municipal council is able to exercise its executive and legislative authority, in respect of the budget, by engaging with the detail of the proposed budget. These provisions, it was submitted, are peremptory and must be read together. They establish a process whereby contested areas of the budget are able to be subjected to detailed scrutiny in a public deliberative process and, where insufficient voting support is garnered for the proposed budget, to allow for further and subsequent voting until the budget is approved.

[87] The phrase “consider approval” must be interpreted in the context of s 24 as read with s 25. It is apparent from s24 that “approval” of a budget involves the adoption of a resolution which accords with the provisions of s17 of the MFMA. Section 25 makes it clear that in the event that the budget is not approved, as contemplated by s24, then the municipal council is required to “reconsider the budget and again vote on the budget”. This suggests that the process of “considering approval” requires a vote on the budget. To hold otherwise would render the use of the phrase “again vote on the budget” in s 25 meaningless.

[88] This interpretation of the phrase “consider approval” accords with the ordinary meaning of the words. In *Madamombe and Others v Salisbury Municipality*³⁵ Goldin J said:

The word “consider” must be given its ordinary meaning within the context of the relevant section of the Act. In the case of *Neale v Mayor of East London*, 1935 EDL 225, it was held at pp. 230 – 1 that in its context the word “consider” meant “to debate and decide upon”. In *Kensington Estates (Pvt) Ltd v Minister of Justice and Internal Affairs*, 1956(3) S.A. 468 (S.R), Beadle, J. (as he then was), said that the word “consider” meant “to think about”, “to ponder or to examine”, but it is also frequently used in the sense of to come ‘to a conclusion’ or “to be of opinion” (see also the judgement of Young, J., at p. 478).³⁶

³⁵ 1977 (2) SA 197 (R)

³⁶ *Ibid* p 201

[89] The court in *Neale v Mayor of East London*³⁷ was concerned with the proceedings of a municipal council convened to consider the reduction of the town clerk's salary. A proposed resolution was circulated at the meeting. The Mayor ruled that the resolution could not be debated and that it was out of order. The court was called upon to decide whether the Mayor's ruling was valid. This required that the court decide on the meaning of the phrase "to consider" the reduction of salary. The court says the following:

Probably the most common meaning of the word "consider" is to ponder, to contemplate, to reflect upon. No one will contend that this meeting was confined to silent and Buddhist reflection. At the very least the question could have been considered through the medium of speeches for or against the suggested reduction. But I think that a very common meaning of the word "consider". Especially when it is used in relation to public business, is "to argue pro and con", "to consider by means of debate", generally with an implication that a decision will be taken as a result of such argument and debate.³⁸

[90] The court concluded that the term meant "to debate and decide upon"³⁹. The phrase "consider approval" which is at issue here, when read in the context of the section as a whole requires, it seems to me, that the council must debate and decide upon the proposed budget at the meeting convened for that purpose. Only in the event that the budget is not approved is it competent to defer further consideration to another meeting convened for that purpose seven days later. It should be remembered that consideration of the budget by a municipal council occurs after extensive public participation has occurred in the preparation of the budget and after a notice and comment procedure has been followed. It is at this stage that the representative council exercises its executive authority in a process of public deliberation. The requirement that a council should "consider and decide" serves to ensure that it is held to account by way of an open and transparent process.

[91] It is apparent from the terms of the resolution adopted by the municipal council on 31 May 2011 that the council did not "consider approval" of the budget. There was no

³⁷ 1935 EDL 225

³⁸ *Ibid* p 230

³⁹ *Ibid* p 232

debate about the content of the budget and no vote on the budget was taken. What was considered was a proposal to defer consideration and approval of the budget. It is also clear from the minutes of the meeting on 7 June that the council did not “reconsider the budget and again vote on the budget” as was required by s 25. A reading of the minutes and the transcript of the meeting makes it abundantly clear that what was then envisaged for the approval of the budget was the appointment of a Task Team (which according to the respondent first met on 7 June) to re-examine the budget priorities, engage in a process of consultation regarding certain envisaged changes to the budget and that the budget would be “approved” on 21 June. In the light of this the deferral of the matter to 14 June could serve no purpose other than to attempt to meet the statutory requirements of s 25(1). The meetings of 14 and 21 June also did not involve “reconsideration of the budget and again voting” on the budget. A proposal was tabled at the 14 June meeting to amend the “process plan” which envisaged approval of the budget on 28 June 2011, thereby rendering the meeting of 21 June of no relevance as far as compliance with s 25 (1) was concerned.

[92] The inescapable conclusion from the content of the minutes is that the municipal Council did not comply with either s24 (1) or s25 (1) in respect of the approval of the budget. The question that arises is whether this non-compliance renders the approval of the budget on 28 June unlawful on this basis.

[93] Section 27(4) of the MFMA provides as follows:

Non-compliance by a municipality with a provision of this Chapter relating to the budget process or a provision in any legislation relating to the approval of a budget-related policy, does not affect the validity of an annual or adjustments budget.

[94] The reference to a provision in the Chapter “relating to the budget process” must be a reference to s 21 (budget preparation process); s 22 (publication of annual budgets); s 23 (consultations of tabled budgets); and s 24 (approval of annual budgets). A reading of s 27 as a whole indicate that non-compliance with a statutory time period or

a breach of the approval process other than s 16(1) does not *ipso facto* render the approved budget invalid.

[95] It follows therefore that the applicants' attack as to the validity of the budget founded upon non-compliance with s 24(1) and s 25(1) cannot succeed.

[96] The further basis of attack upon the legality of the budget concerns the events of 28 June 2011, in particular the alleged non-compliance with s 30(5) of the Structures Act and the failure to comply with s160 of the Constitution.

The provisions of section 160 of the Constitution and section 30(5) of the Structures Act

[97] Section 30 (5) of the Structures Act provides that:

Before a municipal council takes a decision on any of the following matters it must first require its executive committee or executive mayor, if it has such a committee of mayor, to submit to it a report and recommendation on the matter

-
- (a) any matter mentioned in section 160 (2) of the Constitution;
- (b) the approval of an integrated development plan for the municipality, and any amendment to that plan; and
- (c) the appointment and conditions of service of the municipal manager and a head of a department of the municipality.

[98] The reference to s 160(2) of the Constitution has the effect that the approval of a budget is one such matter covered by s30(5).

[99] The applicants argued that the report submitted to the Council meeting on 28 June 2011 was presented by the Acting Municipal Manager since the Executive Mayor was at the time travelling abroad on council business and that the report is titled "report of the municipal manager". Accordingly, so it was submitted, no report by the Executive Mayor was presented as required by s 30(5) and that, on this basis too; it should be found that the adoption of the budget was tainted by illegality.

- [100] The Executive Mayor deposed to an answering affidavit in which he denied that the report which was presented to the council was not his report. He states in his affidavit that the process of preparation of the report is a joint effort involving the collation of material by the office of the Municipal manager. He pertinently states that the report was indeed his report notwithstanding the title and that it was presented by the Acting Municipal Manager because he was to be abroad at the time of the meeting which was held on 28 June.
- [101] Although the applicants dispute this, the dispute is not founded upon the allegation of facts which permit of a finding that the allegations made on behalf of the respondent are as far-fetched as to warrant rejection on that basis. In dealing with this aspect the dispute of fact, such as it is, must be resolved on the basis of the well-known test applied in *Plascon-Evans*.
- [102] Similar considerations apply in relation to the applicants' attack on the voting procedure employed at the meeting of 28 June. It was contended on behalf of the applicants that the Speaker did not call for a show of hands during voting and that the details of the voting were not recorded and that therefore it cannot be said that the resolutions were in fact adopted with the requisite majority. This is denied. The applicants' contentions in regard to what occurred do not establish that the resolutions were not passed with the requisite majority. The Speaker states in her affidavit that she was seated in front of the assembled councillors each of whom occupies a designated seat and the number of seats equals the number of positions on the council. She would have observed if there was any vacancy. She did not observe any such vacancy.
- [103] The transcript records that motions were put and declared carried and that, insofar as the main resolution approving the budget is concerned a counter-motion was put and declared to have been defeated. No objection is recorded either to the procedure or the result in any of these instances. That, coupled with the allegations made by the Speaker decisively resolves any possible dispute that may exist in these proceedings.

[104] I turn now to the appropriate remedy in the light of the finding regarding public participation in budget process.

[105] Section 172 of the Constitution requires a court, when deciding a constitutional matter, to declare any law or conduct that is inconsistent with the Constitution to be invalid to the extent of the inconsistency. I have, for the reasons set out above, found that the respondent's conduct was indeed inconsistent with the Constitutional obligation to ensure public participation in its processes.

[106] The applicants sought orders setting aside the adoption of the budget in its entirety and an order precluding the respondent from enforcing any claims for recovery against the applicants based on the rates determined in that budget. The applicants also raised as an alternative the possibility of an order which limits the retrospective effect of the declaration of invalidity. In doing so they relied on the application of the principle of legality.

[107] This court finds itself in much the same position as the appeal court in the *SAPOA*⁴⁰ matter where orders consequential upon a declaration of invalidity in the context of the adoption of a municipal budget had to be considered. There the majority considered the knock-on effect of successive budgets and the significant practical difficulties in undoing parts of the budget or of making provision for claims founded upon an order declaring parts or the whole of the budget invalid. Navsa JA, on behalf of the majority, said the following:⁴¹

My colleague is, with respect, correct when he states that it was recognised on behalf of *SAPOA* insofar as the setting aside of the budget is concerned, that the egg could not be unscrambled. And, as he pointed out also, s172 of the Constitution requires that although the court must declare conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency, it may make any order that is just and equitable. In my view it is fair and equitable now, for the reasons I have set out and that follow, not to order the repayment of rates that were not validly imposed.

⁴⁰See fn 15

⁴¹*SAPOA* supra at par 70 & 71

Although counsel on behalf of SAPOA persisted in having the rate improperly imposed set aside, he advisedly recognised the difficulties of the court even attempting to set aside the 2009/2010 budget two budgetary periods thereafter. Successive budgets are based on surpluses and 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 successive periods has not been challenged. Considering the knock-on effect it must be so that a subsequent increase in rates would have owed its genesis to and been premised on the rate presently sought to be impugned.

[108] These remarks are apposite to the present matter. By the time the application was argued the budget for the 2012/2013 and 2013/2014 year had been approved. The knock-on effect is obvious. To undo the budget process some years after the event will inevitably give rise to significant disruption and uncertainty. It would not be in the interests of justice to do so. Nor would some form of order limiting the retrospective effect as a means of precluding recovery based upon the rates determined in the invalid budget be appropriate for the same reasons as those referred to in the *SAPOA* judgement.

[109] That brings me to the question whether it is appropriate to grant the further order precluding the respondent from instituting claims for recovery against the applicants other than in accordance with the rate determined in the previous budget period. Such an order would necessarily be determinative of a set of legal issues in dispute that have not been fully ventilated in this application and I would accordingly decline to make such an order.

[110] Lest the declaratory order that I will Issue be considered to be of little effect, it must be emphasised that such declaratory order carries with it the clearest indicate that the respondent has conducted itself In breach of its constitutional obligation to protect and promote the political rights of the community It serves. It is an indictment which should not be taken lightly. The order serves to vindicate the rights of citizens and, it is to be hoped, will serve as a timely reminder that local participatory democracy as enshrined in the Constitution is a critically important feature of our constitutional democracy.

